REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTED BY GEORGE DUVAL, ESQ., ADVOCATE.

Published pursuant to the Statute by

ROBERT CASSELS Jr., Esq., Registrar of the Supreme Court.

Vol. 1.

OTTAWA:
PRINTED BY THE QUEEN'S PRINTER.

1878.

JUDGES

OF THE

SUPREME COURT OF CANADA,

DURING THE PERIOD OF THESE REPORTS.

———:o:———

The Honorable WILLIAM BUELL RICHARDS, C.J.
" " WILLIAM JOHNSTONE RITCHIE, J.
" " SAMUEL HENRY STRONG, J.
" " JEAN THOMAS TASCHEREAU, J.
" " TELESPHORE FOURNIER, J.
" " WILLIAM ALEXANDER HENRY, J.

ATTORNEY GENERAL OF THE DOMINION OF CANADA.

The Honorable EDWARD BLAKE, Q.C.

ERRATA.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF CANADA.

JUNE SESSIONS, 1876.

FRANCIS KELLY, COMMISSIONER OF PUBLIC LANDS OF PRINCE EDWARD ISLAND..... } APPELLANT.

AND

CHARLOTTE ANTONIA SULIVAN, - RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE OF PRINCE EDWARD ISLAND.

Jurisdiction of Supreme Court of Canada.—Court of last resort in P. E. Island.—Jurisdiction of Court to set aside award.—Remedy by remitting back award.

Held, That the Court of last resort in Prince Edward Island, from whose judgment an appeal lies direct to the Supreme Court of Canada, is the Supreme Court of Judicature in that Province.

Held, also, That by Statute of P. E. I., known as "The Land Purchase Act, 1875," an award of the Commissioners cannot be quashed and set aside and declared invalid and void on application made to the Supreme Court of P. E. I., but can be remitted back to the Commissioners in the manner prescribed by the 45th section of the Act.

In the matter of the application of Francis Kelly, Commissioner of Public Lands, for the purchase of the estate of Charlotte Antonia Sulivan, and the Prince Edward Island Land Purchase Act, 1875.

Appeal by the Commissioner of Public Lands of Prince Edward Island.

Prince Edward Island, long ago granted in large blocks of about 20,000 acres each, was, as time went

PRESENT: The Chief Justice, and Ritchie, Strong, Taschereau, and Fournier, J. J.

Henry, J., during the Sessions, was absent from indisposition.

on, let by the grantees in small parcels, generally for long terms of years, reserving an acreable rent of about one shilling.

Out of these terms sprung an agitation which, under various names, occasioned much discord in the Colony, and, in 1862, an Act of Assembly was passed, under the provisions of which a portion of the Island was purchased by the Government from its owners. But a considerable portion remaining in the hands of others who declined to sell, the Land Purchase Act of 1875 was passed. Under its authority a tribunal called the Commissioners Court was organized, and it is out of proceedings instituted in that Court for the purchase of the township lands of Miss Sulivan, the present questions arise.

The nature of the questions decided, and the manner in which they arose, are fully set forth in the Judgments given by their Lordships.

8th, 9th, and 10th June, 1876.

Mr. *Brecken*, Q.C., Attorney-General, Prince Edward Island, Mr. *Cockburn*, Q.C., and Mr. *L. H. Davies*, for Appellant:

1st, As to the jurisdiction of this Court:—The power of the Governor in Council to sit as a Court was given by royal instructions previous to Lord Monck's appointment. In subsequent instructions there are clauses which expressly revoke the power given to the Governor. If this Court exists in Prince Edward Island, it also exists for Nova Scotia, and the practice there shows that the appeal to the Privy Council lies direct from the Supreme Court (1). The Act 36 Vic. c. 22, 1873, Prince Edward Island, is copied from the English

(1) McPherson, P. C. Pract. pp. 92, 93.

Procedure Act, and reference is made to a Court of Error and Appeal because it was intended to provide for a Court of Error and Appeal under the British North America Act, it being only two months previous to Confederation that this Act was passed. Since Confederation the Lieutenant-Governor is appointed by the Dominion Government, and he is not given any judicial functions. *See* Commission to Lieutenant-Governor Patterson, and Royal Instructions to Lieutenant-Governors since 1854.

2nd, As to the finality of the award :—The Act only required that the Commissioners should find in their award, the sum or amount due to the Proprietor for his Estate. Section 28 of the Act, with sub-sections *a*, *b*, *c*, *d*, *e*, is merely directory, and as stated in sub-section *e* "*the number of acres, the reasonable probabilities and expenses of the proprietor*," are only elements to be taken into consideration by the Commissioners in estimating the value of the lands. The object of the Act is to pay every proprietor a fair indemnity or equivalent for the value of his interest and no more. (1) It is the amount of money to be paid they are to ascertain and find ; not any collateral facts. It must first affirmatively appear that there was an omission on the part of the Commissioners ; to set aside an award there must either be manifest fraud, or excess of jurisdiction, or some material matter that has not been taken into consideration. There could not have been any fraud, when the evidence given and accepted was that of the agent of the respondent. The case of *Whithworth* v. *Hulse*, (2) is not in point because it does not appear in this case that any of the sub-sections were not considered. On the contrary, all Respondent's estate was adjudicated upon.

(1) See Sec. 27 ; (2) L. R. 1 Exch. 251.

In support of this branch of the argument were cited:—

Duke of Beaufort, v. *Swansea Harbor Trustees* (1); *In re* Byles (2); *Mays* v. *Cannel* (3); *Queen* v. *Lond.* and *N. W. R. Co.* (4); *Wrightson* v. *Bywater* (5); *Harrison* v. *Creswick*, (6); Russell on Awards (7).

3rd. As to the uncertainty of the award:—All Respondent's estate was adjudicated upon; the Trustee's act was simply ministerial. The Commissioner of Public Lands under the 2nd Section of the Act, notified Miss Sulivan of the intention of the Government to purchase "all her Township lands in the Island, liable to the provisions of the Land Purchase Act." The Commissioners had no power to embrace any lands not part of her estate, or exclude any which were part of it. It was decided lately in the Island that the mere notice given under the Act, brought all the lands of a proprietor under the provisions of the Land Purchase Act, and, therefore, the Commissioners had to estimate only the sum they should award, and their powers were not discretionary as to the lands. There could be no necessity for describing the lands by *metes* and *bounds*. The describing of the land is purely a ministerial act. No description they might insert could alter or change the lands really affected, and bound by the award. A *prima facie* uncertainty in an award does not vitiate it, if capable of being rendered certain. The "Estate" and the lands in this case are capable of being ascertained with accuracy. The following cases cited:—

Round v. *Hatton* (8). *Willoughby* v. *Willoughby* (9).

(1) 8 C. B. N. S. 146; (2) 25 L. J. Ex. p. 53; (3) 24 L. J., C. P., 41; (4) 23 L. J., Q. B., 185; (5) 3 M. and W., 199; (6) 13 C. B., 399 (7) 2nd Ed. p.p. 266, 267, 258, 262; (8) 10 M. & W., 660; (9) 12 L. J. (N.S.) Q. B. 281.

Mays v. *Cannel* (1); *Taylor* v. *Clemson* (2); *Ostler* v. *Cooke* (3); *Wilcox* v. *Wilcox* (4); *The Duke of Beaufort* v. *Swansea Harbour Trustees* (5); *Aitcheson* v. *Cargey*, in error (6). On delegation of authority to Public Trustee. *Russell* on Awards (7). Reference made also to: *In re Montgomery* and *Moore* (8); *Duquet* v. *Greene* (9); *Corporation of the United Counties of Northumberland and Durham* v. *Town of Cobourg* (10); *Hibbert* v. *Scott* (11); *Thorpe* v. *Cole* (12).

The Court had no jurisdiction to declare the award bad (*see* sec. 45 of Land Purchase Act); but had ample power to remit the award back to the Commissioners, to correct any error, informality or omission, provided application made within thirty days after rendering the award. This remedy was treated with silent contempt. The arbitrator's jurisdiction appears on the face of the award. Presumptions will not be made against the award, but rather in its favor.

They referred to *In re The South Wales Railway Company* v. *Richards* (13); *Faviell* v. *Eastern Counties Railway Company* (14); *Colonial Bank of Australasia* v. *Willan* (15); *Thorpe* v. *Cole* (16).

Mr. *M. C. Cameron*, Q.C., and Mr. *E. T. Hodgson*, for the Respondent:

1st. No appeal lies direct from the Supreme Court of Prince Edward Island to the Supreme Court of Canada. Sections 11 and 17 of the Supreme Court Act declare that all appeals to the Supreme Court must be from the Court of last resort in any Province. In Prince Edward

(1) 24 L. J. C. P., 41; (2) Q. B., 978; (3) 22 L. J. (N.S.) Q. B., 71; (4) 4 Eych. 500; (5) 29 L. J., C. P., 241; S. C., 8 C. B. N. S. 146; (6) 9 Moore, 381; (7) Ed. 1856, p. 281; (8) 2 U. C. P. R., 98; (9) 4 U. C. R., O. S., 110; (10) 20 U. C. R. 283; (11) 24 U. C. R., 581; (12) 2 C. M. & R. 367; S. C. 4 Dowl, 457; (13) 18 L. J. Q. B., 310; (14) 17 L. J. Ex., 223; (15) L. R., 5 P. C., 417; (16) 2 C. M. & R., 367.

Island there is a Court of Error and Appeal composed of the Lieutenant-Governor in Council. By various Acts of the Legislature of the Island, this Court is recognized, 1 vol. P. E. Statutes, p. 291, Rev. Stat. p. 51, 21 Geo. III ch. 17, and Section 145 of Prince Edward Island Act, 1873, 36 Vic., ch. 22, and 6 Vic., ch. 26, sec. 51. The discussion *In re Cambridge* (1), shows that in the year 1841 the Privy Council decided that an appeal would not lie to them from the Court of the Island except through the Governor in Council. By Section 24 of Supreme Court Act, the practice in appeals to the Privy Council must be followed in similar cases in the Supreme Court here. In all other British Colonies there have been Orders in Council passed to enable parties to appeal direct from the Supreme Courts of the respective Provinces to the Privy Council without recognizing or appealing to the intermediate Court composed of Governor in Council, but in Prince Edward Island no Order in Council or Act of Parliament has changed or affected the law as it once stood. Reference is made to Royal Instructions, Appendix F., Journals of House of Assembly, Prince Edward Island, Clarke's Colonial Law (2); *Phillips* v. *Eyre* (3).

2nd. As to the jurisdiction of the Supreme Court of Judicature of Prince Edward Island: it has always been admitted that an Appellate Court would never enquire into the procedure of an inferior Court, provided it was legally seized of the cause. By the 32 section, "Land Purchase Act," the Supreme Court had a right to restrain the public trustee from executing a conveyance of the estate of a proprietor to the Commissioner of Public Lands. It is not the duty of this Court as an Appellate

(1) 3 P. C. C., 175; (2) p. 111; (3) L. R., 4 Q. B., 225.

Court to enquire if this was obtained by a rule *nisi* or otherwise.

That Court is given a jurisdiction which it would not have were it a case of arbitration. When a statutory power is given to deprive a person of his land, the strictest interpretation must be given to the Statute, and every means afforded to the proprietor to find out if any omission or error has taken place. The award was open to enquiry by the Supreme Court, notwithstanding the 45th section of the Land Purchase Act, 1875.

So, though certiorari be taken away by Statute, if cause be decided by a majority of a Court improperly constituted, certiorari yet lies. *Colonial Bank of Australasia* v. *Willan* (1); *Reg.* v. *Wood* (2); *Reg* v. *Cheltenham* (3); *Reg* v. *St. Albans* (4); *In re South Wales R. R. Co.* v. *Richards* (5).

3rd. The Commissioners had no jurisdiction in this cause, and therefore their award was bad and should be set aside. First, because the notice required by the Act had not been properly given. The Respondent was not within the jurisdiction of the Court; and to deal with the land only, the notice from the Commissioner of Public Lands should have described the land by *metes* and *bounds*. Second, because it did not appear on the record that notification of the appointment of the Commissioner had been given, or that the Commissioners were sworn under sections 9 and 13 of the Act. *See Joseph* v. *Ostell.* (6). Third, because the notice in the *Royal Gazette*, required to be given under section 14, of time and place of hearing for three consecutive weeks, was advertised for only two weeks.

(1) L. R., 5 P. C., 442; (2) 5 E. & B., 49; (3) 1 Q. B., 467; (4) 17 Jur., 531; (5) 18 L. J. Q. B., 310; (6) 11 Lower Canada R., 499.

Laffurty v. *Stock* (1); *In re Miles* and *The Corporation of the Township of Richmond* (2). In the matter of *Coe* and *The Corporation of the Township of Pickering* (3).

No appearance of Respondent by Counsel could waive these defects, because (*a*) no consent can give jurisdiction; (*b*) the interests of parties other than Miss Sulivan's were affected, whom no consent of her's could bind; (*c*) the Commissioners derive their authority from the Statute, and not from the consent of the parties.

4th. The award is not final and it is uncertain. It is uncertain. It does not show that the Commissioners adjudicated on matters on which they were bound to adjudicate under section 28 of the Land Purchase Act. Award is not made *de premissis*, and there is nothing to show that the various matters specified in this section were taken into consideration by the Commissioners.

The Act is intended to convey an absolute and indefeasible estate of fee simple free from all incumbrances of every description, and to divest the proprietor not only of the land, but also of all arrears of rent. Now unless a proper description be given somewhere, how can Commissioners award on these arrears of rent? If it be doubtful whether the award has decided the question referred, it will be set aside for uncertainty. *See Russell* on Awards (4); *Tribe* v. *Upperton* (5); *Pearson* v. *Archbold* (6). The award does not embrace sub-sections 1, 2, and 3 of section 28, and if specific matters are referred and there be no specific adjudication upon any of them, award is void. Moreover, the form of conveyance used in the schedule annexed to the Act, implies

(1) 3 U. C. C. P., 19; (2) 28 U. C. Q. B., 333; (3) 24 U. C. Q. B., 499; (4) 2nd Ed., 284; (5) 3 A. & E., 295; (6) 11 M. & W., 477.

that the lands should be described by *metes* and *bounds*. It was not impossible for the Commissioners to find on the matters and things contained in sub-section *e* of section 28 of this Act, because section 24 clearly confers authority which would enable them not only to examine the quality of the land, timber, &c., but also to cause such surveys to be made, as might be necessary for carrying the Act into effect. The Public Trustee is merely a ministerial officer, and he could not execute a deed to the Commissioner of Public Lands without exercising judicial functions, in ascertaining what lands to insert in such deed.

Reference is made to the following authorities:— *Russell* on Awards (1); *Randall* v. *Randall* (2); *Rider* v. *Fisher* (3); *Whitworth* v. *Hulse* (4); *Robinson* v. *Henderson* (5); *Wakefield* v. *The Llanelly Railway and Dock Company* (6); *Stone* v. *Phillips* (7); *Ross* v. *Boards* (8).

Further, the award shews an excess of jurisdiction, inasmuch as it deals with all Miss Sulivan's lands, whereas they had jurisdiction only over the excess above 500 acres. It can only be with regard to this excess that the compulsory clauses of the Act were intended to operate. The Respondent's Counsel relied also on the reasons for judgment by the Court below, and referred to the following authorities:—

Rorer on Judicial Sales (9); *Hopper* v. *Fisher* (10); *Gray* v. *Steamboat Reveille* (11); *Little* v. *Pitts* (12); *Lawson* v. *Kerr* (13); *Devine* v. *Holloway* (14).

Mr. *L. H. Davies*, in reply:—

In this case Miss Sulivan did not wish to retain her

(1) 2 Ed. p., 261; (2) 7 East, 81; (3) 3 Bing, N. C., 874; (4) L. R. 1 Exch., 251; (5) 6 M. & S., 276; (6) 3 DeG., J. & S., 11; (7) 4 Bing., N. C., 37; (8) 8 A. & E., 290; (9) Vol. 2, p. 36; (10) Head's Repts., Vol. 2, p. 253; (11) 6 Wisconsin, p. 61; (12) 33 Alabama, 343; (13) 10 M. P. C. C., 162; (14) 14 M. P. C. C., 290.

500 acres. The scope of the Act was to reach proprietors whose lands were not in their actual use and occupation. The presence of Respondent's Commissioner, her appearance by Counsel and affidavit of her Agent, G. W. DeBlois, surely put at rest any contention that certain preliminary formalities of the Act were not complied with. Supposing an omission had taken place, the remedy was marked out in the forty-fifth section of the Act. The Act would have been absolutely unworkable if it had required the mentioning in the award of all the matters submitted to the Commissioners by sub-sections 1, 2 and 3 of sec. 20.

January 15, 1877.

The CHIEF JUSTICE:

This appeal is from the judgment of the Supreme Court of Prince Edward Island, making absolute a Rule to quash the award made and filed in this matter and all subsequent proceedings, wherein it was ordered that the said award be quashed and set aside, and that the said Commissioner of Public Lands pay the costs of the application and the Rule. Against this Judgment and Order of the Court, the Commissioner appeals. On the hearing, the first objection taken on behalf of the respondent was first discussed, viz: that no appeal lies direct from the Supreme Court of Prince Edward Island to the Supreme Court of Canada.

The latter part of section 11 of the Supreme and Exchequer Court Act reads as follows: "And when an appeal to the Supreme Court is given from a Judgment, in any case it shall always be understood to be given from the Court of last resort in the Province where the Judgment was rendered in such case."

The Respondent in the factum suggests that the

Lieutenant Governor in Council is constituted a Court of Error and Appeal in Prince Edward Island, by various Royal Instructions, and refers to the instructions to Sir John Colborne, accompanying his commission of 13th December, 1838, appointing him Captain-General and Governor-in-Chief of the Island.

The instructions which, in the absence of the Captain-General and Governor-in-Chief, were intended for the Lieutenant-Governor or Officer administering the Government for the time being, are referred to as being in the Appendix to the Journals of the House of Assembly of the Island, A.D. 1851, Appendix F. The Commission to Sir John Colborne is also to be found in the same book.

The twenty-third and twenty-fourth sections of the instructions were specially referred to on the argument. The first part of the twenty-third section is as follows: "Our will and pleasure is that you do in all civil causes, on application being made to you for that purpose, permit and allow appeals from any of the Courts of Common Law in our said Island of Prince Edward; and you are for that purpose to issue a writ in the manner which has been usually accustomed returnable before yourself and the Executive Council of the said Island of Prince Edward, who are to proceed to hear and determine such appeals." It goes on to provide that the Judges of the Court whose judgment is appealed from shall not vote on the appeal though they may be present and give the reasons of their judgment. It also directs that the sum or value appealed from must exceed £300 stg. and security be given, and when the sum exceeds £500 stg., and either party is not satisfied with the Judgment of the Governor in Council, an appeal may lie to the Queen in Council, the same to be

made within 14 days, and security given; and in certain cases, when the rights of the Crown are involved, he is to *admit* an appeal to the Queen in Council, though the value be less than £500 stg.

The twenty-fourth section directs him to *admit* appeals to the Queen in her Privy Council, in case of fines to a certain amount for misdemeanors. *Clarke's* Colonial Law, page 111, was cited, and referring to the position of most of the North American Colonies the following language is used: "From the Common Law Courts an appeal in the nature of a writ of error lies in the first instance to the Court of Error in the Colony and from them to His Majesty in Council. The Colonial Court of Error is usually composed of the Governor in Council who decide by a majority." *In re Cambridge* (1), an application was made for leave to appeal where the amount was under £300, the Court of Appeal in the Island only allowing appeals when the amount was over £500. Lord Brougham in giving judgment refers to the existence of the Court of Appeal in the Colony.

The Act 6 Vic., ch. 26 sec. 5, provides that any person dissatisfied with the decree of the Surrogate may appeal "to the Governor in Council." Under sec. 51, he was to give a bond for the payment of such costs as should be awarded by the Governor in Council, If the decision of the Surrogate should be reversed or altered the Governor in Council should make such order touching the subject of the Appeal as to them shall seem fit; sec 52; and by sec. 53, every license to sell real estate, "shall be made in such form as the Surrogate (or in case of the decision of the Surrogate being altered by the Governor in Council) may prescribe."

The Island Statute 21 Geo. III, ch. 17, relates to the

(1) 3 *Moore*, P. C. C., 175.

limitation of actions,—sec. 4 provides that when "judgment given for a Plaintiff is reversed on a writ of *Error*, arrest of judgment, &c., he may commence another action within a year."

The Island Statute 5 Wm. IV. ch. 10, constitutes the Governor in Council a Court for hearing in matters of Divorce with full power, authority and jurisdiction. The Court to sit on the second Monday in May in each year. The Governor may appoint the Chief Justice to preside.

In re Monckton a Barrister (1), the Chief Justice of the Island had made an order in matter wherein the applicant, a Barrister, was interested, striking his name off the Rolls as a Barrister. On Appeal to the Privy Council the order was set aside.

The sections of the Island Statute, 36 Vic. ch. 22, from 136 to 158 inclusive, and section 230, refer to Appeals to a Court of Error *or* Appeal. Sections 136 to 157 inclusive, are the same as those in the English Common Law Procedure Act, 15 & 16 Vic., ch. 76. Sections 146 to 167 inclusive, are slightly varied to adapt them to the circumstances of the Island. The 136th sec. begins "and with respect to proceedings in *Error* be it enacted, &c." The 145th section speaks of the setting down of the case for argument in the Court of Error in the manner heretofore used, refers to the Roll being sent into the Court of Error *or Appeal* and "the Court of Error or Appeal shall thereupon review the proceedings."

The Appellants on the argument contended that as a matter of fact no such tribunal as a Court of Error and Appeal was ever established in the Island. That there is no existing official document of any kind shewing the establishing of such a Court. There is no record of

(1) 1 *Moore*, P. C. C., 455.

any case ever having been brought before such a tribunal, and the reference in the Island Statute 21 Geo. III, ch. 17, respecting the limitation of actions to a year, for bringing an action when cases are reversed in Error, &c., cannot be considered as establishing or recognizing the establishment of a Court of Appeal as a Court of last resort from the Supreme Court of the Island.

That the Statute 6 Vic., ch. 26, so far as it relates to an appeal from decisions of the Surrogate Court to the Governor in Council, does not form them into a general appellate tribunal, but in those special cases allows an appeal to the Governor in Council, and directs the Probate Court to carry out the decision of that body when the appeal is made to them.

And that the reference to appeals in the Act 36 Vic., ch. 22, arose from hasty legislation in adopting the general provisions of the Common Law Procedure Act, and if no Court of Appeal actually existed would not necessarily establish one.

A copy of the instructions given to Governor Patterson was produced at the argument, but his commission was not. It was suggested that application should be made to the Colonial Office for copies of the commissions and instructions of such Governors as would be likely to throw light on the subject, and any other documents of a like nature, and these documents were to be placed before this Court. Reference was also made on the argument to Stuart's History of Prince Edward Island, printed in 1805, and to Haliburton's Nova Scotia, Vol. 2, p. 380.

Since the argument, copies of the commission of Governor Patterson, of Prince Edward Island, then the Island of St. John, and of two commissions to Guy

Carleton, Esq., as Governor of the Province of Quebec, and the instructions accompanying each of the commissions, have been filed with the Registrar of the Court. No other documents referring to the establishment of a Court of Appeals have been brought to the notice of the Court. We must therefore dispose of the preliminary question on the materials before us.

Copies of the commissions of Lord Monck, Sir John Young, Lord Dufferin, and of the present Governor of the Island, Sir Robert Hodgson, were obtained in Ottawa.

Prince Edward Island, or the Island of St. John, as it was then called, previous to the year 1764, was under the same Government with the Province of Nova Scotia, and in giving the boundaries of that Province in the commission of William Campbell, Esq., commonly called Lord William Campbell, dated 11th August, 1766, appointing him Captain-General and Governor of Nova Scotia, the Island of St. John is included.

In the commission to Walter Patterson, dated 4th August, 1769, so much of the Patent to Lord William Campbell as mentioned the Island of St. John was revoked, and Patterson was appointed Captain-General and Governor-in-Chief of the Island and Territories adjacent thereto. Under the commission to Governor Patterson, he had power, by and with the consent of the Council, to erect and establish Courts of Judicature within the Island for the determining and hearing of all causes, civil and criminal according to law and equity, and to constitute and appoint Judges and Commissioners of Oyer and Terminer for the better administration of justice. The commission also refers to such reasonable Statutes as should thereafter be made and agreed upon

by him with the advice and consent of the Council and Assembly of the Island. And as soon as the situation and circumstances of the Island would admit thereof, and as soon as need should require, he was to call General Assemblies of the freeholders and planters to be called the Assembly of the Island, and by the consent of the Council and Assembly he had power to make laws for the good government of the Island. By the instructions, he was to constitute a Council to assist him in the administration of the affairs of the Colony, and the Council to have all the powers and privileges and authority usually exercised in the other American Colonies.

He was to give his immediate attention to the establishing of such Courts of Judicature as might be found necessary for the administration of justice. He was to consult the Chief Justice as to the measures proper to be pursued for the purpose, governing himself as far as difference of circumstances would admit by what had been approved and found most advantageous in Nova Scotia. He was to transmit to the Secretary of State copies of all Acts, orders, commissions, &c., by virtue of which any Courts, Officers, Jurisdictions, &c., were established.

The consideration of calling a Lower House of Assembly could not too early be taken up.

There is no authority in his commission or instructions directing him to establish a Court of Error or Appeal, nor to permit or allow appeals to himself in Council.

The commission of Guy Carleton, afterwards Lord Dorchester, appointing him Governor of the Province of Quebec, dated 12th April, 1768, is similar to that of Governor Patterson, which was dated 4th August, 1769. It appoints him Captain General and Governor in Chief

of the Province of Quebec. His instructions differ somewhat from those afterwards given to Governor Patterson and as to summoning a general assembly of freeholders as soon as the more pressing affairs of Government would allow, stated as it was impracticable to form such an establishment then; he was to make such rules and regulations with the advice of the Council as should appear to be necessary for the peace, order and good government of the Province.

He was to establish Courts of Justice, and consider what had been established in that respect in the other Colonies in America, particularly in Nova Scotia.

He was to allow appeals from any of the Courts of Common Law to the Governor in Council, and for that purpose was to issue a writ *in the manner which has been usually accustomed* before himself and the Council who were to proceed to hear and determine such appeals. (As already mentioned, no such direction or authority as this is contained in the commission to Governor Patterson.)

His second appointment as Governor of Quebec was by a commission, dated 27th December, 1775, after passing of the Imp. Stat. 14 Geo. III, ch. 83, for making more effectual provision for the government of the Province of Quebec. Following the provisions of the Imp. Stat. he was authorized, with the consent of the Council, to make ordinances for the peace, welfare, and good government of the Province, with certain exceptions as to ordinances imposing taxes. He had authority to appoint Judges, &c., as in his former commission.

Under his instructions he was directed, by and with the advice of his Council, to establish Courts of Justice. Suggestions were made as to the kind and

number of Courts—but he was to be guided by circumstances, and amongst other suggestions as to what should be done, was the following, viz: That the Governor and Council should be a *Court* of Civil Jurisdiction for the hearing of appeals from the judgments of the other Courts when the matter in dispute exceeded ten pounds. The decision of the Governor in Council to be final in cases not exceeding £500 stg., in which case an appeal from the judgment *to be admitted* to the King in Council. An ordinance was passed by the Governor in Council, on 25th July, 1777, establishing certain Courts according to the suggestions contained in the Royal instructions, and under that ordinance the Governor in Council was constituted a Court of Appeal. On the margin of the Ordinance in the copy in the Library of Parliament here, there is the following entry in manuscript: "*vide* " ordinance of 17th September, 1773, passed on Ch. J. " Hayes going home." It was the model of this and the next ordinance in some instances. The next ordinance was to regulate the proceedings in the Courts of Civil Judicature in the Province of Quebec. From this it appears that before the Act of 14 Geo. III, and the commission and instructions under it were given, the Governor in Council had passed an ordinance to establish *a Court* of Appeals in Quebec. And this under a commission and instructions similar to that under which Governor Patterson was acting in Prince Edward Island, except so far as the power to grant appeals was wanting in the instructions to Governor Patterson which was contained in the instructions to Governor Carleton.

In August, 1769, the commission to Governor Patterson was issued, and he is said to have arrived in

the Colony in 1770. The first meeting of the Legislature composed of the Council and Assembly, with the Governor of course, was, according to Stewart's History of Prince Edward Island, p. 177, in 1773, and the first Statute, as appears by the Acts of the General Assembly of the Island, published in 1862, was passed in 1773. It is entitled: "At the General Assembly of His Majesty's Island of St. John, begun and holden at Charlottetown, the seventh day of July, Anno Domino 1773, in the 13th year of the Reign of Our Sovereign Lord George the Third, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith. Being the first General Assembly convened in the Island."

The first statute passed recited that it had been found absolutely necessary and expedient by His Majesty's Governor in Council of the Island to make several resolutions, ordinances and regulations for the good government of the said Island; it then repeats these ordinances, and confirms what was done under them.

Cap. 2, is entitled "An Act to confirm and make valid in law all manner of process and proceedings in the several Courts of Judicature within this Island from the first day of May, 1769, to this present Session of Assembly. The recital states:—

"Whereas this Island has been without a complete Legislature from the commencement of the Government thereof which took place on the first day of May, 1769, unto this present Session of Assembly, during which time many and various proceedings have been had at the several Courts of Judicature in the Island." It then declares the writs, judgments and proceedings in the Courts from and after the said 1st May, 1769, to the end of that Session good and valid in law. That it should

not extend to take away or rectify errors in the using of process, mispleadings and erroneous rendering of judgment in point of law, but in all such cases the parties aggrieved might have their writ or writs of error upon such erroneous judgment in such manner as they might have done before the making of the Act.

Governor Patterson apparently remained Governor until 1786, when he was succeeded by Governor Fanning, who continued in office, it is said, for nineteen years, that would be until 1805.

Governor Patterson was authorised by his commission with the advice and consent of the Council, to establish such and so many Courts of Justice within the Island, as they should think fit for determining causes as well criminal as civil according to Law and Equity, and to constitute and appoint Judges, and in cases requisite to issue commissions of Oyer and Terminer. We have nothing to shew that in Governor Patterson's time, any Court of Error or Appellate Court was established by any Act of his. And it seems admitted that, as a matter of fact, no such Court ever exercised any jurisdiction in the Island, and no case was ever brought before such a Court. If it had been established under any ordinance of the Council before the first sitting of the Legislature, we have not been referred to any such ordinance. It is shewn by Statutes passed at that sitting, that Courts of Judicature had before that been established and they have been continued ever since. As to those Courts that have been exercising their functions and powers ever since, with legislation from time to time with reference to them, they would no doubt be considered as established tribunals and as having been legally established. But when it is contended that so important a tribunal as a Court of last resort exists in a Province, it should be

shewn there was such a Court actually exercising Judicial functions, or that it was established by some Act of the Legislature or of the Crown.

As far as Governor Patterson is concerned, it does not appear that by any kind of Legislative enactment or order, either by the Governor in Council or by the more perfect legislation after the General Assembly was called, such a Court was established, nor does it appear that he was, by instructions, specially authorized to establish such a Court, or to *allow* appeals from any of the Courts of the Common Law, as Governor Carleton was in the instructions accompanying his first commission, and as Sir John Colborne was in the instructions accompanying the commission to him in 1838.

Under the instructions to Governor Patterson he was to send to the Secretary of State copies of all Acts, orders, commissions, &c., by virtue of which any Courts, &c., were established. We presume the parties have had proper enquiries made as to the existence of copies of such documents, and that none can be found. It is said none exist in the Island.

Whether under any subsequent commission or instructions an attempt was made to establish such a Court in the interval between the commission to Governor Patterson, 1769, and that to Sir John Colborne, 1838, we have nothing before us to shew. Under that commission, as already stated, he was authorized to *allow appeals*, and for that purpose, to issue a writ in the "*manner which has been usually accustomed*" returnable before himself and the Executive Council who were to proceed to hear and determine the same.

The instructions to most of the Colonial Governors were said to be to the same effect In *Macpherson's*

Practice of the Privy Council, (1) he speaks of the Governor in Council as forming the Court of Error in the Colony.

The instructions accompanying the commission to Lord Monck, in 1861, do not in any way refer to the allowing of appeals, and from what is said on the subject in *Macpherson's* Practice in the Privy Council, it seems that "in the royal instructions, issued to Colonial Governors of the Colonies (that have Legislatures), for some time past no mention is made of appeals." And the same can be said as to the instructions to Lord Lisgar in 1868. Nor is anything said as to allowing appeals in the commissions to Lord Monck and Lord Dufferin, nor in the instructions accompanying the same.

The reference to the matter in *Haliburton's* Nova Scotia, (2) is to the effect that the Governor in Council conjointly constitute a Court of Error, from which an appeal lies on the *dernier resort* to the King in Council. He considers the origin of this appellate jurisdiction to have been the custom of Normandy, when appeals ay to the Duke in Council.

In *Stewart's* Nova Scotia, after stating the only Common Law Court established in the Island was the Supreme Court, pointing out how the Chief Justice was appointed, and how the proceedings were conducted, it is added: An appeal, in the nature of a Writ of Error, is allowed from the Supreme Court to the Governor or Commander-in-Chief in Council when the debt or value appealed for exceeds £300 stg., with an appeal from their judgment when the debt or value appealed for exceeds £500 stg.

There is a chapter on appeals in *Clark's* summary of

(1) Appendix 72; (2) Vol. 2, p. 330.

Colonial Law, (1) in which he refers to the right of determining, in the Court of last resort, all controversies between the citizens of a State, as having been always considered the best evidence of the possession of Sovereign power. At page 111 he uses the language already referred to, and at p. 120, referring to the practice in the Privy Council, and to the case of a party who has been prevented by accidental causes from applying to the Governor of a Colony within the period limited in the particular Colony for leave to appeal to His Majesty in Council, the Governor having no jurisdiction after that to allow the appeal, he proceeds: "*But His Majesty in Council, from whom the right of appeal itself in all cases emanates*, may, *of course, at his pleasure*, relax in any such particular instance, *when it appears equitable to do so*, the *restrictions* to which it is generally subject. So it may happen that a Governor not improperly refuses to allow an appeal, from some doubts as to its competency or regularity, or from any other cause, where justice required a contrary decision. In all such cases the party aggrieved is, of course, entitled to apply to His Majesty in Council."

In the report of the case *In re* Cambridge cited on the argument, Lord Brougham said there is no instance of allowing an appeal from the Supreme Court at once to the Queen in Council, there being, by the Constitution of the Island, a Court of Appeal, namely, the Governor in Council, from whose decisions alone an appeal lies, and then says "the proper course, and the only course their Lordships can take is to advise Her Majesty to allow it to be appealed to the Governor in Council; it may then be brought before us in a future stage, if the parties are not satisfied with the decision."

(1) p. 106.

In the statement of the case, it is said (this was in 1841) that by the Royal instructions to the Governor, he was directed to allow appeals to himself in Council in cases where the value appealed from amounts to £300 sterling, and to the King in Council only where the value appealed from amounts to £500 sterling. That the amount being below £300, the case was not appealable either to the Governor in Council or to Her Majesty.

Now if a *Court* in the sense as contended for by the respondent had been created by the Constitution of the Colony, or in any other way recognized by law where the jurisdiction it had was only in matters above £300 sterling, could an appeal be *allowed* in that Court by order of the Queen in the manner suggested in Cambridge's case ? I should think not. But if it be considered as the exercise of the prerogative right of the Crown to review the judgments of Colonial Courts, and the Crown chooses to exercise that right through the Governor and Council, appeals may be allowed to them according to instructions, which, of course, may be varied from time to time, or according to specific cases as to the Crown may seem just. The Governor in Council may be considered a court as long as these instructions exist, but when they are withdrawn, the Court must fall with them.

At the time of the passing of the Dominion Statute establishing the Supreme Court, the Lieutenant Governor of the Island was not an officer holding a commission under the Great Seal of Great Britain, nor did he receive any instructions to allow appeals, nor was he authorized to issue writs for that purpose returnable before him and the Executive Council, nor were they directed or authorized to proceed to hear and determine such appeals.

In the absence then of any evidence showing the establishment of a Court of Error, or that any tribunal ever exercised within the Island the powers of such a Court, I am of opinion that the unmistakable references to such a Court in the Island Statute of 1873, or in the other Acts to which we are referred, do not create such a Court, if it had not an existence previous thereto. If it had been shown that such a court assumed to exercise the functions of a properly organized Court, and had been doing so for years, the recognition of it by the acts of the Legislature might be considered as affirming its legal existence, but not to create a Court.

In the reference to the Court of Error or Appeal in the Statute referred to, mention is not made of the Governor in Council constituting such Court

The Island Statute of 21 Geo. III, ch. 17, does not necessarily imply that the revising of a judgment in Error must be by a Court superior to the Supreme Court; or, if it does, that that Court must be necessarily one existing in the colony. The King in Council might revise on error.

As to the Statute relating to the estates of intestates, special jurisdiction is, by the Statute, given to the Governor in Council, who are to decide the matter on appeal, and their decision, I apprehend, is to be carried out by the Judge of the Court.

The fact that in the instructions to most of the Governors in the American colonies, reference is made to the granting of letters of administration and probates of wills, probably suggested that it was desirable to have an appeal to the Governor, and that appeal is expressly given to him and the Council by name in the Statute.

The Act constituting the Governor in Council a

Divorce Court, creates them for that purpose, and does not make them a Court of Error or Appeal.

In the Imperial Act of 1791, (1) the existence of the ordinance of the Governor in Council of the Province of Quebec, constituting the Governor in Council a Court of Civil Jurisdiction for hearing and determining appeals in certain cases, is recognized under section 34, which enacts: That the Governor of each of the Provinces (of Upper and Lower Canada), with such Executive Council as shall be appointed by His Majesty, for the affairs of such Province, shall be a Court of Civil Jurisdiction within each of said Provinces, for hearing and determining appeals within the same, in like cases and manner, and subject to such appeal, as before the passing of the Act might have been heard and delivered by the Governor in Council of the Province of Quebec, but subject, nevertheless, to such further or other provisions as might be made by the Legislature of the Provinces.

The Legislature of Lower Canada passed a Statute on the subject, (2). In Upper Canada, the same year, (3) the Governor, Lieutenant-Governor, or person administering the Government, or the Chief Justice of the Province, together with any two or more members of the Executive Council of the Province, shall compose a Court of Appeal for hearing and determining all appeals from such judgment or sentences as might lawfully be brought before them. Sec. 35 declares in what cases an appeal should lie to the Court. Appeals were also allowed under the Upper Canada Act of 1837, from the decisions of the Vice-Chancellor, though the Governor was Chancellor. In *Woodcock's* West Indies, (4)

(1) 31 Geo. III, ch. 31; (2) 34 Geo. III, ch. 6; (3) 34 Geo. III, ch. 2, sec. 33; (4) p. 288.

the following reference is made to appeals in the Colonies :—

"Appeals from the decisions of Colonial Courts may be considered as existing at the Common Law as affected by the King's instructions to the Governors, by Colonial Law and parliamentary enactment. It has been said to be an inherent right of the subject of which he cannot be deprived to appeal to the Sovereign to redress a wrong done to him in any Court of Justice, and also an inherent right of the King, inseparable from the Crown, to distribute justice amongst his subjects.

His Majesty, by his instructions, declares his Royal will and pleasure to be that his representative shall, in all cases, on application being made to him for that purpose, permit and *allow* appeals from any of the *Courts* of Common Law, and he and the Council, with the exception of such as may have heard the cause as judges in the Court below (who are, nevertheless, allowed to give their reasons for the Judgment complained of), are to proceed to hear and determine the appeal. It is provided, however, that the sum or value appealed for do exceed £300 sterling, and that security be first given by the appellant to answer such charges as shall be awarded in case the first sentence shall be affirmed. And if either party be dissatisfied with the decision of the Governor in Council, then an appeal is *allowed* to the King in Council, provided the sum or value appealed for exceed £500 sterling; the appeal to be made within 14 days after sentence, and good security given by the appellant that he will effectually prosecute the same, and answer the condemnation, and also pay such costs and charges as shall be awarded in case the sentence of the Governor in Council be affirmed."

It is also provided that in special cases the Governor is to admit the appeal. In McPherson's Practice of the Privy Council, (1) the instructions to Governors previous to 1854, are referred to. They were said to be substantially the same in all the American Colonies, and were generally to the effect mentioned in Mr. Woodcock's book. It is added in the Royal instructions now issued to Colonial Governors no mention is made of appeals.

Special orders are made in the Privy Council as to appeals from the Supreme Court in the Colony, named in the Order where the sum or matter in issue is above a certain amount. Such orders appear to have been made in reference to the Provinces of New Brunswick and Nova Scotia.

It may be that after the powers conferred by the Stat. 3 & 4, William IV., ch. 41, on the Judicial Committee of the Privy Council, had began to be exercised, it was found by experience that it was better not to continue to all the Governors of the Colonies the right to permit appeals to the Governor in Council, but rather that the appeals should come direct to the Queen in Council, and that in consequence when it was not desired to continue such powers, the Governors were not authorized to exercise them by their instructions. Whatever may be the reason, the latest instructions I have seen to the Governors of the Island, viz: those to Sir John Young, afterwards Lord Lisgar, dated 29th December, 1868, contain no authority to allow appeals to the Governor in Council from any of the Courts of the Island.

When the Provincial Statute of 1875, called the Land Purchase Act, was passed, and when the judgment now

(1) Appendix 72.

appealed from was pronounced, the Governor of the Island was appointed by a commission issued under the Great Seal of Canada, and attested and signed by the present Governor General of Canada, Lord Dufferin, and no instructions accompanied that commission.

During the time instructions of the kind alluded to, and the power to appeal to the Governor in Council existed, and was exercised, it might be referred to as a *Court* in the same way as the Queen in Council, or the Judicial Committee of the Privy Council, is frequently called a Court; but when these instructions were withdrawn, and no other authority existed by which the appeals to the Governor in Council could be made, then I fail to see how the Governor in Council for the time being could be such a Court. If the commission to any Governor had ordered and directed that he and his Exetive Council and the Governor and Council for the time being should constitute a Court to which appeals might be made, it could then with more force be urged that a Court was thereby established. But I do not think such authority as was contained in the instructions to Sir John Colborne, by itself constituted a Court of Appeals as a permanent institution, but for the time being he was to exercise the prerogative right of the Crown to hear appeals from the Colonial Court under such instructions; and when such instructions were withdrawn, the right of the Governor in Council to hear appeals ceased.

I am not satisfied that any Court of Error or Appeal or any Court of last resort, save the Supreme Court, within the meaning of the Dominion Act creating this Court, was established or existed in the Island of Prince Edward, during the time that Mr. Patterson was Governor of the Province. We were not referred to any

case that had ever been brought before such a Court, and it was not denied that no case had ever been taken to such a Court within the Island. It is not pretended that such a Court had ever been *established* by Legislative enactment, though it was contended the existence of such a Court was recognized in Statutes passed by the Legislature. If established at all it must have been by an instrument under the Great Seal or under the instructions to the Governor, if that would establish a Court of that kind. No instrument under the Great Seal, either of Great Britain or of the Colony, has been referred to as establishing such a Court. Now the Governor in Council was constituted *a Court* of Appeals by an ordinance of the Province of Quebec, when the instructions expressly authorized an appeal to the Governor in Council. The instructions to Governor Carleton with his second commission, when referring to subjects for (if I may use the term) legislation, directs his attention to constituting the Governor in Council *a Court of Civil Jurisdiction* for the hearing of appeals. The Act of 31 Geo. III, ch. 31, distinctly recognizes such a Court, and the subsequent legislation both in Upper and Lower Canada constitute the Governor in Council a Court. The tribunals so established were properly Courts, and exercised their powers under laws which continued them as long as the laws existed. There is a manifest difference between tribunals so constituted, and those which exercise powers conferred by the Royal instructions alone, and which seem only to exist whilst the instructions are continued. In the one case they exist and continue by positive enactment, and in the other by virtue of the prerogative right to revise the decisions of the Colonial Courts ; and when the Governors are not authorized to exercise that right,

it seems the natural and logical result that they cease to possess it.

The commissions issued to the Governors since Sir John Colborne's time, which we have seen do not contain any authority to the Governor to hear and allow appeals, and the reference to this matter in *Macpherson's* practice indicates that in most, if not all of the commissions issued lately, that authority which was formerly given has been intentionally withdrawn.

On the whole, I come to the conclusion that the present Governor of the Island of Prince Edward had no authority to allow an appeal in the matter now before this Court, and that it is properly brought before us. As already stated I do not think the references to the Court of Error or Appeal in the Island Statute of 1873, create such a Court if none existed at the time.

The other Statutes referred to do not necessarily imply that a Court of Appeal existed in the Colony, and none of these Statutes create a general Court of Appeal.

I do not think that the Dominion Parliament, when they enacted that the appeal given to this Court was to be "understood as given from the Court of last resort in the Province in which judgment was rendered" meant to compel suitors before bringing their cases here, to have them heard in, if I may use the term, a *mythical Court* that had never been resorted to by them, or to Courts where such resort, if any ever existed, had long been abandoned and ceased to be used.

I think, therefore, this appeal is properly before us, and we have jurisdiction to *hear it.*

The case states that the Right Honorable Hugh Culling Eardley Childers was duly appointed a Commissioner, by the Governor General in Council, under the seventh section of "The Land Purchase Act,

1875," John T. Jenkins, Esquire, was duly appointed a Commissioner by the Lieutenant Governor in Council under the fifth section, and Robert Grant Haliburton was appointed by Miss Sulivan as her Commissioner, under the ninth section.

That the Commissioners so appointed met at a day and place in Charlottetown, then appointed for the purpose of hearing and considering the matters referred to them, and at the same time and place so appointed, the Commissioner of Public Lands and the proprietress, Charlotte Antonia Sulivan, were represented by Counsel, and evidence tendered on both sides having been heard, the said three Commissioners made an award which was set out.

The notice by the Commissioner of Public Lands served on Miss Sulivan's agent is set out in the case, and refers to the act and the powers of the Commissioner under it, and states that the Island Government intend to purchase all her township lands in the Island, liable to the provisions of the Act, including all such parts or portions of lots or townships numbers, 9, 16, 22 and 61 in the Island, as she was or claimed to be the proprietor of, and as were liable to the provisions of the Act.

It appears, from the Statute, that the Government of the Island was entitled to receive from the Dominion Government a large sum of money for the purpose of enabling the Government of the Province to purchase the township lands held by the proprietors in the Island.

We may, without going beyond what is considered the legal province of a Judge, be supposed to know that there had been difficulties in the Island existing for many years in relation to the collections of rents on

these lands; that there had been legislation on the subject, and that further legislation was deemed necessary. The recital in the Statute that it was desirable to convert the leasehold tenures into freehold estates, indicates that it was a matter affecting the public interests. This Statute ought, therefore, to be viewed not as ordinary legislation but as the settling of an important question of great moment to the community, and in principle like the abolition of the Seigniorial tenure in Lower Canada, and the settling of the land question in Ireland. In carrying out such measures as these, there may be cases where the law works harshly, where important rights may seem to be disregarded, and private interests are made to yield to the public good without sufficient compensation being given. Yet the legislation on the subject generally assumes to be based on the principle of compensation to individuals when their property is taken from them and points out a mode of ascertaining what the indemnity shall be, and how it shall be paid

It is not doubted in the Court below, and we do not doubt that the Legislature of the Island had a right to pass the Statute in question.

The great object of the Statute seems to have been to convert the leasehold tenures into freehold estates, a matter of very great importance, and one which, if not settled, would be likely to affect the peace as well as the prosperity of the province.

Their intention seems to have been, as to all questions connected with the land, such as rents and judgments obtained for the rents, and claims arising out of the ownership of the land (as far as the proprietors were concerned), that they should no longer be enforceable by them; that those incidents such as arrears of rent

and the like rights should, with the soil itself and all interest in it, pass from the proprietor to the Government; that the money value of the rights of the proprietor, taking into consideration, in estimating such value, certain circumstances such as the price at which other proprietors had sold their lands, the annual rentals due and actually received each year, the expense of collecting, the net receipts for six years, &c., was to be fixed by three Commissioners. These Commissioners were to be selected, one by the Island Government, one by the Dominion Government, and one by the party interested. It can hardly be disputed that this was a fair mode of selecting the Commissioners, who were, after hearing the evidence, to make the award; and the money awarded was to be paid into the Island Treasury, to the credit of the suit or proceeding. The object, no doubt, being that the money should represent the land, and the different parties interested should, on application to the Court, receive what they were entitled to from that fund.

They intended the award of the Commissioners to be final; but if either party wished to have any *error*, *informality* or *omission* in the award corrected, he could apply, within 30 days after the publication of the award, to the Supreme Court to have it remitted back to the Commissioners.

A trustee was to be appointed, to convey the estate of the proprietor to the Commissioner of Public Lands, notice was to be given to the proprietor, and the Court or a Judge might restrain the execution of the deed. This conveyance and the payment of the money awarded into the Treasury was to vest the lands in the Commissioner in fee simple.

The money awarded in each case was to be paid into

the Provincial Treasury at the expiration of 60 days, and the public trustee, after the money was so paid, was to execute a conveyance of the estate of the proprietor, unless restrained, after 14 days' notice to the proprietor.

Why should not the intention of the Legislature be carried out in this matter? I do not think it necessary to discuss the elaborate judgments given by the learned Judges in the Court below. The view I take of the Statute renders that unnecessary.

The view I take is that the mode pointed out by the Statute is the one which should have been pursued by the proprietor in this matter if there were any *error*, *informality* or *omissions* in the award made, and that the Court had no other authority to enquire into the proceedings of the Commissioners further than to see if the subject matter was properly before them, and, perhaps, to see if they had been guilty of any fraud in their proceedings. And if they had the strict legal right to do so, in the exercise of a sound discretion, according to the best of my judgment, the proprietors' application to set aside the award should have been refused.

I see no reason to doubt that the Commissioners properly entered on the enquiry as to the compensation to be awarded to Miss Sulivan for her rights as a proprietor in township lands in the Island.

It is not denied that Miss Sulivan was a proprietor, within the meaning of the Act, of township lands exceeding in the aggregate 500 acres. Her lands were, therefore, liable to be purchased under the Act.

The appointment of the Commissioners is stated in the case, and the notice to Miss Sulivan of the intention to purchase *all* her lands is set out. The notice complies

with the Act. If only a portion could be purchased, it might be that the portion selected would be that which was most profitable to the proprietor and most desirable for her to keep.

In my opinion the Statute contemplates the purchase of all of the peculiar description of lands owned by a proprietor whose estate exceeded 500 acres, and when the value was to be ascertained, it would be for the interest of the proprietor to shew what the land was in order that compensation might be given for all, and that none should be omitted. If the Statute had required the Commissioner of Public Lands to define by *metes* and *bounds* in his notice the lands intended to be purchased under the Act, it would probably induce him to describe such lands as were well known to belong to the particular proprietor, and which, probably, would be those that were most valuable and most for the interest of the proprietor to retain, or it would have the effect of making the Statute useless if the Commissioner could not give a minute description of each parcel of land owned by the proprietor. The Court below thought the notice sufficient, and I see no reason to dissent from that view.

It was suggested on the argument for the first time that it did not appear that the Commissioners were sworn, or that the Commissioner appointed by the proprietor ever notified the Commissioner of Public Lands of his appointment. It was also suggested that the notice of the sitting of the Commissioners was not published a sufficient length of time before the day fixed for their sitting.

The provisions of the Statute as to these matters seem directory, and it is reasonable to presume they were followed, particularly as the objections were not taken

on the argument in the Court below, nor in the rule, nor mentioned as relied on in the respondent's factum. It is not now shewn affirmatively that, as to the points suggested, the proceedings were not regular except as to the time of giving the notice of the sitting of the Commissioners, which, as the parties appeared, could be no objection. If necessary to show in any proceeding that these things were done, it could, I apprehend be averred in pleading and proved in evidence.

If the proprietor's Commissioner gave the Commissioner of Public Lands no other notice of his appointment than claiming to sit, and sitting as a Commissioner when the matter was proceeded with, when the Commissioner of Public Lands was either personally present or was represented by counsel, that would be some notice of his appointment; and, on a bare suggestion of this kind, we will not presume that the parties did not do what they ought to have done.

The papers before us show that the case was fully enquired into before the Commissioners, a large number of witnesses examined, able advocates addressed the Commissioners, and two of them made their award, as follows :—

DOMINION OF CANADA,

PROVINCE OF P. E. ISLAND.

In the matter of the application of Emmanuel McEachern, the Commissioner of Public Lands, for the purchase of the estate of Charlotte Antonia Sulivan, and "the Land Purchase Act of 1875,"

The sum awarded under Section 26 of the said Act by us, two of the Commissioners appointed under the

provisions of the said Act, is eighty-one thousand five hundred dollars.

HUGH CULLING EARDLEY CHILDERS,
Commissioner appointed by the Governor-General in Council.

JOHN THEOPHILUS JENKINS,
Commissioner appointed by the Lieutenant-Governor in Council.

Charlottetown, 4th Sept., 1875.

The award was duly published 7th September, A.D. 1875, pursuant to the 29th Section of the Act. The application was made to set it aside on the 17th November, the Public Trustee having notified Miss Sulivan's agent on the 3rd of November that the sum awarded had been paid into the treasury of the Island to the credit of the suit, and that after fourteen days from the service of the notice he would execute a conveyance to the Commissioner of Public Lands of the estate of Miss Sulivan, the proprietor, which estate was more particularly described in the four schedules annexed.

The question is whether the Court below had any authority to make the rule absolute to quash the award; and in discussing this question it is necessary to refer to the 45th Section of the Act, which is as follows:—

"No award made by said Commissioners, or any two of them, shall be held or deemed to be *invalid* or *void* for *any reason*, *defect* or *informality* whatsoever, but the Supreme Court shall have power, on the application of either the Commissioner of Public Lands or the proprietor, to remit to the Commissioners any award which shall have been made by them, to *correct* any *error*, *informality* or *omission* made *in their award.* Provided always that such application to the Supreme

Court to remit such award to the Commissioners *shall be made within thirty days* after the publication thereof, as aforesaid; and provided, further, that in case any such award is remitted back to the Commissioners, they shall have full power to revise and re-execute the same, and their powers shall not be held to have ceased by reason of their executing their first award, and in *no case shall any appeal lie* from any such award, either to the *Supreme Court*, the Court of Chancery, or any other legal tribunal; nor shall any such award or the proceedings before such Commissioners be removed or taken into or inquired into by any Court by *certiorari*, or any other process; but with the exception of the aforesaid power given to such Supreme Court to remit back the matter to such Commissioners, *their award shall be binding, final and conclusive on all parties.*"

Could any more emphatic language be used to shew that the Legislature intended that this award should be "binding, final and conclusive on all parties," and should not be held or deemed to be invalid or void for any reason, defect or informality whatsoever.

On the application to the Court below, certain facts were stated by the agent of Miss Sulivan, in his affidavit.

1. That in Schedule B there is a farm alleged to be 34 acres, purchased by Arthur Ramsay, on Lot 16, whereas Ramsay had purchased 84 acres; this being 50 acres more than Miss Sulivan claimed to own or demanded compensation for.

2. That in the 15,000 acres claimed to be conveyed to the Commissioner by the trustee, there is included 1,100 acres on Lot 16, held under verbal agreement, whereas, in truth, under verbal agreement, the lands owned by Miss Sulivan, and for which she claimed compensation, amount only to 708 acres.

The following matters are in dispute, and evidence given concerning the same :—

The amount of arrears of rent due by several tenants upon the estate. The performance of the conditions of the original grants from the Crown, and how far the performance has been waived. That Miss Sulivan contended the conditions of the original grants had been waived. The Commissioner of Public Lands alleged the contrary, and gave, in evidence, despatches of Secretaries of State for the Colonies, printed in the Journals of the House of Assembly, in support of his claim and in denial of her contention.

That in Schedule B, four several plots of land purchased by Arthur Ramsay and Samuel Yeo, upon Township No. 16, and excepted out of the said Township, claimed to be conveyed as aforesaid, are referred to as "being numbered or coloured green upon the plan of the said Township, in the possession of Miss Sulivan's agent and produced by him before the Commissioners, under 'The Land Purchase Act'"; whereas there was more than one plan of Lot 16 in the agent's possession and produced by him before the Commissioners. There were two produced by him and they differ from each other, and he had no means of finding out from the notice which of the plans is referred to.

The same thing is stated in effect as to Schedule D, Township No. 61.

If, in relation to these matters thus stated in the affidavit, it was necessary to protect Miss Sulivan's interest, or even to prevent inconvenience in carrying out the award, that something more explicit should be stated in the award relative thereto, application might have been made under the 45th Section of the Act to the Supreme Court to remit the award to the Commissioners

to correct the same. But that was not done. If an application had been made to the Court, and it had been shewn that the omissions or error referred to in the affidavit would prejudice Miss Sulivan, or were such as ought to be remedied by the arbitrators, the Court would have sent it back for that purpose. But the course taken on Miss Sulivan's behalf in lying by until the time for applying to the Court under the Statute had passed, it can be seen, has worked great injustice and inconcenience to those acting on behalf of the public. If it had been urged that the award was faulty, it could have been corrected. The Commissioner of Public Lands does not complain of it, therefore there was no reason to apply on his behalf. The proprietor does object, therefore she ought to have applied sooner. She might have applied according to the terms of the Statute; she has deliberately chosen not to do so; she must therefore abide by the consequences.

As I understand the judgment of the Court below, the matter in their view was properly before the Commissioners, it was within their jurisdiction, and they were fully authorized to decide on all questions arising in relation to the enquiry and decision they were to make. The objection is that they did not decide matters which they ought to have decided, and that the award is void by reason of that defect, though, if the proprietor had applied within the thirty days, the award might have been remitted to the Commissioners to correct the error or omission.

It is not pretended that after the thirty days the Court have the power of setting aside this award under the Statute, nor am I aware that they have any peculiar powers conferred on them by local Statutes to interfere

when the Legislature has declared that an award shall be final. I understand that the Court below proceed on the Common Law right of the Court to review the decisions of inferior tribunals, and to see that they properly carry out the powers and authority vested in them —not that they are a Court of Appeal to review the conclusions at which the inferior tribunal has arrived, but that they can, if that tribunal has not done all that it should have done, declare void its decisions. The more logical course to take under such circumstances would be to require the inferior tribunal to do what it ought to do, and that was what the Legislature authorized the Court to do.

But in this case I do not think any such right existed in the Court below. The Statute emphatically declares that in no case shall an appeal lie from any such award either to the Supreme Court, the Court of Chancery, or any other legal tribunal. Nor shall any such award or the proceedings before such Commissioners, be removed or taken into or inquired into by any Court by *Certiorari*, or any other process. but with the exception of the power of the Supreme Court to remit back the matter, their award shall be *binding*, final and conclusive on all parties.

If a power of a Superior Court to review or set aside an award or decision of a special tribunal can be taken away by Act of Parliament, it seems to me that the words in this Statute ought to be held to do it.

In *Richards* v. *South Wales Railway Company*, (1) Sir William Erle, in his judgment said: "It was admitted that the writ (of *certiorari*) was taken away as to all proceedings under the Acts (which he referred to), this rule therefore cannot be made abso-

(1) 13 Jurist, page 1097.

lute unless it distinctly appears that in the proceedings the Sheriff and the Jury have taken upon themselves to decide on a matter on which they had no jurisdiction. When that is made out the Statutory prohibition does not apply and the inherent jurisdiction of this Court is unrestrained. * * * There is, however, a great disposition to evade clauses in Acts of Parliament which take away the *certiorari*, on the alleged excess of jurisdiction, and we feel bound not to yield to attempts of this kind unless they rest on very clear and satisfactory grounds."

In the *Colonial Bank of Australasia* v. *Willan*, (1) the following language is used in the decision of the Judicial Committee of the Privy Council :—"There are numerous cases in the books which establish that, notwithstanding the privative clause in a Statute, the Court of Queen's Bench will grant a *certiorari*, but some of those authorities establish, and none are inconsistent with the proposition, that in any such case that Court will not quash the order removed, except upon the ground either of a *manifest defect of jurisdiction* in the tribunal that made it, or of manifest fraud in the party procuring it," and at p. 450 the following language is used : —"The Court of Queen's Bench, *whose exercise of this power is discretionary*, would certainly not quash an order of an inferior Court upon the ground of fraud, unless the fraud were clear and manifest."

Here there is no defect of jurisdiction, and it is not pretended that there is any fraud. But as I understand the argument it was urged that all the jurisdiction was not exercised, and that is a defect of jurisdiction They were to consider and award on the matters referred to in the 28th section, and not having done so the whole proceeding is void.

(1) L. R. 5, P. C. 442.

After giving the matter my best consideration I have arrived at the conclusion that the Legislature did not intend that the Commissioners should find as specific facts, the facts and circumstances mentioned in the 28th section, which they were to take into their consideration in estimating the amount of compensation to be paid to a proprietor for his interest or right in any lands.

If it had been intended they should find specifically on each of these points, I think different language would have been used, and if the Court thought some kind of decision necessary on the points, they could have referred the award back to the Commissioners for that purpose. In any view, it does not seem so plain a question of want of exercise of jurisdiction as to justify setting aside the award under such a Statute as this.

The object of this Section 28 being to allow the Commissioners to take evidence on all these subjects, and having all these matters and the evidence relating to them before them, and seeing that the declared object of the Legislature was to pay every proprietor a fair indemnity or equivalent for the value of his interest, and no more, in the land to be purchased. All this was to be taken into consideration and then they were to award, under Section 26, the sum due to the proprietor as "the compensation or price to which he should be entitled by reason of being divested of his land and all interest therein and thereto."

The papers before us shew that the matters referred to in the 28th section were brought before the Commissioners, except perhaps, those relating to the conditions of the original grants. It is said that as Miss Sulivan was one of the parties referred to in the Act (1)

(1) 27 Vict., ch. 2.

she was not a party affected by any decision of that question. After hearing the evidence, the Commissioners made their award. They say, in express terms, the sum awarded under the 26th section of the Act is $81,500. Is there any reason why we should presume they did not take the matters into consideration, which the law directed them to do, before they made their award? They were to make the award after hearing the evidence; this, of course, implies they were to consider it, or it would be useless to offer evidence. On the contrary, ought we not to assume that as they could not properly make an award under the 26th section unless they considered these matters, that they have done so? In *Britain* v. *Kinneard* (1) Dallas, C. J., said formerly the rule was to intend everything against a stinted jurisdiction, that is not the rule now, and nothing is to be intended but what is fair and reasonable; and it is fair and reasonable to intend magistrates will do what is right.

It is fair and reasonable to presume here that the Commissioners did what was right. It is a fair and reasonable intendment that they did what the law required of them, unless it appears on the face of the award that they did not. The proceedings before the arbitrators show that these matters were discussed before them, and the only reasonable conclusion is that they must have taken them into consideration. In the view that I take, then, the award ought not to have been set aside. The Commissioners were not required to find specifically on the matters they were to take into consideration, under the 28th section, and the presumption is they did take them into consideration.

Then, as to the necessity of describing the specific

(1) 1 Brod. & Bing, p. 430.

lands as to which they made the award, suppose they had, in the award, described lands that Miss Sulivan did not own, or lands that were not liable to be purchased under the Act, would their finding bind anyone not a party to the award? It is not pretended it would. The Commissioner notified Miss Sulivan he intended to purchase *all* her township lands, that being the kind of land referred to in the Statute, which he was authorized to purchase, and it was concerning all these lands the award was made. The money has been paid into the Provincial Treasury, and represents all these lands. When those claiming the money are before the Court, they will decide to whom and in what proportion the money is to be paid. *Primâ facie* it is Miss Sulivan and those who contest her right must shew how their claims originated. The finding of the Commissioners could not in any way deprive the parties of rights which arose out of matters in which those parties and Miss Sulivan were alone concerned. The Court might say if the Commissioners took a certain view, it would be only fair as between individuals that the other parties should have a certain sum, but the Court would not necessarily be bound to take that or any particular view. The whole matter is open to them, and when the parties are before the Court they will dispose of their rights as they show them to be. Mere speculative difficulties ought not to be very seriously considered when the party suggesting them had an opportunity of having them all settled, but did not choose to avail herself of it.

I do not consider the describing of the property in the deeds by the Public Trustee a transfer of their authority by the Commissioners. There were certain lands, the value to be paid for which was the subject

of their enquiry. What those lands were seems to me easily ascertainable, and if the particular maps in the description cannot be identified, and the conveyance is held void for uncertainty, I fail to see how Miss Sulivan is injured by that, or why she should concern herself with it. It seems to me all her township lands and her interest in them and in the rents were properly before the Commissioners, and they have awarded her all the compensation she is entitled to for them. The amount so awarded has been paid into the Treasury, and I see no reason why she should not get what she is entitled to from the Treasury. Why she should concern herself about the conveyance, unless as it may affect her interest, is not so apparent. If the conveyance included any of her land not liable to be purchased under the Act, she might then say she was interested as to that, and insist upon its being put right. She might apply to the Court to restrain the conveyance, under the 32nd section, until it was corrected. I fail to see that the omission to describe the lands in the award is a ground for setting it aside. The Trustee is to execute a conveyance of the estate of the proprietor. If he executes a deed of property not a part of her estate, that cannot prejudice her nor apparently anyone else. It has indeed been suggested that if it was her estate, the conveyance gives a *primâ facie* title; and if a squatter on the estate were sued, the Land Commissioner or purchaser under him would only be obliged to show that title under the conveyance by the trustee, instead of tracing the title from the Crown. I hardly think a Court would set aside an award like this on that ground alone.

The money was awarded under the 26th section for the lands, of which Miss Sulivan was divested, and

they were all the lands of a certain description of which she was proprietor in the Island. As it was not necessary to describe them in the notice, I fail to see why it is necessary for the Commissioners to describe them in their award. If she had devised all her township lands in the Island and died, it is not doubted that such a description would carry to her devisee all the lands of that description which she owned in the Colony. It is urged that the form of deed appended to the Statute makes it necessary the lands should be described by *metes* and *bounds*. The Section 32 says the deed *may* be in the form, and if a clear and intelligible description were given without *metes* and *bounds*, I do not think the deed would be inoperative.

It seems to me that the words of the 20th section of the Act, authorizing the Commissioners to summon and examine witnesses upon matters submitted to their consideration, "and the facts which they may require to ascertain, in order to carry this Act into effect," taken in connection with the 28th section, mean the facts and circumstances they are to take into consideration, in order to make their award, and they could not do this unless they had power to examine the witnesses as to these facts. That cannot mean all the facts necessary to carry the Act into effect as far as the action of others is concerned. Much must be left to the Court to ascertain when they are called upon to distribute the money, and as the Commissioners were not called upon in my view to find specially on these matters referred to in the 28th section, I do not think the words referred to in the 20th section compelled them to do so.

Take the converse of the case before us, suppose, after the time for moving to refer the case back to the Commissioners had passed, and after the money had been

paid into the treasury, and an application had been made on Miss Sulivan's behalf to the Court for an order to pay over the same, then, for the first time, the Commissioner of Public Lands had applied to set aside the award, because he would be embarrassed in discharging his duties under the Act, inasmuch as the Commissioners had not found specially on the matters referred to in the 28th section, would not the answer have been? "You had the knowledge of the award and its contents long ago; you have deliberately chosen to let the opportunity pass of having the alleged errors corrected, and you must now work out your rights under the award as you best can. Miss Sulivan has had a certain sum awarded to her; by your notice you claimed to purchase all her township lands; she has been awarded a sum for her interest in those lands, and she ought to have it." If this would be the proper answer to such an application, a similar answer to Miss Sulivan seems to me equally just and proper.

I have not met with any case where special provision was made for the correction of the errors or omissions of the tribunal created by the Statute, and where the privative enactment was so strong and emphatic as it is in this Statute, when the Court has felt justified in setting aside the award of the inferior tribunal.

Under such circumstances, on an application like this, I think that the declared intentions of the Legislature ought to be respected, and the parties should be left to assert their rights in some other way than by asking the Court, on an application such as this is, to declare the award invalid and void, when the Legislature has said it shall be binding, final and conclusive on all parties, unless inquired into in the manner

prescribed by the Act, and shall not be inquired into by any Court on *certiorari*.

If either of the parties to the award find a difficulty in obtaining all the benefits under it to which they claim to be entitled, that is a matter which may be said to have arisen either from their own deliberate act or want of reasonable care or attention.

The appellant in this matter does not anticipate difficulties of a serious character, as far as his part of the case is concerned. If the respondent finds a difficulty she ought to have taken the steps that were open to her to have had it remedied.

The case may be briefly summed up as follows :

After considering what has been brought before us relating to the subject, we are not satisfied there is a Court of last resort in the Province of Prince Edward Island other than the Supreme Court, from whose judgment this appeal is brought, and therefore the appeal is properly brought directly to this Court.

Secondly, That by the Statute passed by the Island Legislature, and which they had a right to pass, the award of the Commissioners could not be quashed and set aside, or declared invalid and void, on an application made to the Supreme Court; but it could have been remitted back to the Commissioners in the manner prescribed by the 45th section of the Act. The application for the rule in the Court below not having been made within the proper time, nor according to the provisions of that section, the decision of that Court is against the express words of the Statute, and cannot be allowed to stand.

RITCHIE, J.:—

I think this appeal is properly before us. It was ad-

mitted on both sides on the argument, that no evidence could be discovered of the establishment of a Court of Appeal either by charter or patent under the Great Seal, or by any statutory enactment, nor could it be discovered that any such Court has ever sat in the Island. The observation of Lord Brougham, in the Cambridge case must, therefore, I think, refer to the clause at that time usually inserted in the Royal instructions to Colonial Governors, authorizing the Governor in Council to permit and allow appeals.

I think this was not the establishment of a Court, because there is clear authority for saying that the power to establish Courts cannot be granted by the Crown by instructions, or otherwise than under the Great Seal; but it is rather, I think, an exercise of the Royal prerogative, in furtherance of the right of the Queen, to receive and hear appeals from Colonial Courts by which the Queen directs that before coming to her direct, the appellant shall first go to her representative in Council in the Colony. A Governor, without instructions to that effect, has, it appears to me, no authority to entertain such appeals: and no such instructions exist at present. If the Queen's representative, without instructions, would have no such power, much less would the officer of the Dominion Government. I do not think it can be said that there is either *de jure* or *de facto* any Court of Appeal in the Island; therefore, I think the matter was appealable to this Court from the Supreme Court, as being the highest Court of final resort in the Island.

It was, I think, clearly the object of the Legislature to provide for a speedy, final, and conclusive decision by the Commissioners of all questions referred to them, and to make their award "final, binding and conclu-

sive on all parties." At the same time, it was obviously the desire of the Legislature to secure to the public, through the Commissioner of Public Lands, and to the proprietors, the means of having the doings of the Commissioners reviewed, and any errors they may have committed, corrected, any omissions supplied, and any informalties or defects cured. For accomplishing which, the Commissioners were placed, as it were, under the immediate supervision of the Supreme Court of the Island, and ready access to that Court was afforded by the simple application either of the Commissioner of Public Lands, or the proprietors. And to enable the Court, when its aid was invoked, to see that right was done, ample power is given to remit the awards to the Commissioners to correct any error or informality or omission, provided the application was made within the time limited; and on such award being remitted to the Commissioners, full power is given them to revise and re-execute the same.

The Statute first declares that, "no award made by the said Commissioners, or any two of them, shall be held or deemed to be invalid or void for any reason defect or informality whatsoever," and then provides a suitable tribunal for the correction "of any error or informality or omission;" and declares that in no case shall any appeal lie from any such award either to the Supreme Court, the Court of Chancery, or any other legal tribunal, nor shall any such award, or the proceedings before such Commissioners, be removed or taken into, or inquired into by any Court by *certiorari*, or any other process; and, as if to prevent the possibility of the intention of the Legislature being misapprehended, the section of the Act, after being thus minute, thus concludes:—"But with the exception of the aforesaid

power given to such Supreme Court to remit back the matter to such Commissioners, their award shall be binding, final and conclusive on all parties." It cannot be denied that the Legislature had the power to deal with this subject, and, if it chose, make the award of the Commissioners final; and, most certainly, it had the right to establish a Court of Review, final in the Island, so far as the Courts of the Island were concerned. And could they have selected a more suitable tribunal than the Supreme Court,---the Court to which, under ordinary circumstances, belongs especially the duty of supervising the proceedings of the inferior tribunals of the Island? The practical effect really was merely to give the Supreme Court a more summary and ample jurisdiction, to enable it more speedily and effectually to deal with the matter, free from the technicalities and delays, and possibly costs, incident to the ordinary mode of proceeding. If this was the intention of the Legislature, as from the Statute I gather it to have been, I am at a loss to conceive what language could have been used to achieve that object, if the language of the 45th section of the Land Purchase Act of 1875 does not do it.

In the case of, *The Nawab of Surat*, (1); an Act of the Legislature of India, empowered the Governor in Council of Bombay to administer the private estate of the Nawab of Surat, and it was by section 2 enacted "that no act of the said Governor of Bombay in Council, in respect of the administration to, and distribution of, such property, from the date of the death of the said late Nawab, should be liable to be questioned in any Court of law or equity." No provision was made for an appeal from the Governor's decision

(1) 9 Moore. P. C. C., p. 88.

On an application by a claimant, dissatisfied with the award made distributing the estate, for leave to appeal to the Judicial Committee, Knight Bruce, Lord Justice, said: "Their Lordships are of opinion that the intention of the Act was not to create a Court; that the intention of the Act was to delegate, either arbitrarily or subject to certain limitations of discretion, the administration and distribution of the Nawab's property, but in such a way that the administration and distribution should not be judicially questioned. * * * It may seem, an anomalous and extraordinary proceeding to vest powers of this description, not liable to be checked by any ordinary course or powers of law, in any individual, or in any body; but the Indian Legislature had power over the property; they might in the exercise of that power, which is inherent in legislation, have given the whole property at once to any stranger, or devoted to any purpose, and whether with moral justice or not, is not the question. Instead of doing that, they do, what to their Lordships appears substantially the same thing,----they vest the power of dealing with it in a particular individual or a particular body, and declare that its acts shall not be liable to be questioned in any Court of law or equity."

How different is this case, in view of the exigencies and necessities of the country? The Legislature compells proprietors to sell, no doubt in many cases against their will, and makes provision for compensation, to be estimated by disinterested parties, and not by parties whose acts cannot be judicially questioned. It only provides that if such acts are questioned, it must be before a particular Court, within a specified time, and in a specified manner.

I have been unable to discover, after a most careful

investigation, that the Commissioners have in any way dealt with any matter over which their jurisdiction did not extend, or that, in dealing with matters over which they had jurisdiction, they exceeded in any way that jurisdiction.

The only question the Commissioners had finally to determine and award, was, in the words of the Statute, "The sum due to the proprietor as the compensation or price to which he shall be entitled by reason of his being divested of his lands, and all interest therein or thereto."

The provisions of the Act, as to how they were to proceed, and what they were to take into their consideration to enable them to arrive at a just and proper conclusion, were directory, though not the less obligatory on them, and which, if they failed to regard, ample remedy, as we have seen, was provided. It is not shewn that they did not do everything that they were required to do, and did not follow the directions of the Statute in every particular; but the complaint seems to be, that this does not appear on the face of their award. But if they did not do as they were required, or if they did, and it should have appeared on the face of the award, which I by no means affirm, is not the answer to the complaining party very obvious? If you were aggrieved thereby, or in any other way, why did you not avail yourself of the remedy provided for you, and apply to the Supreme Court within the time and in the manner prescribed, and have the error or omission, irregularity or defect rectified?

The Commissioners have referred to and incorporated in their award, the application of the Commissioner of Public Lands and the Lands Purchase Act, 1875; and in the matter of such application for the purchase of the

estate of C. A. Sulivan, have awarded, under Section 26 of said Act, a certain sum. This, it seems to me, is just what they were authorized and required to do. If, in their proceedings, the Commissioners were guilty of any error, informality or omission, a remedy was at hand. The course to be pursued by a dissatisfied party was plain and simple in the extreme. But it was a course they could adopt or not. If they did not choose to take it, and so get the error corrected or omission supplied, and award revised and re-executed in the mode prescribed, but have allowed the time given them by the Legislature to elapse, they have only themselves to blame. The law, in clear, strong and unambiguous language not to be misunderstood, says in effect: "If the Commissioners err, or for any reason you are dissatisfied with the award, go to the Supreme Court within a certain time and in a certain way, and get the error corrected; but you shall go to no other Court, and, with the exception of the power given to the Supreme Court to remit the matter to the Commissioners, their award shall be binding, final and conclusive on all parties;" and neither the Supreme Court of the Island, nor this Court have, in my opinion, any right to say to the contrary; and I think, therefore, the adjudication of the Supreme Court was not warranted, and their judgment must be reversed.

STRONG, J.:—

Although entirely concurring in the conclusion arrived at, I am unable to assent to all that has been propounded in the preceding judgments as to the law on the question of the jurisdiction of a Colonial Governor and Council as a Court of Appeal. I consider it sufficient to say that the preli-

minary objection raised in this case to the jurisdiction on the ground that the Supreme Court of Prince Edward Island was not a Court of last resort, has not been sustained, for the following reasons: If any appellate Court exists in the Island it must owe its origin either to an Imperial Act of Parliament, a Statute of the Island Legislature, or to Letters Patent, under the Great Seal of the United Kingdom or of the Island, if, indeed, a Court exercising a jurisdiction by way of appeal, which was unknown to the Common Law, can be created otherwise than by Statute. No such Statute can be shewn to have been in existence, and no Letters Patent conferring such a jurisdiction are now extant. For this reason, and this reason only, I think the objection fails.

As regards the merits, I agree on all points with the judgments of His Lordship, the Chief Justice, and my Brother Ritchie.

TASCHEREAU, J.:—

The facts of the case have already been stated by my learned Brother Judges who have just expressed their opinion, and I will, therefore, abstain from repeating them. Neither shall I notice the objections made on the part of Miss Sulivan to the right of appeal *de plano* in this case from the judgment of the Supreme Court of Prince Edward Island, on the ground that the same appeal should have been, in the first instance, to the Governor in Council as a Court of Error and Appeal, and thence to our own Court, viz.: the Supreme Court of Canada. As it has been clearly shewn, no such Court of Error and Appeal exists in the Island, and, therefore, the appeal was rightly brought before this Court, the judgment complained

of being rendered by the Court of last resort in Prince Edward Island.

But, coming to the merits of the case, I say that the respondent had no right such as she claimed in the Court below, and such as the same Court entertained—that is to say, to set aside the award made by the Commissioners appointed under the Land Purchase Act of 1875, stating the amount of money to be paid to respondent, Miss Sulivan, as proprietor of certain township lands. The grounds on which the respondent based her motion to set aside the award, were on account of pretended irregularities and insufficiency in the wording of the award. Looking at the text of the Act in question, we find at section *four* that the amount of money to be paid as an indemnity to any such proprietor shall be found and ascertained by three Commissioners, or any two of them, duly appointed; no form of procedure is indicated, and it seems that the duty of the Commissioners is purely and simply limited to the award of an amount as an indemnity, and, in fact, they were authorized to proceed in a summary way, without even reducing the evidence to writing. It is also to be observed that by section forty-five of the Land Act in question, it is provided that "in no case shall any appeal lie from such award, either to the Supreme Court, the Court of Chancery, or any other legal tribunal, nor shall any such award, or the proceedings before such Commissioners be removed or taken into, or enquired into, by any Court by *certiorari* or any other process; but "(mark this)" the Supreme Court shall have power, on the application of either the Commissioner of Public Lands or the proprietor, to remit to the Commissioners any award which shall have been made by them to correct any error or infor-

mality or omission made in their award. Provided always, that any such application to the Supreme Court to remit such award to the Commissioners shall be made within thirty days after the publication thereof; and, provided further, that the said Commissioners shall have power to revise and re-execute the same."

I think the above enactment of the "Land Purchase Act," clearly indicates the intention of the Legislature as to celerity of action and proceedings, as to denial of any revision or appeal, as to avoiding a multiplicity of proceedings in the law Courts, and as to the correction and revision by the Commissioners themselves alone of any defect or informality duly pointed out to them by any of the parties within thirty days from the promulgation of the award.

Now the thirty days had elapsed before any of the parties had, in the terms of the Statute, lodged any complaint. I infer that the respondent is now estopped from lodging her complaint before a Court of Justice unless Section 45 above referred to means nothing and should be looked upon as a dead letter. The language of the section seems so clear and so energetic that I can see no way of eluding it. It is true, that the learned Judges of the Court appealed from have quoted a number of decisions having some bearing on the case; but others of equal strength are to be found to shew we could not interfere and set aside such an award supported by a section so formal as the 45 section of the Land Act in question. I, for one, would not be disposed to set aside the law (which is clear and positive in its terms) on the strength of decisions whose authority is destroyed by contrary rulings.

Now referring to the 46th section of the said Land Act, we will see that the Supreme Court of Prince Edward

Island has power to make rules and regulations not inconsistent with the provisions of the Act, for the purpose of more effectually carrying out the requirements of the Act, and I say that it is not shewn that any such regulations have been made authorising all the forms of proceeding claimed in the Respondent's brief.

But what did the Commissioners omit to do? To declare in their award the matters mentioned in the 28th section of the Land Purchase Act of 1875, and therein indicated as to be taken into consideration by them in estimating compensation to proprietors. An attentive perusal of that section has convinced me that the suggestions therein contained are merely directory for their investigation, and as it was very well said in Appellant's factum, were intended, merely as *beacons to light the Commissioners on their way to a final conclusion*, and that the mention of details was not a necessary ingredient in their award. In arriving at their award the Commissioners must be presumed to have taken into their consideration all the suggestions contained in the Land Purchase Act, and this under the very common rule of law, "*omnia præsumuntur rite solemniter acta.*"

The Commissioners, by the Act in question, are put in the position of juries. It is not either evident that all the details required by the respondent can be easily reached; and, in fact, of what greatuse would it have been for the respondent, if the Commissioners had categorically alluded to each of the matters of fact mentioned in the 28th Section? None, whatever, for the report was final to all intents and purposes; it could not be questioned in any way nor reversed. The respondent, if desirous of knowing her true position, can easily ascertain it; the important facts being very few in number; her number of acres guaranteed, and her rights to arrears of rent not affected

All the presumptions are against the respondent, and so is the law of the case. She did not comply with the law; she did not complain in due time (she had ample time to do so), but allowed her adversary to rest in peace; she does not avail herself of the only efficient proceeding pointed out by the Statute, but an afterthought leads her to adopt, in the Court below, the proceedings alluded to. I consider the respondent is not rightly before this Court, and, as one of its members, I am not disposed to disturb the award of the Commissioners for the reasons mentioned in the *rule nisi* granted by the Supreme Court of Prince Edward Island. I would therefore maintain the appeal.

FOURNIER, J. :—

La première question : Cette cour a-t-elle juridiction pour entendre cet appel ?

L'Intimée prétend que non. Il existerait d'après elle, dans l'Ile du Prince Edouard, un tribunal supérieur à la Cour Suprême de cette province, composé du Gouverneur en Conseil, auquel l'Appelant aurait dû s'adresser avant de porter son présent appel. Elle fonde cette prétention sur l'article de notre acte déclarant qu'il n'y aura d'appel à cette Cour que du jugement de la Cour de dernier ressort dans la province d'où l'appel provient.

Les nombreux documents cités par l'honorable Juge-en-chef et les recherches historiques faites pour constater l'existence de cette cour n'ont eu d'autre résultat que de prouver d'une manière bien certaine qu'un tel tribunal composé du Gouverneur en Conseil, comme cour d'appel pour l'Ile du Prince Edouard, n'existe pas maintenant s'il a jamais existé.

Conséquemment l'appel est bien porté. Ce point

réglé, reste la question de savoir si l'Intimée en s'adressant à la Cour Suprême de l'Ile du Prince Edouard, au moyen d'un *certiorari* pouvait faire mettre de côté la sentence arbitrale dont elle se plaint. Dans ce procédé devant la Cour Suprême, l'Intimée a eu gain de cause.

Mais l'acte concernant la vente des terres de l'Ile du Prince Edouard "The Land Purchase Act" contenant une disposition formelle enlevant le recours au procédé du *certiorari* pour attaquer les procédures des arbitres, et y substituant un mode particulier, l'Intimée ne devait-elle pas récourir au remède particulier que lui indique le Statut pour se protéger contre les erreurs et omissions qui pouvaient se glisser dans les procédés des arbitres ?

N'ayant pas jugé à propos d'invoquer le seul remède que lui indiquait la loi, elle ne doit s'en prendre qu'à elle si elle n'obtient pas de faire réformer la sentence arbitrale.

Mais au surplus je suis convaincu, comme mes honorables collègues, que les formalités voulues par la loi ont été remplies par les arbitres et que l'Intimée n'a pas de griefs réels.

Appeal allowed with costs.

Attorney for appellant: *L. H. Davies, Esq.*
Attorney for respondent: *Edward J. Hodgson, Esq.*
Agents in Ottawa :—
For appellant: *Messrs. Cochburn & Wright.*
For respondent: *Messrs. Bradley & Bell.*

JAMES TAYLOR, - - - - - - APPELLANT.

AND

THE QUEEN, - - - - - - - - RESPONDENT.

ON APPEAL FROM THE COURT OF ERROR AND APPEAL FOR ONTARIO.

Jurisdiction—Construction of the 26th Section of 38th Vict. Ch. 11.

Held: That the Supreme Court of Canada has no jurisdiction when judgment appealed from was signed, or entered or pronounced, previous to the 11th day of January, 1876, when, by Proclamation issued by order of the Governor in Council, the provisions referred to in the latter part of 80th Section of 38th Vic., Ch. 11, and the judicial functions of the Court took effect and could be exercised.

That the Court proposed to be appealed from or any Judge thereof, cannot, under Section 26 of the Supreme and Exchequer Court Act, allow an appeal when judgment had been signed, entered or pronounced, previous to the 11th day of January, 1876.

Information for penalties, filed by the Attorney-General of Ontario, in the Court of Queens Bench of that Province, alleging: "That the Defendant was a brewer in the town of St. Catharines, in the County of Lincoln, after the passing of the Provincial Statute 37 Vic., intituled: 'An Act to amend and consolidate the Law for the sale of fermented or spirituous liquors' and then, being a brewer licensed by the Government of Canada for the manufacture of fermented, spirituous or other liquors, did manufacture, a large quantity of liquors, to wit; one thousand gallons of beer, and afterwards at St Catharines aforesaid, unlawfully, and in contravention of the Act, did sell by wholesale a large quantity of the said fermented liquor for consumption within the Province of Ontario, without first obtaining a license as required by the said Act of the Legislative Assembly of the Province, to sell by wholesale, under the said Act, liquor so manufactured by him for consumption within the Province, and without having

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, and Fournier, J. J.

obtained any shop license or any other license under the said Act, to sell wholesale, as a brewer, liquor, in contempt of the Queen and her laws, to the evil example of all others and contrary to the form of the Statute, and against the Peace."

To this information a demurrer was filed. The special matter stated for argument was, that the Legislature of Ontario had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information.

The Attorney-General joined in demurrer, and, on 16th March, 1875, judgment was given for the Defendant, and judgment was signed on the 12th May, 1875.

The case was taken to the Court of Error and Appeal of the Province of Ontario, on the 12th May, 1875, and on 17th May, errors were assigned. On the 18th May, joinder in error.

The case was argued in the court of Error and Appeal on the 17th and 18th June, 1875, and, on the 25th September of that year, that Court ordered and adjudged that the writ of error should be allowed, and that the judgment of the Court of Queen's Bench should be reversed and judgment entered in that Court for the Plaintiff.

On the 13th April, 1876, the Honorable Mr Justice *Moss*, one of the Judges of the Court of Error and Appeal, with the consent of the parties, ordered and allowed that the appeal then might be brought within ten days from that date, notwithstanding that such appeal had not been brought within the time prescribed by the Statute in that behalf, and he declared that it did not seem to him necessary or proper to impose any terms as to security or otherwise under the circumstances.

The Supreme and Exchequer Court Act, by which the Supreme Court of Canada was established was passed on the 8th April, 1875. But by Section 80 of this Statute it was provided that "this Act shall come into force as respects the appointment of Judges, Registrar Clerks and Servants of the said Courts, the organization thereof and the making of general rules and orders under the next preceding Section on a day to be appointed by proclamation under order of the Governor in Council; and the other provisions thereof, and the judicial functions of the said Courts respectively shall take effect and be exercised only at and after such other time as shall be appointed by proclamation under order of the Governor in Council."

The Proclamation respecting the organization of the Court was issued on the 17th September, 1875, and the Proclamation calling into exercise the judicial functions of the Court was issued on the 10th day of January, 1876.

The case was set down for the sittings of the Supreme Court, held in June, 1876, when the question of whether the Supreme Court of Canada had jurisdiction was discussed.

5th June, 1876.

Mr. *J. Bethune*, Q. C., (of the Ontario Bar) for Appellants:

The Supreme Court established by virtue of 101 Section of British North America Act, as a general Court of Appeal for Canada, is a substitute for the Privy Council. *Maxwell* on Statutes (1). By chap. 13, Cons. S. U.C. sec. 57, 58, one year from date of the judgment is given to either party to bring his appeal to the Privy Council, and the same margin as to time ought to be

(1) pp. 195, 196.

allowed. *Chowdry* v. *Mullick* (1); *Tronson* v. *Dent* (2); Sect. 47 of the Supreme Court Act, states that the judgment shall be final in all cases saving the usual right of prerogative of Her Majesty, and there is, therefore, no right to pass by this Court and appeal to the Privy Council. *Vide* case of *Cuvillier* v. *Aylwin*, (3); and the case of *Earl of Roseberry* v. *Sir John Inglis* (4) in which a decree was pronounced by the Court of Session in Scotland in 1695, and, immediately after the union of the two Kingdoms in 1707, the House of Lords heard an appeal from this decree. Moreover, an appeal is a mere step in a cause, a procedure, and the Court may give any order concerning a proceeding in a cause. *Vide Cranmer's* Practice of House of Lords (5); *Queen* v. *Vine* (6). Now under sections 21 and 26 a Judge of the Court below may, in his discretion, extend the time for appealing. An order to that effect has been given, and so long as it is not moved against it remains in force, and the fact of the Court having been organized at the date the appeal was granted, enabled the limitation as to the time of entering the case to be overruled.

The combined effect of sects. 15 and 47 gives this Court alone the appeal, and if there is a doubt as to the jurisdiction, the consent of the parties should be sufficient.

[RITCHIE, J.—No jurisdiction of appeal can be taken, unless expressly given by Statute.]

Sect. 17 clearly gives this Court jurisdiction over cases decided before its existence by proclamation, and the proviso in sect. 26 gives the power to a Judge of the Court below to extend this limitation of time. By sect. 24,

(1) 1 Moore, P. C. C. p. 404; (2) 8 Moore, P. C. C., p. 419; (3) 2 Napps. P. C. C.; (4) MacQueen's Practice in the House of Lords, p. 287; (5) p. 147; (6) L. R. 10 Q. B. 195.

all proceedings not otherwise provided for by the Act, or by the rules to be made by the Court, are ordered to be as nearly as possible in conformity with the practice of the Judicial Committee, and there one year from the rendering of the judgment is the limit of time granted to appeal. This case now stands before this Court as if proceedings were taken in the Court below within such time as to warrant the Judge of the Court below, in his discretion, to grant the appeal, and the power of this Court to try the case cannot be called in question.

Mr. *Adam Crooks*, Q. C., for the Respondent:

This is an amicable suit, brought to determine the furisdiction of the Legislature of the Province of Ontario. The time limitation was imposed for the protection of the parties, but neither of them wishing to invoke it it cannot apply. This is a proceeding in the nature of a writ of error, and an appeal lies to the highest tribunal where there is error. *Tronson* v. *Dent* (1). *Vansittart* v. *Taylor* (2). This was not an appeal except in that such cases were designated by that conventional expression by the Supreme Court Act.

January 15th, 1877.

THE CHIEF JUSTICE:—

I believe we are all agreed that,as to powers of the Supreme Court of Canada under the Statute 38 Vict., ch. 11, we are to construe the Statute as if it had been assented to by the Crown on the eleventh day of January, 1876, when, by the proclamation issued by order of the Governor in Council, the provisions referred to in the latter part of the 80th section of the Act, and the judicial functions of the Court, were to take effect

(1) 8 Moore P. C. C. p. 420; (2) E. and B. 910.

Under the Statute, those provisions and the judicial functions of the Court were to take effect and be exercised *only at and after* the time appointed by the proclamation.

At this time, this case had been decided by the Court of Appeals in Ontario. The judgment was pronounced on the 25th day of September, 1875. The provisions of the Act allowing an appeal to this Court had not then been brought into operation, and could not be exercised; and the right of appeal which the Defendant in the suit had, if any, was to Her Majesty, in Her Privy Council.

This state of things continued until after the statute had come into full operation, and until the thirteenth day of April last, when one of the Justices of the Court of Appeals for the Province of Ontario, upon hearing Counsel for the Queen, the Plaintiff in error, and *by consent*, ordered and allowed that the appeal in this cause might be brought within ten days from that date, notwithstanding that such appeal had not been brought within the time prescribed by the statute in that behalf. And he declared that it did not seem to him necessary or proper to impose any terms as to security or otherwise, under the circumstances.

The 16th section of the Statute says: "whenever *error in law* is alleged, the proceedings in the Supreme Court shall be in the form of an appeal." The 17th Section declares that "an appeal shall lie to the Supreme Court from all *final* judgments of the highest Court of *final resort.* * * * * now or hereafter established in any Province of Canada, in cases in which the Court of original jurisdiction is a Superior Court * * * and the right of appeal in civil cases given by the Act shall be understood to be given in such cases only as

are mentioned in this section, except Exchequer cases, and cases of mandamus, habeas corpus or municipal by-laws " as thereinafter provided. Section 18 provides that an appeal shall lie upon a special case. Appeal shall lie, by Section 19 " from the judgment upon any motion to enter a verdict or non-suit upon a point reserved at the trial "; by Section 20, " from the judgment upon any motion for a new trial, upon the ground that the Judge has not ruled according to law." By Section 21, under these three sections, no appeal is allowed unless notice of appeal is given within 20 days after the decisions complained of " or within such *further time* as the Court appealed from or a *Judge thereof may allow*." Section 25 provides, that every appeal, other than an election appeal shall be brought within 30 days from the signing or entry or pronouncing of the judgment appealed from. Then follows the 26th Section. " That the Court proposed to be appealed from, or any Judge thereof, may allow an appeal under special circumstances, except in the case of a election petition, notwithstanding that the same may not be brought within the time hereinbefore prescribed in that respect: but in such case, the Court or Judge shall impose such terms as to security or otherwise as shall seem proper under the circumstances."

This appeal is not under Sections 18, 19 or 20 of the Statute. It is not a special case, or on a judgment on a motion to enter a non-suit or verdict, or for a new trial upon the ground that the Judge has not ruled according to law. There was, therefore, no necessity of giving a notice of appeal within 20 days after the decision complained of under Section 21.

There is no other provision as to regulating appeals when error in law is alleged, than Section 16, except

that it must be brought within 30 days from the signing, entry or pronouncing of the judgment appealed from. No writ is required to bring any appeal into the Court. It is sufficient if the party desiring to appeal, shall within the time *hereinbefore limited*, have given the security required, and obtained the *allowance of the appeal;* in this case that would be 30 days.

It was more than three months after the judgment appealed against in this cause was pronounced, before any right to appeal under this statute existed, and unless it can be shewn that that right was to be given to judgments pronounced before the Statute was an operative law, then I fail to see how this case can be appealable here.

It is contended, however, that by the 26th section any Judge of the Court appealed from might allow an appeal, though it might not have been brought within the time prescribed; in effect, that any Judge of the Court to be appealed from had a right to grant an appeal in a case, though such right did not exist, and the Statute allowing it had not become operative as a law until long after the judgment had been rendered, and long after an appeal under the provisions of this Act had, according to its terms, become impossible, but for the section referred to.

I do not think the Dominion Parliament intended to leave it in the discretion of a single Judge to grant an appeal in a case decided before the Confederation of the Provinces or the Parliament of the Dominion had an existence, and yet such would be the case, if we would give the interpretation to this section which the Appellant desires.

The rule of law is not disputed, that the right of appeal to a Court like this is one which must be created by express enactment.

If the Dominion Parliament had intended to give the right contended for, it would have been easy to have expressed that intention in distinct words, but that clearly has not been done, and we are asked to infer it. It is said, however, that the power to allow the appeal under the 26th section can never be exercised, when the judgment to be appealed from was pronounced *more than a year* before the application, because the 24th section of the Act provides that proceedings in appeal, when not otherwise provided for by the Act or by the rules to be made under it, shall be as nearly as possible in conformity with the practice of the Judicial Committee of Her Majesty's Privy Council, and that by the rules of that Committee no appeal will be heard unless the record be lodged there within a year from the time judgment was pronounced in the Court below. But under our Statute and rules, the case in appeal must be filed within a month after the security required by the Act *is allowed*, or the party will be considered as not duly prosecuting his appeal, and so the rule referred to in the Privy Council would not apply. It is said the natural tendency of all tribunals is to grasp jurisdiction, but certainly an Appellate Court, which only exercises a jurisdiction expressly conferred on it, ought not extend that jurisdiction by construction.

The reasonable view of the provisions of the statute referred to, and one which would give complete form and effect to them all, is: That the Legislature contemplated that, from the time the statute became operative, certain judgments and decisions of certain Courts within the several Provinces might be appealed to the Supreme Court created under the Act.

That if, from circumstances, an appeal in any case *which might have been brought within* the time therein

prescribed, was not brought within such time, then the Court or Judge might allow the appeal. Section 26 and this Section, taken in connection with Section 21, seems to shew that what was intended by both sections was virtually to extend the time within which the party desiring to appeal might perfect his security and get it allowed. The final act in allowance of the appeal seems to be the approving of this security. Section 33 says when the security has been perfected and allowed, any Judge of the Court appealed from may issue a fiat to the Sheriff to stay execution.

It was argued that the right of appeal existed, and that the Dominion statute in effect abolished the appeal to Her Majesty in Her Privy Council, given by the statute of Ontario, and substituted the appeal to this Court for it; and, therefore, in all cases pending in Ontario which, at the time of the Dominion statute, were appealable under the laws of Ontario, ceased to be appealable at all unless the right could be revived under the 26th section of the Dominion Act. There is nothing in the statute itself declaring in terms that such shall be the effect of establishing the Court. It certainly does not assume to abolish the right to appeal to Her Majesty in Her Privy Council, conferred by Local legislation. The 17th section declares that, subject to limitations, an appeal shall lie to this Court from all final judgments of the *highest Court of final resort* in any Province of Canada, and the 47th section declares that "the judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be

ordered to be heard; saving any right which Her Majesty may be graciously pleased to exercise, by virtue of Her Royal Prerogative." Suppose Appellant, within a month after judgment pronouced, had taken steps to appeal to Her Majesty in Her Privy Council, and the necessary bond had been given, and all the proceedings taken then necessary to go on with the appeal in England, could the Respondent contend, when the case came on to be heard before the Judicial Committee of the Privy Council, that the Appellant had no *locus standi* there, because all the powers of this Court could then be exercised, and that, under the 26th section of the statute, a Judge of the Court of Appeals in the Province of Ontario might have allowed the appeal, notwithstanding the same was not brought within the time in that respect prescribed by that Act; and as there was in Canada a Court to which an appeal might be had, therefore it should not be heard before the Judicial Committee of the Privy Council. Would not the answer be that, when the steps to appeal the case were taken, the statutory powers given to the Supreme Court of Canada were not in force, and the Appellant, so far from being guilty of any laches in not bringing his appeal within the time prescribed by that Act, had, in fact, brought it before either the Supreme Court or the Judges of the Court of Error in Ontario had any power whatever in relation to appeals or as to allowing an appeal under the Supreme Court Act.

I am now assuming that steps were taken to bring the appeal before the Judicial Committee of the Privy Council previous to the 11th January, 1876. If, in the hypothetical case which I have put, the Judicial Committee of the Privy Council would have decided to hear the appeal, on the ground that the Dominion Statute

did not prevent the Appellant from exercising the right which he had of appeal, and which, in fact, could only, at that time, have been exercised in that way; then, I think, we are bound to hold that we cannot properly hear this appeal. In the view suggested, the case would be heard by the Judicial Committee of the Privy Council, because, at the time the judgment was given in the Court of Appeals in Ontario, there was no tribunal in the Dominion of Canada authorised to hear appeals from the decision of that Court; and that state of things continued from 25th September, 1875, when the judgment was pronounced, to the 11th January, 1876, when this Court become endowed with appellate powers.

The fact that the Supreme and Exchequer Court Act of 1875, under its 26th section, permitted a Judge of the Court appealed from to allow an appeal under it, in cases where the same had not been brought within the time prescribed by that Act, would hardly authorise the rejection of an appeal regular in all its forms, and, perhaps, ready to be heard when the Act of 1875 was brought into force.

We should not give a forced construction to the Statute. It is not reasonable to suppose the Legislature intended to legislate as to cases in which judgment had been pronounced by the final tribunal in this country before this Court became possessed of any appellate power whatever. If they had so intended, it would have been easy to express that intention in an unequivocal manner. The provision in the 26th section of the Statute, to give the right to appeal when the party from excusable causes omitted to take the proper steps under the statute to appeal within the time prescribed by the Act, seems reasonable and quite proper to be made and applicable to judgments or decisions after this Court had full power to deal with the matter.

If it is decided that this Court has jurisdiction in this cause, because the Judge of the Ontario Court of Appeal ordered and allowed that the appeal might be brought within ten days from the 30th April last, notwithstanding the appeal had not been brought within the time prescribed by the Statute, what is to prevent appeals being granted in cases in which judgments were entered 15 years ago, and in which the money has been paid under execution. Surely such could not have been the intention of the Legislature.

The 25th section of the Act, after providing that appeals from decisions on election petitions shall be brought within eight days from the rendering thereof proceeds: "and every other appeal shall be brought within thirty days from the signing or entry or pronouncing of the judgment appealed from." This language expels the idea that it was contemplated that judgments pronounced before the language used became law, should be appealable under the Act. If we are to consider only the effect of these words, there would not be any doubt on the subject, but if it is contended that the 26th section gives the right, the language is: "Provided always, that the Court proposed to be appealed from, or any Judge thereof, may allow an appeal under special circumstances, except in the case of an election petition, notwithstanding that the same may not be brought within the time hereinbefore prescribed in that respect; but in such case the Court or Judge shall impose such terms as to security or otherwise, as shall seem proper under the circumstances."

Does not this language imply that the case must be one in which the appeal might have been "brought within the time hereinbefore prescribed." But this case

could not have been brought within that time ; there was no Court to bring it in. Does not the reference to the imposing terms as to security, &c., imply that the party seeking relief had been guilty of laches, but, as already suggested, he was guilty of no laches, for he could not have brought in his appeal within the thirty days.

I have referred to the cases cited on the argument, and I do not think they conflict with the conclusion I have arrived at in this case, that we have no jurisdiction Mr. Bethune referred to the case of the *Earl of Roseberry* v. *Sir John Inglis*, the first case from Scotland appealed after the union. There was some difficulty at first but it was finally settled.

As before the union the people of Scotland had the right to appeal to the Scots Parliament, the act of union was not intended to deprive the Queen's subjects of any privileges formerly enjoyed by them. The British Parliament came in, in place of the Scots Parliament, and the appellate jurisdiction exercised by the latter was transferred to the former by plain and necessary implication, though not by positive enactment. (1) The latest case referred to on the argument was *The Queen* v. *Vine*.(2) The statute there under consideration 33 and 34 Vic., c. 29, s. 14, enacted that " every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no license to sell spirits by retail shall be granted to any person who shall have been so convicted, and if any person after having been so convicted, shall take out or have a license to sell spirits by retail the same shall be void to all intents and purposes." Many cases are referred to in the argument.

(1) MacQueen's House of Lords Practice p. 288; (2) L. R. 10 Q. B. 195.

The question was whether a person who had been convicted of a felony before the passing of the Act became disqualified on the passing of the Act; and the majority of the Court held he did. Cockburn, Chief Justice, said the Act was not to punish offenders, but to protect the public against public houses in which spirits were retailed, being kept by persons of doubtful character. He thought, from comparing the Statute with others for similar purposes passed by the Legislature, that it was intended to apply the rule to persons who had been convicted of felony before the passing of the Statute.

The case of Taylor was referred to on the argument as shewing the proper view of the subject.

In *Vansittart* v. *Taylor* (1); Jervis C.J., in giving judgment said: "we are all agreed that jurisdiction cannot be given by the conduct of the parties, if we have none independent of it; so that the only question is whether it is given in this case." The case was under the 34th section of the English Common Law Procedure Act, which is as follows: "In all cases of rules to enter a verdict or non-suit upon a point reserved at the trial, if the rule to shew cause be refused or granted, and then discharged or made absolute, the party decided against may appeal." The trial was before the Statute received the royal assent, but the rule to obtain a verdict was obtained after the Act came into operation. As before that there was no appeal in such a case, it was only by consent that such a reservation could be made, it was in fact an agreement to refer the case to the Court of Queen's Bench. In that case Parke, B. said: "I take it to be a clear rule of law that the language of a Statute is *primâ facie* to be construed as

(1) 4 E. & B. 910.

prospective only. This is according to the legal maxim, *Novâ constitutio futuris formam imponere debet non preteritis.*" A point reserved at the trial before the Act was only by consent of parties, and was a consent to refer it to a particular Court, only and not that the decision should be reviewed in error. The rule to set aside the proceeding was made absolute. Platt, B. dissenting.

In *Kimbray* v. *Draper*, (1); in an action commenced in a Superior Court before August, 1867, application was made under the County Court Act of that year, passed in the month of August, to transfer the case to the County Court unless the Plaintiff gave security for costs, it being shewn by Defendant's affidavit, that he had no visible means of paying the costs in case the verdict should go against him. It was considered this was a matter of procedure only, and the order could be made, although the Act was passed after Plaintiff had commenced his action. Though the Judges had great doubt on the subject, they thought the case of *Wright* v. *Hale*, (2), an authority for Defendant, and granted an order to transfer the case to the County Court. *Blackburn*, J. said in giving his judgment: "When the effect of an enactment is to take away a right, *primâ facie*, it does not apply to existing rights, but when it deals with procedure only, *primâ facie* it applies to all actions pending as well as future"

In *Evans* v. *Williams* (3) it is laid down that it is a broad principle of construction that, unless the Court has a clear indication of an intention in an Act of Parliament to legislate *ex post facto*, and to give to the Act the effect of depriving a man of a right which belonged to him at the time of the passing

(1) L. R. 3 Q. B. 160; (2) 6 H. and N. 227; (3) 2 Drew and Sm. 324.

of the Act, the Act will be declared not to have a retrospective operation.

The Midland Railway v. *Pye* (1), Plaintiff, a married woman, obtained an order, under Acts 20 and 21 Vict., c. 85, of protection; before that she had brought an action in the County Court to recover the value of some furniture, some of which had been acquired by her after the desertion by her husband. It was contended on her part that the order of protection related back to the time of the desertion, and she could maintain the action in her own name; the concluding part of the 21st section being: "If any such order of protection be made, the wife shall, during the continuance thereof, be, and be deemed to have been, during such desertion of her, in the like position, in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation." The Court held that this order of protection obtained by her during the pending of the suit would not entitle her to maintain an action which was not maintainable at its commencement. *Erle*, C.J., said: "Those whose duty it is to administer the law, very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the Legislature that it should be so construed is expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and, *wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction.*" Can there

(1) 10 C. B. (N. S.) at p. 179.

be any doubt that the allowing an appeal where no right of appeal existed materially affects the rights of parties to enforce their judgments, as well as increases the expenses?

In *Vansittart* v. *Taylor*, already referred to, Baron *Parke* said the proceedings in error are far more expensive than where the case is not subject to appeal, and ought not to be imposed on a party who did not consent to it.

My Brother Ritchie has drawn my attention to the case of *Atty.-Gen.* and *Sillem* (1). Many of the observations of the Judges in that case, both in the Exchequer Chamber and the House of Lords, have a bearing on some of the questions discussed in this cause. There, there were different opinions entertained by the Judges in the Courts below and by the Law Lords when taken into the House of Lords. One question was, whether an appeal was a proceeding in the cause or a new right. Willes, J., said: The understanding to be gathered from works with respect to practice is that a proceeding by way of error or appeal is part of the practice on the side of the Court in which the process originates." Erle, C.J., said: "Procedure in a suit includes the whole course of practice from the issuing of the first process by which suitors are brought before a Court, to the execution of the last process on the final judgment." According to the provisions of the Common Law Procedure Acts, the appeal is effected by the act of the suitor in the Court of first instance.

The question was whether, under the power given by statute to the Barons of the Exchequer Court to apply the provisions of the two Common Law Procedure Acts to the process practice and mode of proceeding on

(1) 10 H. of L. 720.

the revenue side of the Court, with the purpose of making it, as nearly as may be, uniform with the process practice and mode of pleading on the pleas side of the Court of Exchequer, an appeal would be given. Compton, J., said: "No doubt the Legislature might, had it so pleased, have given such a power of creating such appeal to this Court, and ultimately to the House of Lords; but it certainly would be a new and unusual course of legislation in creating a new statutory appeal." * * * "There is great difference between the machinery of the appeal and the right of appeal. The former might, with less difficulty, be called practice but I have great difficulty in seeing how the giving a right to appeal is practice."

Cockburn, J. said: "Can it be supposed, in the absence of clear legislative enactment, that Parliament intended to confer on the Court of Exchequer the power of creating or withholding an appeal in matters of revenue at its pleasure and discretion?"

In arguing the case in the House of Lords, Sir Hugh Cairns said: "It cannot be supposed that the Legislature intended that a party who gained a verdict at a trial should have his right to retain that verdict affected by a statute, still less by new rules of Court coming into operation after the trial." He referred to *Moon* v. *Durden*, (1) where it was held that the 8 & 9 Vic., c. 109, did not defeat an action upon a wager commenced before the statute, and the rule was also applied in *Pinhorn* v. *Souster*, (2) to pleadings demurred to before the Common Law Procedure Act of 1852.

The Attorney General, in reply, as to the retrospective operation of the rules, said: "The cases cited only shew that the substantive rights of the parties are not to be

(1) 2 Exch. p. 22. (2) 8 Exch. 138.

retrospectively affected ; but they do not shew that the Court may not, the instant after the passing of a Statute, regulate the proceedings taken to enforce those rights in conformity with its provisions ; and in that way a party may even incur a new liability to costs. *Freeman* v. *Moyes* (1); *Cox* v. *Thomason* (2); *Wright* v. *Hale* (3).

Lord Westbury, in giving his judgment, said : "The creation of a new right of appeal is plainly an act which requires legislative authority * * * A new right of appeal * * is in effect a limitation of the jurisdiction of one Court, and an extension of the jurisdiction of another * * * An appeal is the right of entering a Superior Court and invoking its aid and interposition, to redress the error of the Court below. * * * The appeal itself is wholly independent of these rules of practice. * * The words *step in the cause* are used, as is well known, for the purpose of denoting that in future it should not be necessary to sue out a new writ for the purpose of entering a Court of Error."

Lord Wensleydale said : "The new law took away no right from the claimant ; it gave both the claimant and the Crown precisely the same right, that of questioning the propriety of the decision of the Court of Exchequer on a rule for new trial for misdirection. If judgment was given for the claimant the Crown has the right to question that by appeal. If for the Crown, the claimant has exactly the same right. The new law is therefore perfectly fair to both parties" * * * "There is no doubt of the justice of the rule laid down by Lord Coke, that enactments in a statute are generally to be construed to be prospective and to regulate the future

(1) 1 Ad. & Ellis 338 ; (2) 2 C. & J. 498 ; (3) 6 H. & N. 227.

conduct of parties. But this rule of construction would yield to the intention of the Legislature. It could not be supposed the Legislature intended to deprive a man of a vested right of action; this was laid down in *Moon* v. *Durden*," (1).

"On the other hand, it is clear that there is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away; and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter. This has been most clearly and satisfactorily explained in the case of *Wright* v. *Hale* (2); particularly by Sir James Wilde." * * *

"The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure."

I think, when a party has obtained a judgment, issued an execution under which he is enforcing the collection of his debt, who is disturbed by an appeal, the right to which has been created more than a year, perhaps ten years, after he has obtained his judgment, such disturbance is a very serious interference with an important right, the result of which may be ruinous to him. If we decide the right to appeal exists in this case, because a Judge of the Court below, whose judgment is appealed from, allowed an appeal, we must hold if an allowance were made in a case, where the judgment had been given ten years ago, the appeal would be legal and proper.

I do not think the Legislature ever contemplated such a serious interference with the rights of successful

(1) 2 Exch. 22; (2) 6 H. & N. 227.

litigants. I do not consider this a mere question of procedure.

If it be a mere matter of procedure in the cause in the Ontario Court, has not the Ontario Legislature the exclusive right to regulate the procedure in civil suits brought in the Courts established by it?

The statute creates a new Court, gives a new right of appeal which did not exist before; and in my judgment, is not to be considered as a matter of procedure. As already intimated, I do not think the Dominion Parliament, in passing the Statute, intended to legislate in relation to judgments rendered years before the Act was passed, and under which most important rights may have been considered as decided. I think the whole scope of the Act is to provide for appeals in cases in which decisions or judgments should be pronounced after the Act came in force.

Under the circumstances, I think we should pronounce no judgment on the subject-matter of this appeal. If application had been made to set aside or quash these proceedings as in *Vansittart* v. *Taylor*, (1) we would have made the rule absolute, and in *Tronson* v. *Dent* (2) where it is said, when Appellate Court has no jurisdiction, the Respondent ought to apply to quash the appeal.

RITCHIE, J.:—

All questions of jurisdiction, more particularly questions touching jurisdiction of a Court such as this, are so vital, and the jurisdiction which we are now called on to declare that this Court possesses, involve such important consequences, and both parties having contended that this Court has the jurisdiction claimed, I feel it my duty to state at greater length, the reasons that

(1) 4 E. & B. 910; (2) 8 M. P. C. C. 444.

have led me to the conclusion at which I have arrived, than otherwise I should have thought necessary to do in a case to my mind so very clear.

No doubt there are exceptions engrafted on the rule of law which I presume at this day cannot be denied, that the language of a Statute is *primâ facie* to be construed as prospective as where it clearly appears, from the wording of the Statute, that the Legislature intended it to have a retrospective operation, or where the Statute relates to matters of procedure not affecting rights, for when a Statute deals with procedure only, it applies to all actions, those pending as well as future.

In proceedings to recover rights, it is quite reasonable that a pending suit should be conducted in the way and according to the practice of the Court in which it is brought, and if an Act of Parliament alters the mode of procedure, the right to have it conducted in that altered manner would seem to be proper enough, because it takes nothing away from the parties; the Court merely says to the parties, that an Act of Parliament declares how you shall proceed to enforce your rights; in other words, that the action shall be conducted from time to time according to the rules in force, with a respect to procedure during the progress of the suit. See *Atty.-Gen.* v. *Lillon*, (1). But the cases establishing this doctrine, clearly demonstrate that while such is the case with reference to procedure when the enactment changes or takes away rights, it is not to be construed as retrospective.

This distinction will be found very clearly enunciated in *Wright* v. *Hale* (2), and in *Kinbury* v. *Draper* (3). In the present case I can see no reason why this

(1) 10 H. of L., 764; (2) 6 Hurl. and N., 227, 232; L. R., 3 Q. B., 161; (3) 2 Exch., W. H. & G., p. 22.

Statute should have a retrospective operation, inasmuch as I cannot consider the creation of this Court and the right of appeal thereto mere procedure, and I can discover no language in the Statute indicating that in its construction the *primâ facie* rule that statutes ought to be construed to operate in the future, was to be departed from. On the contrary, such a construction would, in my opinion, prejudicially affect existing vested rights, and the legal character of past acts. It may be well, before proceeding further, to cite some cases and notice the very strong language used in respect to the retrospective construction of Statutes.

As *Moon* v. *Durden* (1) may be, and I believe is, considered a leading case, I will refer to the rule as put forward by Rolfe Baron in that case, because it has been frequently cited and approved of. "The general rule" (he says) "on this subject is stated by Lord Coke, in the 2 Inst., 299, in his commentary on the Statutes of Gloucester."—'*Nova constitutio futuris formam imponere debet non præteritis*,' and the principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively." "In *Pinhorn* v. *Souster*, (2) Parke, B., says, the well known maxim is '*Nova constitutio* &c.'" We must therefore read the Act as if its words had been "no future pleading shall be deemed insufficient &c.," and adds: "the rule as to construction of Statutes was fully considered by this Court in *Moon* v. *Durden*."

On *Freeman* v. *Moyes*, (3) being mentioned, he

(1) Exch. 22; (2) 8 Exch. 142; (3) 1 A. & E. 338.

said: "Littledale, J., dissented from that judgment, and I can't help thinking with strong reasons." In *Doolubdals* v. *Ramcoll et al.* (1), the Privy Council agreed with the Court in the construction of Statutes in *Moon* v. *Durden.*

In *Thompson* v. *Lach* (2), Wilde, C. J. says: "The "general principle that a Statute is not to be con- "strued so as to have a retrospective operation, is a "just one; for persons ought not to have their rights "affected by laws passed subsequently." And again "in order to give a retrospective effect to any Statute "the words should be very clear." In the *Midland Railway* v. *Pye* (3), Earl, C. J., says: "Those whose "duty it is to administer the law, very properly guard "against giving to an Act of Parliament a retrospec- "tive operation, unless the intention of the Legisla- "ture that it should be so construed is expressed in "clear, plain and unambiguous language; because it "manifestly shocks one's sense of justice that an act "legal at the time of doing it should be made unlawful "bysome new enactment. Modern legislation has "almost entirely removed that blemish from the law, "and whenever it is possible to put upon an Act of "Parliament a construction not retrospective, the "Courts will always adopt that construction."

In *Waugh* v. *Middleton* (4) it was held in construing the 224th section of the Bankrupt Act (5), which enacts that "every deed or memorandum of arrangement *now* "or hereafter entered into &c." did not operate upon such instruments as were entered and completed before the passing of the Statute, but applied to such instruments as were entered into before and were inchoate

(1) 7 M. P. C. C. 256; (2) 3 C. B., 551; (3) 10 C. B. N. S., 191; (4) 8 Exch., 352; (5) 13 & 14 Vic., c. 106.

at the time of the passing of the Act and had been completed since that time.

In *Marsh* v. *Higgins* (1), Wilde, C. J., says : "Statutes are not to be held to operate retrospectively, "unless they contain express words to that effect. "Sometimes, no doubt, the Legislature finds it expe- "dient to give a retrospective operation to an Act to a "considerable extent ; but, then, care is always taken to "express that intention in clear unambiguous language." And again : "The words of an Act are to be "construed to be prospective only unless the intention "of the Legislature to the contrary is unequivocally "expressed."

In *Jackson* v. *Woolley*, (2), *Thompson* v. *Waithman* (3) was overruled and the language of Rolfe, B., approved. And *William* v. *Smith* (4) affirmed *Jackson* v. *Wolley*, and referred again with approval to Rolfe, B., observations in *Moon* v. *Durden.*

And in *Evans* v. *Williams*, as reported in 13th Weekly Reporter, 424, Kindersley, V.C., says : "But "the ground on which I come to my conclusion, is, "that unless the Court sees clearly an indication that "the Legislature intended *ex post facto* to deprive a "man of rights which existed at the time of the passing "of the Act, it will never deprive him of those rights. "Where an Act deprives a man of his land it gives him "ample compensation, and provides for the taking away "of the right. But, unless it is clear that the Legisla- "ture meant the Act to be retrospective, the Court will "not hold it to be so, and upon that point the case of "*Moon* v. *Durden*, in the Exchequer, is a very strong "authority. That was the case of pending action, and

(1) 9 C. B. 567 ; (2) 8 E. & B., 784 ; (3) 2, Drew, 628 ; (4) 4 H. & N., 562.

"yet in the face of the words 'shall be maintained,' it "was held that the Statute was not retrospective, so as "to defeat an action instituted before the passing and "on the same principle as I am now acting upon, three "of the Judges, Lord Cranworth, B. Alderson and B. "Parke, were clearly of opinion (in which I concur, and "that is not the only case in which it was so held), that "the Court will not deprive a man of existing rights "by giving the Act a retrospective effect."

In *Vansittart* v. *Taylor*, (1) Pollock, C. B., says: "The "language of section 34 is no doubt couched in terms "apparently absolute; but," he says, "generally speak- "ing the language of an Act of Parliament, however "much it may be couched in the present tense, is to be "construed as applying to the future only."

In *Queen* v. *Vine*, (2) the Court held the words "any person convicted of felony" in the wine and beer amendment in Act 33 & 34 Vict., ch. 29, sect. 14, applied to a person convicted either before or after the Act passed, and so the Act was retrospective. And though Cockburn, C. J., and Mellor, J., thought the Act was not to punish offenders, but for the protection of the public, and that the Legislature categorically drew a hard and fast rule as to who should receive licenses, and Archibald, J., thought the language of the Act showed the Act was intended to be retrospective, Lush, J., was of opinion that the general rule, even in such a case, should not be departed from, and the Statute should apply only to a person convicted after the passing of the Act.

And *ex parte* Jones, (3) under the 126th section of the Bankrupt Act, which declared that the composition

(1) 4 E. B., 913; (2) L. R., 10 Q. B., 195; (3) 10 L, R., Ch. App. 663.

should be "binding on all creditors whose names and addresses and the amounts of whose debts were shewn in the debtor's statement," it was held that a resolution for composition had no retrospective effect so as to invalidate securities obtained by a creditor in the interval between the filing of the petition and the first meeting of creditors at which the resolution was passed to accept a composition.

Sir W. James, L. J., says: "In order to take away a legal right from any body, it is necessary to shew express words or clear implication. In this" he says, "the Respondents have, by due process of law, obtained a security on all the goods which the sheriff could seize that was their legal right and they have it still, unless it can be shewn to have been taken away from them."

Now, in the case before us, can it be said that rights will not be changed or affected if we give a retrospective effect to the Supreme Court Act? When judgment was pronounced by the Appeal Court of Ontario, the suit ceased, in my opinion, to be a pending or existing litigation; the matter became *res judicata*, because a final judgment is the putting an end to the action by an award of redress to one party or discharge of the other, as the case may be. The Court pronouncing the judgment in this case had at the time full and final jurisdiction over the subject-matter, and it disposed of the controversy and established the rights of the parties by a judgment then final and unimpeachable so far as relates to Courts in this Dominion.

Procedure, in my opinion, is mere machinery for carrying on the suit, whether in the Court appealed from or the Court appealed to, and for removing the cause from the Court appealed from to the Court appealed to but not affecting the respective jurisdictions of either Courts.

But if an appeal was mere matter of procedure, which I humbly think it is not, I fail to see how, (unless the proceedings were opened up by clear statutory enactments), such procedure could apply to a suit thus settled and disposed of by a final judgment before any such procedure or right to take such procedure existed.

I cannot think that the Legislature contemplated that the rights of parties so established should be altered or affected by the creation of an appellate tribunal by a Statute subsequently passed, in which no language, that I can discover, is to be found indicating any such intention. I think the fair and proper construction of the Statute is that the Legislature intended to establish an appellate tribunal to regulate the future, not the past. To which all judgments pronounced after the coming after the operation of the Act might be appealed, and that there was no intention by *ex post facto* legislation to disturb or interfere with causes previously determined and settled, and thereby to jeopardise judgments and rights thereunder, which successful litigants had a just right to consider the law as administered by a competent tribunal and sacredly assured to them. It is not easy to foresee the litigation, confusion, insecurity and hardships that might arise, should it be held that all judgments pronounced before the coming into operation of the Supreme Court Act, in each and every of the Courts of final resort in the several provinces of the Dominion, were now opened to be appealed by simply obtaining an order from a single judge of any of such Courts respectively, allowing such appeal, no matter what length of time may have elapsed since the judgment was pronounced ; for if a judgment given three months before the Act came into operation can be appealed, I can see no reason why one pronounced

three years ago or longer is not equally opened to be appealed, if the Court or a judge should make the necessary order. In my opinion the Legislature intended to give either party an appeal as of right, and I do not think the Act was intended to apply to any case that the party had not the appeal as a right. In this case the Appellant could have no appeal of right by reason of the impossibility of appealing within 30 days after the pronouncing of the judgment, for the obvious reason that there was no Court to appeal to. I think the Statute only contemplated the exercise of the discretionary power of the judge, where a party, having had the right and opportunity to appeal, was prevented by accidental causes without negligence, and not to any case where the party never could, of his own motion, have exercised the right. In other words, I do not think that the Legislature could have intended that while as to all the judgments pronounced after the passing of the Act, the parties were, of their own motion, to have the right of appeal as to all judgments pronounced anterior to 30 days before the coming into operation of the Statute, the appeal was to be purely discretionary in the Court appealed from or a judge thereof. I think it would be most unjust to parties who, having had their rights passed upon and determined by law, and who had been for months or years, as the case may be, in the enjoyment of such rights so awarded to them by the solemn judgment of the law, unimpeachable at the time it was pronounced, if this Court now, by calling an appeal mere procedure, give this Statute a retrospective operation, and so render the security heretofore looked upon as unimpeachable, namely : the security of a judgment of a competent tribunal, a delusion, and could make the decisions under

which parties had hitherto held and possibly dealt with property, feeling themselves as safe as the law could make them, now liable to be re-opened and appealed at the discretion of a single judge.

The principle of this Statute should apply to the future and not to the past, seems to my mind so clear, the consequences, if the contrary was held, so disastrous to parties who may have received and disposed of the full benefit of their judgments, as also to those who may have acquired rights to property on the faith of such adjudications and on the belief that litigation was at an end in respect thereto, and would not be re-opened, that in the language of Parke B. in *Vansittart* v. *Taylor*, (1) "I think this would be such an unjust construction that, independent of the general rule referred to, I am quite clear the Legislature never meant it." But, independent of all this, I think the creation of a right of appeal is by no means mere matter of procedure, but is a matter of jurisdiction, that is, of the limitation and extension of jurisdiction, and by which limitation and extension the rights of suitors may be most materially affected. After the Supreme Court Act came into operation, the jurisdiction of the Courts of final resort in the several Provinces of the Dominion became more limited, their adjudications becoming subject to affirmance or reversal by this Court, which in its turn acquired a jurisdiction not heretofore existing in the Dominion. Bearing strongly, I think, on this view, are the observations of Lord Chancellor Westbury and Lord St. Leonard in the celebrated case of *Attorney General* v. *Sillem*. (2) At p. 720 the former says :—

"The creation of a new right of appeal is plainly an "Act which requires legislative authority. The Court

(1) 4 E. & B., 915; (2) 10 H. of L. C. 704.

"from which the appeal is given, and the Court to which "it is given must both be bound, and that must be the "act of some higher power. It is not competent to "either tribunal, or to both collectively, to create any "such right. Suppose the Legislature to have given to "either tribunal, that is to the Court of the First In- "stance, and to the Court of Error or Appeal respectively, "the fullest power of regulating its own practice or "procedure, such power would not avail for the creation "of a new right of appeal, which is in effect a limitation "of the jurisdiction of one Court, and an extension of "the jurisdiction of another. A power to regulate the "practice of a Court does not involve or imply any "power to alter the extent or nature of its jurisdiction."

And again at page 724 :—

"An appeal is the right of entering a Superior Court "and invoking its aid and interposition to redress the "error of the Court below. It seems to denominate this "paramount right part of the practice of the inferior "tribunal. The mode of proceeding may be regulated "partly by the practice of the inferior and partly by the "practice of the superior tribunal; but the appeal itself "is wholly independent of these rules of practice. The "right to bring an action is very distinct from the re- "gulations that apply to the action when brought and "which constitute the practice of the Court in which it "is instituted. So the 34th and 35th sections of the "Act of 1854, which create new rights of appeal, and "the 36th section which defines and binds certain "Courts to receive and determine such appeals, cannot "with any accuracy or propriety be termed provisions "which relate to process, practice or mode of pleading, "either in the Court appealed from or that to which the "appeal is to be made. They are enactments creating

"new relations between certain Courts in cases which "are defined, and they are as distinct from rules of "practice as international is distinct from municipal "law."

And at page 752 Lord *St. Leonards* says:—

"Now the making of orders, giving a right of "appeal from the Court of Exchequer, where such "right of appeal did not before exist, is an act by "the present Barons of the Court of Exchequer which "does, if valid, affect and prejudice the jurisdiction "and authority of the Court in all time to come. "The present Barons, exercising their power, have super- "added what did not before exist, namely, a right of "appeal in various modes from the decision of the Court "of Exchequer The Court of Exchequer, having a right "to decide without any power of appeal, the present "Barons of the Exchequer have, in the exercise of the "authority which they claim, made their judgments "subject to the decisions of a higher tribunal. If that "is not affecting the jurisdiction of the Court, I cannot "imagine what can be said to be so."

It has been suggested that the remarks of the learned Judge Dr. *Lushington*, in the *Alexander Larsen* (1), militate against this view, but I cannot see that it does so at all. He says: "I am not aware of any principle or decision which establishes the doctrine that where a Statute affords a new mode of suing, the cause of action must necessarily arise subsequently to the period when the Statute comes into operation. On the contrary, where a Statute creates a new jurisdiction, the new jurisdiction, I apprehend, takes up all past cases, and there is not the slightest injustice in this, for although the circum-

(1) 1st Robinson's Admiralty Reports, 295.

stances may have occurred prior to the passing of the Statute, the suit or action may have been commenced subsequently."

This is all right enough as applicable to Courts established to enable parties to recover their rights, but I am not aware of any case where a Statute passed affording a new mode of suing, creating a new jurisdiction, or establishing a new Court or regulating procedure, has ever been held to apply to a suit that has been duly litigated and finally decided by a competent Court before the passing of the Statute, whereby the litigation and the rights of the parties thereunder had passed as the law stood in *rem adjudicatam*, so as to open the controversy and enable the matters originally in dispute to be adjudicated upon afresh. For these reasons, and because I think this Court should be extremely careful not to assume any jurisdiction which it does not unquestionably possess, I am of opinion we have no right and ought not to adjudicate upon this matter.

STRONG, J.:

It is a well established exception to the rule that Statutes are not to receive a retroactive construction, that enactments regulating procedure may have such an operation, so as to be applicable to pending suits, when the language of the Act is sufficiently large to bear such a construction (1). In such cases, the ordinary presumption against a retrospective effect, requiring that general words be restricted to future cases, does not apply. The creation of a new right of appeal is a regulation of procedure (2), and, as section

(1.) Maxwell on Statutes, p. 199; (2) Atty.-Gen. vs. Sillem, 10 H. of L. C., 704; and Vansittart vs. Taylor, 4 E. & B., 910.

26 of the Supreme and Exchequer Courts Act is sufficiently comprehensive in its terms to include cases pending at the time it was passed, I should, if it stood alone, consider that this appeal was admissible. Section 32 of the same Act, however, provides for a stay of execution on certain conditions, as a consequence of an appeal. This, it seems to me, is more than an enactment concerning procedure, as it amounts to a serious interference with the substantial rights of the respondent. Therefore, reading sections 26 and 32 together, I think that section 26 ought not to operate retrospectively, and, for this reason, I concur in the judgment that the appeal be quashed without costs.

TASCHEREAU, J. :----

Section 25 of the Supreme Court Act enacts, that, except in election cases, every appeal must be brought within thirty days from the rendering or entry or pronouncing of the judgment appealed from ; but by Section 26 it is enacted that a Judge of the Court appealed from may allow an appeal, under special circumstances, after the thirty days.

In this case, the judgment sought to be appealed from was rendered and signed several months before the existence of this Court. The order allowing the appeal was made without any affidavit of circumstances to justify the order, and authorize a deviation from the general rule of the statute ; at least no such affidavit is apparent on the face of the record, but the order mentions that it was granted by consent of parties.

At the date of such order, the judgment had acquired all the authority of a final judgment, so far as this Court is concerned, and, in my opinion, no consent of parties could give this Court any jurisdiction over the

case. The consequence of allowing such an appeal after the expiration of legal delays, nay, even with the authority of the Legislature, would be very serious indeed, inasmuch as vested rights in other people might be greatly affected, such as those of creditors; but the case of allowing an appeal by consent from a judgment rendered several months before the existence of a tribunal would be fraught with the greatest danger. I do not think that such was the intention of Parliament in framing the 26th section of the Supreme and Exchequer Court Act. I am happy to find that the majority of this Court in the present case agrees with me, and will decide that the 26th section of the Supreme and Exchequer Court Act does not apply to cases finally decided before the existence of our Supreme Court. The authorities quoted by my learned colleagues are in point and completely warrant our decision.

FOURNIER, J.:—

Le jugement soumis à la révision de cette Cour a été rendu le 25 Septembre, 1875, par la Cour d'Appel d'Ontario, " Court of Error and Appeal."

L'Acte créant cette Cour n'est devenu en opération que le 11 Janvier 1876, c'est-à-dire, plus de trois mois après la date de ce jugement

D'après la 25ième section, le délai dans lequel un appel doit être porté, est de trente jours, mais lorsqu'il est interjeté en vertu des sections 19, 20 et 21, il doit être précédé d'un avis par écrit donné à la partie ou à son procureur, dans les vingt jours après le prononcé du jugement, à moins que le délai ne soit prolongé par la Cour ou le Juge dont est appel.

Il est évident que ce n'est pas en vertu d'aucune de

ces sections que le présent appel a été interjeté, puisque les délais pour le faire étaient expirés longtemps avant la mise en opération de la loi. Aussi ce n'est pas sur ces sections, mais sur une autre, la 26ième que l'Appelant base son droit d'appel. Elle se lit comme suit :—" 26. Pourvu toujours que la Cour dont on " voudra en appeler, ou l'un des Juges de cette Cour, " pourra permettre qu'appel soit interjeté dans des " circonstances spéciales, sauf dans le cas d'une pétition " d'élection, bien que l'appel n'ait pas été interjeté dans " les délais ci-dessus prescrits à ce sujet ; mais dans ce " cas, la Cour ou le Juge imposera telles conditions, à " l'égard du cautionnement ou autrement, qui lui " paraîtront justes dans les circonstances." Sans cette section et l'interprétation que lui donne l'Appelant, un appel du jugement en cette cause n'était pas possible. C'est en se fondant sur cette disposition qu'il a, plus de six mois après la date de son jugement, demandé et obtenu la permission de porter le présent appel, laquelle est en ces termes : " Upon the application of Counsel for the said James Taylor, the Defendant in Error, and by consent, I order and allow that the appeal herein may be brought within ten days from this date, and notwithstanding that such appeal has not been brought within the time prescribed by the Statute in that behalf. And I declare it does not seem to me necessary or proper to impose any terms as to security." Comme on le voit par ce document, les parties en cette cause s'accordent avec l'honorable Juge qui a rendu cet ordre à considérer que malgré que le délai d'appel fut expiré, avant la mise en force de la loi, cette disposition a l'effet de donner au Juge, même en ce cas, le pouvoir de prolonger le délai d'appel.

Telle est la prétention des deux parties

litigantes, prétention qui a l'effet de soulever une question préliminaire de la plus grande importance, celle de savoir si cette cour a droit de prendre connaissance de la présente cause. Il me semble pourtant, bien évident, qu'un appel en vertu du présent Acte ne pouvait exister avant la mise en force de la loi créant le tribunal qui devait l'entendre ; et qu'il n'était pas possible de proroger un délai qui n'a pas existé. Aussi pour sortir de cette difficulté les parties prétendent-elles que la section 26 donnant au Juge le pouvoir, pour des raisons spéciales, de permettre un appel après le délai fixé, doit être interpretée comme s'appliquant indistinctement à tous les jugements rendus soit avant soit après la passation de l'Acte établissant cette Cour ; ou, en d'autres termes, que cette section doit être interpretée comme ayant un effet rétroactif, affectant les droits acquis dans les jugements rendus avant sa passation.

Bienque les deux parties soient d'accord à reconnaître que cette Cour a juridiction dans le cas actuel, leur consentement n'est cependant pas suffisant pour l'autoriser à assumer une juridiction que la loi ne lui donne pas. Il n'y a rien de plus certain que cette maxime, que le consentement des parties ne peut avoir l'effet de donner juridiction. La loi seule peut le faire. Cette Cour doit donc indépendamment de ce consentement considérer la question de savoir si l'ordre permettant l'appel en cette cause est légal.

Si sa légalité ne fait pas doute, il en résulte nécessairement que la disposition qu'il s'agit d'interpréter doit avoir un effet rétroactif. Mais la loi a-t-elle eu cette intention ? Contient-elle quelque disposition qui serait de nature à forcer d'admettre une telle interprétation ? Je cherche en vain des traces d'une telle

intention soit dans le préambule de l'Acte qui établit cette cour, soit dans son dispositif. Au contraire, tout son contexte fait voir qu'il a pour but la création d'une institution nouvelle tirant son origine de l'article 101 de l'Acte Constitutionnel, et le langage de sa rédaction est celui dont on se sert pour donner aux lois effet pour l'avenir seulement. On n'y trouve pas une seule des expressions généralement employées lorsqu'on veut leur donner un effet rétroactif. Une interprétation qui produirait ce dernier effet me semblerait donc blesser, sans raison, un des principes fondamentaux en matière de législation.

Voici comment s'exprime Maxwell on Statutes, p. 191:

"It is a general rule that all Statutes are to be construed to operate in future, unless from the language a retrospective effect be clearly intended." *Nova Constitutio futuris formam imponere debet, non præteritis.* Maxime qui appartient, on peut dire, à toutes les législations, et que la loi Française formule en ces termes si brefs et si expressifs:

"Les lois n'ont d'effet que pour l'avenir."

Mais à ce raisonnement l'Appelant objecte que le langage de la section 26 est général; qu'il ne distingue pas entre les jugements rendus avant ou après la passation de la loi; et que conséquemment tous indistinctement peuvent être soumis à l'exercise du pouvoir discrétionnaire qu'elle accorde au Juge.

A cette objection je réponds que si c'eût été l'intention de la loi de porter atteinte aux droits acquis, elle se serait exprimée en termes clairs et formels ne laissant aucun doute sur sa volonté (1). "It has been said that nothing but clear and express words will give a retro-

(1) Maxwell on Statutes, p. 191.

spective effect to a Statute, and that much, however the present tense may be used in it, it must be construed as applying only to future matters."

Je me demande en outre s'il n'y a pas une autre manière d'expliquer cette disposition, et s'il s'en trouve une qui soit d'accord avec l'ensemble des dispositions de l'acte, ne doit-on pas, d'après les règles d'interprétation, la préférer à celle qui lui donnerait un effet rétroactif? Il me semble qu'une explication logique et sensée de cette disposition résulte du fait que les délais d'appel ont été considérablement abrégés par l'acte créant cette Cour. En effet, on sait que l'appel au Conseil Privé de Sa Majesté des Jugements de la Cour d'Erreur et d'Appel doit être interjeté dans l'année de la date du jour qu'ils ont été prononcés. Il en est de même pour la Province de Québec et je crois qu'on peut en dire autant de toutes les autres Provinces de la Puissance. L'appel à cette Cour ayant été, en vertu de la 47e section de l'Acte de la Cour Suprême, substitué à l'appel à Sa Majesté en Son Conseil Privé, on comprend que les délais pour les appels à cette Cour ne pouvaient plus être les mêmes que ceux des appels au Conseil Privé de Sa Majesté. Delà la necessité de les abréger. Le délai n'étant plus en vertu de notre Acte que de trente jours, il pouvait arriver que dans certains cas des parties désirant, de bonne foi, interjeter appel, n'auraient pu être prêtes à temps, et que sans le pouvoir discrétionnaire dont il est question dans la 26e section, ces parties auraient pu souffrir un tort considérable par la privation de leur droit d'appel. C'est sans doute pour venir à leur secours que cette disposition a été adoptée. Ainsi expliquée, il devient évident que cette section ne peut avoir d'application qu'aux causes jugées depuis la mise en force de la loi.

Une autre interprétation me parait impossible à cause des graves conséquences qu'elle entrainerait. En effet, si l'honorable Juge qui a rendu l'ordre dont il s'agit a eu raison de le faire dans le cas actuel, lui-même, et d'autres Juges n'en pourraient-ils pas faire autant dans des causes jugées depuis longtemps? Si ce pouvoir peut, comme on l'a fait dans cette cause, être appliqué aux jugements qui, par l'expiration des délais d'appel, ont acquis la force de chose jugée, quelle sera la limite où l'on s'arrêtera? Sera-ce un an, cinq ans, vingt ans, l'Acte n'en fixant aucune? D'après l'Appelant cette limite serait laissée à la seule discrétion du Juge Mais ne peut-il pas se trouver des causes jugées depuis longtemps, dans lesquelles, en exerçant cette discrétion, ce serait venir au secours d'une partie qui a été mal-à-propos condamnée, ou qui l'a été en vertu d'une jurisprudence admise alors par ces tribunaux, mais qui depuis a été reconnue comme incorrecte et contraire aux veritables principes qui devaient servir à la décision de telles causes. La chose est fort possible, et c'est bien là supposer le cas le plus favorable où cette discrétion pourrait être exercée quant au passé. Mais alors que deviendrait le principe du respect des droits acquis et de la *chose jugée?* Principe si protecteur de la paix et de la tranquilité des familles. Peut-on croire un instant que la loi a voulu le sacrifier pour introduire un principe qui serait un élement de trouble et de désordre, propre à bouleverser l'action des tribunaux depuis un temps illimité? Certainement non. Le législateur n'a pu vouloir une telle absurdité. Ceci seul ne suffirait-il pas à démontrer que l'intention n'était pas de permettre d'attaquer le passé, mais bien seulement de n'accorder cette discrétion que pour les causes dont le sort n'était pas finalement réglé lors de

la mise en force de la loi. A ce propos je citerai encore du même auteur, les paroles suivantes : "It is where " the enactment would prejudicially affect vested " rights, or the legal character of past acts, that the " presumption against a retrospective operation is " strongest. Every Statute which takes away or " impairs vested rights acquired under existing laws, " or creates a new obligation, or imposes a mere duty, " or attaches a new disability in respect of transactions " or considerations already past, must be presumed, out " of respect to the Legislature, to be intended not to have " a retrospective operation."

Cependant il en serait autrement si cette intention de donner un effet rétroactif était claire et formelle. " However, when the intention is *clear* that the Act " should have a retroactive operation, it must unques- " tionably be so construed, however *unjust* and *bad* the " consequences may appear." Cette règle d'interprétation est certainement correcte. Le devoir du Juge est de respecter la loi, de la faire exécuter quellequ'elle soit, ce n'est pas à lui de la juger. Mais dans la clause qu'il s'agit d'interpréter trouve-t-on qu'il y soit exprimée une intention *claire* qu'elle doit avoir un effet rétroactif? Certainement non.

Maintenant je dirai un mot d'une autre proposition de l'Appelant. L'appel, dit-il, n'est qu'une procédure dans la cause, et la présomption contre l'interprétation rétroactive n'a pas d'application aux Actes qui n'affectent que la procédure et la pratique. Délà il conclut que la disposition doit avoir un effet rétroactif. Sa proposition n'est vraie qu'en partie. Le mode d'exercer un droit d'action peut-être affecté par les lois de procédure, mais le droit d'action lui-même ne peut pas l'être. La procédure peut être changée, mais le droit d'action doit être respecté.

"It does not follow that, because a suitor has a cause "of action, he has also a vested right to enforce it by "the course of procedure and practice which was in "force when he began his suit. He has only the right "of prosecuting it in the manner prescribed for the "time being, by and before the Court in which he sues. "And if an Act of Parliament alters that mode of pro- "cedure, he has no other right than to proceed accord- "ing to this altered mode."

Dans le cas actuel il n'est certainement pas correct de dire que l'appel n'était qu'une procédure dans la cause, puisque ce droit n'existait pas et n'avait jamais existé avant la date de l'ordre du 13 Avril, 1876, comme le font voir les sections précédemment citées. Ce droit d'appel est une création du Juge qui, en permettant un appel dans un cas où la loi n'en accordait pas, a excédé ses pouvoirs. Lorsque l'appel est permis par la loi le Juge en peut régler l'exercise, mais il ne peut pas le conférer quand il n'existe pas. La loi seule a ce pouvoir.

Il faut remarquer de plus que quant à l'effet des lois de procédure, l'appel ne peut être mis au même rang que les autres procédés, comme le fait voir la décision ci-après citée. Lors de la mise en operation du *Common Law Procedure Act of* 1854, il a été rendu sur des faits analogues à ceux de cette cause, une décision dont le principe est applicable à celle-ci ; c'est celle qui a été prononcée dans la cause de *Hughes* v. *Lumley* (1). Je me contenterai d'en citer ici la mention abrégée qu'en fait l'auteur que j'ai déjà cité (2) :—

"But the new procedure would be presumedly inapplicable where its application would involve a breach faith between parties. For this reason, those provi-

(1) 24 L.J., Q.B., 29 ; (2) Maxwell on Statutes, p. 202.

sions of the Common Law Procedure Act of 1854 which permit a writ of error to be brought on a judgment upon a special case, and give an appeal upon a point reserved at the trial, were held not to apply where the special case was agreed to, and the point was reserved before the Act came into operation. (*b*) Where a special demurrer stood for argument before the passing of the first Common Law Procedure Act, it was held that the judgment was not to be affected by that Act, which abolished special demurrers, but must be governed by the earlier law. (*d.*) The judgment was, in strictness, due before the Act, and the delay of the Court ought not to affect it."

Cette raison étant applicable à cette cause, ne doit-elle pas aussi y produire le même effet?

La difficulté soulevée en cette cause intéressant également toutes les Provinces, quelque soit d'ailleurs la divergence de leurs lois, je crois devoir ajouter que les nombreuses autorités qui ont été compulsées et tirées des décisions des causes Anglaises, et des jurisconsultes Anglais, et qui ont été citées à l'appui du jugement qui va être rendu, ont, dans la Province de Québec, la même force et la même valeur que dans les autres Provinces. Pour mieux établir ce point, je citerai de feu Sir Louis H. Lafontaine quelques paroles résumant les règles d'interprétation sur la rétro-activité des lois, lesquelles sont en même temps très applicables à la question sous considération.

Dans une cause, Kierzkoski v. La Compagnie du Grand Tronc de chemin de fer (1), dans laquelle il s'agissait de priver un plaideur d'un droit acquis en vertu d'une loi antérieure, voici comment il s'exprimait: ' Pourqu'il en fut privé, il faudrait que la

(1) 10 vol., p. 52, des Décisions des Tribunaux du Bas Canada.

Législature eut porté à cette fin un décret formel, clair et précis, dont la disposition destinée à rétroagir sur le passé, ne pût permettre d'entretenir aucun doute sur son intention de législater ainsi avec effet rétroactif. Si l'on me présente une telle loi, je dois l'éxécuter ; car ce n'est pas à moi à juger la loi ; lorsqu'elle n'offre qu'un sens, et que ce sens ne pourrait être répudié par un Juge, si ce n'est en s'arrogeant les pouvoirs du législateur. Mais si la disposition n'est pas claire et précise, si elle est mal rédigée, si elle est ambigue, si elle est contredite par d'autres dispositions qui sont conformes à l'esprit et au but avoué du décret, tandis que la disposition dont il s'agit est contraire à cet esprit et contredit ce but, alors il y a lieu, pour le Juge, à interpréter la loi ; et dans cette interprétation, il ne doit pas perdre de vue que le respect des droits acquis est la première règle qu'il doit suivre."

Ce principe de la non-rétroactivité des lois si bien développé dans les paroles de l'Honorable Juge en Chef, ainsi que dans Mailher de Chassât (1) sur la rétroactivité des lois, est le même dans le droit Anglais que dans le droit Français, parcequ'il dérive d'une même source, le droit Romain.

Pour ces considérations, et pour beaucoup d'autres si savamment traitées par l'Hon. Juge en Chef, dans lesquelles je concours pleinement, j'en suis venu à la conclusion que cette Cour n'a pas juridiction pour décider l'appel qui lui a été soumis en vertu de l'ordre du 13 Avril 1876.

Appeal quashed.

Attorneys for Appellant: *Bethune, Osler & Moss.*

Attorneys for Respondent: *Mowat, MacLennan & Downey.*

(1) Tome 1, p. 124.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF CANADA.

JANUARY SESSIONS, 1877.

ROBERT BOAK, ET AL. - - - - - APPELLANTS;

AND

THE MERCHANTS' MARINE INSURANCE COMPANY..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal in matter of Discretion—Supreme and Exchequer Court Act, Sec. 22.

Held:—Under Section 22 of the Supreme and Exchequer Court Act no appeal lies from the judgment of a Court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion.

This was an appeal from the judgment of the Supreme Court of Nova Scotia, of the 16th May, 1876, making a *rule nisi* absolute for a new trial, and setting aside a verdict obtained by the Appellants in an action brought against the Respondents, to recover $4,500 under a marine insurance policy for the loss of the cargo and hull of the brigantine "Alexina."

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, JJ.

The cause came on for trial before Mr. Justice Smith of the Supreme Court of Nova Scotia, and a Jury, on the 12th May, 1875, and a verdict was given for the Appellants.

This verdict was moved against, and on the 19th May, 1875, it was ordered that the verdict for the Plaintiffs be set aside with costs, and a new trial granted. The rule was moved on the following grounds:

1st. That the verdict is against law and evidence.

2nd. For the improper reception and rejection of evidence.

3rd. For misdirection of the learned Judge.

The judgment of the Court making the *rule nisi* absolute, was delivered by Ritchie, J. and Wilkins, J.

Among other pleas, the Defendant pleaded that the vessel did not proceed upon and continue on the voyage indicated to the insurers, and that material facts were concealed from them, and no sufficient proof of loss given. The reason given by Ritchie, J., for making the rule absolute was that the verdict on these two points was against the weight of evidence; and Wilkins, J., concluded his judgment as follows: "My own mind is in a state of doubt and uncertainty, whether the cause of the loss of this vessel was (she being seaworthy, severity of the gale, or unseaworthiness that disabled her from effectually resisting it. The doubt could not have existed if the insured had had the vessel regularly surveyed at St. George's Bay, and thoroughly repaired there to the extent demanded by the result of the survey. My opinion is, that justice to the Defendant's Company demands that this case should be submitted to another investigation."

22nd January, 1877.

Mr. *W. H. Kerr*, Q. C., for Appellant:

Before arguing on the merits of this case it is desirable to have a decision on the question of jurisdiction of this Court which is raised in Respondent's factum as follows: "The Respondents will contend that no appeal lies from the judgment of the Court below in having granted a new trial, that being matter of discretion only, and decided in whole or in part, on the ground that the verdict was against the weight of evidence."

The rule was made absolute, as appears by the printed case: 1st. Because the verdict is against law and evidence. This brings the case under the 20th section of the Supreme Court Act which declares that an appeal shall lie from a judgment upon any motion for a new trial upon the ground that the Judge has not ruled according to law.

[THE CHIEF JUSTICE: If judgment is wrong with regard to misdirection there still remains the fact that the new trial was granted on the ground that the verdict is against the weight of evidence, and we cannot get over that.]

The judgment, it must be admitted, is difficult to understand, but there was no reservation of any ground urged in support of application.

Mr. *Cockburn*, Q.C. for Respondent, was not called upon.

23rd January, 1877.

The judgment of the Court was delivered by THE CHIEF JUSTICE:

We have read the judgments delivered in the Court below, we are satisfied that the verdict in this case was set aside as against the weight of evidence, and that

the application in this case being upon a matter of discretion only, it comes under the 22nd section of the Supreme Court Act. We do not think that the rule of the Court below was made absolute granting the new trial for misdirection, and we are, therefore, of opinion that this appeal should be quashed with costs.

Appeal quashed with costs.

Attorneys for Appellant : *Kerr & Carter.*
Attorney for Respondent : *J. N. Ritchie.*

THE HONORABLE PETER SMYTH - - APPELLANT;

AND

ELIZABETH McDOUGALL, SUGGESTING THE DEATH OF THOMAS MOONEY..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Special Case—Further Evidence.

Held:—That when a case has, by consent of parties, been turned into a special case, and the Judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the Court has no power to add anything thereto, except with the like consent, and has no power to order any further evidence to be taken.

This was an appeal from the Supreme Court of Nova Scotia, which delivered judgment in favor of the Plaintiffs, in an action of ejectment brought by the Plaintiffs to recover from the Defendant possession of certain lands and premises which are situate in the County of Inverness in that Province.

The case was tried on the twenty-eighth of October, 1874, before Mr. Justice McCully and a Jury, at Port Hood. After the evidence on both sides was concluded, on the recommendation of the presiding Judge, a juror was withdrawn, and it was then agreed "that the Judge's minutes be returned to Halifax, and that this cause should be treated as a special case, and that the Court on argument were to draw all such inferences of fact as a Jury might, and that final judgment be entered for Plaintiffs or Defendant as the Court should order." A *rule nisi* was granted, in accordance therewith, to enter judgment for the Respondents, and during the progress of the argument of the said rule, the Court stopped the argument and intimated that it would order

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PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J.J.

further evidence to be taken before a Commissioner at Port Hood, which evidence was to be returned and to be used in the further argument of the cause. Appellant's counsel protested against this course, and insisted that this being a special case the Court had no power to interfere or make such order, except by consent of both parties. The Court took time to consider, and afterwards granted a rule "authorizing a Commissioner to take evidence as to whether the widow or daughter of Angus Morrison, the devisees named in the will of Donald Morrison, were living or dead at the time of bringing this action; also when said devisees of said life estate, if dead, either or both of them, departed this life, and, further, that the testimony to be taken under such rule, of which Defendant's attorney to have due notice, that he may attend and cross examine if he choose, be received on a future argument of the case, in the same way and to the same effect as if it had been taken down and returned at the trial with the minutes;" and it was with the further evidence, taken under this special order therefor, that the Respondents obtained the judgment which gave rise to the present appeal.

1st February, 1877.

Mr. *Gormully* for the Appellants:

When a case has been stated by consent of all parties the Court has no power to add thereto, except with the like consent. The parties in this case agreed to turn the action of ejectment into a special case, the Judge's minutes of the evidence taken at the trial to be the statement of the said special case. No Statute gave the Court below power to order any further evidence to be taken on two material facts and, excluding such further evidence, a nonsuit ought to have been entered in the Court below.

The only jurisdiction the Court had was that given to it by the consent of the parties.

38 section of Supreme and Exchequer Court Act and *Mersey Docks Trustees* v. *Jones* (1), especially the judgment of *Erle, C. J.*, were referred to.

[THE CHIEF JUSTICE to Respondent's Counsel:—If this point is against you, can you maintain the judgment?]

Mr. *Ferguson* for Respondents:—It was the Court ordered the evidence to be taken and we could not ask for a nonsuit. The judgment of the Court by *McCully*, J., directing further evidence, was given on the authority of *Mersey Docks Trustees* v. *Jones*. If this is not deemed sufficient the judgment cannot be maintained.

1st Feb., 1877:—

The judgment of the Court was delivered by

THE CHIEF JUSTICE:

The appeal must be allowed with costs on the ground taken by the appellant in his factum, that the Court below had no power to add any fact to the special case without consent of the parties, though such fact may have been ascertained by an order of a Judge, such order having been made against the consent of the party now objecting. We, therefore, allow the appeal and adjudge that the rule for judgment in the Court below be charged, without prejudice to any application the parties, or either of them, may be advised to make in that Court as to the disposal of the special case or otherwise.

Appeal allowed with costs.

Attorney for Appellant: *S. McDonnell.*

Attorney for Respondent: *Peter Lynch.*

(1) 8 C. B. N. S., 114.

MICHEL LALIBERTÉ,.....APPELLANT.

AND

THE QUEEN,.....RESPONDENT.

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

Rape—Cross Examination of Prosecutrix—Previous connection with other men—New Trial—Discharge of Prisoner.

The Prosecutrix, in an indictment for rape, was asked in cross-examination, after she had declared she had not previously had connection with a man, other than the prisoner, whether she remembered having been in the milk-house of G——— with two persons named M———, one after the other.

Held,—That the witness may object, or the Judge may, in his discretion, tell the witness she is or she is not bound to answer the question; but the Court ought not to have refused to allow the question to be put because the Counsel for the prosecution objected to the question.

Held also,—That, since the passing of 32 and 33 Vict., ch. 29, sect. 80, repealing so much of ch. 77 of Cons. Stat. L. C. as would authorize any Court of the Province of Quebec to order or grant a new trial in any criminal case; and of 32 and 33 Vict. ch. 36, repealing sect. 63 of ch. 77 Cons. Stat. L. C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and that the Supreme Court of Canada, exercising the ordinary appellate powers of the Court, under sects. 38 and 49 of 38 Vict., ch. 11, should give the judgment which the Court whose judgment is appealed from ought to have given, viz.: to reverse the judgment which has been given, and order prisoner's discharge.

The prisoner was convicted of rape at the sittings of the Court of Queen's Bench for the Province of Quebec, held in the month of October last, before the Honorable Mr. Justice *Plamondon*, one of the Judges of the

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PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J. J.

Superior Court for the Province of Quebec, at the Village of Arthabaskaville, in the District of Arthabaska.

At the trial, the Prosecutrix, Philomène Michaud, on her cross-examination, after having described the details of the violence committed on her person by the prisoner, declared that it was the first time she had had carnal connection with a man.

This statement was made by her, without objection on her part or on the part of the Crown prosecutor.

In reply to another question she answered, that she was acquainted with D'Assise Malhoit and Baptiste Malhoit. She was then asked the question, "Do you remember your being in the milk-house of Clovis Guilmette with the two Malhoits, one after the other?"

The Crown prosecutor objected to this question as illegal, and the Court sustained the objection.

Joseph Provencher was a witness called for the defence. The prisoner's Counsel proposed to ask him the following question, "Did you ever see Philomène Michaud with D'Assise Malhoit and Baptiste Malhoit? If you have, please state on what occasion, and what they were doing?" The Court refused to allow the question as illegal.

The Court, in the conflict of decisions on the matter in the English Courts, reserved for the consideration of the Court of Queen's Bench, for the Province of Quebec, in appeal, the question of the legality of the two questions, and requested the opinion of the Court in regard thereto.

The Court deferred pronouncing judgment on the verdict rendered against the Defendant, and ordered him to be imprisoned in the common gaol of the district until the first day of the next term for the sitting of the Court to receive judgment, or until otherwise discharged according to law.

The matter Came before the Court of Queen's Bench, for the Province of Quebec, on the appeal side,* sitting in the City of Quebec, on the 15th December, 1876 ; and they rendered judgment, affirming the ruling of the Judge at the trial; Ramsay, J., dissenting as to the ruling on the first question.

The Defendant appealed from that decision under the 49th section of the Supreme and Exchequer Court Act.

26th of January, 1877.

Mr. *W. Laurier*, of the Quebec Bar, for the prisoner, and Mr. *W. H. Felton*, of the Quebec Bar, on behalf of the Crown.

The authorities cited in argument were: *Rex* v. *Hodgson*, (1); *Reg.* v. *Robins*, (2) ; *Rex* v. *Barker*, (3) ; *Rex* v. *Martin*, (4) ; *Rex* v. *Clarke*, (5) ; *Reg.* v. *Dean*, (6) ; *Verry* v. *Watkins*, (7) ; *Andrews* v. *Askey*, (8) ; *Reg.* v. *Cockcroft*, (9) ; *Reg.* v. *Holmes*, ; (10) 2 Starkie, Ev. (11) ; Philipps on Ev. (12) ; Taylor on Ev., (13) ; Best on Ev., (14) ; Russ. on Crimes, (15) ; Roscoe, (16) ; Taschereau Criminal Acts, (17) ; 3 Greenleaf on Ev., (18).

3rd February, 1877.

THE CHIEF JUSTICE: The case of *Rex* v. *Hodgson*, (19) ; is the leading case on the subject. The prisoner was convicted before Baron Wood at the Yorkshire Summer Assizes, in the year 1811, for committing a rape on Harriet Halliday.

* *Present*:—Monk, Ramsay, Sanborn, and Tessier, J.J.

(1) 1 R. & R. 211 ; (2) 2 Moo. & Rob. 612 ; (3) 3 C. & P. 589 ; (4) 6 C. &. P. 562 ; (5) 2 Starkie N. P. C. 241 ; (6) 6 Cox C. C. 23 ; (7) 7 C. & P. 308 ; (8) 8 C. & P. p. 7 ; (9) 11 Cox C. C. 410 ; (10 L. R. 1 C.C. 334 ; (11) p. 700 ; (12) 8 Lond. Edt. 489 & 914 ; (13) 2 Edt. 1122, 1137, 1314, 1319 ; (14) 244, 287 ; (15) 1 p. 925 ; (16) p. 880 ; (17) 1 p. 311 ; (18) 3 p. 214 ; (19) 1 R. & Ryan, 211.

After the prosecutrix had given her evidence in support of the prosecution, she was cross-examined by the prisoner's counsel, who put these questions to her.

Whether she had not before had connection with other persons, and whether she had not before had connection with a particular person named. The counsel for the prosecution objected that she was not obliged to answer these questions, but it was contended by the prisoner's counsel that in a case of rape she was. The learned Judge allowed the objection on the ground that the witness was not bound to answer these questions as they tended to criminate and disgrace herself, and said that he thought there was not any exception to the rule in a case of rape.

The prisoner's counsel called witnesses, and amongst others offered a witness to prove that the girl had been caught in bed about a year before this charge with a young man, and offered the young man to prove he had had connection with her.

The counsel for the prosecution objected to the admissibility of this sort of evidence of particular facts not connected with the present charge, as they could not come prepared to answer them. The case was first considered on the 2nd December, 1811, by all the Judges (except Mansfield, C.J., Macdonald, C.B., Grose, J., and Lawrence, J., who were absent), and was postponed for consideration to Hilary term, 30th January, 1812, when, all the judges being present, they determined that both the objections were properly allowed.

If we look closely at the statement of the case, we will see that the objection taken on the questions being asked her was *that she was not obliged to answer those questions*, not that she could not be asked them; and the learned judge allowed the objection on the ground

that the witness *was not bound to answer* these questions as they tended to criminate and disgrace herself. All that the Judges decided in that case was, that both objections were properly allowed.

In *Reg.* v. *Robins*, (1); before Coleridge, J., in 1843, the prosecutrix having denied on cross-examination that she had had connection with several men who were named, and who were brought into Court and shewn to her at the time she was questioned, the counsel for the defence called these persons to prove they had had connection with her.

Greenwood, for the prosecution, objected that such evidence was inadmissible, and cited *Rex* v. *Hodgson*, and referred to *Rex* v. *Barker*, (2); and *Rex* v. *Martin*, (3). Coleridge, J., after consulting Erskine, J., said neither he nor that learned Judge had any doubt on the question. It is not immaterial to the question whether the prosecutrix has had this connection against her consent, to show that she has permitted other men to have connection with her, which, on her cross-examination, she has denied.

This case does not seem to be sustained by the subsequent decisions.

The case of *Rex* v. *Barker*, (4); went to show that the prosecutrix was a common prostitute, and such evidence had long been held to be material.

The case of *Rex* v. *Martin*, (5); was tried before Mr. Justice Williams in 1834. The prisoner's counsel proposed to ask the prosecutrix whether on the Whit Sunday before the alleged offence, the prisoner, Aaron Martin, had not had intercourse with her by her own consent.

(1) 2 Moody & Rob. 512; (2) 3 C. & P. 589; (3) 6 C. & P. 562; (4) 3 C. & P. 589; (5) 6 C. & P. 562.

The counsel for the prosecution objected to the question, and relied on *Rex* v. *Hodgson*, and *Rex* v. *Clarke*, (1). Williams J., said he was one of the counsel in R. v. Hodgson. The question in the present case was as to previous intercourse with the prisoner, and the question there was as to intercourse with other men. He received the evidence and added: "I must say that I never could understand the case of *Rex* v. *Hodgson*. The doctrine that you may go into general evidence of bad character of the prosecutrix, and yet not cross-examine as to specific facts, I confess, does appear to me to be not quite in strict accordance with the general rules of evidence."

In *Rex* v. *Clarke*, (2); in 1817, Holroyd J., said: "It is clear that no evidence can be received of particular facts, and such evidence could not have been received, although the prosecutrix had been cross-examined as to those facts, because her answers upon those facts must have been taken as conclusive. With respect to such facts the case is clear. Then with respect to general evidence; such evidence has been held admissible in all cases where character is in issue, and, therefore, the only question is whether the character of the prosecutrix is involved in the present issue. In the case of an indictment for a rape, evidence that the woman had a bad character previous to the supposed commission of the offence is admissible, but the Defendant cannot go into evidence of particular facts.

Rex v. *Clay*, (3). Evidence of the general character of the prosecutrix was admitted, such as that she had been reputed a prostitute, by Patterson J. At first he

(1) 2 Starkie N. P. C. 241; (2) 2 Starkie's Reports 244; (3) 5 Cox C. C 146.

was disinclined to allow the evidence, but on referring to the case of *Rex* v. *Barker*, he admitted it.

In *Rex* v. *Dean*, (1); prosecutrix had been examined about stealing from a former mistress. Her mistress had lost 15s. Burrowes, a constable, searched her box, she snatched a parcel containing 15s. from the box. When asked to account for the possession, in her examination, she said she had told Burrowes a gentleman had given her the 15s for insulting her; she said: "I did not say it was for having connection with me." It was proposed to call Burrowes to contradict her. Platt, B., after consulting Wightman, J., said that Wightman, J., said he could not call the constable to contradict the statement of the prosecutrix; as to her general character he might call him or other witnesses.

Verry v. *Watkins*, (2). In an action for seduction, the Plaintiff's daughter was cross-examined to shew her general bad character in respect of chastity and moral conduct. Alderson held the Defendant might call evidence as to particular acts of unchastity The question of damages, in such a case, would be affected by the want of chastity.

Andrews v. *Askey*, (3) In an action for seduction it was held that the Defendant could not contradict the witness as to statements about the paternity of the child until she had been asked in the witness box if she had made such statements.

Regina v. *Cockroft*, (4). The prosecutrix was asked whether she had ever had connection before with other men. She declined to answer the question Willes, J. said the prosecutrix need not answer the question unless she likes: "You may cross-examine

(1) 6 Cox C. C. 23; (2) 7 C. & P. p. 308; (3) 8 C. & P. p. 71; (4) 11 Cox. C. C. 410.

the prosecutrix with respect to particular acts with other men, but if she denies them then you are bound by her answer. You may not call those men to contradict her. You may, however, examine her with respect to particular acts of connection with the prisoner, and if she denies them, you may call witnesses to contradict her."

On a former trial of the same prisoner, when the jury did not agree, Martin Baron was referred to *Reg.* v. *Robins.* His Lordship said he considered the decision, in the case cited, wrong, and so would not allow a witness to be called to prove particular acts of connection between the prosecutrix and other men.

These were the principal cases decided in the English Courts when the case of the *Queen* v. *Holmes* was considered, (1).

In that case, the prosecutrix, in her cross-examination, was asked by the prisoner's counsel if she had had connection with Robert Sharp, and she denied it. The prisoner's counsel called Robert Sharp, and asked him if the prosecutrix had ever had connection with him, but the counsel for the prosecution objected to the question on the authority of *Reg.* v. *Cockroft*, and the Court refused to allow the question to be answered, and reserved the question for the decision of the Court of Crown cases reserved.

The prisoner's counsel contended the evidence tendered was strictly relevant to the issue, as having material bearing upon the probability of the prosecutrix's consent. For the prosecution, it was contended that the question put to the prisoner was not relevant to the issue, it only went to credit. Upon principle, therefore, her answer is binding. Kelly, C.B., in his

(1) L. R. 1 Crown cases 334 (1871).

judgment, considers the question as on a collateral point, and the answer given must be taken for better or for worse, and that evidence to contradict the witness on the collateral point was not admissible. "If such evidence were admitted, the whole history of the prosecutrix's life might be gone into; if a charge might be made as to one man, it might be made as to fifty, and that without notice to the prosecutrix. It would not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice. Upon principle we must hold that the answer is binding.

On referring to *Rex* v. *Hodgson*, he said it was an actual decision that the prosecutrix, on a charge of rape, was not bound to answer such a question as that here put. He then refers to the second objection taken as raising the very point before them, and the decision being in accordance with the view that the Court took. He referred to the authorities, and shewed the only one against *Rex* v. *Hodgson* was *Reg.* v. *Robins*, which they declined to follow, and cited *Reg.* v *Cockroft* as an authority supporting his view.

Pigott, B., said he thought the evidence proposed to be given, not relevant to the issue and its admission, might lead to great injustice. Hannen, J., said *Rex* v. *Hodgson* was a decision that such evidence could not be given as substantial evidence in the cause and be regarded as relevant to the issue, but only as going to the *credit* of the witness. The witness's answer is therefore binding, and the reason is that the prosecutrix cannot come prepared to try all the issues which would be thus raised.

In Starkie on Evidence, (1); the question is consid-

(1) 4 Edt. Vol. 2, p. 237.

ered; and it is stated, as the result of the authorities, that it is perfectly well settled that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts not relevant to the issue, for this would cause the enquiry which ought to be simple and confined to matters in issue, to branch out into an indefinite number of issues.

Questions put to witness himself upon cross-examination are not, it may be observed, open to this objection since his answer is conclusive as to all collateral matters.

In Phillips on Evidence, (1); the question is referred to as follows:—"In criminal matters, evidence of character frequently affords a material presumption in regard to the perpetration of offences. Thus, when the charge is that of rape the general bad character of the prosecutrix may, under the circumstances of particular cases, afford a just inference as to the probability of her having consented to the commission of the act for which the prisoner is indicted. Accordingly, upon the trial of indictments for such offences, evidence is admissible on the part of the prisoner, that the woman bore a notoriously bad character for want of chastity and common decency. It appears also that, at least in trials for rape, evidence is admissible that the woman had been before criminally connected with the prisoner. But it seems that the evidence of particular facts cannot, in general, be received to impeach the chastity of the woman, as that, previously to the commission of the offence, she had a criminal connection with other persons. It has been held that the woman, in a prosecution for rape, is *not bound* to answer questions tending to criminate and disgrace herself, as, whether

(1) Lon. Edt. p. 489

she had not before connection with other persons or with a particular person."

In a note, the learned author refers to the ruling of Mr. Justice Holroyd in *Reg.* v. *Clarke*, that the woman's answers as to particular facts would be conclusive, and adds, but it is to be observed that this is treating the question as merely discrediting the witness and not as relevant to the issue, and in *Rex.* v. *Hodgson*, on the alleged ground that the prosecutrix could not be prepared to answer evidence of particular facts. Perhaps it may be considered that the question of the woman's chastity is not directly in issue upon such charges as it is in actions for *crim. con.* and seduction. The determination of this question may, however, afford a material inference as to the truth of the charge, and referring to the questions in *Rex* v. *Hodgson*, he adds: "It may be observed that the questions do not merely tend to discredit the witness, but are also relevant to the issue." In the same work at p. 914, reference is again made to the subject, on an indictment for rape, the woman *is not bound to answer* whether, on some former occasion, she had not a criminal connection with other men or with particular individuals, and Hodgson's case was again referred to.

Whether questions of such a description may not be legally asked is a very different question from that before considered, whether the witness is compellable to answer. It may be just to allow a witness the privilege of not answering in certain cases; but that the party against whom the witness appears shall not be allowed to ask the question, and force him to his privilege, is a proposition which, if carried into practice, might often be attended with unsatisfactory consequences.

Mr. Taylor, in his work on Evidence, (1); says: "It is said the prosecutrix in a rape case might be cross-examined with a view of showing that she had been guilty of incontinence with the Defendant, or even with other men, or with some particular person, and when she had denied the facts imputed, witnesses have been called for the purpose of contradiction."

In a note, it is said the cases cited seem to overrule *Rex* v. *Hodgson*, and at page 318, of the same edition, in a note referring to *Rex* v. *Hodgson*, it is said this case seems to be overruled.

In Best, on Evidence, (2); the matter is referred to as follows: "When the female prefers a charge of rape, or of assault with intent to commit rape, she brings the question of her own chastity so far in issue that it is competent for the accused to give general evidence of her bad character in this respect, or even to show that she has been criminally connected with himself; but the authorities are conflicting, whether he will be allowed to prove particular acts of unchastity with other men.

In Taylor, on Evidence, (3); it is laid down when the witness is not compellable to answer, the privilege is his, and counsel in the case will not be permitted to make the objection. Nor is the Judge, it would seem, bound to warn the witness of his right to demur to the question, though in the exercise of his discretion he may occasionally deem it right to do so.

At p. 1137, sec. 1314, the propriety of allowing witness the privilege to decline answering questions not directly material to the issue, but which affect his character is discussed, and the propriety of the rule is doubted. The section concludes: "No doubt cases may

(1) 2 Edt. p. 1122; (2) p. 287 Sec. 244; (3) Sec. 1319.

arise when the Judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date, might in general be rightly suppressed, for the interest of justice seldom require that the errors of a man's life long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant; so questions respecting alleged improprieties of conduct which furnish no real ground for assuming that a witness who would be guilty of them would not be a man of veracity, might very fairly be checked." And by sec. 1315: "But the rule of protection should not be further extended, for if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compell a witness either to commit perjury or destroy his own reputation, but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause."

I have made these references, perhaps at greater length than nccessary, to shew the views that prevailed on the subject before the decision of *Regina* v. *Holmes*. One of the learned Judges in the Court of Queen's Bench inclined to the opinion that the allowing the question to be put was a matter in the discretion of

the Judge. I understand the discretion referred to is as to compelling the witness to answer the questions. It seems to me the party has a right to put the question, and the Judge will, in his discretion, decide whether he will compel the witness to answer.

When the object is to discredit the testimony of the witness, to show him to be of a disreputable character, there are conflicting authorities as to the right of the witness to refuse to answer. Generally, the question may be asked; but when it is not material to the issue, and the object is merely to degrade the character of the witness, he is not compellable to answer. Of course the Judge decides, when the witness claims the privilege, whether he may exercise it or not.

When the prisoner admits the improper connection, but contends that it was with the consent of the prosecutrix, the fact that she had had connection with other men at no distant time would, to the unprofessional mind, seem a fact proper to go to the jury, and relevant to the question, whether the connection complained of was against her will or not.

Were it nor for the last decision on the subject, so recent as 1871, in the *Queen* v. *Holmes*, I should have thought the question more relevant to the issue than as merely affecting the credit of the witness, but that case is expressly on the point that such is the nature of the question, and I think we ought not to depart from that decision. But, as already intimated, the right to put the question is an important one, of which the prisoner ought not to be deprived, and though, if answered by the prosecutrix, and the answer were false, he could not call witnesses to contradict her, yet she might answer truly, and, if she so answered, it might be of service to him. The question, as reported

in this case by the learned Judge, is not, in terms, asking her if she had had improper connection with the other men named, but that was the object of it and seems to be its effect; and it was argued in the Court of Queen's Bench, and in this Court, properly, I think, in that view.

On the whole, then, I come to the conclusion that the weight of authority and the course of practice by the Judges in England, is to permit questions of the kind objected to by the prosecuting officer, to be asked of a witness on cross-examination in cases of rape; that the prosecuting officer is not permitted to raise the objection; the witness not being bound to answer the question. The witness may object, or the Judge may tell the witness she is not obliged to answer, if he thinks proper, though not bound to do so, and the Judge will decide whether the witness is obliged to answer or not, when the point is raised.

In this case, the Judge, having ruled on the objection taken by the prosecuting officer, that the question was illegal and could not be put, the prisoner was deprived of a legal right which he wished to exercise, and we cannot say that the refusal to allow the question to be put has not prejudiced his case.

If the witness had answered the question which the prisoner's counsel wished to put in the negative, the case of *Regina* v. *Holmes* referred to is an express authority that she could not have been contradicted. Therefore, the ruling of the learned Judge rejecting that evidence tendered for the prisoner was correct when it was tendered as relevant to the issue in the cause.

As we are all of opinion that the conviction cannot be sustained, the next question is whether we have power to grant a new trial.

Just before the passing of the Statute 32-33 Vic., ch. 29, the provisions of ch. 113, Con. S., U. C., intituled: " An Act respecting new trials and appeals and writs of error in criminal cases in Upper Canada " were in full force.

The Act provided that when any person had been convicted of any treason, felony, &c., such person might apply for a new trial, upon any point of law or question of fact, in as ample a manner as any person might apply to the Superior Courts of Common Law for a new trial in a Civil action.

If the conviction was affirmed by the Superior Court, the person convicted might appeal to the Court of Error and Appeal, provided the appeal was allowed by the Superior Court, or any two Judges thereof, and any rule or order of the Court of Appeal was to be final.

The Court to which the application for a new trial was made, either in the first instance or by way of appeal, were to have power to determine the questions of law and fact involved in the application, and were to " affirm the conviction or order a new trial or otherwise, as justice requires."

In case of a new trial being granted, the same proceedings as to any future trial, or the commitment or bailing of the person convicted, as if no conviction had taken place. In case of a new trial being refused, the Court were to make such order for carrying out the sentence already passed, or for passing sentence if none had been passed, or for the discharge of the person so convicted, on bail or otherwise, as justice requires.

Ch. 112 of the same statutes provided that when any person convicted of treason, felony, &c., before any Court of Oyer and Terminer * * * * the Judge before whom the case was tried, might in his discretion

reserve any question of law, which arose on the trial, for the consideration of the Justices of either of the Superior Courts of Common Law. The Judge, thereupon, was to state in the case the question or questions of law reserved with the special circumstances upon which the same arose, which was to be transmitted to one of the Superior Courts.

The Justices of the Court to which the case was transmitted were to hear and finally determine the said questions and reverse, affirm or amend any judgment given on the indictment or inquisition on the trial whereof the question arose, or to avoid such judgment or order an entry to be made on the record that in the judgment of the said Justices the party convicted ought not to have been convicted, or arrest judgment, or if no judgment had been given, should order judgment to be given thereon at some future session of Oyer and Terminer or Gaol Delivery * * * or make such other order as justice might require. The judgment was to be certified to the Clerk of Assize, who was to enter the same on the record in the proper form. If the judgment was reversed, avoided or arrested, the person convicted was to be discharged from further imprisonment.

Under Cons. Statutes L. C., Ch. 77, Sects. 57, 58 and 59, similar provisions were made for reserving questions of law on a conviction for treason, felony, &c., for the consideration of the Court of Queen's Bench, which arose on the trial. The case is to be transmitted to the Clerk of Appeals. The Court of Queen's Bench, on the appeal side, to have full power to hear and finally determine every question therein; and thereupon to reverse, amend or affirm any judgment which has been given on the indictment or inquisition on the trial,

whereof such question arose, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the Court of Queen's Bench the party convicted ought not to have been convicted or to arrest the judgment * * * * or to make such other rule as justice requires. The judgment to be certified to the Clerk of the Court from which it came, who is to enter the same on the record in the proper form. If the judgment has been reversed, avoided or arrested, the sheriff or gaoler shall forthwith discharge the prisoner.

By sec. 63, if in any criminal case, either reserved as aforesaid or brought before it by writ of error, the Court of Queen's Bench is of opinion that the conviction was bad from some cause not depending upon the merits of the case, it may by its judgment declare the same and direct that the party convicted be tried again as if no trial had been had in such case.

The Statute 32 and 33 Vic., ch. 29, sec. 80, repealed so much of ch. 113 of the Cons. Stat. for U. C. as allowed an appeal to the Court of Error and Appeal in any criminal case where the conviction had been affirmed by either of the Superior Courts of Common Law on any question of law reserved for the opinion of such Court, as regarded any conviction after that Act came in force, and the judgment of the Superior Court on any question reserved should be final and conclusive, and so much of ch. 113 of the said Cons. Stat. U. C. or of ch. 77 of Cons. Stats. L. C., or of any other Act as would authorise any Court in the Province of Ontario or of Quebec to order or grant a new trial in any criminal case were repealed as regards any conviction after that Act came into force; and no writ of error was to be allowed in any criminal case unless

founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases. But nothing in the Act was to prevent the subsequent trial of the offender for the same offence in any case where the conviction is declared bad for any cause which made the former trial a nullity, so that there was no lawful trial in the cause.

Under ch. 36 of 32 and 33 Vict., ch. 113 of Cons. St. U. C. was repealed, except sects. 5, 16 and 17, which do not relate to the granting of new trials, and sec. 63 of ch. 77, Cons. Stats. L. C. was also repealed.

The effect of these repealing statutes is to take away the power of granting new trials in criminal cases and leaves the law applicable to Ontario and Quebec depending upon the provisions of the Con. Stat. U.C., ch. 112, and Con. Stat. L. C., ch. 77, sects 57, 58, 59 as to reserving questions at the trial for the consideration of the Court as the same may be affected by 80 sect. of 32-33 Vict., and by the 49 sect. of the Supreme and Exchequer Court Act, which, so far as applicable to the matter under consideration, is to the following effect:— "Any person convicted of treason, felony or misdemeanor before any Court of Oyer and Terminer or Gaol Delivery, or before the Court of Queen's Bench, in the Province of Quebec, on its Crown side, or before any other Superior Court of criminal jurisdiction, whose conviction has been affirmed by any Court of last resort, or in the Province of Quebec by the Court of Queen's Bench on its Appeal side * * * * may appeal to the Supreme Court against the affirmation of such conviction * * * * and the said Court shall make such rule or order therein, either

in affirmance of the conviction, or for granting a new trial or otherwise * * * * as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect, anything in the 80th section of the Act passed in the session held in the thirty-second and thirty-third years of Her Majesty's reign, ch. 29, to the contrary notwithstanding. Provided that no such appeal shall be allowed where the Court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney-General for the proper province within fifteen days after such affirmance or refusal."

The object of the Statute 32 and 33 Vict., chap. 29, sec. 80, taken in connection with the Statute chap. 36 of the same Session, repealing the provisions of the Statutes allowing new trials in criminal cases in Ontario and Quebec, seems clearly to have been to prevent in these Provinces new trials in criminal cases, and to leave questions of law to be decided on reserved cases as was and is the practice in England. Looking at the numerous Acts affecting the criminal law passed in that Session, it was, no doubt, after deliberation, determined to make this important change in the law then existing in the two Provinces on the subject.

In that view there would be no doubt, I apprehend, that, under a reserved case, on a question like this, stated under the direction of the Court, when we are of opinion that the ruling of the learned Judge at the trial was wrong, our duty would be to declare that the prisoner ought not to have been convicted, and on that being certified to the proper officer, the prisoner would be discharged from custody.

The question now to be considered is whether the

Dominion Parliament, when allowing an appeal to the Supreme Court from the decision of the Provincial Courts on a case reserved, intended to change the law so as to authorize new trials to be granted by this Court when such right did not exist in the Provincial Court if they entertained the same view of the law which this Court does. I do not think such was the intention of the Dominion Parliament.

If it were not for the words "and the said Court shall make such rule or order either in affirmance of the conviction or for granting a *new trial* or *otherwise* as the justice of the case requires," I should say this Court had no power to grant a new trial on an appeal in a criminal case brought here when the judgment of the Court below is reversed on the ground of the Judge who tried the case having, contrary to law, refused to admit evidence offered on behalf of the prisoner.

If the Court of Queen's Bench for the Province of Quebec had decided in this matter that the prisoner ought not to have been convicted, and had ordered an entry to be made to that effect on the record, it seems to me the person having the prisoner in custody should forthwith discharge him from imprisonment. Then, is it not absurd that, on an appeal alleging that the decision of the Court of Queen's Bench was incorrect on one of the questions reserved, if we are of opinion that the Court decided wrong, that the effect should be different from what it would have been if they had decided correctly.

In exercising the ordinary appellate powers of the Court, this Court under sec. 38 of the Supreme and Exchequer Court Act are to give the judgment which the Court whose judgment is appealed from ought to have given. Here, we think, the judgment

which should have been given by the Court appealed from was to have reversed not affirmed the conviction, and not to grant a new trial, for under the law, as it now stands, they had no power to do so

This man has been put in jeopardy by this trial, for an offence which is still a capital felony, and he has been convicted, perhaps, because the learned Judge refused to allow him to ask a certain question of the prosecutrix. Therefore, the conviction, being bad, cannot be sustained, and he ought not again to be put in jeopardy by us, unless there is express authority given us to place him in that position. In the present state of legislation upon the subject, and the uniform practice, as far as I am advised, not to have a *venire de novo* awarded in treason or felony, when on a case reserved the Court decides in favor of a criminal, I think we should not make an order for the affirmance of the conviction or for granting a new trial, but "*otherwise*" that our order should be to reverse the judgment which has been given on the indictment and order the prisoner's discharge.

As I have already stated, I do not think that by the clause in the Supreme and Exchequer Court Act referred to, the Dominion Parliament intended this Court to grant new trials in cases of treason or felony when questions were reserved by a Judge at the trial for the consideration of a Superior Court, unless such right existed independent of such section; and as it does not now exist in Quebec by virtue of any other law, as far as I am advised, this Court ought not to order a new trial.

In any event there must be grave doubts if such a power exists, and we are authorised to make an order "*otherwise*" than affirming the conviction or granting a new trial. We obey the Statute, and do what "the justice of the case requires" by reversing the judgment

which has been given in the matter by the Court of Queen's Bench.

I may here observe that the provisions as to cases reserved for the consideration of the Court for Crown cases reserved in England under Imp. Stat. 11 & 12 Vict. ch. 78, are the same in effect as those contained in the Cons. Stat. U. C. ch. 112 & Cons. Stat. L. C. ch. 77, the 36 sect. of the latter Statute being repealed as to reserving cases for the consideration of the Superior Courts of Law in Ontario, and of the Court of Queen's Bench in Quebec.

RITCHIE, J.:—

I think the conclusion to be arrived at from a consideration of all the authorities is that the prisoner's counsel had a legal right to put the first question objected to, and rejected by the learned Judge, and that the counsel for the prosecution had no right to object to the question; that if the witness herself objected to answer, I think it was in the discretion of the Judge to compel an answer; and that on the question being put, it was discretionary with the Judge to intimate to the witness that she might or might not answer it.

I think the answer of the witness when given must be accepted, and is not open to be contradicted by evidence on the part of the prisoner.

Under the peculiar circumstances of this case, viz: of prisoner's contention, as admitted on the argument, that the connection was with consent, and in view of the witness having, without objection, answered generally that the connection complained of was the first time any person had had carnal connection with her, it became, in my opinion, practically very important

that the prisoner should have been allowed to sift the witness as to the accuracy of such previous connection by putting the question proposed.

It is right, I think, to say that the witness does not appear to have objected to the question, or to have been at all unwilling to answer it, and it is obvious, had the prosecuting counsel not objected, and the Judge had not ruled the question out, she might have been only too glad to avail herself of the opportunity of denying the imputation and of vindicating her character, thus, by the question proposed, inferentially assailed. Be this as it may, I think on a trial jeopardizing the life of the prisoner, as this did, he was deprived of a right the law gave him, and was thereby prevented from making full defence, and, therefore, without attempting an inquiry into the extent of the injury he sustained, or speculating on the benefits he might or might not have received by the answering or refusing to answer the question when propounded, I think it sufficient to say the law gave the prisoner the right to put the question, and the learned Judge having deprived him of that right his trial was not according to law, and his conviction on such a trial cannot be sustained.

STRONG, J.:—

I am of opinion that the learned Judge who tried the case ought to have permitted the prisoner's counsel, on the cross-examination of the prosecutrix, to put the question which was objected to by the Crown Counsel, and that the Counsel for the prosecution had no right to interpose the objection which he made to it. The result of the English authorities is, that the question was one which might be put to test the credit of the witness, but that the prosecutrix

might, if she objected to answer it, in the discretion of the Judge, be excused from doing so, on the ground that it tended to degrade and harass her.

It is said by a text writer of high authority on the law of evidence, (1) that "cases may arise where the Judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance." Another author of repute, Best on Evidence, (2) lays it down that though in strictness the Courts can compel a witness to answer such a question ; yet, in their discretion, they will not do so, as the end of the cross-examination is obtained by putting the question and the refusal of the witness to answer. These writers state, I think, correctly the conclusion from reported cases. Here, however, the learned Judge did not permit the question to be put, and, therefore, deprived the prisoner not only of the chance of obtaining an affirmative answer, but also of the obvious practical advantage which might have resulted to him from a refusal to answer. Had the question been put, and the witness, on claiming protection herself been excused from answering, the exercise of discretion of the Judge could not be reviewed on a case reserved under the Statute, but must have been considered as conclusive.

Formerly there existed in England a reason for according to a witness an absolute privilege from answering such a question as that propounded to the prosecutrix, inasmuch, as a party guilty of an act of incontinence could have been made liable to penal consequences by a prosecution in the Ecclesiastical Court. This reason it seems, never had any force in the Province of Quebec, and it has long ceased to exist in England ; though in

(1) Taylor, 4. Edt. Sec. 1314, 1315. (2) 6th Lond. Edt. Sec. 130.

1812, when *Rex* v. *Hodgson*, (1) was decided it was applicable, and appears to have been one of the grounds of the decision, for Baron Wood there held the witness not bound to answer, as it tended to *criminate* her.

As to the question which was put to the witness Provencher, that was, without doubt, properly overruled on the authority of *Reg.* v. *Cockroft* (2), and *Reg.* v. *Holmes*, (3) and upon the very well settled principle that a witness cannot be contradicted in matters foreign to the issue, which on the trial of this indictment was, as Mr. Justice Ramsay points out, not whether the prosecutrix was unchaste, but whether the prisoner had had connection with her by violence.

The proper order to be made on the present appeal will, I think, be to reverse the judgment of the Court below, to direct the conviction to be quashed and the prisoner to be discharged. A new trial is out of the question, for Section 38 of the Supreme and Exchequer Court Act directs that this Court shall,in the alternative of a reversal, give the judgment which the Court below ought to have given, and since the repeal of Section 63, ch. 77 of the Consolidated Statutes of Lower Canada, the Court of Queen's Bench could not have granted a new trial. Section 49 of the Supreme Court Act which authorizes this Court to grant a new trial must be read in such a way as to make it consistent with section 38 already referred to, and this requires us to hold that the power to grant new trials is confined to cases in which the Court appealed from could have made such an order.

(1) R. & R. C. C. p. 211; (2) 11 Cox, C. C. C. 410; (3) L. R. 1 C. C. 334.

TASCHEREAU, J.:—

The prisoner was convicted of rape, and he now seeks to be discharged on the ground that he had not a fair trial, inasmuch as the presiding Judge excluded material evidence on cross-examination of the private prosecutrix. The question was "as to her having been in the dairy of one Clovis Guilmette with two men named Malhiot, the one after the other."

I agree with my brother Judges in declaring that the Judge was wrong in rejecting the question, which was manifestly calculated to affect the character, and, as a consequence, the credibility of the prosecutrix in a case of rape where her chastity was in question. For it is an undoubted principle in criminal cases as in civil cases, and now settled by the best and latest decisions, that any question tending to affect the character, and consequently, the credibility of a witness,should be allowed. As to her refusal to answer the question, if it had been allowed by the Judge, I have nothing to say at the present moment; as to the practical result of such a refusal, and as to the line of conduct of the Presiding Judge under the circumstances, I think we are not called upon to express any opinion on this subject.

It must also be noted that the prosecutrix had freely declared that she had had no carnal connection with any man previous to the occasion in question in this case. I think that by such answer she had, to a certain extent, challenged a very severe cross-examination, and renounced any privilege if she had been entitled to claim any. I am, therefore, of opinion that the ruling of the presiding Judge rejecting the question was wrong, and that the prisoner should have the benefit of it, and obtain nothing less than his discharge, in the actual state of the law.

FOURNIER, J. :—Concurred.

HENRY, J. :—

Agreeing as I do with the conclusions of the judgment already given in this case, on the two points raised and argued, it is unnecessary for me to make any extended remarks, and I will content myself by saying that, after the best consideration I have been able to give to the question submitted, and a consultation of the governing authorities, as well as the principles and the consequences involved, I have no hesitation in approving the reasons given by Mr. Justice Ramsay, in the Court of Queen's Bench.

The authorities, without doubt, in my mind, establish the right of the accused to have the question put, and having been prevented by the presiding Judge from having that done, I consider that his defence was thereby affected, and legal evidence virtually, though perhaps not technically, rejected.

Upon the second point, as to the rejection of the evidence of Joseph Provencher, there ought not, I think, be any doubt that the ruling of the presiding Judge was correct.

Having declined to permit the question to be put to the prosecutrix, it would, independently of previous testimony, be irrelevant to the issue, and therefore, not admissible; and the prosecutrix, not having made any statement on the point, it could not be received as contradictory.

For the reasons given in the other judgments delivered, I concur in the view that the prisoner should be discharged. Under the Act constituting this Court, power is given it to order a new trial in criminal appeal cases; but, independently of the other reasons given, I at present entertain doubts as to the

propriety of our doing so, except in cases where a mistrial has taken place.

I have advisedly confined my judgment to the two points raised.

Appeal allowed.

CONTROVERTED ELECTION OF THE COUNTY OF CHARLEVOIX.

OSÉE BRASSARD, *et al*,

Appellants

(*Petitioners in Court below.*)

AND

HON. L. H. LANGEVIN,

Respondent.

*

Held:—That the election of a member for the House of Commons guilty of clerical undue influence by his Agents is void.

That sermon and threats by certain parish priests of the County of Charlevoix, amounted in this case to acts of undue influence, and are in contravention with the 95th Section of the Dominion Elections Act, 1874.

PER RITCHIE, J.—A clergyman has no right, in the pulpit or out, by threatening any damage, temporal or spiritual, to restrain the liberty of a voter so as to compel him into voting or abstaining from voting otherwise than as he freely wills.

This was an appeal from a judgment rendered by Mr. Justice Routhier at Malbaie, in the District of Saguenay,

*PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

Province of Quebec, dismissing the election petition of O. Brassard *et al.*, against the return of Hon. Hector L. Langevin, as member of the House of Commons for the Electoral District of Charlevoix.

The petition was brought under the Dominion Controverted Elections Act, 1874. The petitioners contested the election on the grounds of bribery, treating, *undue influence*, and of the employment, as agent and canvasser, of a scheduled briber.

On the argument in appeal the principal ground urged was, that certain priests of the County of Charlevoix had exercised, in and out of the pulpit, undue influence.

The principal questions to be decided were, whether certain sermons and threats made by parish priests in the Province of Quebec, to their parishioners during an election were to be interpreted as acts of undue influence within the meaning of the 95th section of the Dominion Controverted Elections Act of 1874 (*a*), and if so whether in this case the priests were to be considered as acting as agents for the Respondent.

By the evidence it appears that Hon. Mr. Langevin consented to become a candidate after one Onésime Gauthier had, at Respondent's request, secured for him the support of the clergy of the country; that he sub-

(*a*.) Section 95 of Election Act, 1874, is as follows:—

"95. Every person who, directly or indirectly, by himself or by any other person on his behalf, makes use of, or threatens to make use of any force, violence or restraint, or inflicts or threatens the infliction, by himself, or by or through any other person, of any injury, damage, harm or loss, or in any manner practices intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who, by abduction, duress or any fraudulent device or contrivance, impedes, prevents or otherwise interferes with the free exercise of the franchise of any voter, or thereby compels, induces or prevails upon any voter to give or refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence."

sequently met and visited the *curés*, and at public meetings declared that the members of the clergy were favourable to him. It was also proved that one priest, Rev. Mr. Gosselin, had publicly declared at Eboulements, in presence of Respondent, that "the clergy of the county had unanimously chosen Mr. Langevin, and had promised to support him."

The election took place in January, 1876. The two candidates were the Respondent and Mr. P. A. Tremblay. The pastoral letter of the bishops, extracts from which will be found in the following pages, was read previous to the election from the various pulpits of the parish churches, and sermons, in which references were made to the election in question, were delivered on the Sunday previous to the polling day by Rev. Mr. Sirois, curé of Baie St. Paul; by Rev. Mr. Langlais, curé of St. Hilarrion; by Rev. Mr. Fafard, curé of St. Urbain; by Rev. Mr. Roy, curé of St. Irénée; by Rev. W. E. Tremblay, curé of St. Fidèle; by Rev. Mr. Cinq-Mars, curé of St. Siméon; and by Rev. Mr. Doucet, curé of St. Etienne de la Malbaie.

The petition contained the two following counts in reference to undue influence:—

"7. Your Petitioners further say: That at the said ele on, before, during and after the same, the said Honorable Hector Louis Langevin by himself as well as by his agents and other persons acting for him and on his behalf, with and without his knowledge and consent, was guilty of the offence of undue influence and made use of spiritual and temporal intimidation, and that therefore the election and return of the said Honorable Hector Louis Langevin were and are absolutely null and void.

"10. Your Petitioners state that at, before, during

and after said election, a general system of bribery, of treating, of undue influence, of intimidation by spiritual and temporal threats, of personation, of inducing persons to commit personation, of hiring vehicles to convey voters to and from the polls, of payment of travelling expenses of electors in going to or returning from said election, all kinds of corrupt and illegal practices, was exercised in the interest of the candidature of the said Honorable Hector Louis Langevin, and that the said general system of corrupt practices was intended to and did in fact unduly influence a great number of electors to vote against the said Pierre Alexis Tremblay and in favour of the said Honorable Hector Louis Langevin, or to prevent them from voting, and that in consequence of the said general system of corrupt practices, the electors of the said electoral district were deprived of freedom of action, and that the said election instead of being the result of the free exercise of the will of the people, was but the result of illegal practices employed in favour of the candidature of the said Hector Louis Langevin, and, therefore, the said election and the return of the said Honorable Hector Louis Langevin were and are absolutely null and void."

After the filing of the Petition a motion was made on behalf of the Respondent, for particulars, in the following words :—

" 3rd. As to paragraph seven, the names, surnames and addresses of all persons guilty of undue influence, spiritual and temporal intimidation, and when and where such undue influence, spiritual and temporal intimidation was exercised, or when and where it was attempted to exercise the same and on what persons, with the names, surnames and addresses of the persons

upon whom such undue influence was exercised, or upon whom it was attempted to exercise the same ; in the second place, upon what class of persons such undue influence was exercised, or it was wished or attempted to exercise such undue influence, with as exact a description as possible of the class of persons, and showing in relation to each act the nature and character of the undue influence, and whether undue influence purely and simply or spiritual intimidation or temporal intimidation is in question.

6th. As to paragraph ten, each act which has not been already stated as a particular in relation to the preceding paragraphs, and which the Petitioners propose to prove in order to show a general system of bribery ; a general system of acts called treating ; a general system of acts called undue influence ; a general system of temporal intimidation ; a general system of spiritual intimidation ; a general system of personation ; a general system of subornation ; a general system of corrupt practices, with the names and addresses of the persons who practice the same or upon whom they were practiced, and when such acts were practiced, distinguishing whether an allusion is made to an individual or to a class of persons, and in such latter case to furnish as exact a description as possible of the class of persons upon whom such acts were practiced, with the place and date of each of the said acts."

The parties having been heard on the motion of the Defendant for particulars, the Court granted the said motion with costs, and the Petitioners were in consequence enjoined to deposit in the office of the Court and to supply the Defendant, on or before the first July next, with the particulars demanded.

The Petitioners then produced the following particulars:—

"4. The Reverend François Cinq-Mars, curé of St. Siméon, some days before the voting at St. Siméon, in the pulpit and out of the pulpit, stated to all the Roman Catholic electors of the said parish, and among others to Narcisse Bouchard, Johnny Desbiens, Abraham Tremblay, Michel Jusbeau, farmers; Michel Tremblay, beadle, and Séraphin Guérin, trader, that it was a case of conscience, a mortal sin, a heavy sin, to vote for the opponent of the Defendant.

"5. The Reverend Joseph Sirois, curé of Baie St. Paul, on the sixteenth of January last, and on the preceding and following days, as well in the pulpit as out of it, threatened with spiritual and temporal penalties, all the Roman Catholic electors of Baie St. Paul, and amongst others," [certain persons whose names are given.]

"6. The Reverend Ambroise Fafard, curé of St. Urbain, in January last, in the pulpit and out of it, at St. Urbain, threatened with the refusal and deprivation of the ordinary assistance that he was accustomed to give them, as well as with the deprivation of situations, employments and other advantages, all the Roman Catholic electors of the said parish of St. Urbain, and among others," [certain persons whose names are given.]

"7. The Reverend Ignace Langlais, curé of St. Hilarion, on the sixteenth of January last, and on the preceding and following days, at St. Hilarion, in the pulpit and out of it, intimidated by threats of spiritual penalties, if they voted for the Defendant's opponent, all the Roman Catholic electors of the said parish, and among others," [certain persons whose names are given.]

"8. The Reverend L. E. Lauriault, curé of Petite

Rivière St. François, in the said parish, on the 16th of January last, and on the preceding and following days, in the pulpit and out of it, intimidated by threats of spiritual penalties, if they voted for the Defendant's opponent, all the Roman Catholic electors of the said parish, and among others," [certain persons whose names are given.]

9. The Reverend W. Tremblay, curé of St. Fidèle, on the 16th of January last, and on the preceding and following days, at St. Fidèle, in the pulpit and out of it, intimidated by threats of spiritual penalties, if they voted for the Defendant's opponent, all the Roman Catholic electors of the said parish, and among others, Abel Maltais, Exé Gagnon, Emilien Bouchard, farmers, and Johnny Tremblay, trader.

" 10. The Reverend N. Doucet, curé of St. Etienne of Malbaie, out of the pulpit, stated to the Roman Catholic electors of the said parish, and among others, to Denis Harvey, Vital Harvey, Narcisse Harvey, farmers, Xavier Warren, hotel keeper (to himself and his wife), to Cyrille Guérin, senior, and Henri Guérin, farmers, that they would expose themselves to damnation by voting for Defendant's opponent.

" 11. The Reverend Mr. E. Roy, curé of St. Irenée, on the sixteenth of January last, and on the preceding and following days, in the pulpit and out of it, stated to the Roman Catholic electors of the said parish, and among others to Germain Lajoie, blacksmith, Jean Gauthier, Ferdinand Tremblay, Gilbert Bouchard, Octave Girard and Marc Bouchard, all farmers, that it was a case of conscience to vote for the Defendant's opponent.

Issue being joined, parties proceeded to *enquête*.

The evidence being very voluminous, and being re-

ferred to at length in the argument of counsel and the judgments of Justices Ritchie and Taschereau, it is deemed sufficient in this statement to insert the following extracts taken from the *exhibits* chiefly relied upon by the parties :—

"1. *Extracts from pastoral letter of the Bishops of the Ecclesiastical Province, 22nd September*, 1875.

" * * * * Each priest, on receiving from his Bishop the mission to preach and administer spiritual help to a certain number of the faithful, has, likewise, a rigorous right to the respect, love and obedience of those whose spiritual interests are confided to his pastoral solicitude.

* * * * * *

"This subordination does not prevent these societies from being distinct, because of their respective ends, and independent each in its proper sphere. But the moment a question touches faith, morals, or the divine constitution of the Church, her independence, or what is necessary for the fulfilment of her spiritual mission, she is the sole judge; for the Church alone Jesus Christ has said: "All power is given to me in heaven and on earth...As the Father hath sent me, I also send you... Going therefore teach ye all nations...He that heareth you, heareth me; and he that despiseth you, despiseth me. And he that despiseth me, despiseth him that sent me...He who will not hear the Church, let him be to thee as the heathen and publican, that is to say as unworthy to be called her child." (Matt. XXVIII., 18, 19; Luke X. 16; John XX. 21; Matt. XVII. 17.)

* * * * * *

"The Church is not only independent of civil society, but is superior to it by her origin, by her comprehensiveness and by her end.

"Undoubtedly, civil society originates in the will of God, who has ordained that men should live in society; but the forms of civil society vary with times and places; the Church was born on Calvary of the blood of a God, from His lips She has directly received her immutable constitution, and no power on earth can alter the form thereof.

* * * * * *

"*The part of the Clergy in Politics.*"

"Men bent upon deceiving you, Our Dearly Beloved Brethren, incessantly repeat that religion has nothing to do with politics; that no attention should be paid to religious principles in the discussion of public affairs; that the clergy has duties to fulfil, but in the Church and the sacristy; and that in politics the people should practice moral independence!

"Monstrous errors, O. D. B. B, and woe to the country wherein they should take root! By excluding the clergy they exclude the Church, and by throwing the Church aside they deprive themselves of all the salutary and immutable principles she contains, God, morals, justice, truth; and when they have destroyed everything else, nothing is left them but force to rely upon!

"Whoever has his salvation at heart should regulate his actions according to the divine law, of which religion is the expression and the guardian. Who does not understand how justice and rectitude would everywhere prevail, did rulers and people never lose sight of this divine law, which is equity itself, nor of the formidable judgment they shall have, one day, to undergo before Him whose look and strong arm nobody can escape. The people have, therefore, no greater enemies than those men who want to banish religion from politics, for under the pretence of freeing the people

from what they call *priest tyranny, priest's undue influence*, they are preparing, for the same people, the heaviest chains, and the most difficult to throw off: they put might above right, and they take from the civil power the only moral restraint which can stop it from degenerating into despotism and tyranny!

"They want to relegate the priest into the sacristy?

"Why? Because, forsooth, he has derived from his studies healthy and true notions on the rights and duties of every one of the faithful confided to his care? Because he sacrifices his means, his time, his health, even his life, for the welfare of his fellow beings?

"Is he not a citizen as much as others? What, the first comer may write, speak and act! sometimes are seen flocking towards a country or a parish, strangers, who come thither to fasten upon the people their political opinions; the priest alone can neither speak nor write! It will be permitted to whomsoever it pleases to come into a parish and hawk about all sorts of principles; and the priest who lives in the midst of his parishioners, like a father in the midst of his children, shall have no right to speak, no right to protest against the enormities which are uttered!

"Some who to-day cry out very loud that the priest has nothing to do with politics, but yesterday found this influence salutary; some who to-day deny the competency of the clergy in these questions, but lately extolled the sureness of principles which gives to a man the study of Christian morals! Whence this change, if not that they feel to act against themselves the same influence which they once called salutary and just, and which they are now conscious no more to deserve!

"Undoubtedly, O. D. B. B., the exercise of all the rights of a citizen, by a priest, is not always opportune;

it may even have its inconveniences and its dangers; but it must not be forgotten that it belongs to the Church alone to give to her ministers the instructions she thinks fit, and to reprehend those who depart therefrom, and the Bishops of this Province have not failed in their duty on this point.

"So far we have looked upon the priest as a citizen, and speaking politics in his own and private name, as any other member of civil society.

"Are there questions in which the Bishop and the priest may, and even sometimes should, interfere in the name of religion?

"Without hesitation we answer: Yes, there are political questions in which the clergy may, and even should, interfere in the name of religion. The rule of this right and of this duty is to be found in the distinction we have already pointed out between Church and State. Some political questions, in fact, touch the spiritual interests of souls, either because they may affect the liberty, the independence, or the existence of the Church, even in a temporal point of view.

"A candidate may present himself whose platform is hostile to the Church, or whose antecedents are such that his candidature is a menace for these same interests.

"A political party may likewise be judged dangerous, not only by its platform and by its antecedents, but also by the particular platforms and antecedents of its chiefs, its principal members, and its press; if this party does not disown them and definitely separate therefrom, when, having been warned, they persist in their error.

"Can a Catholic, in these cases, without denying his faith, without proving himself hostile to the Church of which he is a member; can a Catholic, we repeat, refuse to the Church the right to defend herself, or

rather to defend the spiritual interest of the souls confided to her? But the Church speaks, acts, and combats by her clergy, and to deny those rights to the clergy is to deny them to the Church.

"The priest and the Bishop may then, in all justice, and shall, in conscience, raise their voice, point out the danger, and authoritatively, declare that to vote on such a side is a sin, that to do such an act makes liable to the censures of the Church. They may and should speak, not only to the electors and candidates, but even to the constituted authorities, for the duty of every man who wishes to save his soul is marked out by the divine law, and the Church, like a good mother, owes to her children of every rank, love, and consequently spiritual vigilance. Therefore, to enlighten the conscience of the faithful, on all these questions which concern their salvation, is not converting the pulpit of truth into a political tribune.

"Doubtless, O. D. B. B., such questions do not arise every day, but that this right exists, no Catholic can deny.

"The nature of the question makes it evident that, to the Church alone, it belongs to determine, under what circumstances, she should raise her voice in favor of Christian faith and morals.

"It may be objected that the priest is liable, like every other man, to exceed the limits assigned him, and that then the State has the right to recall him to the path of duty.

"To this we answer: Firstly, that it is offering a gratuitous insult to the whole Catholic Church, to suppose that in her hierarchy no remedy can be found to the injustice, or to the error of one of her ministers: in effect, the Church has her regularly constituted tribu-

nals, and whoever thinks he has grounds of complaint against a minister of the Church, should arraign him, not before the civil, but before the ecclesiastical tribunal, alone competent to judge the doctrine and the acts of the priest. Therefore, Pius IX in his Bull *Apostolicæ Sedis*, October, 1869, declared struck with a major excommunication such as, directly or indirectly, oblige lay judges to arraign ecclesiastical persons before their tribunal, against the dispositions of canon law.

* * * *

"Secondly: When the State shall invade the rights of the Church, trample under foot its privileges the most sacred, as this happens to-day in Italy, in Germany and in Switzerland, were it not the height of derision to give to this same State the right to gag its victim?

"Thirdly: If they lay down the principle that a power no longer exists, because some one may abuse it, all civil powers must be denied, for all such as are invested therewith are fallible men."

EXTRACTS *from circular letter to the Clergy, accompanying pastoral letter of 22nd September*, 1875.

"These adversaries of religion, who however, pretend to the name of Catholics, are the same everywhere; they flatter those among her ministers whom they hope to gain to their cause; they insult, they outrage the priests who denounce or fight their perverse designs. They accuse them of exercising an *undue influence*, of turning the pulpit of truth into a political tribune; they dare sometimes to drag them before the civil courts to give an account of certain functions of their ministry; they will, perhaps, endeavor even to force them to grant a Christian burial in spite of ecclesiastical authority.

"In view of such threatenings, several among you, gentlemen, have asked us to trace for them a line of conduct. It is clearly pointed out in the canonical rules.

"1. A priest, accused of having exercised an *undue influence* in an election, for having fulfilled some priestly office, or given advice as preacher, confessor or pastor, and being summoned before a court, should respectfully but firmly challenge the competency of the civil court, and plead an appeal to an ecclesiastical court.

"2. A priest who, having exactly followed the decrees of the Provincial Councils and the Orders of his Bishop, would, nevertheless, be condemned by a civil court for *undue influence*, should suffer patiently that prosecution for the sake of the holy Church."

ANALYSIS *of a Sermon by Mr. Sirois, Priest and Curé of St. Paul's Bay.*

"Notice proceeding from the pastoral letter (*mandement*) of our Lords the Bishops, to be given to my parishoners on the Sabbath before the voting, the 16th day of January, 1876.

"MY BRETHREN,—It is with sorrow and sadness that I see myself under the necessity of making you acquainted with the grief I experience at this moment, with respect to certain light and disrespectful expressions which several of you are allowing yourselves to utter against our Bishops, their pastoral letter (*mandement*) and against the clergy. It seems that I ought not, in these days of excitement, to lift up my voice to give these Christians to understand how wrong they are in speaking in that manner, and that I am astonished to see them criticize to-day those whom they respected yesterday.

"While thanking you for the kind reception which you have given me, I cannot refrain from expressing to you how grieved I am with the unchristian manner with which some people are speaking ill of the priests in our days. How can we explain the improper and unjust criticisms which in these days several of you are making against the Pope, the bishops and the priests? Ah! brethren, I understand it; you have listened to the speeches of certain men who have come from afar to put you on your guard against the clergy, to utter a thousand falsehoods and a thousand calumnies.

"Beware! brethren, they are false prophets, ravening wolves who come to raise a disturbance in the flock, who come to tell you that the Pope, the bishops and the Clergy have nothing to do with politics. Beware of their perverse teachings! they want to seclude the Priests in the church and the vestry in order to succeed better in their unchristian work, which is to scatter and divide the flock of Jesus Christ.

"These false prophets will tell you that the priests go too far in the time of elections, because they are afraid of losing their rights and their tithes. Yes, brethren, we can never go too far in defending the rights of truth.

* * * *

"Allow me, brethren, to show you the inconsistency of the expression of some of you, with their general conduct. Are they sick? Is one of their animals sick? Have they any difficulty?—they come immediately to ask the priest for remedies and advice. They have a full confidence then; and how is it that in the time of an election these very same Christians speak ill of the priests, refuse them the right and competency

to enlighten and counsel them in a matter of the highest importance, such as the importance of giving a vote. Know ye well that one day God shall ask you to give an account of it before His formidable tribunal. Is it not true that on your death-bed you would reproach yourselves bitterly if your conscience should upbraid you for having contributed, by your vote, to the election of men who wish to separate the Church from the State, and who are working to destroy the confidence which you are to have in the priest?

* * * *

"For you, brethren, bind yourselves to the Holy Church, to the salutary teachings which she gives you through the voice of her pastors, if you wish to escape the woes which the false prophets of our day prepare for us. Yea, listen to those to whom it has been said: 'Go ye and teach all nations.' As long as you will remain docile to them, fear not to err. Be deeply impressed with the truths set forth in the last pastoral letter (*mandement*) of our Bishops, on the Constitution of the Church, on Catholic Liberalism, and on the office which the clergy is to fulfil in the time of elections. Your chief pastors have not made this pastoral (*mandement*) for the United States, but for the Province of Quebec; they do not wish to warn you against phantoms, but, indeed, against Liberalism and its partizans; then, do not listen to those who tell you that there is no Liberalism in our country, that the pastoral (*mandement*) condemning and denouncing it has no right to be issued because those who are the authors of it (Liberalism) do not exist in our country. You shall see men having outward appearances of piety and religion allow themselves to be fascinated without suspecting it, by the deceitful words of the serpent

Catholic Liberal. You know in what manner the serpent found his way into the terrestrial paradise, with what cunning he succeeded in convincing Eve that she should not die, nor Adam either, by eating of the forbidden fruit. You all know what took place; the serpent was the cause of the misfortunes that are weighing upon us. In the same manner Catholic Liberalism wishes to find its way into the paradise of the Church to lead her children to fall. Be firm, my brethren, our Bishops tells us that it is no longer permitted to be conscientiously a Catholic Liberal; be careful never to taste the fruit of the tree Catholic Liberal. * * *

"Respect, my brethren, the holy hierarchy of the Church, that is, the Pope, our Bishops and your pastor. As long as I shall remain in communion with my Bishop, as long as I shall preach to you the sound doctrine, you are to obey and hear me. I am here your legitimate pastor, and consequently to enlighten, instruct and counsel you; if you despise my word, you despise the word of your Bishop, then of the Pope, and even thereby the word of our Lord who hath sent us. You will perhaps say: 'You go too far; you have your own political party, and, therefore, you cannot force us to follow your opinion.' My brethren, if you believe the declarations of the first comer, whom you do not know, will you believe me if I declare to you that I have no political party? Yea, believe me, I have no party but that of good principles, I have no politics but those of teaching and defending them. * * * *

"Do you see, my brethren, how the priest is respected by certain persons? They are not afraid to compromise him by publishing private letters. Do you not see that the design of Catholic Liberalism is, indeed, to labour to

break the bond which unites the members of the Holy Church. * * * * * * *

"Once more, then, brethren, beware of these false prophets who wish to bring disunion between you and your legitimate pastors! Do not listen to their falsehoods and their calumnies. Obey the Vicar of Jesus Christ condemning Catholic Liberalism. Obedience to our Bishops who have pointed out to us its tenderness, obedience to your pastor who tells you to vote according to your conscience, enlightened by the pastoral letter (*mandement*) of our Lords the Bishops of the Province of Quebec."

ANALYSIS OF REV. MR. LANGLAIS' SERMON.

"ST. HILARION, April, 1876."

"To My Lord, the Archbishop of Quebec:—

"We, the undersigned, parishioners of St. Hilarion, solemnly declare that our priest did not say on the 16th day of January last.

"1. That the parishioners of St. Hilarion were crooked heads; but that there are among us some crooked heads, who, instead of submitting themselves to the decisions of the Church and obeying the letter of our bishops, make a pastime of keeping and increasing discord in the parish.

"2. He did not speak of the Conservative party, but said that we could not conscientiously vote for a Liberal candidate when he is known to be such.

"3. He did not say, in a general manner, that those who should vote for a Liberal candidate would sin mortally; but, that to vote for a Liberal candidate through contempt of the decisions of the Church, constituted a serious fault.

"4. It is absolutely false that he said that there are people, in the parish, who call themselves Catholics,

and who are Garibaldians, and make war against the Pope. Here is as much as we can remember of what he has said: 'You are to be called, this week, to choose a man to represent your interests in Parliament. I will, tell you to vote according to your conscience, enlightened by your superiors.' Do not forget that the bishops of the Province assure you that Liberalism is 'like the serpent which crept into the terrestrial paradise to tempt and lead the human race to fall.'

"According to our bishops, the Liberals are deceitful men; then you must not follow them if you do not wish to be deceived. Liberalism is condemned by our Holy Father, the Pope The Church condemns only what is evil; now Liberalism is condemned, then Liberalism is bad, and, therefore, you ought not to give your vote to a Liberal, your bishops declare it openly."

"Moreover, your first pastors tell you that 'the priest and the bishop can justly and must conscientiously lift up their voice to point out the danger, and declare authoritatively that to vote in a certain way is sin.'

"Now, if sometimes it is sinful to vote in a certain way rather than in another way, it cannot be, assuredly, when you are voting according to the wise counsels of all the bishops of the Province; and if it is not in that way, it must be in the opposite. However, I must tell you that if you are voting for a Liberal candidate, not believing him to be so, because your conscience tells you that he is the man that will best represent your interests in Parliament, in such a case you do not sin. But if you know that he is a Liberal, you cannot conscientiously give him your vote; you are sinning by favoring a man who supports principles condemned by the Church, and you assume the responsibility of the evil which that candidate may do in the application of the dangerous principles which he professes.

"And mark, brethren, it is not sufficient for a candidate to be a Catholic in order to deserve your votes; because it is not precisely the man whom you are to consider, but the political principles as well as the principles of the Government which he supports.

"Victor Emmanuel is a Catholic, Garibaldi is a Catholic, and yet this does not prevent them from rebelling against the Church and from making war against our Holy Father the Pope, and from keeping him a prisoner in his castle. In the same manner, the Liberals make war against the Church, for Jesus says: 'He that is not with me is against me.'

"Now the Liberals are against the Church, since she condemns them; therefore they make war against the Church, since they refuse to yield to her teachings.

"Remember, my dear children, that you shall have to render to God an account of the vote you will cast this week. Tell me on what side would you prefer to be at the hour of your death? Is it on the side of the Church, of your Sovereign Pontiff and your Bishops? or on the side of Victor Emmanuel and Garibaldi? Consider, and decide like men and not like children.

"The act which you are going to perform has, perhaps, more importance than you could imagine.

"What is important, then, is to have your conscience enlightened by those whom you believe capable of advising you well, and to follow your conscience, thus enlightened, as far as you can. By doing this, God will not reproach you, and, consequently, I shall not do so myself.

26th January, 1877.

Mr. *J. Bethune*, Q.C., of the Ontario Bar, and Mr. *F. Langelier*, of the Quebec Bar, for Appellants;

It may be said with perfect truth no more important

consideration can be presented to a Court of Justice than that which is involved in this case, viz.: the freedom of election. The principle upon which Mr. Justice Routhier has determined the case was to think himself incompetent, and that the law of the Church is superior to the law of the land. That being the case, whatever may be the result, the petitioners are entitled to have a judicial opinion on this point. Now, no such immunity as put forward in the Respondent's factum exists in the Province of Quebec. In support of this immunity, is cited the fourth article of the Treaty of 1763, by which "His Britannic Majesty, on his side, agrees to grant the liberty of the Catholic religion to the inhabitants of Canada; and will, consequently, give the most effectual orders that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Romish Church, *as far as the laws of Great Britain permit.*" These last words indicate a limitation. It was so decided by the Bonaventure case lately in Quebec.

How far these pretensions are well founded will be ascertained by referring to Statutes at Large, (1) by which the free exercise of the religion of the Church of Rome was granted, subject to king's supremacy, declared and established by an Act made in the first year of the reign of Queen Elizabeth. By the form of oath, subjects were obliged to renounce all foreign allegiance even in matters of faith, and, consequently, a new oath was framed. The Quebec Act of 1791 was passed to show the desire to make our constitution similar in principle to that of England. Moreover, the first lines of the B.N.A. Act shew that desire; they are as follows: "Whereas the Provinces of Canada, Nova Scotia and

(1) Vol. 8, p. 406; sec. 5 of c. 83, 14 Geo. III.

New Brunswick have expressed a 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." Now, the effect of these Acts must make the Province of Quebec subject to the English Constitutional system.

In the early cases in Ontario, the point came up how far the Common Law of Parliament was available and in force in this country. In *The Queen* vs. *Gamble et al.* (1) the law is laid down on that point.

By the "Rectories' Act," (2) which is continued by the 129th section of the B.N.A. Act, and which is applicable to both provinces, a direct subordination of the laws of the church to the laws of Canada is enacted. It may be said that it only dealt with the secularization of the clergy reserves, yet it is wider than that, for it is stated that they "*all denominations*" shall be free, subject to the control just mentioned. This Act has not been repealed.

Undue influence has always been a subject of statutory enactment. It is admirably treated in Warren's book on Elections, (3). Freedom of election lies at the basis of our constitutional rights.

What are the facts in this case? In Quebec and specially in Charlevoix the electors are Catholics. Before the election a document signed by all the bishops was read in all the churches of the County. It is important to see what this document, a pastoral letter, contains to connect it with what was said in the pulpit afterwards. It is declared the Church is not only independent of civil society but is superior to it.

(1) 9 U.C.R., p. 546; (2) Con. St. of C., ch. 74, p. 857; (3) Edt. 1857, p. 409 to p. 419.

Now nearly all the *curés* have construed that in such a way as to believe they had the right to tell their parishioners how to vote, and to apply all that is said on Catholic Liberalism to the Liberal candidate, Mr. Tremblay. The pastoral claims for the priest all the rights of a citizen, but, moreover, it declares that the priest is not subject to the control of the tribunals of the land, and yet *authoritatively declares that to vote on such a side is a sin, that to do such an act makes liable to the censures of the Church.* What stronger language can be used? We do not deny the priest his right as a citizen, but we protest against his assuming the right of making a voter liable to the censures of the Church. In the evidence a great deal has been said about Garibaldi and Victor Emmanuel. It will be seen how the sermons were in accordance with the pastoral. Allusion is there made to what happens to-day in Italy, and Victor Emmanuel is known as having taken away the Pope's temporal power.

Besides this pastoral, a circular letter was sent to the clergy, and as petitioners argue that there was a union of priests to promote Respondent's candidature we refer to the following lines: "Before every thing else, we must insist upon the union which should prevail among all the members of the sacerdotal order." The intention it is evident was not to deal only with matters of faith but also to act in matters of election. If so, we contend that if there is a conflict between these immunities and civil rights, the immunities must be subordinate.

[Here the learned Counsel referred to the circumstances under which the Respondent became a candidate.]

Now I shall take up the evidence which brings the clergy within the pale of the law.

1st. Analysis of a sermon by Mr. Sirois, of Baie St. Paul, delivered on 16th day of January, 1876, Sunday previous to the polling day. It is to be remarked that this document was prepared to answer a charge brought against the curé before his Archbishop, and that we can believe it was more colored when pronounced. Yet it is such a sermon as to be destructive of the freedom of the *habitants* who heard it. In it there is a declaration that they are bound to obey the priest. Now are these simple *habitants* free agents with such a declaration? We are told that the Protestant clergy might say such words. But there is this difference between Protestants and Catholics. Protestants are not bound to this doctrine of obedience. Undue influence is a question of degree. What may be undue influence to one class of people may not be to another. There are cases of undue influence with reference to property, viz: Huguessin *vs.* Basely, (1) and case of Holmes the Spiritualist. Undue influence begins the moment the party ceases to be a free agent. As to the evidence which has reference to this sermon, see depositions of Xavier Larouche, Frs. Turgeon, A. Girard, Oct. Simard, Z. Perron, Florent Coté, Pierre Danielson, Boniface Larouche, J. B. Bolduc, L. Pilote, Maurice Bouchard, Etienne Pàquet, and Emile Jacot.

The evidenee on the other side is what I may call negative evidence; but still the Respondent's witnesses went too far, for they said that in the sermon there was no reference to elections. Now, the analysis of the sermon, which they signed, proves the contrary.

The learned Judge who tried the case has found, as a matter of fact, that four or five persons have been influenced by the sermons; but he has declared that

(1) White & Tudor, Leading cases.

it was not a ground for setting aside the election. Under the Dominion Act the law requires but two things. 1st. That an Act of undue influence has been proved, and 2nd. That agency has been proved. Now it would seem that the learned Judge had in his mind the law as introduced in Ontario, which declares that if the acts complained of were not sufficient to disturb the election, they will not affect it. The Dominion is the old law as interpreted in O'Malley and Hardcastle. (1)

The next sermon is that of the Rev. Mr. Langlais, *curé* of St. Hilarion. [See analysis of the sermon and evidence relating to it.]

The next sermon is that of Rev. M. Fafard. Two witnesses, Pitre Gilbert and Dominique Duchesne, have related the sermon preached by the Rev. Mr. Fafard on the 16th of January. Their testimony agrees perfectly with the solemn declaration sent, shortly after the election, to His Grace the Archbishop of Quebec, and proved by the witnesses for the defence. This declaration forms part of the record.

As to Rev. Mr. Roy's sermon, cure of St. Irénée, I refer to testimony of J. B. Gauthier, Gilbert Bouchard, Ferd. Tremblay, L. O. Gauthier, and Geo. Tremblay.

It was with reference to Rev. Mr. Tremblay's sermon, *curé* of St. Fidéle, when Abel Maltais was examined, that the immunity of the clergy was raised. The objection reads as follows.—"Objected to by the Defendant: 1st. Because the Petitioners have no right to bring evidence before this tribunal of any fact or act done by the Rev. Mr. Tremblay in his capacity of priest or curé of the Parish of St. Fidéle, in the pulpit of the church of St. Fidéle, and in the exercise of the functions of his ministry; 2nd. Because this tribunal is incom-

(1) Vol. 1, p.p. 52, 173, 240.

petent to pass a judgment on the conduct of an ecclesiastic in the exercise of the functions of his ministry, inasmuch as an ecclesiastic is only responsible for his conduct to his ecclesiastical superior and to the ecclesiastical tribunals; 3rd. Because no ecclesiastic can be summoned before a civil tribunal, either as plaintiff or as defendant, or as a witness, without his having previously obtained leave from his ecclesiastical superior, and that such leave has not been produced in the case; 4th. Because, in fact, Rev. Mr. Tremblay has already been summoned before his ecclesiastical superior to answer the same charges made in this case and for the words he spoke in the pulpit, and of which it is wished to give evidence in this cause." The witnesses examined on this sermon are J. Tremblay, (p. 21) who established the fact that the *curé* said *there was no difference between Catholic Liberalism and Political Liberalism;* Abel Maltais, E. Bouchard and D. Dassylva, of those admitted to have been influenced; Alexis Gagnon, D. Gauthier and T. Brassard. The importance of some of this evidence is to judge of the intelligence of the people, and having got that, you are then able to judge of the influence exercised and to find if it was undue and to what degree. It is always difficult to get direct evidence; one man remembers one thing and another man another thing, and the mischief is increased by being perpetuated by each channel through which is is repeated.

The next case of clerical undue influence we have to deal with is that of Rev. Mr. Cinq-Mars. The first witness I will refer to is the Rev. Mr. Cinq-Mars, who is the only *curé* examined in this case, and that by the Respondent. His evidence is important; he proves the pastoral letter. It seems he was brought up as a witness to contradict Johnny Desbien's evidence as to

who was present when the *curé* spoke to him of the election.

We get the declaration that disobedience to the pastoral letter is a grievous sin. The words, "I then explained that *sub grave* meant under pain of grievous sin," is a most positive declaration on this point. We have a distinct avowal of the purposes for which he made that statement, viz.: to condemn Mr. Tremblay's party. While on this part of the witness' deposition, I will remark the following answer with respect to the question of agency: "State whether the following passages contain the truth as to the action of the clergy, &c., * * * '2nd. In the first place let us say distinctly that the clergy of Charlevoix are not ashamed of having accepted the candidature of Honorable H. Langevin, and of having done the best in his favor, while restricting themselves within the limits of the Provincial councils, the pastoral letters and the civil laws.' Answer: "I admit the truth of what is stated in the 2nd extract."

The proper deduction from Curé Cinq-Mars testimony is that he told his parishioners that, inasmuch as Mr. Tremblay professed Liberalism it would be a grievous sin to vote for Mr. Tremblay.

[The learned Counsel then commented on Judge Routhier's judgment and argued against the arguments put forward by him in favor of the personal immunity of the clergy in the Province of Quebec.]

It is manifest from this judgment that he considers there exists on the part of the clergy some personal immunity. An attempt is also made to declare them not liable to be summoned before a Court. I take it there is no such immunity which prevents them from being summoned. There are some well-known privi-

leges, such as the Advocate's privilege, as to what has taken place between him and his client.

But in this case no privilege was sought for by these gentlemen, it is the Defendant who deliberately raises the objection. In the Bonaventure case, in Province of Quebec, lately decided, that point was disposed of, and all three Judges came to the conclusion that the privilege did not exist. In Ontario it does not exist. Surely the Catholic doctrine on this point must be universal as well as on other points. The learned Judge refers to the celebrated case he decided at Sorel, "*Derouin* v. *Archambault*," (1) in which he invoked the privilege of ecclesiastical immunity in order to declare himself incompetent. This decision was unanimously reversed by the Court of Review at Montreal. Reference is made that no accusation was served on them in virtue of section 104, 37 Vic., chap. 9. They are not liable under the Act of 1876. This Act cannot have a retroactive effect, and this is not asked. What the learned Judge means, is to set up judicially this personal immunity. He puts the question, that if any person may come to the church door and speak, why not the clergyman? The fallacy is that they do not stand on the same footing. The one is speaking *ex-cathedra*, he is laying it down as part of their faith. Now if you find the clergy all arrayed on one side, stating that a party is condemned as a matter of faith, and to put you under pain of sin or grievous sin, can it be said fairly they occupy the same position as others? The Legislature intended to give each man his franchise, and the law, as enacted, was found necessary to give him freedom. If the clergy had gone outside of the church and had addressed the electors as citizens, it might be said

(1) 5 Revue Legale p. 308.

they were right. But when they bring to bear to support their candidate, the power of the Church, with its censures and penalties, I maintain there can be no freedom. In such cases the priest brings himself within the pail of the law. The learned Judge then goes on to say that the intention of the Legislature in adopting this law was not to limit and restrain the liberty of ecclesiastical preaching. The law is not new, it was in the Statute of Canada, 1860, p. 47, and this was framed on the English Act of 1854. The judicial interpretation given to this law in the Galway case was to extend it to priestly influence. Is it not fair to believe that the Dominion Parliament intended it to apply to this influence. There are numerous cases in Great Britain decided in accordance with this view. I will refer to the Mayo case, Dublin case, Galway case, Longford case, and Tipperary case. (1)

The interpretation of the Dominion Act should be according to the precedents and conclusions arrived at. There is no reason why the influence of the priest should be greater in Ireland than in the Province of Quebec. On the contrary, here the priest has not only a spiritual power but he has a temporal power, that of enforcing the payment of the tithes to which he is entitled by the law of the land.

All religious tests have been abolished, and no test is required from the candidates. A Free Thinker can be a candidate. Now, if the pastoral and circular in this case, together with the judgment rendered by the Court below, be carried into effect, would it not be imposing a test which Parliament has not thought proper to impose, as far as Lower Canada is concerned? The question is, after all, which policy is to be supreme,

(1) 11 vol. of O'Malley and Hardcastle.

the Church or Parliament? Now, if a Church exists in Lower Canada, either as a State Church or as a voluntary association, it is by virtue of the law of the land; is it reasonable, then, for the clergy to make war on Civil Law, which allows them to collect tithes, The measure of freedom should be the same for Catholics as for Protestants. There is no freedom if they are allowed to denounce the voters from the pulpit. Nor is it right to the Protestant element in the Dominion that the *habitants* should not be free. If you impose the restraint of the priest on the electorate, what would be the result. The candidate would have to go, hat in hand, to these gentlemen, and, when elected, they would be members representing the powers of the Church.

As to necessity of specific threats, it is a question of power, and a general threat is as great power as a specific threat. The particular form of words used makes no difference. They are told, you commit a grievous sin if you take a particular course. Refusal of sacraments is only one form of censure.

The circular tells them to be united; a meeting is held at Baie St. Paul, and they all decide to support the candidature of Respondent. How could this pastoral be discussed, when the elector is told that the priest is speaking the Divine word, and that he is bound to obey the Church?

As to the question of agency, refer to the summary of the conclusions of the judgment. There is not a word of agency, which proves that the agency was thought so plain that it was unnecessary to comment on it.

From the evidence of the Respondent, it is clear that the priests of the County of Charlevoix were, collectively and singly, his agents.

By law, agency may be inferred from the existence of facts. Take the case of bribery. A candidate tells his agent not to bribe, yet, if he does bribe, the law makes the candidate responsible. The view taken in all cases is, that if you find a candidate and another person making common cause, working together, &c., there is agency, and the reason is that inasmuch as the candidate takes the benefit of this person's acts he must take the responsibility. *See* Limerick case, (1) on this point; Galway case. (2) Implied authority results from any act or word of the candidate which implies that he wants another person to work in order to secure votes to him, or that he knows that person to be so working, and does not disallow his conduct. (3)

I submit undue influence has been established because Judge Routhier admits this fact, and that though, as a matter of fact, it might not have changed the result of the election, as a matter of law, the election should be voided.

Mr. *F. Langelier* :—

As to intimidation by Rev. Mr. Doucet upon Denis Harvey.

Denis Harvey declares that the Rev. Mr. Doucet, *curé* of that parish, said nothing in the pulpit against Mr. Tremblay ; it was in private conversation that he spoke against him.

He has heard reports of sermons preached by the *curés* of the other parishes of the county ; he is alarmed on being told that if *Mr. Tremblay is elected, religion will be abolished before two years have elapsed.* He goes

(1) O'Malley & Hardcastle, P. 262, (2) 2 O'Malley & Hardcastle, P. 53 and 54, Bushby, P. 117 to 121. (3) O. & H., Vol. 1, P. 55, 26, 17, 183 and Vol. 2, P. 73, 74, 102, 103, 136, 137. Rogers on Elections, p. 500, 509, 511, 515. Cornwall Election, 10 L. J. U. C. P. 314. North Wentworth, 11 L. J. N. S. P. 198 and 328.

to his curé expressly to consult him. Mr. Doucet says to him that it is true Mr. Tremblay, his parishioner, is a perfectly honest man, capable of rendering great services to the country, but that he *supports a dangerous party.* "*I will read the pastoral letter of the Bishop's next Sunday,*" he adds: "*after that, those who wish to lose their souls may do so* (*ceux qui voudront se perdre se perdront.*") Denis Harvey declares he understood that these words were directed against Mr. Tremblay, and certainly he could not otherwise understand them.

This fact related by Denis Harvey is very important, not on account of its intrinsic value, but as it establishes how unanimous the *curés* were against Mr. Tremblay. Mr. Doucet is known to be a very moderate man, a priest of exemplary prudence; he never interfered in politics. So much so that in the preceding elections his opinions could not even be surmised. But in this election, the action of the clergy was so decided that he could not resist the movement, and was carried as it were against his will by the force of the current.

[The learned Counsel referred to some further evidence bearing on the question of undue influence, and then commented on the Galway case, showing that that case was in point, and that the law should be interpreted here as it was in the Galway case. He concluded by stating that the corrupt practices with which the Petitioners had charged the Respondent were sufficiently proved to have the election declared void by the Court.]

Mr. *J. Cockburn*, Q. C., of Ontario, and Mr. *C. H. Pelletier*, of Quebec, for Respondent:---

Assuming that the priests of the County of Charlevoix, have preached against Catholic Liberalism, and that it has had some effect on the electors, we contend that by

the Quebec articles of capitulation, by the treaty of Paris, and by the Imperial Act 1791, absolute freedom in the exercise of their religion was granted to the Roman Catholic inhabitants of the Province of Quebec. These privileges and rights have not been taken away by any Imperial or Dominion Act. It cannot be held that the general language used in the 95th section of the Dominion Controverted Election Act, has taken away these rights so as to prevent priests speaking in the pulpit against a candidate who would be *e. g.* in favor of establishing Divorce Courts in the Province. The pastoral letter written long before the election is simply an exposition of the Catholic doctrine on certain subjects. It is the duty of every Catholic priest to preach in accordance with his Bishop's instructions, and the liberty of preaching necessarily forms part of the free exercise of their religion. We submit, therefore, that they had a right to so preach, and that their sermons cannot be treated as spiritual intimidation within the meaning of the Irish cases cited by Appellant's Counsel.

The County of Galway case indeed is quite different from that of Charlevoix.

In the Irish case, the record shows that several bishops and about fifty priests had been constantly in communication with the candidate Captain Nolan; that, in order to induce him to withdraw at a previous election, they had pledged themselves verbally and in writing to support him against any comer; that, later, when the county was once more vacant, this candidate requested them by letters to call meetings; that he was present at meetings where these clergymen used excessively violent language, and that finally he thanked them for it.

In their sermons, the parish-priests here, have been

content with reading the pastoral-letter which the Bishops of the Province had published in the month of September, 1875, not on account of this election, but on account of the principles which should be propounded and defended. Thus, after reading this pastoral-letter, the pastors confined themselves to commenting upon it generally, without applying it to the political parties which divide this country and to the candidates who were before the people in Charlevoix. They explained the doctrine of the Catholic Church with respect to the several subjects touched upon in this pastoral-letter, without attacking or insulting any political party or any candidate.

There is, therefore, no parity between the Galway County election, and that of the County of Charlevoix.

The learned Counsel then referred to the Borough of Galway case decided by the same Judge, (1). also to Brickwood & Croft (2.)

As to the *quantum* of intimidation there can be no comparison as the evidence shows that they were only four cases. The case of Bonaventure is not in point. There threats were used and the sermons were delivered in the presence of the Respondent. Since the ballot, the free exercise of the franchise is full and complete and a person can no longer be influenced to vote for one in preference to another.

As to the question of agency—none has been proved. The Respondent positively denies that the members of the clergy were employed by him. If the priests were acting as agents it was as agents of the Bishop and not of Respondent.

The words imputed to Defendant cannot constitute the priests his agents. If he had said I will come

(1) p. 344, Prlt. Papers, Election Petitions, 1868-69. (2) pp. 120, 212, 216, 218.

forward provided the manufacturers are favorable to my candidature, would that constitute all the manufacturers his agents?

To establish an agency you must prove that the party has agreed to canvass and procure votes. See Brickwood & Croft, (1); O'Malley & Hardcastle, (2); Borough of Galway case, 1874, (3.) Priests doing nothing more than preaching doctrines of their church can not be declared agents of the Respondent. Moreover, in this case it is proved that Mr. Tremblay tried to get the support of the clergy and not having been successful, he surely cannot charge Respondent because they preferred to be favorable to him. The clergy has the civil right as well as other persons of volunteering their united support to a candidate.

When the petitioners attempted to prove the acts with which they charge seven of the parish priests of Charlevoix we made the following objection, which has been repeated for every similar case, viz:—

"Objected to this evidence by the Defendant:

"1. Because the Petitioners cannot prove before this tribunal any fact, any act performed by the Reverend Mr. Wilbrod Tremblay, in the pulpit, in the church of St. Fidèle, in his capacity of priest and parish priest of this parish, and in the exercise of the functions of his office;

"2. Because this tribunal is incompetent to judge an ecclesiastic's conduct in the exercise of the functions of his office, in as much as this ecclesiastic is answerable for his conduct only to his ecclesiastical superior and to the ecclesiastical tribunals;

"3. Because no ecclesiastic can be summoned before a civil tribunal either as plaintiff, either as defendant,

(1) p. 32, s. 2; (2) p. 197; (3) p. 37.

or as a witness, without leave from his ecclesiastical superior, and that such leave is not fyled in this case;

" 4. Because in fact the Rev. Mr. Tremblay has already been summoned before his ecclesiastical superior, to answer the same charges that are made in this case, and explain the words he is accused of having uttered in the pulpit, all which is attempted to be proved before this tribunal."

This objection, which has been reserved on its merits, raises a question of the highest importance in a social and religious point of view; for it leads to the discussion of the relations which should exist between Church and State.

We affirm, as an incontestable and uncontested fact, that the Church is perfectly free in this country. This freedom is not denied by the petitioners, who are Roman Catholics, and who cannot complain should they be judged according to the rules of their church, inasmuch as these rules are recognised by the law of this country.

The Church being free, the civil law cannot fetter its action.

The reasons given to sustain our objections may be summed up as follows :—

This Court has not the right nor the competence to appreciate the evidence produced in this case, with respect to the acts of certain parish priests, because the Catholic doctrine formally denies to civil tribunals the right of judging either the teachings of the Church or its ministers. Should we establish our proposition, viz : that the doctrine of the Church does not admit in civil tribunals the competence to judge its teachings and its ministers; we shall have the right to conclude that the evidence produced before this tribunal is illegal,

and that consequently it must be rejected from the record and considered as null and void. The Catholic Church is a perfect society. In this case, we claim for the Church the right to exercise freely its functions. We want that its legislative, executive and udicial power be not overlooked by civil society. Thus we maintain that the petitioners deny to the Church the possession and exercise of these rights, when they attempt to submit to the State, represented by this Court, the judgment of its legislation, of its doctrine and of its ministers. The proof, under reserve of objection, has been made of certain sermons of the parish priests of Charlevoix, as well as of certain other words spoken by them out of the pulpit. Had the Court the right of examining this evidence, it would have the equal right of appreciating it, judging its meaning. Consequently the Court would have the right of judging the doctrines, the preaching, the teachings, the ministers of the Church ; that is to say, it would declare itself superior ; it would state positively that the Church is not a perfect society, is not independent, inasmuch as the Church would be liable to have its teachings, its doctrine, its ministers judged by officers of another society. Preaching (and upon this runs nearly the whole evidence on Petitioners' behalf) is within the exclusive jurisdiction of the Church, and the State is not a competent judge of its value nor of its teachings.

In the case now under consideration, it is said :

'We do not wish to deprive the clergy of their political rights ; but we ask this tribunal to repress and punish the abuse which the parish priests of Charlevoix have been guilty of during the last election. We admit the priest's rights as a citizen ; but we require that, should he use them, he be placed on the same footing

as other citizens.' The liberty of preaching exists in election times as well as in any other time. The priest, in this circumstance, as ever, is responsible for his conduct only to his ecclesiastical superior. In elections, civil tribunals have not, more than in any other time, the right of judging the teachings of the priest, of the minister of the Catholic Church. The Church alone has the right of judging within what limits, in what circumstances, and under what forms, the right of preaching should be used; otherwise, civil society would encroach on religious society.

In support of our pretension, we quote to the Court 'Guyot, *La somme des conciles*." (1)

We refer the Court also to Phillipps, who is an authority in these matters.

The pastoral letter of the Bishops of Quebec, dated the 22nd September, 1875, is also very formal when it denies the competence of secular judges in reference to ecclesiastical acts and persons.

This freedom of preaching and of the priest's speech, which we claim in this case, has been several times admitted by our tribunals, and amongst others in a case of Poulin against the Reverend George Tremblay, parish priest of Beauport, unanimously confirmed by the Court of Appeal, Quebec. The learned counsel also cited Tarquini (2).

But should we suppose for a moment that the Court will maintain the legality of this evidence, the Defendant contends that it is insufficient in fact, and does not

(1) Edition of 1818, 2nd volume, page 146, 150; (2) *Principes du droit public de l'Eglise*, pages 12, 43; Audisio *Droit public de l'Eglise*, 1st volume, pages 72 and following, and page 218; Phillips, *Du droit public de l'Eglise*, 2nd volume; *Instituts du droit naturel, privé et public*, by A. B., page 401, 2nd volume, chapter 10; *Le libéralisme, la franc maçonnerie et l'Eglise Catholique*, by Canon Labis, 2nd edition, pages 230 and following.

in any way justify the charges brought by the Petitioners in their *Particulars* against certain parish priests of Charlevoix.

The Rev. Mr. Cinq-Mars, parish priest of St. Siméon, is charged in the *Particulars* with having, "in and out of the pulpit said to all the Roman Catholic electors of his parish, and amongst others to Narcisse Bouchard, Johnny Desbiens, Abraham Tremblay, Michel Imbeau, farmers, Séraphin Guérin, merchant, and Michel Tremblay, beadle, that to vote for the Defendant's opponent was a case of conscience, a mortal sin, a great sin;" but they have tried to prove only two charges, viz., N. Bouchard and J. Desbiens.

As to N. Bouchard, Rev. Mr. Cinq-Mars, in his deposition, says:—

"I had no intention whatever of influencing Narcisse Bouchard's vote. I even believed that he had no vote. *This conversation took place by mere chance, and was without any importance.*"

Bouchard corroborates this part of Mr. Cinq-Mars' evidence: "What Mr. Cinq-Mars told me did not change in any way my opinion. He told me this very quietly, and he had not the appearance of an election canvasser."

In order that there may be intimidation, *undue influence*, it is required that the act should be committed in view of the elector's vote: "It must be shewn that it was done on account of the vote." (1)

Suppose even we would accept Bouchard's version, this act is without importance, and is one of those which the law does not take notice of—"*de minimis non curat lex.*" (2)

(1) Brickwood and Croft, pages 199 and following; Messrs. Justices Willes and Blackburn, judgments in the Tamworth and Norfolk cases; (2) Brickwood and Croft, page 201.

As to the charge against J. Desbiens, this is what Rev. Mr. Cinq-Mars says: "I swear positively that I did not then say to Johnny Desbiens, that to vote for *Pitre Tremblay would be a mortal sin.* I knew then François Bergeron's opinion; he was for the defendant; but I did not know Johnny Desbiens' opinion, *and I did not ask him for it.*"

As in Narcisse Bouchard's case, this is a conversation which took place by chance, and *without any intention whatever of influencing Desbiens' vote.* The parish-priest did not even take the trouble of enquiring about his opinion.

The charge against Rev. Mr. Doucet is not justified by the evidence.

During the election, he went to the parish priest's house purposely *to speak to him about the election.* The parish priest told him that Mr. Tremblay was an honest man, that there was *nothing wrong in voting for him.* After that, they began to speak about the electoral canvass: "It is strange, said the parish priest, how people will become excited about elections; I, for one, do not become excited, and I remain quiet. On Sunday next, I shall read to them the pastoral letter, and, afterwards, if they wish to be lost, they will be lost." He did not speak to me against Mr. Tremblay's party, adds Harvey.

It is clear that the parish priest intended to speak about the canvass, and not about the votes. By the words "if they wish to be lost, they will be lost," he designated those who became excited, who made trouble, who behaved badly during the election.

There is no evidence against Rev. Mr. Roy. Numerous witnesses prove that he did not speak about the election, and that he had declared that he was neither

for Mr. Langevin nor for Mr. Tremblay; that he belonged to no party.

As to the charge against Rev. W. Tremblay. The evidence is contradictory. Ten of Defendant's witnesses contradict the six witnesses examined by the petitioners, as well as the political character that the latter have tried to give to the parish priest's words.

The charges against Rev. Mr. Fafard are supported but by two witnesses and by the evidence produced by the defence; nine witnesses prove that the parish-priest did nothing but his duty as a pastor. He wished to warn his flock of the danger that threatened them, if they kept company with a man of bad character, a man who constantly spoke against his parish-priest, and whose conduct showed easily what principles he had. There is nothing in his words that can affect the election. It is at most a matter to be discussed between the parish-priest and his parishoners.

Besides, in an analogous case, on deciding the Galway Town election, pages 350 and 351, Mr. Justice Keough, in his judgment on the 3rd of March, 1869, declares that such words do not interfere with the freedom of an election.

To prove their charge against Rev. Mr. Langlais, the Petitioners have examined 18 witnesses. The Respondent, by twenty-eight witnesses, proves that the sermon explained the Bishop's pastoral letter read by the parish-priest. It showed to the parishioners of St. Hilarion what the Church teaches by its Bishops with respect to Catholic Liberalism. The parish-priest attacked neither the Conservative party, the Liberal party, Mr. Langevin, nor Mr. Tremblay. He neither threatened nor intimidated any one. He left every one free to vote for whom he pleased, recommending only to

the people to vote according to their conscience, and not to give the scandal of selling their votes.

And with respect to the three or four individuals who, they say, have changed their opinion on account of the parish-priest's sermon, either these individuals, examined by the defence, prove themselves the contrary, or the contrary proof is given in a positive manner by other witnesses of the defence. These witnesses are Antoine Bouchard, Pierre Tremblay, Grégoire Tremblay, David Gilbert, &c.

With respect to Réul Asselin, who tried to show that the parish-priest had refused to make his pastoral visit with him, because he did not wish to follow the parish-priest in this election, it has been superabundantly proved, by the witnesses of the defence, that it is not so ; but that the reason of this refusal by the parish-priest was that Réul Asselin always thwarted the parish-priest in Church business.

The Petitioners have specially directed their attacks against the Reverend J. Sirois, parish-priest of St. Paul's Bay. They have examined eighteen witnesses ; the Defendant on his side has answered by examining twenty-eight witnesses.

The testimonies on both sides are so numerous that we would fear to abuse the patience of the Court, should we undertake to examine these testimonies one by one ; to compare them in order to see how they contradict one another, and to convince the Court that after all nothing certain remains before it but the analysis of the parish-priest's sermon. To this the whole evidence is reduced. It matters very little what the electors may have understood, at a period when they were working zealously in the contest ; the whole question is what did the parish-priest say. And if he has spoken within

the ordinary limits of preaching, no one can complain about the impression produced by his words ; for words uttered with conviction must always produce some effect.

The learned Counsels, in an argument which lasted nearly two days,commented on the voluminous evidence on the part of the defence in answer to the different charges brought against the Respondent, and concluded by referring, on the question of the free exercise of the Catholic religion in the Province of Quebec, to Christie's Canada, Vol. 6, p. 16; Despatch of Lord Dorchester, 1789; 2 Foyer Canadien, p. 131; Clarke's Colonial Law, p. 8; Quebec Act, 1774.

Mr. *J. Bethune*, Q.C., in reply:—It is manifest, by reading the circular to the clergy, that the Church did not fear a collision with civil power. It was not merely doctrinal preaching, as contended for by Respondent's counsel, but guidance in civil elections. The parish priests were to explain the pastoral letter at the eve of an election. In this case, all the priests of the county had in view was the success of Mr. Langevin. As to articles of capitulation, they were only of authority until the signing of the treaty. (1) Catholics under Treaty of Paris, 1763, cannot claim more freedom than Rev. Dr. Doyle, did in 1825 as a Catholic living under the British Constitution.

This case cannot be distinguished from the Bonaventure case. It is simply a question of degree as to the punishment threatened. In both cases what was said affected the freedom of the franchise. As to priests

(1) Reference was here made to the evidence given by Rev. Dr. Doyle before Parliament in 1825, at pp. 173, 190, 192, Vol. 8, Parl. Papers. Vol. 8—Reports of Committes. Catholic Emancipation Bill.

not being agents because they did not go round canvassing, surely if a priest calls his flock together on Sunday, and in church, where no one can answer him, publicly *ex cathedrâ* tells his parishioners, that they must vote for a candidate, it is equal to canvassing from house to house. In the Galway case (1) a letter was deemed sufficient to prove the agency. The general doctrine of agency, as laid down in Art. 1050–1054 of C. C. is applicable here.

As to the immunity of the priest, it cannot exist under the British constitutional system. In the British North America Act there is not a word of this immunity, and no difference is made in favour of elections taking place in the Province of Quebec. This is a new doctrine in Quebec. Several priests have been condemned by the Courts of Justice for libel, and this immunity was never raised. In Ontario and in the United States Catholics freely exercise their religion, and yet they do not claim these rights and privileges. If your Lordships are powerless to give effect to this Statute, manifestly it must destroy freedom in every county in the Province of Quebec.

28th February, 1877.

TASCHEREAU, J. (translated):—I acknowledge that it is with great misgivings as to my own powers, and with a deep feeling of regret that I find myself compelled to pronounce a decision as a Judge in a contestation of the nature of the present. Already an identical case, in which most important questions of law arose, has been unanimously decided by three eminent Judges of the Supreme Court of the Province of Quebec, professing the Catholic religion, and has created a precedent of high importance; but, on the other hand, the principles

(1) 2 O'M. & H., p. 53.

which those honorable Judges took, as the basis of their decision, have been commented on, and severly blamed as opposed to the faith by an eminent member of the Canadian Episcopate. I mention this circumstance in order to show the difficulty of the position in which I, together with one of my colleagues upon this Bench, am placed as a Catholic.

We have, therefore, to approve the principle set forth by the Judges in question, or to adopt the criticism pronounced upon them by his Lordship the Bishop, of whom I have made mention.

The whole difficulty arises out of the interpretation of the electoral law in reference to the asserted undue influence exercised by the clergy, and to the power of the Civil Courts to decide that question.

The difficulty is further increased by the decision rendered in the first instance by his Honour Judge Routhier, who set forth principles of law diametrically opposed to those of the Judges above alluded to.

In January, 1876, the Respondent was elected a member of the Parliament of Canada, as representative for the electoral district of Charlevoix, after a severe struggle on the part of Mr. P. A. Tremblay as a candidate.

The Appellants, electors of the County, and partizans of Mr. Tremblay, contested the election of the Respondent for corruption, threats, undue influence and corrupt practices, and their contestation was set aside by Judge Routhier, and it is of that judgment that the Appellants complain.

The chief grievances of the Appellants are comprised in the exercise of undue influence by certain *curés* of the County by means of sermons delivered by them from the pulpit during divine service upon several Sundays, immediately preceding the day of polling, and also

in private conversation; and, further, in threats held out to electors by influential persons in the county.

To succeed in their contestation it was incumbent upon the Appellants to prove:----

1. The agency of those members of the clergy and other persons.

2. Threats, amounting to undue influence, promises, or other corrupt practices.

I say at once that the Appellants have proved that agency in the most complete manner possible in such a case.

It appears, in fact, that through one Mr. Onésime Gauthier, the Respondent, the Hon. Mr. Langevin, was invited to come and solicit the votes of the electors of the County of Charlevoix; that gentleman replied that he would not accept the candidature except upon the condition that the support of the clergy of the County was assured to him. Mr. Gauthier assured himself of the good feeling of the several *curés* in the County, and upon the report which he made to the Respondent, the latter accepted and entered upon his electoral campaign; he met with and visited the *curés*; at a public meeting the Respondent declared that the members of the clergy were favourable to him, and that the electors should listen to the voice of their pastor; and at Eboulements, in the presence of the Respondent, one Mr. Gosselin, Vicar of the parish, publicly declared that all the clergy supported the respondent, and had unanimously selected him as their candidate. Taking as a sequence of all this, the sermons which a large number of those curés delivered from the pulpit, denouncing Mr. Tremblay and his political party, evidently with the view of favouring the avowed and well-known candidature of the Respondent, it is indubitable that that

gentleman is responsible for the consequences of the conduct of those curés, if the evidence shows on their part the exercise of undue influence provided for by the electoral law.

Let us remark here that the law does not require that the agency should be established by means of a written or even of a verbal authority; it is inferred from the relations of the parties—from the *bonâ fide* support which the agent affords to the candidate with the sincere view of ensuring his election. The agent here in question is not the one specified by section 121 of the Election Act, whose name should be notified by the candidate to the returning officer, but is the one specified by section 101; that is, the one who, with the formal or implied consent of a candidate, in good faith supports his candidature. All these qualities are present in the case of the reverend *curés* of whom I shall speak in a moment.

Decisions in England, the election law of which is identical with ours, and those rendered in Ontario and the Province of Quebec, lay down the principle that every person who in good faith takes part in an election for a candidate with his consent, becomes, *ipso facto*, an agent of the candidate. Upon that point there can be no doubt, and, unless I am mistaken, the election of a prominent member of Parliament was annulled in consequence of the excessive zeal of his agents.

I shall now give a brief summary of the statements of the reverend curés of which the Appellants complain.

1. The Reverend Mr. Cinq-Mars, *curé* of St. Fidèle, said to one Narcisse Bouchard upon an occasion when he had repaired to his (Bouchard's) house to administer the sacraments, that "to vote for M. Tremblay was a

grave sin, a matter of conscience," and that was said but a few days before the polling. Narcisse Bouchard swears that the conversation was commenced by Mr. Cinq-Mars. On the same day Mr. Cinq-Mars being taken back to his house by the person named Johnny Desbiens, said that "to vote for Mr. Tremblay was a mortal sin." And, further, the reverend gentleman repeated the same thing from the pulpit.

Let us remark that M. Cinq-Mars, when heard as a witness for the Respondent, did not deny those conversations and declarations.

2. The Reverend M. Doucet, *curé* of Malbaie, although he delivered no sermon with which he can be reproached, nevertheless said to the person named Dennis Harvey, that "although it was true that Mr. Tremblay was a perfectly honest man, and capable of doing his country service, yet he supported a dangerous party," and he added, "I shall read you the Bishop's pastoral letter on Sunday next, and they who choose to lose themselves will do so."

3. The *Curé* Sirois, of Bay St. Paul, in a sermon which lasted an hour and a half, made a violent attack upon the Liberal party, which he likened to Catholic Liberals, comparing them to ravening wolves, promoting by their speeches rebellion against religion, saying that "with that party in power we should wade in the blood of the priests; that all the horrors of the French revolution would be re-enacted; that to prevent those misfortunes Liberalism must be crushed by the people and by the clergy. That already the Canadians had been almost ruined by a terrible scourge, and that if the electors did not listen to their curé, that scourge would soon be renewed. That there were false Christs and false prophets."

Mr. Pâquet, a member of the Local House of Quebec, who took note of that sermon delivered by M. Curé Sirois, swears that he understood that those remarks applied to Mr. P. A. Tremblay, the candidate, and that that sermon of M. Sirois' made great impression upon the people, and had the effect of causing Mr. Tremblay to lose a good number of votes.

4. The Rev. Mr. Langlais, *curé* of St. Hilarion, declared that it was a grave, a mortal sin to vote for M. Tremblay, and that at the hour of their death the electors would like better to have followed the banner of the Pope than that of Victor Emmanuel and Garibaldi; and in a summary of that sermon which M. Langlais sent to the Archbishop of Quebec, he (Mr. Langlais) admits having said that it was a sin to vote for the Liberal party, and that at the hour of death those who had voted for the Liberal party would regret it, &c, &c.

5. The Rev. Mr. Tremblay, *curé* of St. Fidèle, in one of his sermons, used the following extraordinary language: "That he who should vote for M. Tremblay would be guilty of grave sin, and if he died after so voting, he would not be entitled to the services of a priest."

I give but a brief summary of the sermons of those gentlemen, all very nearly in the same sense, comparing Liberals in politics to Catholic Liberals. The proof of those sermons appears to me to be unassailable, and, I have asked myself, if, indeed, those singular sermons with which those gentlemen of the clergy are reproached were not delivered, why did not the Respondent cause them to be heard as witnesses to disprove the accusation? Nothing was easier for him. He did, indeed, cause the Rev. Mr. Cinq-Mars to be

heard as a witness, who nobly acknowledged the truth of the reproach which was made against him. I think, in fact, that it was the duty of those reverend gentlemen to come forward and deny (if they could conscientiously do so) the accusations made against them, were it but to protect the Respondent against the consequences of their imprudent language.

All these sermons, accompanied by threats and declarations of cases of conscience, were of a nature to produce in the mind of a large number of the electors of the county, compelled to hear these things during several consecutive Sundays, a serious dread of committing a grievous sin, and that of being deprived of the sacraments. There is here an exerting of undue influence of the worst kind, inasmuch as these threats and these declarations fell from the lips of the priest speaking from the pulpit in the name of religion, and were addressed to persons of little instruction, and generally well disposed to follow the counsels of their curés.

I can conceive that these sermons may have had no influence whatever on the intelligent and instructed portion of the hearers; nevertheless, I have no doubt but these sermons must have influenced the majority of persons void of instruction, notwithstanding that by reason of the secrecy in voting by ballot it has not been possible to point out more than six or eight voters as having been influenced to the extent of affecting their will. According to the testimony of over fifteen witnesses, a very large number changed their opinion in consequence of this undue influence. I may here state, that, in like cases to annul an election, a large number of cases of undue influence by a candidate or an agent is not required, and that one single case well

proved, suffices, although the candidate availing himself of it may have had an overwhelming majority.

Taking the evidence as a whole, it appears to me to be clear that a general system of intimidation was practised; that as a consequence undue influence was exercised, and that the electors did not consider themselves free in the exercise of their elective franchise.

The undue influence which the evidence reveals in this case seems to me as general and effective as that referred to in the several English and Canadian decisions which I shall not quote *in extenso*, but content myself with briefly indicating, namely:—

1. The Mayo election case in 1857.
2. The Longford case.
3. The Galway cases.
4. The case of the County of Bonaventure.

The principle of all the decisions in these cases is that the priest must not appeal to the fears of his hearers, nor say that the elector who votes for such a candidate will commit a sin, or incur ecclesiastical censures, or be deprived of the sacraments. Mr. Justice Fitzgerald expressed himself in accordance with these views in the Longford case.

The object of the electoral law was to promote, by means of the ballot, and with the absence of all undue influence, the free and sincere expression of public opinion in the choice of members of the Parliament of Canada. This law is the just sequence to the excellent institutions which we have borrowed from England, institutions which, as regards civil and religious liberty, leave to Canadians nothing to envy in other countries.

The able Advocate for the Respondent maintained before the Court below that the *curés*, whose names I

have just mentioned as being accused of having exercised undue influence, were not amenable to that civil tribunal, inasmuch as they were in the pulpit (*chaire de vérité*) at the moment when they delivered the incriminated sermon, that, as such, they were commissioned to instruct their parishioners, to forewarn them against Catholic Liberalism. The Advocate quoted the Treaty of Peace of 1763, which, on the cession of Canada to England, guaranteed to us the free exercise of our religion. I admit, without the least hesitation, and with the most sincere conviction, the right of the Catholic priest as to preaching to the definition of dogmas and of all points of discipline; I deny that he has, in this case or in any other similar case, the right to point to an individual or a political party and hold them up to public indignation, by accusing them of Catholic Liberalism or of any other equally grievous irregularity, and, above all, to say that he who should help in the election of such individual would commit a grievous sin. Admitting the singular doctrine I am opposing, it would be competent for a *curé* to exclude a Protestant from in any way being a candidate for the representation, on the pretext that he is opposed to the Catholic religion. The good sense of the ecclesiastical authorities and of the people has hitherto condemned such a doctrine, and the present composition of the representation in Parliament shows that, if such a doctrine existed, it has happily ceased to be countenanced. It has been maintained by the Respondent that the reverend curés might have spoken as they did without, by so doing, having used an undue influence which could be deemed such in this case, inasmuch as the acts with which they are charged were in spiritual matters and not in temporal matters, and that in conse-

quence they could not be judged by a civil tribunal, but only by an ecclesiastical tribunal. A single answer would suffice to set at naught this singular pretension; it is, that the tribunal which is to take cognizance of a contestation of an election is indicated by the law, which, by that choice, excludes every other tribunal. Nevertheless, let us say a word as to the ecclesiastical tribunal of which the Respondent invokes the jurisdiction as exclusive, and I ask myself where is that tribunal to be found in Canada. For me it is invisible, intangible, non-existent in this country, being capable of existing effectively therein but by the joint action of the episcopacy and of the civil power, or by the mutual consent of the parties interested, and in the latter case it would be only in the form of a conventional arbitration, which would be binding on no one but the parties themselves. If this tribunal exists, I am not aware that it has any code of law or of procedure; it would have no power to summon the parties and the witnesses, nor to execute its judgments. And if it existed, it would be very singular to see the Jew seeking, at the hands of a Catholic Bishop, the justice he can claim from civil tribunals, and submitting to a corporal punishment adjudged by that tribunal, and the same might be said of any other individual belonging to a different religion. In place of this ideal system (Mr. Justice Routhier admits that it does not exist in this country) we have a special law, the Electoral Law, and for the Province of Quebec we have, moreover, our civil code and code of procedure, protecting the exercise of the rights of all, Catholics, Protestants, or others. All are equal before that law, which declares that whosoever does injury to another must repair it, and indicates the means to be used to compel him to do so.

In this case the petitioners, electors of the Electoral division of Charlevoix, ask for the annulling of the Respondent's election, on the principle that by his agents he carried the election by undue means, and they addressed themselves to the civil tribunal, the sole tribunal constituted for that object. The ecclesiastical tribunal could neither annul nor confirm the election, nor condemn in an effective manner any one of the parties to pay the costs. Parliament could not ratify such a judgment, it would, by so doing, renounce its privileges and violate the most elementary constitutional principles. In connection with what I have just said, I cannot abstain from referring to a judgment of Mr. Justice Routhier, enunciating the extraordinary doctrine of the immunity of the Catholic priest who, speaking from the height of the pulpit, would allow himself to defame any person whomsoever, and this immunity would protect him up to the point of not being liable to be brought before the civil tribunals, and this on the plea that he is only amenable to an Ecclesiastical Court. Such is not the law, such it was not up to the time of the judgment in question. The most ancient as well as the most modern authors repudiate this doctrine. In the Province of Quebec, the particulars of the causes in which actions for defamation brought against priests speaking from the pulpit have been maintained, would be more curious than edifying, and after forty years of practice as an Advocate at the Bar of Quebec, and as a Judge, I have heard, for the first time, the opinion expressed which I have just stated. The principle which should govern in cases of the like nature is the following, to wit, that the minister who so far forgets himself in the pulpit as to revile or defame any person, does not speak

of religion, does not define doctrine or discipline, but puts aside his sacred character, and is considered like any other man as satisfying his personal revenge, or as acting through interest, and, in consequence, he is not held to be in the exercise of his spiritual functions. With this exception, full and entire liberty is guaranteed to the priest by all our civil laws, and by the Treaty of Peace of 1763, rights which have always been recognized by the Imperial Government. If this judgment of Mr. Justice Routhier, instead of being reversed in appeal, had been maintained, we might strike out from our civil and criminal codes of law several hundred of articles on defamation, rebellion, and other subjects of the highest importance. Let us judge from this the confusion which this interpretation of priestly immunity would produce. As for me, my oath of office binds me to judge all matters which are brought before me according to law and to the best of my knowledge. The law expressly forbids all undue influence, from whatever source it may arise, and without any distinction. I must, therefore, carry out this law fully and entirely, conformably to the Act. I cannot discover anything in this law which can be interpreted as being contrary to my religion and to the exercise of that same religion by its ministers. I have no discretion to employ. I cannot alter the law, and I think that, in favour of this proposition, I have the support of the soundest theologians who have written on the question of determining how far the powers and the duty of the Judge extend in the application of a law, and even of an unjust law; if I am deceived, I have the advantage of the companionship and soundness of these theologians. Applying this law to the various cases of undue influence and threats in ques-

tion in this cause, I am of the opinion, as are all the members of this Court, that undue influence has been employed by the Rev. Messrs. Cinq-Mars, Doucet, Sirois, Langlais, and Tremblay, all *curés* of parishes in the County of Charlevoix. As agents of the Respondent, the acts of these priests bind their principal for all legal purposes, and are sufficient to annul the election of the Respondent.

As it is not proved that the Respondent had any actual knowledge of the addresses set down to these gentlemen, or that he approved of them, the Respondent ought not to be disqualified by reason of the indiscreet zeal of his agents. We have given much consideration to this important point, concerning the disqualification an of elected member, involving the temporary loss of a portion of his civil rights ; and, in spite of some plausible presumptions, we have considered ourselves bound to give the Respondent the benefit of the doubt. Nor are we disposed to consider as proved, the charges of fraudulent practices committed by Messrs. Denis Gauthier, Onézime Gauthier, Joseph Kane, J. S. Perrault, and by the Hon. David Price. We do not consider as proved the accusation brought against the Respondent of threats made by him to Major Dufour, that he would make him lose his place as Major, with an annual salary of $120, if he continued to work in favour of the candidature of his adversary, Mr. Tremblay, because the evidence of that man stands by itself, and is not corroborated by any important circumstance. If to that is added the fact that the Respondent, in the most emphatic manner, denied having made any such threats, and that the Major, in the course of the election, played a somewhat extraordinary part, attending alternately the meetings of the two candidates, appearing to support first one party and then the other,

we shall be convinced of the injustice of disqualifying the Respondent upon evidence which does not inspire full and entire confidence. The judgment of the Court will be in effect to declare the election of the Respondent as the representative of the electoral district of Charlevoix void, with costs against the Respondent to be taxed according to law, less, however, the cost of printing that part of the record comprising the subpœnas and certificates of service thereof, the exclusion of which the Petitioners should have applied for, in view of the inutility of those documents; and we shall also declare by the formal judgment that the Respondent is not to pay to the Petitioners the cost of summoning, and the taxing of the witnesses, specified in the judgment, and summoned to prove accusations of threats, and promises, and others, from which we have exonerated the Respondent in this judgment.

The following is the judgment as rendered in French by the Honorable Judge :—

J'avoue que c'est avec une grande défiance de mes propres forces, et avec un profond chagrin que je me trouve obligé de me prononcer comme juge dans une contestation de la nature de celle-ci.

Il est vrai que déjà une cause identique, dans laquelle s'élevaient les questions de droit les plus importantes, a été décidée à l'unanimité par trois juges éminents de la Cour Supérieure de la Province de Québec, professant la Religion Catholique, et que cette décision a créé un précédent d'une haute portée. Mais il est également vrai qu'un membre éminent de l'épiscopat canadien a jugé à propos de commenter ce jugement, de le blâmer sévèrement, et de déclarer contraire à la foi catholique les principes de droit invoqués par ces

honorables juges. Ceci me suffit pour démontrer la difficulté dans laquelle je me trouve, comme catholique, de concert avec un de mes confrères de cette cour.

Nous avons donc à approuver les principes émis par le tribunal dont je viens de parler, ou à nous incliner devant l'opinion de Sa Grandeur l'Evêque qui les a condamnés.

Nous avons à interpréter la loi électorale dans une de ses dispositions les plus importantes, à déclarer si elle réprouve et défend l'influence indue qu'on allègue avoir été exercée par le clergé dans l'élection dont il s'agit, et s'il est au pouvoir des tribunaux civils, de se prononcer sur l'exercice de cette influence.

Nous avons de plus à peser la valeur des raisons données au soutien du jugement rendu en première instance par Son Honneur le Juge Routhier, qui a fait une longue énonciation de principes de droit diamétralement opposés à ceux émis par les juges que j'ai déjà mentionnés.

En janvier 1876, l'intimé fut élu membre de la Chambre des Communes du Canada pour représenter la division électorale de Charlevoix, à la suite d'une lutte sérieuse avec M. P. A. Tremblay.

Les appelants, électeurs du comté et partisans de M. Tremblay, contestèrent l'élection de l'Intimé, pour cause de corruption, menaces, influence indue, manœuvres frauduleuses, et leur contestation fut rejetée par M. le juge Routhier. C'est de ce jugement que les appelants se plaignent.

Les principaux griefs des appelants sont ceux-ci: exercice d'une influence indue par certains curés du comté, au moyen de discours par eux faits en chaire à l'office divin, plusieurs dimanches consécutifs avant la votation, et par des conversations privées pendant l'élec-

tion, et menaces faites à des électeurs par des personnes influentes du comté.

Pour réussir dans leur contestation, les appelants devaient prouver : 1o. L'agence de ces membres du clergé, et autres personnes incriminées ; 2o. des menaces équivalant à une influence indue ; 3o. des promesses, ou autres manœuvres frauduleuses.

Je dois dire de suite que les appelants ont fait de cette agence la preuve la plus complète qu'il soit possible de faire dans des cas semblables.

En effet, l'on voit que par l'entremise d'un M. Onésime Gauthier ; l'Intimé, l'honorable M. Langevin est invité à venir briguer les suffrages des électeurs du comté de Charlevoix. Il répond qu'il n'acceptera la candidature que si on lui assure l'appui du clergé du comté. M. Gauthier sonde les dispositions des différents curés du comté, et sur le rapport favorable qu'il fait à l'Intimé, ce dernier accepte la lutte et commence sa campagne électorale. Il fait la rencontre des curés et leur fait visite. Dans une assemblée publique, il déclare que les membres du clergé lui sont favorables, et que les électeurs doivent écouter la voix de leurs pasteurs. Aux Eboulements, en présence de l'Intimé, un M. Gosselin, vicaire de la paroisse, déclare publiquement que tout le clergé supporte l'Intimé et que c'est le clergé qui l'a unanimement choisi comme candidat. A la suite de ces faits, plusieurs curés font des discours en chaire, dénonçant M. Tremblay et son parti politique, évidemment dans le but de favoriser la candidature, avouée et bien connue, de l'Intimé. Il est indubitable que l'Intimé doit être tenu responsable, par l'annulation de son élection, des conséquences de la conduite de ces curés, si la preuve constate qu'ils ont exercé l'influence indue prévue et punie par la loi électorale.

Il faut remarquer que la loi n'exige pas que l'agence soit le résultat d'une autorisation écrite ou verbale. L'agence s'infère des relations des parties, de l'appui *bonâ fide* que l'agent a donné au candidat dans le but sincère d'assurer son élection. Il n'est pas ici question de l'agent dont il est parlé dans la section 121 de l'acte électoral et dont le nom doit être donné à l'officier-rapporteur par le candidat qui l'emploie, mais il s'agit de l'agent mentionné à la section 101 du dit acte, savoir : de celui qui, avec l'assentiment formel ou implicite d'un candidat, soutient *bonâ fide* sa candidature. Toutes ces conditions de l'agence se rencontrent chez les Révérends curés qui ont violé l'acte électoral dans l'élection de l'Intimé

Toutes les décisions rendues en Angleterre, ou la loi électorale est identique à la nôtre, et celles rendues dans les Provinces d'Ontario et de Québec, concernant le principe que toute personne qui de bonne foi s'immiscie dans une élection pour favoriser un candidat, avec l'assentiment de ce dernier, devient *ipso facto* l'agent de ce candidat. Ce point n'est pas susceptible de doute, et plusieurs membres marquants du Parlement ont vu leurs élections annulées par suite du zèle outré de leurs agents.

Je vais maintenant donner un court aperçu des discours prononcés par certains curés à l'occasion de l'élection dont il s'agit.

1° Le Révérend M. Cinq-Mars, curé de St. Fidèle, dit au nommé Narcisse Bouchard, en se rendant dans sa famille pour y administrer les sacrements de l'Eglise, peu le jours avant la votation, "que voter pour M. Tremblay était un péché grave, un cas de conscience." Narcisse Bouchard jure qu'à cette occasion, c'est M. Cinq-Mars qui avait entamé la conversation. Le même

jour, le même M. Cinq-Mars, ramené chez lui par le nommé Johnny Desbiens, dit " que voter par M. Tremblay était un péché mortel." En chair, M. Cinq-Mars a répété les même paroles.

Et remarquons que M. Cinq-Mars, entendu comme témoin par l'Intimé, n'a pas nié avoir tenu ces conversations et fait ces déclarations.

2° Le Révérend M. Doucet, curé de la Malbaie, n'a fait en chair aucun discours qu'on puisse lui reprocher. Mais il a dit privément à un nommé Denis Harvey que " quoiqu'il fût vrai que M. Tremblay fût un parfait honnête homme et capable de rendre des services à son pays cependant il soutenait un parti dangereux." Et ajouta-t-il, " Je vais vous lire la lettre pastorale des Evêques dimanche prochain, et après cela, ceux qui voudront se perdre se perdront."

3° M. le Curé Sirois, de la Baie St. Paul, dans un discours d'une heure et demie, a fait une sortie violente contre les membres du parti libéral, " qu'il a assimilés aux catholiques-libéraux, les comparant à des loups ravisseurs, disant qu'ils fomentaient par leurs discours la rébellion contre la religion, qu'avec ce parti au pouvoir on marcherait dans le sang des prêtres, que toutes les horreurs de la révolution française se renouvelleraient ; que pour prévenir tous ces malheurs, il fallait que le libéralisme fût écrasé par le peuple et le clergé ; que déjà les Canadiens avaient été presque ruinés par un fléau terrible, et que si les électeurs n'écoutaient pas leur curé, ces fléaux se renouvelleraient bientôt ; qu'il y avait des faux Christs et des faux Prophètes "

M. Paquet. membre de la Législature de Québec, qui a pris note de ce discours de M. Sirois, jure qu'il a compris que ces remarques s'appliquaient à M. P. A.

Tremblay, candidat, et que le discours de M. Sirois à fait une grande impression sur les gens, et a eu l'effet de faire perdre un bon nombre de votes à M. Tremblay.

4. Le Révérend M. Langlais, curé de St. Hilarion, a déclaré que "c'était un péché grave, mortel, que de voter pour M. Tremblay, et qu'à l'heure de la mort, les électeurs aimeront mieux avoir suivi la bannière du Pape que celle de Victor Emmanuel et de Garibaldi." Dans une analyse de ce discours que M. Langlais a envoyée à l'Archevêque de Québec, il admet avoir dit que "c'était un péché de voter pour le parti libéral, et qu'à l'heure de la mort ceux qui auraient voté pour le parti libéral le regretteraient."

5. Le Révérend M. Tremblay, curé de St. Fidèle, dans un de ses sermons, a prononcé les paroles extraordinaires qui suivent : " que celui qui voterait pour M. Tremblay serait coupable d'un péché grave, et qui s'il mourait après avoir ainsi voté, il n'aurait pas droit aux services d'un prêtre."

Je n'ai donné qu'une courte analyse et que des extraits des discours de ces révérends Messieurs. On voit que tous parlent à peu prés dans le même sens. La preuve qui a été faite à cet égard me semble inattaquable, et je me suis demandé, si vraiment les incroyables et étranges propos qu'on leur reproche n'ont pas été tenus, pourquoi l'intimé n'a-t-il pas fait entendre ces Messieurs comme témoins à décharge ? Rien ne lui était plus facile. Cependant il n'a examiné comme témoin que le Révérend M. Cinq-Mars, qui a noblement admis la vérité des paroles qu'on lui avait attribuées. Je crois même que ces prêtres auraient dû offrir eux-mêmes à l'Intimé le secours de leur témoignage pour nier (s'ils le pouvaient consciencieusement) la vérité des accusations portées contre eux, ne fut-ce que pour

protéger l'Intimé contre les conséquences de leur imprudent langage.

Tous ces discours, accompagnés de menaces, et d'affirmations de *cas de conscience*, étaient de nature à produire dans l'esprit du plus grand nombre des électeurs du comté, condamnés à entendre ces choses pendant plusieurs dimanches consécutifs, une crainte sérieuse de commettre un péché grave, et d'être privés des sacrements de l'Eglise. Il y a en cela l'exercice d'une influence indue de la pire espèce. En effet, ces menaces et ces déclarations tombaient de la bouche du prêtre parlant du haut de la chaire et au nom de la religion, et étaient adressées à des gens peu instruits et généralement bien disposés à écouter la voix de leurs curés.

Je conçois que ces discours peuvent n'avoir produit aucun effet sur la partie intelligente et instruite des auditeurs ; mais je n'ai aucun doute qu'ils n'aient dû affecter la majorité des personnes ignorantes, quoique à raison du secret du vote au scrutin, on n'ait pu trouver plus de six ou huit voteurs qui aient été *influencés*, d'après la preuve, au point de n'être plus libre dans l'exercice de leur franchise. D'après le témoignage de plus de 15 témoins, un très-grand nombre ont changé d'opinion par suite de cette influence indue. Il est élémentaire, au reste, de dire que pour l'annulation d'une élection, un seul cas bien établi d'influence indue suffit, quelque écrasante qu'ait été la majorité du candidat élu.

D'après l'ensemble de la preuve, il me parait évident qu'un système général d'intimidation a été suivi, que l'influence indue a été exercée, et que les électeurs ne se sont pas considérés libres dans l'exercice de leur franchise électorale.

L'influence indue que la preuve révèle en cette cause, me semble avoir été aussi générale et aussi effective que celle qui a donné lieu aux diverses décisions qui ont été rendues sur la matière, tant en Angleterre qu'en Canada, dans les causes suivantes :

1° Mayo election case (1857.)

2° Longford case.

3° The Galway cases.

4° Bagot case.

5° La cause de Bonaventure.

Le principe de toutes ces décisions est que le prêtre ne doit pas faire appel aux craintes de ses auditeurs, ni dire que l'électeur qui votera pour tel candidat commettra un péché ou encourra des censures ecclésiastiques, ou sera privé des sacrements.

Voici ce que disait M. le Juge Fitzgerald dans la cause de Longford. Après avoir soutenu que le clergé d'une division électorale avait le droit de s'assembler pour appuyer un candidat, il ajoutait :

" In the proper exercise of his influence on electors " the priest may counsel, advise, recommend, entreat " and point out the true line of moral duty, and explain " why one candidate should be preferable to another, " and may, if he thinks fit, throw the whole weight of " his character into the scale ; but he may not appeal " to the fears, or terrors, or superstition of those he ad- " dresses. He must not hold out hopes of reward, " here or hereafter, and he must not use threats of tem- " poral injury, or of disadvantage, or of punishment " hereafter. He must not, for instance, threaten to ex- " communicate, or to withhold the sacraments, or to " expose the party to any other religious disability, or " denounce the voting for any particular candidate as " a sin, or as an offence involving punishment here or " hereafter."

L'objet de la loi électorale est de favoriser au moyen du vote au scrutin, et par la répression de toute influence indue, l'expression franche et sincère de l'opinion publique dans le choix des membres du Parlement. Cette loi est le complément naturel des belles institutions que nous tenons de l'Angleterre, et qui, sous le rapport de la liberté civile et religieuse, ne nous laissent rien à envier aux autres peuples.

L'habile avocat de l'Intimé a prétendu devant la cour de première instance que les prêtres-curés, accusés d'avoir exercé une influence indue, n'étaient pas justiciables d'un tribunal civil, vu qu'ils étaient dans la chaire de vérité, au moment où ils firent les discours qu'on leur reproche ; que comme curés ils avaient mission d'instruire leurs paroissiens et de les prévenir contre des erreurs telles que le libéralisme politique. Il a aussi invoqué le traité de paix de 1763 qui, lors la cession du Canada à l'Angleterre, a garanti aux Canadiens le libre exercice de la religion catholique. J'admets sans la moindre hésitation et avec la plus sincère conviction le droit du prêtre catholique à la prédication, à la définition du dogme religieux et de tout point de discipline ecclésiastique. Je lui nie dans le cas présent, comme dans tout autre cas semblable, le droit d'indiquer un individu ou un parti politique et de signaler et vouer l'un ou l'autre à l'indignation publique, en l'accusant de libéralisme catholique ou de toute autre erreur religieuse. Et surtout, je lui nie le droit de dire que celui qui contribuerait à l'élection de tel candidat commettrait un péché grave.

En admettant la singulière doctrine que je combats, on permettrait à un curé de travailler, par ses dénonciations, à exclure un protestant de toute candidature à la représentation du peuple, sous le prétexte qu'il est op-

posé à la religion catholique. Le bon sens des autorités ecclésiastiques et du public a fait justice d'une telle prétention, qui n'a jamais été sérieusement appuyée.

Comme conséquence nécessaire de son opinion, l'Intimé a prétendu que même en cas d'abus en fait de prédication ou dans l'exercice de leur ministère comme pasteurs, les prêtres curés ne relèvent pas d'un tribunal civil, mais du tribunal ecclésiastique seul chargé de les restreindre, et que dans la présente cause, les actes qu'on leur reprochait étaient en matière spirituelle, et non en matière temporelle.

Une seule réponse suffirait pour mettre à néant cette prétention singulière. C'est que le tribunal qui doit prendre connaissance d'une contestation d'élection est indiqué par la loi, qui, par ce choix, exclut toute autre juridiction.

Cependant, disons un mot du prétendu tribunal ecclésiastique, dont l'Intimé invoque la juridiction comme exclusive. Je me demande, où le trouverons-nous ce tribunal en Canada? Pour moi, il est *invisible*, *insaisissable*, il n'existe pas en ce pays, il ne peut y exister effectivement que par l'action conjointe de l'Episcopat et du pouvoir civil, ou par le consentement mutuel des parties intéressées, et dans ce dernier cas il n'existerait qu'à titre d'arbitrage conventionnel, et n'obligerait que les parties elles-mêmes, et par la seule force de leur convention. Si un tel tribunal existe, je ne lui connais aucun code de loi ou de procédure; il n'a aucun pouvoir d'assigner les parties et leurs témoins, ni d'exécuter ses propres sentences. Et s'il existait, il serait assez singulier de voir le juif aller demander à un évêque catholique le redressement de torts que lui aurait causés un prêtre catholique, solliciter de cet évêque la justice qu'il peut réclamer des tribunaux

civils, ou se soumettre à une peine afflictive qui serait prononcée par ce *tribunal ecclésiastique !* On pourrait multiplier les exemples, et en dire autant de tout autre individu appartenant à n'importe quelle dénomination religieuse autre que la religion catholique.

Au lieu de ce système idéal (M. le Juge Routhier admet qu'il *n'existe pas* en ce pays), nous avons une loi spéciale, la loi électorale de la Puissance, et pour la Province de Québec, nous avons en outre nos codes civil et de procédure, qui protégent l'exercice des droits de tous, catholiques, protestants ou autres. Tous sont égaux devant ces lois, qui déclarent que quiconque porte préjudice à un autre doit réparation et indiquent les moyens à employer pour obliger à cette réparation.

Dans cette cause, les Pétitionnaires, électeurs de la division électorale de Charlevoix, demandent l'annulation de l'élection de l'Intimé, sur le principe qu'au moyen de ses agents, il a emporté l'élection par des moyens indus, et ils s'adressent au tribunal civil seul constitué pour cet objet. Le *tribunal ecclésiastique* ne pourrait ni annuler, ni maintenir l'élection, ni condamner d'une manière effective aucune des parties à payer les dépens. Le Parlement ne pourrait ratifier le jugement d'une telle Cour sans renoncer à ses priviléges, et sans violer les principes constitutionnels les plus élémentaires.

Je sais que M. le Juge Routhier a déjà, dans une autre cause, affirmé la doctrine extraordinaire qu'un prêtre catholique, qui, parlant du haut de la chaire, se permettrait de diffamer quelqu'un, serait protégé à tel point par son immunité ecclésiastique, qu'il ne pourrait être traduit devant nos tribunaux civils, et ne relèverait que d'une cour ecclésiastique.

Telle n'est pas la loi et elle n'a jamais été telle. Les

auteurs les plus anciens comme les plus modernes répudient cette doctrine. Dans la Province de Québec, le détail des causes dans lesquelles des actions en diffamation portées contre des prêtres pour abus de prédication ont été maintenues, serait plus curieux qu'édifiant, et après quarante années de pratique au barreau de Québec, comme avocat et comme Juge, j'ai pour la première fois entendu exprimer l'opinion que M. le Juge Routhier a énoncée dans son jugement.

Le principe qui doit dominer dans les causes de cette nature est celui-ci ; que le prêtre qui s'oublie dans la chaire jusqu'à injurier ou diffamer quelqu'un, ne parle pas religion, ne définit pas la doctrine ni la discipline, mais sort de son caractère sacré, et est censé, comme tout autre homme, satisfaire une vengeance personnelle ou agir par intérêt, et conséquemment n'est pas dans l'exercice de ses fonctions spirituelles. A part de cela, liberté pleine et entière est assurée au prêtre par toutes nos lois civiles et par le traité de 1773, et a toujours été reconnue par le Gouvernement Impérial.

Si ce jugement de M. le Juge Routhier au lieu d'être renversé en appel, eût été maintenu, nous pourrions rayer de nos Codes de lois civiles et criminelles, plusieurs centaines d'articles sur la diffamation, la rébellion, et autres sujets de la plus haute importance.

Jugeons par là de la confusion que produirait cette interprétation des immunités du prêtre !

Quant à moi, mon serment d'office m'oblige de juger toutes les causes qui me sont soumises suivant la loi, et au meilleur de ma connaissance.

La loi défend expressément toute influence indue, de quelque source qu'elle vienne, et sans aucune distinction. Je dois donner à cette loi une exécution pleine et entière, conformément au statut. Je ne vois rien

dans cette loi qui puisse être interprété comme contraire à ma religion ni à l'exercice de cette religion par ses ministres. Je n'ai aucune discrétion à exercer, je ne puis modifier la loi.

Je pense qu'en énonçant ces propositions, j'ai le concours des Théologiens les plus distingués qui ont écrit sur les pouvoirs et les devoirs du Juge dans l'application de la loi, *et même d'une loi qui paraîtrait injuste.*

Appliquant ici la loi aux divers cas d'influence indue qui ont été prouvés dans cette cause, je suis d'opinion, avec tous les membres de cette Cour, qu'il y a eu exercice d'influence indue de la part des Révérends Messieurs Cinq-Mars, Doucet, Sirois, Langlais et Tremblay, tous curés de paroisses du comté de Charlevoix. Ces prêtres ayant été les agents de l'Intimé, leurs actes lient leur principal [l'intimé] et suffisent pour annuler l'élection en cette cause.

Mais comme il n'est pas prouvé que l'Intimé ait eu une connaissance *actuelle* des discours prononcés par eux, ou qu'il les ait approuvés, l'Intimé ne devra pas être déqualifié à raison du zèle indiscret de ces agents

Nous avons donné beaucoup d'attention à ce point important de la déqualification d'un membre élu, entraînant la perte temporaire d'une partie de ses droits civils. Dans l'espèce actuelle, malgré quelques présomptions plausibles, nous nous sommes crus obligés de donner à l'Intimé le bénéfice du doute.

Nous ne sommes pas non plus disposés à considérer comme prouvés les reproches de pratiques frauduleuses faits à MM. Denis Gauthier, Onézime Gauthier, Joseph Kane, J. S. Perrault, et l'honorable David Price.

Nous ne pouvons maintenir l'accusation portée contre l'Intimé d'avoir fait des menaces au Major

Dufour de lui faire perdre sa place de Major, avec un salaire annuel de $120, s'il continuait à travailler en faveur de la candidature de M. Tremblay. Le témoignage de Dufour est isolé, et n'est fortifié par aucune circonstance importante. De plus, l'Intimé a nié de la manière la plus emphatique avoir fait ces menaces, et si l'on considère que le Major Dufour a dans le cours de cette élection, joué un rôle assez extraordinaire, qu'il était vu fréquentant alternativement les assemblées de l'un et de l'autre candidat, qu'il paraissait supporter tantôt un parti, tantôt l'autre, on doit être convaincu de l'injustice qu'il y aurait de déqualifier l'Intimé sur un témoignage qui n'inspire pas une confiance pleine et entière.

Le jugement de la Cour va être à l'effet de déclarer nulle l'élection de l'Intimé, comme représentant de la division électorale de Charlevoix, avec une condamnation de l'Intimé aux dépens à être taxés suivant la loi. Mais les frais d'impression de cette partie du dossier imprimé qui comprend les *subpœnas* et les certificats de leur signification, et que les Pétitionnaires auraient dû demander d'élaguer, vu l'inutilité de ces pièces, resteront à la charge des Pétitionnaires, ainsi que les frais d'assignation et de taxe des témoins mentionnés au jugement et qui avaient été assignés pour prouver les accusations dont nous avons exonéré l'Intimé par notre présent jugement.

RITCHIE, J. :—

We are agreed that, with respect to all the charges, except that of undue spiritual influence and intimidation, the evidence is not of such a conclusive character as would justify us in reversing the decision of the learned Judge, and declaring the election void by reason of any such alleged corrupt

acts. But with respect to the charge of undue influence and intimidation, the case is very different, and several questions have been raised of very great magnitude; grave questions of constitutional law, in which all in this Dominion are deeply interested.

Whilst it has not been denied that a number of the *curés* of the county of Charlevoix did interest themselves actively on behalf of the Respondent, it has been claimed that they did no more than as clergymen of the Catholic Church they had a right to do; that what they did was in the exercise of the spiritual functions of their offices, and which are not cognizable before and for which they are not amenable to the jurisdiction of the Civil Courts; that the Respondent is not responsible for what they said or did; and that what they said or did had not such an influence on the result of the election as to render it not a free election; and therefore the election should not be avoided by reason of anything said or done by these gentlemen. At the outset, I have no hesitation in saying, that I cannot look on the matter in controversy in this case, so far as this Court is concerned, as at all a religious question. The electoral franchise is a statutory civil right, pure and simple, and its exercise is regulated and protected by statute, and the means of redress for any interference with, or infringement of, this right is likewise provided for by statutory enactments, and by and within these statutory provisions, and by and before the civil tribunals indicated therein must all questions affecting the validity of elections and the conduct of parties as affecting elections be tried and determined: and it is, therefore, simply a constitutional legal question we have to determine. And having determined what the law is, we have only to apply facts we may find

established by the evidence to that law, and to declare whether there has been any breach of the law, and, if so, declare the penalty that the law attaches to such infringement. It has long ago been said by a standard legal authority as a common law doctrine that "It is essential to the very existence of Parliament that elections should be free, wherefore all undue influences on electors are illegal." The rights of individual electors are the rights of the public. All, without distinction of class or creed, are alike interested in the good government of the country, and in the enactment of wise and salutary laws, and therefore the public policy of all free constitutional governments in which the electoral principle is a leading element, (at any rate of the British Constitution) is to secure freedom of election; and it has been truly said a violation of this principle is equally at variance with good government and subversive of popular rights and liberties, and therefore the Legislature has, with the greatest care, made stringent provisions to prevent any unconstitutional interference with the freedom of elections, by prohibiting anything calculated to interfere with the free and independent exercise of the franchise in the following plain and unmistakeable language:—"Every person who, directly or indirectly, by himself or any other person on his behalf, makes use of or threatens to make use of any force, violence, or restraint, or inflicts or threatens the infliction, by himself, or by or through any other person, of any injury, damage, harm, or loss, or in any manner practices intimidation upon, or against, any person, in order to induce, or compel, such person to vote, or refrain from voting, or on account of such person having voted or refrained from voting at any election * * shall forfeit the sum of two hundred

dollars, &c." It has been contended, and the learned Judge below seems to have sanctioned the contention, that this section does not apply to undue spiritual influence. Independent of the principle of the common law, of which this section may be said to be in affirmance rather than a statutory introduction of a new principle, the section has repeatedly received judicial construction in Ireland and in England and in this Dominion whenever and wherever the question has been raised, so far as I am aware, except in the judgment now appealed from. It has been clearly declared that undue spiritual influence is within the spirit and the letter of the enactment, and this interpretation, and construction has never received any legislative repudiation. With the clause thus judicially passed on in Great Britain and Ireland, where first enacted, and with a resolution of a Committee of the House of Commons on their journals, affirming the doctrine that undue spiritual influence, if alleged and proved should avoid an election, which resolution was reported pursuant to the 90th section of the then Act respecting Controverted Elections on the 22nd April, 1869," is on this point in these words :—" That inasmuch as the petitioners do not intend to go into a scrutiny, and no list of objections have been filed by the petitioners, nor any particulars furnished as to any of the charges or allegations of corruption or undue influence, and as there is no allegation of knowledge or scienter on the part of the sitting member as to the alleged spiritual influence said to have been exercised at the said election, which said spiritual influence, if properly alleged and true, would, of itself, in the judgment of this committee, be sufficient to render the said election absolutely null and void," passed by—Yeas—Mr. Wood, M. Masson (Soulan-

ges), M Masson (Terrebonne), Mr. Merritt—4; Nay—Mr. Mills—1. so it passed in the affirmative;" the Parliament of this Dominion enacted the section I have read in the very words of the Imperial statute. Now, it is a well established rule that where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them. We, therefore, on the principles of the common law, on the construction of the language of the Act, of which we entertain no doubt, and on judicial authority, cannot for a moment doubt that it is our duty to declare that undue spiritual influence and intimidation is prohibited by the statute. But the learned Judge intimates that, while that might be so in England or Ireland, it is not so in the Province of Quebec; he does not suggest what the law would, in his view, be in the other Provinces of the Dominion, but I am clearly of opinion that the law on this point is the same in all parts of this Dominion as it is in Great Britain. The rights secured to the Roman Catholic Church of Quebec by treaty and by Imperial legislation are sacred, and not to be impaired or curtailed by any decision of this or any other court.

The Treaty of Paris (1763) declares "That his Britannic Majesty on his side agrees to grant the liberty of the Catholic Religion to the inhabitants of Canada; he will consequently give the most precise and the most effectual orders that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish Church as far as the laws of Great Britain permit;" and

By 14 Geo. III., cap. 83, it is provided, sec. 5: "And for the more perfect security and ease of the mind of the inhabitants of the said Province (Quebec) it is hereby declared that his Majesty's subjects, professing the religion of the Church of Rome, of and in the said Province of Quebec, may have, hold and enjoy the free exercise of the religion of the Church of Rome, subject to the King's supremacy, declared and established by an Act made in the first year of Queen Elizabeth over all the dominions and countries which then did or thereafter should belong to the Imperial Crown of this realm, and that the clergy of said Church may hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion." By 1 Elizabeth, cap. 1, sec. 16, thus referred to, it is enacted "that, and to the intent that, all usurped and foreign power and authority, spiritual and temporal, may for ever be clearly extinguished, and never to be used or obeyed within this realm or any of your Majesty's dominions or countries; may it please your Highness: That it may be further enacted by the authority aforesaid that no foreign prince, persons, or prelate, state or potentate, spiritual or temporal, shall at any time after the last day of this Session of Parliament use, enjoy, or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence or privilege, spiritual or ecclesiastical, within this realm, or within any other of your Majesty's dominions or countries that now be or hereafter shall be, but from thenceforth the same shall be clearly abolished out of this realm and all other your Highness's dominions for ever, any statute, ordinance, custom, constitutions, or any other matters or cause whatsoever to the contrary in any wise notwithstanding.

"17. And also it may likewise please your Highness that it may be established and enacted, by the authority aforesaid, that such jurisdictions, privileges, superiorities, and pre-eminces—spiritual and ecclesiastical—as by any spiritual or eccelesiastical power or authority, hath heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever, by authority of this present Parliament, be united and annexed to the Imperial Crown of this realm."

Thus we see that under these Acts the free exercise of the religion of the Church of Rome is guaranteed to the inhabitants of Quebec as far as the laws of Great Britain permit, subject to the King's supremacy. But while the members of that Church thus have a perfect right to the full and free exercise of their religion in as full and ample a manner as any other Church or denomination in the Dominion, every member of that Church, like every member of every other Church, is subordinate to the law. There is no man in this Dominion so great as to be above the law, and none so humble as to be beneath its notice. So long as a man, whether clerical or lay, lives under the Queen's protection in the Queen's dominion, he must obey the laws of the land, and if he infringes them he is amenable to the legal tribunals of the country—the Queen's Courts of Justice. Upon a question of immunity somewhat analogous, though not exactly similar to this, raised in the Queen's Bench of Ireland, in the case *O'Keefe v. Cardinal Cullen*, Fitzgerald, J., a Catholic, I believe—but that is wholly immaterial—uses language so apposite to the present case that I cannot refrain from quoting it at length. The

case will be found reported in 7 Irish Law Reports (C. L.) 371. Fitzgerald, J., says: "The point emphatically relied on for the Plaintiff, and which we were confidently called on to decide in his favour, was that the rule or the supposed rule of the Roman Catholic Church which prohibits a priest from impleading another priest in the temporal courts in respect of matters relating to his office and character of priest, under pain or suspension from ecclesiastical functions of expulsion from membership in the Church is illegal and void as being against public policy. This question, which is of importance to the government of all voluntary churches, has been so fully and ably handled by my brother Barry that I have to say but little on it. There can be no doubt that if the rule in question or rule of any Church had for its object the exemption of the clergy from secular authority or their immunity from civil jurisdiction or civil punishment, it would be our duty at once to declare that such a rule was utterly illegal. Upon this there ought to be, as there is, no doubt. No church, no community, no public body, no individual in the realm, can be in the least above the law, or exempted from the authority of its civil or criminal tribunals. The law of the land is supreme, and we recognize no authority as superior or equal to it. Such ever has been and is, and I hope will ever continue to be, a principle of our Constitution."

And near the conclusion of his judgment he adds :—

"And I may add for ourselves the general proposition that we do not profess to have jurisdiction over any church or religious association as such; we do not undertake to decide for them ecclesiastical questions or questions of discipline or internal government. All that we undertake to do is to enforce the law of the land,

to protect civil rights and to uphold and preserve the public peace."

The 95th section of the Election Act being in force throughout the Dominion, we are bound to say it can be contravened by no man with impunity. The question then arises, was there any breach of the law by any of the parties charged in the petition? I regret to be compelled to answer this in the affirmative.

Clergymen, and I draw no distinction—my observations I wish distinctly to be understood as applying to all churches and denominations alike—Clergymen, I say, are citizens, and have all the freedom and liberty that can possibly belong to laymen, but no other or greater. The fullest and freest discussion of the fitness of the candidates, of the policy of the Government, of the merits of the Opposition, of any or all of the public questions of the day, can be denied to neither priest nor layman; but while there may be free and full discussion, solicitation, advice, persuasion, the law says, in language not to be mistaken, and not to be disregarded, there shall be no undue influence or intimidation to force an elector to vote or to restrain him from voting in a particular manner. The layman cannot use undue influence or intimidation, neither can the priest; many things, in themselves perfectly legal, may become corrupt, using the word, as pointed out by Mr. Justice Blackburn, in the North Norfolk case (1) as meaning with the object and intention of doing that thing which the statute intended to forbid, not "*corrupt*" in the sense in which you may look upon a man as being a knave or a villain. As, for instance, in the case of a layman, as put by Justice Blackburn, "the landlord has a perfect right to choose his tenant and

(1) O'M. & H., 241.

turn him out, but if the landlord threatens or does inflict that turning out of his tenant for his vote, that is inflicting harm and loss within the meaning of the Act," and he says, "I think that was intended to be struck at by the statute."

So in the Blackburn and Oldham cases, he says it was rightly held that though the loss and harm to be done to a man is not an illegal harm—not a matter that would be a crime—yet if it be a loss inflicted for the purpose of affecting the vote, it is brought within the statute. And in the North Allerton case (1) two persons threatened a Baptist minister that they would give up their pews in his chapel if he voted as he wished to do. Willes, J., said, "If agency had been proved, I should have held it to be a case of intimidation within the fifth section of the Corrupt Practices Prevention Act, 1854."

So a clergyman has no right, in the pulpit or out, by threatening any damage, temporal or spiritual, to restrain the liberty of a voter so as to compel or frighten him into voting or abstaining from voting otherwise than as he freely wills. If he does, in the eye of the law this is undue influence. But, as I intimated before, legitimate influence can be denied neither to the clergy nor to the laity. As Willes, J., said in the Litchfield case; "The law cannot strike at the existence of influence. It is the abuse of influence with which alone the law can deal."

If this, then, is the state of the law, let us see what was done in this case. On 23rd August, 1875, the election of Tremblay was declared void. On the 28th August, judgment was received by the Speaker, who issued his warrant for a new election. On the same

(1) O'M. & H., 168.

day an inscription for review was filed, the Court sitting in review on the 18th December declared the election void, and judgment was received by the Speaker on the 3rd of January. On the 22nd day of September, 1875, the archbishop and bishops of the Province of Quebec issued a pastoral letter to the clergy in Quebec, in which many matters were discussed, and Part V. was devoted to "the part of the clergy in politics." After declaring *inter alia* that "there are political questions in which the clergy may, and even should, interfere in the name of religion," and, after pointing out that political questions might affect the Church, and that a candidate might present himself hostile to the Church, and that a political party might likewise be judged dangerous, &c., it, in a subsequent paragraph, declares that "the priest and the bishop may then (under the circumstances previously recounted), in all justice, and should, in conscience, raise their voice, point out the danger, and authoritatively declare to vote on such side is a sin, that to do such an act makes liable to the censures of the Church."

This pastoral letter was directed to be read and published at the *prone* of all parochial churches or chapels of parishes, and missions where public service is performed, on the first Sunday after its reception, and, in a circular of the same date, from the bishops to the clergy, was the following paragraph:—"A priest accused of having exercised undue influence in an election, for having fulfilled some priestly office, or given advice as preacher, confessor or pastor, and, being summoned before a Court, should respectfully but firmly challenge the competency of the Civil Court, and plead an appeal to an Ecclesiastical Court."

With these documents in the hands of the *curés*,

they read them as directed, and a number of them in their churches discussed the election then about to take place. And after most carefully analysing, sifting, comparing and considering every part of the great mass of evidence in this case, we are constrained to the conclusion that certain of these *curés*, viz., the Rev. Messrs. Sirois, Doucet, Cinq Mars, Langlais and Tremblay exceeded the limits permitted by law, and that several persons were unquestionably acted on and hindered and prevented, by the threats, intimidation and undue influence of these reverend gentlemen, from voting for Mr. Tremblay, as they wished and had intended to do, and, but for such illegal interference, they would have done But it is alleged that these gentlemen were not the agents of Mr. Langevin, and that their acts did not affect the result of the election, and, therefore, there is no ground for declaring the election void. The rule is well settled, that one corrupt practice contrary to the Statute, if done by an agent, is sufficient to avoid the election, though done without the knowledge of the Respondent, and the reason of this is very obvious. The law does not view the contest as one solely between the Petitioner and the Respondent, and, therefore, as said by Lord Coleridge in *Moeson v. Perry*. "What the law looks at is not the guilt or innocence of the candidates, but the purity of election; the candidate is liable for the acts of the agents, if done on his behalf and in his interest, though personally altogether unaware and innocent of it." Let us see, then, whether these gentlemen can be legally considered the agents of the Respondent. To obtain a solution of this question, I think we need go no further than the evidence of the Respondent him-

(1) L. R. 10 C. Pleas 174.

self. The Respondent, in his testimony, gives this account of the terms on which he consented to become a candidate. He says: "The first time M. Gauthier spoke to me he asked me if I would consent to run against M. Tremblay. I answered him, I would run if I were the only candidate against M. Tremblay, if the clergy seemed to me to be in my favour, and if the electors of the county who were opposed to M. Tremblay seemed disposed to vote for me. I understood that under these circumstances he would support me. I did not accept the candidature at that interview. He made me the offer a second time. I then understood that he had gone ino the county and satisfied himself that I would be the only candidate against M. Tremblay. He told me that I would have the support of the clergy. I understood that he had met at Baie St. Paul a certain number of the priests of the county."

The Respondent, when asked whether he had not stated at a public meeting at Baie St. Paul, and other places, that he had been asked or chosen as a candidate by the whole clergy of the county, does not deny the statement, but says he does not recollect whether he used those expressions, nor does he give any expressions he did use, but says, "The meaning of my words was that the clergy of the county were in my favour, and wished to see me elected," clearly recognizing a united action on the part of the clergy on his behalf, and this is still more apparent in the answer to the following question:—

"*Question*—Is it not true that you did not accept the candidature until you had convinced yourself, or had been assured, that the whole clergy of the county were in your favour and would support you?

"*Answer*—I convinced myself that the clergy of the

county were in my favour, and would not have run had it not been so, as I would not wish to have been elected against the will of the clergy."

It appears also from his testimony that he called on all the clergy in the county with one and the same object, because, in addition to mentioning the individual curés, he, speaking of the Rev. Mr. Doucet, *curé* of Malbaie, says, "I spoke to him once during the election; I called on him at his residence and told him why I was calling; it was the same reason that had induced me to visit the other members of the clergy in the county," and what that reason was is placed beyond doubt by the Respondent, when, in answer to another question, speaking of the Rev. Mr. Ambrose Fafard, *curé* of St. Urbain, he says, "I think I saw him twice; I spoke to that gentleman about the elections on that occasion as I have also done on the other occasions when I met other members of the clergy," and that he identified himself with them in the canvass, and recognized and adopted what they said and did on his behalf is placed beyond any doubt whatever by his answer to the following question:—

"*Question*—Is it not true that at a public meeting, held at the church-door at Malbaie, you publicly stated that you had been asked for by the whole clergy of the county, and that the electors were bound to obey the voice of their *curé*, or something in that sense or to that effect?

"*Answer*—I do not recollect the very words that I may have used on that occasion, but what I may have said was in conformity with what I had said in the other parishes of the county, viz., that the clergy of the county were in favour of my candidature, and desired it. As to whether I have said that the people should

listen to the voice of the clergy, I don't know whether I stated it on that occasion, but it was decidedly my opinion; and if I did not then say so I must have said it elsewhere."

M. Tremblay, the candidate, deposed, and his statement in this particular, is not denied by the Respondent:—

"I met M. Langevin in many parishes, and in each of his speeches he invariably spoke of the clergy, stating that the electors were obliged to obey the voice of their pastor, and answer to the call of the bishops or of the bishop, for I took a note of that expression at St. Agnes, held at Mr. Joseph McNicoll's, 'that he had the unanimous support of the clergy of the county;' and when, at Eboulements, the truth of this was questioned, the Vicar, M. Gosselin, from the garret window of his parsonage, asserted in the presence of M. Langevin that he was certain M. Langevin had the support of all the curés in the county; that at St. Fidèle he stated the same thing as to the unanimous support of the clergy. At St. Agnes Mr. Langevin said 'the electors must obey the powerful voice of the clergy.' I noted the expression. The notes I took were in writing."

Here, then, we have the Respondent, before determining to run the election, stipulating *inter alia* that he should have the support of the clergy; and, on receiving from the gentlemen who asked him to run, and who, he understood, had gone into the county and had met at Baie St. Paul a certain number of the priests of the county, the assurance that he would have their support, he accepts the candidature, and, after such acceptance goes himself into the county, calls on all the clergy, talks with them about the election, and, no doubt, from his testimony, received confirmatory

assurances of their favour and support; and at public meetings promulgated the fact that the clergy favoured and desired his candidature and publicly proclaimed to the people that they should listen to and obey the voice of the clergy. It is somewhat difficult to conceive how a candidate could much more formally and unequivocally put forward parties whose aid he desired and appreciated, and whose words and acts on his behalf throughout the election he not only adopted but put forward as authoritative words, to be obeyed. If parties so recognized and commended to the public by a candidate are not his agents, and their words and acts are not to affect the election, if such words and acts are not contrary to the provisions of the Act, it is difficult to understand how an election can ever be disturbed for the words and acts of agents, unless, indeed, it is shown the candidate was cognizant of and authorized the very words uttered and acts done, which is clearly not necessary for the avoidance of the election. With respect to the general effect of the language of these cués, in view of the united action of all the clergy in the county, or the fact that it was not isolated cases of undue influence, but it was an attempt to affect the whole population of the parishes, of the fact that the whole county was Roman Catholic, that a large proportion of the population were illiterate, and of the effect proved to have been produced on numerous witnesses, and the general feeling evidently produced by the pastoral, the sermons, and the declarations of the curés, I cannot doubt that the combined effects of the bishop's pastoral and the denunciations of the clergy so permeated the county as to make it impossible for me to say that there was a free election; and though I have no means of computing or ascertaining the exact

extent of the terror or undue influence, it was still in my opinion such and so great an interference with the freedom of the elections as demands that the election should be annulled, even if the agency of the curés had not been established.

The last, and a most serious question remains, viz: whether there is sufficient evidence to connect the Respondent with the words and acts of the curés as to justify his disqualification. This question we have most seriously and anxiously considered. In view of the *quasi* penal nature of the enactment, I think, that before inflicting consequences so serious, the evidence should be most clear and conclusive; and though we have found it somewhat difficult to arrive at the conclusion that the Respondent was not aware of what his agents, the curés, were saying and doing on his behalf, still we are not prepared to say there is not such a reasonable doubt on the point as to justify us in adopting the milder view, and reporting that the undue influence was not with the Respondent's actual knowledge and consent.

MR. JUSTICE HENRY:—Concurring fully in the judgments just delivered by my brothers Ritchie and Taschereau upon the points in issue, I consider it necessary, dissenting as I do from the majority of the Court in regard to a portion of the costs, to explain my views in regard to them.

Previous to the making by me of the order for the translation and printing of the case, I enquired particularly of the Counsel on both sides if by any agreement between them portions of the evidence or other parts of the record might not be omitted? Both parties alleged that the whole was required to be used on the

hearing, and I had therefore no authority to make an order for less than the whole, at all events, of the evidence. Moreover, it did not occur to me, nor did I imagine that "record" in our rule had in Quebec a peculiar technical meaning by which all the documents in a cause would be included even to the subpœnas issued. Had I been aware that such was the case, I certainly would have made an exception which would have prevented the necessity and cost of printing all such unnecessary papers.

Rule 55, however, provides that "In election appeals a Judge in Chambers may, *upon the application of the Appellant*, make an order, dispensing with the whole or any part of the record, and may also dispense with the delivery of any factum or points for argument in appeal. Such order may be obtained *ex parte*, and the party obtaining it shall forthwith cause it to be served on the adverse party." The Appellant here, so far from seeking an order of that kind alleged that such would not be practicable. It is, therefore, through this default that unnecessary printing took place, and he ought not to reimburse himself out of the pocket of the Respondent. When awarding costs to the Appellant, I think the cost of the unnecessary printing should not be included.

I cannot, however, agree to any other deduction, and dissent from the decision not to reimburse the Appellant for the costs of the witnesses in the issues found against him. The witnesses examined were necessary, and there were reasonable grounds for inquiry on all the charges brought against the Respondent, and strong although not necessarily conclusive evidence given to sustain them.

The Respondent has been declared illegally elected,

and his seat declared vacant. The law has been maintained, and a party illegally elected has been unseated, and the law vindicated. In election cases there are generally many charges of bribery and other undue influences, and if the petitioner succeeds in one or more of them, I know of no principle under which he would not be allowed the costs of witnesses on other charges attempted to be proved, but which, in the opinion of the Court, fell slightly short. The policy in the administration of the Statute should be to encourage investigations into charges of undue influence, and I cannot help thinking that if a successful petitioner or prosecutor is left to pay the costs of his witnesses in all but the individual case in which he is successful, I cannot but feel that we are imposing conditions that will tend seriously to prevent that searching inqury into cases of alleged bribery, and other undue influences, which is necessary to enforce obedience to the law when there are such incessant temptations during an election to violate it. I think, too, that on the general principles governing taxation in ordinary suits at law, the Appellant is entitled to the costs in question.

I have made research, and can find no election case wherein such costs were disallowed, but ascertained that in 25 cases in England and Ireland, since the trials have been before Judges, each party had to pay *all* his own costs, and in 85 cases *full costs* were taxed against the unsuccessful party, and in no case were costs disallowed as to one or more branches of a case, unless for special reasons wholly absent from this case.

There is a discretionary power as to costs, but I must dissent to the judgment of the majority of the Court as to the portion of the costs in question, as I conceive the principle wrong upon which it is founded.

The Chief Justice, Strong, J. Fournier, J. and Henry, J. concurred on the merits;

Fournier, J. concurred with Henry, J. as to costs.

The following is a copy of the judgment and decision of the Supreme Court of Canada.

The appeal of the above named Appellants from the judgment of the Superior Court for the Province of Quebec, rendered by the Hon. Mr. Justice Routhier on the 5th day of November, A.D., 1876, setting aside the petition of the said Appellants, complaining of the illegality of the election of the said Respondent as a member of the House of Commons of Canada for the Electoral District of Charlevoix, having come on to be heard before this Court on the 26th, 27th, 29th, 30th and 31st days of the month of January last past, and the 1st day of the month of February instant, in presence of Counsel as well for the Appellants as the Respondent, and this Court having heard what was alleged by Counsel aforesaid, was pleased to direct that the said appeal should stand over for judgment, and it having come on this day for judgment this Court did order and adjudge that the said appeal should be, and the same was allowed and that the said judgment of the said Superior Court for the Province of Quebec be reversed, and this Court did further adjudge and determine as follows:—

1. That the said The Honorable Hector Louis Langevin was not duly elected a member to serve in the House of Commons for the Electoral District of Charlevoix, in the Province of Quebec, at the election held in the month of January, A.D. 1876, which election and return were published in the *Canada Gazette*, on the 5th day of February, A.D. 1876.

2. That the said election for the said Electoral District of Charlevoix is a void election.

3. That the said Hector Louis Langevin was by his agents guilty of the offence of undue influence at the said election.

4. That the said offence of undue influence was committed by the Reverend Joseph Sirois, curé of Baie St. Paul; the Reverend W. Tremblay, curé of St. Fidèle; the Reverend Ignace Langlais, curé of St. Hilarion; the Reverend François Cinq-Mars, curé of St. Siméon; and the Reverend N. Doucet, curé of St. Etienne of Malbaie, the agents of the said Hector Louis Langevin, without his actual knowledge and consent.

5. That the said Hector Louis Langevin do pay to the Petitioners the costs of this appeal, except the costs as to the 60 pages of the printed case in appeal relating to the subpœnas and to the bailiff's certificates as to the service thereof.

6. That the Prothonotary of the said Superior Court for the District of Saguenay do pay to the said petitioners the sum of one hundred dollars deposited in his hands on the 28th day of November last, as security for costs on their appeal to this Court.

7. That the said Hector Louis Langevin do pay to the said petitioners the costs of the said proceedings in the said Superior Court, except so much of the costs of the evidence and hearing as are incidental to those portions of the case in which the petitioners have failed, namely:—those relating to the bribery, threats and undue influence charged in the petition, and from which the Respondent remains exonerated. Their Lordships Mr. Justice Fournier and Mr. Justice Henry dissenting from the deduction of the costs of the Appellants as hereinbefore last mentioned.

JAMES JOHNSTON .....APPELLANT;

AND

THE MINISTER AND TRUSTEES OF ST. ANDREW'S CHURCH, MONTREAL ..... } RESPONDENTS.

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

Rights of a pew-holder in St. Andrew's Church, Montreal—Refusal to continue lease to a pew-holder by Trustees—Damages.

J., an elder and member of the Congregation of St. Andrew's Church, Montreal, had been a pew-holder in St. Andrew's Church continuously from 1867 to 1872, inclusive. In 1869 and 1872 he occupied pew No. 68, and received for the rental of 1872 a receipt in the following words:

"66.50. MONTREAL, January 9th, 1872.

"Received from James Johnston the sum of sixty-six $\frac{50}{100}$ dollars, being rent of first-class pew No. 68, in St. Andrew's Church, Beaver Hall, for the year 1872.

"For the Trustees,

"J. Clements."

On the 7th December, 1872, the Trustees notified J. that they would not let him a pew for the following year. J. thereupon tendered them the rental for the next year, in advance. On several occasions in 1873, and while still an elder and member of the congregation, he was disturbed in the possession of pew No. 68, by the Respondents, the pew having been placarded "For Strangers," strangers seated in it, his books and cushions removed, &c. For these torts he brought an action against Respondents, claiming $10,000 damages.

Held: that J., being an elder and member of the Congregation of St. Andrew's Church, Montreal, as such lessee, having tendered the rent in advance, was, under the by-laws, custom and usage, and constitution of St. Andrew's Church, entitled to a continuance of his lease of the pew for the year 1873, and that reasonable, but not vindictive, damages should be allowed, viz., $300. (The Chief Justice and Strong, J., dissenting).

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J.J.

James Johnston vs. The Minister and Trustees of St. Andrew's Church, Montreal.

Appeal from the Court of Queen's Bench for Lower Canada (Appeal side) confirming (1) the judgment of the Superior Court for Lower Canada, sitting in the District of Montreal, dismissing an action for damages brought by Appellant against the Respondents for refusing to allow him to continue in the occupation of pew No. 68 in St. Andrew's Church in the City of Montreal.

In his declaration the Plaintiff alleged:

1st. That from 1867 to 1873, inclusive and continuously, he was lessee of pews from the Defendants in St. Andrew's Church, Montreal.

2nd. That he was the legal lessee, *holder* and occupant of pew No. 68 for the year 1872.

3rd. That by his previous leasing and pewholding he became and was a *pewholder* in St. Andrew's Church, under the 10th by-law in the Act of Incorporation of Defendants and amendments.

4th. That his holding of pew No. 68 for the year 1872, was by *verbal* lease.

5th. That he was an elder and member of session of he church.

6th. That he was the legal lessee of said pew 68, for the year commencing 1st January, 1873, and ending 31st December, 1873, by tacit renewal.

7th. That Defendants declined to let Plaintiff a pew for the year commencing 1st January, 1873.

8th. That Plaintiff, on the 20th December, 1872, and on the first juridical day of 1873, tendered the amount of rental to the Defendants notarially for a pew for the year 1873, and that Defendants refused to let "said pew 68, or any other pew in the said church, to Plaintiff."

9th. That Plaintiff being the legal lessee and holder of

(1) Dorion, C. J., and Ramsay, J., dissenting.

pew 68 for the year 1873, the Defendants annoyed and disturbed him in his use and occupation of it, by pasting upon it printed placards containing the words "for strangers," by removing his books and placing other books in it, by discommoding him by placing strangers in it without his consent, by removing his cushions and hassocks from it to his warehouse.

10th. That the Defendants acted "*as aforesaid*, maliciously and knowingly, and with intent to bring "Plaintiff into contempt, ridicule, disgrace, &c." and that "by reason of the said illegal, unjust, scandalous, malicious and defamatory conduct of Defendants, Plaintiff hath been and is greatly injured in his "good name, fame and reputation, &c.; and hath, "by reason of ALL THE SAID PREMISES, suffered loss "and damage, the whole to the damage of the said "Plaintiff at Montreal aforesaid, of ten thousand "dollars currency of Canada;" and concluded as follows: "wherefore Plaintiff making option of a trial "by jury, and praying *acte* of said option further prays "*acte* of the sufficiency of his said tenders for rental "for said pew, made to Defendants previous to the "institution of this action for the said year, commencing the first day of January, 1873, and ending the "31st day of December, 1873, as also of the tender and "deposit herewith made and renewed, and further "prays that the Defendants may be adjudged and condemned to pay and satisfy to Plaintiff the sum of ten "thousand dollars, currency of Canada, with interest "and costs of suit, and of exhibits, out of the amount "herewith deposited, in so far as it may be sufficient "distracts in favor of the undersigned Attorney."

To this declaration the Defendants pleaded:

First, the general issue; and secondly, a special plea averring:

1st. That Plaintiff was not a pewholder or lessee of a pew in St. Andrew's Church after the 31st December, 1872.

2nd. That they had a right to refuse pew 68 for the year 1873.

3rd. That by the by-laws, customs and practice in the church, the pews are let each year and from year to year, and the lease expires at the end of each year; that there is no continuation without a consent, and no notice required to discontinue.

4th. That it was undesirable and inexpedient to let pew 68 to Plaintiff for the year commencing the 1st day of January, 1873, or for any other time, and in the exercise of their discretion, and in good faith, without malice, or any other than conscientious motives, and with a desire to fulfil their duties, and for the preservation of peace and harmony in the congregation, the Defendants did, to wit, on the 7th day of December, 1872, decide and determine not to let a pew to Plaintiff.

5th. That on the 25th December, 1872, the congregation, in a general meeting, at which Plaintiff was present, and in the proceedings whereof he participated, confirmed this action of the trustees.

6th. That the Plaintiff then and thereafter acquiesced in said decision of the Defendants, and admitted that he was not the lessee of pew No. 68, and the Defendants thereafter desired to accommodate strangers in said pew, there being no other pew in the church available for the purpose, but the Plaintiff wrongfully disturbed and interrupted the use of the said pew by strangers and injured and caused damage in the premises of the

Defendants; but himself has suffered no damage whatever in the premises; and that the Defendants, in the whole matter, acted in good faith and in accordance with the practice, by-laws, rules and regulations of the said Church.

The Plaintiff's answer and replication were general. Upon these issues the parties went to proof, and judgment was given in favour of Respondents.

16th, 17th and 18th Jan., 1877.

D. Macmaster, Esq., Counsel for Appellant :—

The Appellant complains of a tort, and asks for damages on three grounds.

1st. Because of the refusal of the Respondents to lease or assign him "a pew" in St Andrew's Church.

2nd. Because of their refusal to lease or assign him pew 68 for the year 1873.

3rd. Because having complied with all the formalities necessary to insure the continuance of his pew holding and the lease of pew 68, and being, according to his contention, the legal lessee and pewholder of that pew for the year 1873, he was molested and disturbed in his use and occupation of it by the Respondents who, placarding it "for strangers," placed strangers in it without his consent and against his will to an extent to deprive himself and his family of the use and occupation of it; removed his cushions and books from it and sent them to the warehouse of his firm with a carter, and otherwise questioned his title and brought him into ridicule.

He alleges that he has "by reason of all the said premises suffered loss and damages to the extent of $10,000."

The issue raised by the Plaintiff is much broader than that to which the Defendants have attempted to restrict him, and to that to which the Honorable Judges, adher-

ing to the judgment of the Courts below, have restricted him.

The Respondents by their resolution "declined to let a pew to Mr. James Johnston for the next year" (1873).

Appellant relies upon:—

1st. His right as a pewholder in St. Andrew's Church from 1867 to 1872 inclusive, under the tenth by-law of the church, as interpreted by the usage and customs prevailing in St. Andrew's Church.

2nd. His rights as a lessee of pew 68 for the year 1872, by a *verbal lease* under the law of the Province (1.)

3rd. His rights as a commoner and corporator derived from his being a member of the congregation owning the church property administered by the Respondents, and

4th. His rights and privileges as an elder and member of St. Andrew's Church, under the constitution of the Church of Scotland.

His allegations called for an adjudication upon all these points, and upon all and each of them he relied for the maintenance of his claim for damages.

The Plaintiff's allegations also raise the issue that he was entitled to a continuance of his lease for the year 1873 by *tacite reconduction*, under Article 1609 of the Civil Code of Lower Canada; this contention he now waives, relying on the four propositions stated.

The germ of the issue is, whether the Appellant was entitled to hold and occupy a pew in St. Andrew's Church for the year 1873, or had the trustees the right to refuse him a pew for that year.

1. The Plaintiff was entitled to a pew for the year 1873, under the tenth by-law of the church, and the

(1) Civil Code of Lower Canada, Article 1657.

customs and usages prevailing in it. "Any person who shall lease a pew from the trustees for one year and pay the rent in advance shall be considered a pewholder. The lease of a pew and sittings are to be paid annually in advance from the 1st January, and are considered to be then due, &c," (By-law 10.)

[CHIEF JUSTICE RICHARDS :—"Did they refuse him a pew or pew 68 ?"]

MR. MACMASTER :—"Both, my Lord; he alleges that they refused to lease him that pew or any other pew, and the Respondents contend and plead that they did 'decide and determine not to let a pew to the Plaintiff.'"

The quality of pewholder was acquired by the payment of one year's rent in advance. The by-law plainly has reference to a permanent occupation, and it is proved that it was so construed by the congregation.

The evidence clearly established that when a person had once paid his rent in advance, he retained his pew from year to year as a matter of right, without reference to the trustees and that, as a matter of practice, the pews did not revert to the trustees at the end of each year. No express leasing of pews to Plaintiff is proved. The parties are presumed to have contracted with reference to the prevailing custom. 2 Parsons on contracts (1).

In doubtful cases usage may be referred to in the construction of a Statute as affording a contemporaneous exposition. *Dunbar* v. *Countess of Roxborough* (2). *Noble* v. *Durell*, (3) usages become consensual laws. Brown's Law of Usage and Customs (1875) (4). In this case the well-established custom of continuous pew occupation emanated into contract.

(1) Sec. 543-4; (2) 3 Cl. & Fin. 335; (3) Durnford & E. R., p. 271; (4) p. 28.

2. The Plaintiff was entitled, under the law of the Province, to the lease of pew 68 for the year 1873.

His lease was verbal. No written lease is proved by the Respondents.

He paid his rental on the 9th of January, 1872, for pew 68, and received a receipt signed by the church officer. The Court of Original Jurisdiction held this receipt to be a written lease, and that the tenure expired at the end of the year 1872.

"The lease, if written, terminates, of course, and without notice, at the expiration of the term agreed upon," (1)

A simple receipt acknowledging the payment of a sum of money for a specific thing for a specific time, signed by only one of the parties, is not a contract, much less a written contract, though it may be evidence of a contract written or verbal. The receipt of the money for the time specified is not inconsistent with the existence of either a written or a verbal lease for a much longer period. In this case the lease was undoubtedly *verbal*, but the term agreed upon not being proved, is presumptively one reconcilable with the provisions of Article 10 of the by-laws, which seems to contemplate continuous pew tenancy, so long as the pew holder pays his rent in advance. Interpreted by usage, the term is *uncertain* as to its duration, dependent on the payment of pew rent annually in advance; but "when the term of a lease is *uncertain*, or the lease is *verbal*, or presumed, as provided in Article 1608 (three separate conditions) neither of the parties can terminate it without giving notice of it to the other, with a delay of three months, if the rent be

(1) C. C. L. C. 1658.

payable at the terms of three or more months, &c." (1). The Plaintiff, under the law of the Province, was then by reason of the term of his lease, being *uncertain*, and by reason further of the lease itself being *verbal*, entitled to a notice of three months to terminate. This notice he did not receive, and the lease remained undetermined, and continued during the year 1873.

There are no provisions in our law which exempt pews or church seats from the ordinary rules of lease relating to houses and other immovable property. "The rules contained in this chapter relating to houses extend also to warehouses, shops and manufactories, and to all immovable property other than farms and rural estates, in-so-far as they can be made to apply."(2) Pew 68 is proved to be fastened to the floor with nails for a permanency. It is immovable by destination (3).

3. The Appellant was entitled to a pew, and could not be deprived of a seat in the church, under the Act of Incorporation (4) and the by-laws made thereunder.

He was a member of the congregation, and had rights as a commoner and corporator in the church property administered by the Respondents. The church property was held and administered by the Respondents, and by their predecessors "for the use and behoof of the congregation." The congregation purchased and owned the church lot and building.

A pew-holder was a member of the congregation (by-law 12) and a joint owner of the church property. He was a constituent of the Respondents, who, for the sake of convenience, were entrusted with the supervision and general management of the temporal affairs of the church.

(1) C. C. L. C. 1657 ; (2) C. C. L. C. 1645; (3) C. C. L. C. 379 and 380 ; (4) 12 Vic., Cap. 154.

They had no absolute or arbitrary rights They were the mere servants of the congregation in temporal matters. They prefunctorily leased the pews as they became vacant from any cause, and collected the rent also. They had no extraordinary or exceptional powers. Their authority is expressly restricted by the Statute incorporating them.

They "may make, establish and put into execution, alter or repeal such by-laws, rules, ordinances and regulations as shall not be contrary to the constitution and laws of this Province, or to the provisions of this Act, or to the constitution of the Church of Scotland, as in that part of the United Kingdom of Great Britain and Ireland, called Scotland now (1849) by laws established, and as may appear to the said Corporation necessary or expedient for the interests thereof." They had no authority to exclude the Plaintiff from the church in which he had a legal interest and right of property. By analogy of reasoning, as explained by the learned Chief Justice in the Court of Queen's Bench, they might have excluded the whole congregation and have closed the church.

4. The Appellant was entitled to a pew by reason of his rights and privileges as an elder and member of the church, under its act of incorporation. The congregation of St. Andrew's Church expressly subjected themselves to and prohibited themselves departing from the constitution of the Church of Scotland, as in that part of the United Kingdom of Great Britain and Ireland called Scotland now (1849) by law established." They, furthermore, by their first by-law, enact: "This church and congregation now in connection with the established Church of Scotland, and adhering to the standards

thereof, declare that they shall continue to adhere to the said standards and maintain the form of worship and government of said Church," In virtue of these enactments and of By-law 18,it is plain that the members of the congregation intended to subject themselves to the constitution, standards and forms of Church government of the Church of Scotland, as then established in Scotland. They are presumed to have obtained legislation intelligently and with reference to the existing Statutes in Britain. The Church of Scotland is one of the established Churches of the United Kingdom. (1) The Church is recognized by the Statutes of Canada (2) as well as the act of Incorporation of St. Andrew's Church. At the time of the passing of the latter Statute (1849)there existed,and there still exists in Great Britain, a Statute 7 and 8 Vic., Chap. 44, Sec. 8 and 9, which provided for the establishment of "*quoad sacra*" churches in Scotland, in which the Elders are entitled to a pew in the church. The Plaintiff alleges his quality of Elder and the Rev. Gavin Lang, for the Defendants, declares that *quoad sacra* churches are governed in very much the same way as Churches here. The Imperial Statute last cited is entitled to recognition here. The Civil Code of Lower Canada, (3) provides for reference to the Statutes of the United Kingdom. The Plaintiff, as an Elder and spiritual officer of St. Andrew's Church, was a member of the Kirk Session, a body entirely independent of the Respondents, having cognizance of the spiritual affairs of the Church. If he were guilty of any offence against the spiritual laws he might be tried by the Kirk Session and not by the Respondents. The

(1) (Imperial Statutes, 5 Anne (1706) Chap. 8, Art. 25); (2) 18 Vic., Chap. 2, and by 7 George IV., Chap. 2, Sec. 1; (3) Art. 1207.

Kirk Session alone has power to exercise discipline for ecclesiastical offences.

Heale's practice (1); Cook's styles of procedure in the Church Courts (2); Duncan's Ecclesiastical laws of Scotland (3.)

The offence complained of against Defendant was that "he did not work harmoniously with the minister and his brother elders"—not a very serious accusation under the Republican system recognized by the Presbyterian Church. This resolution was passed on the 4th of November, 1872. The Trustees made the resolution the motive of their determination to refuse the Plaintiff a pew.

It is clear that the Plaintiff's failure to work harmoniously with his minister and his brother elders, was no ground for depriving him of his civil rights, and that the trustees acted *ultra vires*. It is also plain that he had been guilty of no offence entailing forfeiture of privileges for which he was amenable to spiritual censure—otherwise he would have been subjected to the discipline of the Kirk Session.

The previous attempts at disposing or suspending the Appellant had terminated disadvantageously to the Session, in the Synod—the highest Court of the Church, where the Appellant maintained his position and obtained a reversal of the judgment of suspension pronounced against him. The authorities seemed, however, determined to exclude him arbitrarily from the church, and the failure of the Kirk Session to secure this end in their previous venture, seems to have acted as a stimulant to the Respondents without any sufficient ground whatever to deprive him of his civil rights. It is to be

(1) pp. 9 and 10; (2) p. 1; (3) p. 211.

regretted that this attempt was accompanied with a series of petty, though distressing annoyances, extremely irritating to a sensitive man, evincing on the part of Respondents a dearth of charity dishonoring to the Christian profession. These facts are referred to as bearing upon the question of damages.

Under the constitution of the Church of Scotland, the Plaintiff, in virtue of his Eldership, was entitled to the privilege of a pew (1); such was the rule in this country also. Depriving an Elder of a pew was never heard of, either in this country or in Scotland, according to the testimony of the reverend gentlemen examined on both sides. Rev. Robert Campbell says it is contrary to the spirit of the Church of Scotland. The action of the Trustees is without ecclesiastical precedent. In England, every member of a Church is entitled to a pew (2).

The law of France is similar (3).

In Lower Canada the *concessionaire* (allottee) is entitled to a continuance of his lease so long as he pays his rent; and his wife, after his death, is entitled to continue the pew on the same terms: See Langevin, Manuel des Paroisses (4); Beaudry, Code des Curés (5.)

Toute personne majeure Catholique Romaine domiciliée dans la paroisse *a droit d'avoir un banc dans l'église:* Langevin, Manuel des Paroisses (6).

Plaintiff submits that for each of the four con-

(1) Duncan's Ecclesiastical Laws of Scotland, pp. 202, 204, 206, 207; (2) Burns' Ecclesiastical Law, vol. 1, p. 358, s. 3; Haggard's Consist. R., p. 317; Heale's Law of Church Seats, London, 1872, Book Second, pp. 31, 32, 48 and 49; (3) Denizart v. "Banc dans les Eglises," p. 174, sec. 7, p. 175, sec. 8; (4) p. 27; (5) pp. 236 and 242; (6) p. 28.

siderations mentioned he was entitled to a judgment in his favor, and in view of the aggravating character of the torts of Respondents, and their wanton invasion of his rights, to exemplary damages.

[The Appellant submitted the following authorities in support of his claim for damages against the Respondents:

Mayne on Damages (1); 10th Jur., N. S., part 2nd (2); *Yarborough* v. *Bank of England* (3); *Stevens* v. *Midland* (4); *Lawson* v. *Bank of London* (5); *Green* v. *London General Omnibus Company* (6); Civil Code of Lower Canada (7); *Brown* v. *City of Montreal* (8); *Long* v. *Bishop of Capetown* (9); *Brown* v. *Le Curé et les Marguilliers de la Paroisse de Montréal* (10); *Forbes* v. *Eden* (11).]

Mr. *W. H. Kerr*, Q.C., Counsel for Appellant, followed:

If one of the objects of the congregation, in getting their Act of Incorporation, was to give to the trustees power to administer for their benefit the temporal affairs of the church, it cannot be denied that at the same time they declared that they would continue to adhere to the standards of the Church of Scotland, and maintain the form of worship and government of said Church.

It therefore becomes necessary to look into what was the form of worship and usages of said Church. Now assimilating St. Andrew's Church with a parish church, and its constituent congregation of pewholders as par-

(1) Pages 1 to 10; (2) Page 499; (3) 16, East, 6; (4) 18 Jur., N. S., 932; (5) 2 Jur., N. S., 716; (6) 6 Jur., N. S., 228; (7) Art. 356; (8) 17 L.C. Jur., 46; (9) 1 Moore's P.C.C., N.S., 411; (10) L.R. 6 P.C. Ap. 159; (11) L.R. 1 Sc. Ap. 568 et seq.

ishioners, etc., under the parochial system, authorities from the common law and from the civil law of the province are not wanting to sustain the rightful claim of the Appellant to continued pew occupation during his congregational connection and membership of the Church as a pewholder, and it was held in *Forbes* v *Eden* (1) per Lord Colonsay that a "Court of Law will interfere with the rules of even a voluntary association to protect the civil rights or interests of individuals which may be infringed." Citing from parallel parish laws: "Every man who settles as a householder (here, who joins the constituted Church and Congregation) has a right to call upon the parish for a convenient seat." *Groves & Wright* v. *Rector of Hornsey* (2.)

In Quebec the same rule is followed. The parallelism between the parish rights and the congregational member rights of St. Andrew's Church are near and plain. The intention of the members of the congregation, it is evident, was to import into St. Andrew's Church all the rules of the Scotch Church which could be imported.

Now in Scotland one of the greatest rights of a parishioner is the right of attending public worship and the right to a seat in the church.

Here by using the word *congregation* instead of the word *parish*, it may be argued that St. Andrew's Church is the parish church for its own congregation.

Moreover, in this case Appellant's right to holding a pew as a member of the congregation was recognized, and, according to the usage and custom of the church, he could not be deprived of this right except by the sentence of a Spiritual Court.

(1) L. R., 1 Sc., Ap., pp. 568, 569. (2) 4 Haggard's Consist. R. 194.

It will be contended that the receipt for the rent limited the term of the lease to one year. The receipt in an act done subsequently to the agreement between Respondents and Appellant, and all that can be said of it is that it is indicative of a verbal lease. In which case under Civil Code, Article 1657, Appellant was entitled to a notice of three months.

The Respondents have no arbitrary power to refuse a lease of a pew to a member of the congregation. If there is any doubt as to the character of the lease, we are entitled to refer to usage and custom. But where a Statute is express as to some points and silent as to others usage may well supply the defects, if not inconsistent with the express directions of the Statute : See *Noble* v. *Durell* (1), *United States* v. *Macdaniel* (2), and other authorities collected in Parsons on Contracts, Vol. 2. And hence these proved usages become consensual laws in the way to become chapters of law in the unwritten rules of the country, binding upon the parties to them. "These "usages are proved by evidence like a fact, and when "proved it is held in law it has an obligatory character "in relation to certain executed transactions. Its exist- "ence will raise the presumption that the parties to a "contract acted in conformity with its terms." (3)

The proved custom and usage are manifestly undeniable and form not only part of the original contract between the parties, but may be read with the 10th By-law as supplementary, not contradicting it, and may be given as follows : "Any person who shall lease a pew from the "Trustees for one year, and pay the rent in advance, shall

(1) 3 Durn & E. p. 271; (2) 7 Peters R. p. 15; (3) See Per Nelson, J. in *Allan* v *Merchants Bank*, 15 Wend. and Note to 3 Lansing R. 94, 95, cited by Browne, Law of Usages and Customs 1875, p. 28.

"be considered a pewholder: The rents of pews and "sittings are to be paid annually in advance, from the "first day of January, and are considered to be then due; "the current year is included when in these by-laws it "is stated as a qualification that the individuals must "have paid rent for three years and are members of three "years standing," "*and the pewholder shall be entitled* "*to continue in the occupation of his pew from year to year,* "*by paying his yearly rent in advance as heretofore* "*directed*" The supplemented by-law is not only the rule of the contract between the parties, but the constituent of the pewholder's title to the possession of his pew, which cannot be diverted from him by the arbitrary or discretionary exercise of trust power, and which is defeasible by the act alone of the pewholder, by his voluntary surrender or by his criminal misconduct subjecting him to deprivation of his pew tenancy by the proceedings at law: Because his possession is in the nature of a life tenancy so long as he continues his connection with the church, in the same way as the right of the parishioner to his pew concession continues during his connection with his parish. "Of course when the right to a pew has been created by a lease for a defined period, it will terminate at the expiration of that period, but when the pew has been sold to a purchaser, his right, unless surrendered, will continue as long as the church stands and is used for church purposes. On the death of the owner, it devolves upon either his heirs, or legatees, or devisees, or upon his personal representatives." Relations of Civil Law to Church Polity----Strong, 1874-75, page 130.

[The learned Counsel then referred to the following articles of the Civil Code, which he thought applicable

to the present case, viz.: Art. 1657, 1608 and 1642, and concluded by submitting that Appellant was not only entitled to a sitting but to a pew, and that he could not be deprived of it except by excommunication or by a new division being deemed necessary.]

Mr. C. P. Davidson, Q. C., and Mr. Cross, Q. C, Counsels for Respondents :—

The only two contracts relied on by Plaintiff, as stated in his declaration, are: 1st. A legal verbal lease. 2nd. A continuance of that lease by *tacite reconduction* or by verbal lease for want of notice. His conclusions are for damages for having been molested in his occupation and enjoyment of pew No. 68. The controversy is therefore solely as to his rights to occupy that particular pew. If Appellant wishes now to widen the issue and say he was entitled to a pew generally, failure on his part to prove his contracts ought not to turn against us if it should be shewn that usage and custom were not in favor of Respondents.

The first point, therefore, Respondents contend is that the declaration must contain all the causes of action, and no adjudication can be beyond its conclusions, and on this point will refer to Art. 17, 18, 20 and 50, of the Civil Code of Procedure.

Now as to the nature of this holding of Mr. Johnston. Was it a lease? If so, was it a written lease?

A verbal lease, if the holding of pews in a church fall within the provisions of the Civil Code, relating to the lease of houses or real estate, would have entitled Appellant to three months' previous notice of its termination, while a tacit renewal would have taken place by his remaining in possession more than eight days after the expiration of the lease, without any opposition or notice on the part of the Respondents.

The written receipt is "for the year 1872," and it obviated the necessity of giving the three months' notice. Evidence of verbal lease does not exist, and by By-law No. 10 no member or adherent could become a pewholder in St. Andrew's Church without prepayment of rent; so we find Appellant on the 9th January, 1872, renewing the lease of pew No. 68, paying its rental, and receiving a written contract for its enjoyment during the next ensuing year. Now under Civil Code, Art: 1658, leases if written, terminate of course and without notice. But it is impossible to apply to the lease of a pew the law applicable to ordinary leases.

The Court below has unanimously held that it was such a contract as could not be brought within the articles of the Code.

In the case of *Richard* v. the *Curé et Marguilliers de l'Œuvre et Fabrique de Québec*, (1) C. J. Sir L. H. Lafontaine, in his judgment at p. 16, remarks:—"The concessions of pews are made for a fixed term. It is in the interest of the Fabrique and of the parties concerned, including the Appellant, that it should be so, because this tends to assure equally for a fixed term the receipt of the revenue derived therefrom. The Fabrique is, by these means, put in a condition to fulfil the engagements of their administration. The Fabrique would be deprived of this advantage, if the clause in question was other than *comminatoire*, and if it was necessary in each case, to give notice, so as to put the lessee of each pew in default."

In this case the occupant had failed to pay his rent in advance, and the Church Beadle ejected him from his pew.

(1) 5 L. C. Reports, p. 16.

5 American Rep., (Albany); Kincaid's Appeal (1). The rights of pew owners in church discussed *arguendo;* 2 Pardovan (Hill's Institute) (2); *Auger* v. *Gingras.* Stuart's Rep., "A quasi possession *qui ne consiste* "*que dans des droits*;"(3) 1 Bell's Dictionary (4); Strong —Relations of Civil Laws to Church Polity (5.)

As to securing any new rights by holding possession for eight days after the 1st January, 1873. It is difficult how such a claim can be urged in the face of the facts of record and of Appellant's case, as stated by himself. He had notice of the resolution passed by the trustees on the 1st of December. He was present and voted at a meeting of the congregation held on the 25th of the same month, when a motion was carried endorsing the action of the trustees. He himself complains that Respondents refused the tenders of rent made with his protests of the 20th and 27th December, 1872, and 2nd January, 1873.

The evidence of more than one witness gives a positive denial to the pretension of acquiescence. Moreover, obedience to the articles of the Code previously referred to, ceases to be a necessity if the lease of pews cannot be assimilated to that of houses or other real estate, and an action for disturbance in the enjoyment of a pew cannot be maintained without title.

Auger v. *Gingras*, Stuart's Rep. (6); 1 Ferrière, Dic. des Termes de Prat., &c., (7); Jousse, Traité du Gouvernement Spirituel et Temporel des Paroisses (8); Beaudry, Code de Curés (9); 1 Marechal (10); *Stocks* v. *Booth*, (11) Possession for above sixty years of a pew in a church is

(1) P. 382. (2) P. 508; (3) P. 135; (4) P. 203; (5) P. 126; (6) P. 135; (7) Vo. Banc l'Eglise, (8) P. 55; (9) P. 37; (10) P. 73; (11) 1 Dunford and East, P. 428.

not a sufficient title to maintain an action upon the case for disturbance in the enjoyment of it. Woodfall, Landlord and Tenant (1); Prideaux on Churchwardens (2); Smith, The Parish (3); *Pettiman* v. *Bridger* (4); 2 Phill. Ecc. Law (5); Rogers (6).

It cannot be said that the act of Respondents was *ultra vires*. The control of pews is a temporal matter. It is proved that the practice was that all pews come once a year within the control of the Respondents, so that objectionable persons might be refused renewals of their holdings. The choice of pewholders so belongs to the temporalities of the church, that it cannot be interfered with by the Session. The by-laws give power to the trustees to let pews, and by the 9th Article it is provided that all buyers of forfeited pews must be approved of by the trustees. By the 3rd Article, all monies are to be received and paid "by order of the trustees only." The minister, and members of the church of very long standing, declare that the Respondents did not act *ultra vires*. On this point of the case were cited 2 Pardovan, (Hills Institutes) (7); Durand de Maillane *vo.* "*banc*" (8); *Burton* v. *Heuson, et al.*, (9); *Cooper* v. *First Presbyterian Church of Sandy Hill.* (10). This case, like all others found in the American Reports, is founded on title. Hoffman's Ecc. Laws of the State of N.Y. (11).

But Appellant claims his right as a spiritual right. If so, he should have addressed himself to an Ecclesiastical Court. The decision of the Trustees in exercising

(1) Page 540; (2) Page 260; (3) Page 408; (4) 1 Phill. Ecc. Rep., 324; (5) Page 1811; (6) Page 170; (7) Pages 523, 528; (8) Page 272; (9) 10 M. & W. 104; (10) 32 Barbour's N.Y. Rep., 222; (11) Pages 171, 247 and 251.

their power over a temporality of the church, must be considered as final. The Appellant, it is contended, had rights as a member of the congregation. This is doubtful, for he was not a corporator, so far as Trustees were concerned, as the election was by the vote of the proprietors. The Appellant has not been in continuous possession of a pew for three years, and he could not be on a committee to appoint a minister. Now, were not the Trustees justified in not renewing the lease, or, in other words, what is necessary to justify their act?

[On this point Counsel referred to Grant on Corporations (1); and Angell and Ames on Corporation (2); and also to the evidence of Dr. Campbell, one of the Trustees and connected with the Church for forty years, Rev. Gavin Lang, Dennistoun, Macdonald, Hunter, Mitchell, John Ogilvy and Morgan.]

Of the nineteen witnesses examined on behalf of Appellant, only one, the Rev Mr. Campbell, has ventured to assert even the qualified belief that it is not in accordance with the "spirit" of the Church of Scotland to refuse a member a pew. But his opinion is admittedly "founded on the parochial system," and he qualifies it by saying that "the Trustees would not be justified in refusing him a pew *so long* as he behaves himself civilly." But we urge also that Appellant acquiesced in jurisdiction of Respondents, although he has taken objection to the decision arrived at. The letter of the 10th December, 1872; the resolutions of the congregational meeting of 25th December, 1872, on which he voted; the letter of 29th May, 1873; pieces 4 and 5 of record being demands upon Respondents to exercise their powers in Appellant's favour, constitute

(1) Page 246; (2) Par. 411.

an acquiescence, such as bars Mr. Johnston from contending that session or trustees had no right to refuse him a pew. [See Brice, Ultra Vires (1); Hoffman's Ecc. Laws of the State of N. Y. (2); *Dumner* v. *Corporation of Chippenham*, (3)] Alldecisions opposed are based on the parochial system. The system followed in the Province of Quebec, where parishioners are compelled to pay tithes, cannot be assimilated to that of St. Andrew's Church, the contrast could hardly be more striking than between these Churches :

Respondents conclude by praying for confirmation of the judgment of the Courts below :—1st. Because the Appellant has alleged want of sufficient notice to quit, and tacit renewal, as the sole grounds in support of an alleged verbal lease ; whereas the Articles of the Code relating to lease do not apply to pews.

2nd. Because Appellant's holding of pew No. 68 terminated on the 1st December, 1872.

3rd. Because the Respondents, in the exercise of a rightful discretion, on the 7th of December, 1872, determined to refuse Appellant the occupation of pew No. 68 during 1873, and because that determination was ratified and confirmed by the congregation, on the 25th December following.

4th. Because Appellant has not set out any title to said pew ; has not questioned the power of the Trustees in the premises ; has not asserted any jurisdiction on the part of the Session ; has not alleged himself to be a member of the congregation, or that he has been deprived of or disturbed in any spiritual right, or that he was refused a pew generally.

(1) Pages 131, 275 ; (2) Page 279 ; (3) 14 Ves. Page 251.

5th. Because the renting of pews, collection of revenues and determination of holdings, are inseparable powers, and all of a purely temporal kind.

6th. Because there is no evidence of record legally connecting the Respondents with the four series of acts complained of, and because Appellant has not proven damages.

7th. Because the Superior Court first, and afterwards the Court of Queen's Bench, have found the facts and the law in this case to be in favour of Respondents.

8th. Because Appellant's action has been rightfully dismissed, with costs.

Mr. *Kerr*, Q.C., in reply, explained the difference between a servitude in the Province of Quebec, and an easement. The laws of lease and hire, as contained in the Code, were applicable to all kinds of tenure "all corporeal things might be leased or hired" (1); even incorporeal things might be leased or hired (2). The allegations of the Plaintiff's declaration were sufficiently wide to enable the Courts to adjudicate on all the points raised by him (3): upon the whole he contended that the Appellant was entitled to a judgment in his favour.

June 28, 1877.

THE CHIEF JUSTICE:—

The Statute under which the Defendants were created a Corporation, 12 Vic., Cap. 154, recites that the ground on which St. Andrew's Church was erected for the public worship and exercise of the religion of the Church of Scotland, in Montreal, was purchased by Alexander Rae and William Hunter, as Trustees, for the congregation worshipping in the said

(1) Civil Code, L. C., 1605; (2) Civil Code, L. C., 1606; (3) Code Civ. Proc., L. C., Part 20.

church, and held under a deed dated 3rd May, 1805, for the benefit and behoof of the said church, and the congregation thereof, and for no other purposes. The Statute further recited the purchase of certain lots forming part of the Beaver Hall property, in the City of Montreal, by certain trustees of the said church, for the use and behoof of the said congregation of the said church, and on which there was then being built a church suitable for the increased numbers of the said congregation. The inconvenience of the trustees not having a corporate capacity was also referred to, and the Legislature proceeded to constitute the then existing trustees (who are named) a body corporate and politic, by the name of "The Minister and Trustees of St. Andrew's Church, Montreal."

They were authorized to make, establish, and put in execution, alter or repeal such by-laws, rules, &c., as shall not be contrary to the Constitution and Laws of the Province, or to the provisions of the Act, or to the Constitution of the Church of Scotland, as established in Scotland, as may appear to the Corporation necessary or expedient for the interests thereof. Three of the members of the Corporation to form a quorum, for all matters to be done and disposed of by the Corporation. Section 2.—The Corporation were to hold, stand, and be possessed of the lots of ground, with the buildings thereon, forever, for the several limitations, trusts, provisions and uses declared and expressed in respect of the same by the deeds of sale referred to, and the declaration by Alexander Rae and William Hunter (made before notaries) and by the terms under which the trustees were elected. Section 3.—The Corporation were authorized to sell all, or any portion of, the proper-

ty held in trust by them, but only on a requisition signed by three-fourths of the proprietors of pews in the church, of at least one year's standing, and not in arrear of rent, and at the time residing in the parish of Montreal; and no sale or alienation shall be valid unless sanctioned by three-fourths of the proprietors, qualified as aforesaid. Section 5 provides for filling up vacancies in the Corporation. When the vacancy is occasioned by the death, removal, or change of residence of the minister, the succeeding minister shall fill the vacancy. When the vacancy is in the number of the lay members, the same shall be supplied by the votes of such persons as shall be elected to fill the same, by a majority of the votes of the proprietors of pews in the said church, of one year's standing, not in arrears of pew rent. at a meeting to be convened as thereafter provided. Section 6 — Whenever a vacancy occurs in the office of minister of the church, a meeting is to be called of the *proprietors*, *pewholders* and *members* of the church *not in arrear of rent*, for the purpose of taking the steps necessary for supplying the vacancy, by electing a committee of nine, of whom six shall be proprietors of at least one year's standing, and in full communion with the church, and the remaining three may be pewholders who have *paid rent for three years* preceding their election, and are in full communion with the church; who shall have full power to take such steps as to them may seem best adapted for speedily obtaining a minister to the said church. Under Section 7—to fill the vacancies as to the lay trustees—a meeting is to be called of the proprietors, not in arrear of rent, on a day to be named, for the purpose of supplying such vacancy or vacancies by a person or persons who are *proprietors in communion* with the

said church. Section 8 provides for the calling of public meetings of proprietors or *pewholders*, on a requisition signed by 20 *proprietors* or *pewholders*.

Under the amending Act, passed 27th May, 1857, Cap. 191, it was provided that the trustees, save the minister, should go out of office the 25th December then next; and by Section 2 an annual general meeting of the proprietors of pews is to be held on the 25th December in every year, and by Section 3, six trustees shall be elected at the first annual meeting after the passing of the Act. Section 4.—Two trustees to retire annually.

The by-laws of the church were put in evidence. They appear to have been passed on the 11th March, 1851. Under Article 2, the trustees were to call a general *meeting of the congregation*, to be held annually on the 25th December. Two auditors were to be appointed by those present, say of proprietors of at least one year's standing, and not in arrear of rent, and pewholders who have paid rent for the two years preceding, one of which auditors must be a proprietor, and the other may be a pewholder, *both* qualified as above. Article 3.—At the general meeting of the congregation the members present, qualified as above, shall elect a treasurer. Article 4.—In appointing a committee to select a minister, all proprietors *in right of property possessed* not less than one year, and not in arrear of pew rent, shall be entitled to vote, and also all members of not less than three years' standing, one at least of which shall have been a member in full communion, and not in arrear of pew rent, shall be entitled to vote. It was understood that there should be only one vote for each pew. *Where two or more persons so qualified* should occupy a pew, they should give but one vote, and in

case of disagreement as to who should vote, they should have no vote. No proprietor or pewholder was to have more than one vote. Section 6 of the Act is referred to. Article 9.—Every person having purchased a pew, and having paid for the same, and who shall produce a deed, duly executed by the trustees, is a proprietor, and entitled to all the privileges of a proprietor. Proprietors not in arrear for rent may transfer their pew, but no transfer is to be valid except on the express condition of the new proprietors being approved of by the trustees, and subscribing to the by-laws. Any proprietor who does not pay the annual rent fixed on his pew, agreeably to his deed, for the space of two years, shall be considered as having forfeited his pew in the church, and after notice, the trustees may sell the same to the highest bidder, and the proceeds of the same shall be applied to pay the rent due, and the surplus shall be paid to the last proprietor. Article 10.—Any person who shall lease a pew from the trustees for one year, and pay the rent in advance, shall be considered a pewholder. The rents of pews and sittings are to be paid annually in advance, from the 1st day of January, and are to be considered then due. The current year is included, where in the by-laws it is stated as a qualification, that the individuals must have paid rent for three years, and are members of three years' standing, &c. Article 11.—The trustees are empowered to sell all pews in possession of the church, at such times and upset prices as they may decide on, but not for a less sum than two years of the fixed annual rent amounts to, and subject to an annual rent over and beside the purchase money, and all deeds granted shall contain a clause that the annual rents may be augmented or in-

creased by the trustees, according as they may deem the wants of the congregation require; they having obtained the sanction of two-thirds of proprietors of pews of at least one full year in possession, not in arrear of rent, at the time residing within the Parish of Montreal. Article 12.—The congregation in these by-laws implies the proprietors of pews, pewholders, members in full communion with the church, and regular sitters whose names are entered in the church books, *collectively.* Article 13. The term church in these by-laws, referring to persons, comprehends those members of the congregation, collectively, who are in full communion. Article 15.—The trustees are to enter in a book, to be kept for that purpose, the names of the *proprietors* of pews, *pewholders* and sitters; when more than one individual rents a pew, they shall give their names to the trustees, that they may be entered on the roll of the congregation. Article 14.—The trustees, previous to the election of a trustee, or the election of committees for selecting a minister, shall make out lists or rolls of the *proprietors* and *members* qualified to be trustees, or to vote on the election of trustees or members of committees for the selection of a minister, or to vote in the election of such committees.

In the view I take of this case, it will not be necessary to consider, or express any opinion on, the unfortunate differences that have occurred between the Plaintiff and the congregation of St. Andrew's Church. The right of a parishioner to a seat in a parish church in England and Scotland being based on the fact that the nation assumes to provide for the spiritual instruction of the people, cannot be asserted in relation to the members of religious congregations in this country, which have

none of the rights of established churches, and must be regarded as voluntary associations.

The right to a pew in a church must be considered in the nature of an easement. The proprietor for the time being has a right to occupy it at meetings of the congregation for religious purposes, but he could not destroy it or erect beneath it a cellar or place of deposit for goods, or use it for like purposes. His rights being of a limited character, may be subject to modifications which would not attach to other interests coming out of lands. The fee simple in the property in this, as in most of the churches of this country, is vested in the trustees, whether under the name of trustees or minister and churchwardens, and they hold according to the various rights declared by the conveyances to them, or the acts of the Legislature incorporating them.

The Plaintiff, though, occupied a pew in the church for several years, and occupied one in 1869, described as "area pew No. 68 in St. Andrew's Church, Beaver Hall." The rent for the year was $75. He took the pew in dispute, and began to occupy it in January, 1872, and obtained a receipt for the rent dated the 9th January, 1872. Plaintiff produced and gave it in evidence, it reads: "Received from James Johnston the sum of "sixty-six $\frac{50}{100}$ dollars, being for rent of first-class pew No. "68, in St. Andrew's Church, Beaver Hall, for the year "1872. For the Trustees, J. Clements." Under the By-laws the rents are to be paid annually in advance, that taken in connection with the receipt shows that this letting was at all events for one year certain. Mr. Justice Sanborn, in his judgment, says: "If this is a lease it is "not one which falls within the application of Article "1657, C. C. It is not such a verbal lease as is contem-

"plated by that article. It is the uncertainty of the "term of the lease which necessitates the three months "notice to terminate it. This was fully discussed and "determined in the case of *Webster* v *Lamontagne*, "decided in this Court in 1874. In this case there was "no tacit renewal. The pew No. 68 had only been "leased in 1872, and the rent was paid in advance, and "a receipt taken specifying the rent for one year. This "was in conformity with the By-laws, and Appellant, "as a party interested, must have been presumed to "have known it without such receipt. Before the expir- "ation of the year Respondents notified Appellant that "they would not lease him a pew for the next year. "This was quite sufficient if it were treated as an ordin- "ary lease to prevent a contract of *tacite reconduction*." I don't understand that any of the learned judges before whom the case came, thought the Article 1657 of the code applied, nor do they think, as I understand their judgments, that there was a *tacite reconduction*.

The Plaintiff's right must then be based on the simple ground that he had a right to have a lease for the year 1873 of the pew No. 68, he being willing to pay the rent in advance for it. If we were to decide he was entitled to three months' notice to terminate the lease because it was a verbal one, I apprehend this would not be satisfactory to the Appellant, or to those who contend that the holders of pews have the right to a renewal of their leases from year to year on payment of the rent suggested. If this be the correct view, all the trustees would be required to do to terminate the lease, would be to give three months' notice, according to Article 1657, and there would be no difficulty and necessity of presumed or added conditions to the leases or licenses to occupy

It is not contended there is any express provision in the Statute or By-laws giving the right to pewholders not proprietors, to have a renewal of their *leases*, as they are called, and that right must be implied from the nature of the interest which the pewholders have as members of the church or from usage. As I have already intimated, I do not think there can be any analogy drawn from the right to occupy seats in the parish churches in Scotland, the right to a seat being based on a different principle there,—there are no pew *rents*, as such, and the minister being supported from other sources, whilst in St. Andrew's Church the rents of pews are appropriated to the payment of the minister's stipend.

The rights of proprietors seem to be defined by the Statute, and by By-laws adopted by the Corporation under the Statute. They alone can vote for trustees. In selecting a committee of nine for the purpose of choosing a minister, six of the number must be proprietors, every person having purchased a pew in the church, having paid for the same, and who shall produce a deed duly executed by the trustees is a proprietor, and entitled to the privileges of a proprietor as specified by the By-law. Proprietors not in arrear of rent may transfer their pews by sale, gift or will, but no transfer to be valid *except on the express condition of the new proprietors being approved by the trustees.*

A proprietor who refuses or neglects to pay the annual rent fixed on his pew agreeably to the deed for two years, shall forfeit his pew; and the trustees, having given two weeks notice of the forfeiture, may sell the pew to the highest bidder, provided the bidder *be approved* by the trustees. The proceeds of sale to be applied to the payment of the rent, and any surplus to be paid to the last proprietor.

I think we may fairly assume that it was not intended that pewholders should have greater privileges than proprietors. There is nothing in the by-laws or Act of Incorporation giving them the right to continue to hold a pew beyond the year for which it is leased, nothing said about their being entitled to a renewal of the lease of a pew, though reference is made to pewholders who have paid rent for three years. Suppose a pewholder neglects to pay his rent, can he continue to hold the pew? If not, how is he to be dispossessed of it? and when? Is he to have a reasonable time after the end of the year to pay the rent for the next year, which is payable in advance, and in the mean time is he a "pewholder"? And is the pew to be considered in his possession? Or is the pew in the possession of the trustees? When is it to be considered in the possession of the trustees, that they may sell it if they think proper? No provision is made as to these matters by the by-laws.

If the *pewholder* has the right of his own mere will to continue to occupy the pew for an indefinite period, the trustees would be very much embarrassed in carrying on the affairs of the Corporation. It might be for the interest of the Corporation to sell the pews that had been leased, and yet if the pewholder claimed to have his lease renewed from time to time, this would create difficulty. It might be necessary to raise the rents in order to pay the stipend of the minister, yet no provision is made for that purpose, as far as the pewholders are concerned; but when the pews are sold the deeds are to contain a clause that the annual rents may be augmented or decreased by the trustees, according as they may deem the wants of the congregation require, first obtaining the sanction of two-thirds of the proprietors

of pews, of at least a year in possession, and not in arrear of rent, residing within the parish of Montreal. There are other alterations as to the occupation of seats, that the change of time and circumstances might render it desirable to make, such as making the seats free, in relation to which this perpetual right of renewal (if I may use the term) of the pewholder would very much embarrass the management of the church. Suppose the pewholder paying the pew rent regularly, and not joining any other congregation, very seldom, if ever, attended church; must the trustees continue to let him have the pew, when there were other persons desirous of obtaining it, who would occupy it constantly?

If it be considered that the pews are let for a year, and the trustees re-let for each year, then none of these difficulties will arise. Whenever circumstances require a change in the mode of letting or occupying the pews, or the increase or diminution of the rent, such changes may be made at any time after the end of the year for which the leases are current. It is not to be presumed that this power will be exercised capriciously, or to the prejudice of the congregation worshipping in the church. The most favoured parties in the congregation are subject to the exercise of this discretion of the trustees, as to whom they may sell their pews. When selling pews they can exercise their discretion as to whom they will sell them, and I see no reason why they should not exercise that discretion as to whom they may lease pews. By giving to the pewholders the right which the leasing of the pew and paying of the rent for one year secures to them, you leave the trustees free to act as may be considered advantageous for the benefit of the congrega-

tion. Any reasonable or necessary changes may be made at the end of the year, when each pewholder has had what he has bargained and paid for—the use of the pew for the year. In this view no difficulty could arise; no discussions, whether what was about to be done was reasonable, or done at a reasonable time, in a reasonable manner; and no law-suits or unpleasant litigation, bringing the matters of the congregation before the Courts. These domestic affairs would be settled in their own forum, and in a more seemly manner than by legal proceedings, which produce discontent, anger and ill-feeling.

If the right to a lease for another year had been claimed by a pewholder the next year after the By-laws had been passed, and the trustees had refused to grant it, I am satisfied it would have been held, that there was no doubt that the pewholder, having leased the pew for one year, and paid his rent for that period, and having obtained the receipt, could not claim as a right to have the same pew granted to him for another year at the same rent, without the consent of the trustees. If that would have been the effect, then why should the Appellant, who must be held as to this particular pew, to have taken it for the year 1872 (he not holding it for 1871), be considered entitled to claim the lease of it as a right for 1873? I can see no satisfactory reason why it should be so held. It is argued, however, because pewholders for the last twenty-five years or more in St. Andrew's Church have had their leases renewed, therefore it must be conceded as a right.

No doubt usage is a strong point to take in these matters, but when the usage may be accounted for quite consistently with the claim of right set up, and

when it has not been exercised in a manner to show it has been claimed and admitted as of right, you may show facts and circumstances which would prove that the right claimed was not intended to be granted as claimed.

I have endeavored to show that the right claimed by the pewholders could not have been intended to be granted to them, by showing how carefully the rights of the trustees have been guarded in relation to "proprietors;" and if the rights now claimed bythe pewholders had been intended to be granted to them, more minute provisions would have been made as to enforcing the rights of the trustees against them, and matters would not have been left in such a chaotic state as it appears to me they would be in, if the views contended for by the Appellant are allowed to prevail. The fact that the congregation worshipping at St. Andrew's Church for more than 25 years past, have acted harmoniously, and been so united that the trustees have not had occasion to refuse to renew the lease of a pew to any pewholder who desired it, does not, to my mind, prove that it was because the pewholders had a right to claim this renewal as of right, but shews that the trustees, acting as reasonable men, did what they thought was right for the interest of the congregation and what was likely to ensure harmony. It is possible this may go on now for another quarter of a century or more without having any difficulty,

It is only when the exigency arises making it necessary to exercise the right to refuse to let a pewholder have for another year, a pew which he has occupied perhaps for several years, that the right of the trustees to refuse becomes known to the congregation in such a way as to attract attention. The giving of the right to occupy for another year, each year, through the receipt

given for the rent, is not all inconsistent with exercising the right to refuse to continue giving such right. It was necessary they should rent the pews to raise the revenue to pay the stipend of the minister; and the fact that the occupant of the pew wanted it for another year, and was willing to pay the rent, was a reason why they should let him have it. It was not necessary or desirable, merely to show their right to refuse to let for another year, that they should capriciously annoy pewholders by refusing to renew the letting to them. I do not think it is contended that the trustees could compel a pewholder to continue to hold the pew after the end of the year, though they might wish to do so, and though they may have refused to let it to another applicant, anticipating that the former holder would continue to occupy it. It seems to me that the doctrines contended for by the Appellant would give many important rights, options and privileges to the pewholder without corresponding obligations, and cast burdens and restraints on the trustees which they never undertook to submit to, and which it is not for the interests of the congregation they should bear. Giving to the pewholder the right to occupy the pew for the year for which he bargained and paid for, he has what in my judgment it was intended he should have, and you have the trustees free to manage the business of the congregation entrusted to their care, in the manner which may be best calculated to further the objects for which the Respondents were incorporated. This view would settle the rights of the parties on intelligible legal grounds.

In the evidence of one of the clergymen called for Appellant, it was stated that they had not legislated

on the subject of the rights of parties to pews, and therefore they must be governed by the principles of the Church of Scotland. The Church of Scotland lays down the rule that every man in the parish has rights in the parish church, and unless he makes himself offensive to the church his rights cannot be interfered with. It is founded on the parochial system. If a person were to apply for admittance into a Presbyterian church, and were notoriously objectionable, yet if he profess adherence to the principles of the Church of Scotland, the trustees would be bound to give him a pew if they had one at their disposal.

The Rev. Mr. Lang, the minister in charge, said:—"There is a time at the end of each year when all the pews in the church virtually revert to the trustees; that does not include the pews owned by proprietors." One of the trustees said:—"The trustees have always contended that the pews are rented from year to year; and that the lease of each pew ends with the year, and can only be renewed with the consent of the trustees either tacit or expressed." He has known cases in which parties have grumbled on being deprived of their pews in that way. The notice of the annual meeting intimates that the trustees or their representatives will be on hand to lease the pews of the church. It was customary to continue tenant in his pew as long as he pays rent regularly. The trustees consider they have a sort of discretion in regard to the letting of pews, "our right has never been questioned before, that I know of, to refuse a pewholder a pew."

Another minister, speaking of the church in which he is the minister, says:—"The managers (in his church) have duties very similar to the trustees in St.

Andrew's Church. The managers have the sole power over the pews, and can let them to whomsoever they please. As I understand it, the managers have the power to eject a member from his pew. I have no doubt of it." Many members of the congregation stated the custom to be, that you paid the rent and you were supposed to keep possession of your pew; the receipt given was for the rent for the year.

Some said they understood that any person paying his pew rent, got his pew on paying from year to year. The pews are continued by the payment of the rent in advance. There seems to be no doubt that the trustees have exercised the discretion so far as to refuse to continue single letting in pews, when a pew was wanted for a family. The pew occupied by Appellant in 1871 was owned by Mr. Mackenzie, who sold it, and Appellant wanted the trustees to refuse to approve of the sale; they, however, declined doing so, but compelled the young men who had sittings in No. 68 to leave that seat in order to give it to Appellant. I understand these young men had paid for the sittings just as the pewholders paid for their pews, but when the occasion, in their discretion, called for the exercise of the right to refuse to renew the letting of the seat, the trustees exercised it. When the necessity, as in this case, for the exercise of their right to refuse to renew the letting of a pew arose, they, in their discretion, exercised it, and refused to renew the letting of this pew to Appellant, and, as already intimated, I think they had the right to do so.

I have not been able to see all the cases and authorities cited on the argument to show that the right to refuse a member of a religious society a seat in a church

belonging to the body, is one which rests with the congregation alone, and that the exercise of their discretion will not be reviewed by legal tribunals. Many of the decided cases go to the full extent contended for. As I do not consider it necessary to go into that question in deciding this case, I express no decided opinion upon it. I consider that the Plaintiff here claims that he had a right to the pew in question; and, in the view I take of the law, he had not such right under the Act incorporating Defendants and their by-laws, and therefore his action fails and this appeal should be dismissed.

RITCHIE, J.:—

I have given this case a great deal of consideration; and have felt, throughout the argument and during my investigation, that it is surrounded with a great many difficulties, and my mind has doubted and fluctuated from time to time; but, after most careful consideration, I have arrived at the conclusion that the principle which Chief Justice Dorion, in the Court below, put forward, is the correct one.

The church which has given rise to this unhappy controversy, dates its origin as far back as 1805. The 12 Vict. cap. 154, incorporating the minister and trustees of St. Andrew's Church, Montreal, passed 30th May, 1849, recites that: "Whereas the ground in St. Peter's "Street, Montreal, upon which the church for the "public worship and exercise of the religion of the "Church of Scotland in the City of Montreal, commonly "called "St. Andrew's Church," is erected, was pur- "chased by the late Alexander Rae and William Hunter, "as trustees for the congregation worshipping in the "said church, under a deed executed in their favor on

"the third day of May, 1805, before Guy and Barron, "Notaries Public, and held by them (the said Alexander "Rae and William Hunter), according to their declara- "tion of date, 14th July, 1805, made before the said "Notaries *for the benefit and behoof of the said church and "the congregation and for no other purpose whatsoever*, "and is particularly described in the aforesaid deed of "sale and declaration."

It appears to have been found afterwards that the church was too small for the accommodation of the congregation, and that incorporation was desirable, and the Act, after reciting the election from time to time of trustees, and specifying the names of the then trustees, further recited that as such trustees by deed, passed before J. J. Gibb and colleague Notaries Public, bearing date at Montreal the 4th December, 1847, they acquired by purchase from Edwin Atwater, "those certain lots "of land * * * (particularly describing them) "* * * *for the use and behoof of the said con- "gregation of the said church, and on which there is "now being built a church suitable for the increased "numbers of the said congregation*," and after reciting that the trustees were not a body corporate, and that the trustees had represented the inconveniences resulting from the want of a corporate capacity, and that it had become necessary to sell the church in St. Peter's Street, and provide a larger building for the accommodation; the minister, trustees and their successors were constituted a body corporate with perpetual succession, with power to make such rules, ordinances and regulations as should not be contrary "to the constitution and laws of this Province, or to the provisions of this Act or *to the constitution* of the *Church of Scotland*, as in that

part of the United Kingdom of Great Britain and Ireland called Scotland, now by law established, and as might appear to the said corporation necessary or expedient for the interests thereof;" and it was also enacted "that the several lots of ground, together with the buildings thereon erected by the trustees aforesaid, shall be holden by the said Corporation to stand and be possessed thereof for ever, to and for the several *limitations, trusts, provisions and uses declared and expressed in respect of the same in and by the above referred to deeds of sale and declaration by the said Alexander Rae and William Hunter, as also by the terms under which the said trustees are elected.*"

Thus only the site of the church was changed, and after making provision for the corporation accepting and holding real estate to a certain amount, for alienating the buildings on St. Peters Street and other lands on certain conditions, for raising money by way of mortgage, for the filling of certain vacancies in the Corporation, the Act proceeds to provide for the filling of a vacancy in the office of minister of the church, and whenever a vacancy happens it is the duty of the Kirk Session to require "a meeting of the proprietors, pewholders and members of the said church, not in arrears of rent, for the purpose of taking the steps necessary for supplying such vacancy, by electing a Committee of nine by plurality of votes, of which six shall be proprietors of at least one year's standing, and the remaining three may be pewholders who have paid rent for three years preceding their election, and are in full communion with the said church," and shall have full power to take such steps as to them may seem best adapted for speedily obtaining a minister, &c., &c.

James Johnston vs. The Minister and Trustees of St Andrew's Church, Montreal.

Under the Act of Incorporation certain by-laws were adopted. Article 1 provides that

"This church and congregation, now in connection with the Established Church of Scotland and adhering to the standards thereof declare that they shall continue to adhere to the said standards, and maintain the form of worship and government of said Church."

Article II.—"The trustees shall call a general meeting of the congregation, annually, to be held on the twenty-fifth day of December—or should that day fall on a Sabbath, then on the following day,—notice of which must be given from the precentor's desk on the two preceding Sabbaths; at which meeting the trustees shall lay before the congregation a statement of all accounts and financial matters connected with the church and congregation. Two auditors shall be appointed by those present,—say of proprietors of at least one year's standing and not in arrear of rent, and *pewholders who have paid rent for the two years preceding*,—one of which auditors must be a proprietor, and the other may be a pewholder, both *qualified as above*, to whom the accounts shall be submitted for examination. And provided, that upon the report of the auditors, or on other grounds, it may appear that the funds of the church, or any portion thereof, shall have been misapplied, the proprietors, or ten of them, may call a general meeting of the congregation to consider the same; and if any defalcation be found, they shall be empowered to take such steps as they may see proper to secure the interests of the congregation."

Article III.—"At the general meeting of the congregation, the members present, qualified as above, shall

elect a treasurer who shall receive and pay all moneys, by order of the trustees only; he shall prepare a statement of his intromissions, to be laid before the general annual meeting. He shall also furnish the trustees with a statement of the funds in his hands whenever they shall require it."

Article X.—"Any person who shall lease a pew from the trustees for one year, and pay the rent in advance, shall be considered a pewholder; the rents of pews and sittings are to be paid annually in advance from the first day of January, and are considered to be then due; the current year is included when in these by-laws it is stated as a qualification that the individuals must have paid rent for three years, and are members of three years' standing," &c.

Article XII.—"The term congregation in these by-laws implies the proprietors of pews, pewholders, members in full communion with the church, and regular sitters, whose names are entered in the church books collectively."

Article XV.—"The trustees shall enter in a book, kept for the purpose, the names of the proprietors of pews, pew holders and sitters; when more than one individual rents a pew, they shall all give their names to the trustees that they may be entered on the roll of the congregation."

Article XXI.—"Every person, whether proprietor, pewholder, sitter, or member of this church, shall, before they can be competent to elect or be elected to any office, or to have any share in the management of this church, subscribe the by-laws."

It is clear, from these provisions, that this church was for the benefit of the congregation according to

the form of worship and government of the Established Church of Scotland.

It is very much to be regretted, that either in this Act or in the by-laws, which were passed in 1851, provisions affecting questions which have arisen in this case had not been put on a footing more clearly enunciated.

It is evident that this church was not vested in these trustees for the purpose of letting or not letting, for the purpose of doing with reference to the congregation worshipping in it as might seem right in their own eyes, but they held the church for the use and behoof of the congregation at large, and they had no arbitrary discretion in the matter, nor right to treat the church as if it were their private property; either to gratify their own feelings or carry out their own individual views. To find out what rights the congregation had in this church, may we not fairly, must we not rather, look at what rights congregations have in the Church of Scotland, according to the form of worship and government of that Church.

As judicial notice cannot be taken of what the rules and regulations of that Church are, they must be proved. It is to be regretted that in this action this was not proved in a clearer manner, so that it could be easily understood, and we could be guided in the matter by something more distinct than appears in this case. The very words of the minister of this church, quoted by the learned Chief Justice, show how little reliance can be placed upon that clergyman's idea of what the duties of these trustees were when he says they had "a sort of discretion." What is the meaning of a "*sort* of discretion?" They must have a legal discretion or none at all.

The evidence of Rev. Mr. Campbell puts it on a more intelligible footing. He says, in effect, the rights in this church and the congregation are as near as may be, analogous to those of the Church of Scotland in Scotland, and the rights of a congregation there; and he says, that there the congregation are never deprived of their seats; that there such a thing as depriving an elder of the church of his seat was never heard of, so long as he was a member of the congregation; and taking the whole evidence together, I can arrive at no other conclusion than that for a period of seventy years, the constant and uniform usage and practice of this church has been that, so long as a party continued in good standing in the church and paid his rent in advance, he had the lease of his pew continued as a matter of course, and that the standing of a member of the church is a matter to be determined by the church courts and not by the trustees. Chief Justice Dorion, in his judgment (which I understand is, on this point, quite concurred in by my learned Brothers on this Bench from Quebec), shows that this is no unusual tenure in Quebec, for he says: "under the parochial organization which "prevails in Quebec, with reference to Roman Catholic "churches, the right of the lessee of a pew to retain it "as long as he resides in the parish on payment of the "annual rent originally agreed upon, unless there be a "written agreement to the contrary, is undoubted."

The contention, therefore, is not novel, that in this church the pews are let to the congregation, the rent being payable in advance; that when the rent is paid in advance the lessee continues to have the right of occupying the pew until some good cause can be shewn why he should be deprived of it, and thereby of the

benefit secured to the members of the congregation by the first deed and the Statute passed in 1849.

The members of the congregation are certainly entitled to the use of the church, and I can see nothing unreasonable in the mode of allotment and holding of seats in conformity with the usage proved in this case to have existed, and which Chief Justice Dorion, as we have seen, says was in accordance with the parochial organization of the largest church in the Province of Quebec. Nor does this system appear to have produced any inconvenience or to have in way interfered with the accommodation or orderly and convenient seating of all for whose benefit the church was organized and incorporated. On the contrary, the reasons are very obvious to my mind why the trustees should not have an arbitrary right to deprive members of the congregation of church privileges, by depriving them of pews, and so enabling them practically to hold the church not for *the use and behoof* of the congregation, but for those only whom they may, from time to time, choose to permit to enjoy its use, and which system appears to have worked without the occurrence of any one of all those numerous difficulties suggested by the learned Chief Justice as possible to arise.

I may mention also, I find in these by-laws the idea of continuity of occupancy of pewholders clearly recognized, and certain rights and privileges given, as for instance: Whoever paid rent for two preceding years is enabled to elect certain officers in the church. It is to be observed also, that instead of saying that the trustees shall make fresh agreements each year for renting the pews for each and every year, Article 10 declares that any persons who shall lease or rent pews

and sittings, are to pay for them annually in advance. That provision could not be necessary if they were to be leased every year, the clause would then be meaningless. If they were leased only for a year, and paid for in advance, there would be an end of the matter; but it says "the rents of pews and sittings are to be paid annually in advance." What does that mean? It means, I think, that having got the right of pre-emption or tenant right—if I may use the term—they go on exercising it, paying from year to year in advance, and if they do not pay in advance they forfeit the right to the occupancy of the pew. How could it be considered due, if it all rests on one indivisible agreement to be made each and every year? There would be nothing due, in that case, until the agreement was made—nothing due if the rent must be paid in advance.

The Act of incorporation and by-laws, fixing the qualifications of pewholders as electors as those holding pews for more than one year, in connection with the usage of the church, strengthen me in the conclusion at which I have arrived. It may be, all the difficulties suggested by the learned Chief Justice may arise, but they have not arisen in this church in seventy-three years, and it is clear the present difficulties did not arise from any of those causes put forward by the learned Chief Justice, but from the trustees (and possibly a majority of the congregation also) desiring to do indirectly what they could not do legally and directly.

It is absolutely necessary that I should make some reference to the unhappy differences which occurred. Otherwise I should not do so. One reason why I refer to them is to show there was no cause why the Plaintiff

should be deprived of his pew; and another is, it affects the damages to be awarded to this case. I trace the whole of these difficulties to the action of the minister of the church in changing the forms or modes of worship in the church, which was distasteful to the Appellant in this suit, and to others, a minority in the church. I know historically, I know individually, as a member of a church, and I know judicially, as having been called upon to decide questions growing out of difficulties arising from cases of that sort, that there is nothing more calculated to introduce an inharmonious spirit in a church, than departing from ancient usages of the church, and adopting forms and observances that the congregation are not accustomed to. If parties are in the minority under such circumstances; while I do not mean to say there may not be such changes as they might not be bound to submit to, I think their feelings—nay, even what may be regarded as prejudices—ought to be dealt with leniently. I appears, growing out of these changes, other difficulties arose. There is no doubt the Appellant in this case put forward a statement without sufficient foundation, though he says he had information which he supposed to be accurate at the time; and he certainly did contradict his minister with reference to a question of fact, in a manner and under circumstances that I do not think anybody would approve of, because, before he ventured to contradict another pointedly and unequivocally, he should have been well assured he had used all means to obtain information to justify him in putting forward a contradiction of that kind; but, though he was wrong in that contradiction, I think the gentleman who

aggravated him was far more wrong when he, openly at a public meeting of the church, said that that man had called his minister a liar. That is a term which I think no man is justified in putting into the mouth of another, unless that other has actually used the very expression itself, because, though it may be that a man may contradict another under the conviction that the statement made is erroneous or incorrect, still, to say the statement is erroneous or incorrect is far different from telling the person who is contradicted that he is "a liar." If the Plaintiff, really, honestly and sincerely believed the statement to be incorrect, and it was a matter material to the discussion in the church at that time, it seems to me he would be wanting in independence if he had not pointed out its incorrectness, but he should have taken good care that his information was accurate, and the manner in which he put forward the contradiction should have been carefully guarded. After that, there seems to have been other discussions, and then the trustees appear to have desired to get rid of the Plaintiff as an elder of the church. Now, so far as the evidence in this case goes, it appears that as to elders of the church the trustees have nothing to do, either with reference to their conduct or office or to their displacement from office; that they are subject alone to the jurisdiction of the Church Courts, and to be tried and removed by their decrees. And it seems also that for any misconduct of a member of the congregation, he may be brought before the proper courts, and have the matter duly investigated and duly tried, and, if tried, dealt with as those courts in their discretion may judge right and proper, but that the trustees, as such, have no power or

right to deal with the matter. It appears that Mr. Johnston was tried before a Church Court, and was at first condemned; but, upon appeal to a higher Church tribunal, he was entirely acquitted, and remained in his office of elder, not in any way subject to the control of the minister, or dismissal by the trustees.

But it appears they and a large majority of the congregation were desirous of getting rid of him as an elder. If they wished to get rid of him legally and properly, they had a perfect right to take such action as would properly accomplish that object, but I cannot assent to the proposition, that to accomplish what they could not do legally, they had a right to pursue another course and refuse to allow him to occupy his pew and to continue a pewholder, and thereby prevent him from continuing to be a member of the congregation. They could not do indirectly in that way what they failed to accomplish directly through the instrumentality of the Courts established in the church for adjudicating on such matters. When they adopted that course they were not, in my opinion, exercising a reasonable or a legal discretion—they were not withholding the pew from Mr. Johnston for any reasonable, legitimate or proper cause, they were simply endeavouring to gratify their own feeling with regard to his (in their opinion) obnoxious position in the church as an elder. They were endeavoring to use the power they had in the church as trustees, in a manner which, I think, the laws of the Church of Scotland, the original deed of the church. the charter of the church and the articles of the church never contemplated, and in a manner not justified by any precedent in the church, but directly contrary to the

uniform usage and practice of the church from its foundation. I cannot think it was ever contemplated that trustees should coerce or turn out an elder of that church by using a power over the pews in the way in which they did in this case. I make this observation here more particularly with reference to damages; for the very circumstance of their feeling, and avowing, they were accomplishing an object in that way, which they had tried before and could not accomplish by legal means, rendered their conduct all the more irregular, and in my opinion, improper. The way in which they carried out their purpose was equally objectionable. Considering the Plaintiff was an elder in the church; considering the number of years he was a member of the congregation, and his position in the church; sending, without any notice, by a common carter, all those articles used in his pew in the church, and putting them into his place of business, was not treatment such as he should have expected. He was an officer of the church (for an elder is a high officer), and this conduct was certainly not what he had a right to expect. This and the placarding of his pew afterwards was all done with one object—evidently to drive him from the eldership if not from the church. If he had done anything to entitle him to be driven from his eldership and from the church, that should have been established in the spiritual tribunals of the church, and not by the trustees in the way in which they have; so contrary to the spirit of the laws and government of the church.

In view of all these circumstances, I am constrained to the conclusion that the Plaintiff has been wronged in being practically turned out of this church when he

ought not to have been. I think this Court ought so to decide, and adjudge him such reasonable damages as, while not of a vindictive character, will serve to warn persons situated as these trustees, against such an improper exercise of the duties of their office. There is no more delicate position than that of an officer of a church who exercises such functions as these. Every man loves his church; every man feels that he will almost lose his life rather than his rights in his church, and if there is anything in this world calculated to arouse a man's feelings—and laudably so, for it is between him and his God—it seems to be an interference between him and his God, or the worship of his God, at all events. Therefore, I say it s that men's feelings are always keen on matters of this kind, and in persons in office in a church should not in disregard of their duty, deprive people wrongfully of their rights in the church. If they do, they must expect to be mulcted in such damages as will prevent a recurrence of the wrong doing. There is nothing more unseemly than a congregation at variance among themselves. It is at variance with the principles and doctrines inculcated in the church—with the life and doctrines of the blessed Saviour they go there to worship. We should do everything in our power, in adjudicating cases of this kind, to prevent these difficulties arising, and if the result of this judgment should be such, that these difficulties which have been so strongly pointed out by His Lordship, the Chief Justice (which, I humbly think, have not arisen in this case to justify the action of the trustees), should become apparent, all I can say is, if the regulations of this church and the laws of the Church of Scotland are not sufficiently

elastic to meet these cases, I am perfectly sure the right has never been refused to any church (in our province at all events) to make such rules and regulations for the management of their affairs as a body, as they may think right and proper, and may to the Legislature seem reasonable.

Regretting I am called upon to adjudicate upon this case; regretting the observations which, in the solemn discharge of my duty, I am called upon to make, I trust that all parties will re-consider this matter, and that it will lead to an amicable arrangement among them. I believe the Plaintiff had the right, when he had the pew for one year, to keep it so long as he continued paying pew rent in advance, unless, indeed, some good cause, which it is not necessary for me to specify, should be shown for depriving him of it. I will not say there may not be many matters referred to which might not be sufficient for suspending him. I do not say that might not be done, but it is sufficient for me to say nothing appears in this case that warrants the trustees, in my opinion, in depriving him of the right to have that pew when he was willing to pay for it annually in advance. Under these circumstances, I think the judgment of the Court below should be reversed, and the Defendants in this case should be condemned to pay $300 damages, with full costs in all the Courts.

STRONG, J.:—

This action is, as I read the declaration, brought to recover damages for disturbing the Plaintiff in his enjoyment of pew No. 68, in St. Andrew's Church, in the city of Montreal. It is confined to the wrong

alleged to have been done to the Plaintiff in respect of this particular pew, and does not make the case that Plaintiff was illegally excluded from the church altogether; and, if it had made such a case, the evidence clearly would not have supported that pretension. It becomes material then to ascertain, in the first place, what was the Plaintiff's title to the pew 68 at the time of the disturbance of Plaintiff's possession, in the month of January, 1873.

The opinion I have formed, after consulting all the authorities cited in the factums and at the Bar, and several others, is that the contract entered into between the Plaintiff and the Defendants, the trustees, under which the Plaintiff occupied this pew No. 68, during the year 1872, was a verbal lease----a character which the Plaintiff himself attributes to it in his declaration. The Plaintiff then proves a title precisely as he alleges it in his declaration, as a lessee for the year ending on the 31st December, 1872, under a verbal contract with the Defendant, at a rental of $66.50. By the law of the Province of Quebec, a lease for a short term, less than nine years----entirely unlike such a contract in English law----gives no right of property to the lessee, but constitutes merely a personal contract between the parties. There is, therefore, much less difficulty than in the case of a similar contract governed by the laws of England, in holding that the right of use of a pew, which involves no interest in the property in the church, or in the pew itself, may be made the subject of a lease. The absolute sale of a right to use a pew has been held in England to confer no right of property in the soil, but merely a right in the nature of an easement or servitude, though, of

course, not an easement or servitude proper.----(*Hinde* v. *Charlton*) (1).

Article 1608 of the Civil Code of Lower Canada contains a provision not in terms expressed in the Code Napoleon, though it appears to be universally considered as the law of France also: "Incorporeal things "may be leased or hired except such as are inseparably "attached to the person. If attached to a corporeal "thing as a right of servitude they can only be leased "with such thing." There seems, then, no reason why a contract conferring a right to use a pew in the manner in which such property is generally used, namely, by occupancy during divine service, should not be as much a lease as the right to work a mine or quarry, or the right conferred by contract on a particular person, not amounting to a servitude in favor of another property, to use a right of way or passage.

In all these cases I find several of the commentators on the Code Napoleon, treating the contract as a lease. Marcadé, on Article 1713 of the Code Civil, at p. 431 (6th edition) says: "On ne loue pas une église, un "cimitière, une place publique, une grande route, un "fleuve, mais on loue très bien *des places dans une* "*église*, des emplacements d'étalages de marchands sur "la voie publique, le droit de recolter les fruits et "l'herbe d'un cimitière, le droit de pêche dans un "fleuve."

Other authorities are to be found to the same effect. I can see, therefore, no objection to attributing to the contract which the Plaintiff entered into, for the occupancy of the pew for the year 1872, the denomination and character of a lease as the Plaintiff himself has done

(1) L.R., 2 C.P., p. 104.

Then if it is a lease, one of the learned counsel for the Appellant, Mr. Kerr, whilst he concedes that the notice of 7th December made *tacite reconduction* impossible, invokes Article 1657 of the Civil Code (L. C.), which he says must apply to all verbal leases, whether made for fixed and certain term or not. According to the strict letter of Article 1657, three months' notice would be in all cases necessary to put an end to a verbal lease, even though it should be proved or admitted (as in the present case) to have been for a term certain.

The Article 1657 is almost identical with Article 1736 of the French Code, which only differs in requiring notice to be given, according to the custom of the place, instead of fixing an invariable delay of three months; and the Commissioners of the Code in their Report (4th Report, p. 29), say of the Article that "it is based partly "upon Article 1736, C. N., but goes beyond it in speci- "fying the delay of the notice required to be given." Then the commentators seem to be all of accord that the Article 1736 was inaccurately drawn, and that notice was only necessary in the case of a verbal lease for an uncertain term, and consequently where the duration of the lease is ascertained, though the contract may be verbal, the Article does not apply. Marcadé after discussing this Article, comes to the conclusion: "Il faut donc dire que le congé sera ou non sera neces- "saire, selon que la convention (écrite ou verbale, peu "importe) laisse, ou non, indefinie la durée du bail." (1) See also Duvergier (2); Duranton, (3); Troplong (4); Zachariæ (5); Demante, (6); and Laurent (7).

(1) Vol. 6, Page 481; (2) T. 18, No. 485; (3) T. 17, No. 116; (4) Du louage, No. 404; (5) Par Massé & Vergé T. 4, No. 383, Note 11; (6) T. 7, Pages 268, 269; (7) T. 25. Page 349.

This, I gather from the judgment of Mr. Justice Sanborn, was also discussed and decided in the case of *Webster* v. *Lamontagne* (1), though the report of that case in the Lower Canada Jurist does not show that very clearly. The lease was, of course, subject to the requirements, as to proof, of Article 1233, and as the rental was upwards of $50 it could not have been established by the testimony of witnesses; all difficulty on this head is, however, removed by the clear admission of the Plaintiff. The consequence is that the lease came to an end, without any notice, on the 31st December, 1872, at which date, in my opinion, the Plaintiff ceased to have any legal right to occupy the pew No. 68. The Plaintiff seems to have considered himself, that his right terminated at the end of the year, for, as Mr. Justice Monk points out, his tender of the rent for 1873 implied a recognition by him of the necessity for a new lease on which to found his title to the continued occupancy of the pew. Nothing is to be found in the Act of Incorporation, or in the by-laws made pursuant to it, giving colour to the contention that a contract for the lease of a pew for a year shall be construed not to mean what the parties agreed to, but shall be intended to be a lease for an indeterminate period, possibly for the life of the lessee.

Then, with reference to the usage applicable to the holders of pews in the Roman Catholic Churches in Lower Canada, upon which the judgment of the learned Chief Justice of the Court of Queen's Bench proceeds, I would venture, with great deference to an authority of so much weight, to suggest that in the cases to which

(1) 19 L. C. Jur. Page 10f

the Chief Justice refers, the lease of the pew being indeterminate as to duration, custom has provided for that, on which the parties have been silent, and has annexed to the contract the term that the lessee shall have the occupation of it as long as he resides in the parish, but I do not understand, from the statement of the law, which the Chief Justice gives in his judgment, that the usage would override the express contract of the parties, and that in a case like the present, where there was a lease of a pew for a year certain, this usage would entitle the lessee to insist on a right of occupancy as long as he remained a parishioner. Moreover, I should doubt, though on this point I hesitate to express an opinion, whether the rules applicable to the parish churches in Lower Canada would apply at all to the congregation of a voluntary religious body, regulated by an Act of the Legislature similar to that which forms the organic law of the Respondents' corporation.

As to the law applicable in Scotland to pews in churches belonging to the Established Church there, I find no reference to that law or usage either in the Act of Parliament or in the by-laws, and I am at a loss to understand any principle on which customs prevalent in Scotland can be imported into this contract of lease in such a manner as to override the express agreement of the parties. If it could be shown that these rules as to the occupation of pews in churches of the Scotch Establishment, had been expressly or by implication adopted by the Corporation of St. Andrew's Church they would, of course, have an important bearing, and the law of Scotland might be made applicable, but there is no evidence to show any such adoption, and, therefore, the rights of pewholders in this church are to be

assimilated rather to those of other voluntary religious associations than to those of pewholders in Scotland.

Then it has been argued that some usage or custom not to disturb a pewholding lessee in the occupation of his pew, has existed within St. Andrew's Church itself. Some testimony has been given by witnesses who rather state their own opinions on the subject than prove the fact of such a usage, which is, of course, not the proper way to prove a custom. Moreover, what these witnesses speak of, as to this usage of continuing leases is to be referred rather to courtesy and good feeling than to right, so that even if it were admissible to affect the rights of the parties in this way, the evidence would fall very far short of establishing any binding custom. But surely as matter of law it is out of the question to say that a lease having been made for a fixed term of one year, such a lease can be prolonged indefinitely by the proof of any usage or custom. Articles 1017 and 1024 of the Civil Code of Lower Canada, certainly do provide for a reference to usage in the interpretation of contracts. Article 1017 provides: "The customary clauses "must be supplied in contracts, although they be "not expressed." And Article 1024: "The obliga- "tion of contract extends not only to what is ex- "pressed in it, but also to all the consequences which, "by equity, usage or law, are incident to the contract "according to its nature." But these Articles only mean that all natural incidents and consequences flowing from the expressed agreement of the parties may be added to it by proof of usage. It is not meant that the express contracts of parties may be overruled or extended by usage. Larombiere, in his commentary on Article 1160 of the Code Napoleon (corresponding to Article

1017 of the Civil Code of Quebec) states this very decisively. He says: (Obligations, vol 1, p. 629): "Mais uniquement destiné à suppléer le silence du contrat, "l'usage ne peut prévaloir contre les dispositions "expresses des parties, ni contre les dispositions "formelles de la loi. Celles-ci commandent, celles-là "dérogent, et tous deux retirent à l'usage une puissance "qu'il ne peut et ne doit exercer qu'en l'absence d'un "texte explicite de la loi ou d'une clause dérogatoire "des contractants." I consider it just as much beyond the power of the Plaintiff to control or add anything inconsistent to the terms of the lease, as if, instead of it having been made verbally, it had been made in the most solemn and authentic manner known to the law, by a notarial instrument, in which the contract of the parties was recorded as a lease for one year, and *no longer*. Surely, in that case, violence could not be done to the agreement of the parties by any evidence of usage or custom, however clear and decisive

Referring to the authorities on English law, the rule as to annexing incidents to mercantile contracts or leases, by evidence of custom or usage, is governed in that jurisprudence by principles precisely similar to those I have mentioned (1).

If the Respondents had a right to take possession of the pew, their manner of exercising that right, provided they were guilty of no excess, cannot be called in question. This is in accordance with a well-known rule of the Roman law, which, I apprehend, finds a place in all systems of jurisprudence. (2)

There can, therefore, be no enquiry *quo animo* a party

(1) Leake on Contracts, pp. 111-115; *Webb* v. *Plummsr*, 2 B. & Ald. 746; *Clarke* v. *Roystone*, 13 M. & W., 752. (2) Dig. De Reg. Jur., L. 151.

exercises his undoubted right. At all events, this is the law of England (1), and I find the law laid down in precisely the same terms in a reported decision of the Court of Queen's Bench for Lower Canada (2). I think the appeal should be dismissed with costs.

TASCHEREAU, J. :----

The Appellant, as a member of the congregation of St. Andrew's Church, Montreal, brought against the Respondents, in the Superior Court in that city, an action upon the case, complaining of their refusal to allow him to continue, in 1873, in the peaceful occupation of a certain pew, known as No. 68, in the church above mentioned. He alleges, in his declaration, that from the year 1867 to 1873 he was lessee of that pew from the Respondents, at a yearly rent of $66.50, which sum he paid them regularly, and that he thus became and was a pewholder under the tenth by-law made under the Act of Incorporation of Defendants, and amendments thereto. That his holding of pew No. 68 for the year 1872 was *by verbal lease*. He further alleges that on the 7th December, 1872, he received from Respondents a notice that they declined to re-let him a pew for the year commencing the 1st day of January, 1873, which notice was in the following words, to wit :----

" MONTREAL, 7th December, 1872.

" Extract from the minutes of meeting of the trustees " of St. Andrew's Church, held in the vestry, on Satur- " day the 7th December, inst. It was resolved :

" That, in order to sustain the action of the congre- " gation, taken in regard to Mr. James Johnston, at its

(1) Williams' Notes to Saunders, pp. 18, 19; (2) *David* v. *Thomas*, 1 L. C. Jurist, p. 69.

"meeting on the evening of the 4th November last, "the trustees do now decline to let a pew to Mr. "James Johnston for the ensuing year.

"Carried,—Mr. A. Buntin dissenting.

"(Signed) JAMES WARDLOW,
"St. Andrew's Church,
"Secretary.

"To James Johnston, Esq., Montreal."

The Appellant alleges, also, that on receiving this notice he wrote a friendly letter to Respondents, saying that he was anxious to continue the lease of his pew for another year, and that, on being informed that they would not let him a pew, he caused a legal tender of $66.50 to be made to Respondents on or about 20th December, 1872, as rental for the year commencing about 1st January, 1872, which tender was refused by Respondents, who further refused to let him a pew for any sum. He alleges that this was followed by a notarial protest of the same date, and by another on the first juridical day of January, 1873, with a renewal of tender, which was refused by Respondents, with a declaration that they would not let the said pew, or any other pew, to the Appellant. He alleges, further, that notwithstanding said refusal, as an elder and a member of Session of the church, he was present at Divine Service on the first day of January, 1873, and occupied the pew in question, and continued to occupy it during the first ten days of January, without objection or interference by or on the part of the Respondents, and that he thus became the legal lessee of pew 68 for the year 1873, by tacit renewal (*tacite reconduction.*)

He then states that subsequently to the 10th January, 1873, he was molested by Respondents in the

occupation of his pew to such an extent, that Appellant's family was driven from attendance at Divine Service in said church, and that he had to put up with the presence of strangers in his pew, seated there by order of the Respondents. That Respondents had his cushions and books removed from the pew, and put and pasted in his pew placards with the words "For Strangers" printed thereon, and, in fact, by several other acts that they treated Appellant as having no right to the occupation of the pew, and did, in fact, act with intent to bring the Appellant into contempt and ridicule, and to force him to leave the church, to his damage of $10,000.

The Respondents pleaded that Appellant was no longer a pewholder after the 31st December, 1872, alleging their right to refuse to lease a pew to Appellant, and that according to the by-laws of the church they were under no obligation to continue the lease, and, moreover, that they were justified in so doing by a desire for the preservation of peace, and that they acted in good faith.

The facts proved in the case justify the averments of Appellant's Declaration, and, moreover, establish that the Respondents are a corporate body by virtue of Chap. 154, 12 Vict., which grants them the property, the administration of the temporalities of the church, for the use and advantage of the congregation. Now, it appears that in the year 1872, the Appellant gave offence to certain members of the congregation. He was then requested to retire from the eldership, and, having refused, the several resolutions above alluded to were passed, and, as the result of his grievances, the Appellant brought the present action. He has been unfortunate in the Superior Court, and on appeal to the Court

of Queen's Bench, the Court, by a majority of one out of five Judges, has confirmed the judgment which dismissed his action. I must here admit that the receipt for the rent constitutes a lease of that pew for the year commencing 1st January, 1872, and ending 31st December, 1872. Such a lease, under general terms, would terminate with the year, and a *tacite reconduction* could not for a moment be inferred, according to Article 1657 of Civil Code; but I am of opinion that the rule of law applicable, according to our Civil Code, to a lease of an immoveable property, is not applicable to a lease of a pew.

The Appellant contends that, according to the rules of the church, being a member of the congregation and an elder, he was entitled each year to the lease of a pew on payment of the yearly rent, and could not be deprived of that right without a fair trial by a competent tribunal, not composed of persons such as the trustees whose authority he energetically denies, but of the Kirk Session. I adopt in this cause this view of the Appellant. It is undeniable that according to the usuage of that church, a member once a lessee of a pew can continue to hold it by paying the usual rent and remaining a member of the church, unless he be guilty of immoral behaviour, and in that case the member can only be deprived of his pew by the Kirk Session. They alone were entitled to pass a vote of censure against the Appellant and settle the difficulty.

Moreover, the Respondents are mere trustees, to be compared to procurators and agents, with the very limited powers given to them by the constitution and by-laws of the church,—and nowhere can I find such extraordinary powers as those claimed by the Respon-

nents as trustees. The 10th Article of the by-laws, read in connection with the 9th Article, clearly shews that once lessee of a pew, a member of the congregation, by paying the annual rent and conforming to the rules of the congregation, is entitled to all the privileges belonging to the proprietors.

Now, as to the merits of the case relating to the justification set up by Respondents, I admit that the lanlanguage of the Appellant towards his minister was not the most polite, having flatly contradicted him on a question of facts; but some allowance must be made for the excitement of the moment; and if he was somewhat wrong in the beginning, his fault was certainly more than compensated and atoned for, by the petty annoyance he was subjected to on the part of the trustees, and specially by the unfair and illegal resolution to deprive him of the right to a pew. Having no authority, in the capacity in which they acted, to refuse to re-let pew No. 68, or any other pew, which was tantamount to an excommunication from his church, the conduct and language of the trustees towards a man of character and energy must have been very offensive, and of a nature to wound his feelings. I am therefore disposed to allow the appeal. I am of opinion that Appellant was entitled to his pew, and could not be deprived of it in this manner, so long as he paid the rent and remained a member of the corporation, unless he be expelled by the Kirk Session. I would allow him $300 damages for the ill-treatment and vexations he has been subjected to, by the conduct of the Respondents, with full costs in all the Courts.

Johnston vs. The Minister and Trustees of St. Andrew's Church, Montreal.

FOURNIER, J:

L'Appelant a, depuis l'année 1867, jusqu'à l'année 1872 inclusivement, continuellement occupé un banc dans l'Eglise St. André de Montréal. En 1872, il occupait légalement le banc No. 68, comme membre de cette congrégation, en vertu d'un bail verbal qui lui avait été consenti par les Intimés à raison de $66.50 par année, payable d'avance suivant les réglements adoptés pour la régie des affaires de cette congregation et l'acte de 12 Vict. Ch. 154 qui l'a érigé en corporation. La qualité de locataire de banc (pew holder) lui donne en vertu de l'article 12 de ces réglements tous les droits et priviléges appartenant aux locataires de bancs (pew holders), suivant la constitution, les réglements, la pratique, et les coutumes de l'Eglise St. André depuis son établissement.

En 1871, l'Appelant fut élu un des officiers spirituels (elder) et occupa cette position jusqu'à l'époque du grief dont il se plaint dans sa déclaration.

Le 7 Décembre 1872, les Intimés lui firent remettre l'avis suivant: "It was resolved that in order to sus- "tain the action of the congregation taken in regard to "Mr. James Johnston (the Appellant) at its meeting of "the 4th November last, the trustees do now decline "to let a pew to him for the ensuing year. Carried--- "Mr. A. Buntin dissenting."

L'Appelant, nonobstant cet avis, informa les Intimés qu'il entendait conserver la jouissance de son banc. Afin de ce conformer à l'obligation de payer d'avance, il fit faire deux fois en Décembre 1872, et une autre fois le 2 Janvier 1873, jour de l'échéance, des offres réelles du montant du loyer du banc en question. Malgré le refus de ces offres, il continua d'occuper le banc

pendant quelque temps ; mais les syndics ayant fait mettre des placards imprimés indiquant qu'ils avaient mis ce banc à la disposition des étrangers, dont quelques-uns prirent possession malgré l'Appelant ; ayant de plus, fait enleyer les coussins et les livres de l'Appelant, qu'ils firent transporter à son bureau d'affaires, ce dernier se trouva enfin forcé d'abandonner son banc pour éviter un plus grand scandale.

Les Intimés ont plaidé par dénégation générale, et aussi par exception qu'il n'avait qu'un bail d'un an pour le banc No. 68, et qu'ils avaient le droit de refuser de le lui louer pour une autre année, invoquant spécialement l'usage de la manière suivante : " That according to the " by-laws, customs and practice of the said church, the " pews therein are let each year, and from year to year, and " without notice for their termination ; that there was " no continuation of his lease, and they were under no " obligation to continue the lease to him." Ils ajoutaient qu'ils n'avaient pas jugé à propos de lui louer un banc pour l'année 1873, ni pour aucun autre temps ; que le 7 Décembre, ils avaient dans leur discrétion décidé de ne pas lui louer de banc, décision qui fut confirmée dans une assemblée générale de la congrégation.

La prétention de l'Appelant est d'après ce qui précède, que comme membre de la congrégation et comme locataire de bancs pendant plusieurs années, les Intimés n'avaient pas le droit de le priver de son banc, tant qu'il se conformerait à la condition de payer d'avance. Il prétend de plus que faute d'avis conformément à l'article 1657 du Code Civil, il y a eu continuation de son bail, par tacite reconduction.

La difficulté en cette cause repose entièrement sur la nature du bail fait à l'Appelant par les Intimés dans

l'Eglise de St. André à Montréal, d'un banc d'église sans qu'il ait été fait de conditions spéciales entre les parties. On ne peut considérer comme des baux les différents reçus donnés à l'appelant pour constater le paiement de son loyer pendant les cinq années qu'il a occupé un banc dans cette église. Ils sont tous dans la même forme, je ne citerai que le dernier :----

" St. Andrew's Church.
" No. 1----$66.50.

" MONTREAL, January 9th, 1872.

" Received from James Johnston the sum of sixty-
" six $\frac{50}{100}$ dollars, being rent of 1st class pew No. 68 in St.
" Andrew's Church, Beaver Hall, *for the year* 1872."

Ce reçu ne fait preuve que du paiement pour 1872 ; il ne contient aucune expression qui puisse faire voir quelle est la durée du bail qu'il fait nécessairement supposer. S'il y avait eu un bail par écrit de ce banc pour dix ans, pour la même somme, payable annuellement et d'avance, e reçu aurait-il été conçu dans une autre forme ? Certainement non. Le bail intervenu entre les parties en cette cause n'a pas été mis par écrit. Il est en preuve que ce n'est pas l'usage de les faire ainsi. Le seul article des règlements concernant les baux est l'article 10 ainsi conçu : " Any person who shall lease " a pew from the Trustees for one year and pay the rent " in advance shall be considered a pewholder." Le terme d'une année mentionné dans cet article n'est pas pour déterminer la durée du bail en déclarant qu'il ne sera pas de plus d'une année, mais il n'est là évidemment que pour définir la qualité de *locataire* de banc (*pewholder*) qui donne à celui qui la possède le droit d'être considéré comme membre de l'église. Le même article

parlant d'une autre catégorie de membres, ceux qui ont droit de voter à l'élection du comité chargé du choix d'un ministre, déclare qu'ils devront avoir payé trois années de loyer; mais là encore c'est pour définir une qualification, non pas pour fixer la durée du bail. Au contraire, l'obligation de payer annuellement et d avance n'implique-t-elle pas que le bail doit avoir une durée indéfinie ? Il n'y a rien ni dans ces règlements, ni dans l'acte d'incorporation qui fasse voir qu'on a eu l'intention de déterminer la durée des baux. Ce silence n'exclut pas certainement le droit des syndics de faire des règlements sur ce sujet, mais il indique clairement qu'on n'a pas voulu en faire, parce que l'on a, sans doute, agi sur la présomption que celui qui loue un banc, le prend pour tout le temps qu'il sera membre de la congrégation. Il n'est pas supposé devoir changer d'église comme de logement. On n'a pas fixé le terme du bail parce que l'on a considéré que de sa nature il doit être pour un terme indéfini ; on y a mis qu'une seule condition, le paiement d'avance. Jusqu'ici c'est ainsi que le règlement a été interprêté et mis en pratique. La preuve établit ce fait de la manière la plus complète.

La prétention des intimés que c'est l'usage de louer les bancs annuellement a été contredite de la manière la plus formelle. Bien, au contraire, il est prouvé au-delà de tout doute que de tout temps l'usage invoqué par l'Appelant a prévalu. Je considère la preuve sur ce point comme suffisante pour me justifier d'arriver à la conclusion que le bail fait à l'Appelant, en l'absence de toute preuve contraire, est conforme à l'usage constant depuis l'existence de la congrégation. Dans l'acte d'incorporation, pouvoir est donné aux syndics de faire des règlements, etc., pourvu qu'ils ne soient pas

contraires aux lois de la province, ou aux autres dispositions de l'acte d'incorporation ou à la constitution de l'Eglise d'Ecosse telle qu'établie par la loi, en Ecosse. L'article 1er des réglements déclare que l'Eglise de St André conservera la forme de culte et de gouvernement de la dite Eglise Etablie d'Ecosse. Cette déclaration ne justifie-t-elle pas de recourir aux usages suivis dans cette église concernant la location des bancs et d'en faire l'application dans ce cas ? Je le crois, pourvu qu'il n'y ait point conflit entre ces usages et les lois du pays. Il n'en existe certainement pas. Car d'après la preuve faite en cette cause les usages suivis à ce sujet en Ecosse différeraient peu de ceux qui le sont généralement dans la Province de Québec. Ils ne sont en contradiction directe avec aucune des lois de cette province.

Pour expliquer un contrat, on peut invoquer l'usage telque le permet le code civil qui a conservé la maxime du droit romain. *In contractibus tacitè insunt quæ sunt moris et consuetudinis.*

En consultant ces usages d'après la preuve, on voit que l'Eglise St. André a adopté celui de l'Eglise d'Ecosse, de louer les bancs à des membres de la congrégation, sans terme défini, à la condition de payer le loyer d'avance.

Pour toutes ces raisons tirées de la nature du bail, de l'usage de louer les bancs dans l'Eglise St. André, de l'usage suivi en Ecosse, et que l'on peut invoquer sous les circonstances particulières de cette cause, je crois que l'Appelant était légalement en possession du banc No. 68, dont il a été injustement dépossédé.

Cette manière d'apprécier la nature du bail en question étant incompatible avec idée d'une *tacite réconduc-*

tion, je rejète la prétention émise à ce sujet par l'Appelant.

Les Intimés ont essayé, mais en vain, de prouver que la conduite de l'Appelant dans les assemblées de la congrégation et de l'église avait été telle qu'ils étaient justifiables de lui enlever son banc. Comme les faits ont été mentionnés en dét ail par ceux qui m'on précédé, je m'abstiendrai de les répéter. Si la conduite de l'Appelant méritait une censure ce n'était pas aux Intimés à la lui infliger, mais c'est devant un tribunal spirituel, le Kirk Session, qu'il devait être traduit pour en répondre. Cet avancé n'a été fait par les Intimés que pour essayer de pallier l'abus de pouvoir qu'ils ont commis par leur résolution du 7 Décembre, refusant de louer un banc à l'Appelant pour supporter l'action de la congrégation t le forcer de résigner sa charge d'*elder* et le priver du droit de prendre part aux affaires de l'église. C'est pour arriver à ce résultat qu'ils ont eu recours à l'expédient de lui refuser un banc, le mettant de cette manière hors de l'église. Mais les Intimés oubliant qu'ils ne sont que des administrateurs, prétendent qu'eux seuls forment la corporation et que l'Appelant ni aucun autre, ne peuvent réclamer l'exercise d'aucun droit comme membre de la congrégation (corporator). Cependant ils dérivent leur pouvoir de ces mêmes membres qu'ils prétendent n'avoir aucun droit ; ils ne sont que leurs agents, soumis, dans bien des cas, au contrôle des assemblées dont les membres sont les vrais propriétaires de l'église. Je répéterai à ce sujet les paroles de l'Honorable Juge en Chef Dorion :

" As commoners, the members of this congregation " have certain rights resulting from the implied contract " entered into when they joined the congregation, and

" of which they cannot be deprived arbitrarily by the " Respondents. Among these rights is that of obtain- " ing seats and pews on the same terms and conditions " as all the other members of the congregation, and of " retaining them as long as they submit to the rules " and usages of the Church."

Pour ces motifs, je concours dans le jugement infirmant celui de la Cour de la Banc de la Reine renvoyant l'action de l'Appelant, et je suis d'avis que les Intimés doivent être condamnés à payer $300 de dommages, avec tous les frais tant en Cour Inférieure que dans cette Cour.

HENRY, J. :—

The Appellant having been in the legal possession of a pew (No. 68) in St. Andrew's Church, Montreal, during the year 1872, and during the months of January, February, March and April, 1873, complains of being disturbed in his possession thereof, on several occasions during the months named by the Respondents, they having removed his books, cushions, &c., therefrom, and by placing placards therein intimating that the pew should be reserved for strangers. The Appellant is shown to be one of the congregation for whom the Respondents, as Trustees, held the title of the church (1). He had been the holder of pews in the church for several years, and of the one in question (No. 68) during the years 1869 and 1872. The church having been burnt in October, 1869, and not rebuilt and occupied till November, 1870, the Appellant occupied No. 66 instead of No. 68, from that time till the end of 1871, returning to No. 68 in January, 1872.

(1) See Art. 12 of the by-laws.

The rents of the pews were paid annually, but no written leases were granted and no letting was annually made, but those in possession continued from year to year to pay the rent, sometimes but not generally in advance. The Respondents contend that under these circumstances the leases terminate every year, that no notice to quit is necessary, and that they, as trustees, could be justified, the day after the expiration of the year, in turning out, without any previous legal notice to quit, without any other legal justification or necessary explanations, the books and furniture of any of the pewholders.

If they have that abstract right, we cannot, in an action like the present one, withhold from them the defence which that right enabled them to set up.

The arbitrary and improper exercise of a right so peculiar as that claimed, would lead to the most unpleasant consequences, and the existence of it would enable the Trustees, without legal restraint, to unseat and drive from their pews any number of the pewholders they pleased to injure, without a moment's notice.

All that would be necessary for them would be on the first day of January, in any year, to say to A, B, C or D : "We have decided that although you are an elder and communicant of the church, and one of the parties for whom we are trustees, you shall no longer hold a seat in the church." Can any one say that such should be the relative position occupied by Respondents and those for whose use they hold the title in trust? The Respondents do not avowedly claim that position, but give a reason for the commission of the acts complained of, and make an insufficient attempt at a justification.

Their justification for the acts complained of, on the ground of alleged improper conduct of Appellant, must

wholly fail, for neither the law nor the Constitution of the church, empowers them to refuse the continued occupation of a pew to which the party holding it was otherwise entitled, because they *might* have objections to his moral character or conduct. By their plea they attempt a justification on the ground that, to the best of their judgment, before the 31st of December, 1872, it had become undesirable and inexpedient to let the said pew No. 68 to the Appellant for the year commencing the first day of January, 1873, or for any other time, and in the exercise of their discretion, and in good faith, without malice or any other than conscientious motives, and with a desire to fulfil their duties, and for the preservation of peace and harmony in the congregation, the Respondents did, to wit: on the 7th day of December, 1872, decide and determine not to let *a pew* (that is, any pew,) to the Appellant. For the sake of the Respondents, it is, perhaps, to be regretted that it having become "undesirable and inexpedient, to the best of their judgment," to give any sitting in his own name in the church, does not constitute them the judges in such a case; nor does it allow them, "in the exercise of their discretion," to take the stand they did; and although they acted in good faith, and without malice, &c., there is no justification under this plea; and it is to be further regretted that the course they adopted (conscientiously, no doubt), resulted, as in many other cases where arbitrary power is exercised or attempted to be used, in lessening instead of increasing the peace and harmony of the congregation. The By-laws and Constitution of their church directly vested the power, not in the trustees (who are frequently not persons capable of deciding questions of moral conduct, &c., or versed in church discipline), but in the Session, and, by appeal, in the Synod.

The Appellant had recently been deposed as an elder by the Session, but the Synod reversed the action of that body; and at the time of the refusal to him of a seat in the church, he was, by the rules of that church, and by a decision of its highest court, an elder in full standing, and one in regard to whom the Trustees had no right to exercise their judgment or discretion so far as to refuse him a seat for the reasons pleaded; and if, in their judgment, in a matter in which they had no legal control, they thought it "undesirable and inexpedient" not to leave the Appellant in the enjoyment of his rights, but invaded them, they must abide the consequences; and if, by attempting to usurp power that properly belonged to other bodies in the church, and by disregarding the action of the Synod, whose decision should have been respected, they have produced litigation and otherwise increased discord and want of harmony in the congregation, it is but what might have been expected. The attempt by the Respondents and the Session to disrate the Appellant having failed, we can only conclude that the attempt to do so should not have been made; and if the Appellant, after the judgment of the Synod, acted improperly, a fresh case, before the proper authorities, should have been brought; but to permit the trustees, who merely hold the title for the benefit of the congregation, and who have limited powers only, as their dealing with it, to decide upon the conduct of one of its members, and an elder, too, and thereupon deprive him of a pew or seat in his church, would be to strike at the root of all proper church government, and create an *imperium in imperio* calculated to create all sorts of strifes and conflicts.

Having thus disposed of this justification, I will now

consider the case as presented by the other pleadings Much has been said at the several arguments of this case, a good deal of irrelevant testimony introduced, and many points discussed, in the judgments rendered in this case previous to the appeal to this Court; but many of those points and arguments, and a great portion of the evidence, I consider unnecessary to refer to in my view of the law that must govern the decision.

The Appellant claims that he was rightfully in the possession of the pew in question when the trespasses and wrongs were committed. 1st. Because having been in possession in 1872, he was entitled to three months' notice to quit, and without which he could hold over for the year 1873, during which year the trespasses complained of were committed. 2nd. That having continued in possession eight days after the 1st of January, 1873, under Article 1609 Civil Code, Lower Canada, he could hold possession on paying the annual rent in due time for that year by *tacite reconduction.*

The Respondents deny the correctness of these positions, and contend, as to the first, that no notice to quit was necessary, and, secondly, that they having given the notice of the 7th December, 1872, and subsequently refused to receive the rent, there was no *tacite reconduction.*

I am of opinion that there was no renewal of the lease by *tacite reconduction*, and that the notice referred to, and the refusal to receive the rent, destroy the Appellant's contention on that point. See Articles 1609 and 1610 Civil Code (L. C.) I will, therefore, proceed to consider the Appellant's first position, and in doing so must, in the first place, solve the question as to the *nature* of his holding. Was it by a lease? I feel bound

to decide that it was, and by a *verbal one*, for the receipt for the rent for 1872 does not constitute a lease. It is merely an acknowledgment of the receipt of the rent for the year, signed *on behalf* of the Treasurer, and would not be incompatible with a holding by lease, written or unwritten, for life, or from year to year, or otherwise. Besides the Treasurer had no authority to lease or let pews or make any contract therefor. The letting was a verbal one by the Respondents, as Trustees, to the Appellant, but it has been adjudged that if it were a lease, it was not of the ordinary kind. Mr. Justice Sanborn properly says:----" In St. Andrew's " Church in Montreal some persons have a *proprietary* " interest in pews----others, as Appellant, hold only by *lease*, having no ownership in a pew;" and adds:----"As " the rights which ownership of pews gives to the " owner are peculiar, and not subject to many of the " ordinary incidents of property, so what is termed " *lease* is not an ordinary kind of lease." And further: " It is a means of contributing to the support of the " Gospel." I cannot conceive that in the relation of the parties here now, the *object* for which the pews are let, or the purpose for which the rent is applied, can in any way affect the character of the holding, or that *the application of the rents* can in any way affect the rights of the tenant who pays them; nor can it legally affect those rights, whether they are merely trustees or owners; nor are the trustees the less lessors in the ordinary sense, as between them and their tenants, because the funds derived from pew rents are only received in trust for the benefit of the congregation, and as "means of contributing to the support of the Gospel."

In support of the view taken by him, Mr. Justice Sanborn quotes Pothier (Louage ; No. 4), who says :---- " On tolère néanmois le louage des bancs et des chaises " dans les églises ; on peut dire ce n'est pas proprement " un contrat de louage, et ce qu'on donne n'est pas " donnée comme le prix d'usage de ces choses qui ne " sont pas (*not applicable*, as the Judge quotes him, but " *appréciable*,) mais comme une contribution aux " charges de la fabrique." This doctrine is held and may be properly applicable to churches under the laws of France and to Roman Catholic Churches in Lower Canada, and be totally inapplicable to churches held by a civil corporation like the one in this case. In this and other countries, churches are owned by one or more persons not necessarily belonging to the same religion as those who worship in them, and surely the doctrine of Pothier cannot be held applicable to them. If owned by a civil corporation, the same principles, I take it, would govern, as if owned by an individual, except as being the trustees and those for whom they hold. But if French law is to be enforced in one respect, why not take it in its integrity and comprehensiveness ? We would then have, under the French and Lower Canadian parochial organization which prevails with respect to the Roman Catholic Church, and even under the jurisprudence in England and Scotland in regard to the Established Church there, to decree to the Appellant, as lessee of the pew in 1872, the right to retain it as long as he resides at Montreal, on payment of the rent originally agreed upon, subject to the right of the Respondents as trustees, with the sanction of the two-thirds of the Congregation, to raise or lower it. In that view the Appellant's action would

be sustainable to recover by law compensation for the damages done to him.

The trustees in this case hold the titles, and, although restrained in some respects, they have the ordinary powers of trustees to lease; and can do so "within the "terms of the Constitution and By-laws and as incident "to their title. Corporations aggregate may make what "estates they please in their church or other lands."—(1) When that power is so exercised by them I can see no difference in principle by which their leases would, as between them and their lessees, be different from other leases by other trustees, or be subject to the application to them of different rules of law. The lessee in either case obtains the right of possession and user for the time, and pays the rent agreed on. The trusts are declared by the conveyances, the Acts of Incorporation, and its amendment and the by-laws, and the trustees have to account in the ordinary way to their *cestui que trust.* After full consideration of the position of the Respondents, in regard to their lessees, I can come to no other conclusion than that it is one incident to any ordinary civil corporation, and that the Court, without in the slightest degree trenching on the religious rights, privileges or responsibilities of the trustees or congregation, or with any discretionary power of the former, is empowered and bound to deal with the subject matter, as one purely of civil contract, and in that view to consider and adjudge the rights of parties as in regard to the proprietorship and leasehold of pews. The exercise of this power will not trench on the rights of spiritual jurisdiction, nor will it in any way affect the contracting powers of the trustees. It

(1) 2 Step.: Dom., 733.

only, in this case, is invoked to decide *upon the contract made*, and for an unlawful interference with the rights of the Appellant under it.

To sustain the proposition that the Appellant held by lease, and not a mere easement or license, it is necessary, first, to show that the subject-matter is capable of being leased, and if there be no legal prohibition, the understanding and expressed views upon that point of the parties themselves, may aid in ascertaining their respective rights under the circumstances. A lease is well defined at Common Law to be "A conveyance by which a man grants lands or tenements to another for life, for years, or at will (1) In ordinary legal intendment, tenement includes not only land, but rents, commons, and several other rights and interests issuing out of, or concerning lands. (2) By Article 1605, C. C. (L.C.) "All "corporeal things may be leased or hired, except what "may be excluded by their special destination, and those "which are necessarily consumed by the use made of "them." By Article 1606, "Incorporeal things may also "be leased or hired, except such as are inseparably con- "nected with the person, &c." The pew in this case is, in my opinion, a subject of Article 1605, and under that Article may be leased for any term within the trust. If a subject of Article 1606, it might also be leased.

By the 10th Article of the By-laws, "Any person who "shall *lease* a pew from the Trustees for one year, and "pay the rent in advance, shall be considered a pew- "holder. The rents of pews and sittings are to be paid "annually in advance, from the 1st day of January, and "are to be considered then due, &c." I have before stated that in regard to the church temporalities, the

(1) Step., Com. 512; (2) 1 Step., Com. 170.

corporation here not being an ecclesiastical one, but the creature of a special Act of Incorporation, partakes of the character of all ordinary civil corporations, and I have so decided after an exhaustive search for the leading principles to determine that point. If correct in the positions taken, it necessarily follows that the trustees had power to lease for a year, or for years, the pews in the church, and that the party leasing from them got a leasehold title, and not a mere easement or license to occupy and use, which was revokable. The right acquired by the Appellant was not, therefore, an easement; an easement lies not in livery, but in grant; and a freehold interest cannot be created or passed otherwise than by deed; "and the right of *profit à* "*prendre*, if enjoyed by a holding of a certain other estate, "is regarded in the light of an easement appurtenant "to such estate; whereas, if it belongs to an individual, "distinct from any ownership of other lands, it takes "the character of *an interest or estate in the land itself*, "rather than that of a proper easement in or out of the "same." (Washburne on Easements (1); *Grimstead* v *Marlowe*,) (2) "Easements, that is, such as stated, being "interests in land, can only be acquired by grant, and "ordinarily, by deed, or what is deemed to be equivalent "thereto, a parol license being insufficient for the pur-'pose." (Washburne on Easements, (3) "No servitude "can be established without a title; possession even 'immemorial is insufficient for that purpose." (4). "As regards servitudes, the destination made by the "proprietor is equivalent to a title, but only when it "is in writing, and the nature, the extent, and the 'situation of the servitude be expressed." (5) A

(1) P. 7; (2) 4 T. R., 717; (3) P. 18; (4 C. L. C., 549; (5) C.L.C., 551.

parol license being revokable, no term of holding could be created, and therefore the holding by the Appellant cannot be an easement or under a mere license. His holding must, therefore, be as a lessee under a verbal lease. It is now the settled legal doctrine that a corporation, just as the Respondents' corporation in this case, has all such authority as will conduce to the attainment of its ends, save such as are, by direct provision in its Act of Incorporation or other constating instruments, or by necessary inference from the same, denied it. (Bryce on Ultra Vires, 38, *et seq.*, where some decisions are quoted.)

"Ownership is the right of enjoying and disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations." (1) Then, I take it that not only had the Respondents as trustees, by the express terms of the By-laws, by the Civil Code, but also by the late decisions, the power of granting leases of pews, and that such would bind the congregation their *cestui que trust*. I will apply but two more tests:---1st. Could not the Appellant have had recourse for damages, if the Respondents, during the year 1872, had ejected him from the occupation of the pew, or have interfered with his proper use of it? Having received the rent, would they not be estopped from saying he held only by "license" when their contract was irrevocable for that year? Were they not bound, under the 3rd section of Article 1612 of the Civil Code, to give "peaceable enjoyment, &c., during the continuance of the lease?" And 2ndly, Had not the Respondents, in the language of Article 1619, for the payment of their rent and obligations of the

(1) C. C. L. C. 406.

lease, a *privileged right* upon the moveable effects which are found upon the property leased, upon which they had a *privileged claim* for any rent falling due.

Having disposed of the question as to the lease, the next point for consideration is the *nature* of the lettings as to the term granted. I have already characterized them as ordinary leases, and can find no law to make them otherwise.

We have now to consider the nature of the holding of the pews for over forty-nine years up to 1872. The trustees let the pews originally for a year, and for rent in advance, and the pewholders, whether the rent was paid or not in advance, were allowed to become lessees for a second year by *tacite reconduction*, and so on from year to year. Art. 1609 provides: "If the lessee remain "in possession more than eight days after the expiration "of the lease without any opposition or notice on the "part of the lessor, a tacit renewal of the lease takes "place for another year, or for the term for which such "lease was made, if less than a year, and the lessee can "not thereafter leave the premises or be ejected there-"from unless notice has been given within the delay "required by law." This article clearly applies to all holders of a pew for over a year. The Appellant was a lessee of No. 68 for two years ('68–'69), and during the latter year was clearly entitled to notice. He resumed possession of it in 1872, having occupied No. 66 in 1871 at the same rate as he previously paid, without any new bargain or arrangement, so far as appears. What then was, under all the circumstances, the nature of the holding under the contract? Would it not be a fair inference that he resumed his former position as to No. 68, and which was the same as that of all other pewholders who

held for over a year? And was it not the true understanding of the parties that his occupation should be identical with all the other pewholders? Did not the Respondents virtually say: "The rule and practice is to let pews, for rent payable annually in advance, and you shall have the same tenure as all the others, which is a holding as long as you pay the rent in proper time; and we having now adjudged you as a fit person to hold a pew, you can, by paying the rent in advance, continue to hold the pew until we give you notice to quit, or you are declared by the proper authorities not a fit person to do so?" I feel satisfied that, had such been submitted for the consideration of a jury in an English Court, and they found that such was the implied contract, the verdict would be sustained, and I have found no law or rule which would prevent a Judge in Lower Canada finding the same under the Code of Civil Procedure. In that case the Appellant would be entitled to a legal notice to quit. It is not, however, necessary, in my opinion, to decide positively that point; although, did the determination of the lease depend solely on it, I would not have any hesitation to do so.

That in *all* cases of verbal leases, and where the term is uncertain, a notice is necessary, appears to me unquestionable. By Article 1657, "When the term of a lease is "uncertain, or *the lease* is *verbal*, or presumed, as provided "in Article 1608, neither of the parties can terminate it "without giving notice to the other, with a delay of three "months, if the rent be payable at terms of three or more "months; if the rent be payable at terms of less than "three months, the delay is to be regulated according to "Article 1642." *When the term of the lease was uncer-*

tain. This is clearly applicable to a written lease where the term is not stated, and under which a party may hold by the year, quarter, month or otherwise. It is also applicable to verbal leases, where the term is not originally agreed upon, for the word "lease" applies to both; and nothing further was necessary to be provided for by the Code, unless a distinction were intended to be made otherwise between *written* and *verbal* leases. The Code evidently was intended to go further, and adds, "or the lease is verbal," a comprehensive term embracing all verbal leases, and so plainly mandatory that I feel bound to the consideration that, for good reasons (one of which may have been, not to leave so important a right as the ending of a lease to be resolved by verbal proof, subject, as it would be, to conflicting evidence), the framers of the Code used the words advisedly, and that they, in the employment of words so plain, and the Legislature, in adopting them, intended them to apply to *all* cases of verbal leases, and to those where the term is uncertain. Such being my opinion, I am necessarily bound to declare that, as no legal notice was given to the Appellant, as required by the Code in the case of verbal leases, and, where the term is uncertain, as I maintain it was in this case, the Respondents were not justified in the trespasses and grievances committed by them, and that the appeal should be allowed, with costs, and that the Respondents should be adjudged to pay to the Appellant the sum of $300 damages for the injuries complained of.

Appeal allowed.

Attorney for Appellant: D. MacMaster, Esq.

Attorneys for Respondents: Messrs. Cross, Lunn and Davidson.

ALFRED JOYCE, - - - - - - APPELLANT;

AND

DAME CONSTANCE H. HART, ET VIR, - - RESPONDENTS.

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

Right of Appeal by Defendant (P.Q.)—Prepayment necessary to exercise Mitoyenneté—Demolition of Works.

The 38th Vic., c. 11, sec. 17, enacts that no appeal shall be allowed from any judgment rendered in the Province of Quebec, in any case wherein the sum or value in dispute does not amount to two thousand dollars. H. brought an action against J., praying that J. be ordered to pull down wall, and remove all new works complained of, &c., in the wall of H.'s house, and pay £500 damages, with interest and costs. H. obtained judgment for $100 damages against J., who was also condemned to remove the works complained of, or pay the value of "*mitoyenneté*."

Held:—That in determining the sum or value in dispute in cases of appeal by a Defendant, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment (Strong, J., dissenting.)

Held:—That an owner of property adjoining a wall cannot make it common, unless he first pays to the proprietor of the wall half the value of the part he wishes to render common, and half the value of the ground on which such wall is built.

Held also:—That demolition of works completed may properly be demanded in a petitory action for the recovery of property and that the present action is one in the nature of a petitory action.

This was an appeal from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side), compelling the Appellant to pay one hundred dollars damages for acts of trespass complained of by the Respondent, and ordering the Appellant to remove, within four months, all the works he had made in the gable wall of Respondent's house, in order to join his own house with the said wall, and to restore the wall in the state it was when the Appellant begun his works; unless,

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, JJ.

within the same delay of four months, the Respondent did proceed to have the wall and ground valued by experts named according to law, and pay to the Respondent the amount of indemnity required as would be determined by the Superior Court, on the report of the said experts, to render the wall a common or mitoyen wall; and, in case the Appellant failed to comply with this order, the Respondent was given power to remove the works complained of and restore his own wall in its original condition, at the costs and charges of Appellant.

The action was first instituted in the Superior Court for the District of Montreal, on 7th September, 1874, under the following circumstances :—

Mrs. Hart had acquired, in 1872, a lot of land on Durocher Street, in the City of Montreal, and had erected thereon a two-storey stone house, with mansard roof; later, the Defendant Joyce acquired the two lots of land on Durocher Street, adjoining Plaintiff's property, and, in the spring of 1874, proceeded to erect a three-storey brick building, divided into tenements, and, in the course of erection, joined his building to that of the Plaintiff, and used her north-west gable wall, which he desired to make a common wall.

In the declaration, the Plaintiff alleged that the Defendant had trespassed upon her property, by erecting his building contiguous thereto, using her wall as a division wall, and by piercing holes therein, and by destroying a portion of a water-spout and removing a console, thus changing the architectural appearance of the house; the whole being done against her will and formal protest, and without first having the matter settled by experts, in conformity with Art. 519 of the Civil Code; and concluded for the demolition of these new

works, and that Defendant be held to place the wall in the same state it was prior to the making of these works, and to pay the sum of five hundred pounds currency for damages.

The Defendant met the action, first, by a demurrer, *defense en droit*, denying any right of action on the part of Plaintiff to obtain the demolition of the works, which, as appeared from the allegations of Plaintiff's declaration, were completed before the action was brought; and also denying any right of action, other than for the indemnity fixed by law, for rendering the wall of Plaintiff's house common. Defendant also pleaded the same law-grounds by a second plea, of *Exception peremptoire en droit;* and, thirdly, answered specially, denying all the allegations of Plaintiff's declaration save as expressly admitted in their answer, alleging that in using the wall of Plaintiff's house as he had done, Defendant acted only as by law and custom he was allowed to do, said gable wall not being built entirely on Plaintiff's property; that before erecting his said building, the Defendant did request Plaintiff to have the indemnity determined and fixed, and did offer to pay such indemnity, but that Plaintiff refused to name an expert or have an *expertise* for said purpose; that Defendant acted in good faith and in accordance with the custom and practice of builders, and in a manner to cause no damage to Plaintiff; and that he, Defendant deposited in Court, with his plea, the amount of indemnity as fixed by his own expert, after action brought, although such indemnity was not demanded of him by Plaintiff's action. Defendant also pleaded the general issue.

The Plaintiff answered generally: the parties were then heard upon the demurrer, which was dismissed by the judgment of the Superior Court, Montreal, of the thirtieth day of November, one thousand eight hundred and seventy-four.

The case was then inscribed for proof, and the evidence being finished, the case was heard upon the merits; and on the thirtieth day of April, one thousand eight hundred and seventy-five, the Superior Court at Montreal rendered judgment, dismissing Plaintiff's *demande*, in so far as it asked for the demolition of the works complained of, as the building of the Defendant with respect to which the Plaintiff complained, was done and completed before the institution of the action, and ordering an *expertise* for the determination of the question of damages.

From this judgment, as an interlocutory one, the Plaintiff obtained leave to appeal to the Court of Queen's Bench of Lower Canada, which Court, on the twenty-second of June last, rendered the judgment from which the present appeal arises.

JANUARY 16th, 1877.

Mr. *M. A. Hart*, on behalf of Respondent, made a motion to quash the appeal for want of jurisdiction, on the ground that the amount in dispute was settled by the judgment of the Court below, and did not exceed $2,000. In support of his motion he cited: *McFarlane* v. *Leclaire* (1); *Cuvillier* v. *Aylwin* (2); and Stats. L. C. (3).

Mr. *L. H. Davidson*, Q. C., *contra*, referred to *Richer* v. *Voyer* (4); *Buntin* v. *Hibbard* (5); and *In re Louis Marois* (6).

The Court reserved judgment on this point until after the argument of the appeal on the merits.

JANUARY 20, 22, 1877.

Mr. *L. H. Davidson*, Q. C., for Appellant:—

The action brought is one *en demolition de nouvel*

(1) 6 L. C. Jur. 170, & 15 Moore P. C. C. 181; (2) 2 Knapp's P. C. C. 72; (3) 34 Geo. III., c. 6, sec. 30; (4) 2 Rev. Leg. 244; (5) 1 L. C. L. J. 60; (6) 15 Moore P. C. C. 189.

œuvre, and when brought the new works complained of were completed. No action *en demolition de nouvel œuvre* lies when works are completed. It is only necessary to refer to the following authorities to establish the truth of this proposition. Carou *Actions Possessoires* p.p. 30, 31, 33, 40; Daviel, "Cours d'Eau," *Du Domaine Public*, par. 471; Ferriére (Dict.) *Verbo Denonciation de nouvel œuvre*. *Brown* v. *Gugy* (1) shows that authorities commenting the French code are inapplicable to this case. The French code is different from what the old French law was, and it is that law which prevails in Canada.

Appellant contends that in this action the conclusions of the declaration ask for the demolition of the whole wall, from top to foundation, and are strikingly like those given by the authors as conclusions in an action *en denonciation*, and dissimilar to those of an action *possessoire*. In a possessory action it is necessary to allege expressly, and prove positively, Plaintiff's possession for a year and a day before the *trouble*. *Cardinal* v. *Belanger* (2); C. C. L. C., Art. 946; 2 Doutre Proc. Civ., p. 258, Art. 1468; *Jourdain* v. *Vigereux* (3).

Nor can the Plaintiff's demand be maintained as one in the nature of an action *petitoire*. In that case the plaintiff would ask to recover the absolute and free ownership of her gable wall, and not demolition of works and damages. (4).

By Art. 518, C. C., Plaintiff's ownership is affected by the equal right of her neighbor to make use of the wall.

(1) 2 Moore, P. C. C. N. S., p. 341; (2) 10 L. C. J., p. 251; (3) Robertson Digest, p. 12; (4) See Ferrière (Dict.) *Verbo Petitoire*; 2 Demolombe, liv. II, tit. IV, Cap. II, No. 367.

Neither is prepayment of the indemnity mentioned in Art. 518 absolutely required. This article is a reproduction of Art. 594 of the *Coutume de Paris*, but the word *prepayment* is left out.

The Appellant therefore claims that the only action left to Plaintiff after completion of the works, was a personal action for damages. The decisions given in Louisiana under Art. 680 of the Louisiana Code, which is almost a copy of Art. 518 of our Code, are favorable to Appellant's contention that prepayment is not necessary, and that the only action which could be maintained is one of damages. *Graihle* v. *Hown* (1); *Murrell* v. *Fowler* (2); *Davis* v. *Graihle* (3).

Lastly, can this action be maintained as one of damages? The Appellant respectfully submits that it cannot. There was no wrongful act committed. By Art. 514, C. C., all the works complained of are allowed, and moreover by the judgment no special damages have been appropriated for the alleged trespass.

[The learned Counsel also referred to *Beck* v. *Harris* (4), Duranton, Vol. 5, p. 337 on Art. 657 of C., and Washburne on Easements, p. 472]

Mr. A. M. Hart, of the Montreal Bar, on the part of Respondent:—

Plaintiff, before being interfered with her acquired rights, and before the new works were proceeded with, was entitled, under Art. 518 and Art. 519, to be asked her consent and, on her refusal, Defendant could have caused to be settled by experts the necessary means to prevent the new work from being injurious to the rights of the other.

The decisions under Art. 661 of French Code, of

(1) 1 Louis Rep., p. 149; (2) 3 Louis Rep., p. 165; (3) 14 Louis Rep., p. 338; (4) 6 L. C. J. p. 206; (5) 13 L. C. J., p. 108.

which our Art. 518 is a reproduction, prove beyond all controversy that prepayment was necessary, and that Plaintiff can have an action not only after works were completed, but also an action in *rem.* against any subsequent purchaser of Defendant's property. *Pochet* v. *Des Rocher* (1); Demolombe (2); and Ferrot (3); *Odiot* v. *Rousseau* (4) is expressly in point. Although this case was not cited in any of the Courts below, your Lordships will be surprised to find how strikingly similar are the *considerants* of the judgment in that case with those of the judgment in this case given by the learned Chief Justice Dorion.

Now, as to the nature of this action, it is immaterial to Plaintiff whether the action of the Appellant for the removal of the works made on his gable wall is considered as of the nature of an action, *petitoire* or of an action *possessoire* and *en denonciation de nouvel œuvre.* By Art 20 of the C. C. P., it is sufficient that the facts and conclusions be distinctly and fairly stated, without any particular form being necessary, and, by referring to the following authorities, it will be seen that an action *en denonciation de nouvel œuvre*, can be merged into a petitory or possessory action. *Vide* Merlin, *Question de Droit* (5); Curasson, *des Actions possessoires* (6); Troplong (7).

The case of *Gugy* v. *Brown*, cited by Appellant, is not in point. In that case the question of *denonciation de nouvel œuvre* was only casually touched upon in a dissertation,and there was no adjudication as to whether an action asking for the removal of works illegally

(1) 40 Jour. du P., p. 638; (2) P. 408, No. 367, liv. 11; (3) Lois du Voisinage, p. 364; (4) 26 Jour. du P., p. 76; (5) Denonciation de nouvel œuvre, p. 6; (6) No. 23, p. 30 and p. 32; (7) Vol. I., Des Prescriptions Nos. 313, 328, 479 and 487.

placed on a Plaintiff's property could be maintained after the works were completed.

The contention that Plaintiff cannot recover damages for the trespass is not warranted. The English, as well as the French authorities, are clear on this point.

See *Shadman* v *Smith*, (1) and Fisher's Common Law Digest, p. 8384.

Mr. L. H. Davidson in reply :—

The evidence proves that Appellant acted in good faith, and that Plaintiff had no objection that the works should be proceeded with. The protest was insufficient, if she really objected to the works, she should have obtained an injunction, or, rather, instituted her action before the works were completed. The judicial interpretation given to the law on this point, in France, is different from that given by the Judicial Privy Council in *Gugy* v. *Brown*.

June 28, 1877.

THE CHIEF JUSTICE :—

In this case I have felt considerable difficulty as to the question of jurisdiction, but we have been referred to the Code of Lower Canada, which contains words relative to appeals either from the Circuit Court or from the Superior Court, similar to those used in the Statute establishing this Court in relation to appeals from the judgments of the Court of Appeals in the Province of Quebec.

The general rule is, that when the words of a Statute have received a judicial interpretation and the Legislature subsequently passes an Act on the same or a similar subject, using the same words, then you hold that the Legislature approved of the meaning affixed to the words by the Judicial decision.

(1) 3 Vol. Jurist, N. S. p. 1248.

I understand that the Judges and Courts in the Province of Quebec, before the passing of the Appeal and Exchequer Court Act, decided under the code that it is the amount claimed in the Declaration which gives the right to appeal and not the amount of the judgment.

I think we may here hold that such is the effect of the Act of the Dominion Parliament and that the Legislature so intended by the words used. We must, I apprehend, assume to a certain extent that the Dominion Parliament is aware of the proceedings and matters which are being transacted in the Provinces which compose the Dominion, and particularly as to the decisions of the Courts of Justice; and being aware of the decisions as to Appeals in Quebec, when the same legislative language as to Appeals from the Court of Appeals of Quebec is used, we may apply the rule referred to and hold this Appeal will lie.

The case seems to me to turn on two questions:

1. Whether the wall of Plaintiff's house was built wholly on her own land; and, 2nd, if so, whether the Defendant had a right to use it as a common wall, without first paying her for the same, or taking the steps necessary to make it a common wall, under sec. 578 of the Civil Code of Quebec.

The evidence called by the Plaintiff shewed the wall was erected three inches within the line of her lot; that this line was ascertained by the posts that had been planted by the surveyors, and the fence that then stood on the premises. The witnesses called by the Plaintiff were architects. The Defendant called a surveyor, and by his measurement, taking the house on the opposite side of Prince Arthur Street to be on the line of that street, then the wall of the Plaintiff's house was six inches off the line of Portland Street,

and, giving her lot 31 feet front, it would bring the north-west gable wall of Plaintiff's house directly on the line between Plaintiff's and Defendant's lots. Supposing the Plaintiff's lot thirty feet in rear, the wall would be somewhat in on Defendant's land.

He said he took no precise measurement of the rear of Plaintiff's house, and was not certain with regard to the excess in the rear of the house.

Mr. Justice Tessier, in his judgment as to this point, said Mrs. Hart had built her house wholly on her own land.

Mr. Justice Sanborn said the wall of Respondent's house was wholly on her own land, and was not mitoyen under article 518 C. C.

Chief Justice Dorion said the Plaintiff has established that she was proprietor of the wall when the works were made.

I should draw the same inference from the evidence that these learned Judges have, that the wall in question was built wholly on Plaintiff's land.

The decision on the demurrer in the Superior Court was in favor of the Defendant as to the right of Plaintiff to demand the demolition of the work of which she complained. Mr. Justice Johnson, in his judgment says: "that she built up to the limits of her lot, and, of course, the Defendant had the right to the *mitoyenneté*; but no experts were named to value it, and it is now too late to ask for the demolition. It would be obviously absurd to condemn this Defendant to demolish what he would have a right to build again the next day, upon the observance of the proper formalities."

The Plaintiff contends that the evidence shows that the wall in question was built wholly on her land, and

no agreement or understanding was had with the adjoining proprietor as to the expense of building; she, therefore, was the owner of the wall in question, and the Defendant was the owner of property adjoining a wall which he had the privilege of making common under article 518 of the C. C. of Lower Canada.

That article reads as follows:

"Every owner of property adjoining a wall has the privilege of making it common, in whole or in part, by paying to the proprietor of the wall half of the value of the part he wishes to render common, and half of the value of the ground on which such wall is built."

The Defendant contends that he had the right to make this a common wall, and to use it as such without first paying for it, and that the only way Plaintiff could prevent him from proceeding with the work or to have it demolished was to institute proceedings against him whilst the work was in progress, and before it was finished. That this must be done by an action of *dénonciation de nouvelles œuvres;* that, having failed to do so, the only remedy left was to sue for the value of half the wall, and the land on which it stands.

He also contended that there had been no trespass or damage done to Plaintiff, and that in resting the building against the gable wall of the Plaintiff's house he only exercised the right of making the wall common.

I think the Defendant's contention in this respect cannot be sustained, but that before he can exercise any rights as to this wall as a common wall, he must make it a common wall, which he has not done. Even if it had been a common wall under Article 519 he could not make any recess in the body of the wall or rest any work thereon without the consent of the neighbour or without, on refusal, "having caused to be settled by

experts the necessary means to prevent the new work from being injurious to the rights of the other."

It was further urged by Defendant that the action could not be considered as a possessory action, because it was not shewn that the Plaintiff was in possession a year and a day before the *trouble*, and it is not so alleged in the declaration.

It is alleged in the declaration that she purchased the property in December, 1872; that about the first of May, 1873, she began to build her house on the lot, and it was finished and occupied on the 15th December, 1873. The action was commenced in September, 1874, certainly more than a year and a day after the Plaintiff had taken possession of her lot by beginning to build upon it. The only person who speaks of the time Defendant began to encroach on Plaintiff's wall was Plaintiff's son; he said it was in the beginning of July, 1874. The learned Chief Justice Dorion, in his judgment, seems to think she was in possession of the wall more than a year and a day before the commencement of Defendant's works. However that may be, it is not necessary to maintain the action against the Defendant, that she should state in her declaration or shew in evidence that she was in possession for a year and a day before the *trouble*. It is not denied she was in possession at the time the trespass was committed, and that she was the owner of the premises. The action seems to be in substance that the Defendant, the Appellant, had taken upon himself illegally to make in the north-west wall of Plaintiff's house holes and recesses which had caused her damage, and had applied and rested his works on her property without her consent and without having first notified her or taken and observed the formalities required in such cases. That he had trespassed on her

property for about six inches, had broken and taken away ten feet of the water spout of her house; had raised the wall five feet in height, and made thereon a work in brick and cut stone which altered the appearance of her house and rendered it of less value than it was before; the whole without her consent, and without having placed her *en demeure* to name experts to establish the means to render the works as little injurious to her as possible.

The Plaintiff Respondent contended for the demolition of the new works, that Defendant be held to fill up the holes and recesses which he had caused to be made in the wall, to place the whole in the state it was prior to the making of these works, and to pay £500 for damages for the trespass in question.

This shows a trespass on Plaintiff's property, and she claims damages for the injury.

The ground on which Defendant urges that Plaintiff could not maintain a petitory action, is that the wall was a common wall, but as that is not the case and no other objection is urged, I think the petitory action proper.

The Defendant contends also that the article 518 of Civil Code does not require the prepayment to the proprietor of half the value of the part of the wall he wishes to render common. If it were a case of first impression, I should be prepared to hold that the article conferred the privilege of making the wall a common wall, the paying half of the value of the wall and land to be considered a condition precedent to the wall becoming *mitoyen*. This, I think, is the proper interpretation of the article. Mr. Davidson referred to No. 154 of the Custom of Paris: "If "anyone wishes to build against a wall *non-mitoyen*,

" he can do so on paying the half as well of the said " wall as of the foundation thereof, as far as the height " of the wall *non-mitoyen*; this he is held to pay " before either demolishing anything or building."

I think this is, in effect, the same as article 518 of the Code.

The only ground for contending that the Defendant might use the wall, if it was wholly on Plaintiff's land, was that conferred by the 518th article of the Code, and as that neither in terms or by implication confers the right of making it *mitoyen* until it was paid for, I fail to see how it can justify trespassing on it. Even if it were *mitoyen*, he could not make holes in it nor rest his works thereon without consent, unless he settled by experts the means of preventing the new work from being injurious to the other owner under Art. 519.

Mr. Justice Tessier, in his judgment, refers to the appropriation, by the Defendant, of the half of his neighbor's wall, and of the ground on which it stands, as a kind of forced expropriation. He says: "It is a general principle of expropriation that the individual is paid beforehand, and he cited article 407 of the Code: 'No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.' If it were otherwise, Mrs. Hart would lose her right *in rem*, and nothing would be left her but a recourse *ad personam* against Mr. Joyce, who might be solvent or insolvent. It, therefore, follows that Mrs. Hart should pursue her right of action *in rem* for the demolition of the new work, or the replacement of her wall in the state it was without innovation."

The learned Chief Justice Dorion said the Plaintiff

does not complain that the Defendant erected his building on his own lot, but that he has appropriated one-half of the wall of her house, by erecting his building on it and over it. It is not an action *en dénontion de nouvel œuvre*, the conclusions of which are that the party, Defendant, should discontinue his works, but an *action petitoire*, by which Plaintiff says: "I am sole owner of the gable wall of my house; you have committed a trespass by building upon it; I ask that you be ordered to remove your building from it, and to restore the wall to its original state." There is not an author or judicial decision to be found to show that this is not a proper action, and that it ought to be dismissed, because the works were completed when the action was brought."

I think this is the proper view to take of Plaintiff's case, and that the action is maintainable.

Mr. Davidson referred to Demolombe, (1) to show the only action Plaintiff could take was a personal action for the value of the wall. The first part of the citation reads thus (translated): "But if the "proprietor of a wall, for any reason whatever, has "not received the price of the *mitoyenneté* acquired, "could he claim the privilege of his debt in a case "where the circumstance would render the exercise of "this privilege possible? The Court of Paris has "adjudged in the negative, holding that article 661 "gives him only a personal action." But the author further continues: "It is a fact, however, that the pro-"prietor has sold an immoveable, and we cannot see "why he could not, as well as any vendor of an "immoveable, claim the privilege of his debt. Article "661 does not give him a personal action, for it has

(1) Vol. II., No. 367, p. 408.

" been decided, and correctly, in our opinion, in 1843, " in the case of Pochet, Desrocher's Journal du Palais " Vol. 40, p. 368, that an action would lie against a " subsequent purchaser."

The case of *Rousseau* v. *Odiot*, referred to by Mr. Hart, well sustains the view that an action will lie similar to this, though the work complained of has been completed; having reference to Article 661 of Code Napoleon, which is to the same effect as Article 518 of Civil Code of Lower Canada.

The report is to the following effect (translated) :—

DeCourt had built a house adjoining the wall of a house belonging to Odiot, and Rousseau bought it at a public sale. Odiot sued DeCourt and Rousseau to have the building demolished or to pay the value of the wall and charges. The judgment was "considering that " when a party has taken his neighbour's wall the abso- " lute owner has a right to get back possession if he " has not been paid the value of the *mitoyenneté*, and that " it gives him a right to an action *in rem* against any " subsequent holder of the property; the claim of M. " Odiot is, therefore, well founded against DeCourt and " Rousseau, saving to the latter his rights against " DeCourt." The concluding part of the judgment was: "The Court doth condemn DeCourt and Rousseau to " demolish within a fortnight after the notification of " the judgment, the works erected alongside of the wall " of Odiot's house, and on their failing to comply with " this order Odiot is authorized to do so at the expense " and cost of Rousseau, provided always Rousseau " refuses to pay, after the amount has been settled by " experts, the value of the *mitoyenneté* and interest and " costs."

This was appealed and judgment affirmed.

At the time the case of *Gugy* v. *Brown* (1) was decided in the Privy Council, the Civil Code was not in force in Lower Canada, if that would make any difference. This action, however, is not at all like the case of *Gugy* v. *Brown*, for the Plaintiff complains here of acts done by Defendant on her property, whereas in *Gugy* v. *Brown* what was complained of was done on the Defendant's own property, or at all events not on the property of the Plaintiff.

I see no reason why the judgment of the Court of Queen's Bench should be interfered with.

RITCHIE, J:—

As to the jurisdiction of this Court in this case, I will say that I would be very much impressed with the line of argument taken by Mr. Justice Strong, but for the fact that a judicial construction was given to these terms by the Lower Canada Bench before the Supreme Court Act was passed. I am, therefore, of opinion that the appeal is properly before us. I entirely agree with the judgments delivered in the Court of Appeal. Respondent in Court below (Appellant in this Court) had no right to use Plaintiff's wall without having taken the necessary legal steps to secure the right, and having first indemnified Plaintiff, by paying for one half the value of the wall and ground on which erected; pre-payment being, in my opinion, expressly required before the owner of a property adjoining a wall obtains the privilege of making it common.

STRONG, J.:—

I am of opinion that the motion to quash this appeal which was made by the Respondent ought to be granted unless the Appellant, within a reasonable time, files

(1) 2 M. P. C. C., N. S., p. 341.

an affidavit shewing that the Defendant's works, which the judgment orders the demolition of in the event of the Defendant not making the wall common are of the value at least of $1,900, which, with the damages ($100), would make up the sum of $2,000.

I feel bound by Lord Chelmsford's judgment in *McFarlane* v *Leclaire*, (1) to hold that to ascertain if this Court has jurisdiction in appeals from the Province of Quebec, under Sect. 17 of Supreme Court Act, we are, in cases of appeals by a Defendant. to take the amount awarded by the judgment as the amount in dispute.

If the judgment deals in any way with property of which the value is not ascertained by the judgment itself, I am of opinion that an affidavit should be filed shewing the value of the property. This was the practice followed in the Supreme Court of the United States in the case of appeals from the Circuit or District Courts, which were limited to cases in which "*the matter in dispute exclusive of costs*" exceeded the sum or value of $2,000. The Supreme Court adopted precisely the same rule as that laid down in the Privy Council, and held that, if a judgment was recovered against a Defendant for a less sum than $2,000, there was, on the part of the Defendant, nothing in controversy beyond the sum for which the judgment was given, and that consequently he was not entitled to appeal or bring a writ of error. (2). In an old case in the Supreme Court, the question arose where the judgment appears not to have been for the recovery of damages but *in rem*, and the Court there made an order that the Plaintiff in error should be at liberty to shew by affidavit that the matter in dispute

(1) Curtis Comment: Vol. 1, p. 220, *Columbian Insurance Company* v. *Wheelwright*, 7 Wheat, 534;

exceeded in value $2,000 (1). I refer to several authorities on this question (2).

The majority of the Court being, however, of opinion that the value of the matter in dispute is to be ascertained by reference to the amount of the damages for which the declaration concludes, my opinion is overruled.

I therefore proceed to state briefly my judgment on the merits:

I consider this case does not call for any adjudication upon the question whether the action of "*dénonciation de nouvel œuvre*" is or is not a possessory action distinct from the ordinary possessory action of "*complainte*"; or whether it lies for works erected on the Plaintiff's land or only on the Defendant's own land to the prejudice of the Plaintiff; or whether demolition may be ordered after the works are completed or only when they are in an unfinished state; all subjects of much controversy, though they seem now to be settled by the general consent of commentators and authors who have written on the subject.

The declaration contains no allegation of possession for a year and a day before the "*trouble*", which would be fatal to it as a possessory action.

It is, as far as I am able to give an opinion, a petitory action brought to recover property of the Plaintiff of which the Defendant has illegally possessed himself; it libels all the facts necessary to such an action and the conclusions are adapted to it. That demolition of works completed, as well as works unfinished, may properly be

(1) *Course* v. *Stead's* Executors, Curtis, Commentaries on U. S. Courts, in Append. 4, p. 577. (2) 1 Abbott's Practice, U. S. Courts, par. 336; 2 Abbott's Practice, U.S. Courts, par. 263; *Winston* v. *U. S.*, 3 How., 711; *Lee* v. *Watson*, 1 Wallace, p. 337; Powell on Appeals, pp. 87, 88; *Hagar* v. *Foison*, 10 Pet., 160; *Ex. p. Bradstreet*, 7 Pet., 634, 647; Conkling's Practice, pp. 42, 54, 654, 655.

made an incidental demand in a petitory action for the recovery of property is very clear on many authorities (1).

When the Plaintiff, by his conduct, has induced the Defendant to proceed with his works in error, or in the belief that the Plaintiff acquiesced in the prejudice caused to his rights, I take it for granted that an exception, analogous to an exception of fraud, might be opposed to the action. Take, for instance, the case of the Defendant making a large expenditure in building on his own lands to the prejudice of an insignificant servitude of the Plaintiff, the Plaintiff could not, after passively awaiting the termination of the work, in either a possessory or petitory action, insist on the demolition of the buildings. Again, if the Defendant believed himself to be building on his own land, whilst the Plaintiff knew he was on the Plaintiff's land, it would be conduct amounting to fraud on the part of the Plaintiff silently to permit the Defendant to complete his erections and then turn round, assert his title, and ask to have the buildings destroyed.

In the present case nothing of this kind occurred, for the protest made by the ministry of a notary, in due form of law, gave early notice to the Defendant that he was infringing on the Plaintiff's rights, and put him in such a position that all he did subsequently was done with full knowledge, and at his own risk and peril.

Then the Court of Appeals, having it in their power to award immediate unconditional demolition, thought fit to interpose a delay and conditions in favor of the efendant, by giving the Defendant an opportunity of making the wall common. The Defendant's Counsel

(1) Belime Act: Poss: No. 369; Molitor, Vol. 3, La possession, pp. 219, 220, 221, No. 122 *et seq.*; Curasson, t. 2, No. 2; Troplong de la Prescription: No. 325; Bioche Act: Poss., p. 29.

however, insists that this had already been done, for that under Art. 518, Civil Code of Lower Canada, which corresponds with Article 661 of Code Napoleon, the payment of half the value of the wall and of the soil on which it was built, was not a condition precedent to making it common, as it was expressly under Art. 194 of the Custom of Paris. This, however, cannot possibly be so; this right of a proprietor to make his neighbour's wall "*mitoyen*," is a species of expropriation for purposes of public utility, and prior indemnity is always a condition of such a mode of forced acquisition, which, indeed, the words of Article 518, though not so explicit as the article of the Custom, seem to contemplate.

If any authority were wanting to negative such a proposition, it is to be found in the case cited in the Journal du Palais (1), an arrêt of the Paris Court of Appeals, corresponding exactly with the judgment of the Court of Queen's Bench in the present case. This arrêt also shows that the demolition may be awarded in such an action as this, for the case of *Odiot* v. *Rousseau* could not have been a possessory action, since it appears to have been originally instituted in the civil tribunal.

I am, therefore, of opinion the appeal should be dismissed with costs.

TASCHEREAU, J. :—

La première question que nous devons décider en cette cause, est celle de savoir si l'appelant avait droit d'appel. Les intimés prétendent que le montant que l'appelant

(1) *Odiot* v. *Rousseau*, 26 Jour. du Palais, p. 76. Also *Desrochers* v. *Blanchette* 40 Jour. du Palais p. 638.

a été condamné à leur payer n'étant que de $100, en sus d'une condamnation à défaire certains ouvrages par lui érigés sur la propriété des intimés et dont la valeur n'est ni alléguée ni prouvée être d'un montant suffisant pour couvrir les $2,000, montant requis par la section 17 du statut érigeant la Cour Suprême pour donner droit d'appel, ce droit d'appel n'appartient pas a l'appelant et que son appel devrait être renvoyé. En un mot les intimés prétendent que ce n'est pas le montant demandé par l'action originaire qui doit régler le droit d'appel, mais bien le montant accordé par le jugement.

Nous n'adoptons pas dans le même sens que les intimés, la section 17 de l'acte de la Cour Suprême qui règle le droit d'appel quant à ce qui concerne la province de Québec qui est en ces termes : " Pourvu que nul " appel d'un jugement rendu dans la province de " Québec, ne sera permis dans les causes où la somme " ou la valeur de la chose en litige ne s'élève pas à deux " mille piastres."

De son côté l'appelant prétend que le droit d'appel n'est pas réglé par le montant ou la valeur de la matière en litige.

Cette question n'est pas nouvelle et elle a déjà été soulevée devant nos tribunaux civils en la province de Québec, à propos du droit d'appel de la Cour du Banc de la Reine au Conseil Privé de Sa Majesté. L'article 1178 du Code de Procédure Civile qui permet ces appels est, à peu de chose près, dans les mêmes termes que ceux de la section 17 de l'acte de la Cour Suprême savoir : " Il y a appel à Sa Majesté en son Conseil Privé de tout " jugement dans une cause où la matière en litige " excède la somme ou valeur de £500 sterling." On voit qu'il n'y a de différence que dans le montant.

Pendant quelque temps en la province de Québec, les

tribunaux par quelques majorités ont adopté la manière d'interpréter ces section et article dans le sens que leur donnent les intimés ; mais ces décisions n'ont pas été confirmées ni approuvées, je crois au contraire qu'elles ont été sévèrement blâmées, et en effet depuis plusieurs années les tribunaux civils de la province de Québec les ont renversées ; ils ont interprété ces articles du Code de Procédure Civile comme réglant que le droit d'appel serait déterminé par le montant réclamé ou la valeur de la matière en litige, donnant ainsi le droit d'appel à l'une ou l'autre des parties qui se croirait lésée par le jugement. La même question soulevée quant aux appels de jugements de la Cour de Circuit à la Cour Supérieure, et quant à ceux de la Cour Supérieure à la Cour du Banc de la Reine a été jugée dans le même sens.

En la présente cause, il est indubitable qu'il est demandé deux mille piastres de dommages, et de plus, que le défendeur soit condamné à démolir certains travaux de grande valeur. La somme ou la valeur de la chose en dispute est évidemment d'au moins deux mille piastres ; les demandeurs, présents intimés, ont fait leur position et ont admis que la chose en litige était d'au moins $2,000, mais le jugement de la Cour d'Appel ne leur accorde que $100 de dommages et les oblige à remettre la maison des intimés dans le même été qu'elle était avant les voies de fait dont ils se sont plaints. Et les intimés qui très probablement auraient eu droit d'appel de ce jugement qui ne leur accorde que $100 lorsqu'ils en ont demandé $2,000 pourraient refuser à l'appelant le même droit d'appel sur le principe que pour *lui seul*, la valeur de la matière en litige n'est que de $100.00 ? Comme je l'ai déjà dit les décisions du plus haut tribunal de la province de Québec, ont fait justice de

ces prétentions, et aujourd'hui il n'y a plus de doute que le droit d'appel est reglé tant en faveur d'un demandeur qu'en faveur d'un défendeur par le montant originairement réclamé par l'action et non par le montant adjugé. Il serait singulier qu'un demandeur qui prétendrait avoir un bon droit d'action pour un montant de $2,000 pût être forcé de renoncer à son droit d'appel sous prétexte que n'ayant obtenu que $100, la matière en litige ne représente pas un montant suffisant pour lui donner droit d'appel et qu'il lui faut accepter ce verdict comme final. Un défendeur poursuivi pour $2,000.00 mais condamné seulement à payer $1,999.99 se verrait également privé de son droit d'appel parce qu'il aurait plu à une autorité quelconque de ne le condamner que juste pour un montant qui lui enlèverait son droit d'appel, droit qu'un centin de plus dans le chiffre de sa condamnation lui assurerait. Je crois que le montant réclamé doit régler le droit d'appel et non pas le montant de la condamnation.

Quant au mérite de la demande et de la défense, je dirai que les faits qui y ont donné lieu sont peu compliqués et se réduisent à la plainte que forment les intimés contre l'appelant d'avoir commis certaines voies de fait contre la propriété des intimés, savoir, de s'être emparé du mur du pignon de leur maison, d'y avoir fait des surcharges, d'y avoir fait des trouées et des ouvertures en bâtissant lui-même à côté et d'avoir traité ce mur comme mitoyen tandis qu'il ne l'était pas, et surtout d'avoir fait tous ces empiètements sans avoir pris les moyens d'acquérir la mitoyenneté et d'en avoir payé la valeur.

Les faits sont incontrovertibles et ne font aucune difficulté, et l'Appelant a été condamn épar la Cour du Banc de la Reine à défaire ses travaux et à payer $100 de

dommages aux Intimés. Je crois le jugement bon, tout en déclarant que lors de la plaidoirie devant nous, mon impression était en faveur de l'Appelant, et ce qui contribuait alors à me faire considérer la position des intimés sous un jour très défavorable était le fait (lequel ne semblait pas nié par eux) que les travaux dont les intimés se plaignaient avaient été commencés et complètement terminés par l'Appelant au vu et su des Iintimés et sans protestation de leur part. Je me disais et je crois avec raison qu'après avoir vu l'Appelant faire les ouvrages en question, sans objection de leur part, il y avait consentement tacite, sinon formel de leur part à ce que l'Appelant acquit ainsi la mitoyenneté et que la question de l'indemnité n'était que secondaire entre des voisins et devait se régler à l'amiable ;—et dans ce cas il me semblait remarquer une grande rigueur dans le jugement dont est appel, lequel condamnait l'Appelant à payer des dommages pour avoir fait ce qu'il pouvait faire sous certaines conditions préalables, il est vrai, mais dont les Intimés me semblèrent le dispenser en ne s'y opposant pas, ou en ne protestant pas. Mais la lecture du dossier m'a convaincu que l'Appelant a été protesté dès le commencement des travaux faits par lui, et que sous le prétexte que le protêt notarié qu'il avait reçu était rédigé en langue française, il avait renvoyé ce protêt aux Intimés. L'Appelant a eu grand tort en agissant ainsi : si vraiment il ne pouvait comprendre le français il devait se faire expliquer ce protêt et discontinuer ses opérations. Dès ce moment il était constitué en mauvaise foi et ne pouvait plus se méprendre sur le silence des Intimés : il violait la propriété de son voisin et agissait en contravention de l'article 518 du Code Civil de la province de Québec qui l'obligeait de payer, avant que de rien entreprendre contre le mur des

intimés, la valeur du droit de mitoyenneté qu'il prétendait acquérir et la valeur du sol dont il s'emparait.

Il a été condamné et je crois avec raison, et quoique les dommages me paraissent un peu au-dessus de la réalité, je considère que sa conduite a été précipitée et blâmable. Je suis d'opinion de renvoyer l'appel au mérite et de confirmer le jugement de la Cour du Banc de la Reine.

FOURNIER, J :

La preuve en cette cause démontre de la manière la plus convaincante le fait que l'Intimée, Mde. Hart, a bâti le mur de sa maison entièrement sur son terrain, dans la ligne de division.

Son voisin l'Appelant, Joyce, sans avoir payé ou fait aucune offre réelle de payer la valeur de la moitié de ce mur et le prix de la moitié du terrain sur lequel il est bâti, a exercé, comme s'il les avait légalement acquis, les droits de mitoyenneté dans le mur en question, en y faisant pratiquer les ouvrages dont l'Intimée se plaint dans sa déclaration. Le pouvait-il ? Il le prétend dans sa défense, alléguant qu'il n'a fait qu'user de la faculté donnée par la loi, d'acquérir la mitoyenneté et qu'il a toujours été prêt à payer la moitié du mur. Suivant lui, la loi n'exige pas le paiement préalable de l'indemnité pour devenir mitoyen. Cette prétention est évidemment erronée. L'article 518 C. C., quoique moins explicite que l'article 194 de la Coutume de Paris, n'en contient pas moins la même condition de paiement préalable. Cet article donnant "au propriétaire joignant un mur la faculté de le rendre mitoyen *en remboursant* au propriétaire la moité de la valeur de la portion qu'il veut rendre mitoyenne et moitié de la valeur du sol sur lequel le mur est bâti," est identique avec l'article 661

du Code Civil français. Bien que dans ce dernier article, comme dans le nôtre, il y ait omission des expressions de l'article 194 de la Coutume de Paris au sujet du paiement du droit de mitoyenneté "*ce qu'il est tenu payer paravant que de rien démolir, ni bâtir*," on n'a cependant pas cessé en France, depuis le Code, d'exiger le paiement préalable;—le privilége n'étant donné qu'en *remboursant* la moitié de la valeur, etc., dépend par conséquent de l'accomplissement de cette condition. Ce droit n'est pas acquis avant ce paiement. Cela résulte bien clairement des termes des deux articles. C'est ainsi que les commentateurs du Code français ont interprété l'article 661, et c'est aussi, sans doute, l'interprétation que nous devons adopter pour l'article 518 puisque la rédaction est la même. Si elle laissait un doute sur sa signification, ce que je ne pense pas, on pourrait alors recourir à l'article 407 exigeant l'indemnité préalable dans le cas d'expropriation forcée pour cause d'utilité publique. Puisque c'est pour cette raison que la législation française a adopté cette modification du droit de propriété, on pourrait donc sans inconséquence appliquer à l'acquisition du droit de mitoyenneté la disposition de l'article 407. Mais l'accord des commentateurs sur l'interprétation de l'article 661 C. N. (Article 518 de notre code) nous dispense d'aller au-delà de l'article lui-même pour trouver la solution de cette question.—*Toullier, Droit Civil*, vol. 3., No 195. "Le prix (de la mitoyenneté) est fixé par des experts, si les deux voisins ne peuvent s'accorder, et le prix doit être payé *préalablement* à toute entreprise" *Demolombe*, vol. 11, No. 367. "L'indemnité doit être payée au propriétaire du mur préalablement à toute entreprise." Plus loin il ajoute: "L'article 661 d'ailleurs a si peu voulu lui accorder une action purement personnelle que l'on a décidé fort justement, à

notre avis, que son action pouvait être formée contre tout tiers détenteur de l'héritage voisin." Il cite plusieurs arrêts à l'appui de cette proposition.

Solon, Servitudes réelles, No. 145. "La vente de la mitoyenneté d'un mur ne peut être forcée que moyennant une juste et préalable indemnité."

No. 146. "Les parties peuvent fixer d'un commun accord, le montant de l'indemnité, si elles ne peuvent s'accorder sur ce point, il faut qu'elles conviennent au moins, de la nomination d'un ou de trois experts, et si enfin leur caprice va jusqu'au point de ne pouvoir s'entendre sur cette nomination, il faut que l'acheteur fasse désigner les experts par la justice et à ses frais."

No. 147. "Dans tous les cas, celui qui veut acheter la mitoyenneté ne peut prendre possession du mur, c'est-à-dire qu'il ne peut y adosser aucune construction, y adosser aucun appui, sans avoir préalablement payé le prix d'achat. C'est bien assez de forcer un individu de vendre, contre son gré, la chose qui lui appartient, sans l'exposer à perdre le prix ou à plaider pour l'obtenir." Voir aussi : *Pardessus, Traité des servitudes*, No. 153, p. 365.

Duranton, vol. 5, No. 328. "Lorsque la mitoyenneté n'est pas cédée à l'amiable, celui qui la réclame doit aire signifier une sommation de cession avec offre d'un prix suffisant." * * * Un peu plus loin l'auteur ajoute que l'expertise judiciaire n'est pas de rigueur.

"Nous pensons, dit-il, sans difficulté que l'acquéreur pourrait faire offre réelle de l'indemnité, et forcer ainsi le vendeur à l'accepter telle qu'elle serait faite ou à soutenir son insuffisance. Le procès qui aurait lieu sur ce point serait à la charge de l'acquéreur, s'il n'avait point fait une offre suffisante, tandis qu'au contraire, les frais en seraient supportés par le propriétaire du mur, si son refus n'était pas fondé."

Par ce qui précède on voit qu'avant de toucher au mur de l'Intimée, la loi traçait à l'Appelant une conduite toute différente de celle qu'il a suivie. Ayant négligé d'avoir recours aux procédés indiqués pour l'acquisition de la mitoyenneté, il n'a pu sans violation du droit de propriété de l'Intimée, faire les travaux dont elle se plaint à bon droit. Mais il répond à celle-ci que l'action qu'elle a portée contre lui et qu'elle désigne sous le nom d'*action en démolition de nouvelles œuvres*, ne lui compète point, parce qu'elle aurait dû être émanée avant la fin des travaux dont elle demande la démolition. Sous le droit antérieur au code cette objection eût été fatale, mais il n'en peut être de même aujourd'hui. Sous le Code Civil de la province de Québec, comme sous le Code Napoléon, cette action a perdu le caractère particulier qu'elle avait autrefois. Ce n'est plus aujourd'hui, en France comme ici, qu'une action possessoire ordinaire qui peut être exercée avant ou après la fin des travaux considérés comme trouble. Ce changement résulte du silence du code comme le dit *Daviel*, "*Cours d'Eau*": "Sous notre nouveau droit la dénonciation de nouvel œuvre est assimilée aux autres actions possessoires, parce que les lois n'ont pas reproduit les conditions particulières qui la caractérisait autrefois." Cette omission a également lieu dans notre code. Concourant pleinement dans les vues exprimées sur la nature d'une telle action dans les savantes dissertations des honorables juges de la Cour du Banc de la Reine, je regrette cependant d'avoir à ajouter que je ne les crois pas toutes applicables à l'action de l'Intimée que je considère comme étant seulement de la nature d'une action pétitoire.

Pour en faire une action possessoire la déclaration manque d'un élément essentiel: l'allégation d'une possession légale pendant l'an et jour avant le trouble qui

donne lieu à la plainte. D'accord avec l'honorable juge qui a renvoyé la défense en droit par laquelle l'Appelant prenait avantage de cette objection, je trouve, comme d'ailleurs la Cour du Banc de la Reine l'a fait aussi, des allégations suffisantes, pour accorder la plupart des conclusions prises par cette déclaration.

Je considère cette action comme bien portée parce qu'elle contient les éléments de l'action pétitoire. La dénomination erronée donnée par l'Intimée à son action ne peut avoir aucun effet. J'adopte entièrement sous ce rapport l'opinion ainsi exprimée par l'honorable juge en chef Dorion, sur le caractère de l'action : " The action " of the appellant is not an action *en dénonciation de* " *nouvel œuvre*, the conclusion, of which are that the " party defendant should discontinue his works, but an " *action pétitoire* by which appellant says : I am the " the sole owner of the gable wall of my house, you " have committed a trespass by building upon it, I ask " that you be ordered to remove your building from it, " and to restore the wall in its original state. There is " not an author or a judicial decision to be found to " show that this is not a proper action and that it ought " to be dismissed, because the works were completed " when the action was brought." Cette manière d'envisager l'action de l'appelant est conforme aux principes posés dans le jugement de la Cour Royale à Paris le 22 juin 1834, dans la cause de *Odiot* v. *Rousseau*. (1) Les faits ont tant de similitude avec ceux de la cause actuelle que je crois devoir la citer en entier pour en faire voir la parfaite application à la cause maintenant sous considération.

" COUR ROYALE DE PARIS, 22 JANVIER 1834."

" *Lorsque le voisin a pris le mur de son voisin pour le*

(1) 26 Jour. du Palais, p. 76.

" *rendre mitoyen, celui à qui le mur appartient exclusive-*
" *ment a le droit de le reprendre, s'il n'est pas payé de la*
" *valeur de la mitoyenneté.*

" *Ce droit donne lieu à une action réelle qui peut être*
" *exercée contre tout détenteur de l'immeuble en quelques*
" *mains qu'il passe C. C., art.* 661.

ODIOT *v.* ROUSSEAU.

" Decourt avait construit une maison contre le mur de
" la maison voisine appartenant à Odiot.

" Rousseau achète la maison de Decourt par adjudica-
" tion publique.

" Le contrat était transcrit et les notifications faites aux
" créanciers inscrits, lorsqu'Odiot assigna Rousseau et
" Decourt à l'effet de démolir les constructions adossées à
" son mur, sinon à payer les droits de mitoyenneté et de
" surcharge.

" Le 23 Mars 1833, jugement du tribunal civil de la
" Seine qui admet cette demande. ' Attendu qu'aux ter-
" ' mes de l'art. 658 et 661, C. Civ., tout propriétaire joi-
" ' gnant un mur a la faculté de le rendre mitoyen en tout
" ' ou en partie, en remboursant au maître du dit mur les
" ' droits de mitoyenneté et de surcharge. Attendu que
" ' lorsque le voisin a pris le mur de son voisin pour le
" ' rendre mitoyen, celui à qui il appartient a le droit de le
" ' reprendre s'il n'est pas payé de la valeur de la mitoy-
" ' enneté ; que ce droit donne lieu à une action réelle, qui
" ' peut être exercée contre tout détenteur de l'immeuble,
" ' en quelques mains qu'il passe, qu'il en résulte que la
" ' réclamation du sieur Odiot est fondée tant contre De-
" ' court que contre Rousseau, sauf le recours de ce dernier
" ' contre Decourt : Par ces motifs condamne Decourt et
" ' Rousseau à faire démolir dans la quinzaine de la signi-
" ' fication du présent jugement les constructions élevées
" ' contre le mur de la maison d'Odiot ; sinon et faute de

" ' ce faire dans le dit délai, et icelui passé, autorise dès
" 'à présent le sieur Odiot à faire faire les démolitions aux
" ' frais, risques et périls des défendeurs, si mieux n'aiment
" ' ces derniers payer au dit sieur Odiot dès après le règle-
" ' ment contradictoire, la somme à laquelle montent les
" ' droits de mitoyenneté et de surcharge, plus les intérêts
" ' à compter du jour de la demande.'"

Par le dispositif du jugement qui n'est sans doute que la répétition des conclusions prises par le demandeur, il est évident que l'action d'Odiot devait être semblable à celle de l'Intimée. Les arrêts et jugements consacrant ce principe sont nombreux.

Le jugement de la Cour du Banc de la Reine adjugeant les conclusions de démolition, sous l'alternative de payer, étant conforme à la jurisprudence et aux opinions des commentateurs, doit être confirmé avec dépens.

HENRY, J. :—

A motion was made in this case to set aside the appeal, on the ground that the judgment being under $2,000 an appeal does not lie and we have, therefore, no jurisdiction.

We have heard the arguments on the merits in this case, but we must first dispose of the preliminary question, as upon it depends our power to deal with the subject-matter.

The case is not without some difficulties.

The Statute says the appeal shall not be had in the Province of Quebec in any case wherein the sum or value in dispute does not amount to two thousand dollars. When the writ and declaration are served, the amount claimed in the latter as debt or damage is clearly the amount then in dispute, and so remains, at least till verdict. It has been held by high authorities that the sum or value of the matter in dispute is then

affected by the verdict, and if the amount the Defendant would then have to pay to settle the Plaintiff's demand be under $2,000, he would not be entitled to an appeal, although the Plaintiff, if dissatisfied with the judgment, would be entitled to one. A manifest inequality between the position of the parties would be thus established that ought not, I think, to exist if it can be properly avoided. The Plaintiff, by the operations of that system, qualifies himself, by the insertion of a large sum as a claim in his declaration, to ask for an appeal, in case the judgment should be against him, or he should be dissatisfied as to the damages awarded him. On the trial, however, he might feel it his interest to deprive his opponent of the appeal by taking means to have a verdict for less than an appeal would lie for, if that would avail to prevent the Defendant's appealing. He could do this by asking damages only to a certain amount, and no Judge or Jury would in that case be likely to give him more. Construing the Statute in a manner to permit of this being done, would, I think, be unjust to a Defendant, and I am of opinion that where a Plaintiff, by claiming over two thousand dollars, secures to himself the right to appeal, in such a case an appeal should lie also at the instance of the Defendant. If the Plaintiff thus secures to himself the right of appeal, and the right to go before the highest legal tribunal, he should not complain that his adversary should, if necessary, do the same. In regard to the legal rights of the parties, they are thus placed on an equal footing, and if the Plaintiff, when bringing his suit, is to take his chance of being satisfied with the judgment the Court of last resort in the Province of Quebec may give, he has the power, by limiting the claim in his declaration, of confining the final decision of his case

to that tribunal. It has not been done so in this case, and I am of opinion the appeal is therefore regular.

With all due deference to those entertaining an opposite opinion, I cannot bring myself to the conclusion that the Legislature intended to apply the restriction to cases where but one party could avail himself of the privilege of appealing. I feel bound, therefore, to construe the provision of the Statute in question as intended by the Legislature not to give an absolute right to one party and leave that of the other dependent, it may be,on the finding, upon doubtful evidence, of a Judge or Jury, or, what would be worse still, the contrivance or cunning management, on the trial, of the Plaintiff himself. Being clearly of the opinion that justice and equity favour this view, I am, I think, bound to declare that the Legislature so intended it. The views I have expressed have been, as far as I can learn, those unanimously for some time held and acted upon by all the Courts in Quebec. Several judgments founded on those views have been recently given in accordance with them when the Act establishing this Court was passed, and I think myself fully justified in holding, in view of that fact, independently of other considerations, the provision in question was intended as, and should be adjudged, a Legislative sanction of those judgments. We should not, I think, restrict the right of appeal in Quebec more than we are compelled by the Act to do, when in the other Provinces no restriction whatever of that right exists.

The Respondent (Mrs. Hart) was, in 1874, the owner of a stone house in Durocher Street, in the City of Montreal. The Appellant became owner of the lot next adjoining the north-west gable wall of her house, which, at that time, seems admitted on all sides not to have been

mitoyen under Article 518 of the Civil Code, or indeed in any other way. It is even contended that her lot extended six inches beyond the line of the wall in question. In view, however, of the law bearing on the case as I look at it, the fact last referred to is of no consequence. The Appellant, in the spring of 1874, while Mrs. Hart so owned and possessed the premises in question, committed the injuries complained of. Was he in any way justified? If not, what redress is Mrs. Hart entitled to, and by what means can she obtain it? I think I am safe in starting with the proposition that the wall in question, when the injury to it was done was not *mitoyen*. How, then, could the Appellant make it so? By Article No. 518, Civil Code, by *paying* to the proprietor of the wall half the value of the part he wished to make common and the value of the ground on which said wall is built. The Code requires "*payment*" to be made and a "*tender*," but if not sufficient it fails to provide the means of ascertaining the amount to be paid. He might possibly have an *expertise*, although the code does not provide for it; at all events, unless he made previous *payment*, he, I think, was not justified in doing what is complained of. Article 519 provides for calling in the aid of experts, but that provision only applies to cases where one neighbor wishes to make "any recess in the body of a common wall" (*mitoyen*) or to "apply or rest any work there," but the provision does not in any way apply to Article 518. The latter article is, to my mind, of better help to the applicant, or to any other situated as he was previous to the commencement of his works. If that course was not open to him, then he should not have committed the trespass complained of. This it appears was not done. The Appellant committed a trespass on the Plaintiff's pro-

perty, for which, as far as I can see, there is no justification. He is consequently answera ble for such damages as may be shewn to have been done.

The Respondents, however, not only seek to recover damages for the injury but *démolition des nouvelles œuvres*. The question is therefore raised as to their right to that remedy, as awarded by the Court of Queen's Bench (Appeal side), over-ruling the judgment of the Superior Court, Montreal, which declares, that although no *expertise* was had respecting the value of the right of *mitoyen neté* existing between parties, Plaintiff and Defendant, yet, as the building of the Defendant was done and completed before the institution of the present action, "the Plaintiffs have therefore no right to obtain the demolition of the same."

The fact that the Defendant's wall was finished before the proceedings herein were commenced, is found by the Court of first instance, and such conclusion I feel bound by. The fact is hardly disputed and the evidence satisfies me of the soundness of that conclusion. I am of opinion that in the old action *en dénonciation de nouvel œuvre*, the Respondents cannot recover for the appropriation of their wall by building on it, although a doubt may exist that such is the law, for certainly by many, if not all the authorities, it is alleged to apply to cases only where the erection is on the land of the party himself and not on his neighbor's.

The learned Chief Justice of the Queen's Bench, says: "The action of the Appellant (now Respondent) is not one *en dénonciation de nouvel œuvre*, the conclusions of which are that the party Defendant should discontinue his works; but an action *petitoire*, by which Appellant says, 'I am the sole owner of the gable wall of my house; you have committed a trespass by building a wall on it,

I ask that you be ordered to remove your building from it and to restore the wall to its original state.' There is not an author or judicial decision to be found to show that this is not a proper action, and it ought to be dismissed because the works were completed when the action was brought."

If, therefore, the action is not one *en dénonciation de nouvel œuvre* but *petitoire*, and not a jumbling up of both, we must see, before concluding, whether, in the action *petitoire* the Respondent can ask for a judgment for *demolition.* The learned Chief Justice again says: "It is true that in the action *en dénonciation de nouvel œuvre* proper, under the Roman law, no order could be obtained to remove the works when once completed," but he denies that the French jurisprudence adopted that principle. With all due deference, I am warranted in the statement that the French jurisprudence, until an alteration of the Code, fully adopted the principle of the Roman law, and that, under that jurisprudence, the action *en dénonciation de nouvel œuvre* was available up to any time before the completion of the work, and, but for the alteration by the Code or otherwise, it would still be the law in Lower Canada. Let me quote, in proof of this position, portions of the judgment of the Privy Council in *Brown* v. *Gugy* (1864), (1). "In *Daviel* '*Cours d'eau,*' (2) it is distinctly laid down that by the old French law, that is by the law now prevailing in Lower Canada, the *dénonciation de nouvel œuvre* could only be maintained if instituted before the work was completed, though by an alteration introduced by the French Code the law is in this respect altered, and the action may be maintained in respect of a work either *fait ou commencé.*'"

(1) 14 L. C. R. 213; (2) Tit. '*Du Domaine Public*' par. 471.

"In this case," the judgment proceeds, "there is no doubt that the work was completed before the action was commenced and the relief sought is different from that which, according to Daviel, could be granted in an action *en dénonciation de nouvel œuvre.*" I have thus the highest and most controling authority for the position, that in 1864 the action *en dénonciation de nouvel œuvre* would not lie where the works had been completed, and I have sought for a legislative change in that law in Lower Canada by the Code of 1866, or otherwise.

Article 20, Code Civ. Proc., L. C., provides, that "in judicial proceeding it is sufficient that the facts and any conclusions be distinctly and fairly stated, without any particular form being necessary, and such statements are interpreted according to the meaning of words in ordinary language."

Article 17 of the same Code provides that "the Court cannot adjudicate beyond the conclusions of a suit, but it may reduce them and grant them only in part."

Article 20 may be said to have done away with the *forms* of actions, and therefore the peculiar form of the action *en dénonciation de nouvel œuvre* is no longer necessary.

Does it in anyway affect the subject-matter of that peculiar remedy so as to entitle a party in an action *petitoire* or *possessoire*, according to his title or possession, to the remedy or judgment now, under circumstances in which previously to the Code, he was not entitled? Or, indeed, could a party, before the Code, either by an action *en dénonciation de nouvel œuvre*, or otherwise, have a judgment *en démolition* for a work *done* and *completed* on his land before action brought? From a careful study of the matter I cannot see that Article 20 of this Code

establishes any new or different rights or relations between the parties, and gives any new remedy in the shape of *démolition*, and as the Respondent's claim cannot be sustained by a remedy *en démolition*, as the work was finished before the action was brought, and the only remedy, previous to the Code, being by action *en dénonciation de nouvel œuvre* where the work was unfinished, I do not see my way clear to adjudge that remedy to the Respondent in that peculiar action; but, according to reliable authorities, a party in an action *petitoire* would be entitled, in case of a trespass to his property, to recover damages for the injury; and, in case of a building erected upon his land, to a judgment or *démolition*, irrespectively of the principles which governed in actions *en dénonciation de nouvel œuvre*, and that as well before as since the Code. I am of opinion that the judgment appealed from should be confirmed, and the appeal dismissed with costs, the time given by the Court appealed from to run from the date of the judgment herein.

Appeal dismissed.

Attorneys for Appellant: *Davidson and Cushing.*

Attorney for Respondent: *A. M. Hart.*

WM. DARLING.....APPELLANT;

AND

ROBERT BROWN ET AL.....RESPONDENTS.

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

Loan by a non-trader to a trader—Prescription—Arrears of Interest—Acknowlegement of debt, what sufficient.

In 1858, W. D., senr., opened a credit of $584, in favor of his daughter I. D., with W. D. & Co., a commercial firm in Montreal consisting of the appellant and one T. D., W. D. & Co. charging W. D. senr., and crediting I. D. with that amount. In 1860, W. D., as sole executor of the will of D. D., credited I. D. in the books of W. D. & Co., (appellant at that time being the only member of the firm), with a further sum of $800, the amount of a legacy bequeathed by such will. These entries in the books of W. D. & Co., together with entries of interest in connection with the said items, were continued from year to year. An account current was rendered to I. D. exhibiting details of the indebtedness up to the 31st December 1861. After 31st December 1864, the firm of W. D. & Co. consisted of the appellant and his brother T. D. In December 1865 another account was rendered to I. D. which shewed a balance due her at that time of $1912.08. The accounts rendered were unsigned, but the second account current was accompanied by a letter, referring to it, written and signed by the appellant. I. D. died, and in a suit brought by G. T., her husband and universal legatee, to recover the $1912.08 with interest from 31st December 1865:

Held:—1. That a loan of moneys, as in this case, by a non trader to a commercial firm is not a "commercial matter" or a debt of a "commercial nature"; that, therefore, the debt could be prescribed, neither by the lapse of six years under *Consolidated Statutes of Lower Canada*, ch. 67, nor by the lapse of 5 years under the *Civil Code of Lower Canada*, but only by the prescription of 30 years.

Whishaw v. *Gilmour* (1) approved.

(1) 15 L. C. R., 177.

PRESENT: The Chief Justice and Ritchie, Strong, Taschereau, Fournier, and Henry, JJ.

2. That, even if the debt were of a commercial nature, the sending of the account current accompanied by the letter referring to it signed by the Appellant would take the case out of the Statute.

3. That the prescription of five years against arrears of interest, under Art. 2250 of the *Civil Code of Lower Canada*, does not apply to a debt, the prescription of which was commenced before the *Code* came into force.

4. That entries in a merchant's books make complete proof against him.

Appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) dated the 22nd day of June, 1876, affirming a judgment of the Superior Court for Lower Canada, sitting at Montreal, dated the 19th day of June, 1875.

This suit, instituted on the 5th of October, 1871, and returned on the 20th October, 1871, was brought by George Templeton, as the universal legatee of his deceased wife, Isabella Darling, to recover from William Darling and Thomas Darling, $1,912.08, with interest since the 31st day of December 1865.

The plaintiff alleged, that William Darling and Thomas Davidson, carried on trade and commerce as co-partners under the name and style of William Darling and Co., from 1st January 1854 to 30th April 1860, from which time their business was continued by William Darling, under the same name and firm, to the 31st December 1864, when he and Thomas Darling became copartners, from which date they carried on trade and commerce under the name and firm of Wm. Darling & Co., which last firm assumed all the assets and liabilities of the business.

That on the 31st December 1861, William Darling, individually, and as having been a copartner with Thomas Davidson, and as having carried on trade and

commerce alone under the name and firm of Wm. Darling & Co., was indebted to Isabella Darling in the sum of $1,640.07 for moneys received and collected for and on account, and to and for the use, benefit and behoof of said Isabella Darling, and for money loaned and advanced to the firm and to William Darling individually, and for interest; which William Darling had promised to pay, with interest, since 31st December 1861. That on the 26th March ,1862, he rendered to Isabella Darling an account current exhibiting in detail the amount of his indebtedness, commencing 3rd March 1858 and ending 31st December 1861, made up with interest each year, whereby he acknowledged to owe $1,640.07, with interest since 31st December 1861; and on the 6th December 1865, William Darling & Co., composed of William Darling and Thomas Darling, rendered to Isabella Darling another account current, commencing 31st December 1861, and ending 31st December 1865, whereby they acknowledged to owe her $1,912,08, subject to the payment of interest.

That the said Isabella Darling, on the 1st day of April, 1871, made and executed her last will and testament in holograph form, bequeathing to the plaintiff the whole of her property, and appointing him sole executor; and that on the 2nd of May, 1871, the said Isabella Darling executed in the presence of witnesses another will similar to, and confirmatory of, the first.

The defendants severed in their defence.

William Darling, by his first plea, attacked the validity of the two Wills set up in the declaration, but as one of these Wills is admittedly good, and has been so declared, the other having been set aside, no further reference need be made to it.

By his second plea, William Darling admitted that

about the 3rd March, 1858, an entry appeared in the books of Wm. Darling & Co. of $584, and another of $800 on the 14th April, 1860, to the credit of Isabella Darling, but denied that these sums were due to her, or that Wm. Darling & Co. were bound to her by said entries, to which, he alleged, she was not a party, nor that there was any privity of contract with her respecting them, nor any interest promised thereon. That the entries were unauthorized and Isabella Darling had received more money, goods and value than the amount so credited. That in the absence of any promise or undertaking in writing, or otherwise, the prescription of five years applied especially to all interest, and the whole matter being commercial, the prescription of five years applied also as well to capital as interest, by which all recourse was barred.

By a third plea, he opposed to the demand the prescription of six years.

By a fourth plea, Appellant pleaded compensation for the board and lodging of said Isabella Darling from 1st September 1858, to November 1862, at the rate of $300 per annum.

There was also pleaded the general issue. The answers and replications were general.

The alleged indebtedness of the defendants was based, as appears from the evidence, upon the two sums, one of $584 and the other of $800, (mentioned in the second plea) to which Isabella Darling was alleged to be entitled under the following circumstances:—

In 1858, Isabella Darling paid to her father William Darling, senior, then residing in Edinburgh, the sum of £120 stg., equal to $584. William Darling, senior, opened a credit in her favor with William Darling & Co., for this sum, so that the firm charged William

Darling, senior, with that sum and credited Isabella Darling with the same amount.

Under the will of David Darling, a brother of William and Isabella Darling, made the 9th October 1856, a sum of $800 was bequeathed to Isabella, and a similar sum was bequeathed to each of his other sisters Margaret and Grace. Of this will William Darling was sole executor, and probate of it was granted to him on the 2nd of June, 1857. One of the assets of the estate of David Darling was a mortgage for £1,000, bearing interest on its face at 12½ per cent. This was set aside by the executor for the £200 devised to each of the three sisters. $800 were credited to Isabella Darling, and interest at 12½ per cent. on that amount was also from time to time credited to her.

It was alleged, on behalf of the appellant, that litigation arose with a subsequent mortgagee, both as to the real amount advanced on this mortgage, and the rate of interest: that finally a compromise was effected, by the executor accepting $1,000 for the mortgage, out of which had to be deducted the expenses of the suit; and that in fact, therefore, the appellant never received the $800 on account of Isabella Darling, nor interest at the rate mentioned.

It is in evidence, however, that accounts current were made up every year, beginning with 1858, showing the balance at the credit of Isabella Darling. In 1858 and 1859, the £120 stg. with interest, and also interest on the $800, at 12½ p. c. less ½ per cent. for collection appear; and among the entries in the account current for 1860, there is, in addition to a like credit for interest, a credit of the sum of $800. These entries, with interest at 6 per cent. making yearly rests, and charging cash, goods, &c., were con-

tinued yearly, and a balance struck. At the end of 1861, this balance was $1,640.07, and, at the end of 1865, $1,912.08, the amount sued for.

These accounts were taken from the books of William Darling and Wm. Darling & Co. and were headed "Miss Isabella Darling in acct., and int. 6 p. c. per an., with William Darling & Co." They were not signed; but William Darling wrote Isabella Darling a letter which, the Plaintiff alleged, accompanied and referred to the account current rendered on the 6th December, 1865, and the relevant portions of which are as follows;

"MONTREAL, 6th Nov., 1865.

"DEAR ISA,—I did not get your letter till three weeks "after it was written, and I now send you the statement "of your account. There was an amount paid to Morgan "but I do not know whether it should be charged to "you or to my father, and I have omitted it altogether "from your account and from his. * * * * * * * * *

"W. DARLING."

George Templeton died March 28th, 1875, and the suit was continued by Robert Brown, Charles Proctor, and Adam Darling, as his executors.

The Superior Court dismissed the action as against Thomas Darling, holding that there was no privity of contract between him and Isabella Darling and that the investment of the moneys in the firm was an act between William Darling and the firm, with which Isabella Darling had nothing to do, and rendered judgment against William Darling for $1,661.23 with interest from the 31st December, 1862. This judgment the Court of Queen's Bench for Lower Canada (Appeal

side) affirmed with costs, (1) and the Appellant then appealed to the Supreme Court of Canada.

The principal questions submitted in appeal were:

First.—Whether legal and sufficient evidence was adduced of William Darling's indebtedness for the amount in which he was condemned?

Second.—Whether the remedy for interest beyond five years was barred and prescribed by the lapse of five years before action brought?

Third.—Whether the matter in question was commercial, and whether the remedy for capital and interest was barred by the lapse of five years before action brought?

Fourth.—Whether the remedy was barred and prescribed by the lapse of six years before action brought?

Fifth.—Whether the plea of compensation for board and lodging was established by the Appellant?

January, 18th and 19th, 1877.

Mr. *Cross*, Q.C., Counsel for the Appellant:—

There are two entries of credits, which appear in the books of Wm. Darling & Co., but without any basis or actual indebtedness; the first, as the result of certain trading and commercial exchanges with Wm. Darling, sen., Merchant, of Edinburgh, and the second, as a collection of a commercial liability. Isabella Darling was no party to these entries. The first account was rendered on 26th March, 1862; the second account was rendered on 6th December, 1865; the alleged indebtedness is of 1861, and interest dates from then. The evidence shows the entries made in the books to have been incorrect and unauthorized, and the accounts referred to in Plaintiff's declaration were not written or signed, or in any way authorized by Appellant.

(1) See case as reported in 21 L. C. Jur., 92.

With regard to item £120, William Darling and Thomas Darling prove beyond a doubt that no value was received by them. The first entry in the books was a legitimate transaction at the time; the father was advised of a credit of £120, and it was entered in the books. It was subject to revocation by William Darling & Co. until Isabella Darling availed herself of it, and her recourse upon William Darling, sen., was at no time interrupted.

This claim, either for capital or interest, is barred and prescribed by the lapse of more than five years before action brought; and also by the lapse of six years.

Respondents allege that the indebtedness is due by Wm. Darling & Co., as merchants and co-partners. The claim is of a commercial nature, and is based upon the alleged rendering of a commercial account by a mercantile firm. The interest entered as received on the mortgage is 12½ per cent. That amount has never been received; the entry was erroneous and can be explained. Moreover, this amount not having been collected, and there having been no privity of contract with Isabella Darling, her claim for the amount is against the estate of David Darling, and not against the Appellant.

Now, if the claim can be considered commercial in its nature, there can be no doubt about the application of the law of prescription or limitation of actions. The Court *a quo* held that the transaction was merely a loan on the part of Isabella Darling to Wm. Darling, whilst by the proof there is nothing to shew that Isabella Darling made a loan of the two sums to Wm. Darling & Co. On the contrary, it is shewn that the first item is an exchange of money between William Darling, sen., and Appellant, and that the second is nothing else than a collection of money, and both are

of a commercial nature. The evidence resorted to is similar to that given in a commercial transaction, and Appellant is entitled to apply all laws of prescription which he has invoked.

The case of *Whishaw* v. *Gilmour* (1), relied upon by Respondents, is not in point, and can hardly be admitted as a precedent, even to establish that a loan by a non-commercial person to a commercial firm is not of a commercial nature. If it was a loan, Appellant contends that it was a mercantile one, and as it is urged strongly against him that the entries made in the books created a novation, I submit that the engagement must be considered (having been entered into by him as a merchant), as mercantile. Once you establish the transaction to be a commercial matter at all, you must apply the short prescription.

The following points and authorities were also referred to by the learned Counsel:

Civil Code, L.C., Art. 1233, 1243, 1245, 1235, 2267, 2270. With regard to novation and delegation: *Civil Code, L.C.*, Art. 1171, 1172, 1174.

As to Commercial Jurisdiction—how established: *Edict* of the King of *France*, of the year 1563, establishing Consular Courts, as cited in the case of *Pozer* v. *Meiklejohn* (2); the case of *Pozer* v. *Meiklejohn* (3), and particularly the concluding remarks of Sewell, C. J. (4); *Lalonde* v. *Rolland* (5); *Morrogh* v. *Munn*, (6); 10 and 11 Vic., c. 11. See preamble as well as secs. 1 and 2. This Statute does not exclude accounts between merchants, as does 21 James I., c. 16. New promise by stated account, therefore, insufficient unless signed.

(1) 15 L. C. R., 177; (2) Stuart's R., 122, note*; taken from L. C., Den., 369; (3) Stuart's R., 122, note*; (4) Foot of p. 124; (5) 10 L. C. Jur., 321; (6) Stuart's R., 44.

Commercial acts, as such, give jurisdiction to the Consular Courts, whether the parties be merchants or not: *Bédarride*, Jurid. Com. p. 116; *C. N.* Arts. 631, 632; *Bédarride*, Jurid. Com. p. 128; *Bravard Veyrières*, Droit Com. t. 1, p. 52.

A loan is commercial as regards the merchant borrower: *Goujet et Merger*, Dict. de Droit Com. *vo.* "Acte de Commerce," t. 1, p. 26, nos. 12 and 14; *Sebire et Carteret*, Encyclopédie de Droit *vo.* "Commerçant," "Commerce," t. 1, p. 47.

Acts, when done by merchants, presumed to be mercantile: *Pardessus*, Droit Com, t. 1, pp. 84, 86; *Goujet et Merger*, Dict. de Droit. Com., *vo.* "Acte de Commerce," t. 1, p. 26, no. 9.

Exchange operations are commercial as regards all parties to them: *Namur*, Cours de Droit Com., t. 1, p. 47; *Pardessus*, Droit Com., t. 1, p. 44, no. 28; *Orillard*, Tribuneaux de Com., nos. 338, 339 and 340; *Bédarride*, Droit Com. Comment. du Code de Com., t. 1, p. 34, no. 28.

Agencies also: *Namur*, Cours de Droit Com., t. 1, p. 47; *Pardessus*, Droit Com., t. 1, p. 70, no. 42; *Orillard*, Tribuneaux de Com., p. 303, nos. 338, 339 and 340.

Accounts current between merchants: *Pardessus*, Droit Com , t. 1, p. 90, part of no. 52.

To whom the plea of prescription belongs: *Civil Code, L. C.*, Art. 2,208.

For interruption or new promise: *Angell* on Limitations, cap 20, no. 211; *Bowker* v. *Fenn* (1).

As to date of letters, &c: *Civil Code, L. C.*, Art. 1,226.

In question of prescription, the party should not be interrogated to draw inferences from his answers: *Alauzet*, Code de Com., t. 3, p. 598, no. 1,562.

New law of prescription should be retroactive:

(1) 10 L. C. Jur., 120.

Mailher de Chassat, Retroactivité des Lois, t. 2, pp. 293, 298.

As to interest recoverable: *Civil Code, L C.*, Art. 1,077. The first credit of interest is prior to 22 Vic., c. 85, and while 16 Vic., c. 80, was in force.

Mr. *Edward Martin*, Q. C., of the Ontario Bar, followed on behalf of the Appellant :—

The first item in the accounts was with the firm, but the one of $800 is due by David Darling's estate, and Wm. Darling is not proved to have been present, or had knowledge of the entering of this item in the accounts, and is not bound by such entry.

Re the Commercial Bank Corporation of India and the East. (1) *In re Family Endowment Society.* (2) *Williams* on Executors. (3) *Re India and London Life Assurance Company.* (4)

The transactions were of a commercial nature :—

Cons. St. of L. C. (5) *Waring* v. *Cunnliffe.* (6) *Fergusson* v. *Fyffe.* (7) *Exparte Bevan.* (8) *Crosskill* v. *Bower.* (9) *Rhodes* v. *Rhodes.* (10)

This case is distinguishable from *Whishaw* v. *Gilmour* (11) The declarations in the two cases were different, and the case of *Whishaw* v. *Gilmour* went on demurrer for want of allegation of debt being of a commercial nature.

The compound interest was not recoverable: *Civil Code of L. C.*, Art. 1078; *Waring* v. *Cunliffe.* (12) The account not being signed, could not take the case out of the Statute; and the letter, being of a different date, could not be connected with the account, *Clark* v. *Alexander* (13); nor could the entries in the books be

(1) 16 Weekly Reporter, 958; (2) L. R. 5 Chy. Ap., 118; (3) Vol. 2, par. 1,243; (4) L. R. 7 Chy. Ap., 651; (5) C. 82, s. 17–18; c. 83, s. 26; (6) 1 Ves., 98; (7) 8 C. & F., 121; (8) 9 Ves., 223; (9) 32 Beav., 86; (10) Johns., 653; 6 Jur., N. S., 600; (11) 15 L. C. R., 177; (12) 1 Ves., 98; (13) 8 Jur., 496.

deemed sufficient to take the case out of the Statute; *Bush* v. *Martin*, (1); *Morgan* v. *Rowlands*, (2); *Hyde* v. *Johnson* (3).

Mr. S. *Bethune*, Q. C., Counsel for the Respondent:—

The principal question in this case is whether it comes under the Statute of Limitations. As to the prescription of five years (even if the debt claimed were one of "a commercial nature") it cannot by any possibility apply, as it is a new prescription created by the *Code*, which came into force on the 1st August, 1866, long after the dates mentioned in the accounts current; and under Article 2270, "prescriptions begun before the promulgation of this *Code* must be governed by the former laws. The case of *Bowker* v. *Fenn* (4), relied on by Appellant comes under the short prescription mentioned in the *Code*. This decision has been overruled by a decision of the Court of Appeal last term, 22nd December, 1876, in the case of *Walker* v. *Sweet* (5), which shows how a prescription may be interrupted by any acknowledgement.

As the provision of law relied on by the Appellant in support of his plea of prescription of six years is that contained in chapter 67 of the *Consolidated Statutes of Lower Canada*, the Respondents answer, that the debt sued on is not a "commercial matter," and consequently does not fall within the Statute. In this case William Darling is sued individually as well as in his capacity of a member of the firm of William Darling & Co. The evidence in this case has been taken under the *Code of Civil Procedure*, Article 251; and as to what proof can be made out of the books of a merchant for and

(1) 2 H. & C., 311; (2) L.R. 7 Q. B., 493; (3) 2 Bing. N. C., 776; (4) 10, L. C. Jur., 120; (5) 21 L. C. Jur., 19.

against himself, I will refer to *Pothier* on Obligations no. 723.

Art. 2250, *Civil Code, L. C.*, cannot be invoked as against arrears of interest, inasmuch as the prescription of the debt had commenced prior to the passing of the *Code*.

The Respondents further contend that, even if the debt sued on can be regarded as a commercial matter, the rendering of the account current of the 6th December, 1865, the letter of the Appellant of the 6th November, 1865, and the entries in the Appellant's books down to as late as the 30th September, 1871, as proved in Court, clearly took the case out of the Statute; the action having been returned into Court on the 20th October, 1871.

The legacy of $800 was clearly recoverable from the Appellant. He was the sole executor of David Darling, and when the legacy was past due and payable under the will, he credited Isabella Darling and debited the estate with the amount.

As to whether the transaction was non commercial *quoad* Miss Isabella Darling, the learned Counsel referred to the following authorities:

Pardessus, Droit Com., nos. 5, 20, 48, 49, 50, 52, p. 5 to 89; *Goujet et Merger*, Dict. de Droit Com. *vo.* "Acte de Commerce" pp. 24, 25, nos. 1, 2, 4, 5 and 6; *Devilleneuve et Massé*, Dict. du Contentieux Commercial *vo.* "Acte de Commerce," p. 15, no. 153; *Dalloz*, Dict. *vo.* "Acte de Commerce," nos. 4, 5, 6; *Bédarride*, des Commerçants, &c., nos. 26, 27, 246, 247, 248; *Bravard et Veyrières*, Droit Com. pp. 51, 56, 236, 237, 322; *Orillard*, Compétence des Trib. Com., no. 245; *Sebire et Carteret* "Encyclopédie de Droit, *vo.* "Commerce," nos. 204, 207, *Whishaw* v. *Gilmour* (1).

(1) 15 L. C. R., 177.

Mr. *Cross*, Q.C., in reply :—

The entries made with reference to the $800 were merely for the purpose of measuring the extent of interest Isabella Darling should have in the mortgage, and it is in evidence that Appellant did not get the money, and as to the other entry it is evident that it is a commercial transaction. If Mr. Darling, Sen, had advised Appellant, that he had drawn a bill of exchange in order to credit Miss Isabella Darling with the amount, the Respondents could not contend that the transaction was not a commercial one ; in this case evidence of an exchange by the opening of a letter of credit has taken place, and is equivalent to a bill of exchange.

JUNE 28th, 1877.

The CHIEF JUSTICE :—

The principal item composing the original claim in this matter arose in this way. Isabella Darling, the Testator, and William Darling the Defendant, were brother and sister. Isabella resided with her father in Scotland ; Defendant resided in Montreal, Canada. Isabella had about £100 in money, which she wished invested. It appears from a letter written by William Darling to Isabella, dated 1st September, 1857, that Isabella contemplated visiting Canada to relieve Mary, William's wife, in her household duty, as she intended visiting Scotland. On the 4th of January, 1858, William wrote a letter in answer to one from her, with reference to the £100. He said, "Your best way will be to keep "it until I give you notice that I have invested the "money ; I will advance the amount, and, after having "done so, will ask you to pay the money over to my

"father on my account." In the account current of William Darling & Co.. of Montreal, with William Darling, Esquire, of Edinburgh, to 31st December, 1858, is entered February 27th, 1858: To cash from Isabella, £120; and in the account current (produced in the cause) of Miss Isabella Darling, in account, interest at 6 per cent., to 31st December, 1858, with W. Darling & Co., is entered March 3rd, 1858, "By cash to William Darling, sen., £120 sterling." A balance is struck at the expiration of the year, and of every year thereafter, according to the accounts current produced, showing a balance (in which this £120 sterling and the interest thereon is included) on the 31st December, 1865, of $1,912.08 Under the will of David Darling, a brother of William and Isabella, made the 9th October, 1856, £200 currency was devised to each of his sisters, Margaret, Grace and Isabella. Probate was granted to William Darling, sole executor of the will, on the 2nd of June, 1857. In the account current already referred to, showing the balance on 31st of December, 1858, Isabella Darling is credited 14th April, 6 months' interest on $800, at 12½ per cent., less ½ per cent. collection $51.74; a similar amount is credited October 14th of the same year; in the account current for 1859, on 14th April, a credit entry of a similar amount is made, and another entry on 14th of October of same amount. In the entries on the account current for 1860, on the 14th of April, there is a credit of a like sum of $51.74, and on the same day D. Darling's legacy of $800. These entries, with interest at six per cent., making yearly rests, charging cash, goods, &c, are continued in the accounts current produced to the last one in which the balance is brought down to the 31st December, 1865, as already mentioned, the amount due Miss Darling being

$1,912.08. The account current filed, which is first in date, shows the account from March, 1858, to 31st December, 1861, is dated 26th of March, 1872, and shows a balance of $1,640.07. That showing the state of the account from January, 1862 to 31st December, 1865, when the balance of $1,912.08 is shown, is dated Montreal, 6th December, 1865. They are transcripts from the entries in the books of W. Darling & Co. This suit was instituted on the 5th October, 1871, and was returned into Court on the 20th day of the same month.

There was evidence offered with a view to showing that William Darling was not aware of the entries of the items in the books of the firm, and that the credit of the legacy of $800 to Isabella, and the charging the estate of David Darling with the amount of the legacy to Isabella in the books, was not made on the authority of William Darling. The statement dated 26th March, 1862, Thomas Darling said, was made up by him, and the items in the books were entered by him, and he was not aware that William knew what he had done. He (Thomas) was aware of the fact that Isabella was entitled to the legacy of $800. The entry as to the cash paid William Darling, Senior, and the two items of interest of $51.74 each, were in the books before he made up the full statement of 26th March, 1862. The statement was made out because Isabella asked him to make a statement of what she termed her fortune, he at that time being the book-keeper of the firm of William Darling & Co. The statement of account dated 6th December, 1865, was made out by Defendant's book-keeper, Ross; he did not know by whose directions but he said he must have been directed to do so by some one. He did not recollect what he did with it after it was made out. The balance made up to 31st December, 1865, and as shown

in that account, was $1,912.08 due Isabella. The Plaintiff produced a letter signed by William Darling, dated Montreal, 6th *November*, 1865, addressed to his sister. It contains the following paragraph; "I did not get "your letter till three weeks after it was written, and "I *now send you the statement of your account*. There "was an amount paid to Morgan that I do not know "whether it should be charged to you or my father, "and I have omitted it altogether from your account, "and from his. I will send you a corset if I can get "one with the articles ordered in your letter from "Mary, and which are not sent, because the expense "would be more than they are worth. Perhaps there are "some other articles you wish: if not, I will send them "by express to Orillia." It was urged on behalf of the Plaintiffs, that in this letter the month in the date was by mistake, written November instead of December, and the statement of account referred to in it was the account made out by Ross, dated the 6th December, 1865. Both William Darling and the book-keeper, Ross, were very closely examined on this matter, and failed to give any satisfactory explanation as to what statement of account was referred to in William Darling's letter. That account undoubtedly existed in William Darling & Co's books—books connected with his business and to which he had constant access, and in it were charged against Isabella, from time to time, cash, goods, paid for furs, for box to pack piano, and very trifling amounts, such as goods, T. Davidson, 22 cents. In the absence of any satisfactory explanation, the judges in the courts below were of opinion that the statement of account referred to and sent in that letter was the one dated 6th December, 1865. Isabella, of course, was well aware that

she had an account with William Darling & Co., and the letter, dated 6th November, would warrant the inference that she had written for a statement of her account. He seems to apologise for not sending it before. He says, "I did not get your letter till three weeks after it was written, and I now send you *the statement* of your account." At this time Isabella was not living in Montreal, but somewhere near Orillia, in the Province of Ontario. An attempt was made to show that these entries which were made in William Darling's books, and which remained there so long, showing a large balance due to Isabella, were entirely a mistake; the first attempt to put the matter right by cross entries and the "*magic power of book-keeping*" was made after this action was commenced. In the meantime, Isabella Darling had married George Templeton, and in the marriage contract between them, dated 9th August, 1870, her property is referred to as wearing apparel, jewellery, trinkets and paraphernalia, the sum of about *two thousand four hundred dollars in the hands of William Darling & Co.*, &c., &c. William Darling was examined as to this contract. He says the amount to Isabella's credit on 1st January 1871, was $2,535.10. He says he was spoken to about it, but he could not say if he ever saw the contract. In answer to the question if he had not informed Mr. Hunter, the Notary, who prepared the contract, that the sum of about $2,400, the property of Isabella Darling, was then in the hands of William Darling & Co., he answered, "I am quite satisfied I never gave Mr. Hunter, or anybody else, any information of that kind. I may have stated that there was such an amount to the credit of Isabella Darling, but subject to all the adjustments I have stated in my previous evidence. As to the language that is used

there, it is not my language." He was asked, "is it not a fact that the information, such as it was, was derived from conversations between you and Mr. Hunter, the Notary?" He answered, "it may have been." Isabella Darling having married, died on 13th May, 1871; this action was instituted on 5th October, 1871. George Templeton died 28th March, 1875, and the suit was continued by his executors. The fair inference is, that William Darling, about the time of his sister's marriage, was aware that a considerable amount stood to her credit in the books of William Darling & Co., and no steps whatever were taken to rectify any errors, if they existed, until after the commencement of this action. As to the principal items of £120 sterling, equal to $584, and the $800, the devise of David Darling, I fail to see how there are any errors to correct. Isabella had a little money that she wished invested in this country, which she contemplated visiting soon. Her brother intimated to her that he would be looking out for an investment for her, and when he found one he would make it, and told her she could then pay the money to his father, on his account. Before he advised her as to an investment, she paid to his father, to his credit, the £120 sterling. That amount is charged in the books of William Darling, of Edinburgh, to Wm. Darling & Co., Feb. 1, 1858, as cash from Isabella; £120 is credited to her 3rd March, 1858, by cash paid to William Darling, sen., £120—$584—and this item is contained in the accounts rendered to Isabella, and down to the commencement of this suit. Isabella is made aware of the fact—has enquired as to the state of her account—has had statements rendered to her, and in the last one sent to her the balance brought down includes this item and the interest. I think we must assume, under the evidence, that William

Darling knew what was in his own books, and how the account which he sent Isabella in his letter of 6th November was made up, as I can come to no other conclusion than that the account of the 6th December was sent in the letter dated 6th November. William himself is as much bound by the account as if he had signed it at the bottom, or as if he had annexed it to the letter, and it had been verified by witnesses as the account annexed and referred to in it. Having recognized the payment by her to William, sen., on his account, having charged this amount to William, sen., and credited the amount to her, I fail to see how there was any error to be corrected, or how there could be, without her consent, any re-charging, because William, sen., may or may not have paid W. Darling & Co.

Then, as to the legacy, as I understand the law, until an executor or any other trustee acknowledges to hold money which comes into his hands intended for another as the money of the devisee, or *cestui que trust*, he cannot be sued at law for it; but when he sets it apart as the money of the devisee, and charges the estate of the testator with it, and credits the same to the devisee, then it is money had and received to the use of the devisee. Now, in the case before us, this appears to have been done. On the 14th April, 1860, Isabella Darling was credited with D. Darling's legacy, $800, and the estate of David Darling was debited, 31st May, 1862, with the legacy of $800, and interest at 12½ per cent., to 14th April, 1860, and 6 per cent. from 14th April, 1860, to 12th September, 1861, $67.73. So here was debiting of the estate of the testator with the legacy, and a crediting of it to the legatee, and an account rendered afterwards allowing interest on it.

It seems to me this enables the legatee to sue the executor for money had and received.

There may be some question how far the interest credited at 12½ per cent. is proper to be considered as accruing from the legacy, and as belonging to the legatee. It is stated that there was a mortgage owned by David Darling's estate, which, it was thought, would bear 12½ per cent. interest, and this was set aside for the £200 devised to each of the three sisters, and when the interest was paid at this high rate, it was credited to Isabella for her $800, but subsequently, in a proceeding in Chancery, the Court would not allow this excessive interest, and it was reduced to 6 per cent. by considering the excess as paid on the principal. Notwithstanding this, and the compromise that was effected, the amount still remained to the credit of Isabella Darling in the books of William Darling & Co. until after the commencement of this suit.

Perhaps a defence might have been raised as to the excess of interest beyond 6 per cent. credited as the first four or five payments of interest, if it had been shown that the estate of David Darling had really lost the excess. I do not understand that question to have been specially raised in the Court below. The broad question as to William not being liable for the legacy is what was discussed, and that, I think, was properly decided against him. There is no question raised as to the solvency of the estate of David Darling, so there can be no pretence for retaining any portion of the legacy to pay debts. As to interest, the general rule is that the legacy bears interest from the time it is payable, but if the executor uses the funds of the testator for his own business or purposes, the rate

of interest will be affected thereby (1). It does not clearly appear at what time David Darling died. His will is dated 9th October, 1856, and the probate is dated the 2nd June, 1857. The legacy to Isabella is payable one year from the death of the testator. The first interest on the $800 is credited on the 14th April, 1858, for six months, at 12½ per cent., $51.74, and there are five of such payments credited. There is some mistake in this, for six months' interest, at 12½ per cent., does not amount to $51.74. If the question had been discussed in the Court below, and it had appeared that the funds of the testator were only bearing 6 per cent. interest, or that the sum credited to Isabella was too much by 6 per cent., the claim might have been reduced by about $130, and the interest thereon, according to the mode of calculating by the account rendered, and, perhaps, that would be the correct mode to treat this matter now.

Assuming, then, that the transaction is to be considered as binding, is it to be considered as one of commerce or non-commercial. If non-commercial, the entries in the books of Darling & Co., the statement of the account of the 6th December, 1865, and the letter enclosing the same, are sufficient evidence of the indebtedness to bind William Darling, and if commercial, equally so.

The next question is as to the statute of limitations. If the transaction is non-commercial, then it is conceded on all hands, as I understand, that the claim is not barred by prescription. If the matter is to be considered as one of commerce, then is the Plaintiff's claim barred by the Statutes of Lower Canada or by the provisions of the *Civil Code*? The 2270th article of the *Code* reads: "Prescriptions begun before the

(1) 1 Williams on Executors, 1284-1288.

promulgation of this *Code* must be governed by the former laws." The *Code* came into operation on the 1st August, 1866, and the statement of account to which the letter of William Darling refers is dated 6th December, 1865, from which day the prescription began to run. According to the literal wording of the *Code* it does not apply, and the case must be governed by the former laws.

Under the *Consolidated Statutes of Lower Canada*, in force until the *Code* was promulgated, it was enacted (1) that "no action of account, or upon the case, nor any action grounded upon any lending or contract without specialty, shall be maintainable in or with regard to any commercial matter, unless such action is commenced within six years next after the cause of such action." Under sec. 2 it was provided that "no acknowledgment or promise by words only shall be sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the next preceding section, or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made, or contained by, or in some writing, to be signed by the party chargeable thereby."

Is the acknowledgment put forward on behalf of the Plaintiff sufficient? I think it is. The account is in writing; it purports on the face of it to show the indebtedness of William Darling & Co. to Isabella Darling; the amount is stated to be, as made up to the 31st December, 1865, $1,912.08 The evidence, I think, as already stated, leads to the conclusion that Isabella wrote William Darling, asking for the statement of her account, and in the letter, purporting to be dated 6th of November, 1865, *he sends her that very account*, saying "I now send you the statement of your account." Taking

(1) Cap. 67, sec. 1.

both together, both being in writing, and the letter signed by him, I think this sufficiently complies with the statute. Suppose the account current had been continued over half a sheet of paper, and the letter had followed immediately after the striking of the balance, and then had been signed by the Defendant at the end of the letter, would there be any doubt that the Statute would have been complied with? Or, as already suggested, suppose they had been attached together with a ribbon and the ends sealed, with William Darling's seal unbroken, would it not be said that the two papers were incorporated together? If sent together, which I do not doubt they were, may they not be considered as one document for the purposes of the Statute? I think they may. In *Hartly* v. *Wharton*, (1) where Defendant was an infant when goods were sold to him, it was sought to make him liable on a written promise of ratification under Imperial Statute 9th George IV, chap. 14, sec. 5. The written document was in the form of a letter, but was not addressed to any one and contained no date. Lord Denman, in giving judgment, said, "there is no date to the writing, the Act requires none, but only a promise or ratification made by some writing, signed by the party to be charged therewith. Then it is urged that the party to whom the promise was made is not named. That I do not think necessary If such a promise were in a letter the address would be evidence, and if that were in an envelope evidence might be given to connect the two, and so evidence may be given for or to whom the written acknowledgment was made by delivery or otherwise." So here we connect the letter and the statement of the account by evidence, and thus connected together they are an admission of

(1) 11 A. & E., 934.

the balance due signed by William Darling. The later cases seem to sustain the view that you may use another document or paper referring to the contract to make it binding under the statute of frauds. In a recent case, a learned judge said----"On the document itself there must be some reference from one to the other, leaving nothing to be supplied by parol evidence, except the identity, as it were, of the document," *Peirce* v. *Corf*, (1); *Buxton* v. *Rust*, (2). If the object of the Statute be taken into consideration, I can hardly conceive a more satisfactory way of acknowledging an amount due than the rendering of an account showing the balance, and a letter accompanying it, saying----"I send you a statement of your account"; and this in reply to a written request to send it. Here there is nothing transacted by "parole" between the parties. It is all in writing; all the act of the party to be charged therewith. Suppose the account had only been running five years, and Isabella had been in Montreal and asked William Darling for a statement of her account, and one had been made out showing a balance due her of $1,000, and this, though not signed, had been handed her by William Darling, there is no doubt if she had sued William Darling within a month for that balance, and had proved just what has been stated, she would have recovered as for the admitted balance of the account. She could not have recovered after the six years, because the admission is not in writing. But, being sent in a letter signed by him, it then became an admitted balance under his signature, and so taken out of the Statute----see *Baumann* v. *James*, (3). There is a very late case as to an acknowledgment taking the case out of the Statute in the Exchequer

(1) L. R. 9. Q. B., 217; (2) L. R. 7 Exch., 282; (3) L. R. 3 Ch. Ap., 509; Maxwell on Statutes p. 262.

Division before Baron *Cleasby* in *Skeet* v. *Lindsay* (1). It was argued at some length, and many cases were referred to. The learned Baron adopted the language of *Mellish* L. J. in the case of the *River Steam Co.; Mitchell's claim* (2). "There must be one of these three things to take the case out of the Statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied, or, *secondly*, there must be an unconditional promise to pay the debt, or, *thirdly*, there must be a conditional promise to pay the debt and then the evidence that the condition has been performed."

Here there is the clearest evidence of the acknowledgment of the debt, the account current showing the amounts and the balance due. The law then implies the promise to pay, this was less than six years before the entry of this case into court, and therefore, considering the matter as a fairly commercial one, and the rules of evidence in commercial cases in England to apply, I think we ought to hold that the action is properly maintainable.

It was pressed upon us in argument that we should hold that if the Statute had run so as to bar the remedy that the subsequent admission should not take the case out of the statute, and the debt should be considered as wholly extinguished. The case of *Bowker* v. *Fenn*, (3) was referred to. How far that case may be affected by *Walker* v. *Sweet* (4) in the Court of Appeals in Quebec, recently decided, it is not necessary to determine. Under the decided cases in England there can be no doubt that the legal effect of an acknowledgment of a debt barred by the statute of limitations, is that of a promise to pay an old debt, and for this pur-

(1) 36 L. T. N. S., 98; (2) L. R. 6 Ch. Ap., 822; (3) 10 L. C. Jur., 120; (4) 21 L. C. Jur., 19.

pose the old debt may be said to be revived. It is viewed as a consideration for a new promise. If the creditor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. This is the language of Vice-Chancellor *Wigram*, used in *Philipps* v. *Philipps* (1), and referred to in subsequent cases, particularly in *Buckmaster et al.* v. *Russell* (2).

At this late day, I do not think we should lay down a different rule as to the effect of acknowledgments to take a case out of the Statute.

The evidence showed that Thomas Darling was not the party bound to pay the indebtedness of the firm to Isabella Darling, and as to Thomas, it was not argued before this Court that the case was not properly decided in his favour; and as against William, if the evidence to establish liability was sufficient, he, (William), being charged as jointly and severally liable, the judgment was proper enough, he being solely liable.

As to the first question submitted to this Court, I think there was sufficient evidence of William Darling's indebtedness to the amount of $2,288.44, with interest at 6 per cent., since 1st January, 1871; and I do not think the explanations given in the evidence in behalf of William Darling were sufficient to exonerate him from liability. Second—The articles of the *Code* as to the prescription of interest to five years does not apply in this case, as the prescription began before the *Code* was promulgated. Third—Whether the matter in question was commercial or not, the remedy is not barred by the lapse of five years before the bringing of the action. Fourth—Six years had not elapsed before the commencement of this action since the written acknow-

(1) 3 Hare, 281-299; (2) 10 C. B., N. S., 745.

ledgment was made by William Darling, which took the case out of the Statute. Fifth.—It was not argued before this Court that the plea of compensation for board and lodging was established by appellant. If it had been argued, I think the evideuce was not sufficient to sustain the plea.

The rate of interest in this account was six per cent. per annum making annual rests. In this way the account was rendered by Darling & Co., and Isabella Darling did not object. It may be considered, therefore, that this was the mode agreed upon between the parties as to the interest, and, according to that mode, the Plaintiffs should be entitled to recover. I do not quite understand how the learned Judge in the Superior Court fixed the amount to be recovered from the Defendant, William Darling, at $1,746.42, balance shown to be due on 31st December, 1863, under Plaintiff's exhibit No. 2, with interest on $1,661.23, balance due 31st December, 1863, until perfect payment and costs. I fail to see why the balance on 31st December, 1863, should be fixed as the sum due, or why that balance should not carry interest until payment. If the mode adopted of computing interest, and making annual rests anterior to 1863, be correct, it seems to me it should be followed up to the time of the bringing of the suit, or to the last balance which would have been struck previous to the bringing of this action. Taking the balance of the account, say on 1st January, 1871, as stated in William Darling's account at $2,535, and allowing for the excess of the five payments of interest credited with the interest thereon computed in the same way, I make the balance due the Plaintiff, $2,288.42, bearing interest from the 1st January, 1871, which, I

think, is the proper amount to find againt the Defendant, with costs.

RITCHIE, J., concurred.

STRONG, J.:

As regards the question of prescription, I have found nothing to lead me to the conclusion that the decision in *Whishaw* v. *Gilmour* (1) should not be considered as correctly settling the law; and I am, therefore, of opinion that the only prescription applicable to the case was the long prescription of thirty years. I fail to see any element of a commercial transaction in the loan by Isabella Darling, there being nothing in the contract, which is implied from the facts, making it obligatory on the borrowers to use the loan for the purposes of trade or speculation, and nothing making the rate of the lender's remuneration dependent on any contingencies of a speculative character. I need not say more on this head, as I entirely agree in the judgment which will be delivered by my brother Fournier, and which contains a full discussion of this question.

I also concur with the Chief Justice in the opinion that, if the short prescription were applicable, the letter of the 6th of November, 1865, would be an acknowledgment sufficient to interrupt it.

I think the appeal should be dismissed with costs.

TASCHEREAU, J.:

The action in the Superior Court was instituted by George Templeton, as universal legatee of his deceased wife, Isabella Darling. Templeton died during the

(1) 15 L. C. R., 177.

pendency of the suit; the Respondents, as executors of his will, took up the instance in the place of said Templeton. The action was brought against the Appellant and his brother Thomas Darling for $1,912.08, and interest from 31st December, 1865, as per settlement of account, for loan of monies at different times from 1858 to 1860. The Appellant fyled several pleas, but only the following need be considered under the present appeal: 1st. Plea of prescription for five years; 2nd. Plea of prescription for six years; 3rd. Plea of compensation by a counter claim for board and lodging from September, 1858, to Nov. 1862, at the rate of $300 per annum; 4th. The general issue.

We are of opinion that the judgment of the Court below should be confirmed. It is evident that the pleas of prescription of five and six years cannot be maintained for one instant, the debt claimed not being of a commercial nature. It consists in two separate loans of money bearing interest, made by a non-trader to traders it is true, but such a loan cannot be considered as a commercial transaction. This proposition was adhered to in the case of *Whishaw* v. *Gilmour* (1), and we find the same rule of law laid down in *Pardessus*, Droit Commercial (2); *Goujet et Merger, vo.* "Acte de Commerce" (3); *Dalloz* Dict., *vo.* "Acte de Commerce" (4); *Bédarride*, des Commercants, nos. 26, 27, 246, 247, 248; *Sebire et Carteret vo.* "Commerce," (5); and the Court of Queen's Bench, which confirmed the judgment appealed from, assented to the same doctrine. Even admitting, for the sake of argument, that the debt claimed was one of a commercial nature, the prescription of five years would not apply as being a new prescription created by the

(1) 15 L. C. R., 177; (2) Vol. 1 pp. 5 to 89; (3) P. 15, no. 153; (4) 34, no. 456; (5) P. 560, nos. 204 to 267.

Code (which came in force on the 1st August, 1866), and under Article 2,270, all prescriptions begun before the *Code* must be governed by the former laws.

The debt being of a civil and not of a commercial nature, the prescription of six years cannot apply, nor, if commercial, can the contention of the Appellants that the debt had not been acknowledged by any writing of his be of any avail, for the entries in his books are, according to our laws, conclusive proof against him unless otherwise explained or an error is accounted for, and in this case I am satisfied that there has been no error. This also disposes of the plea of general issue fyled by the Appellant. Now as to the plea of compensation, claiming $1,200 from the Respondent for board and lodging at different times from 1858 to 1862, we are of opinion that the claim cannot be entertained. No proof of a contract for board was made; on the contrary, it seems that it was on the invitation of the Appellant that Isabella Darling went to live with him. To show his intention of charging for this board, Appellant should have included this item in the accounts he furnished Mrs. Templeton whilst she was living with him. If we take into consideration the relationship of the parties, the rendering of the accounts without such a charge, and all the surrounding circumstances, I think we may safely come to the conclusion that no intention ever existed in Appellant's mind to charge board or lodging to a sister who came to his house by invitation. We therefore dismiss this plea as not proved, and confirm the judgment of the Court of Queen's Bench for the Province of Quebec, with costs in this Court as well as in the other Courts appealed from, with a slight alteration as to the amount.

FOURNIER, J.:

La principale question a résoudre se résumant à savoir si le contrat sur lequel est basé l'action en cette cause est, ou non, d'une nature commerciale, il suffit pour en déterminer le véritable caractère de rappeler en peu de mots de quelle manière il a eu lieu, et la qualité des parties contractantes à cette époque.

Le 3 mars 1858, William Darling, marchand de Montréal, reçut de William Darling, senior, son père, pour le bénéfice de sa sœur Isabella Darling, la somme de £120 stg., égale à $584.00 courant. Plus tard cette dernière devint légataire d'une autre somme de $800, en vertu du testament de David Darling, son frère. William Darling fut seul chargé de veiller à l'exécution de ce testament. Ces deux sommes lui ayant été laissées à titre de prêt, à six par cent d'intérêt par année, il en rendit compte à sa sœur jusqu'au 31 Décembre 1867. A cette époque il apparaissait être dû, tant par les livres de la société William Darling et Compagnie, que par un état de compte fourni par William Darling à la dite Isabella Darling, y compris l'intérêt échu, une somme totale de $1,746.72 courant.

Isabella Darling n'a jamais fait aucun commerce et rien ne fait voir qu'en plaçant ses fonds dans la société de William Darling et Cie., elle l'ait fait dans un but de trafic et de spéculation. Par le seul fait que William Darling était marchand, le prêt qui lui a été fait alors est-il devenu pour cela un acte d'une nature commerciale auquel la prescription particulière à ces sortes d'actes établie par la 10 et 11 Vic., chap. 11, se trouve applicable? Il est indubitable que de la part d'Isabella Darling, cet acte n'est point commercial. C'est un contrat civil pour le placement de ses fonds

auquel la spéculation est tout à fait étrangère et qui conséquemment reste soumis, quant à la preuve et à la prescription, aux règles qui concernent le prêt. Comme on le verra par les autorités suivantes, le contrat pourrait être considéré en France comme une opération civile de la part d'Isabella Darling et comme un acte de commerçant de la part de William Darling. *Dalloz* (1) "Le même acte peut n'être commercial que de la part de l'une des parties. Ainsi dans le cas d'une vente, l'acheteur peut faire un acte de commerce tandis que le vendeur ne se livre qu'à une opération civile, et réciproquement." *De Villeneuve et Massé* (2) "Les obligations d'un commerçant au profit d'un non-commerçant lorsque la cause en est commerciale, sont acte de commerce à l'égard du commerçant seulement."

Ce double caractère donné au même acte dans la législation française provient de la division des juridictions, attribuant au tribunal de commerce, la décision des matières commerciales, et aux tribunaux civils, celle des causes d'une nature civile. Il y a bien des cas en France où l'on donne le caractère de commercialité à un acte uniquemment pour définir la juridiction. Par exemple si le prêt fait à un commerçant est déclaré pour celui-ci, acte de commerce, c'est a fin de le soumettre à la juridiction du tribunal de commerce qui peut décerner contre lui la contrainte par corps pour le forcer de remplir ses obligations, ou le déclarer en faillite. Mais le commerçant ne pourrait y traduire sa partie adverse, si elle n'a pas fait un acte de commerce; il serait obligé de l'assigner devant les tribunaux civils qui appliqueraient au contrat toutes les règles du droit civil qui le régissent. C'est ce que dit *Dalloz* (3),

(1) 1 Vol. Dict. de Legis. no. 5; (2) Dict. du Contentieux commercial, page 15, no. 153; (3) Dict. de Legis. no. 5. *Vo* "Acte de Commerce."

" Mais la compétence consulaire ne s'étend pas au " prêteur qui n'a pas fait personnellement un acte de " commerce même lorsque la convention formée entre lui " et le commerçant avait pour objet le trafic auquel ce " dernier se livrait."

Et aussi *Goujet et Merger* (1) Sect. I. au. No. 1. " Ce qui donne en général à un acte le caractère commercial, c'est la *spéculation ;* toute opération faite dans un but de trafic, avec l'intention d'en retirer un bénéfice, constitue un acte de commerce."

No. 4. " Il résulte du même principe qu'un contrat peut être commercial de la part d'une des parties et civil de la part de l'autre, si l'une d'elles seulement a eu en vue la réalisation d'un bénéfice."

No. 6. " Toutefois il existe cette différence entre les commerçants et les non-commerçants, que les premiers sont, jusqu'à preuve du contraire, supposés avoir agi dans l'intérêt de leur commerce, au lieu que les derniers sont réputés également jusqu'à preuve du contraire, n'avoir pas voulu entreprendre une opération commerciale."

Dans la province de Québec, où cette division de juridiction n'existe pas, il n'y a pas la même raison de donner au même acte ce double caractère. Si le contrat est civil de sa nature, il ne change pas de caractère parce que l'une des parties qui y a pris part est commerçante.

Une question, exactement semblable à celle-ci, a été décidée par la Cour du Banc de la Reine en appel. C'est celle de *Whishaw* vs. *Gilmour* (2). Dans cette cause, il s'agissait aussi du prêt d'une somme d'argent par un non-commerçant à des commerçants qui opposaient à la demande la prescription de six ans, invoquée sur le principe que l'acte étant de leur part un acte de com-

(1) Dict. de Commerce *Vo* " Acte de Commerce," p. 24; (2) 15 L. C. R., 177.

merce, ils avaient droit de se prévaloir de cette prescription.

Leur prétention fut rejetée. Bien que les juges aient été divisés d'opinion, il n'y a jamais eu de décision au contraire et ce point a été depuis considéré comme règle, par ce jugement.

Je suis d'avis que dans cette cause comme dans celle de *Whishaw et Gilmour* la seule prescription applicable est celle de trente ans.

Il y a aussi un plaidoyer de compensation qui n'est pas mieux fondé que celui de la prescription.

Aucune preuve n'a été faite pour établir une convention en vertu de la quelle la dite Isabella Darling devait payer pour sa pension et logement dans la famille de son frère, William Darling, et rien ne fait voir qu'il ait jamais eu l'intention de lui en tenir compte.

Pour ces motifs je suis d'avis de confirmer le jugement de la Cour du Banc de la Reine en appel, avec dépens, en le modifiant cependant de la manière mentionnée par l'honorable Juge en Chef.

HENRY, J. :—

I agree with the views expressed by the Chief Justice, and my other colleagues, as to the nature of the transaction. The case of *Whishaw* vs. *Gilmour* is in point, and the transaction must be considered as being non-commercial, and the only prescription applicable is that of thirty years.

Appeal dismissed with costs, with certain variations as to interest in judgment of Court below.

Attorneys for Appellant: *Cross, Lunn & Davidson.*

Attorneys for Respondents: *Bethune & Bethune.*

ROBERT NICHOLLS AND THOMAS ROBINSON ..... } APPELLANTS;

AND

WILLIAM CUMMING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Notice of assessment—Alteration without notice by Court of Revision—Liability of ratepayer.

The Plaintiffs, being persons liable to assessment, were served by the assessors of a municipality with a notice in the form prescribed by 32 Vic., c. 36, sect. 48, O., and on that notice the amount of the value of their personal property, other than income, was put down at $2,500, but on the column of the assessment roll, as finally revised by the Court of Revision, the amount was put down at $25,000, thereby changing, without giving any further notice to Plaintiffs, the total value of real and personal property and taxable income from $20,900 to $43,400.

Held:—That the Plaintiffs were not liable for the rate calculated on this last-named sum, and that a notice, to be given by the assessor in accordance with the act, is essential to the validity of the tax.

This was an appeal from a judgment of the Court of Appeal for the Province of Ontario, reversing the judgment of the Court of Common Pleas of the said Province. That Court decided on demurrer that the Defendant did not sufficiently justify, by his avowry, the taking of Plaintiffs' goods, which were replevied (1).

The action of replevin was commenced on the 16th December, 1874, to recover forty-one chests of tea that had been seized by the Respondent, as collector of taxes for the town of Peterborough for the year 1874, for taxes assessed against the Plaintiff Nicholls and his Co-Plaintiff Hall, now deceased, in whose possession the property was at the time of the distress.

(1) See case as reported in 25 U. C. C. P., 169, and in 26 U. C. C. P., 323.

PRESENT: The Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, JJ.

The declaration was in the ordinary form for taking and detaining forty-one chests of tea.

The Defendant pleaded: 1st. Not guilty; 2nd. Avowed the taking on the ground that the Plaintiffs were duly assessed by the assessors of the municipality in respect to real and personal property and income, for the year 1874, at the sum of $43,400. That the roll was delivered to the clerk of the municipality, completed and added up, on the 28th April, 1874. That the clerk filed the roll on the 18th June, 1874. That it remained on file in his office, open for inspection of all householders, &c., and on the 24th July it was finally revised by the Court of Revision, and the clerk on that day certified the roll as finally revised. That in respect of such assess ment there was due and owing by the Plaintiffs certain rates and taxes amounting to $672.70. That in the collector's roll of the said municipality for the said year 1874, delivered to the Defendant as being the duly authorized collector of the taxes for the municipality for that year, the Plaintiffs, Nicholls & Hall, appeared duly rated and chargeable with the said sum of $672.70, as their municipal taxes for that year. That Defendant duly demanded payment of the said taxes, and the same remaining unpaid for fourteen days after such demand, he duly seized and took the goods as a distress for the said taxes, and well avowed the same.

The Plaintiffs, for a plea to the said avowry of the Defendant, said that "the said assessors, in pursuance of the statute in that behalf, before the completion of their roll, left for Nicholls & Hall, at their place of business within the said town of Peterborough, a notice of the sum at which their real and personal property had been assessed, whereby they were notified that they had been assessed for the said year in the sum of

$5,400, value of real property; the sum of $2,500, value of personal property other than income; the sum of $13,000 taxable income; $15,500 total value of personal property and taxable income, and the sum of $20,900, total value of real and personal property and taxable income; and the said Nicholls & Hall, being satisfied with the assessment so notified to them, and not receiving any notice, and having no knowledge that they were assessed otherwise than as set out in the said notice until after the said assessment roll became confirmed, as in the said avowry mentioned, were deprived of their right to appeal against the said assessment in the said avowry mentioned, and the Plaintiffs aver that the said Nicholls & Hall were ready and willing to pay their taxes for the said year upon the said sum of $20,900, and before the said distress tendered the sum of $323.95, being the full amount of taxes properly chargeable under the by-laws of the said town of Peterborough in respect of the said sum of $20,900 so notified to them as aforesaid, to the said Defendant, who refused the same."

And for a further plea to the said avowry, that "Nicholls & Hall were assessed, not as in the said avowry mentioned, but for the sum of $20,900, in respect of their real and personal property, and that their being so assessed was, by the said assessors, duly notified to them, in pursuance of the statute in that behalf, and thereafter, without the knowledge of the said Nicholls & Hall, and without any notice to them thereof, the said assessors altered and changed their said assessment from $20,900 to the said sum of $43,400, and returned their said assessment roll so altered and changed to the clerk of the said town of Peterborough, and the said Nicholls & Hall, having no knowledge of

the said alteration until the payment of taxes on the said sum of $43,400 was demanded of them by the said Defendants, were deprived of all opportunity of objecting to the said alteration and change by appeal to the Court of Revision, but were ready and willing to pay taxes under the said by-laws upon the said sum of $20,900 so assessed against and notified to them as aforesaid, being equal to the sum of $323.95, and tendered the said sum before the said distress to the said Defendant, who refused the same."

The Defendant demurred to these pleas on the grounds :

1. That the said pleas are no answer in law. 2. That the said pleas admit that the said assessment roll was finally revised and confirmed as in the said avowry mentioned, and seek to set up a defect or error committed by the assessor in or with regard to the said roll, and that this cannot be done.

The issues of fact were struck out, with liberty to replace them, if necessary, after judgment upon the issues of law had been obtained.

The Court of Common Pleas gave judgment in Easter Term, on the 19th June, 1875, in favor of the Plaintiffs on the demurrer.

The case was appealed to the Court of Appeals for the Province of Ontario, was argued on the 20th March, and judgment was given on the 27th March, 1876, allowing the appeal, reversing the judgment of the Court of Common Pleas and ordering judgment to be entered for the Defendant on the demurrer with costs.

January 19th and 20th, 1877.

Mr. *Christopher Robinson*, Q. C., and Mr. *J. F. Dennistoun*, Q.C., for Appellants:

The decision in the Court of Appeals in this case has reversed, not only the judgment of the Court of Common Pleas, but, in effect, has reversed the decision of the Court of Queen's Bench in the case of *The Municipality of London* v. *The Great Western Railway Company* (1). Both English and American authorities lay down the general principle, that when a statute is passed imposing a tax, its provisions are not merely directory but imperative and require to be strictly complied with. Now, statute 32 Vic. c. 36, O., requires assessors of municipalities to give notice to the ratepayer of the value at which his property is assessed, the whole object of the notice being to inform the party of the amount of his assessment, so that, if dissatisfied, he may appeal; the notice at the foot of the assessment slip and the one endorsed on the back clearly shew this. Such a provision is compulsory, and a strict substantial compliance with it is a condition precedent to any proceeding to compel payment of the tax.

In this case, moreover, the Appellants rely on the well known rule in the construction of statutes that whenever a particular provision in a statute which has received a judicial construction is subsequently re-enacted in another statute, it is clear the intention of the Legislature was to adopt the construction which the courts had applied. This section 49 of c. 36, 32 Vic. is only a re-enactment of a similar provision which was in 16 Vic. c. 182; the assessment act in force when the case of *The Municipality of London* v. *The Great Western Railway Company* was decided.

The notice is for the benefit of the ratepayer, and if the roll were conclusive when finally passed and certified under section 61, as contended by the Respon-

(1) 16 U. C. Q. B., 500.

dent, then the notice, so carefully provided for by the statute, would not only be useless, but, if erroneous, would mislead the person assessed. The very object of giving him the notice is to enable him to decide whether he will appeal from the assessment mentioned in it. The form of the notice, and of the endorsement upon it, as given in schedule B to the act, shew this clearly. After specifying the sum at which the person has been assessed, it proceeds in effect to say: "Take notice that you are assessed as *above specified.* If you deem *this* an overcharge you may appeal." And the notice which in that case he is directed to give is; "Take notice that I intend to appeal against this assessment." There is nothing in this notice to lead any person receiving it to suppose that he must examine the roll in order to see whether the notice is correct, or that he must appeal or take any other step in order to protect himself against being assessed for any other sum. On the contrary, the words seem to preclude any such idea, and neither upon principle, nor under the language of the act, can such an obligation be imposed upon him. The roll is conclusive when, and only when, it has been made up and finally passed and certified in substantial compliance with the directions of the statute.

What is meant by section 61 is, that the roll is conclusive when made according to law, namely, according to the requirements of the Assessment Act.

The assessment, in order to warrant a distress for the amount, is constituted by the entries on the roll, combined with the proper notice, and the proceeding in question, being in the nature of a judicial proceeding, the ratepayer, the party affected by it, must have notice, unless the Legislature have expressly enacted that notice shall not be necessary.

It is no answer to the Appellants to say that they have their remedy against the assessor, or that he may be punished. It is more just, and more in accordance with principle, to say that the municipality, by which he is appointed and controlled, should be responsible for his negligence (1).

The ratepayer must be bound either by the sum named in the assessment roll, or in the notice of assessment, and after the roll has been finally revised there is no authority or tribunal by which the sum that ought to have been, or to be assessed, can be enquired into or decided. Appellant was entitled to receive another notice when the amount was changed.

The learned counsel also referred to the following points and authorities :—

As to the necessity for proper notice, as a condition precedent to the validity of the assessment :—*The Municipality of London* v. *The Great Western Railway Company* (2); *Regina* v. *Cheshire Lines Committees* (3); *Capel* v. *Child* (4); *Ponton* v. *Bullen* (5); *Noseworthy* v. *Overseers of Buckland* (6); *Maxwell* on Statutes (7); *Regina* v. *Justices of Middlesex* (8); *Sedgwick* on Statutes and Constitutional Law (9); *Dwarris* on Statutes (10); *Dillon* on Municipal Corporations (11); *Lowell* v. *Wentworth* (12); *City of Nashville* v. *Weiser* (13); *In re* Ford (14); *Doughty* v. *Hope* (15); *Sharp* v. *Speir* (16); *Sharp* v. *Johnson* (17); *Striker* v. *Kelley* (18); *Newell* v. *Wheeler* (19); *Cooley* on Taxation (20); *Darling* v. *Gunn* (21); *Cleghorn* v. *Postlewaite* (22); *Patten* v. *Green* (23).

(1) 32 Vict. c. 36, secs. 19, 20, 176; (2) 16 U. C. Q. B., 500; (3) L. R. 8 Q. B., 348; (4) 2 C. & J., 558; (5) 2 Grant, Er. & Ap. Rep., 379; (6) L. R. 9 C. P., 233; (7) Pp. 337, 340; (8) L. R. 7 Q. B., 653; (9) P. 275, *et seq.*; (10) P. 477; (11) 2nd edition, sec. 643; (12) 6 Cush., 221; (13) 54 Ill., 246, 249; (14) 6 Lansing, 94; (15) 3 Denio, 595; (16) 4 Hill, 76; (17) 4 Hill, 92; (18) 7 Hill, 25; (19) 48 N. Y., 486; (20) P. 265; (21) 50 Ill., 424; (22) 43 Ill., 428; (23) 13 Cal., 325, 329.

As to the general construction of such statutes: *Partington* v. *Attorney General* (1); *Brown's* Leg. Max. (2); *Sedgwick* on Statutes and Constitutional Law (3); *Maxwell* on Statutes (4); *Newton* v. *Cowie* (5); *Brooks* v *Cock* (6); *Cooley*, Constitutional Limitations (7); *People* v. *Allen* (8); *Dwarris* on Statutes (9); *Newell* v. *Wheeler* (10); *Hilliard* on Taxation (11); *Torrey* v. *Millburn* (12).

As to the effect of the confirmation under sec. 61: *Maxwell* on Statutes (13); *Reg.* v *Middlesex* (14); *Reg.* v. *Mayor of New Windsor* (15); *Rawlinson* on Municipal Corporations (16); *Newell* v. *Wheeler* (17).

Generally: *Williams* v. *Dobert* (18); *Cooley* on Taxation (19).

As to what constitutes an assessment: *Blackwell* on Tax Titles (20); *Cooley* on Taxation (21).

Mr. *James Bethune*, Q. C., and Mr. *W. H. Scott*, Q. C., for Respondent:

The proceeding in this case is one against a public officer who is not an agent of the municipality, but an independent officer, acting under the authority of sections 93 and 106 of c. 36, 32 Vict. As such he was entitled to a notice. *White* v. *Clark* (22); *Corporation of Kingston* v. *Shaw* (23).

The roll which is given to the collector contains all the rates of the different municipalities, and the rate which has been struck by the Council is calculated on the final revised roll.

(1) L. R. 4 H. L., 100; (2) Edition 1864, Pp. 4-6; (3) 2nd edition, 304; (4) Pp. 333, 340; (5) 4 Bing., 234; (6) 3 A. & E., 141; (7) 3rd edition, Pp. 74-8, 522; (8) 6 Wend., 486, note; (9) P. 477, cited in *Sedgwick* on Statutes and Constitutional Law, 278; (10) 48 N. Y., 486; (11) Pp. 37, 379; (12) 21 Pick., 67; (13) P. 281; (14) L. R. 7 Q. B., 653; (15) 7 Q. B., 908; (16) P. 23; (17) 28 N. Y., 486; (18) 2 Mich., 570; (19) Pp. 248, 547; (20) 2nd edition, p. 108; (21) Pp. 259, 260; (22) 10 U. C. Q. B., 490; (23) 20 U. C. Q. B., 223.

If you hold that the assessment slip is the roll, you would never have a roll complete. The Assessment Act was passed for the benefit of the bondholders as well as of the ratepayers.

The intention of the law was to levy the taxes and rates upon the whole ratable property, real and personal, of the municipality, according to the assessed value, (see section 8 of the Assessment Act) except as to the exceptions enumerated in section 9.

The words "*according to the assessed value*," which are in this section and are not in the old acts, clearly mean the assessed value as appears by the *revised roll.*

The assessment is to be made as directed by section 21, that is, by the preparation of an *assessment roll*, in which is to be set down by the assessors, according to their best information, and in specific columns, the particulars enumerated in the sub-sections. Such assessment roll is the basis of taxation, with which, as the primary roll, all other copies and entries should correspond. *Laughtenborough* v. *McLean* (1).

The object of the Legislature was, that there should be a time when the roll was to be conclusive, namely, when it was finally revised, and should then preclude all further inquiry as to the validity of the assessment in all cases in which there was jurisdiction to make the assessment.

By section 60, sub-section 6, the time of the sitting of the Court of Revision is required to be advertised so that every ratepayer may have notice.

By section 60, sub-section 4, palpable errors on the roll may be corrected by the Court of Revision, for which purpose the time for making complaints may be extended, and the court may adjourn to determine them.

(1) 14 U. C. C. P., 180.

By section 59, the duties of the Court of Revision are to be completed, and the roll *finally passed*, by a specified day.

By section 61, the roll, as so *finally passed* and certified, *shall bind all parties, notwithstanding any defect or error committed in or with regard to such roll*, except as it may be further amended on appeal to the Judge of the County Court.

And the roll is to be amended by the clerk according to the decision of the County Court Judge (section 69), and thereupon a certified copy is to be transmitted to the County Clerk. (Section 70.)

Moreover, by section 48, a non-resident, who has required his name to be entered on the roll, is entitled to the same notice as a resident. Assuming the contention of the Appellants, this notice must constitute the assessment. It is clear, however, from section 64, that the act contemplates the entry on the roll and not the notice as the assessment of such non-resident, inasmuch as that section permits such non-resident, if he has not before appealed to the Court of Revision, to appeal to the Municipal Council when his lands, *in any revised and corrected assessment roll*, have been assessed 25 per centum higher than similar lands of non-residents.

See *Scragg* v. *City of London* (1) and cases there cited. *Earl of Radnor* v. *Reeve* (2). *Reg. ex. rel. Ford* v. *Cottingham* (3).

The assessment roll is also the basis of taxation, and the franchises, both in municipal and parliamentary elections, are based upon it. If the roll is not conclusive but the notice is to govern, in case of any irregularity in the notice the rate struck will be irregular, and

(1) 26 U. C. Q. B., 263. (2) 2 B. & P., 391. (3) 1 U. C. L. J., N. S., 214.

in any sale for taxes the sale on such ground could be objected to. The words of the 61 section are clear and positive, no stronger language could be made use of : " *The roll shall be valid and binding, notwithstanding any defect or error.*" It is quite clear that the roll is to be conclusive, and that the requirements of section 48, as to giving notice, are merely directory.

When the case of *The Municipality of London* v. *The Great Western Railway Company* (1) was decided, no such powers were given to the Court of Revision, and this section was introduced in order to cover every possible case which might arise.

There was jurisdiction in this case to make the assessment, and therefore it was conclusive.

McCarrall v. *Watkins* (2) ; *Niagara Falls Suspension Bridge Company* v. *Gardiner* (3) ; *De Blaquierre* v. *Becker* (4).

The Legislature might even have said that no notice need be given. The authorities cited by the Appellants' Counsel in support of his argument that this provision of the statute was judicially interpreted before being re-enacted in this statute, do not apply; section 8 of this act is entirely new, and the roll, by section 61, is intended to be final, except in so far as the same may be further amended on appeal to the Judge of the County Court. In the act under which the case of *The Municipality of London* v. *Great The Western Railroad Company* was decided, there was not the same right of appeal. These sections impair the effect of section 48. You may read that section as merely directory, so that an assessor who would not do his duty might be amenable to a fine of $200 or imprisonment under sections 177 and 178 of the act.

(1) 16 U. C. Q. B., 500; (2) 19 U. C. Q. B., 248. (3) 29 U. C. Q. B., 194. (4) 8 U. C. C. P., 167.

The assessment roll is also to include the assessment of lands of non-residents who have not required their names to be entered on the roll, though such are to be separated from the other assessments. (Section 34 and sub-sections 1, 2 and 3).

A non-resident whose name is not entered on the roll has the same right of appeal against the assessment of his land as is permitted to a resident. (Section 60, sub-section 1).

No notice of the assessment of these lands is required to be given to any person, and no entry or record of such assessment is required to be made otherwise than by the assessor on his roll.

The roll must, therefore, necessarily constitute the assessment of these lands, and be final and conclusive as to them. Assuming, therefore, the contention of the Appellants, the language of the 61st section would be applicable to a part, though not to the whole of the roll, while making no distinction.

Respondent contends also, that the making of the assessment roll is in the nature of a proceeding *in rem*; and, after passing through the various stages mentioned in the Assessment Act, everything directed to be done is conclusively presumed to be done.

Much more inconvenience will arise in allowing the true and final roll to be affected by a defective notice than in holding that ratepayers cannot rely on the slip and notice as the final roll.

Mr. *Christopher Robinson*, Q. C., in reply :—

The collector is as much an officer and agent of the municipality as the assessor. See section 19. Who appoints him? Who can dismiss him? Has he not

to give security in such manner as the council of the municipality may direct? See sects. 173 and 174.

It was never contended that a party could recover for improper taxation otherwise than by replevin.

The learned counsel referred also to the following points and authorities :—

Notice of action is not required in replevin—*Folger* v. *Minton* (1); *Kennedy* v *Hall* (2); *Applegarth* v. *Graham* (3); *Lewis* v. *Teale* (4).

Instances of replevin brought to test validity of assessments :—*Holcomb* v. *Shaw* (5); *The Great Western Railway Company* v. *Rogers* (6); *Fraser* v. *Page* (7); *Spry* v. *McKenzie* (8); *Sargant* v. *City of Toronto* (9); *The Great Western Railway Company* v. *Ferman* (10); *Barton* v. *Corporation of Dundas* (11).

June 28, 1877.

THE CHIEF JUSTICE :—

Before the statute of the Province of Canada of 1850 (12), the assessors in Upper Canada, by the law then in force, were required to apply to the parties liable to be assessed for a list of their ratable property; it was their duty to enter this on the roll. They had nothing to do with the value to be put on such property; that was fixed by the statute.

Under the statute of 1850, the assessors were to proceed to ascertain, by diligent enquiry, the names of all

(1) 10 U. C. Q. B., 423; (2) 7 U. C. C. P., 218; (3) 7 U. C. C. P., 171; (4) 32 U. C. Q. B., 108; (5) 22 U. C. Q. B., 92; (6) 27 U. C. Q. B., 214; (7) 18 U. C. Q. B., 327; (8) 18 U. C. Q. B., 161; (9) 12 U. C. C. P., 185; (10) 8 U. C. C. P., 221; (11) 24 U. C. Q. B., 273; (12) 13 & 14 Vic., c. 67.

the taxable inhabitants in their townships, &c., and also all the taxable property within the same, its extent, amount and value. They were then to prepare an assessment roll and set down in separate columns the names of the taxable parties in the township, with the extent or amount of property assessable against each. They might demand of parties assessable a statement in writing of all their assessable property verified by oath, but the statement was not binding on the assessors.

By this change in the law, the assessors not only placed on the roll the property for which a party was liable to be assessed, but also fixed a value on it. The effect of this change was virtually to give the assessors power, according to their own unaided judgment, of imposing burthens which might be unjust on any taxpayer, and this might be done by design, or want of care or capacity to form a correct opinion as to value by the assessors. If this could have been done without notice to the parties who might be injured, it would be a proceeding frequently characterized in the books as being against the first principles of natural justice. As a general rule, no man's property or liberty, even in a judicial proceeding, however large the power given to the courts, can be brought in jeopardy, so that he may be said to be bound by it, unless he has had the opportunity of being heard. The framers of the statute of 1850 (1) were not unmindful of this rule, for by the 25th section of the statute it was enacted, that the assessors should, immediately *after* the completion of their roll, leave for every party a notice of the value at which his property had been assessed.

By the 28th section, if any person deemed himself

(1) 13 & 14 Vic., c. 67.

overcharged by the assessors, he might, within six days after he received the notice, notify the clerk of the municipality of the overcharge, and the complaint was then to be heard by the Court of Revision, created under the same section of the statute, which court was to determine the matter, and affirm or amend the roll accordingly ; and if two members of the municipality thought any member assessed too low, after reasonable notice to the party and the assessors, the matter was to be decided in the same manner as complaints by a party assessed.

Looking at these provisions, there can be no doubt they were reasonable ones, intended for the protection of the ratepayer, providing also for the protection of the public, when the amount assessed was too low, but making it necessary that the party should have notice when it was intended to increase the amount of his assessment. Is this proceeding directory, or is it mandatory? Can any court properly say, that proceedings, which the Legislature has required should be taken to protect tax-payers from unequal or unjust taxation, may be dispensed with, by holding that they are directory, and, therefore, non-essential? I think not. On the contrary, I think reason and authority shew the proper rule to be, that provisions, intended for the security of the ratepayer, to enable him to know, with reasonable certainty, for what real and personal property he is taxed, and the amount, are essential conditions, and, if not observed, he is not legally taxed.

There are many authorities which shew, that provisions intended to regulate the manner of carrying out the system established by the statute, but which do not affect the rights of the taxpayer, are merely directory ; and not strictly following them would not affect

the validity of an assessment, but I do not think they apply to the case before us.

This notice is the only one which the taxpayer receives. Under the statute of 1850, the copy of the roll was not required to be put up in some public place within the municipality, as it was by the 25th section of the statute of 1853 (1), nor does it appear that any public notice of the sitting of the Court of Revision was required to be given under the former act. Reasonable notice of the sitting of the court is to be given to the complainant.

With these provisions in the act of 1850, I think there would be no doubt it would be held that the notice to be given by the assessor to the taxpayer, was essential to the validity of a tax If it were not, the taxpayer would be in no position to appeal to the Court of Revision ; he had received no notice, and he must give notice of his intention to appeal within six days after receiving notice of his assessment As no public notice was required to be given of the sitting of the Court of Revision, he would not know when that court was to sit. He would be compelled, if a farmer seldom visiting the place where the meeting of the Court of Revision was held, to enquire, from time to time, when this court would sit; which would impose a burthen, I think, never contemplated by the Legislature.

If two members of the municipality thought any party assessed too low, then the court might revise the assessment. If then the notice of the assessment would be considered necessary to a valid assessment, in the view so far taken of the statute of 1850, would the following words in the 28th section of the act require that it should be held to be only directory and

(1) 16 Vic., c. 182.

not essential to a valid rate, viz : " and the roll, as finally " passed by the said Court and certified by the clerk as " so passed, *shall be valid and shall bind all parties con-* " *cerned, notwithstanding any defect or error committed in* " *or with regard to such roll.*"

These words, it is said, are sufficient to cover all omissions and make the roll so certified absolute.

It has, however, been held, and, undoubtedly, correctly held, that when property is exempt from taxation, the putting of it on the roll and the confirmation of the roll by the Court of Revision, does not bind the party assessed. Nor when the party resides out of the municipality and has not requested his name to be inserted on the roll for unoccupied land (1). These are exceptions, and it seems to me, that the notice to the tax-payer is so essential an element in the imposition of a valid tax that its omission ought to be considered quite as fatal as where there is no jurisdiction to tax at all. Although by that statute notice was not required to be given before the completion of the roll, it was essential to be given before the roll should be held valid and binding on all parties concerned.

It was argued that if the clause requiring notice was essential to the validity of the rate, and would be so held if it stood uncontradicted, yet the section declaring the roll as finally passed to be binding was a subsequent one and the last legislative declaration of the law, and was, therefore, binding and over-rode the former section. We must, if possible, give effect to both sections. We make the revised roll conclusive if we hold, as has been decided (2), that when a party is assessed as owner, who is a tenant or occupier, and who omits to appeal,

(1) *Municipality of Berlin* v. *Grange*, 1 Grant, Er. & Ap. R., 279;
(2) *McCarrall* v. *Watkins et al.*, 19 U. C., Q. B., 248.

yet is bound by the assessment, and when if on an appeal the Court of Revision or County Judge makes an erroneous decision and holds that real estate is personalty, as in the *Niagara Falls Suspension Bridge Co.*, v. *Gardner* (1), yet the roll as finally revised is binding. It is probable the omission to certify the roll by the assessor, or to verify the certificate by affidavits or some mistake in the date of the certificate or affidavit, would not invalidate the roll, if these mistakes, errors or omissions did not deprive the taxpayer of his right to appeal, or of having the reasonable time required by law to do so; they may be properly considered as covered by the words referred to, and so both the sections have proper operative effect.

In 1853 the act of 1850 was repealed (2) and many of its important sections re-enacted and amended. During the same session the statute relating to the registration of votes (3) was passed, and the machinery of the assessment law was adapted to carry that system out, and this rendered alteration necessary in some of the sections to which reference will be made.

The provisions as to the assessors ascertaining the owners and value of the real and personal property and entering the same on a roll were re-enacted. But this important change was made with regard to the time of serving the notice on the party of the assessment of his real and personal property by the assessors; that notice, under section 23, was to be given *before* the completion of the roll, and the certificate appended to the roll was to be verified upon oath, or affirmation, and the certificate, in addition to what was contained in that required by the statute of 1850, was to state that they had entered the names of the freeholders and householders, with the

(1) 29 U. C. Q. B., 194; (2) 16 Vic., c. 182; (3) 16 Vic., c. 153.

true amount of property owned by each, and they had not entered the names of any one they did not truly believe to be a *bonâ-fide* freeholder, householder, &c. Then follows section 25, which required the clerk to make a copy of the roll, arranged in alphabetical order of the names, to be put in some public place in the municipality, there to remain until after the meeting of the Court of Revision.

The 25th section is somewhat altered from that in the former act. It established the Court of Revision and allows any party, who deemed himself wrongfully inserted on or omitted from the roll, or undercharged or overcharged by the assessors, within 14 days after the time fixed for the return of the assessors' roll, to notify the clerk of the municipality, stating that he considered himself aggrieved, and the subject-matter of his complaint would be heard by the Court of Revision, who were, after hearing the complaint, to determine the matter, and confirm or amend the roll, "and if *any* "*municipal elector* shall think a party has been assessed "too low or too high, or has been wrongfully inserted "on, or omitted from, the roll, the clerk is to give notice "to the party and the assessors when the same is "to be tried by the Court, and the matter shall "be decided in the same manner as complaints "by a party assessed." Then the roll, as finally passed, was to be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as it might be amended by an appeal to the County Judge, who was to hear the appeals from the Court of Revision, and his decision was final.

By the 45th section, if in any case the taxes payable by any party could not be recovered in any special

manner provided by the act, they might be recovered as a debt due to the city, town, &c., in a competent court, and the production of the copy of so much of the Collector's roll as should relate to the taxes payable by such party, purporting to be certified by the clerk of the municipality, should be *primâ facie* evidence of the debt. A similar provision was contained in the act of 1850.

This was the state of the law when the case of *The Municipality of London* v. *The Great Western Railway Company* (1) was decided. The amendments made by the act of 1853, in my judgment, were not in the direction of withdrawing any protection which the previous statute had given the taxpayers. On the contrary, the compelling the service of the notice on the taxpayer, by the assessors before they completed their roll, indicated, I think, unmistakably, that the giving of the notice was something that must be done before the roll could be considered as completed, and its being certified by the Court of Revision without that being done would not make the roll binding on the ratepayer.

Before the Plaintiffs could maintain their action for the taxes sued for in *The Municipality of London* v. *The Great Western Railway Company*, it was necessary that the assessors should serve the Railway Company with a notice of the amount at which they had assessed the real property of the Company, and that notice was to be held to be the notice required to be served by the 23rd section of the act on the ratepayer of the amount for which he had been assessed.

The learned Chief Justice in that judgment said, "Neither by distress, nor by action, can a ratepayer, we "think, be compelled to pay a tax of which such notice

(1) 16 U. C. Q. B., 500.

" has not been given to him as the law has provided, " in order to give him the opportunity to appeal under " the 26th and subsequent clauses * * It must " be open to the Defendant to deny that such notice was ' given, and to put the Plaintiffs to the proof of it." He refers to the alleged omission of the Railway Company to send a statement of real property to the clerk of the municipality, and concludes " that could not " authorize the assessors of the municipality to impose " any amount they chose and enforce it without having " given notice of the amount required by law in time to " allow of an appeal."

After this judgment was given, the statute of 16 Vic. c. 182 was consolidated (1). Though the arrangement of the sections was changed, it was substantially re-enacted as to matters arising in this case. The law continued in this state until the passing of the Assessment Act by the Legislature of Ontario (2), by which the Consolidated Statute of Canada was repealed. Most of the Consolidated Statute of Upper Canada was re-enacted by it, with some amendments; the general scheme of assessment of real and personal property according to its value being maintained. The assessors, after diligent inquiry, were to set down on the rolls the names of all taxable parties, the description and extent or amount of property assessable against each. They were to state various matters under 26 different columns of the roll, the last column being *the date at which the notice under section* 48 *was delivered.*

Section 48 required the assessor, before the completion of his roll, to serve a notice of the sum at which the taxpayer's real and personal property had been assessed according to schedule B, and that he should enter on

(1) Con. Stat. U. C. c. 55; (2) 32 Vict. c. 36, O.

the roll opposite the name of the party, the time of delivering or transmitting such notice, which entry should be *primâ facie* evidence of such delivery.

The schedule B is apparently the transcript of that part of the assessment roll applicable to the tax-payer, and would contain the total value of his real and personal property, and taxable income.

Then at the bottom—

"Take notice that you are assessed as above specified "for the year 18— under the statutes. If you deem "yourself overcharged, or otherwise improperly assessed, "you, or your agent, may notify the clerk of the municipality, in writing, of such overcharge or improper assessment, within 14 days after this notice has been left with "you, and your complaint shall be tried in conformity "with the provisions of the statute by the Court of Revision for the municipality of

"[ENDORSED.]"

"Sir,—Take notice that I intend to appeal against "this assessment for the following reasons."

The mode of forming the Court of Revision is defined, and any person complaining of an error or omission with regard to himself, as having been wrongfully inserted on, or omitted from, the roll, or as having been undercharged or overcharged by the assessor, may, within 14 days after the time fixed for the return of the roll, give notice in writing to the clerk of the municipality that he considers himself aggrieved; an elector may also give notice if he thinks any person wrongly inserted on the roll and assessed too high or too low, and after notice given to the parties and the assessors, and hearing upon oath the complainant, witnesses, &c., the Court shall determine the matter and confirm or amend the roll.

The 61st section makes the roll, as finally passed by

the court, binding on all parties, the same as in the other statutes, subject to the appeal to the Judge of the County Court, whose decision is final and binding.

The necessity of giving notice to the tax-payer before the completion of the roll, seems, by this last statute, to be considered of as much importance as under the previous act, for the assessor is obliged to note the time of giving it opposite the name of each taxpayer on his roll, he must verify the correctness of the certificate which states that the date of the delivery or transmitting of the notice is in every case truly and correctly stated in the roll and the taxpayer is expressly told if he deems himself overcharged or otherwise improperly assessed he is to notify the clerk and state his complaint.

If he does not deem himself overcharged, or otherwise improperly assessed, what is he to do? Or if he receives no notice of assessment at all until the time for appealing is passed what can he do?

It is suggested that he is bound to know what he is assessed for, that the roll is open for his examination after its return and that he can inspect it.

Is it reasonable to suppose that the Legislature intended that every taxable inhabitant of a large township should travel to the office of the clerk of the municipality to ascertain whether the assessor had failed to do his duty and properly certify his roll, which he was to verify by affidavit, lest that officer may, through negligence or design have served him with a notice rating his property at what he considered just, but returning it on the roll at a larger amount. If that was the intention of the Legislature it would have been better to dispense with the service of the notice to the taxpayer of the amount at which he was assessed, and which informed him, if he was not satisfied, he might appeal

to the Court of Revision. The reasonable inference being if he was satisfied he need not appeal. I think the proper conclusion to arrive at in this case is that the assessment is good for the amount mentioned in the notice, and it being confirmed for a larger amount would not necessarily destroy it as to the amount for which the taxpayer himself shows it ought to have been confirmed. The fact that if the taxes were sued for, the certified copy of the Collector's roll would only be *primâ facie* evidence of the debt, would seem to indicate that the Defendant might show that the debt was not *due* and, perhaps, go behind the assessment roll. When, however, we consider that the statute, under which these Plaintiffs were rated, was passed after the decision by a Court of competent jurisdiction as to the consequences of an omission to give the notice to the ratepayer required by the 23rd sec. of 16 Vic., c. 182 had been given (and that section was in all its material parts re-enacted by the 48th section of the latter act), we, according to numerous authorities, are bound to hold that the Legislature meant to give the effect to the section which the court that considered it had given to it before it was re-enacted. If so, the notice under the 48th section is essential to a valid assessment, and the payment of the tax cannot be enforced by action or distress when it has not been given.

The notice given to these Plaintiffs was one which did not invite, or require, an appeal at their hands, and the amount could only be properly made or confirmed in accordance with it; otherwise the notice would be the means of lulling the ratepayer into security rather than enabling him to protect his rights.

If the assessor, after giving the ratepayer notice of the amount at which he was rated, discovered that he had

assessed the property too low, he should have notified the party that he had altered the assessment as to him, and have given him another notice. I apprehend he could have done this before the time had elapsed for returning his roll, or, if after the return of the roll he had discovered that the rating was too low, at the instance of any municipal elector, a notice could have been given to the ratepayer under section 60, and then he could have been heard as to any increase of his assessment. In this way any errors could be corrected and the ratepayer be heard; otherwise, he might be made to suffer from the negligence or fraud of the assessor, over whose appointment he had no control, and against whose improper proceedings he could not appeal.

The only case in which, it appears to me, a seeming injustice might be done in the view I take of the effect of the statute, is that an assessor might accidentally, in giving the assessment slip to the taxpayer, omit to insert the full amount of his taxable property and be unaware of the mistake, and so no means of correcting it would be afforded, and the taxpayer would, in that way, escape paying his fair share of taxes. This may occasionally occur, but I think it more consistent with justice that the fundamental rule which ought to prevail is that the provisions that the Legislature has made to guard the subject from unjust or illegal imposition should be carried out and acted on, though, at times, a ratepayer may escape taxation, rather than a single individual should be oppressively taxed without an opportunity of being heard against the illegal imposition.

It is said that the statute provides (1) that the Court of Revision may, when by reason of gross or manifest error in the roll as finally passed, any person has been

(1) Section 62.

overcharged more than 25 per cent. on the sum he ought to be charged, reduce the taxes. This is only permissive; it gives the ratepayer no right to have his case heard and decided on evidence to be adduced with an appeal to the County Judge, and is not the relief from being overcharged which the Legislature clearly intended to give him.

I have arrived at the conclusion that the Legislature required the notice of the amount of his ratable property to be served on the taxpayer by the assessor, in order that he might protect himself against any improper valuation of his property; that being one of the safeguards provided by the Legislature for the protection of the taxpayer, it is essential to the validity of the tax that it should be given and served in time to enable the party assessed to exercise the right of appeal against the rating by the assessors.

That the notice given in this case to the Plaintiffs, so far as it related to the assessed value of their property on the roll as returned, was not the notice required by the statute, and, as to the amount in excess of that mentioned in the notice, the notice is as if no notice had been given, and is void as to any such excess. That the rates and taxes charged against the Plaintiffs on the collector's roll on the amount of the excess of assessment cannot be collected from them.

I think this the proper conclusion to arrive at from the statute itself and the general principles of interpretation applicable to statutes of this nature. If there is any doubt that this is the proper construction of the statute, I think the legislative approval of the interpretation of the sections of the statute of 16 Vic. c. 182, by the judgment of the Court of Queen's Bench referred to, by substantially re-enacting those sections

in the Ontario act, binds us to give the same interpretation of those sections (1).

It was argued before us, though not in the court below, that this action of replevin would not lie against the collector as the goods would be considered in *custodiâ legis*. No authority was shown to sustain that view. The cases referred to by the Plaintiffs shew this form of action has been frequently resorted to in Upper Canada, when it was intended to hold the collector had no right to seize property to satisfy taxes; and it has also been held that the collector in replevin was not entitled to notice of action. (2)

The collector, as well as the assessor, is appointed by the corporation; they are their officers, and though, under some circumstances, the collector might be entitled to notice of action, he is not like a sheriff, bound to execute the writ issued by the court, and for whose protection the writ is a sufficient warrant. If the proceeding is wholly void, and the rate cannot be collected, the corporation must protect their own officers. It is more reasonable that they should do so than that a party should be illegally deprived of his property without remedy.

This appeal must therefore be allowed, the judgment of the Court of Appeal for the Province of Ontario reversed, and that of the Court of Common Pleas for the Plaintiffs on the demurrers affirmed; the Respondents should pay the costs of this appeal, and of the appeal from the judgment of the Court of Common Pleas to the said Court of Appeal.

Since writing the above, the statutes of the Province

(1) *Mansell* v. *Regina*, 8 E. & B., 73. *Ex parte Campbell* L. R. 5 Ch. Ap., 706. *Regina* v. *Whelan*, 28 U. C. Q. B., 43; (2) *George* v. *Chalmers* 11 M. & W., 149.

of Ontario for the year 1877 have come to hand, and I find that by the 56th section of the statutes for the amendments of the law, cap. 8 of the statutes of that session, that the 61st section of the Assessment Act of 1869 is repealed, and another section substituted for it, which makes the final passing of the roll valid and binding on all parties concerned, "notwithstanding any "defect or error committed in or with regard to such "roll, or any defect, error or mistatement in the notice "required by section 48 of this act or the omission to "deliver or transmit a notice."

This amendment will probably prevent actions like the present being brought in future.

RITCHIE, J.:—

I think this is a jurisdictional defect invalidating the tax.

The principle of the Common Law is, that no man shall be condemned in his person or property without an opportunity of being heard. When a statute derogates from a common law right and divests a party of his property, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed. Therefore it has been often held, that acts which impose a charge or a duty upon the subject must be construed strictly, and I think it is equally clear that no provisions for the benefit or protection of the subject can be ignored or rejected. Not to give a proper notice is a clear violation of the statute. To give a proper notice containing the details required by the statute is to place the party in a position, if dissatisfied with the assessment as indicated on the notice, to take the necessary steps which the

notice points out to him for having the amounts put forward investigated and rectified. The right to have such a notice is a substantial privilege and to deprive a taxpayer of it and enrol an assessment against him of which he had no notice is a substantial wrong. To give, as was done in this case, a notice with details and amounts unobjectionable to the taxpayer and subsequently enrolling a different assessment against him, with items different from those furnished, and imposing a much heavier burthen on him, and against which he might and probably would have appealed had he had the notice the law provided he should have, is simply assessing him behind his back in a manner, in my opinion, not authorized by law.

It is a departure not only from the letter but from the spirit of the law. It is even worse than giving no notice at all; for every one must, in this age and country, know that if he has any property, he is bound to be taxed, and, not receiving the usual notice, a party might possibly be led to enquire why he did not receive his notice, but, having received a notice with which he has no reason to be dissatisfied, and which he has a right to assume is the notice to be acted on, he is lulled into a false security and placed in an entirely false position. I think the provision for the giving this notice cannot be considered merely directory. I think it is a condition precedent to the imposition of the tax and the statute required it to be done before the Defendants could become properly chargeable with the tax. As to the inconveniences which appear to have largely influenced the minds of the Appellate Court, I think they should have no weight whatever in a case of this kind. The *argumentum ab inconvenienti*, except in very doubtful cases,

is not of much weight, and certainly in a case such as this should not, I think, be permitted to sweep away a most substantial safeguard conceded by the Legislature to the subject before a burthen is imposed on him. If inconveniences such as have been alluded to would result from giving effect to the statute according to its plain provisions, then it is, in my opinion, for the Legislature to weigh the conveniences and inconveniences of the imposers of taxes on the one hand and the parties respectively to be taxed on the other, and if the taxpayer's privileges under the statute may lead to results too inconvenient, it will be for the Legislature to restrict or take them away altogether, but I do not think rights, substantial rights conferred by the Legislature, can be taken away by the courts.

STRONG, J. :—

The question raised for decision by this appeal, and which depends on the construction to be placed on two clauses of the Assessment Act of Ontario, passed in 1869 (1), is whether the Appellants, who were served with a notice in the form prescribed by sect. 48 of the act, that they were assessed for $20,900, are, by force of the 61st section of the same act, bound by the roll, as finally passed by the Court of Revision, on which the Plaintiffs are entered as assessed for an amount of $43,400. In other words, whether the provision of the 61st section, that the roll, as passed by the Court of Revision, shall be final and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, covers such an irregularity as an omission to give the notice provided for by section 48.

(1) 32 Vic., c. 36.

I am of opinion that the Court of Common Pleas came to a correct conclusion, and that the judgment entered by order of the Court of Appeals should be reversed.

Aside altogether from the grounds on which the judgment of the Court of Common Pleas proceeded, the construction which the Appellants contend for, must, in my judgment, prevail.

It is a cardinal rule in the construction of statutes, that where a particular enactment has received a judicial interpretation, and the Legislature has afterwards re-enacted it, or one *in pari materiâ* with it, in the same terms, it must be considered to have adopted the construction which the Courts had applied. In *Jones* v. *Mersey Docks* (1), *Blackburn*, J., in giving his opinion to the House of Lords, says : " Where an act of " Parliament has received a judicial construction put- " ting a certain meaning on its words, and the Legisla- " lature, in a subsequent act *in pari materiâ*, use the " same words, there is a presumption that the Legisla- " ture used those words intending to express the mean- " ing which it knew had been put upon the same words " before, and, unless there is something to rebut that " presumption, the act should be so construed, even if " the words were such that they might originally have " been construed otherwise." (2)

In the case of *The Municipality of London* v. *The Great Western Railway Company* (3), the Court of Queen's Bench of Upper Canada were called upon to determine the identical point in question here, and it was there held that the omission to give the notice was fatal to

(1) 35 L. J., N.S., Mag. cases, p. 15; (2) See also *Sturgis* v. *Darell* 4 H. & N., 622; Maxwell on Statutes, pp. 234, 277. (3) 16 U. C. Q. B., 500.

the validity of the assessment. This was under the assessment Act of Upper Canada of 1853 (1).

There have, since this decision, been three re-enactments of the same provision, almost in the same words, viz., in the Consolidated Act of 1859 (2), in the Assessment Act of 1866 (3), and in that of 1869 (4), under which the present assessment was made. It is true, that *The Municipality of London* v. *The Great Western Railway Company* arose under section 21 of the act of 1853, and not under section 23 of that act, which corresponded to section 48 of the present act, but this could make no difference, as section 21 expressly provided that the notice required by it should be held to be the notice required by the 23rd section, a provision which has been carried through all the acts down to section 33 of the act of 1869, which refers in the same manner to section 48. This well established and useful rule would, therefore, have precluded any different construction, even if we had been of opinion that *The Municipality of London* v. *The Great Western Railway Company* had been wrongly decided.

I agree, however, in the judgment of the Court of Common Pleas, for the reasons given by Mr. Justice *Gwynne*, for, if the point had been for the first time raised in this case, I should have been of opinion that the clause in question was imperative and the notice required by it essential to the validity of an assessment, and I do not think there is any difficulty in demonstrating the correctness of this conclusion.

No one can deny that if section 61 were out of the way, section 48, standing by itself, must be construed as imposing an essential condition, making a notice indispen-

(1) 16 Vic., c. 182; (2) Cons. St. U. C., c. 55; (3) 29, 30 Vic., c. 53; (4) 32 Vic., c. 36, O.

sable to a valid assessment. The process of assessment is in the nature of a judicial proceeding (1) and, although the scheme of this, and of most other enactments of the same nature, differs from an ordinary judicial proceeding, even of the most summary character, in this, that the assessor first fixes the amount of the assessment, and then calls on the party assessed to bring forward his objections, it is still as much of the essence of the whole proceeding that the party should have an opportunity to object, and notice to enable him to do so, as it is in more formal proceedings, where, according to the usual and natural course of proceeding, the party to be affected is cited in the first instance (2).

Taxation is said to be an exercise by the Sovereign power of the right of eminent domain (3), and, as such, it is to be exercised on the same principles as expropriation for purposes of public utility, which is referable to the same paramount right. Then, it needs no reference to specific authorities to authorize the proposition, that in all cases of interference with private rights of property in order to subserve public interests, the authority conferred by the Sovereign—here the Legislature—must be pursued with the utmost exactitude, as regards the compliance with all pre-requisites introduced for the benefit of parties whose rights are to be affected, in order that they may have an opportunity of defending themselves (4). We find ample illustrations of this principle in the numerous cases which have been decided on acts of Parliament conferring compulsory powers to take lands, the property of private owners, for the purposes of

(1) Cooley on Taxation, p. 265; (2) Cooley on Taxation, p. 266 et seq.; (3) Bowyer's Public Law, p. 227; (4) Cooley on Taxation, *supra;* Maxwell on Statutes, pp., 333, 334, 337, 340; *Noseworthy* v. *Buckland in the Moor* L. R. 9 C. P., 233.

railways, canals and similar works. So far, indeed, has this doctrine been extended, that in cases where a statute has been entirely silent on the subject of notice, the courts have felt justified in implying it as an essential condition precedent. In all cases where a party is to be affected, either in person or property, by anything analogous to a judicial proceeding, the courts, unless shut out from doing so by the most absolute and unequivocal words, invariably apply that sound rule of English law which says that no man shall be condemned unheard (1).

The statute, however, contains internal evidence of the intent of the Legislature, that this provision of section 48 is not to be considered as merely directory, for, in section 49, it requires that the assessor shall attach to his roll a certificate verified by oath, which, amongst other things, is to state "that the date of "the delivery or transmitting the notice required "by section 48 of the Assessment Act, is, in every case, "truly and correctly stated in said roll." Surely, this indicates that the notice is not a mere direction to the assessor, non-compliance with which may be regarded as not affecting the ratepayer's liability, though it may leave the assessor liable to be called to account for neglect of duty. Still more forcible are the concluding words of the section 48: "shall enter on the roll oppo-"site the name of the party, the time of delivering or "transmitting such notice, which entry shall be *primâ facie* evidence of such delivery or transmission."

For what purpose constitute this proof of service of the notice, if that service was a non-essential proceeding?

(1) Maxwell on Statutes, p. 325, and cases there cited; *Re Cheshire Lines Committees*, L. R. 8 Q. B., 344; *Harper's* case, 7 Term R., 270; *Abley* v. *Dale*, 10 C. B., 62.

Against whom but the ratepayer was this record of service to be evidence, and that, too, not conclusive, but only *primâ facie* evidence? And if it was intended, as it must obviously be taken to have been, to conserve evidence against the ratepayer, does not that show in the strongest possible manner that the Legislature considered that it would be in the power of the ratepayer to raise, in answer to an action, or in opposition to a distress, the objection of non-service of notice. It is out of the question to say that this provision as to evidence can have been intended to refer to evidence before the Court of Revision or the County Judge, for there would be no need for such an enactment as regards either of these tribunals, inasmuch as the roll itself, with its sworn certificate attached, is, irrespective altogether of these words at the end of section 48, evidence of the service of notice for their purposes. The words "*primâ facie* evidence," must, therefore, refer to proof before the courts, which implies that the service of notice may be brought in question in actions at law, and that the entry in the roll is not to be conclusive evidence of its having been duly made.

It appears, therefore, to be very clear, that unless the Legislature are to be considered as having reduced this provision of section 48, which, standing by itself, would certainly require notice of the assessment as an indispensable preliminary to the liability of the ratepayer, to a mere direction to the assessor, the appeal must be allowed.

Then section 61 declares, "that the roll shall be valid "and binding upon all parties concerned, notwith-"standing any errors committed in or with regard to "such roll." To hold that this section would cover the omission to give a notice, would be to assume that the

Legislature sanctioned an *ex parte* assessment, leaving the ratepayer to the dilatory and perhaps illusory remedy of an action against the assessor. No doubt it may be in the power of the Legislature to enact such a harsh, oppressive and unusual law, but, in my judgment, their intention to do so must be expressed in language much more precise and absolute than that of the 61st section, before any Court of Justice could assume such an intention. Section 61 is not unequivocal in its terms, and it is, I conceive, the duty of the court, acting on the presumption against *ex parte* proceedings already referred to, to be industrious in finding some mode of reconciling it with section 48 construed as imposing an essential condition; and this there can be little difficulty in doing. The words, taken in their widest sense, would make the roll conclusive, even in cases like *Nickle* v. *Douglas* (1), where, there being clearly no jurisdiction over the property assessed, it was held by the Court of Appeals itself that section 61 was not binding. Then, if the terms are to be limited in cases where the property is beyond the jurisdiction of the assessor, why are they not also to be restricted in cases where there has been a failure to attach the jurisdiction by serving the notice required by section 48? I see no reason for any difference between the two cases. If the words are to be confined in one case to make the clause consistent with other provisions of the statute and with common right and justice, so they ought also to be in the other, and I therefore consider that the vital omission to serve the notice required by section 48, is not one of the "defects or errors" which the confirmation of the Court of Revision can cure. This construction leaves many defects and errors which the passing of the roll by the Court of

(1) 35 U. C. Q. B., 126.

Revision would conclude all objection to; for instance, the assessment in regular form of a person for property which he did not own and which should have been assessed in the name of another (1) is an instance of a most important class of objections, which would be covered by section 61. For the case I have referred to is quite consistent with *Nickle* v. *Douglas*, and is no doubt good law, since the scheme of the assessment law of Ontario, as regards lands, is not to tax the owner in respect of the property, but to lay the tax on the property itself (2).

Therefore, construing section 48 as a provision making notice essential to the validity of the assessment, section 61, limited in its application to a class of objections one of which I have mentioned, can stand quite consistently with it.

I understand Mr. Justice *Patterson* to consider that the Plaintiffs' pleas in bar are defective, for not containing an allegation that the assessment was unjust in the sense of being unfair in amount, and that it was not sufficient to shew the mere absence of notice without also adding an averment that the Plaintiffs were taxed in excess of their liability. I cannot agree in this view; the authorities I have already referred to shew, that without regard to the question of fairness or unfairness, the ratepayer has a right to insist on all essential formalities being complied with before he can be called upon to pay.

Some discussion arose at the Bar as to what constitutes the assessment, whether it is the service of notice or the entry on the roll. I do not see that this is now in any way material; in my opinion, however, neither

(1) *McCarrall* v. *Watkins*, 19 U. C. Q. B., 248; (2) Sections 8 and 9 Assessment Act, 1869.

of these acts constitute the assessment, they are but steps towards it, the process being finally completed when the clerk certifies the roll as having passed the Court of Revision, until which time the assessment is not perfected.

I have dealt with the case as though no notice had been served, but the reasons I have endeavored to state apply with equal, if not greater, force to the actual fact of the service of a notice for an amount less than half of that entered on the roll.

I am of opinion that the judgment of the Court of Appeals should be reversed and the judgment of the Court of Common Pleas, as originally entered for the Appellants, should be restored, with costs to the Appellants in this Court and the Court of Appeals.

Since writing this judgment, I have been informed that pending this appeal the Legislature of Ontario have passed an act, not declaratory in its form but enacting, making, in terms admitting of no question, the roll, as passed, binding.

This, so far from altering my opinion, tends to confirm it.

TASCHEREAU, J., concurred.

FOURNIER, J. :—

La question soumise à la considération de cette Cour ayant été réglée par la 40 Vict. (1), et n'ayant par conséquent plus aucun intérêt pour l'avenir, je crois devoir, surtout après les savantes dissertations de mes honorables collègues, me limiter à indiquer brièvement les motifs pour lesquels je concours dans ce jugement.

(1.) Ch. 81, sec. 56, O.

En 1874, les Appelants reçurent, des cotiseurs de leur municipalité, conformément à la section 48 de la 32 Vict. ch. 36, un avis les informant que leurs propriétés cotisables avaient été évaluées à la somme de $20,900.00. Satisfaits de cette évaluation, ils ne firent aucune démarche pour s'assurer si l'entrée faite sur le rôle de cotisation se trouvait conforme à l'avis qui leur avait été signifié. Plus tard ils apprirent, sans avoir reçu aucun avis à cet effet, que leur cotisation avait été élevée à la somme de $43,400, sur le pied de laquelle leur taxe avait été réglée à la somme de $672.70, au lieu de l'avoir été sur le montant de $20,900 mentionné dans l'avis susdit.

Ils refusèrent de payer cette somme, en offrant de payer $323.95 qu'ils considéraient devoir être le montant de leur taxe, calculé sur l'évaluation dont ils avaient reçu avis. Ce refus donna lieu aux procédés dont un exposé complet a été donné par l'honorable juge en chef. La question qui s'élève est donc de savoir si un contribuable peut être contraint de payer une taxe au sujet de laquelle il n'a pas reçu l'avis requis par la section 48 ci-dessus citée, ou lorsque l'avis donné est défectueux dans une partie essentielle, comme, par exemple, celle du montant de l'évaluation.

La section 48 est ainsi conçue: "Every assessor, be- " fore completion of his Roll, shall leave for every party " named thereon a notice of the sum at which his real " and personal property has been assessed according " to Schedule B, and shall enter on the roll opposite the " name of the party the time of delivery or transmitting " such notice, which entry shall be *primâ facie* evidence " of such delivery or transmission."

Par la 61e sect. du même acte, le rôle d'évaluation, tel que finalement adopté par la Cour de Révision composée de cinq membres du Conseil, est déclaré obliga-

toire pour toutes les parties cotisées, sous la réserve cependant d'un appel au juge de comté.

Cette clause se lit comme suit: "The Roll as finally "passed by the Court, and certified by the Clerk as so "passed, shall be valid and bind all parties concerned, "notwithstanding any defect or error committed in or "with regard to such roll, except in so far as the same "may be further amended, on appeal to the Judge of "the County Court."

Ces deux dispositions sont presque textuellement reproduites des sections 23 et 26 de la 16 Vict., ch. 182. Sous l'opération de ce dernier statut, une question semblable à celle dont il s'agit présentement s'est élevée dans la cause de "*The municipality of the Township of London* vs. *The Great Western Railway Co.*" (1), dans laquelle l'hon. juge en chef Robinson exprime son opinion dans les termes suivants: "And neither by dis- "tress, nor by the action under the 45th clause, can a "ratepayer, we think, be compelled to pay a tax of "which such notice has not been given to him as the "law has provided, in order to give him the opportu- "nity to appeal under the 26th and subsequent clauses."

Lorsque le législateur reproduit textuellement des dispositions qui ont déjà été soumises à l'interprétation judiciaire, il est présumé avoir eu en vue cette interprétation et l'adopter en reproduisant de nouveau le même texte sans l'amender. *Voir*, *Maxwell* on Statutes pp. 234 et 274.

L'avis requis par la 48e sec., étant impérativement exigé pour l'information et la protection du contribuable, je crois qu'il est absolument nécessaire qu'il soit correct dans ses parties essentielles. Si un avis comme celui qui a été donné dans le cas actuel n'était

(1) 16. U. C. Q. B., 500.

pas valable, la loi, chose impossible, se trouverait avoir donné aux cotiseurs le pouvoir, non pas d'informer, mais de tromper les contribuables sur leur véritable position dans une affaire aussi importante que celle de la confection du rôle d'évaluation. La dispense de donner avis serait une bien plus grande protection pour la partie intéressée, car dans ce cas elle ne manquerait pas de se protéger en surveillant elle-même strictement tous les procédés des cotiseurs. L'autorité suivante citée par l'Appelant viz:—*Cooley* On Taxation (1) me parait contenir la véritable doctrine à suivre pour l'interprétation à donner aux clauses du statut qui règle les procédures pour la confection du rôle d'évaluation.

A la page 259: "In making it (the assessment) the "provisions of the statute under which it is to be made "must be observed with particularity."

A la page 260: "But as the course (of assessing) un- "questionably is prescribed in order that it shall be "followed, and as without it the citizen is substan- "tially without protection from unequal and unjust "demands, the necessity for a strict compliance with "all important requirements is manifest."

Et à la page 266: "Notice, or, at least, the means of "knowledge, is an essential element of every just "proceeding, which effects rights of persons or pro- "perty."

Pour ces raisons, je concours dans le jugement prononcé par l'honorable juge en chef.

HENRY, J.:—

I fully concur in the judgment pronounced by the learned Chief Justice, with a trifling, and, in relation to it alone, wholly unimportant exception.

(1) Pp. 259, 260 et 266.

The contention of the Respondent is based solely on the phraseology of section 61, which provides, that the roll, when finally passed by the Court of Revisors, "shall be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, &c." Such contention is that the provision for the notice of assessment necessary to be given by section 48 and schedule B, is only directory, and that, consequently, the ratable inhabitants must each, within fourteen days from the time fixed for the return of the roll, (sub-sec. 1, section 61), which may vary every year between the first of February and the fifteenth of April, as the municipal council may appoint (section 49), make an annual inspection of it to ascertain the amount for which he has been rated, or, in the language so appositely used in the judgment of Mr. Justice *Gwynne*, "to see whether the assessors have not committed the fraud and perjury of returning them upon the roll as assessed at greater amounts than those mentioned in the assessment slips served upon them." If the Legislature intended the mere filing of the roll, the date for which, from year to year, was so subject to fluctuation that each inhabitant would have imposed upon him the additional duty and labour of ascertaining it each year by keeping on the alert as to the action of the municipal council, whose decision there is no provision for publishing, to be a sufficient protection to the ratepayer, I feel bound to conclude that no provision for a notice would be found in the statute.

To arrive at the conclusion, that the notice under section 48 is mandatory, it is enough for us that the statute prescribes a notice so comprehensive and particular in form and *substance* to be given by the assessor to each person rated, and that it requires that, in addition to

the substance to be contained in each column, he is to be informed thus: "If you deem yourself overcharged or otherwise improperly assessed, you or your agent may notify the clerk of the municipality in writing of such overcharge or improper assessment within fourteen days after this notice has been left with you, and your complaint shall be tried in conformity with the provisions of the statute, by the Court of Revision for the Municipality of ————." By schedule B it would appear, that the notice of appeal should be *endorsed* on the notice of assessment, and from this provision the reasonable and natural presumption is that the Legislature intended the provision of the latter to be mandatory and to make it the foundation for proceedings necessary to correct any error in the assessment; for had it been intended that the party should trust altogether to his vigilance in the inspection of the roll filed, why should his attention be directed to the notice served upon him and upon which he was enjoined to *endorse* his notice of appeal.

No one questions the propriety of the general application of the principle, that every one is presumed to know the law, for it is generally a necessity to its proper administration; but, where the Legislature provides a special means of instruction, applicable to particular cases and circumstances created by the statute imposing liabilities, to be given to an individual as to those liabilities and his right and privileges connected therewith, I must conclude, that the general principle applicable to cases where no such provision is made was not intended to be applied; and that the information and intimations contained in the preceding extract from the form of notice prescribed, was intended and required to be given—in substance at all events—by

the party appointed to perform that duty, and for the failure to give which I consider the assessment wholly illegal.

Sub-section 1 of section 60 provides, that "any person complaining of an error or omission in regard to himself &c., may personally, or by his agent, within fourteen days *after the time fixed for the return of the roll*, give notice in writing to the clerk of the municipality, that he considers himself aggrieved, &c." The notice in the schedule provides, that the "fourteen days" notice of appeal shall be *from the date of leaving the notice of assessment.*

The discrepancy apparent here, I do not think of any consequence in this case, but may say, in passing, that I presume the prevailing time for the appeal would be that provided in the sub-section mentioned; nor do I consider it absolutely necessary that the notice of appeal should be endorsed on the notice of assessment, as in the schedule, but that a notice, otherwise sufficiently comprehensive and definite, would be sufficient under that sub-section, and only refer to it as a means of enlightenment as to the proper character of the notice, as to its being mandatory or otherwise. The Legislature clearly, by the very particular wording of the notice of assessment, required that the assessor should substantially say to each person rated: "In the twenty-five columns which I have filled up to the best of my judgment, and upon the best information I have obtained, you will find the result of my action in regard to your assessment; I may have made many mistakes and errors; I may have largely exceeded the value of your property in the different columns; I may have stated you were a hundred years old, and you are not forty; I may have said you have a family of but five,

and you have one of forty; I may have called you a heathen or an atheist, instead of a fervent Christian, and you must put up with all the wrongs I have done you except that in overcharging or improperly assessing you; and I am directed and required by the Legislature to inform you, that in regard at least to the amount to be taken from the means of support of your large family I am not infallible, that there is in relation thereto an appellate tribunal, and that if you give the clerk of the municipality, within fourteen days from this date, a notice of any dissatisfaction you may feel, he will, as he is required by the statute to do, give you further instructions as to the Appellate Court ,and its sitting, whereat you will have a fair opportunity to show, if you can, that I, either from negligence, ignorance or design, have done you wrong."

This, although somewhat playfully expressed, is, in my view, what, in substance, the Legislature required the assessor to communicate in writing to each person rated, and what I consider as necessary to the legality of the rate, and a condition which, being unfulfilled, must affect the finalty and binding effect of the roll, even when confirmed by the Court of Revision.

The statute provides for the giving of the notice by the assessor, and we are to judge of that provision in connection with that by which the roll is made valid and binding. In doing so, it is our duty so to construe the statute as to give effect to the whole of it, or, as far as possible, we must construe one part by light drawn from every other; and, keeping in view the reasonableness and effect of conflicting provisions, determine therefrom the intentions of the Legislature, and, as far as practicable, reconcile the different provisions so as to make the whole act consistent and harmonious. Where

an act directs specific things to be done, and then contains a general prohibitory clause broad enough to cover such things, they will be treated as excepted from the prohibition. The provision for the notice of taxation must, therefore, be excepted from the operation of section 61. Wherever the language admits of two constructions, according to one of which the enactment would be unjust, absurd or mischievous, and, according to the other, it would be reasonable and wholesome, it is obvious that the latter must be adopted as that which the Legislature intended" (1). We are bound also, all things being alike, to give that construction from which the lesser evil or the greater good will result. By requiring the notice no harm can result, and it is prescribed as a part of the assessor's duty, for which he is paid. If a wrong is complained of, the parties will be heard by the proper tribunal, created for the purpose, but by not requiring it we can easily imagine that any amount of injustice might, by mistake, ignorance or design, be perpetrated. The Legislature, therefore, wisely provided against the chance of it, and made it necessary, as one of the means to that end, that the notice of assessment should be given; and, as still further security to the ratepayer, in view, no doubt, of the fact that the Court of Revision was to be composed of the Municipal Council interested in the rates, provided for another appeal to the County Judge. With such legislative provisions for the protection of the ratepayer, how can it be contended that the Legislature, in permitting the heavy, it may be, taxation of the inhabitants of a large township, intended, although prescribing a notice of assessment, relief from injustice to be obtain-

(1) Per Lord *Campbell*, in *R.* v. *Skeen*, 28 L. J. Mag: C., 98; Per *Keating, J.*, in *Boon* v. *Howard*, L. R., 9 C. P., 308.

able only by the exercise of a constant viligance, not to be reasonably expected from every one out of five hundred of the ratepayers. We are, however, again reminded that every one is bound to know the law. So it was once laid down, with a trifling reservation. It was said: "Every man in England is presumed to know the law *but the twelve Judges at Westminster*." We are told that the Appellants should be bound, whether they knew it or not. The proposition I admit to be sound, but the great question remains, what is the law? Judges have differed as to it, and we are required to decide between them; and, in resolving the doubts raised as to it, we must, while endeavouring to carry out the intentions of the Legislature, first, of necessity, ascertain what those intentions were; and in doing so, I cannot conceive that the Legislature, in enacting and publishing the provision for a notice of assessment to be so fully and explicitly given before the completion of the roll, meant that it should not be at all necessary to do so, and recklessly enacted it to become only a snare and a trap to all those who would be instructed by reading the statutory provision for it; that he need take no action in regard to any rate likely to be levied upon him, until the notice of it, and the information and intimations to be contained in it, as to the course he should pursue in case he felt aggrieved, should have been given to him. I think, therefore, the appeal should be allowed with costs.

Appeal allowed with costs.

Attorneys for Appellants: *Dennistoun Bros. & Hall.*

Attorneys for Respondent: *Scott & Edwards.*

RICHARD CHURCH .....APPELLANT;

AND

JOHN ABELL .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of goods—Damages for breach of warranty—Evidence.

C. wishing to procure a water wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, A. undertook to put in a "Four-Foot Sampson Turbine Wheel," which he warranted would be sufficient for the purpose. The wheel was afterwards put in, but proved not to be fit for the purpose for which it was wanted. The time for payment of the agreed price of the article having elapsed, C. sued A. for breach of the warranty and recovered $438 damages.

A. subsequently sued C. for the price, and C. offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him. Objection was taken that it was not competent to C. to give any evidence in reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended, and the learned Judge presiding at the trial declared the evidence inadmissible.

Held:—On appeal, reversing the judgment of the Court of Appeal for Ontario, that as the time for payment of the agreed price of the article had elapsed when the first action was brought, and only *special* damages for breach of warranty had been recovered, the evidence tendered by C. in this case of the worthlessness or inferiority of the article was admissible.

[Strong, J., dissenting.]

The suit in which this appeal arose was brought by the Respondent against the Appellant in the Court of Common Pleas for Ontario, to recover from him $550.

PRESENT: The Chief Justice, and Ritchie, Strong, Taschereau, and Fournier, J. J.

The declaration was on the common counts. The pleas were: never indebted and payment. The case was tried before a jury and the Hon. Mr. Justice *Burton*, at the Fall Assizes of 1874, for the County of York, in the Province of Ontario.

There was conflicting evidence as to the bargain under which the wheel sued for by the Plaintiff had been delivered and put up in the Defendant's mill.

The particulars of the Plaintiff's claim were:

1872, Sept. 30. To 4 feet Sampson's Turbine Water Wheel.....$550.

There were certain papers produced, which, it was stated, shewed the claims of the now Defendant in his cross suit previously brought against Abell for breach of warranty, and that his claim in that suit was only for the special damage he had sustained by the delaying of the working of his mill, the cost and expense of taking out the useless wheel, the timber furnished for putting it in, the freight, loading and unloading, &c., and the expense incurred in repairing the wheel, trying to make it work, &c., and that there was no claim directly or indirectly for the value of the wheel, or the difference in value between the one he agreed to deliver and the one he did deliver. The record in the suit of *Church* v. *Abell* was also produced.

In it there are three counts in the Plaintiff's declaration, on a warranty.

The first, on a warranty that the wheel would give the largest percentage of power for the quantity of water used, and would yield a larger percentage of power than any other description of water wheel in use. The Plaintiff averred that the wheel did not do this, and thereby Plaintiff incurred expense in having the wheel removed, and in putting in another wheel, and incurred loss and damage in the stoppage of the

mill while doing so, being for a long time unable to work the mill.

The second, that the wheel would give perfect satisfaction, yet it did not give satisfaction but was useless to Plaintiff, and unfit for his mill. Averment of damages as in first count.

The third, that the wheel would be reasonably fit for the purpose when put up in Plaintiff's mill, yet it was not reasonably fit for the purpose. Damages as in previous counts. There were also the common counts.

The Defendant's pleas denied all the material averments in the declaration. All the issues raised were substantially found for the Plaintiff, and the damages were assessed at $438. Judgment was entered for the amount of the verdict and costs, and satisfaction was acknowledged on 22nd August, 1874.

At the trial of this action the Defendant proposed to give evidence to shew that the wheel was not according to the warranty, and consequently that the Plaintiff could not recover the agreed price in full for it.

The following is the note of the learned Judge as to his ruling on that point:

"It is now objected that it is not competent to the "Defendant to give any evidence in reduction of dam- "ages, by reason of the breach of warranty, or on the "ground of its not answering the purpose for which it "was intended. Mr. *Osler* proposes to confine the "evidence strictly to show the article was valueless, or "of less value than the agreed price, by reason of such "defect or breach of warranty; but, as I think those "damages were recoverable in the cross action, I exclude "any evidence of this nature. It was optional with the "Defendant to set up the defective quality as a defence, "or, in a cross action, to go for both that and for special

"or consequential damages; but, as he has already "brought a cross action, in which the damages now "sought by way of abatement might, and may have "been recovered, I think I ought not to receive the "evidence."

The case then went on, the evidence proposed to be offered by Defendant being excluded, and the jury found a verdict for the Plaintiff for $550, the amount the Plaintiff claimed was the agreed price.

A Rule was obtained on the 17th November, 1874, to set aside the verdict for the rejection of the evidence tendered to shew that the article, the price of which was sued for in the action, was worthless and of no use to the Defendant, and on the ground of the misdirection and improper ruling of the learned Judge in ruling, that as the Defendant had already recovered damages in a former action for breach of warranty of the said article, he was now bound to pay the full contract price of it, although such price did not form any element in the computation of damages in such former action.

In Hilary Term following, on 10th February, 1875, the Court of Common Pleas ordered that the verdict should be set aside and a new trial had between the parties, without costs.

That judgment was appealed from to the Court of Appeals of the Province of Ontario, and, on the 23rd of January, that Court (Mr. Justice *Moss* dissenting) ordered that the said appeal be allowed and that the Rule *nisi* in the Court below for a new trial should be discharged, with costs to be paid by the Respondent to the Appellant, and that judgment should be entered for Appellant upon the verdict, and that the Respondent

should pay to the Appellant the sum of $227.89 for his costs of the appeal (1).

From that judgment there was an appeal to this Court, which was brought down for a hearing in the month of June, 1876.

JUNE 7th, 1876.

Mr. *J. Bethune*, Q. C., for the Appellant:

The whole question is whether the sale was of a specific chattel or of an ordinary article. The sale here was not one of a specific chattel, and the value of the article was a question which should have been left to the jury to decide. All that the Appellant could recover when suing Respondent was special damages, because he had not then paid the price, and in the present action he had the right of giving evidence of the inferiority of the article.

The case should be sent back to the Common Pleas, in order to ascertain what the contract was.

By the judgment of the Court of Error and Appeal the Defendant is deprived of the right of proving to the jury the worthlessness or inferiority of value of the article, in order to have the contract price reduced. It was a question of fact for the jury, and not for the Judge to decide. By section 34 of the *Administration of Justice Act*, 1874, *Ontario*, the Common Pleas had, in their discretion, the power to send the same back to the jury, and thus get over the difficulty with reference to misdirection. It was competent for the Defendant not to set off by a proceeding in the nature of a cross action, the amount of damages sustained by the breach of the contract, but simply to defend

(1) See case as reported in 26 U. C. C. P., 338.

himself by showing how much less the article was worth by reason of the breach of contract.

Basten v. *Butter* (1); *King* v. *Boston* (2); *Allen* v. *Cameron* (3); *Thornton* v. *Place* (4); *Poulton* v. *Lattimore* (5); *Lucy* v. *Moufet* (6); *Grimoldby* v. *Wells* (7); *Benjamin* on Sales (8).

Further, the Defendant had a right to prove that no recovery with respect to the inferiority of the article was had in the former action, his only claim being then for special damages sustained by breach of warranty. When he sued for special damages, Defendant might reasonably suppose that the Plaintiff would only claim the actual value, or that knowing that the wheel was worthless, he would never sue at all. The Plaintiff could not sue on a special contract, because the contract was broken; he could only recover, if at all, upon a *quantum meruit.* If Appellant was entitled originally to set up inferiority by way of defence to an action for the price, and also to bring an action for his special damage, he cannot be condemned to pay the full contract price simply because he brought his action for damages first. The decisions in *Mondel* v. *Steel* (9) and *Davis* v. *Hedges* (10) are those which seem applicable to the present case. *Barker* v. *Cleveland* (11) is not in conflict with *Mondel* v. *Steel.* All that is affirmed in that case is, that there was a contract made, not that it was performed or that the purchaser is liable for the whole contract price. If a contract is broken you cannot recover on a special contract, and this was a question of fact for the jury to decide. There is also a plain

(1) 7 East, 479; (2) 7 East, 481, note; (3) 1 C. & M., 832; (4) 1 Moo. & R., 218; (5) 9 B. & C., 259; (6) 5 H. & N., 229; (7) L. R. 1 C. P., 391; (8) 2nd Edn., 752; (9) 8 M. & W., 858; (10) L. R. 6 Q. B., 687; (11) 19 Mich., 230.

distinction between suing for a claim and using it to mitigate damages.

Mr. *Mowat*, Q. C., Attorney General of Ontario, and Mr. *John S. Ewart* for the Respondent:

It is argued that the fact of the sale being the sale of a specific article should have been left to the jury to decide, but at the trial no such point was raised, and the language of the Appellant's declaration shows that in suing for breach of warranty, it was for breach of warranty of a specific chattel.

The words "*a certain water wheel*" used in the declaration prove beyond a doubt that it was for a specific chattel that the contract was made. An order such as given in the present case is equivalent to the purchase of a specific chattel. *Ollivant* v. *Bayley* (1); *Prideaux* v. *Bunnett* (2). It was never intended that this question should be left to the jury.

The Defendant could not bring two separate actions for the recovery of two sets of damages. A breach of warranty does not entitle the purchaser to rescind the contract and return the chattel, but only to sue for damages. In the suit that was brought, he was entitled, notwithstanding non-payment of the contract price, to damages arising out of the inferiority of the article. See *Marzetti* v. *Williams* (3); *Doan* v. *Warren* (4); *McLeod* v. *Boulton* (5); *Mayne* on Damages (6).

As to the argument that the Appellant could not in the former action claim these damages because he did not know if ever he would be called upon to pay the contract price, it cannot be entertained, because the respondent when sued, could, by a pleading, have declar-

(1) 5 Q. B., 288; (2) 1 C. B., N. S., 613.; (3) 1 B. & Ad., 415; (4) 11 U. C. C. P., 423; (5) 3 U. C. Q. B., 84; (6) 2nd Edn., 420.

ed his intention of not asking for the price of the article. The mere fact of adding the words "special damage" in the declaration, did not limit the finding of the jury. It cannot exclude the right to recover damages which do not require to be specially alleged. The appellant seems to have based his whole case upon the assumption that damages for inferiority of the article could not have been recovered until the respondent had sued appellant for the contract price. Now, in an action on the warranty, special and general damages were recoverable, and Appellant in his action must have recovered at least nominal damages. *Taylor* on Evidence (1); *Hitchin* v. *Campbell* (2); *Smith* v. *Thomas* (3); *Lord Bagot* v. *Williams* (4); *Smith* v. *Johnson* (5); *Dunn* v. *Murray* (6); *Henderson* v. *Henderson* (7); *Davis* v. *Hedges* (8); *Newington* v. *Levy* (9).

In any event the Appellant should have recovered all his damages in that action and *nemo debet bis vexari, pro unâ et eâdem causâ; Trask* v. *Hartford* (10); *Bennett* v. *Hood* (11); *Farrington* v. *Payne* (12); *Greathead* v. *Bromley* (13).

Neither can you treat a contract as rescinded because of breach of warranty. If there has been a breach of warranty, the law does not declare, as contended by the Appellant, that the only remedy left is in an action for the *quantum meruit;* on the contrary, the vendor is entitled to the whole contract price. The case of *Barker* v. *Cleveland* (14) is clearly in point and shews that the evidence is inadmissible.

(1) P. 1,456; (2) 2 W. Bl., 827; (3) 2 Bing., N. C., 372; (4) 3 B. & C., 235; (5) 15 East, 213; (6) 9 B. & C., 780; (7) 3 Hare, 100; (8) L. R. 6 Q. B. 687; (9) L. R. 6 C. P., 180; (10) 2 Allen, 331; (11) 1 Allen, 47; (12) 15 Johns., 431; (13) 7 Term R., 455; (14) 19 Mich., 230.

Mr. *J. Bethune*, Q. C., in reply :—

In appeal, as a question of law, the right of arguing that it was not the sale of a specific chattel cannot be denied. It is a matter of evidence that no inspection was ever made, and to make it the purchase of a specific article, inspection must be made.

January 15th, 1877.

THE CHIEF JUSTICE:—

[His Lordship, after reviewing the facts of the case, proceeded as follows :—]

I have considered the cases on either side, and will make lengthy abstracts from two of them, which I think sufficiently shew the law applicable to this case.

The first case is *Mondel* v. *Steel* (1). Steel, the Defendant, had agreed to build a ship for Mondel, the Plaintiff, according to a certain specification. Mondel contended that he had not built the ship with certain scantlings, fastenings and planking, according to the specification. Steel had sued Mondel for the price of the ship and certain extra work, and in the declaration Mondel set up that Steel did not build the ship of the very best materials, in conformity with the specification, and did not build the same with the scantlings, fastenings, and planking as required, and gave evidence thereof; and contended that his damages in consequence thereof exceeded or equalled the amount of the balance due Steel for building the ship, and the additional work done thereon, and that he Mondel was

(1) 8 M. & W., 858.

entitled to have a verdict found for him. And the jury found a verdict for Steel, after allowing Mondel for the damages he had sustained by Steel not completing the ship according to contract, and found a verdict for Steel for the balance, £120.

In the action brought by Mondel, it was alleged: That by reason of the breach assigned, the ship in a certain voyage was so much strained that it became necessary to re-fasten and repair her, and thereby Mondel lost the use of her during the time she was undergoing such repairs. The plea setting up the defence was demurred to, on the ground that the action was brought to recover special damage resulting from the breach of contract.

In the argument *Parke*, B., said: This is not the *case of a warranty*. It is an agreement to build a ship of a given description, and if it is not built according to the agreement, the vendee is not bound to receive it; but if he does receive the ship, is he not bound on a new contract on a *quantum meruit* to pay for it.

Cleasby, B., in argument said: "Avoiding circuity of action means that the party should not be compelled to pay the whole sum specified in the agreement, and then be driven to a cross action." He further argued: "No claim was made in respect of the breach of contract, but the Defendant merely insisted on the breach of contract as shewing that the Plaintiff in that action was not entitled to recover the sum agreed upon, but only on a *quantum meruit*.

Parke, B., in giving judgment, cites cases previously decided and refers to the principles governing the action according to the then existing practice.

The Defendant contended that in an action brought for the stipulated price of a chattel *which the Plaintiff*

had contracted to make for the Defendant of a particular quality, or of a specific chattel sold with a warranty and delivered, the Defendant had the option of setting up a counter claim for breach of the contract in the one instance or the warranty in the other, in the nature of a *cross action ;* and that if he exercised that option, he was in the same situation as if *he had brought such an action*, and consequently, could not, after judgment in one action, bring another ; and the case was likened to a set-off under the statutes. *Parke*, B., said that was not the proper view meant in *Street* v. *Blay* (1) that the sum to be recovered for the price of the article might be reduced by so much as the article was diminished in value, by reason of the non-compliance with the warranty ; and that this abatement was allowed in order to save the necessity of a cross-action. He said : "Formerly, it was the practice, where an action was brought for an *agreed price* of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the Plaintiff to recover the stipulated sum, leaving the Defendant to a cross action for breach of the warranty or contract ; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered ; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the Defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back ; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it,

(1) 2 B. & Ald., 462.

and seek his remedy on the Plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price * * * ; and therefore the Defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten* v. *Butter* (1) a different practice * * * began to prevail * * * ; and the Defendant is now permitted to shew that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value * * * where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in these cases the acceptance or non-return affords evidence of a new contract on a *quantum valebat;* whereas, in a case of delivery with a warranty of a specific chattel, there is no power of returning, and consequently no ground to imply a new contract, and in some cases of work performed there is a difficulty in finding a reason for such presumption. It must, however, be considered, that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the Defendant, in all of those, not to set-off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the

(1) 7 East, 479.

breach of contract; and to the extent that he obtains or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more. * * * All the Plaintiff could by law be allowed in diminution of damages, on the former trial, was a deduction from the agreed price, according to the difference, at the time of the delivery, between the ship as she was, and what she ought to have been according to the contract; but all claim for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have been allowed in the former action, and may now be recovered."

The practice before *Basten* v. *Butter*, then, was that where there was an express warranty, the party damaged by its breach could only be indemnified by bringing an action on the warranty, in which he recovered his whole damages, both on account of the inferiority or no value of the article delivered, and the special damages arising out of the warranty; and the person who sold the article, though there was a breach of the warranty, and it might be of little or no value to the purchaser, yet recovered from him the full amount of the agreed price. The reason why the change took place was, that it seemed absurd to allow a party, who had probably been in default, to recover from his opponent a sum of money for an article delivered which did not answer the warranty, and was of less value; when, in fact, the party condemned to pay the money, could immediately recover the difference in value back from the party who received it from him, by bringing another action. And so, to avoid circuity of action, it was held that whatever evidence tended

to reduce the value of the article sued for, could be shewn in the action for its value. And in this way, though the contract price was reduced and there were no special damages, complete justice was done and the multiplying of law suits avoided. *Mondel* v. *Steel* carried the law further, and decided that, although the party had reduced the claim of his opponent to the value of the article actually delivered, he still had the right to recover for any special damages he could shew he had sustained.

In *Davis* v. *Hedges* (1) the action was to recover £42 19s. 6d., damages for the improper performance of certain work, agreed to be done by Defendant for the Plaintiff, at his house, under a building contract, and for not performing the work according to certain specifications, and also for removing certain partitions and appropriating certain materials.

For the Defendant it was stated that he had brought an action in the Court of Common Pleas for the price of the work under the contract, and had recovered the whole of the amount. The present Plaintiff having paid the money would not be allowed to bring an action for the defective performance of the agreement, as he might have set up such defect in the action brought against himself.

Hannen, J., in giving the judgment of *Blackburn*, J., and himself, reviewed the cases at considerable length, and quoted largely from *Mondel* v. *Steel*, and the conclusion at which the Court arrived, the argument of convenience largely entering into the discussion, was that the better rule is, that the Defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case, as *Parke*, B.,

(1) L. R. 6 Q. B., 687.

says, he is concluded to the extent to which he obtains, or was *capable of obtaining*, a reduction ; or he may, as in the present case, claim no reduction at all, and afterwards sue for his entire cause of action. (There he had paid the full amount of the plaintiff's claim in that action.)

In a previous part of his judgment, he said " It is clear that before any action is brought for the price of an article sold with a warranty, or of work to be performed according to contract, the person to whom the article is sold, or for whom the work is done, *may pay the full price* without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken."

Could he recover this amount without paying the full price ? That is the question which we must decide. The argument in this last case went to shew that if the Defendant when sued for the article was bound to set up the deficiency of its value, he might, when bringing his own action, be embarrassed. When he was ready to bring his own action it might be more apparent what was the value or the amount to which the article or work was diminished by Plaintiff's default. *Hannen*, J., adds : "Surely the right to redress for the diminution of value, when discovered, ought not to depend on the accident whether the contracting party in the wrong had or had not issued a writ for the price. He also argued that if the inferiority of the article *must* be set up in an action for its price, instead of avoiding circuity of action, it would in many cases increase litigation, for the party injured would bring an action for the damages he was not allowed for in the first action.

Looking at dates, it appears that the wheel in question was delivered in September, 1872, and it was probably taken out of Defendant's mill in February, 1873. Church did not commence his action against Abell until August of that year.

If, in the mean time, the present Plaintiff had commenced his action, no doubt the Defendant could have shewn the wheel to be of little or no value, and could have then brought his action for his special damages, which appear to have been substantial from the amount recovered was $438.

The Defendant says what he has done and what he wishes to do is exactly the same thing: he wishes to show the wheel was worthless, and he has recovered his special damage. So in *Davis* v. *Hedges*, the Plaintiff might have been allowed for the diminished value of the work in the action against him, but the Court held he could exercise his option by paying in full for the work and then recovering the whole of his damages in the action which he brought.

The argument of convenience is then invoked, but no question is there raised as to what his position would have been had he not paid the agreed price of the work.

Let us look at the practical application of the rule where the buyer, who has not paid for the article (and who has given no note or other security for it, and the time for payment, if any given, has expired), brings his action to recover damages for a breach of the warranty. Take an extreme case, for it is by putting an extreme case that you test the rule. The article sold, say, is a steam boiler, worth, if properly made and of the best materials, and put up on the premises of the purchaser, $1,000. The seller warrants it to be well made and of the best materials, and the price is $1,000. The seller

puts it up on the buyer's premises ; the buyer purchases the steam engine which is to drive his mill from some other person ; the mill is finished, quite ready to work as soon as the engine is fitted up ; a few days after the boiler is completed, and put in its place outside of the mill, and the seller and his workmen have left, considering he has performed his contract. The engine is finished and attached to the boiler; the first time the steam is raised the boiler explodes, in consequence of defective workmanship and bad materials, and it is such a total wreck it is not worth anything, not even the cost of removing it to sell for old iron. In consequence of this accident the purchaser is delayed in getting another boiler made and placed on the ground for six months, and he claims damages for the loss of time in working his mill. He sues the boiler maker. Must he claim from him $1,000 for the value or agreed value of the worthless boiler, in addition to the other damages, although he has not paid anything for it ; and then, having recovered this sum from the boiler maker, must the latter bring an action against him to recover the same sum back again, as the price agreed to be paid for the boiler ? Does not this rule compel circuity of action, and compel a Plaintiff, under such circumstances, to recover what in *æquo et bono* he is not entitled to ? Whereas, if he merely recovered the damages he had actually sustained, there would be no necessity for another action.

Then what is a Plaintiff to do under such circumstances ; as an honest man he does not desire to recover more than he ought to receive, but if the rule is laid down that in a cross action the agreed price can be recovered against him, he must recover it as part of his damages in his own action.

The argument is based on what is said to be the

established rule as to damages for the breach of the guaranty. This rule is not the difference in the value of the article delivered and the contract price, but the difference in the value of the article delivered and of the article agreed to be delivered, and it is said that the contract price has nothing to do with it. As a general rule, in practice, when the contract price has been paid, it is considered as really indicating the value of the article, and damages are given accordingly.

Another objection urged is, that this is a splitting of the demand, and this though the special damage has been recovered and what is intended to be done is to set up the diminished or want of value of the article delivered against the agreed price. This is not a splitting of the demand for the purpose of suing again; he could not, as a Plaintiff, sue again for this diminished or want of value of the article. He can only shew, that by reason of non-compliance with the warranty, the value of the article was diminished, and that a corresponding abatement should be allowed in the price. And this is done to save the necessity of a cross action.

But if this diminished value had been recovered in the former action, and it had been equal to the agreed price, a cross action would be necessary to recover it back. To force this state of things by a technical rule seems to be inconsistent with the general views which now prevail in the administration of the law. The tendency of modern decisions is to have the rights of parties settled, if possible, in one action rather than by a multiplicity of suits. The absurdity of regulating the rights of parties by the accidental circumstance as to which party may first commence his action, is referred to in the judgment of Mr. Justice *Hannen* in *Davis* v. *Hedges*. Mr. Justice *Moss* in his judgment in the Court

below, supposes actions by both of the parties pending at the same time, though that by the purchaser had not reached issue at the trial of the other; in that case the inferiority in value of the article delivered could be given in evidence in reduction of the price, and the purchaser could afterwards go on with his action and recover special damages, or, at all events, discontinue that action and bring another to recover special damages.

Suppose both suits were brought down to trial at the same Assizes, would it not seem absurd that the rights of the parties should depend on the question of which of the suits should be tried first?

The fact of one or other of the parties becoming bankrupt after having recovered money which could be recovered back from him, if he were solvent, is a consideration not to be overlooked. Supposing the Appellant in his action had satisfied the Jury that the article delivered was valueless and he had recovered as damages, on that account the $550 said to be the price of it, and after receiving the money had become insolvent; the Respondent after paying his money, would then be compelled to depend on the chances of getting the amount back from the estate of the bankrupt, and he would be forced into this position by the rule of law contended for by the Plaintiff in this action. Take the further case, where the purchaser has become insolvent, perhaps from the injury to his business and loss occasioned by the article purchased not being according to the warranty; no action has been brought on either side, but an action is brought by the assignee of the bankrupt purchaser who has all the rights of the insolvent. Can he recover for the sum which the delivered article is less in value than the one guaranteed, say the agreed price of the article sold; and compel the

seller to rank on the estate for the agreed price? Such alternatives as these shew the unreasonableness of the hard and fast rule of law contended for by the Plaintiff in this action.

Assuming the Defendant in this action to be able to shew that the wheel was worthless, the following language of Mr. Justice *Moss*, in the Court of Appeal of Ontario, seems to me very appropriate, as shewing the application of the rule contended for, to the circumstances connected with the transaction.

"That rule would constrain him to recover for this sum, and as a consequence would drive Abell into commencing an action against him for precisely the same sum, even if the parties really agreed in the position that the machinery was of no value, and neither desired any litigation upon that point. Church could not omit to claim this sum, because he would then be exposed to a suit, in which he would be compelled, according to that rule, to pay the full contract price for the worthless article.

"Abell must then, to protect himself, commence an action for the whole price, although if no such claim had been made, he might have been content to resume possession of the machine and make no demand for the contract price.

"In my judgment no arguments founded upon mere technicality should suffice for the establishment of a rule leading to consequences so inconvenient and unjust.

"I cannot perceive that it involved any violation of the rule against splitting up a cause of action, to permit Church to say in his action, that he only claimed for the special damages, and that it was time enough to discuss the question of inferiority or worthlessness, if

Abell prosecuted him. Why should Church have been then compelled to advance any claim in respect of a matter which he was content to let rest?

"It seems to me that in harmony with the decisions of *Mondel* v. *Steel*, and *Davis* v. *Hedges*, it is a reasonable rule to lay down for the ascertainment of damages, where a purchaser with a warranty brings an action before he has paid the contract price, or at least, rendered himself absolutely liable to pay it, as by giving a bill of exchange or a promissory note, that he shall only recover the amount of his special damage, and that he shall be left to use the inferiority of value as a weapon of defence, if the vendor claims from him the full contract price.

"It was merely pressed in argument that his liability to pay the full contract price entitled him to recover to the same extent, as if he had actually paid; but if the correct rule be that I have just stated, the patent objection to this argument is that it assumes a degree of liability which did not exist. He was only *liable* to pay what the Appellant could by law compel him to pay.

"This, according to *Mondel* v. *Steel*, was not the contract price, but the difference between it and the inferiority of value: for the amount equivalent to representing an inferiority of value he was not liable.

"Before any action was brought by either party, the ultimate right of the Appellant was to receive from the Respondent the contract price, diminished by the inferiority of value; the ultimate right of the Respondent was to receive from the Appellant compensation for his special damage. As it is, the Respondent, while only recovering his special damage, is condemned to pay the full contract price, for no better reason, so far as I can perceive, than that he brought his action first."

The fitting deduction from the language used and principles laid down in the cases of *Mondel* v. *Steel* and *Davis* v. *Hedges*, to quote again from the judgment of Mr. Justice Moss, is to hold that when the purchaser brings his action upon the warranty before making payment, and I should add to this when the payment is due, he shall be restricted to the recovery of any special damages he has sustained and shall not be permitted to recover for inferiority of value, for the simple reason that if he is afterwards sued for the price, the law affords him full protection by enabling him to assert this inferiority as a ground of defence.

The only decided case to which we have been referred, that is against this view, is that of *Barker* v. *Cleveland* reported in 19 Michigan Reports 237–8. We are not bound by that decision, though pronounced by a distinguished Judge, but I think, looking at the decided cases in the English Courts and the reasons for the same, the conclusion at which we have arrived is the correct one.

The acting on it, will be more convenient and more likely to do justice between the parties than any other. The leading principles were settled when the right to shew the diminished value of the article in diminution of the price and having done so to sue for the special damage was established. The only objection to extending the same rule when the action is first brought by the purchaser of the article instead of the seller, is the technical one that you must recover all your damages in that action and not separate them. The argument of convenience was allowed in *Mondel* v. *Steel* to prevail to establish the rule that the damages having been separated by the diminished value being set up in the first action, the rest of the damages, viz: the special damages, could be recovered in the last. Our decision

is merely the converse of that, and based on the same principles of convenience and justice, viz: that not having paid the price, the same being due, the purchaser should only recover his special damages if his be the first action, and shew the diminished value when called on to pay the price.

Our judgment therefore is, that this appeal be allowed. That the order and judgment of the Court of Error and Appeal for the Province of Ontario, be reversed and set aside with costs. That the rule absolute in the Court below, the Common Pleas, setting aside the verdict and granting a new trial between the parties without costs, shall stand; and that the Plaintiff in the said suit, do pay the costs of the appeal to the said Court of Error and Appeal and to this Court.

RITCHIE, J. :—

The question to be decided in this case is of very considerable practical importance, viz: whether we are constrained by general principles or the weight of authority to enunciate a technical rule fraught with consequences so inconvenient and unreasonable as those so clearly and forcibly pointed out in this Court by the Chief Justice, and by Mr. Justice *Moss* in the Appeal Court of Ontario; or whether we can recognize and promulgate as law, a rule, which, while doing full and ample justice to all parties, is calculated to prevent unnecessary litigation, and that circuity of action which it is always the policy of the law as far as possible to avoid. I am happy to say that, in view of the principles established and acted on in *Mondel* v. *Steel* and *Davis* v. *Hedges*, I have been able, satisfactorily to myself, to come to the same conclusion at which the

Chief Justice has arrived, and, after the elaborate judgment he has delivered, I do not feel it necessary to occupy more time.

STRONG, J. :—

The decision of this Appeal depends altogether on the proper answer to the question whether the Appellant, a vendee of chattels purchased with a warranty for cash, who had not paid the price, could, in an action formerly brought by him for breach of the warranty, have recovered general as distinguished from special and consequential damages.

If the Appellant could have recovered his general damages, the measure of which consisted of the difference between the actual value of the article sold and what would have been its value if it had been equal to the warranty, then it is not disputed but that the former judgment estopped the Appellant from insisting in the present action on recoupment or reduction of the price on the ground of breach of warranty. That a judgment constitutes *res judicata* as to anything which might have been recovered in the action is, if any authority is wanted for so elementary a proposition, clearly stated to be the law in the three cases of *Gibbs* v. *Crookshank* (1), *Henderson* v. *Henderson* (2), and *Davis* v. *Hedges* (3); which may be selected from a great number of authorities as clearly and succintly defining this well-known rule. The extent to which this defence prevails is only limited by the maxim: *Tantum judicatum quantum litigatum;* and everything is considered to have been in litigation which could have been made the subject

(1) L. R. 8 C. P., 454; (2) 3 Hare, 100; (3) L. R. 6 Q. B., 687.

of a claim under the Plaintiff's declaration. It is, however, said, and it forms the principle of decision in the present appeal, that the general ordinary damages, which a purchaser is entitled to recover in respect of a breach of warranty as to quality, which are measured according to a well-settled rule, and with the calculation of which the contract price has nothing whatever to do (1), are not recoverable so long as the price is due and remains unpaid, and that, consequently, the judgment recovered is only an estoppel as regards the recovery of the special damages, though it is conceded, that if the price had been paid, or if, though unpaid, payment had been deferred for an unexpired term of credit, a contrary rule must have prevailed and the former judgment would have been a bar to the reduction of damages which the Appellant claimed at the trial.

As all depends on the fact of the purchase money having been due at the date of the former action, I would call attention to the absence of any evidence shewing that the Appellant was in default for non-payment at the time the action was brought. Granting, however, that the Appellant is now entitled to say that his own default is to be presumed in his favour and against the Respondent, and that the sale must be assumed to have been for cash, although there is no evidence on that point, I am still of opinion, that the law is in the Respondent's favour, and that it was correctly enunciated in the ruling at *nisi prius*, and in the judgments of Mr. Justice *Burton* and Mr. Justice *Patterson*, in the Court below.

There is no direct English authority to be found on the question involved, at which I cannot express

(1) Mayne on damages, p. 130 and cases there cited.

surprise, but an American case (1), decided by Judges of very high professional reputation, is a decision on similar facts exactly coinciding with the opinions of the majority of the Judges of the Court below. All question as to the conclusiveness of the former judgment in the action on the warranty, as regards both general and special damages, would, if the purchaser had then been in no default in payment, be, in effect, precluded by the case of *Davis* v. *Hedges* (2).

The law is also stated in the same way in a text book of established repute (3).

The rule of law, which is now for the first time propounded, and which is to govern the decision of this appeal, must, therefore, in the absence of any reported case directly establishing it, be derived by inference and analogy from cases which are supposed to warrant its deduction. I have been unable to draw any but an opposite conclusion from those authorities.

The warranty, being a contract entirely collateral to the principal contract of sale, the remedy of the vendee for a breach of it was originally restricted to an action, the right to bring which was in no way dependent on the payment of the price; and a recovery in such an action must, on general principles already referred to, have been held to include all the damages, as well general as special, arising from the same cause of action.

After the case of *Basten* v. *Butter* (4), however, a practice was sanctioned, by which the Defendant, in an action for the price, was permitted to set up the breach of warranty in mitigation of damages, and

(1) *Barker* v. *Cleveland*, 10 Mich., 230; (2) L. R. 6 Q. B., 687; (3) Mayne on damages, p. 131; (4) 7 East, 479.

obtain a reduction corresponding with what are called the general, ordinary or immediate damages arising from non-compliance with the warranty, namely, the difference between the actual value of the goods sold and that which would have been their value if they had answered the warranty.

In the case of *Mondel* v. *Steel* (1), it was determined, that a vendee, who had set up the inferiority to the warranted value by way of reduction of damages in an action for the price, was not barred from maintaining an action on the warranty in respect of the special damages incurred, since these damages could not have been recouped to him in the vendor's action.

In *Davis* v. *Hedges* (2), the Court of Queen's Bench held, that the purchaser, when sued for the price, was not bound to set up the defects in the chattel in reduction of damages, but that he might let judgment go for the price and then sue for the breach of the contract of warranty.

It is to be extracted from these authorities, that the vendee, at his election, can either sue for his general damages or use them, as a means of reduction of the vendor's demand, in an action for the price, but that, as to special damages, he can only recover those in his own action, and that, as a necessary consequence, the recoupment of the general damages can be no bar to an action on the warranty, though its effect is to limit the purchaser to a recovery of his special damages in the second action. The cause of action, however, being one and indivisible, although the damages are, to a certain extent, for practical convenience, made divisible, no second action can be brought on the warranty, on the pretence that the recovery in the first action was confined to

(1) 8 M & W, 858; (2) L. R. 6 Q. B., 687.

special damages; and, for the same reason, no recoupment can be had under like conditions, unless the non-payment of the overdue price disentitled the vendee to recover his general damages in the first action, which is the point in dispute in the present appeal. This is all the cases prove. It is now, as I understand the judgments of the majority of the Court, intended to add to these propositions another, namely: that a purchaser is not to be permitted in an action on a warranty to recover his ordinary general damages, consisting of the difference between the actual and the warranted value, so long as he has not fulfilled his own liability under the contract, by the payment of the price. Neither in the reports nor in the books of text writers can any such rule of law be found, and, if it exists, it must be derived by a process of analogical reasoning, from the cases which embody the rules I have already stated.

There cannot be a doubt, and it is not disputed, that the purchaser originally had, irrespective of payment, a right of action on the warranty, which was then considered as an independent contract collateral altogether to the principal contract of sale. Then, so far as I can discover, nothing, which has hitherto been judicially decided, has assumed to take away from that right or made its diminution a necessary consequence. The case of *Basten* v. *Butter* (1), merely authorized the vendee to set up, by way of deduction from the vendor's damages, that which, beyond all doubt, would have been recovered in a cross action; it took no right away from the purchaser, but gave him a remedy by way of reduction, and which was to be alternative with his remedy by way of action. The law now applied in this case goes far beyond this, for it entirely suspends

(1) 7 East, 479.

the remedy on the warranty, so far as regards the general damages, until the price is paid. Thus, in other words, it makes a contract, which, beyond all question, the law, as hitherto settled, has treated as independent and collateral, dependent and conditional. It is easy to understand how, in settling the principles of such a branch of the law as that relating to the measure of damages, and which is even yet far from complete, as very recent cases shew, a new rule, giving a party a convenient and additional remedy like that providing for recoupment or deduction of damages, a sort of set off, though not strictly and technically a set-off, might well be laid down. It is, however, difficult to comprehend, how an absolute vested right to sue on a contract can, without legislation, by the decision of a Court of Justice, be converted into a right merely conditional and dependent on the precedent performance of an act, which the party for whose benefit it is to be performed, as the law interprets the contract, has never stipulated for.

In the case of goods sold to be delivered at a future day, and to be paid for at the expiration of a term of credit more remote than the time fixed for delivery, the obligations of the vendor to deliver and of the purchaser to pay, are, undoubtedly, independent of each other, and, although the day fixed for payment may have passed, the purchaser may maintain his action for non-delivery without having first paid or tendered the price.

This proposition is too elementary to require any authority, for it forms the first of the celebrated rules laid down by Sergeant Williams in his note to the leading case of *Pordage v. Cole* (1).

(1) 1 Williams Notes to Sanders, 551; and see 2 Smith's L. C. (Ed. 7) p. 14.

It would scarcely be acknowledged that the decision in the present case is to have the effect of altering the law on this head.

Then, if it is to remain unaltered, it is surely inconsistent with a rule which requires the purchaser, who has obtained delivery, to pay the price before suing on a warranty. In my opinion, it can equally be said in the one case as in the other, that to require payment as a condition precedent to suing is to interfere, not merely with the remedies of the parties, but with the mutual rights and obligations which they have chosen to contract. If it were expressed in a contract of sale, that the vendee's right to sue on an accompanying warranty should be absolute and not conditional on the payment of the price, I suppose no Court would venture to relieve the vendor from the consequence of his own express contract. Then, is it not necessarily implied in every sale with warranty, that the purchaser may sue for breach of warranty irrespective of payment? In the present appeal, we have the case of a sale of a chattel for cash (as the majority of the Court consider) with a warranty as to quality. Now the law had, at least previously to the promulgation of the modern doctrine introduced by *Basten* v. *Butter*, settled the meaning of such a contract to be, that the vendee should be at liberty to sue on the contract of warranty independently of the payment of the price, just as if that meaning had been expressed by the parties themselves, in so many words, on the face of a written agreement.

It never could have been intended, by the addition to the vendee's remedies of the simple right to deduct his damages when sued for the price, to alter a principle for the legal construction of contracts which, for upwards

of a century (1), had been settled by decisions never questioned. The right to sue for breach of warranty, irrespective of payment of the price, is altogether dependent on the construction to be placed on the contract, whether verbal or written, and I am of opinion, in the absence of all authority to the contrary, that a contract of sale is to be construed precisely in the same manner now as it was before *Basten* v. *Butter* was decided, and no one can deny that prior to that decision the purchaser's rights in respect of the warranty were in no way subject to any condition of prior payment.

To say, therefore, that a vendee shall not be permitted to recover general damages in an action on a warranty so long as the price remains due and unpaid is, in my judgment, to interfere with the substantial and vested rights of parties, by arbitrarily reversing a long established rule of construction, and it is not merely to order remedies and regulate procedure by moulding the very plastic rules which, in modern times, have been laid down for measuring damages, and which, it is plain, is all that was done, or was ever intended to be done, by the decision in 7 East, and the cases which have followed it.

Moreover, it is conceded, that in the case of a sale on credit the right of action on the warranty must, in its inception, be independent; then, if so, upon what principle or authority can a right of action on a contract, originally absolute and independent, be rendered conditional and dependent by matter *ex post facto*? The law, as far as I can discover, affords no analogy, and the case already referred to of the right to sue for non-delivery after a term of credit expired, leads to the opposite conclusion.

(1) *Pordage* v. *Cole, supra*, was decided in 1672.

Again, it is admitted, that the vendee may, at any time, sue for his special or consequential damages, though he may be in default for the price, and this, as I understand it, because he has no other remedy. Will it not, then, be an anomaly that two distinct actions may be maintained for different classes of damages, resulting from the same cause of action—an action for special damages before payment, and an action for general damages after payment—the same warranty being treated in the first action as an absolute and independent contract, and in the latter as dependent and conditional.

I am further of opinion, that the restriction of the right to sue on the warranty in the manner now proposed is shown to be a most inconvenient rule by this consideration. The measure of damages in such an action is now settled to be the difference between the actual value of the goods sold, and their value, if free from defects warranted against. The price is no element in the calculation of such damages. Now, if the vendee, who has not paid his purchase money, is to be confined to a right to set-off or recoup his general damages for breach of warranty in an action for the price, he must be limited to the amount of the price; consequently, if the damages, as may well happen, should exceed the amount of the price, the vendee's only course will be first to pay off the vendor, and then sue for his general damages in a third action, should he, in conformity with the new doctrine, have happened to have already brought one for his special damages, thus rendering three actions instead of two essential for the adjustment of the rights of the parties.

This, it seems to me, would be a result tending

much more to circuity of litigation and splitting of causes of action than the maintenance of the decision now appealed from.

For these reasons, which coincide with those given in *Barker* v. *Cleveland* (1), and *Davis* v. *Hedges* (2), I have come to the same conclusion as the Court below.

There is a view of this case which I was at one time disposed to regard as favourable to the Appellant. I do not consider the contract, as it now appears in evidence, aside from the estoppel of the former judgment, to have been one for the sale of an ascertained chattel; and in this respect, which is, however, unimportant as regards that part of the case on which the decision turns, I differ from Mr. Justice *Patterson.* There being, then, an executory contract for the sale of an unascertained chattel with a warranty as to quality, the cases of *Street* v. *Blay* (3), and *Heilbuth* v. *Hickson* (4), establish that, in such a case, the purchaser may, after a reasonable time for trial, return the article, on the ground of its not answering the description contracted for, which description is to be collected from the whole agreement between the parties, including the collateral contract of warranty. Had the Appellant been in a position to dispute the execution of the contract, by shewing the return of the wheel, the evidence he tendered ought not to have been rejected. The answer to this argument, however, seems to be very clear. The Appellant has estopped himself from treating the contract as one for the sale of an unascertained chattel, never executed, and insisting that he rejected the article tendered as not answering the requirements of the contract, by bringing an action on the warranty, in which he has expressly

(1) 19 Mich., 230; (2) L. R. 6 Q. B., 687; (3) 2 B. & A., 456; (4) L. R. 7 C. P., 438.

averred that the contract was one for the sale of a "certain water-wheel" which the Respondent had "sold" to the Appellant. In the face of a judgment recovered on a count so framed, I think it impossible to hold that the contract can now be considered as one still executory in its character for the sale of an unspecific chattel. The case of *Barker* v. *Cleveland*, already referred to, is also in point here. I considered, in this connection, whether it was possible to hold the previous recovery to have been in an action for non-delivery, treating the allegation of the warranty as having been introduced, in an informal style of pleading, for the purpose of setting forth the whole contract, shewing the description of the wheel and the vendee's consequent right to reject it. I came, however, to the conclusion that the language of the declaration made it impossible so to construe the record, more especially as it appears the contract was not in writing; and, therefore, if the wheel was returned as not complying with the condition as to description, there would have been no acceptance, and the Statute of Frauds would have been an answer to any action brought by the vendee as on a contract still open and unexecuted.

I am of opinion that the judgment of the Court of Error and Appeal of Ontario should be affirmed with costs.

TASCHEREAU, J.:—

The question in this case is whether the Appellant, the purchaser of the wheel which forms the subject-matter of the present appeal, has a right to set up its worthlessness in an action for its price by Respondent Abell; Church (the Appellant), hav-

ing recovered certain special damages in a former action against his vendor? A great amount of learning and many precedents have been brought to bear on the case on both sides, and this circumstance had the effect of throwing great doubt in the minds of the members of this Court, as it did in the Court appealed from.

I shall not enter into the minute details of the case, beyond saying that the sale of the wheel in question was not that of a specific ascertained article; but that, on the contrary, the transaction was purely and simply a bargain for the future construction of a wheel, which the Respondent guaranteed to be of sufficient power to suit the Appellant's wants; no mention of the size of the wheel was made except by an accidental allusion to a four feet wheel, and the price was agreed to be $400 without the gates, or $430 with the gates.

The wheel, when made, was brought to Appellant's mill and proved to be insufficient. Thereupon the Appellant sued the Respondent in damages, claiming $1,000 as per bill of particulars. The jury awarded $438, declaring that the wheel was not reasonably fit for the purposes mentioned in the Appellant's declaration, and costs were also granted, the whole, principal and costs, being paid to Appellant Church. Now Abell sues Appellant Church for the price of the wheel, and he being awarded $550, the question comes whether the ruling of Mr. Justice *Burton*, excluding evidence offered by Appellant Church in reduction of damages in an action for the price, on account of the insufficiency of the wheel, was bad or good in law?

It is contended by the Respondent that the Appellant, having chosen to take an action on warranty, in which he might have recovered both general and special

damages, was prevented from setting them up again in the action against him by Abell.

I do not adopt the view which the Respondent takes of his position. How could Appellant claim in his action damages on account of the worthlessness of the wheel, when he had not accepted it, nor paid for it, and had undertaken to return it, and did, in fact, return it to Respondent? What other damages could he be awarded than those mentioned and claimed in his bill of particulars, and *cui bono* claim damages for the difference of value or worthlessness of an article which he had not accepted, which he did not intend to accept, and which he did not keep? He claimed nothing but his special damages arising from the expenses, trouble and loss of time incurred in trying the wheel and conveying it from place to place.

I fail to see anything in the Respondent's authorities which can convince me that the Appellant's omission to claim damages in his action should preclude him from meeting an action of Respondent for the price of the wheel by a plea and proof of the worthlessness of the article.

I do not see how he could have lost his right by keeping it in suspense till the respondent would make up his mind to attack him. I go further, and say that it was incumbent on the Respondent Abell, to show clearly that the damages which the Appellant is now setting up in diminution of price were actually included in his first action. Nothing in that sense appears, and the Respondent's only argument seems to be derived from that implication.

Mr. Justice *Moss*, who differed from the majority of the Court of Appeals has put the case in a very clear and forcible manner at page 29 of the printed case, and

I confess that he has illustrated, in a very happy manner, the relative position of the parties.

I do not see that the authorities cited in Respondent's factum bear him out in his contentions, and, therefore, I conclude that the ruling at the jury trial by Mr. Justice *Burton* excluded material evidence offered by the Appellant for the jury's consideration, and was contrary to law; consequently, the appeal should be maintained and the record sent back to the Court below, there to be adopted such further proceeding as the Appellant may be advised to take, granting the Appellant all his costs.

FOURNIER, J.---Concurred.

Appeal allowed with costs.

Attorneys for Appellant:—*Bethune, Osler and Moss.*

Attorneys for Respondent:—*Mowat, MacLennan and Downey.*

THOMAS McCRAKEN, ... APPELLANT;

AND

PETER McINTYRE, ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Public Company under 27 & 28 Vic., Ch. 23—Shareholder's Liability.

Certain shares in a Company incorporated by Letters Patent, issued under 27 & 28 Vic., c. 23, were allotted, by a resolution passed at a special general meeting of the shareholders, to themselves, in proportion to the number of shares held by them at that time, at 40 per cent. discount, deducted from their nominal value, and scrip issued for them as fully paid up. G., under this arrangement, was allotted nine shares, which were subsequently assigned to the Appellant for value as fully paid up. Appellant enquired of the Secretary of the Company, who also informed him that they were fully paid-up shares, and he accepted them in good faith as such, and about a year afterwards became a Director in the Company. The shares appeared as fully paid up on the certificates of transfer, whilst on each counterfoil in the share-book the amount mentioned was "Shares, two, at $300=$600."

Held:—Reversing the judgment of the Court of Appeal for Ontario, that a person purchasing shares in good faith, without notice, from an original shareholder under 27 & 28 Vic., c. 23, as shares fully paid up, is not liable to an execution-creditor of the Company whose execution has been returned *nulla bona*, for the amount unpaid upon the shares.

(The Chief Justice and Ritchie, J., dissenting.)

Appeal from a judgment of the Court of Appeal for Ontario, ordering that the rule obtained by the Respondent in the Court of Queen's Bench to enter judgment for him should be made absolute (1).

(1) See case as reported in 37 U. C. Q. B., 422, and 1 App. Rep. O., 1.

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J. J.

This action was brought by Plaintiff, who had recovered a judgment against the Lake Superior Navigation Company (limited), under which an execution had been issued and returned *nulla bona*, against the Defendant for the amount not paid up on nine shares of the stock of the said Company held by him. A charter was granted to the Company in February, 1871, under the provisions of the statute of Canada, 27 & 28 Vic. c. 23. Sec. 5, sub-sec. 19, no. 27 (1) of the statute makes each shareholder liable until the whole amount of his stock has been paid up to the creditors of the Company to an amount equal to the sum not paid up thereon. The petition on which the charter was granted, stated the nominal capital to be $64,000. Number of shares 128 at $500 each. Sixty-five shares, $32,500 of the stock, were subscribed when the charter was granted. About a year after the Company went into operation, it appears additional funds were required to carry on the business, and in July, 1872, it was resolved to call a special general meeting of the shareholders to lay before them a proposal to allot the unsubscribed portion of the stock to the shareholders in proportion to the number of shares held by each, at the rate of 60 per cent. of the nominal value of the shares.

At a general meeting of the shareholders on the 15th March, the proposition was agreed to, and resolutions passed for carrying it into effect. In accordance with the resolutions, ten shares (nine of which came afterwards

(1) "Each shareholder, until the whole amount of his stock has "been paid up, shall be individually liable to the creditors of the "Company, to an amount equal to that not paid up thereon; but "shall not be liable to an action therefor by any creditor, before an "execution against the Company has been returned unsatisfied in "whole or in part; and the amount due on such execution shall "be the amount recoverable, with costs, against such shareholders."

into Defendant's hands) were issued on the 5th April, 1872, to Thos. Griffith & Co., at the rate of 60 per cent. of the nominal value, which price they paid. These shares passed from Thos. Griffith & Co. to W. Griffith, and from him to Defendant and were treated as paid-up shares, though in the share book they were not entered as paid-up shares in the name of Thos. Griffith & Co., as other shares that were taken by them were entered; and in the counterfoils of the shares in the share-book the amount was mentioned (each for two shares) "Shares, two at $300—$600," whilst on the certificate itself the shares were mentioned as $500 each. It was represented to the Defendant when he became the purchaser of the shares, which were taken by him towards payment of a debt due the Bank of which he was the cashier, that the shares were fully paid-up and he was so informed by the officer of the Company on enquiring at the office.

The Defendant became a Director of the Company on the 4th February, 1874. The shares were transferred to him individually on the 30th January of that year, he having held them as trustee of the Bank from April, 1873.

The Plaintiff recovered in his action against the Company, on 19th December, 1874, on a bill of exchange, dated 1st July, 1873, for $750. He issued his writ in the present action against the Defendant on 23rd January, 1875.

In the declaration it is averred that "the Defendant (Appellant) was a shareholder in the Lake Superior Navigation Company, holding nine shares, on which there was due and unpaid the sum of $1,800; that Plaintiff had recovered judgment against the said Company for the sum of $806.02 for a debt due from the said Company to him

for a bill of exchange accepted by the said Company, payable to the order of one A. McMicken, and endorsed by said A. McMicken to the Plaintiff (Respondent), together with $20.83 for costs of said suit, which sums together amounted to the sum of $826.85, with interest thereon from the said 19th day of December, A D., 1874."

"That on the 26th day of December, A.D., 1874, the said Plaintiff (Respondent), caused a writ of *fieri facias de bonis* to be issued out of the said Court, directed to the Sheriff of the County of Grey, commanding him that of the goods and chattels of the said Company, he should cause to be made the said sum of $826.85 and interest, costs of writ and Sheriff's poundage.

"That on the 29th day of December, A.D., 1874, the Sheriff caused a return to be made of *nulla bona*, and the said judgment is still in force and unsatisfied; and it is further averred that the said Lake Superior Navigation Co. (limited), is a Company incorporated under the provisions of an act of the Parliament of the late Province of Canada, passed at a session of the said Parliament held in the 27th and 28th years of the reign of Her Majesty Queen Victoria, c. 23, and intituled "An Act to authorize the granting of charters of incorporation to manufacturing, mining, and other companies," and thereupon Her Majesty, by letters patent issued by the Lieutenant Governor of the Province of Ontario, under the provisions of the said act, on and bearing date the 25th day of February, A.D. 1871, incorporated the said Company, and by reason of the provisions of the said act, the said judgment so recovered by the Plaintiff against the said Company, and the return of the said execution unsatisfied, the said Defendant as such shareholder became liable to the said Plaintiff as a creditor of the said Com-

pany as aforesaid to the amount of the said judgment, the same not exceeding the amount not paid up by him on the shares held by him in the said Company."

The Defendant (Appellant) pleaded several pleas to the said action, but it is unnecessary to refer to any other than the sixth plea, on which the issue between the parties has throughout the litigation been fought. The sixth plea is as follows :—

"6. And for a sixth plea the Defendant says, that the said nine shares in the declaration mentioned were issued by the said Company as fully paid-up shares to one Thomas Griffith, and were taken and accepted by the said Thomas Griffith as fully paid-up shares in the capital stock of the said Company, and, therefore, the said nine shares were entered upon the books of the said Company as fully paid-up shares in the hands of and held by the said Thomas Griffith, and thereafter the Defendant by several mesne transfers or assignments of the said nine shares, for a valuable consideration, paid by the Defendant in good faith, became the purchaser and holder of the said nine shares under the full belief that the said nine shares were fully paid up, and without any notice or knowledge that the said nine shares had not been and were not fully paid up, and the said nine shares were transferred on the books of the Company to the Defendant in the manner prescribed by the Letters Patent incorporating the said Company, and the Defendant accepted the same as fully paid-up shares and not otherwise."

The cause was tried at Toronto, before the Honorable Mr. Justice *Strong*.

The learned Judge, entered a verdict for the Defendant, with leave to Plaintiff to move to enter a verdict for him. The Plaintiff subsequently moved to enter the

verdict pursuant to leave reserved for $852.32, but the Court of Queen's Bench gave judgment on 23rd December, 1875, discharging the rule. From that judgment Plaintiff appealed to the Court of Appeals for the Province of Ontario, and that Court in September, 1876, allowed the Appeal, reversed the judgment of the Court of Queen's Bench, ordered the rule to be made absolute in that Court, to enter the verdict for the Plaintiff for $852.35 with costs, and also the costs of appeal.

From this judgment arose the present appeal.

The question to decide was whether the Appellant, being a *bonâ fide* purchaser of shares transferred to him as prescribed by the letters of incorporation on the books of the Company as *paid up*, but which had been allotted to the original allottee at forty per cent. discount, is liable, having subsequently become a Director in the Company, under subsection 19 no. 27 of sec. 5 of cap. 23 of 27 & 28 Vict., for the amount unpaid on said shares to a creditor of the Company.

Mr. *J. K. Kerr*, Q. C., for Appellant:—

Defendant was a *bonâ fide* purchaser without notice, and was so declared by the finding of the jury at the trial, and this finding has not been found fault with by any of the Courts below. The action was instituted under sub.-sec. 19, no. 27 of sec. 5, cap. 23, 27 & 28 Vict. It is not the intention of this section to impose any contract upon a shareholder, into which he did not enter, nor does it give any higher rights to a creditor than he formerly possessed, other than giving a right of action against the shareholder, instead of compelling him to assert his right of

action through the Company. The right of the creditor, and the liability of the shareholder is measured by the contract the shareholder enters into and the Court will not extend it.

This is the effect of *Waterhouse* v. *Jamieson* (1), approving of *Currie's* case (2).

In that case, under the acts under which the company was incorporated, the shareholders were liable for the full amount unpaid.

Had the originators of the company been the holders of the shares they would have been liable. At page 31 it is stated they were "undoubtedly guilty of the grossest fraud."

But the court refused to charge the shareholder in that case, because, as stated by the Chancellor, the shareholder had only entered into an engagement to pay £5 a share and the court could not make a new contract for him. It was by the contract his liability was measured and the court having found that he was a transferee for value without notice, that the shares were unpaid, he could not be made liable for more than he contracted to pay.

The learned judges in appeal distinguished the case of *Waterhouse* v. *Jamieson* from the present on the ground that in that case the liquidator represented the company and the defence was one against the company and not against creditors.

With all deference the appellant submits that this view is erroneous and that the House of Lords in *Waterhouse* v. *Jamieson* did not view the case as if the liquidator represented the company, and as if any defence available against the company was available against the liquidator.

(1) L.R. 2 Sc. App., 29; (2) 3 DeG., J. & S., 367; 32 L. J., Ch., 67.

The liability to the Company must exist, and there must be a contract between the Company and the shareholders in existence.

The cases relied upon by Respondent are applicable to subscribers of stock who agree to take shares at all events.

What the House of Lords held in *Oakes* v. *Turquand* (1) was, that the contract was a valid contract to take so many shares with a certain sum still to be paid.

There is, however, a late decision which favors Appellant's contention, *Re Carling* (2).

All that the statute gives the creditor is to dispense with notices and calls to compel the shareholder to pay up what is due, and it can only be by the aid of the shareholder's contract that the creditor can have any advantage. In this case the Appellant has protected himself against any new liability, the statute cannot make a new contract for him. All that Appellant contracted for was to take paid-up shares. He entered into no contract with the Company to take shares with 40 per cent. unpaid, and cannot be made liable beyond the measure of his contract.

Further---The position of a transferee for value without notice is different from that of an original shareholder. There is a difference between buying stock at a discount and stock being issued with only 60 per cent. paid up.

The remedy should be against the Directors for doing what the law forbids them to do, and not against an innocent purchaser. *Waterhouse* v. *Jamieson* (3); *Spargo's* case (4).

To hold that the purchaser of shares in a Company

(1) 2 H. L., 325; (2) L. R., 1 Ch. Div., 122; (3) L. R. 2 Sc. App., 29; (4) L. R. 8 Chy., 407.

represented to be, and appearing to be, paid up, are liable, if it should appear that the Directors have been guilty of an act *ultra vires* in selling at a discount or otherwise, would hamper mercantile operations and practically make all shares unmarketable.

Mr. *Richard Snelling* for Respondent :---

The 19th subsection No. 27 of section 5 of ch 23, 27 & 28 Vict., gives to Respondent a statutory right without reference to any contract.

As against the creditors of the Company, Appellant is a shareholder within the statutory definition of a "shareholder" given in the Consolidated Statutes of Canada, where we find it enacted as follows :— "The word shareholder shall mean every subscriber to, or holder of, stock in the undertaking, and shall extend to and include the personal representatives of the shareholder" (1).

This includes all transferees and Respondent's statutory right to be paid by Appellant, a transferee of the original subscriber to the undertaking, if not in full, at any rate to the extent of the amount not paid up on the shares, cannot be taken away by any default or remissness of the Company or its officers.

The charter of incorporation recites *inter alia* that the number of shares is 128, and the amount of each $500. Every shareholder, in accepting shares in this Company, engaged himself to pay money or money's worth to the nominal value of each share.

It is true they were issued as paid up, but the evidence clearly establishes that Appellant was a purchaser of shares which had been allotted at a discount of 40 per

(1) Ch. 66 sec. 7, sub-section 19.

cent. to the original allottee, and he could not take them at a lower rate than the fullypaid up value, and so defraud the creditors of the Company. There is a difference between the Canadian Act of 1864 and the English Joint Stock Companies' Act. Under the latter the official liquidator stands in the position of the Company, and winds up the estate for the benefit of each concerned; he cannot repudiate the contracts of the Company, and it would seem that under that Act creditors are bound by such contracts (1).

As to notice, the evidence does not sustain the averment that the shares were entered upon the books of the Company as fully paid up. In the language of the Defendant himself "the scrip did not, on its face, show it was paid." Defendant, before Respondent was a creditor, became a Director, and the moment he knew the shares were not actually paid-up, he could have repudiated the contract and got rid of them.

This case is distinguishable from *Waterhouse* v. *Jamieson* (2), as in that case the creditor was enforcing his right through an official liquidator.

Moreover, although as between the Company and the Defendant the Company cannot claim what remains unpaid in respect of shares held by him, yet Defendant is liable to a creditor of the Company to an amount equal to that not paid thereon. *Oakes* v. *Turquand* (3); *In Re Hoylake Railway Company, ex parte Littledale* (4). The policy of the statute is that a creditor of the Company should not suffer by any contract entered into between the Company and its shareholders.

The case of *Waterhouse* v. *Jamieson*, on which Appellant relies, and upon which the judgment of the Court of

(1) See Lindley on Partnership, pp. 657 et seq; (2) L. R. 2 Sc. App., 29; (3) L. R. 2 H. L., 325; (4) L. R. 9 Ch. App., 257, 260, 262.

Queen's Bench proceeded, is distinguishable from the present case. The only agreement Mr. *Waterhouse* entered into was to pay up £ per share. The deed or articles of association so stated it, and the registered memorandum of agreement gave notice to the public that these shares were to be so treated, and that only a certain amount was to be paid in respect of them.

This case is very different. This is an action expressly given by the statute to a creditor against the holder of any shares at the time execution is returned unsatisfied. The Plaintiff, (Respondent), creditor, does not claim through the Company, but the act gives a personal, individual and original right, as against the individual shareholder, a right paramount to any right of the Company, and which the creditor exercises adversely in order to reach certain assets of the Company, that is to say, the amount unpaid on any of its stock.

No case in England can overrule this statutory enactment, the wisdom of which shews itself here. The Judges of the Common Pleas have adopted this view. *Benner* v. *Currie* (1); *McGregor* v. *Currie* (2). The public must be protected and there can be but one answer, viz. : payment.

Nor can a creditor of the Company be affected by any fraudulent representations made by the Directors or officers of the Company to its shareholders or those who become shareholders on the faith of such representations.

Henderson v. *the Royal British Bank* (3); *Daniel* v. *the Royal British Bank* (4); *Powis* v. *Harding* (5); *Deposit Life Assurance Company* v. *Ayscough* (6); *The Western Bank of Scotland* v. *Addie, Addie's* Case (7).

(1) 36 U. C. Q. B., 411; (2) 26 U. C. C. P., 58; (3) 7 E. & B., 356; (4) 1 H. & N., 681; (5) 1 C. B., N. S., 533; (6) 6 E. & B., 761; (7) L. R. 1 Sc. App., 145.

Nothing in the statute of 1864, or the Letters Patent issued thereunder, relieves the Company or its individual shareholders from the liabilities imposed on an ordinary partnership or the individual members thereof, and on this point the following authorities were referred to :—

Lindley on Partnership (1) ; *Re Electric Telegraph Company of Ireland* (2) ; *In re The London and County Assurance Company, Wood's* claim and *Brown's* claim (3) ; *Macbeth* v. *Smart* (4) ; *Ryland* v. *Delisle* (5).

Finally, the Respondents fully submit on the whole case that a creditor of such a Company as this, when sueing a shareholder, does not claim through the Company, but that he has a paramount right accorded to him by our statute, and that even if it were certain that the Company could not maintain a suit to recover from the Defendant (Appellant) the unpaid balance due on his shares, which in this case it is submitted it is unnecessary to determine, that would not, upon the authority of the cases cited and upon our statute, absolve him from liability to a creditor.

Mr. *J. K Kerr*, Q. C., in reply :—

It is now too late to fasten any liability on facts found by the Judge, viz. : That Appellant purchased these shares in good faith for value without notice.

In the course of the argument reference was also made to :—

Buckley on Joint Stock Companies Act (6) ; *Spargo's* case (7) ; *Bush's* case (8) ; *Wynne's* case (9) ; *Ashworth* v. *Bristol and North Somerset Railway Company* (10); *Beck's*

(1) Pp. 206, 556, 562, 565 ; (2) 2 De G., F. & J., 275, 295 ; (3) 9 W. R., 366 ; (4) 14 Grant, 310 ; (5) L. R., 3 P. C., 17 ; (6) Pp. 37, 65, 66 ; (7) L. R. 8, Ch. App., 410 ; (8) L. R. 9 Ch. App., 554 ; (9) L. R. 8, Ch. App., 1002 ; (10) 15 L. T, N. S. 561.

case (1); and *South Staffordshire Railway Company* v. *Burnside* (2).

June 28th, 1877.

THE CHIEF JUSTICE :—

[After reviewing the facts of the case, proceeded as follows :—]

A caustic writer, who has considered the subject of Joint Stock Companies in England, thus refers to those of limited liability :—

"The advantages to be enjoyed by reason of limited liability, may be thus enumerated :

"You are permitted to incur debts without limit, but to prescribe your own limit for payment of them. You may invest £20 and trade to the amount of £250,000. If you succeed your profits will be enormous, if you fail you can only lose your £20, the rest of the loss must fall upon your creditors. You are placed by this law in the advantageous position of a man who has everything to gain and nothing to lose. It is obvious wisdom, in any game of chance or skill when the sum staked by you is limited, but the sum for which you play is unlimited, to play for the highes stake upon the table. Limited liability places you precisely in this desirable position. You cannot lose more than your £20 while it is open for you to speculate for £1,000 or for £100,000. The reason why prudent persons did not so speculate formerly was their consciousness that they must stake, not merely the £20 they laid down, but also an amount equal at least to the sum played for. Released by the law from that liability, and your loss limited

(1) L. R. 9, Ch. App., 392; (2) 5 Exch., 138.

to your small stake, you have no longer need for caution, and not only may you safely speculate without limit, but according to the well-known doctrine of chances it will be the most prudent course for you to do so."

According to the contention on the part of the Appellant in this cause, applied to the position of Griffith, who took the shares in question, he might have all the advantages of having paid for his stock in full when he had, in fact, paid but little over half of the price of it. If the Company were successful, and he made his $1,000 on an investment of $300, none of his brother stockholders could complain, as they all had agreed that he should take the stock at the rate he paid for it. If the Company turned out a failure, according to his present contention, he could not be responsible even for the amount unpaid on his stock.

At best, these acts afford but poor protection to the creditors, but in this view they would have none.

Under the statute in question, those applying for a charter must state the amount of the nominal capital of the Company, half of it must be subscribed in good faith, and five per cent. of the whole capital paid in.

The number of shares and amount of each share must be stated. The creditors of the Company, after having exhausted the remedies against the property of the Company, may recover from the *shareholders* any amount not paid up on their shares, (and this seems to be the remedy the creditors have against the shareholders.) As to the unpaid instalments on the shares necessary to be subscribed to obtain the charter, I apprehend there can be no doubt that the original subscribers, who had not paid up the whole amount of their stock, would be liable to creditors though, as between themselves and the Directors, if all had agreed

to pay a less sum than was due, such agreement might be valid and binding.

Under such circumstances, if a stockholder transferred his shares, representing to the purchaser that the whole amount of his stock had been fully paid up, and on enquiring at the office of the Company he received the same information, would the purchaser, after having held the stock for a year or more, and until new debts were contracted, be freed from the liability to the creditors of the Company, because the stockholder who sold him the stock, and the officers of the Company had declared that to be paid up, which was really not paid up? I should say not, for in such a case the creditors would have no protection at all. If the purchaser of the stock, on examining the books of the Company, had found out the stock had really not been paid up, and continued to hold the stock, and continued to be a shareholder, he could not complain if creditors called on him for the unpaid portion of his stock, he thus choosing to remain a shareholder. If he considered himself placed on the list of shareholders by fraud, he should have had his name removed from the list, and the fraudulent transaction set aside. Failing to do so, he must be considered as acquiescing in his position. He must seek his remedy, if he has any, from those who committed the fraud on him.

If this be the correct view to take as to those who had subscribed the half of the stock on which the application for the charter was based, why should it not equally apply to those holding the rest of the stock. There can be no doubt, I apprehend, if Griffith and the other parties had subscribed for the unallotted shares, and had paid fifty per cent. on them, and after that the directors and shareholders had decided, that on paying

ten per cent. more, such payment would be received as payment in full of the stock or shares, that such a resolution would not bind the creditors.

What is admitted to have been done is, in effect, just the same thing. The answer is, that Griffith did not agree to take shares in the Company to be paid up and afterwards change the agreement and pay only a portion of the amount due and get discharged from paying the rest, but that he bought the shares as paid up shares, and to make him liable for the unpaid amount is to make a new contract for him. To this it is urged that the Company was not authorised to issue paid-up shares as such, and to issue these shares with an abatement of 40 per cent. on the value was a fraud on the creditors of the Company, which Griffith, as a Director and stockholder, must have known.

The proper view to take of the transaction is, that he intended to become the holder of the shares, and he had them allotted to him, and as to that the transaction would be affirmed and he be held bound as a shareholder; that being a shareholder he was bound to show how he had paid for his stock and would be liable to creditors for anything unpaid on it. If it is to be viewed as a fraud, that portion of the transaction consisting of the allotting of the shares was perfectly valid and might be affirmed, but that which related to the deduction of 40 per cent. could be repudiated, and he could be called on to pay the 40 per cent. This view would be sustained by *Daniell's* case (1), decided in 1857, and the remarks made on that case by *James*, L. J., and *Mellish*, L. J., in *Carling's* case (2); and by *Turner*, L. J., in *Saunders* case (3), decided in 1864. *Turner*, L.

(1) 1 De G. & J., 372. (2) L. R. 1 Ch. Div., 115. (3) 10 L. T., N. S., 6.

J., said in that case, if the shareholder was privy to the breach of trust, he would be liable as a contributor.

There is still another question as to these disputed shares. If they must be considered as paid-up shares, or that Griffith was not a shareholder at all in relation to them, how long is that state of things to continue? Suppose a Company is prosperous, declares dividends from time to time, giving back to each shareholder more than he ever paid for his stock or even its nominal value; afterwards some great disaster befalls the Company, and the shareholder is asked to pay up the unpaid 40 per cent. to satisfy debts due by the Company, would he then be allowed to say he was not a shareholder at all as to these shares, though he had received dividends on and large profits as a shareholder? I should say not. With a full knowledge of his own illegal conduct as a Director and a shareholder, Griffith chose to place himself in a position to receive benefits; as holder of this stock he ought to be compelled to bear the burthens incident to it.

The doctrine put forth in some of the cases, and which seems to be assented to by some of the Judges, that the rights of creditors cannot be greater than the rights of the Company, cannot apply to all cases. If it does, it seems to me it would work gross injustice to creditors. Take the case before us. If each Director and each shareholder had taken additional shares at 40 per cent. discount, and they had all agreed to it, as between themselves, I see no reason why that arrangement should not be binding; as co-partners they might make between themselves any agreement they thought proper, which would affect their own rights only, but the creditors of the Company, in my humble judgment, could not be bound by such an agreement if it was not authorized by

the charter or the statute under which the charter was granted. If this doctrine be laid down as a rule applicable to these Joint Stock Companies, all that the shareholders and directors will be required to do, still more to limit their liability, will be to buy their shares at fifty or seventy-five per cent. discount, and have them allotted to each shareholder as shares paid in full. If the Company is successful, they make large profits from their investments; if the Company becomes insolvent, they are not liable to pay anything more on their stock.

In some of the cases the matter is put in this way: either the party holds the stock under the original agreement and cannot be called on to pay more than the agreed price for it; or, secondly, the whole matter is to be considered fraudulent and void as against the creditors, and in that view he does not hold the stock at all and cannot be made to pay; or that he allotted the stock to himself at 60 cents on the dollar, and unless it can be shewn that was not all it was worth at the time, no claim can be established against the Director or stockholder for the taking of the stock under the circumstances. This, in case of the failure of the Company, still produces the same result, the stockholder limits his own liability as to risk in a way not allowed by the statute, but has unlimited chances of gain as to profit. Besides, a creditor, who has become such after the stock has been allotted at a discount without his knowledge or consent, might well say: "if your enterprise was of so uncertain a character that after you had carried on business for a year you could not induce persons to take stock except at a discount, you should have wound up the concern. If you had done this in March or April, 1872, you would not have contracted the debt for which I sued the Company on a bill of exchange accepted by

them 1st July, 1873. When I became a creditor of the Company I had a right to suppose that the stock was allotted at par and had been either paid in full, or if not paid, I should have my remedy against the stockholders holding stock not paid in full. You had no right to allot this stock to yourself and others at 40 per cent. discount. You cannot place matters in the position they were when you did this illegal act. You are, therefore, not in a position to assert as against me, that this, which is not stock paid in full, has been paid up and I have a right to claim from you the unpaid amount to satisfy my debt."

I have considered the matter thus far in relation to Griffith. Is the Defendant in relation to this suit and the Plaintiff's claim in any better position than Griffith? I think not.

It is true, when he took the stock he was informed it was paid in full, both by the person from whom he took it, and the officer of the Company. I do not consider that the register of stock is kept for the purpose of making shares articles of commerce, to pass like Bills of Exchange, and that everything stated in it must bind everyone who buys shares, or has dealings with the Company.

If shares actually paid up were not so entered in the register, I do not think the holder could be made to pay the nominal value of his shares a second time, and if they were not in fact paid up, and were entered as paid, I am not satisfied, as against a creditor, that the shareholder could not be made to pay the unpaid amount to the creditor. But here, as a matter of fact, the ten shares acquired by Griffith on 5th April, 1872, are not entered in the stock book as paid up, and the counterfoils on the share book shew, that the certificates

issued for two shares were at $300 each when the full amount of the shares was $500 each.

The Defendant became the absolute owner of these shares on 30th January, 1873, and he became a Director of the Company on the 4th February. In his position of Director he had ample means of knowing all about the transaction, in relation to the shares he held. As a Director of the Company, it is not unreasonable to suppose he would enquire into its concerns and hear something of its assets and management. If he had made such enquiry he would have learned that the shares now in dispute had been paid for at the rate of 60 per cent. of their nominal value. In one of the latest cases, *in re Imperial Land Co. of Marseilles, ex parte Larking* (1) it is said you must attribute to a Director all the knowledge which, by reasonable diligence, he could have acquired. If after that he chose to remain the holder of these unpaid shares, it is not unreasonable he should take the burthens that were upon them. A reasonable time had elapsed before the commencement of this suit (January, 1875) to enable him to make himself acquainted with the title under which he held the shares. If he did not choose to do so, he cannot now complain that he is called upon to discharge the liabilities attached to them. If he, knowing the whole truth about them, chose to retain them when possibly he might have had the transfer to himself set aside as fraudulent, he cannot now repudiate them. It appears to me he is in no better position in relation to these shares than Griffith was.

It is laid down in some of the cases, that the owner of shares in a public company is bound to know how his title is derived, and after a reasonable time he

(1) L. R. 4 Ch. Div., 576.

must be presumed to have this knowledge, and, in this view, I think the Defendant should be held liable.

One of the cases which, I consider, lays down a doctrine that accords with the Respondent's view is *Daniell's* case (1) decided in 1857, which, if good law, fully sustains the view of the Court of Appeal, and although questioned in some of the subsequent cases, has never been expressly overruled, and if it had been, would not necessarily shew that the decision in the Court of Appeal was wrong.

Oakes v. *Turquand* (2) (1867) reviews the whole law on the subject of these Joint Stock Companies, and traces the legislation in relation thereto. The Court there, adverting to the analogy between a stockholder under the act and a co-partner in a Company without a charter of incorporation, shows, that a person, who becomes a shareholder, incurs liabilities to the creditors of the Company, which, as between the stockholders themselves, may not arise. The views there put forth, I think, sustain the judgment of the Ontario Court of Appeals. There are some other cases decided in Chancery which seem to me also to be in accord with the doctrine that a stockholder may be called on to show that his stock has been paid up, though he himself, when he acquired it, did not intend to become the owner of unpaid stock.

On the other hand, it is contended that *Waterhouse* v. *Jamieson* (3), favors the Appellant's views. That case, in effect, decides that the Appellant, having paid what he agreed for the shares, and all that was required to be paid by the registered articles of the association, was not liable to be called on to contribute to pay the debts of the Company, though it had been fraudulently

(1) 1 De G. & J., 372; (2) L. R. 2 H. L., 325; (3) L. R. 2 Sc. App., 29, (1870).

entered on the articles of association that £100,000 was paid up and only £5,000 would be called for. It was not alleged or pretended that the Appellant was a party or knew of the fraud. The House of Lords held the Appellant was only liable to pay what he was required to pay by the articles of association and his agreement with the Company, and having done so he could not be compelled to pay more by the liquidator representing the rights of the creditors, than he would have been obliged to pay the Company under the articles of association (1).

There the deed showed the liability of the shareholders and persons taking stock under it, and by the statutes the articles of association bound the Company and the shareholders therein to the same extent as if the shareholder had subscribed his name and affixed his seal thereto, If, under the Canadian statute under which this Company's charter was obtained, the Company and the Directors had been authorized to issue stock on the terms on which these shares were issued to Griffith, then *Waterhouse* v. *Jamieson* would apply, and shew that the Defendant, if he had taken the stock from the Conpany or from Griffith, would not be liable for what is now the unpaid portion of the stock.

Carling and *Hespeler's* cases (2) really do not touch the point which arises in the case before us. There the Company were authorized to issue paid-up shares to Walker, and they were issued at his request to Carling and Hespeler as such. They were Directors of the Company, ; it was held that as they never intended to become proprietors of any but paid-up shares, they would not be liable as contributors. In that case *ex*

(1) Joint Stock Companies Registration Act, 1856, sec. 10; (2) L. R. 1 Ch. Div., 115.

parte Daniell, though not sustained on the ground on which it was put in the report, another view was suggested which was thought to be more correct, yet the case itself, though not approved of, was not overruled. In argument it was clearly distinguished from *Carling's* case, as the Directors in *Daniell's* case were not authorized to issue paid-up shares; in *Carling's* they were. So here they were not authorized to issue stock as paid up, which was only half paid up. *Currie's* case (1), decided before the Lords Justices, asserts the same doctrine as in *Carling's* case, and lays down the proposition that you cannot fix upon any person any engagement larger or other than that into which he has entered.

In that case the 100 shares on which Currie was intended to be made liable, were issued to one, Butcher, as paid-up shares on an arrangement between him and the Company, and *Turner*, L. J., said:—"The agreement with Butcher was either valid or invalid. If the agreement were valid, then neither Butcher himself nor any alienee from him could be called upon to contribute in respect of those shares. But if, on the other hand, that agreement was invalid, the transaction must be disregarded altogether." The Directors were held liable as contributors on a hundred shares required to be held by them as Directors, and which they had agreed to take under the articles of association.

The case of *Guest* v. *Worcester, Bromyard & Leominster Railway Company* (2), which was not referred to in the Courts below or on the argument, seems to be in favor of the Appellant's contention. That was an application to issue a *scire facias* against Padmore & Abell, alleged shareholders in Defendant's Company. The ap-

(1) 32 L. J. Ch., 57; 7 L. T., N. S., 487; (2) L. R. 4 C. P., 9.

plication was made under section 36 of 8 & 9 Vic., c. 16, Imp. st., Companies' Act, 1845. That section, with others, having been made applicable by the special act, the effect of the section is, that if any execution be issued against the Company, and there cannot be found sufficient whereon to levy such execution, then such execution may, by order of the Court, to be made after notice given to the shareholder, be issued against any of the shareholders to the extent of their shares not then paid up ; and the execution creditor may inspect the register of shareholders to ascertain the names of the shareholders, and the amount of capital remaining to be paid on their respective shares. An execution had been issued against the Company and returned *nulla bona*. It was sworn that Padmore & Abell, appeared, from an inspection of the register to be holders of 1500 shares of £10 each in the Company, no part of which had been paid up. From affidavits filed it appeared that the Company in 1864, being in want of money, applied to a Banking Company with whom they kept an account to allow them to overdraw £5,000. After some negotiation, their request was acceded to, on the terms of their depositing with the Bank, by way of security, fully paid up shares in their Company, to the nominal value of £15,000. On 7th September, 1864, a resolution of the Directors was agreed to for the purpose of carrying out the arrangement, and a certificate for 1,500 shares of £10 each was issued to Messrs. Padmore & Abell, the Chairman and Manager of the Bank, as trustees for the Bank, in the following form:—

"These are to certify that Richard Padmore and Martin Abell, of Worcester, Bankers, are the registered proprietors of 1,500 shares, No. 4308 to 5807 of the Worcester, Bromyard & Leominster Railway Co., subject to the

rules and regulations and orders of the said Company, &c."

Across this certificate was written by the Secretary of the Company: "These shares are registered as fully paid up in the books of the Company." After they were threatened with proceedings, Messrs Padmore & Abell inspected the register of the shareholders and call book of the Company and found their names appear in the former as the holders of 1,500 shares, number 4,308 to 5,807, and opposite their names in the call book was the following memorandum: "Deposited at bank as security for overdraft." It was stated that Padmore & Abell had not given the Company authority to place their names in the register of shareholders otherwise than as above. That the Company obtained the £5,000 which still remained unpaid. No calls had ever been made on them, though the whole £10 per share had been called up against the other shareholders.

It was contended on the argument, that a creditor cannot stand in a better position than the Company itself. If the Company could not enforce the calls against these gentlemen by action, a judgment creditor could not have a *scire facias* against them.

On the other hand, it was argued, the true doctrine was laid down in *Lindley* on partnership, at p. 618, that the issue of paid-up shares otherwise than for full value received, is *primâ facie* a breach of trust on the part of the Directors and the Company, and its creditors are entitled to have such shares treated as not paid up. It was further argued, that if they have for an illegal purpose allowed themselves to be held out as shareholders they are bound, and that *Oakes* v. *Turquand* (1) shewed that there may be a difference between the rights of a

(1) L. R. 2. H. L., 325.

creditor and the rights of the Company against a shareholder.

Bovill, C. J, :—" The bank never contemplated paying calls, but accepted the certificate as a security for their advance on the faith of the statement written thereon, that the shares were registered in the books of the Company as fully paid-up shares."

In order that the matter might be taken to a Court of Error, the Court allowed a special case to be prepared within a month. *Bovill*, C. J., thought this the proper course, though he said he had not the shadow of a doubt. He further said the authorities referred to were very strong, but, independently of them, he should be prepared to hold that these gentlemen were not liable. *Byles* and *Keating*, J. J., concurred.

There does not appear to be any further report of the case, and it is probable it rested there.

There is this distinction between that case and the one before us. There the paid up stock was merely held as a security, and the holders did not claim to exercise the rights of a shareholder, or apparently authorize their names to be entered on the register as such. It may be proper to observe here, that in subsequent editions of *Lindley* on Partnership, the passage above referred to is altered.

The language of the Companies Act of 1845 referred to, giving the creditors of the Company the right to issue execution against the shareholders to the extent of their shares not then paid up, is very like the right to the creditors to sue the shareholder for an amount equal to that not paid up of his stock by the Canadian statute.

It is urged, that the state of things which would give the right to issue an execution under one statute ought to sustain an action under the other, and the case just

referred to seems to me to be the strongest authority I have met in favor of the Defendant. But the parties in whose names the shares were registered were not in truth shareholders in the ordinary sense. They were mere trustees holding the shares as security for a debt, and the Company would have all the value of them if they increased in value, and they could not enforce the payment of calls or treat them as shares not paid up.

This vein of argument, that the creditor could not enforce rights which the Company could not, runs through the later cases, and seems strongly put forth in *Carling's* case, which was only recently decided.

It must not be overlooked that the person who took this stock from the Company intended to become a *shareholder* of the Company, and so did this Defendant, and by the express words of the statute (no. 27 subsection 19, sec. 5) until the whole amount of his stock has been paid up, the shareholder is declared to be individually liable to the creditors of the Company to an amount equal to that not paid up thereon. No doubt the purchaser paid up all he agreed to pay, but still there was 40 per cent. of the amount of this stock not paid up, and it is the statute which makes this payable and not the agreement of the party.

I think the doctrine contended for by Appellant, if carried out, will work great injustice to creditors, and as there is a distinction between the decided cases and the one before us, I do not feel warranted in overruling the judgment of the Ontario Court of Appeals. No doubt the language of some of the cases referred to might justify a contrary decision, but the cases are distinguishable, and, as I think, the view presented by the Court of Appeals the correct one, and calculated to work out

what was the real intention of the Legislature, I think we ought to sustain their judgment.

I do not think we should give a strained construction of these statutes for the purpose of giving increased and perhaps fictitious value to stocks in incorporated companies; we ought rather to have in view the protection of the creditor against the devices of reckless or unscrupulous speculators who may manage these companies or purchase their stock.

RITCHIE, J.:—

I think there are really only two questions in this case to be determined. At the times mentioned in the declaration, was Defendant a shareholder in the Lake Superior Navigation Company, holding nine shares as alleged? If he was, had these shares in fact been actually paid up?

As to the first, I think beyond all doubt Defendant was a duly registered shareholder, had been elected, and had consented to become a director in the Company, and acted as such, and now actually claims to be the holder of the shares in controversy, simply affirming, as to the second question, that the shares, so far as he is concerned as a shareholder, are paid-up shares, and that nothing remains due thereon that he is liable to pay.

It cannot be disputed, that these shares never were actually paid up, but were issued as paid-up, on payment of 60 cents in the dollar instead of 100, leaving 40 per cent. of the capital of the Company represented by these shares wholly unpaid. It is not, in my view, necessary to inquire why this was done, the question being, could it be legally done so as to relieve the holder of the stock from the claim of a creditor of the Company in the

position of the Plaintiff? The 27 and 28 Vict. ch. 23, section 27, expressly declares: "That each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the Company, to an amount equal to that not paid up thereon."

The effect of such an arrangement, if valid and effectual to make the shares paid up shares, would simply be practically to alter the terms of the charter and the liability of shareholders under the law without any authority of law that I am aware of.

The allotment of these shares was perfectly valid, and the acceptance of them and causing himself to be registered in the books of the Company as the holder of them made the recipient a shareholder, and fixed on him all the liabilities which were imposed by law on shareholders; any understanding or agreement, which was entered into between the Company or the Directors and the person taking such shares, to interfere with such legal liability and deprive creditors of rights thereby secured to them, cannot be, in my opinion, of any avail as against creditors; any such understanding or arrangement was, in my opinion, a collateral agreement between the Company or Directors and the shareholder, and, I humbly think, the mistake in Defendant's contention is in assuming that Plaintiff's rights depend upon a contract between the Company and the Defendant or the party under whom he became a shareholder. I think, on the contrary, Plaintiff's rights depend on a statutory contract between himself as a creditor and the Defendant as shareholder, wholly independent of any contract between the shareholder and the Company; that the shareholder's liability is not to be measured or governed by any such contract, but by the liability to creditors imposed on the shareholder the moment he becomes a stockholder;

that neither the charter nor the law ever contemplated that, as regards the creditors or as affecting their rights, the Company could issue, or shareholders accept, shares as paid up, which, in fact, were not paid up; that it was intended creditors should have a right to look to the actual value subscribed and to the full amount of the shares so subscribed as their security.

As we are not now settling the rights of the Defendant and the Company as between themselves, or of the shareholders as between themselves, it is unnecessary to discuss or express any opinion in respect to these matters. It may be, that as between the Company and the shareholder this collateral arrangement may have secured the shareholder immunity from calls, and as between the shareholders themselves, may have entitled the holder of this stock for all purposes of internal management and regulation of the Company, voting, receipt of profits or dividends, &c., &c., to be considered a holder of paid-up shares, but in regard to the payment of debts, he cannot, I think, be heard to say as against creditors, that he is a holder of paid up shares, when in fact he is not, but is in truth and in fact the holder of shares on which 60 cents on the dollar only have been paid.

In *Hope* v. *International Financial Society* (1), *Brett*, J. A., says,—"I think that the amount of capital which may be embarked in a Company, and which amount is named in the memorandum of association is a condition of the memorandum of association. So also is the kind of business which the Company has to carry on."

Now, in this case the charter provides that the nominal capital of the Company is $64,000, that the number

(1) L. R. 4 Ch. Div., 339.

of shares is 128, and the amount of such shares is $500, that the amount of stock subscribed is $32,500, and the amount paid up was $3,400, and then the law provides as we have seen, that each shareholder shall be individually liable to creditors until the whole amount of his stock is paid up. I must confess my inability to understand how any Company or directors can legally make a new charter for themselves and say that each share of stock shall be $300 instead of $500, and each shareholder not be individually liable to creditors for the amount of the stock as fixed by the charter, but only be liable to the extent of 60 per cent. as fixed by the Directors.

If the Directors could issue these shares at 60 per cent., I can see no reason why they might not do so at a much lower rate or even at a nominal sum, and so carry on business with a limited liability but with no such capital as the charter contemplated, and no such security as the law provided for the protection of the public, thus availing themselves of all the privileges and benefits conferred by the charter, but ridding themselves of all the burthens and liabilities imposed on them, and without which it cannot be presumed such privileges and benefits would ever have been created.

The interest of the public and the law alike, in my opinion, demand that parties, who have obtained special privileges for carrying on mercantile, manufacturing or other businesses with limitations of liability and possibly in direct competition with individuals whose whole wealth may be at stake dependent on the result of the enterprise, should be held with a certain degree of strictness to the charter; and the restrictions and protections, which the Legislature has, for the security of the public, imposed, should be fairly enforced on behalf

of the public, and that, thus privileged, the Company and those becoming shareholders and availing themselves of the limited liability thus secured to them, should not be permitted, by arrangements amongst themselves, to neutralize and destroy the security the law gives those dealing with them.

If Defendant had been induced to take these shares by the Company's representations, fraudulent or otherwise, the contract was not void, but at most only voidable, and subsisted until rescinded (1).

It never was rescinded in this case; on the contrary, the holder became and acted as a Director when he might or ought to have known from the books of the Company exactly how the stock stood.

If he wished to get rid of the liability incident to a shareholder, and he had a right to repudiate the transaction, he should have done so at the earliest time possible; have disaffirmed and determined his relation, or, in the words of the Vice-Chancellor (2) "promptly, clearly and unequivocally" repudiated the contract. Any laches in this respect would undoubtedly preclude him at this late day, and after the rights of creditors have intervened, from setting up such representations as a release of his obligations as a shareholder. But the contract has never been annulled or sought to be annulled on either side, the Defendant desires to remain a shareholder still, he wishes only to get rid of the obligations which, as a shareholder, the law imposes on him.

It would appear, however, that the Company were by no means clear as to this stock being paid-up stock

(1) See *Reese River Silver Mining Company; Smith's* case, L. R., 2 Ch. App., 604, and L. R. 4 H. L., 64; and *Ogilvie* v. *Currie*, 18 L. T., N. S., 593; *Ætna Insurance Company* v. *Shields*, Ir. L. R. 7 Eq., 246;
(2) *Ætna Insurance Company v. Shields*, Ir. L. R. 7 Eq., 274.

though issued as such; for, in the stock book of the Company, the stock in question is not entered as paid up. The entries in the stock book relating to Griffith's stock, are:—

Subscribers Seal.	Residence.	Date of Signing.	No. Shares.	Remarks.	Attestation.
T. Griffith & Co., L. S.	Toronto.	January 16, 1871	Two	Paid up.	C. P.
" " "	"	February 6, 1872	One	Paid up.	J. L.
" " "	"	March, 7,	Two	do	F. M. L.
" " "	"	April, 5,	Ten		J. S.

Under these headings are four entries. The three first are all filled in, and under the heading "Remarks" are entered as "paid up"; but with respect to the last entry which covers this stock, there is no such entry as "paid up," and on the counterfoil from share book signed by Griffith is entered two shares at $300=$600. Thos. McCraken says: "The scrip did not, on its face, show it was paid up, so I made enquiry, as usual. I asked Mr. Carruthers if they were fully paid-up shares, and he told me they were. I did not ask Mr. Carruthers to let me examine the books of the Company, the ledger, stock book or journal or any book, and I did not in fact examine them." On 25th April, 1873, Griffith assigned to McCraken the shares in trust. In January, 1874, McCraken became a Director, and on 25th April, 1874, he became holder of the shares absolutely.

On the contrary, the copy of Mr. Griffith's transfer to Defendant is as follows:----

"For value received, William Griffith, of Toronto, hereby assigns and transfers unto Thomas McCraken, of Toronto, in trust, and assigns fourteen shares, on each of which has been paid five hundred dollars, amounting

to the sum of seven thousand dollars, in the capital stock of L. S. N. Co., limited, subject to the provisions of the Act which incorporates the said Company, as well as the rule and regulations laid down by the Board of Directors."

"Dated 25th April, 1875."

"I do hereby accept of the foregoing assignment of fourteen shares in the L. S. N. Co., limited, assigned to me in trust above mentioned, at the office of the Company, this 25th day of April, 1873."

"THOS. MCCRAKEN,"

"*In Trust*."

This puts the stock forward not as stock issued as paid up, but as stock "on each share of which had been paid $500," certainly a most inaccurate way of stating the transaction, for on each share $500 had certainly not been paid up But, in my view, this does not alter the case. I only mention it to show that there is really no hardship on Defendant of which he can fairly complain should he be held liable. Had a proper examination of the books of the Company been made, the true state of the stock would have been readily ascertained, and the Defendant, having, so soon after becoming the registered holder and before being registered as the absolute owner, acted as Director, was in a peculiarly favorable position in this respect.

With respect to this, Lord *Chelmsford* says, in *Downes* v. *Ship* (1) "In the case of *Oakes* v. *Turquand*, I expressed my agreement with the opinion of my noble and learned friend, Lord *Cairns*, in the case of *ex parte Peel* (2), as to its being the bounden duty of a person to ascertain, at the earliest practicable moment,

(1) L. R. 3 H. L., 359. (2) L. R. 2 Ch. App. 674, 684.

what is the charter or title deed under which the Company in which he has agreed to become a shareholder is carrying on business."

In *Bridgers'* case (1), a Bank local agent, being requested to take shares in order to induce others to become shareholders, offered to apply for shares on condition that he should be called on to pay nothing for the shares; but that all payments should be deducted out of his commission on shares sold by him, and upon being told by the manager of the Company that he would "be allowed the privilege of paying them up as convenient," he applied for 100 shares, which were allotted him, and he was registered as the shareholder of the shares, but he never paid any money. He signed a proxy paper under protest that it should not cancel the agreement as to the non-payments on his shares, and attended two meetings of the Company. His commission was insufficient to pay for the shares. Held, that he had entered into an absolute contract to take shares with a collateral agreement as to the effect of taking them, which did not prevent him from being made a contributory.

Giffard, L. J., in *Bridger's* case (2), says: "There may have been an agreement that his calls were to be paid only in a particular way, but he agreed to be a shareholder *in præsenti*, and cannot be heard to say he was not a shareholder, because he had entered into that collateral agreement."

Langer's case (3), confirming decision of *Stuart*, V. C., by *Cairns*, L. J., shows, that if a party has become a registered shareholder on certain false representations, that is not a question as to which the public or other share-

(1) L. R. 9 Eq., 74; (2) L. R. 5 Ch., 308; (3) 18 L. T., N. S., 67.

holders have anything to say, he may have cause for redress against some person who has made an untrue representation to him, but has no case for having his name removed from the list.

The Defendant may or may not have any remedy against the persons making the representations. The creditors certainly could not. The Defendant ought to have known exactly what the law was, and what obligations it imposed on shareholders, and he cannot, in my opinion, escape any liability by showing that he inadvertently became a shareholder, or that others misrepresented the true facts, and so induced him to become a shareholder in ignorance of the extent of liability he incurred.

The 25th section of the Companies' Act, 1867, says: "Every share in any Company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by contract, duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.

Equally strong are the words of the Statute of Canada, 27 and 28 Vict., ch. 23, which says:—

"That each shareholder, until the amount of his stock has been paid, shall be individually liable to the creditors of the Company, to an amount equal to that not paid up thereon."

In *Blyth's* case (1), it was held that this 28th section of the Companies' Act was in favor of creditors, and did not apply as between the Company and the shareholders.

As in that case, so in the case before us between

(1) L. R. 4 Ch. Div., 140.

Griffith and the Company, the shares may be paid up, but the shares were not actually paid, and so Plaintiff is, in this case, as Blyth was in that, "a holder of unpaid shares," and is liable unless he can prove that the shares have been paid for.

STRONG, J.:—

I need not repeat the facts of this case, or the question which is presented for the decision of the Court, as they have already been fully stated in the judgment just delivered by the Chief Justice.

Two cases have been decided on an enactment contained in the Railway Act (1), precisely similar in expression to that in question here (2); *Macbeth* v. *Smart* (3) in the Court of Appeals in Upper Canada, and *Ryland* v. *Delisle* (4) in the Privy Council, on an appeal from the Court of Queen's Bench for Lower Canada.

I refer to these cases to point out that they are no authorities for a proposition which it has been assumed they warrant, viz.: That in an action brought by a creditor under this enactment the creditor sues on a statutory liability imposed upon the shareholder by the statute, and not upon the contract entered into by the shareholder with the Company. This proposition has, it appears to me, been too readily assumed by the Court below, and in that lies the fallacy of the judgment which we are called upon to review in this appeal.

The words of the statute are: "Each shareholder, "until the whole amount of his stock has been paid up, "shall be individually liable to the creditors of the Com-

(1) Cons. Stat. Can., cap. 66, sec. 80; (2) 27 and 28 Vict., cap. 23, sec. 5, sub-sec. 19, no. 27; (3) 14 Grant, 298; (4), L. R. 3 P. C. C., 17.

"pany to an amount equal to that not paid up thereon, "but shall not be liable to an action therefor by any "creditor before an execution against the Company has "been returned unsatisfied in whole or in part, and the "amount due on such execution shall be the amount "recoverable with costs against such shareholders."

This section is in *pari materiâ* with the 36th section of "The Companies' Clauses Consolidation Act, 1845" (1), the only difference between the two enactments being, that the English Act authorized the creditor to apply summarily to the Court in which the action against the Company had been brought for leave to issue execution instead of requiring him to bring a new action against the shareholder as provided by the Canadian statute. The liability of the shareholder was defined in almost the same words, for the execution against shareholders was to be limited "to the extent of their shares in the capital of the Company not then paid up." The Courts, although possessing the power of ordering execution to issue, upon motion in the first instance, yet, in order that questions relating to the shareholder's liability might be raised on the record and so made subject to review in error, without which there could have been no appeal, invariably required the judgment-creditor applying for execution against a shareholder to proceed by writ of *scire facias;* a mode of proceeding which was substantially equivalent to the action against the shareholder required by our statute. Therefore, decisions upon this section 36 of the English Act are directly applicable to the present case.

Then, *Macbeth* v. *Smart* did not decide that the statute in any way extended the liability of the shareholder to the creditors beyond that which he had undertaken in

(1) Imp. Stat. 8 and 9 Vict., Cap. 16.

his contract with the Company, save, perhaps, in this respect, that whilst a call was by the statute made a condition precedent to the right of the Company to sue, the right of the creditor to bring an action was not dependent on the action of the Company making a call. What was decided in *Macbeth* v. *Smart*, and the only point there adjudged, was that the shareholder could not set off against the creditor a debt due by the Company which in an action for calls would have constituted a good subject of set-off against the Company; the grounds being that the statute of set-off was applicable only in cases where there was mutuality of liability, which the rule of Courts of Equity as to equitable set-off also made essential. The Court of Chancery had determined that the creditor's title to sue was derived through the Company, and that, as in the case of an ordinary assignment of a chose in action, the assignee takes subject to the debtor's right of set-off against the original creditor, the assignor, so the shareholder's action was open to the same defence. This contention was clearly erroneous, for, as the Court of Appeals determined, the creditor did not sue on a title derived through the Company, but on one which the statute, subject to the fulfilment of certain conditions, vested in him as soon as he became a creditor, and therefore there was no such right of set-off as had been established by the decree of the Court of Chancery.

In *Ryland* v. *Delisle* (1) a different point was determined, for that decision of the Privy Council did not, as has been assumed, involve the same question of equitable set-off which had been raised in *Macbeth* v. *Smart*.

In *Ryland* v. *Delisle* the action was on the same statute, the Railway Act (1), sect. 80, but what was

(1) Con. Stat. Canada, cap. 66.

there insisted on by the Defendant was not set off, but that the liability on the shares had been extinguished and satisfied by the compensation of a debt due by the Company to the shareholder prior to the bringing of the action; a very different question from that of set off. For had the debts by and to the Company been mutually exigible at the same time, by the operation of the law of Lower Canada, as to compensation, they would have extinguished each other *ipso jure*, and there would have been no more a liability remaining which the creditor could enforce against the shareholder than in the case of payment to the Company by the shareholder of the full amount of his shares before the bringing of the creditor's action.

No calls having, however, ever been made by the Company, it was held in *Ryland* v. *Delisle* that the debt of the shareholder to the Company had never been payable, and that consequently no compensation had been operated.

This case, whilst it recognizes the right of the creditor to sue as an original right conferred by the statute, not one derived through the Company, also concedes the right of the debtor to discharge himself from liability to the creditor by paying or satisfying the Company.

The conclusion to which I have come that the judgment of the Court of Appeals is erroneous, and ought to be reversed, is founded on two distinct propositions. First: I am of opinion that if this had been an action against Thomas Griffith, the original allottee of these shares, the Plaintiff would not have been entitled to recover. Secondly: That the Defendant having purchased the shares for value and in good faith as fully

paid up, is not liable in this action, even if the original allottee would have been. I will take up these two grounds *seriatim.*

The allotment of the remaining shares of the Company, pursuant to the resolution passed at the general meeting of the shareholders of the 15th March, 1872, at a discount of 40 per cent deducted from the nominal value of the shares, though beyond all question *ultra vires* of the Company, illegal and void, as being in effect a reduction of the share capital prescribed by the charter, has been nevertheless found by all the Courts who have had to deal with this case, to have been a measure adopted without any taint of a fraudulent object, but in perfect honesty and good faith. It is equally a fact beyond all controversy, that these shares were not subscribed for eagerly as a matter of speculation, but were purchased to assist the Company, and to enable it to carry on its business, and that Mr. Griffith and the other subscribers would not have taken the shares on any other condition than that they were not to be called upon to pay for them more than 60 per cent. of their nominal amount; that this discount on the price was not a condition collateral to a contract to purchase shares at all events, but was an essential part of the contract entered into by each subscriber for shares allotted under the resolution of the 15th March, 1872, and that the payment of the 60 per cent. was a condition precedent to the vesting of the shares.

Then the contract being to pay sixty cents in the dollar and no more, could the Company in an action on the contract for the price, after making a call for the whole value of the shares, have sued Mr. Griffith for the whole amount? Certainly not. Why? Because when an obligation arising *ex-contractu* is sought to be enforced,

the measure of the Defendant's liability is to be found in the terms of the contract itself. Then Mr. Griffith had paid for these shares all he ever agreed to pay, and satisfied all the liability he ever contracted for in respect of them. It is, however, said that although as between Griffith and the Company, he might not have been liable beyond his contract, yet the statute makes him liable to the creditors beyond his contract. That it makes him liable to the creditors of the Company for the full amount of the shares in money, although he may have guarded himself by the most positive contract not to pay the full amount or to pay the full amount not in cash but in money's worth, work or goods. This is assumed to be warranted by the words "until the whole amount of his stock has been paid up." The question is then brought to this, did the Legislature intend by these words to impose, beyond the express agreement of a party taking shares, an obligation to pay the whole nominal value of the shares in cash, for, if in spite of his express agreement, a party who contracts to purchase shares at a discount for less than their nominal value is liable to make good a residue of the price which he expressly contracted not to pay, so also if he contracts to pay for his shares not in cash but in goods or money's worth he is equally liable to lose the benefit of his latter contract if he is sued by a creditor. Now, a *priori*, putting the authority of decided cases aside altogether for the present, I am of opinion that the statute contains decisive internal evidence that the proper construction of these words is that the shareholder shall be liable for the unpaid residue of what he contracted to pay and for that alone.

The words "not paid up" imply an obligation existing before the right of the creditor attaches

by the return of the writ of execution *nulla bona.* Then in whose favor could an obligation to pay the nominal value of the shares exist? Not certainly in favor of the Company upon a contract which the shareholder never entered into with them, or rather in contradiction of the express contract which he did enter into, that he was only to pay a reduced price or money's worth, (this is the expression used in the English cases) instead of money; and, of course, the price remaining unpaid which the statute gives the creditor the right to avail himself of cannot mean any unpaid liability to any other person or body than the Company.

That there is nothing to prevent a Company such as this from agreeing to take payment for its shares not in money but in money's worth, work or goods, at agreed on rates according to calls, is shewn by numerous English cases. The nice question which has arisen in these cases, and which has no application here, is whether the agreement to take shares is separate and distinct from that to receive payment otherwise than in cash; for, if the exceptional mode of payment is a condition or essential term of the contract, there can be no question but that the Company and its creditors are bound by it (1). The distinction I have adverted to is well defined by two well known cases which have arisen in England, *Simpson's* case (2) and *Elkington's* case (3). Lord *Cairns*, in *Elkington's* case, puts it thus: "The question for determination is, did "the Applicants intend and agree to become shareholders *in præsenti* with a collateral agreement as to what "should be the effect of their so becoming shareholders?

(1) Brice Ultra Vires, 2 Ed. p. 357. and cases there collected; (2) L. R. 5 Ch. App., 306; (3) L. R. 2 Ch. App.,522, see also *Currie's* case, 2 De G., J. & S., 367.

"or, on the other hand, did they agree, that if, and "when, a certain preliminary condition should be per- "formed, and not otherwise, they would become members "and shareholders? In the first case they are contri- "butories, in the second case they are not." This still remains the law in England, subject to this, that a contract to pay for shares otherwise than in cash now requires registration. No similar provision requiring registration has been enacted here.

If, therefore, the interpretation the Respondent contends for is to be given to this section when applied to a case like the present, of an illegal purchase of shares as paid-up shares at less than their nominal value, it must equally apply to a case of a perfectly good legal contract for the purchase of shares in consideration, not of money, but of the equivalent for money, of value to be paid in goods or work. If in the one case the contract of the parties is overridden by the statute, so equally must it be in the other. If in the case where the shares have been issued at a discount and the party taking them has expressly contracted that he shall not pay more than the cash price which he has handed over, so equally in the case, where he has agreed not to pay any cash at all but to pay with his goods or his work—a contract not *ultra vires* like the other but perfectly legal—he can be made by the creditor, in spite of his bargain, by force of this section of the statute to pay in cash. In other words, in every case, beyond the contract which the shareholder enters into with the Company, the law invariably annexes another in favor of the creditor, which may vary, even contradict the express terms of the actual contract, and that this is an effect of the statute which it is beyond the power of a shareholder to con-

trol. Independently of the English authorities, which, as I shall show, are altogether against such a construction, the very unreasonableness of the consequences points to a different intention on the part of the Legislature, which, without doing any violence to language, is compatible at once with the rights of the shareholders and the reasonable claims of the creditors.

The bargain with the Company must be the measure of the shareholder's obligation; the liability sought to be enforced under this section is not one arising *ex delicto*, but is entirely based on contract, whether arising from the agreement of the parties or from the statute, for at most, if the statute has the effect the Court below has attributed to it, it can only be considered as annexing an additional term in favor of the creditor to the contract, not fixing the Defendant with liability for any tortious conduct. Then, there being this single liability on the part of the shareholder to pay just what he has agreed to pay and no more, and to pay in the particular manner he has contracted to pay and not otherwise, there is still ample room for the application of the statute, by giving it the construction which the English cases have put upon the precisely similar provision in the statute already referred to (1), namely: that whilst the extent of the shareholder's responsibility, whether he has agreed to take paid-up shares at a discount for cash, or shares to be paid for otherwise than in cash, is to be found in his contract, he is liable upon that and upon that alone. Whilst every presumption repels a construction which makes a man liable under the statute beyond the terms of the agreement he entered into, there is nothing unreasonable in providing that on a certain contingency,

(1) 8 and 9 Vict. cap. 16, sec. 36.

and subject to certain conditions, a contract originally entered into with a corporation may inure to the benefit of the creditors of that corporation. The words "amount equal to that not paid up" have, therefore, reference to the amount in cash not paid up under the agreement for the purchase of the share. In other words, the shareholder undertakes an alternative liability; it can make no difference to him whom he pays. *Primâ facie* he is to pay his primary creditor, the Company, but in a certain alternative, and subject to compliance with certain preliminary conditions, the contract for the shares is to inure to the benefit of a secondary creditor, the judgment-creditor of the Company, but the shareholder's liability is precisely alike in both cases—the object of the statute having been not to compel shareholders to pay the full cash value of their shares in all cases, if called on to do so by the creditors of the Company, but to transfer to the unsatisfied execution-creditor the benefit of the contract between the Company and the shareholder, whatever that contract might happen to be. Let me guard myself here against misapprehension by saying that I by no means adopt the doctrine of the Court of Chancery in *Macbeth* v. *Smart*, for, in my judgment, that decree was most properly reversed by the Court of Appeals. I do not regard the execution-creditor as being subrogated to the rights of the Company against the shareholder, such as they stood at the time of the action brought against the shareholder, and as being, therefore, liable to be affected by equities or anything else short of actual payment, or satisfaction, equivalent to payment, arising subsequent to the contract for the shares. The statute, in my view, gives a contingent right to the creditor originally which nothing done by the Company short of obtaining actual satisfaction can prejudice.

The Company and the execution-creditor whose execution has been returned *nulla bona* are both creditors *in solido* and up to the time of an action being brought by the creditor against the shareholder, he may, if he does so without fraud, pay either the Company or the execution creditor at his election.

Then how does the case stand in point of authority? We find at least two cases in the English Reports which are authorities for the construction I have propounded. The cases of *Ashworth* v. *Bristol and North Somerset Railway Co.* (1), and *Guest* v. *Worcester Railway Co.* (2), both decided under the corresponding section of the English Act before referred to, are precisely in point. The shares, it is true, in these cases were deposited by way of security ; but no legal distinction can depend on this difference in the facts, since the persons sought to be made liable in both of these cases were shareholders whose shares were not fully paid up, and to make a distinction between absolute purchasers and holders of shares for security merely, would be to introduce a purely arbitrary qualification not warranted by the terms of the statute.

Without intending to set up a text writer however eminent as an authority against the learned Judges of the Court of appeal, I may venture to refer to a work on a subject with which English lawyers of the present day are necessarily very familiar, and which contains internal evidence of its value as a safe guide in applying the English authorities. I mean Mr. *Brice*'s treatise on the doctrine of *Ultra Vires*, a book which, as it has reached a second edition in less than three years, must enjoy some celebrity in England.

At p. 357, of the second edition of his book, pub-

(1) 15 L. T., N. S., 561; (2) L. R. 4 C. P., 9.

lished in March of the present year, Mr. *Brice* cites these cases as authorities for the exact proposition on which, I think, this case ought to be decided; he lays it down in the 117th of the propositions into which his work is divided, that "a person who contracts to take "shares of any kind, or under any condition, can only "be compelled to do exactly what he has contracted to "do." And commenting on this he proceeds to say: "This qualification, if such it be, is clear. A contract "to take shares is like any other contract,—one which "binds both parties to what they have agreed, neither "more nor less. Consequently, the first question is,— "has the person agreed to take paid-up shares and "nothing else, or has he agreed in any event to take "shares, and to call and deal with them as paid up, if "and so far as the law allows?" The answer to this test question in the present case I have already given in the reference before made to the admitted fact that these shares were taken on the express condition that they were to be assumed as paid-up shares at a discount of 40 per cent. deducted from their nominal value.

Therefore, in my judgment, if the Defendant here was Mr. Griffith, the original shareholder, instead of the present Defendant, his transferee, the Plaintiff could not maintain this action.

To go, however, a step further, and to assume that the agreement to treat the shares as paid-up shares was not an essential condition of the bargain, as in fact it was, but that it was, if made contemporaneously, an agreement for payment collateral to an agreement to take shares at all events, or a subsequent agreement as to a particular mode of payment, and that consequently the original subscriber

could, on the principle of *Elkington's* case, have been made liable, the present Defendant would, as a *bonâ fide* purchaser without notice, which he was found to be at the trial, a finding not found fault with in either of the Courts below, be entitled to be exempted from liability. This is the ground on which the judgment of the Queen's Bench proceeded, and it is entirely distinct from that which I have first put forward. It is also amply supported by authority, *Waterhouse* v. *Jamieson* (1), *Bush's* case (2), and *Spargo's* case (3) being all directly in point. The reference in *Spargo's* case to the liability of the original shareholder, who has taken paid-up shares, means, of course, a shareholder who would be liable under the test given by Lord *Cairns*, in *Elkington's* case (4), as having purchased shares, the agreement to treat them as paid-up being collateral, and not an essential condition of the contract as here.

Daniell's case (5) shews that the original shareholder here would be liable not as upon contract but *ex delicto* or *quasi ex delicto* in a Court of Equity, on a bill filed by any shareholder who did not acquiesce in the allotment of shares under the resolution of the 15th of March, the principle being that well known doctrine of Courts of Equity, that every participator in a breach of trust is equally liable with the trustee to make good the consequences of any misappropriation of the trust property. Here the Directors were trustees, and their distribution of these shares at less than their nominal value was a breach of trust, and all shareholders who participated in and authorized that misdealing were equally liable with the Directors. Shareholders who acquiesced in the re-

(1) L. R. 2 Sc. App., 29; (2) L. R. 9 Ch., 554; (3) L. R. 8 Ch. App. 410; (4) See ante; (5) 1 De G. & J., 372.

solution would, of course, not be entitled to complain, but those who were not present might do so, and possibly a suit might be maintained in the name of the Company. But this would not make the Defendant liable, as the principle only applies to those who participated in the breach of trust, and the Defendant is expressly found to be a *bonâ fide* transferee for value without notice (1).

Moreover, the Plaintiff, as an execution creditor, could not assert such an equity. And here I would advert to a distinction between the English Winding-up Acts and the statute applicable to this case, which shews that a false analogy is presented by many of the English cases which, although they are perfectly sound law in themselves, do not apply here. I will suppose that the Defendant here, instead of being a purchaser for value without notice, had, in fact, been a participator himself in the original misapplication of the shares. Under the English acts he would undoubtedly have been put on the list of contributories, and his equitable liability made available to the creditors in that way. Here, however, under the statute which we are construing and applying, all that can be enforced is the common law liability of the shareholder, which must, I submit, be measured by contract only, the creditor having no right to enforce any equities which the Corporation itself might have against its shareholders.

The Court of Appeals were disposed to attach weight to the consideration that the Plaintiff might have contracted on the faith of the liability in respect of these shares, and to assume that any person would have a right to examine the books and records of the Company. Nothing in the act warrants any such assumption. A Company chartered under this statute

(1) *Saunders* case, 2 De G. J. & S., 101,

has a right to keep its books and records as much concealed from the public eye as an ordinary man of business has, except in so far as the statute has otherwise provided; and no provision touching a right to examine the books can be found except that in section 5, sub.-sec. 19, no. 22, which requires that the books shall "be kept open for the inspection of "shareholders and creditors of the Company." As a man must therefore be a creditor before he has a right to inspect the books, it is hard to see how he can say he became a creditor on the faith of what he found in the same books.

There is one point which I have not mentioned, and on which I at one time thought this case might have to be decided. I allude to this: How far can the nullity of a contract, on the ground of its being *ultra* powers, conferred on a corporation by statute, be set up by those who are parties to it; and to what extent is the doctrine of estoppel applicable? This is a very different case from *Oakes* v. *Turquand* (1) where it was held that a transaction voidable, not absolutely void as between the company and a shareholder on the ground of fraud, could not be invalidated after the rights of creditors had attached. The question is a distinct one when the transaction is *ultra vires*, and is thus absolutely void *ab initio*, but whether it is to be considered void to the same extent and in the same manner as a contract is said to be void which offends against the positive rules of law where a party to the contract can set up the illegality (2) does not seem yet to have been entirely settled, though there are authorities favoring the affirmative of this proposition, particularly some of the judgments in

(1) L. R. 2 H. L., 325; (2) *Collins* v. *Blantern*, 2 Wilson, 341.

the *Bank of Hindustan* v. *Alison* (1) in error. If the transaction was wholly void the Defendant would not, of course, in point of law, be a shareholder at all, and on that ground alone would be entitled to keep the verdict (2). I do not, however, place my opinion at all on this principle, but on that which I have first stated, as well as on the distinct ground relied on in the judgment of the Court of Queen's Bench.

I think the order of the Court of Appeals of Ontario should be reversed, and that the verdict as originally found for the Defendant should stand, and that the Respondent should pay the costs both of the Court of Appeals and of this Court.

TASCHEREAU, J. :—

The facts of the case having been fully exposed, I shall make very few observations on the merits of the case. The sole important question we are called upon to decide, is whether a person having in good faith, and for valuable consideration, without notice, purchased shares in a Joint Stock Company incorporated by the Government of Ontario, under 27 and 28 Vict., chap. 23, on representation that the shares were fully paid-up, and which representation was confirmed by the proper officer of the Company, can afterwards be sued under no. 27 of sub-sect. 19 of sect. 5 of the Act. by a creditor, who has discovered that in truth the shares were never fully paid up.

With the greatest respect for the private opinions of the learned Justices of the Court of Appeals for Ontario,

(1) L. R. 6 C. P., 222; (2) See per *Giffard*, L. J., in *Stace* v. *Worth's* case, L. R. 4 Ch., 690.

and for the unanimous judgment rendered by them in this case, I am obliged to differ from the conclusion arrived at by that Court, and to hold that the Appellant should be relieved from the consequences of that judgment, and that this appeal should be allowed.

Starting from the point that the Appellant had no notice or knowledge of the issue of the shares at a discount, but was, on the contrary, informed by the officers of the Company that the shares in question were all paid up, I fail to see how, in contracting with his vendor to purchase shares of a certain value, he can be said to have contracted any other obligation, either towards the Company or the creditors of the Company. To render him so liable would be to declare that the Courts can make contracts for parties and not merely interpret those they have made. Enforcing a different contract against Appellant, would virtually change his contract and make him liable to pay what he did not intend to pay. It would give the creditor in that case two different rights, one against the shareholder for the whole amount and one against the Appellant. The framer of the statute had no such intention. The right to recover against the original shareholder is not lost because he has sold his shares; and to test this:—suppose the first allottee of these shares wished to free himself from his liability towards the creditor, he could in that case effect his object by selling to a person not worth a shilling, and forsooth the Company would have to submit to this. The liability of the Appellant cannot be created in this way in favor of the creditors of the Company if his contract is a limited one, and one in which he entered in good faith.

I fully agree, however, with the proposition that the original shareholders of the Company would be liable,

because they would have entered into the contract with notice. Undoubtedly the contract is voidable, and could be made so at the proper time, but the time being gone by, I do not think Appellant deprived of his right to plead inavoidance as against the creditor of the Company. The recourse of the Respondent is against Griffith, and especially against the Directors of the Company, a recourse which seems to me to be warranted not only by the English law, but by the laws of all civilized nations. The same recourse could be had against the shareholders who were parties to that very extraordinary transaction of altering the amount of the capital and reporting the shares to the public at large as fully paid up, if really the transaction was *ultra vires*.

Now, it is a principal of law, when some person must suffer from the wrongs of the others, the guilty should be in the first instance held responsible, rather than to see those who have not participated in the fraud put in the same footing as the perpetrators of the illegal act. The consequences of a different doctrine are fraught with danger to the commercial world. I, therefore, am disposed to reverse the judgment of the Court of Appeals of Ontario, and to confirm that of the Court of Queen's Bench, with costs in favor of Appellant in each and every Court.

FOURNIER, J.:—

Par lettres patentes émises en vertu du ch. 23 de la 27 et 28 Vict., une société limitée fut constituée sous la désignation de "The Lake Superior Navigation Company," au capital nominal de $64,000, représenté par 128 actions de $500 chacune.

Après quelque temps d'existence, les deniers prélevés

par la souscription au capital et par l'émission d'un certain nombre d'actions, se trouvant épuisés, il devint nécessaire de s'en procurer d'autres afin de continuer les opérations commencées. Dans ce but on essaya de mettre sur le marché une autre émission d'actions, mais il ne se présenta point d'acheteurs. Après cette tentative infructueuse, les Directeurs prirent la résolution d'émettre à 40 pour cent d'escompte la balance souscrite du fonds social, en le répartissant parmi les actionnaires dans la proportion du nombre de parts que chacun d'eux possédait déjà. Ce projet soumis à une assemblée générale des actionnaires, spécialement convoquée pour le prendre en considération, fut adoptée sans opposition.

En conséquence de cet arrangement Thomas Griffith, un des actionnaires originaires, souscrivit dix parts additionnelles pour lesquelles, après avoir payé 60 pour cent il reçut le certificat ordinaire constatant qu'il était propriétaire d'autant d'actions payées. Il transporta plus tard ces mêmes actions, avec quelques autres, à William Griffith, son frère, de qui l'Appelant McCraken en fit ensuite l'acquisition le 25 avril 1873. Dans ces divers transports ces actions sont mentionnées comme complètement payées (paid up).

L'Intimé McIntyre ayant obtenu contre la dite Compagnie, le 18 décembre 1874, jugement pour la somme de $852.35, fit ensuite émaner contre les biens de celle-ci, une exécution à laquelle le shérif fit un rapport de carence.

Après ce préliminaire indispensable pour recourir à l'action directe donnée par la loi ci-dessus citée, aux créanciers d'une Compagnie dont les actionnaires n'ont pas complètement payé leur parts, le Demandeur porta la présente action pour obtenir le montant de son juge-

ment de l'Appelant McCraken, sur le principe que ce dernier était encore débiteur d'une somme de $1800, sur le nombre de parts qu'il détenait dans la dite Compagnie. McCraken répondit à cette action par divers plaidoyers, dont un seul reste maintenant pour la considération de cette Cour, savoir: que les actions dont il était propriétaire étaient complètement payées, *paid up in full*, entrées comme telles dans les livres de la compagnie, et qu'il en était devenu acquéreur de bonne foi, pour bonne et valable considération.

L'honorable Juge qui a présidé au procès en première instance après avoir entendu la preuve a prononcé son verdict en faveur de l'Appelant, déclarant qu'il était acquéreur de bonne foi " that the Defendant was a *bonâ fide* purchaser for value received without notice."

Le jugement de la Cour du Banc de la Reine fut conforme à ce verdict; mais plus tard, la Cour d'Appel et d'Erreur d'Ontario l'infirma sur le principe que malgré sa bonne foi, l'acquéreur en vertu de la 27me section de l'acte déjà cité, demeurait responsable envers les créanciers de la compagnie pour un montant égal à celui de l'escompte de 40 pour cent auquel les parts en question avaient été vendues.

Cette clause est ainsi conçue :

" Each shareholder, until the whole amount of his stock has been paid up, shall be individually liable to the creditors of the Company, to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor before an execution against the Company has been returned unsatisfied, in whole or in part; and the amount due on such execution shall be the amount recoverable with costs against such shareholder."

Ce langage est certainement assez clair pour ne laisser

aucun doute sur l'existence du recours des créanciers contre les actionnaires dont les parts ne sont pas complètement payées. Mais en est-il de même pour celui qui devenu, de bonne foi, acquéreur au-dessous du pair, de parts mises dans la circulation publique a été ensuite régulièrement reconnu par la Compagnie comme actionnaire et propriétaire de parts acquittées (fully paid up) ? Ou en d'autres termes, un actionnaire devenu tel par transport de bonne foi, d'actions dans une Compagnie incorporée, est-il obligé de justifier qu'il a payé le pair pour les actions dont il est devenu propriétaire ; ou ce qui revient au même, les actions de la Compagnie lors même qu'il apparaît à leur face qu'elles sont payées, ne peuvent-elles être ni vendues ni achetées au-dessous du pair, sans que par cela même l'acheteur ne soit exposé un jour ou l'autre à devenir responsable envers les créanciers de la différence entre le pair et la valeur commerciale qu'il a payée.

Poser ainsi la question c'est presque la résoudre, et cependant elle ne peut l'être autrement, d'après les faits ci-dessus exposés. C'est donc sur l'interprétation de cette section 27 qui semble n'avoir aucun caractère exceptionnel, que repose toute la difficulté. Cette disposition ne concerne que les actionnaires endettés, et en les déclarant responsables envers les créanciers, elle est conforme au droit commun qui, en cas de faillite, rend exigibles toutes les obligations à terme du failli et soumet tous ses biens à l'action de ses créanciers. Elle n'accorde, en réalité à ces derniers qu'un moyen plus expéditif de se faire payer sur les biens de leur débiteur. Il me paraît clair qu'elle n'a pas eu en vue d'atteindre l'actionnaire qui ne doit rien. Sur quoi pourrait-on en effet se fonder pour lui en faire l'application, si la loi ne le déclare formellement.

L'Appelant que l'on prétend ici, tenir responsable, n'a pu s'obliger envers la Compagnie qu'en la manière ordinaire soit *ex contractu* soit *ex delicto*. Par le verdict prononcé en sa faveur il est évident qu'il ne s'est rendu responsable par aucune faute ou délit de sa part. Ce n'est donc que par les termes de son contrat qu'il a pu s'obliger envers la Compagnie. Cependant cela ne se peut, puisque par son contrat tel que ratifié par elle, il est devenu propriétaire d'actions payées *en plein*. Il ne les aurait certainement pas achetées, s'il n'avait sincèrement cru qu'elles étaient intégralement payées. Si, lorsqu'il s'est présenté pour se faire inscrire, les Directeurs l'eussent averti qu'il restait encore 40 pour cent dû sur ces actions, pour lesquelles la Compagnie, ou ses créanciers, pourraient revenir contre lui, il n'eut sans doute, pas voulu payer plus qu'il n'était convenu, et il aurait alors certainement, ainsi qu'il en avait le droit, répudié le contrat qu'il avait fait avec son vendeur. Mais bien loin d'en agir ainsi, la Compagnie qui connaît son contrat l'approuve et inscrit l'acquéreur comme propriétaire d'actions payées. Il y a eu alors de la part de celle-ci, de la négligence ou de la mauvaise foi en ne révélant pas à l'Appelant le fait que ses actions n'étaient pas réellement acquittées. En effet la loi impose aux Directeurs l'obligation de n'admettre aucun transport d'actions sur lesquelles il y a des versements dus, etc. Alors, comment leur faute ou leur négligence qui peut bien, comme administrateurs, les rendre responsables envers les intéressés, peut-elle en même temps entraîner la responsabilité de leur victime? Pour arriver à cette conclusion il faudrait du moins établir, ce qui n'a pas été fait, la complicité de l'Appelant dans leur conduite. Prouver de plus que le dommage éprouvé par la Compagnie ou ses créanciers, est bien

son fait, soit qu'il ait violé une disposition formelle de la loi, soit qu'il ait omis de se conformer à une de ses dispositions impératives. Aucune de ses conditions ne se rencontrent dans le cas actuel.

Pour le rendre responsable, ne faudrait-il pas au moins trouver dans ce statut une disposition spéciale déclarant non-seulement la nullité de sa transaction, mais prononçant en outre, comme pénalité pour y avoir pris part de bonne foi, l'obligation de payer une somme qu'il ne s'est jamais engagé de payer. La loi n'a déclaré rien de tel et n'a pu le faire. Puisqu'elle a bien pourvu au mode de faire payer l'actionnaire endetté, si elle eût voulu atteindre l'acquéreur de bonne foi de parts ostensiblement acquittés, mais qui en réalité ne le seraient pas, elle n'eût pas manqué de l'exprimer. Ne l'ayant point fait, on ne peut tirer argument de son silence pour sévir contre des actionnaires induits en erreur par les directeurs. Je ne vois donc rien dans cette loi pour justifier la prétention du Demandeur. En l'admettant, ce serait au contraire se mettre en contradiction manifeste avec ses dispositions au sujet des pouvoirs des Directeurs concernant les transports d'actions, en imposant aux actionnaires une responsabilité que la loi n'a pas en vue et à laquelle ils n'ont jamais entendu se soumettre. En effet, la loi, n'a pu vouloir assimiler l'acquéreur d'actions payées avec le souscripteur originaire ou avec l'actionnaire encore débiteur. Cet acquéreur n'a point contracté les mêmes engagements qu'eux, il n'a même fait aucune remise de fonds à la Compagnie, ni contracté l'obligation d'en faire, puisque le montant de ses parts a été versé entre les mains de son vendeur. Mais s'il en était autrement et que la prétention de l'Appelant fut admise, toute société incorporée deviendrait impossible ; la cir-

culation de ses actions serait arrêtée, et une loi qui a pour objet de les protéger, interprétée de cette manière, n'aurait en réalité abouti qu'à les faire disparaître. Telle n'a pas été assurément la pensée de notre législature qui, évidemment, n'a eu en vue par la 27e sec. que de faciliter le recours des créanciers contre les débiteurs de la Compagnie et nullement de créer une responsabilité nouvelle dans un cas où il n'en existait pas auparavant. Les créanciers, en vertu de cette section, n'exercent que les droits de la Compagnie contre ses débiteurs, l'Intimé n'a donc rien à réclamer de l'Appelant que celle-ci n'a jamais considéré comme son débiteur et qu'aucune disposition légale ne déclare responsable en pareil cas.

En outre, si on remonte à la transaction intervenue entre les Directeurs et Thos. Griffiths, premier acquéreur du stock en question, qu'arrivera-t-il dans ce cas-là ? Elle ne peut certainement pas être considérée autrement que comme légale ou comme nulle. Dans le premier cas, elle doit être exécutée ; dans le second, si on la considère nulle, elle doit l'être dans son entier. Elle ne pourrait être acceptée pour une partie et répudiée pour l'autre. Alors il s'en suivrait que la nullité n'en pourrait être demandée à moins d'offrir en même temps de remettre le prix d'achat. L'adoption de ce parti, en forçant ainsi les créanciers à racheter des parts sans valeur deviendrait désastreux pour eux. S'il est vrai qu'en aliénant des actions au-dessous du pair les Directeurs ont fait un contrat que les tribunaux doivent déclarer nul, cela ne leur donne certainement pas le pouvoir d'en substituer un autre tout contraire à la volonté des parties. Puisqu'un pareil transport est nul comme contraire à la prohibition de la loi, n'est-il pas plus raisonnable et plus juste d'en tirer la conclusion

que l'actionnaire qui l'a consenti est, malgré cela, demeuré responsable envers la compagnie du montant des actions qu'il a souscrites, et que c'est à lui et non à son acheteur de bonne foi qu'il faudrait s'adresser pour obtenir le paiement de la balance due.

Une autre considération qui n'est pas sans importance, c'est que la conduite des Directeurs n'a point causé de dommage à la Compagnie ni à ses créanciers. Tout au contraire, ce stock qui, d'après la preuve n'avait pu trouver d'acheteur à aucun prix, a réalisé pour le bénéfice commun des intéressés un profit de 60 centins dans la piastre. N'ayant rien trouvé ni dans notre statut ni dans les faits de la cause pour justifier la prétention de l'Intimé, j'ai été très heureux de rencontrer des décision rendues en Angleterre qui la repousse comme exorbitante et souverainement injuste. Ces décisions ont été prononcées dans l'interprétation d'une loi dont le principe, quoique mis en pratique par des procédés différents, est le même que celui introduit par la 27e sect. de notre statut. Je ne les passerai pas en revue, l'analyse complète qui en a été faite par quelques uns des mes collègues me dispensent de le faire. Je me bornerai à en rapporter quelques passages d'une application évidente à cette cause.

In re The Imperial Rubber Co. (1) Dans cette cause, comme dans celle qui nous occupe maintenant, on voulait aussi tenir responsable un acquéreur de *paid up shares.* Sir *W. M. James* en prononçant son jugement sur l'appel, après avoir mentionné que Bush (la partie que l'on voulait rendre responsable) "had bought under that title which is a perfect and complete title upon the documents *which this Company* is itself bound by " continue à s'exprimer dans

(1) L. R. 9 Ch. App., 554.

le vigoureux langage qui suit : " I am of opinion that it would be an act of the grossest injustice if we are to endeavour to make him liable on these shares." " I am bound to express my regret and disapprobation at and of official liquidators in these Companies who think that this particular section of the Act, because it was made for the benefit of creditors, is intended to enable them to make innocent and honest men pay money which they never intended to pay. It is a mistake to suppose that the Court is called upon to put a forced construction upon the Act for the purpose of enabling that injustice to be done."

Je citerai encore la cause du " *Great Northern and Midland Coal Company* (1), dans laquelle il a été décidé " That the transaction could not be affirmed in part and repudiated in part, and consequently the directors if treated as shareholders must be treated as *paid up* shareholders and not placed on the list of contributors in either case."

Je m'appuie également de l'autorité des décisions rendues dans les causes suivantes dans lesquelles la même doctrine a été maintenue.

Re Western Canada Oil Lands and Works Co., Carling's case (2) ; *Gray's* case (3) ; *Saunderson's* case (4).

HENRY, J. :—

This action is brought by the Respondent to recover from the Appellant, a shareholder, the amount of a judgment for eight hundred and twenty-six dollars and eighty-five cents, which he recovered against the Lake Superior Navigation Company (Limited), with interest

(1) 3 De G. S. & J., 367 ; (2) L. R. 1 Ch. Div., 115 ; (3) L. R. 1 Ch. Div., 664 ; (4) 3 De G. & S., 66.

and costs. An execution against the Company was issued and a return of *nulla bona* thereon made as required by the statute.

The Defendant has filed several pleas, but the only important ones are—

1st. A denial that any more money was due on the shares.

2nd. On equitable grounds, that the shares were fully paid up, entered, as such, in the books of the Company, and that the Appellant purchased them for a valuable consideration and in good faith. Issue was taken upon all the pleas in the suit, but any reference to the other pleas is unnecessary.

I need not repeat the facts in evidence, further than to state that the shares in question were issued to Thomas Griffith, a Director, and other shares to the other Directors, at the rate of sixty cents in the dollar, and he received the certificates of stock. Attempts had been *bonâ fide* made to sell the stock, but no purchasers could be found; and I feel satisfied the shareholders took the stock at the price named, more to obtain funds for the Company than as a desirable speculation, and gave, as subsequently shown, full value for it, if not more. This purchase, under the circumstances, may have been voidable, as being apparently against the terms of the charter, which provides for the nominal capital of the Company, but as to which, in this case, I feel it unnecessary to give an opinion. So far, however, as appears, the transaction bears no mark of fraud or moral breach of faith.

Those shares, therefore, so alloted and paid for, were subsequently transferred to William Griffith, *as fully paid-up shares*, he purchasing them in good faith *as such*, and without notice that they were not so. He subsequently, for valuable consideration, sold and transferred

them to the Appellant, who purchased them for a valuable, and, in my opinion, sufficient consideration, in good faith, and without notice. It is, however, sought in this action to make him pay the remaining forty per cent. of the nominal value of those shares, under the provisions of section 27, cap. 23, 28 and 29 Victoria.

The right of action being founded solely on that section, it is, consequently, of the first importance that we should interpret it so as properly to carry out the objects it had in view ; and we can only effectually do so after a consideration of the position of creditors of an insolvent company in the absence of such legislation. The part of the section referred to reads thus :—" Each share-" holder, until the whole amount of his stock has been " paid up, shall be individually liable to the creditors " of the company to an amount equal to that not paid " thereon." I have carefully considered all the cases cited at the argument, and many others, and I have failed to find one to sustain the position necessary to success, taken by the Respondent; but, on the contrary, several in opposition to his right to recover.

The Appellant, and those under whom he claims, paid all they ever expected or agreed to pay; and I must be fully convinced of my obligation to construe this section so as, under the circumstances, to make him pay more, before deciding that he should be required to do so.

Section 10 of the same Act authorizes the Directors to " call in and demand from the shareholders thereof, " respectively, all sums of money by them subscribed, " at such times and places, and in such payments or " instalments as the by-laws of the Company may " require and allow."

The power of the Directors to enforce collections for stock is limited to " all *sums subscribed.*" As, therefore,

neither the Appellant nor either of the Griffiths' *subscribed* to pay at any time the remaining forty per cent. of the nominal value of the stock, it could not be recovered by the Company for the best of all reasons—the absence of any contract or promise, express or implied, to do so. If, indeed, the transfer was fraudulent on the part of Thomas Griffith and the other Directors, or amounted to a legal breach of trust on his part and theirs, the Company might, if it did not ratify the transfer, have avoided it, and caused it to be returned under proper and equitable terms; but here the Company did ratify the transfer and were all parties to to it. Reading sections 27 and 10 together, is it unreasonable to conclude that the former refers to, and was intended to refer to, the amount of stock "subscribed" and agreed to be paid for? It is clear *the Company* could recover for no other, and if the Legislature meant that a creditor should recover money from a man who had never agreed to pay it, I cannot help feeling that more explicit terms should, and would have been, employed. After reading all the cases most carefully, I have failed to discover one which sustains the contention that a person in the position of the Appellant should be made a contributory; or forced to pay more than he contracted to do, under the circumstances like those in this case. In some particulars the judgment-creditor after a return of *nulla bona,* occupies a more favorable position than the Company. The latter, in cases where instalments under by-laws are payable, can only recover *after calls duly made.* The creditor can recover *without any calls being made,* but this is from the peculiar wording of the statute, and imposes no liability beyond which the party contracted for, dispensing merely with the "call;" and is similar in princi-

ple and result to the legislation which would dispense with the presentation of a promissory note payable on demand. The money was due in both cases, but, in the present one, no money was *due* between the original contracting parties.

In the matter of the equitable set off, the creditor is placed in a better position than the Company, for when his writ is issued, the money then due and unpaid for stock, becomes a debt due to the creditor, and shuts out, at all events, any set-off accruing due subsequently. *Watson* v. *Mid-Wales Railway Company.* (1)

The directness and certainty of the remedy is of vital importance to a creditor acting promptly, but for which, he might be almost without any, having otherwise to enforce his claim by tedious and often unsatisfactory proceedings against the shareholders. These, and other material advantages given by the legislation in question, are sufficient, in my opinion, to warrant it, independent of the one now contended for, and I feel, justified in concluding that the clause in question is abundantly beneficial; and quite sufficient to satisfy the amending spirit of the Legislature, without giving it such a forced construction as is asked for; and by which contracts would be improperly extended beyond the intention of the contracting parties, and money recovered by a creditor to which he has no equitable or legal right. From evidence before us, it is clearly shown that the stock was not, at the time of the allotment, or since, worth more than it was sold for, and the creditor is no worse off, at all events, than he would have been had it not been sold. It may be answered that if the stock had not been so sold, the Company would have been then incapable of going on, and the Respondent would not,

(1) L. R. 2 C. P., 593.

in that case, have become a creditor. That argument I consider of too speculative a character to be entitled to much weight. Why then should he (the creditor) be put in a better position by the sale, and be permitted to recoup the loss in a business transaction with the Company out of funds never due to the Company? And I may here say that the English statute is the same in substance as the Canadian; the only difference being that the creditor in England could issue an execution on a *scire facias*, instead of bringing a suit. I am sustained in my conclusions on this point by the judgment *in re Imperial Rubber Company* (1). The Company in that case had agreed to purchase property by fully paid-up shares from Tucker. They were allotted to Tucker, and he sold those in question to Bush. Held, that the shares were fully paid-up shares in the hands of the purchaser from the allottee. This case was decided in 1875, and shows pretty significantly that we would commit an error were we to put the forced construction on the governing section of the Act we are asked to do. It was on an appeal by the official liquidator of the Company from the decision of Vice Chancellor *Bacon* against the application to make Bush a contributory. Lord Justice *Sir William James*, delivering judgment on the appeal, after stating that "apparently Mr. Bush brought under that title, which is a perfect and complete title, upon the documents *which the Company* is itself bound by," gave utterance to the following significant and wholesome language: "I am of opinion that it would be an act of the grossest injustice if we were to endeavour to make him liable on those shares. I am bound to express my regret and disapprobation at and of

(1) L. R. 9 ch., App., 554.

official liquidators in these Companies, who think that this particular section of the Act, because it was made for the benefit of creditors, is intended to enable them *to make innocent and honest men pay money which they never intended to pay.* It is a mistake to suppose that the Court is called upon to put a forced construction upon the Act for the purpose of enabling injustice to be done."

If, then, to permit the creditors, through the official liquidator, to recover money in opposition to an agreement "which the Company is itself bound by," and to make innocent and honest men "pay money which they never intended to pay," would be "enabling injustice to be done," I can discover nothing in the section in question to give *one* creditor suing thereunder any better right than the liquidator for *all* the creditors, to seek payment from an "innocent and honest" shareholder occupying the position of the Appellant. From the latest governing cases, as well as from my own appreciation of legal and equitable principles, I feel myself called upon to decide against the Respondent. I feel convinced that we have no power in the present proceedings to alter the contract of the Appellant, and that the creditor is not in a position to ask to have the contract avoided. If the Company ever could have done so, it was only by remitting the Appellant to his *status quo*, before the purchase, and that the Respondent does not seek for or wish. Were we in a position to decree anything to the Respondent (which I feel we are not), it could be only to the extent of the difference between the actual market value of the stock and the price given by Thomas Griffith, when it was purchased by him, and such a decree would in this case I presume, be of little service to the Respondent. My opinion, is, however

clearly against the existence of any such power, and I feel that the creditor in such case can do no more than the Company, and must either wholly adopt, or seek to avoid, the contract, if the circumstances should warrant the latter course.

In re Great Northern and Midland Coal Company, Currie's case (1), the directors became alienees of 100 paid-up shares of an allottee who received them from the Directors as an alleged part payment of property purchased by the Company. The same directors were holders also of other paid-up shares taken by them for attendance fees. The validity of the purchase and the attendance fees were both impugned "Held, that the transactions could not be affirmed in part and repudiated in part, and consequently the Directors, if treated as shareholders, must be treated as paid-up shareholders, and not placed on the list of contributories in either case." Lord Justice *Turner*, in delivering judgment, says: "Contribution must be made according to the liability of the parties at law and equity." "That purchase was either valid or invalid. If valid, it is clear that neither he (the allottee) nor his alienees, can be called upon to contribute in respect of these shares. If invalid, I cannot see my way clear to hold that either a Court of Law or a Court of Equity could do more than treat the purchase as void, and annul the transaction altogether. It could not, as I apprehend, be competent either to a Court of Law or to a Court of Equity, to alter the terms of the purchase, and treat as *not paid-up* shares, what were, given as *paid-up shares*. Fraud, assuming there was fraud, would, of course, warrant the Court in treating the purchase as void, or in undoing it; but it could not,

(1) 3 De G., J. & S., 367, (1862.)

as I conceive, authorize any Court *to substitute other terms*."

"As to the shares taken for attendance fees, I am also of opinion that the Appellants are not liable to contribute in respect of those shares. They were taken, and as it seems to me, improperly taken, as paid-up shares, but the principles which apply to the 100 shares, apply, I think, to these shares also. The transaction *might be undone*, but could not be modelled."

The sale and transfer of stock throughout the world is one of the most important branches of trade. That of one country is sold all over it, and in many others; and a decision such as that asked for by the Respondent, would, and should have, in relation thereto, the most damaging results. No man would be safe in buying stock on certificates setting forth that it was fully paid up, or that which was held out, as such, by the Company issuing it through their responsible officers; and the difficulty of ascertaining the truth of such representations from long distances would necessarily put an injurious clog on sales. I feel myself compelled to the conviction that if my judgment should, in some few cases, prevent a creditor from recovering his claim in the way the Respondent now seeks to do, an immeasurably large balance of evils to the trade of the country would otherwise result; and I, therefore, the more readily conclude the Legislature did not so intend it. I believe the proper jurisprudence to be that which throws a large part of the onus of inquiry upon the party sought to be made the creditor of a Company, and, before occupying that position, of ascertaining precisely how the matter of unpaid-up stock stands. In this case, perhaps, a party could not, as of right, inspect the books of the Company before becoming a creditor, as he might do under the

English statutes, but he always had the option of refusing credit until satisfied of the position of the Company. Had the Respondent here done so he would have no doubt been informed that the Appellant's stock *was fully paid-up*, and if, after that intimation of what all parties considered an honest and fair sale and transfer, he gave credit to the Company with the intention of evoking the aid, to say the least, of a doubtful statute, to intrude a claim for payment between the company and the innocent holder for valuable consideration without notice, by which he would seek to take from the latter more than he agreed to pay, and failed in the attempt, I don't think he should be the object of much commiseration. If he failed to make that inquiry I think he must be taken to have given the credit irrespective of the stock in question, and solely upon the general credit of the Company, and should not be permitted to intervene to the injury of an innocent holder, as the Respondent here seeks to do.

The case of *Macbeth* v. *Smart* (1) was cited as authority for the position that a shareholder, in an action against him, by a judgment creditor of the Company could not set off in equity a debt due to him by the Company, before the judgment was recovered. The decision in that case was by a bare majority of one out of the seven judges. No calls for the unpaid stock had been made, and the case virtually only decides that inasmuch as in the absence of any call *no money was due and payable* to the Company, a set-off could not be allowed. The Company could not sue, and therefore there could be no set-off. The stock, in that view of the law consequently remained unpaid, and in a suit by a judgment creditor he acquired a right under the statute

(1) 14 Grant, 298.

to recover from the shareholder the amount so unpaid, which the Company could not have done in the absence of a call. Had, however, calls been duly made, a sum would then be due to the Company to which the doctrine of set-off could be applied, and to an action to a judgment-creditor of the Company, the shareholder could legally plead a set-off for money due and payable to him by the Company previous to the accruing of the creditor's right of action (1). From all the authorities taken together, I consider that the accruing of the right of action to a creditor of a Company under the section in question, has the same effect and no more, than the notice to a debtor by the assignee of a debt, or *chose in action*, and that therefore a shareholder may defend a claim made by a judgment-creditor, by means of a set-off, for money due and *payable* to him before the accruing of such right, or by showing that he was not *then* indebted to the Company. *In re Matlock Old Bath Hydropathic Company* (2) the shareholders owed £1,000 for shares, but the Company owed him £1,000 for property sold and conveyed by him to the Company. He was placed on the list of contributories by Vice-Chancellor *Bacon*, but, on appeal, his decision was reversed, and it was held that Maynard was to be treated as the holder of fully paid-up shares. Lord *Selborne*, L J., said: "The question in this case is one of payment or no payment. The liability of the Appellant to pay up to the Company the full amount of the shares for which he subscribed, the memorandum of association being unquestionable, and the Company having been free to accept the payment in any honest way. If the contract for the sale of the Appellant's property to

(1) See *Watson* v. *Mid-Wales R. Co.*, L. R. 2 C. P., 593; (2) *Maynard's* case, L. R. 9 Ch. App. 60, (1873.)

the Company, dated the 1st March, 1866, and the conveyances consequent thereon, expressed the true agreement between the parties, the Company became bound to pay the Appellant £1,000, the same sum which he was liable to pay for the shares in question, and there was no difficulty in point of law in setting off one payment against the other. * * * Consistently, therefore, with all that was decided in *Fothergill's* case (1) I think that the Appellant ought not to be on the list for those 100 shares otherwise than as fully paid-up shares." Concurred in by the other Lords Justices *Sir Wm. James* and *Sir T. Mellish*. Under the governing principle of that judgment, I feel justified in concluding, as I have before intimated, that the liability of the shareholder in a case in liquidation, is not greater than that to the Company at the commencement of winding up, with such exceptions as do not touch the points in this case ; and that the position of the liquidator is no better than that of the Company, where the liability to pay, on each side, had previously arisen, and was payable ; and I will here add that I have seen or can find no case where a different rule has been authoritatively laid down or enforced.

In *Leifchild's* case (2) an attempt was made to put him on the list of contributories as the assignee of certain shares in a Company. The shares were subscribed for by Claypole, who assigned a patent to the Company for a nominal consideration of ten shillings, there being also a parol agreement that the delivery of the paid-up shares was the consideration of the assignment. The shares were also represented in the Articles of Association as paid up. Vice-Chancellor *Kindersley* says : " The question is here whether W. Liefchild ought to

(1) L. R. 8 Ch., 270; (2) 13 L. T., N. S., 267 (1865).

be put on the list of contributories." * * * Again "It appears to me there is no reason why Mr. Liefchild should be put upon the list, unless, according to the terms of the Act, he is liable to contribute to the assets." "What do these words mean? Why, that the contributory is liable, with other persons, to pay a certain contribution to make good the liabilities, no one in this case having the right to say that Mr. Liefchild is bound to assist in paying the debts; but it is said that does not apply to creditors. Now, under the original Act, the Court did not concern itself with creditors, but the interests of creditors are now to be consulted; that is to say, by means of contribution the Court is to make up, if it can, the means of paying them. But, unless they can say it is a fraudulent transaction, they can have no remedy anywhere, and if they had, how is the matter to be decided upon a question whether a party is to be placed on the list of contributories or not? Their remedy would be by a bill seeking to set aside the whole transaction."

Here, then, it is again unequivocally held that the only remedy (if any) was, not by making the shareholder a contributory, but by proceedings in equity to avoid the original transfer of shares; and I quote the case, and the learned Vice Chancellor's dicta, in further proof of the position that the Plaintiff here cannot, in the present proceeding, adopt the contract in part and reject it in part, and that, if he cannot do so, the Appellant is entitled to our judgment.

I will now refer to another recent case (in 1868), *Guest* v. *The Worcester, Bromyard and Leominster Railway Company* (1). The Company deposited with the Bank 1,500 shares of £10 each, as security for an advance of

(1) L. R. 4 C. P., 9.

£5,000, the certificates endorsed purporting that the shares were "registered as fully paid-up in the books of the Company (1)." In the "Register" of shareholders the chairman and manager of the Bank were inserted simply as holders of the shares, but in the "call book" was this memorandum: --"Deposited at Bank as security for over draft." No calls had ever been made on them, though the whole £10 per share had been called up against the others. *Bovill*, C. J.: "Mr. Bridge (the Counsel) does not desire to contest the fact, and very properly, for upon the affidavits it is clear that the Bank never undertook any liability to the Company in respect of these shares. *They never contemplated paying calls "but accepted the certificate as a security for their advance, "on the faith of the statement written thereon, that the "shares were registered in the books of the Company as "fully paid-up shares,*" and again, "in a case of this sort, "though I must confess I do not entertain a shadow of "doubt, I do not think the Plaintiff ought to be pre-"vented from trying the question in the form of a "special case. The authorities referred to are very "strong, but, independently of them, I should be pre-"pared to hold that these gentlemen are not liable." *Byles* and *Keating*, J. J., concurred. The points, therefore, that decided that case were, firstly, *That the Bank never undertook any liability to the Company*, in regard to the shares; and, secondly, that they *never contemplated paying the calls*, but, as did the Appellant in this case, took them on the faith of the statement, *that the shares were registered as fully paid-up shares.*

This decision clearly establishes my contention, that applications to make shareholders contributories can only be successfully made where it is in pursuance of

(1) L. R. 4, C. P. 9.

the contract, express or implied, between them and the Company, that the shares are not fully paid-up shares. When that element is wanting, I cannot feel myself justified, in the face of all the controlling authorities, in modelling the contract in this case, in which the Appellant *never undertook any liability to the Company* in respect of his shares, and *never contemplated paying calls.* The *bona fides* and legality of transfers of stock in many of the English cases were impugned, but the invariable answer of the Court has been, in effect, that which I give to the present application, and that is—*that the contract cannot in such proceedings be either avoided or in part only adopted, and, therefore, the shareholder cannot be made a contributory.* I will now refer to another case by which I feel sustained in all the positions I have taken, *in re Western of Canada Oil Lands and Works Company* (1). Previous to this case there were several wherein sales and transfers of stock given in payment of property in violation of the English statute, which provided that *all stock should be paid* for in money, were declared illegal as to consideration, and parties who paid otherwise, and their transferees, were required to pay over again. Those decisions, however, do not appear to have affected late decisions on the other statutes. Walker, in the case last mentioned, entered into an agreement with a person as trustee of an intended Company for the sale to the Company of a property for a certain sum in cash and a certain number of fully paid-up shares. The agreement was not to be binding unless adopted by the Company when formed. The Company was formed and the agreement was set out in the articles. Walker applied to the Appellants to become Directors, which they

(1) L. R. 1 Ch. Div., 115.

agreed to do upon his promising to transfer to them fully paid-up shares to qualify them. They acted as Directors and adopted the agreement for the sale of the property. The number of shares requisite for the qualification of a Director was five; but after the completion of the purchase thirty paid-up shares were, by the direction of Walker, *allotted* to each of the Appellants, and they were entered on the register as holders each of thirty fully paid-up shares; and received certificates to that effect. An order was afterwards made for winding up the Company, and the Master of the Rolls settled them on the list of contributories for "thirty unpaid shares each." "Held, on appeal, that the Appellants (Carling and others), as to the shares allotted to them, stood in the same position as if those shares had been allotted to Walker, and transferred to them by him, and that as there was no contract between them *and the Company* that they would take shares independently of their accepting certificates stating them to be holders of these fully paid-up shares, they could not be placed on the list of contributories as holders of unpaid shares, and the order of the Master of the Rolls was discharged without prejudice to any application that might be made against them under the *Companies Act*, 1862, sec. 165, or otherwise, on the ground that they had entered into a corrupt bargain with Walker. To the statement of the liquidator's Counsel, that Walker, by means of the shares had bribed the Appellants to ratify the provisional contract, by giving them shares as a portion of the proceeds thereof, *James*, L. J., remarked: "There is no doubt that such a transaction cannot stand, but the question before us is whether this order gives you the proper remedy." *James*, L. J., again "There was no contract between the

Appellants and the Company, besides the acceptance of a certain document giving them fully paid-up shares. Are you not altering that by fixing them with unpaid shares?" The Counsel replied: "Where a Director obtains the shares in breach of his duty to the Company, he cannot hold them as fully paid-up;" citing *ex parte Daniell* (1). *Mellish*, L. J.: "There is an affirmance by one Lord Justice, the other doubting or dissenting. Has it been followed?" The latter question was not directly answered, but I can say in relation thereto that if it has been, I have been unable to find any record of it. In delivering judgment, *James*, L. J., says: "We entirely "agree with the Master of the Rolls that these gentle- "men committed a very grave and very reprehensible "breach of trust in accepting a qualification from a "person who was a vendor to the Company, and with "whom it would be their duty to deal as trustees for "the Company; but then the question arises, what is "the mode in which relief is to be given in respect of "such a breach of trust? Of course we are not capric- "ously to punish the persons who have committed it.

"We have to see that if they are punished they are "punished in due course of law. The mode in which "the Master of the Rolls has fixed these gentlemen "is by treating as unpaid shares the shares for which "they are entered in the Register of paid-up shares. "Now, beyond all question, *they never made themselves "liable to take any shares at all. They never contracted "to take shares or to pay for shares; the only contract "between them and the Company was the contract that "arises from the fact that certificates of the shares, as paid "up shares, were sent to them, and they accepted those "certificates.* If, therefore, the case depends on a con-

(1) 1 De G. & J., 372.

"tract between them and the Company, the contract "must either be approbated or reprobated. If the con- "tract was a contract that they would take paid-up "shares, we cannot convert that into a contract to take "unpaid shares." Further on, the learned Lord Justice, referring to the proceedings against the Appellants for the alleged breach of trust committed by them in the acceptance of the shares, says; "I therefore purposely "abstain from saying anything about what may be the "possible results of any proceeding against the Appel- "lants, but I am of opinion *that we cannot in law make* "*these shares unpaid.*"

Mellish, L. J.: "I am of the same opinion. I "entirely agree that the acceptance of these shares on "the part of the Directors was a breach of trust. "* * * There are certainly three things, any one "of which the Company might do," and after stating two of them, he says: "And, thirdly, the Company "might say, although you have made no profit by "selling these shares, yet, by having had them allotted "to you, you deprived us of the power of allotting them "to other persons, therefore you must pay us the sum "which we have lost by reason of our being deprived "of the right of allotting those shares to other persons "who would have 'paid them up.' Of these three "remedies the liquidators may, in my judgment, take "whichever is most beneficial to the Company. But can "they do any more? Can they say, 'although the "'shares which you have taken, which were the "'property of the Company, were absolutely worthless "'or worth very little, both at the time when you took "'them and ever since; nevertheless, inasmuch as nomi- "'nally they were £100 shares we will make you liable "'for that full sum of £100 on each share?' In my

"judgment that would be inflicting an arbitrary punish-
"ment on a trustee for his breach of trust. It would
"not be indemnifying the *cestui que* trust for the injury
"he had sustained, and would be giving him a sum
"which, if the breach of trust had never been com-
"mitted, he would not have acquired. This appears
"to me to be, in principle, wrong." And again: "I
"feel grave doubt whether there is any contract between
"the person who accepts the shares and the Company,
"beyond this, that, of course, by being entered on the
"register as a paid-up shareholder, he at any rate
"becomes a paid-up shareholder. It appears to me,
"therefore, that there is nothing to compel us to do what
"I cannot help thinking it would be a great injustice
"to do, namely, to make gentlemen, who no doubt
"have committed a breach of trust, liable, not for the
"consequences of that breach of trust, but liable to pay
"to the Company a sum of money which, if that breach
"of trust had not been committed, the Company could
"not have recovered. It appears to me that the only
"contract entered into by these gentlemen with the
"Company being that they became members of the
"Company by accepting the certificates of paid-up
"shares, that contract must either be adopted or rejected
"in its entirety. If it is rejected, they are not shareho-
"ders at all. If it is adopted, the Company is entitled
"to say, 'They are not your shares but ours,' but that
"does not make them hold unpaidup shares."

Bramwell, B.: "I am entirely of the same opinion,
"and, therefore, I shall say nothing except that I should
"be very sorry to have it supposed for a moment that
"we consider these gentlemen not to have done wrong.
" * * * I, however, think that the law has quite
"sufficiently provided a remedy for misconduct like

"this without doing what I think we should do if we "supported this order; that is to say, distort the facts "of the case and find that to exist which in reality "does not exist."

Brett, J.: "I am very sorry to be obliged to agree in "this judgment. I should have been exceedingly happy "if I could have agreed with the judgment of the "Master of the Rolls, for I think that the law ought "to be kept as wide as it can be, in order to put an "end, if possible, to this system of Directors taking "paid-up shares; but it seems to me that we cannot, in "point of law, hold that these persons are liable to "pay to the Company the amount of these shares as "if they were unpaid. They can only be made liable "to pay anything to the Company in respect of these "shares *under contract to pay calls in respect of them*, or "by reason of a breach of trust. Now, as I apprehend, "*there never was a contract at all between these gentle-*"*men and the Company* with regard to these shares. "They never entered into a contract with the Company "to take shares at all. If they had entered into a "contract with the Company to take shares, that would "have involved a contract to pay for them. But by "merely taking paid-up shares from a third person "they certainly never entered into any contract with "the Company to pay anything in respect of those "shares, and, therefore, they cannot be held liable to "pay on the ground that they contracted to pay. The "fact of their accepting these shares at the moment "they did, was a breach of trust, but the effect of that "breach of trust *is not to make them liable to pay the* "*nominal amount* of their shares, but to make them "liable as trustees of the Company *for the real value of* "*the shares.*"

I have given lengthy extracts from the judgments in the latter case, as it is one of the latest, and, as I take it, the governing one. There is but one reported since—*Gray's* case (1), and that approves the leading principles in *Carling's* case. Shares were transferred to Gray and another Director as trustees of the Company, to be held as security to the Company for a contract of the party who transferred them. They were not to be registered unless by the direction of the Directors, and were not, until it was done by the official liquidator, who also placed the Directors on the list of contributories, "Held, "that they were not liable to be placed on the share "register or list of contributories * * * under "the express provision that they should not, except by "their own direction, be registered as holders of such "shares."

I will quote shortly from the judgment of *Bacon*, V. C.: "If I were" he says, "to listen to the application "of the liquidator to place the names of these gentle-"men upon the register, I should be doing a thing "directly at variance with common honesty and com-"mon sense. If the law required me to do it, I must "do it, but I feel under no such obligation. The law "has been distinctly settled in *Saunders* case (2), and "the attempts which have been made to diminish the "weight of authority of that case, have been, in my "opinion, wholly unsuccessful." Referring to the agreement not to register the shares without the direction of the Directors, the learned Vice Chancellor says "and these gentlemen consent to become trustees, "but with the express condition that they * * shall "not be entered upon the register of shareholders with-"out their written consent, because that would place

(1) L. R. 1, Ch. Div., 664, (1876); (2) 2 De G. J. & S., 101.

" them under certain legal liabilities. In face of that " plain contract I am asked to hold that what has been " done is equivalent to a registration which would be " altogether to omit and neglect what is the real nature " of the transaction."

Here again is it declared to be law that no person can be put on the register against his own contract, and that principle applies equally strong where an innocent purchaser of paid-up shares and so registered is attempted to be made a contributory for unpaid shares; for the latter would be, equally with the former, a violation of the contract. But let us look at *Saunders* case (1) so recently marked by high legal approval.

Saunders was a local manager of a Company, 500 shares were transferred to him by the manager as a trustee for the Company, by deed which he also executed. He paid nothing for the shares. He subsequently acted as a Director. He was not registered as a shareholder (but the decision was not influenced by that circumstance) and never received any dividends, and the Court was satisfied *that he had never agreed to purchase the shares.*

" Held, that if the Company, which could not be " bound by the transaction, elected to affirm it, Saunders " was only a trustee for the Company and so not a " contributory, and that, if they elected to disaffirm it, " then it not appearing that Saunders was privy to the " breach of duty on the part of the Directors, it must " be rescinded altogether, and that Saunders therefore " was not a contributory."

An order for winding up the Company being made, a question arose as to the liability of Saunders to be placed on the list of contributories, and it came for decision before the Lord Justices.

(1) 2 DeG. J. & S., 101.

Lord Justice *Turner*: "Now, as the case stands on the "evidence, * * * I think the fair and just conclu- "sion to be drawn is, that there never was, in fact, "anything like a sale of the 520 shares in question to "the Respondent, George Leman Saunders, but that "those shares belonging, as they appear to have done, "to the Company, were transferred by the order of the "Directors into the name of the Respondent *in order to* "*qualify him for the Directorship*." [The final transfer to McCraken, the Appellant, in this case was solely to qualify him as a Director.] "The Respondent would "then become a trustee of the shares for the Company "as Williams had previously been. How then would "the case stand as between the Company and the "Respondent? The company, of course, could not be "bound by such a transaction. They might adopt or "repudiate it. Supposing them to adopt it, they "certainly could not insist on their own trustee being "put on the list of contributories. Supposing them, on "the other hand, to repudiate it, would it not be open "to the Respondent to say that the transaction must "be undone *in toto*—that the Company could not affirm "the transaction in part and disaffirm it in part? I "think it would. It might, indeed, be otherwise if it "were shown on the part of the Company that the "Respondent was party or privy to the breach of trust "or duty on the part on the Directors in directing the "transfer to be made. But I am satisfied upon the "evidence that this was not the case, and that the "Respondent did not, in truth, know how these shares "were provided for hi qualification. Upon this ground, "therefore, I am of opinion that this motion ought to "be refused."

The last three cases establish, to my mind most

satisfactorily, what the law is, and the several propositions: First, that before making a shareholder, such as the Appellant, of unpaid stock, liable as a contributory, it must be of the essence of his contract that he should be the holder of *unpaid stock*, as in the cases where the statute requires payment in money. Second, that no stronger position is held by a liquidator to enforce payment of alleged unpaid-up stock than that of the Company; and, third, that the alienee of shares transferred by Directors in breach of their trust, through other persons without notice, and for a valuable consideration, cannot be made a contributory in disregard of his contract, or contrary to its terms. The essence of the contract in this case was the acceptance of fully paid-up shares. The Appellant gave the full market value for them, and if he did not expressly contract not to, he certainly did not contract, to pay any more for them, and never intended or expected to do so. But we are told that the word "unpaid" in this section includes *what was never due or payable* under any contract, and that we are bound so to construe it, and thereby oblige an innocent holder, who has paid the full market price of fully paid-up shares, liable for all the breaches of trust committed by Directors in allotting or issuing shares of which he is in total ignorance, after having made all reasonable enquiries, to pay the difference between the sum paid the Company and the nominal value of the shares. I cannot subscribe to that doctrine; which, with all deference, I must characterize as against "common law and common sense," but. on the contrary, feel bound to hold that "unpaid" in the section means not that which neither of the contracting parties contemplated, but what was fairly and reasonably due and payable

under the terms of the contract by the one to the other.

Appeal allowed with costs.

Attorneys for Appellant:—*Blake, Kerr and Boyd.*

Attorney for Respondent:—*Richard Snelling.*

THE TRUST AND LOAN COMPANY OF UPPER CANADA..... } APPELLANTS;

AND

HENRY JONES RUTTAN..... .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Deed—Escrow—Estoppel.

To a declaration on a covenant for quiet enjoyment in a mortgage to the Plaintiffs (Appellants), executed by T., the Defendants' grantee, R., one of the Defendants (the Respondent), pleaded that T. did not, after the making of that deed, convey to the Plaintiffs.

The deed from Defendants to T. was dated 22nd June, 1855, and the mortgage from T. to the Plaintiffs was dated 10th April, 1855. Both were registered on the 28th July, 1855—the *deed* first. It appeared that there were two mortgages from T. to the Plaintiffs on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J. J.

that a deed from the Defendants to him was necessary to give the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August, 1855.

Held:—On appeal, affirming the judgment of the Court of Queen's Bench, Ontario, and reversing the judgment of the Court of Appeal, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and *the discharge of the other mortgages for which it was given*, and that the Plantiffs, therefore, could recover.

Held also (Per Strong J., the Chief Justice concurring):—that assuming the deed of the 10th of April to have been a completed instrument from its date, the usual covenant contained in it that the grantor was seized in fee at the date of the deed created an estoppel, and that the estoppel was fed by the estate T. acquired by deed of the 22nd June, 1855.

[Henry, J., dissenting.]

Appeal from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of the Court of Queen's Bench of that Province (2) refusing a rule *nisi* to set aside the verdict for the Plaintiffs and to enter a verdict for the Defendant Ruttan.

This was an action commenced in the Court of Queen's Bench for Ontario for breach of covenant for title contained in a deed, bearing date the 22nd June, 1855, and made between the Respondent and Henry Covert of the first part, and Henry H. Thompson of the second part. Thompson, by deed, dated 10th April, 1855, had mortgaged the same lands to the Appellants.

The declaration alleged that the Defendants, by deed, conveyed certain lands to one Thompson, and covenanted with the said Thompson, his heirs and assigns, that "it shall and may be lawful to and for "the said party of the second part, his heirs and "assigns, peaceably and quietly to enter into and have,

(1) Reported 1 App. Rep. O., 26; (2) Reported 32 U. C. Q. B., 222.

"hold, use, possess, occupy and enjoy the aforesaid "lands, tenements, hereditaments and premises hereby "conveyed or intended so to be, with the appurten- "ances, without the let, suit, hindrance, interruption, "or denial of them the said parties of the first part, "their heirs and assigns, or any other person or persons "whomsoever; all that free and clear and freely and "clearly acquitted, exonerated and discharged of and "from all arrears of taxes * * * all former con- "veyances, mortgages, &c.: * * * * for, as the "fact is, the said Thompson, afterwards, for the valuable "consideration of £450, lawful money of Canada, then "paid by the Plantiffs to the said Henry Huddleston "Thompson, by deed, conveyed the said lands and the "estate of the said Thompson therein to the Plaintiffs: "and the Plaintiffs, after the execution of the said deed "to the Plaintiffs, entered into and continued for some "time in the quiet and undisturbed possession of the "premises, yet the Plaintiffs say that after the execu- "tion and delivery of the said deed to the said Thomp- "son, and after the conveyance to the Plaintiffs, certain "persons named (naming them), * * * to whom "a good title to the premises as against the Plaintiffs "and the Defendants, and from either of them, had "accrued in manner hereinafter mentioned, filed their "Bill in the Court of Chancery for Upper Canada "against the said Plaintiffs, the Trust and Loan Com- "pany, and others, and the said Defendants hereto, "Henry Covert and Henry Jones Ruttan, as Defendants, "whereby, after alleging as the fact was, that the said "Defendants hereto, before and at the time of the date "of the said conveyance to the said Henry Huddle- "stone Thompson were seized of the said premises "only upon trust for the said Hannah Eveline Thompson,

"the wife of the "said Henry Huddlestone Thompson, "during her life, and after her decease for the children "of the said Henry Huddlestone Thompson on the "body of his "said wife to be begotten, as tenants in "common, and in default of such issue for the heirs of "one William Hamilton Thompson, and that the said "Defendants hereto had no beneficial interest in or title "to the said premises, although no declaration of the "said trusts appeared on the face of the conveyance "under which the said Defendants hereto were at law "seized of the said premises, and that the said Plain- "tiffs in the said suit in Chancery were the children of "the said Henry Huddlestone Thompson on the body of "his said wife begotten, it was prayed amongst other "things that the said deeds from the Defendants to the "said Henry Huddlestone Thompson, and from the "said Henry Huddlestone Thompson to the Plain- "tiffs, should be delivered up to be cancelled, and the "said Plaintiffs the Trust and Loan Company ordered "to convey the premises to the Plaintiffs named in "the said Bill, and such proceedings were thereupon "had and taken in such suit that on the 15th day of "November, 1867, a decree was duly made and pro- "nounced by the said Court declaring that the said "Hannah Eveline Thompson and the Plaintiffs in the "said suit in the said Court of Chancery (naming "them), were and are benefically entitled to the said "lands, and ordering and decreeing amongst other "things that two proper persons should be appointed "trustees to hold the said lands and premises in trust "for the said Hannah Eveline Thompson for life and "for the said Plaintiffs in the said suit in the said "Court of Chancery as lawful issue of her body by the "said Henry Huddlestone Thompson begotten, as

"tenants in common in fee, and that the Plaintiffs "should execute to such trustees a conveyance of the "said lands to hold for the said Henry Huddlestone "and others (naming them), upon the said trusts there- "by declared, and that the Plaintiffs should deliver "up all deeds, writings and documents in their custody, "possession, or power, including the said deeds from "the Defendants to the said Henry Huddlestone Thomp- "son and from the said Henry Huddlestone Thompson, "to the Plaintiffs to the said trustees, and should de- "liver up possession of the said premises to the said trus- "tees, by reason of which the Plaintiffs have not only "lost and been deprived of the said lands and premises "but have also been obliged to pay the costs and "charges sustained by the said Plaintiffs in the said "suit in Chancery, &c."

The Respondent pleaded that the alleged deed to Henry Huddlestone Thompson was not his deed, and for a second plea: "that the said Henry Huddlestone Thompson did not, after the making of the deed, convey the said lands to the Plaintiffs as alleged."

The original cause was tried before *Galt*, J., at Cobourg, in the Fall of 1870, without a jury.

A new trial to assess damages was ordered by the Court of Queen's Bench (1) and took place at the Spring Assizes, 1875, at Cobourg, before *Richards*, C. J.

From the evidence taken and proceedings had at the trial, the facts are as follows: In 1855, Henry Huddlestone Thompson applied to Plaintiffs for a loan. When money is raised on a loan from Plaintiffs, the money is paid on the applicant's order. The Solicitor makes two reports on the loan—first, when application is made; and, second, when securities are

(1) See case as reported in 32 U. C. Q. B., 222.

completed. E. T. Boulton, Esq., a barrister of Cobourg, did most of the business for his father, the local agent of the Trust and Loan Company; saw the deed of 22nd June, 1855, with full covenants, from Defendants to Thompson, and the mortgage from Thompson to the Company (10th April, 1855), executed; and in his evidence stated that he must have received instructions to prepare the deed from Plaintiffs' solicitors at Kington.

The mortgage and the deed were registered on the same day, viz.: 28th July, 1855, the deed first, being numbered 836 and the mortgage 837. The Company's solicitors made the first report on the 6th August.

The practice of the Company was not to pay money until the mortgage had been returned registered. The money advanced on the mortgage was paid on the order of Henry Huddlestone Thompson, dated 7th August, 1855, and was applied to pay off two mortgages which previously existed.

The second report of the Appellants' solicitor, when the securities were completed, was made on the 10th August, 1855, the concluding part of this report being as follows:

"I further certify, that the deeds enumerated in "Schedule A are the deeds now delivered by me to the "Company, together with the mortgage deed executed "by Henry H. Thompson, and that the sum of four hun- "dred and fifty pounds may now be safely advanced and "paid to him by releasing the properties mortgaged in "Reg. Nos. 708 and 945.

"Dated the 10th day of August, 1855.

(Signed), "JOHN A. MACDONALD,

Solicitor to the Trust and Loan Company of Upper Canada,"

The two discharges were dated 16th August, 1855, and were registered on the same day.

Richards, C. J., decided, that under the evidence and the judgment of the Court (1), the reasonable inference was, that the mortgage was not accepted by the Plaintiffs until after the deed from the Defendants to Thompson, and he found for the Plaintiffs and assessed damages at $4,731.70.

In Easter Term following, Mr. Armour, Q. C., for Defendant Henry Jones Ruttan, moved for a Rule *Nisi* to set aside the verdict, and to enter a verdict for said Defendant Ruttan on his second plea.

The application was refused.

From this judgment, Respondent appealed to the Court of Appeal for Ontario. The appeal was allowed, and it was ordered that a verdict be entered for the Respondent on the issue joined on the second plea of Respondent. Appellants thereupon appealed to the Supreme Court of Canada.

January, 25th, 1877.

Mr. *J. Bethune*, Q. C., for the Appellants:—

The action is for breach of covenant for title contained in a deed, dated 22nd June, 1855, and made between Respondent and H. Covert, of the first part, and H. H. Thompson, of the second part. The covenants were absolute and were broken. The Appellants claim that they are assignees of that covenant by virtue of a mortgage from H. H. Thompson to them, and are entitled to maintain an action upon the covenants. The whole difficulty arises from the fact that the date of the

(1) See 32 U. C. Q. B., 222.

mortgage is earlier than the date of the deed. The mortgage in question was given in lieu and in satisfaction of two other mortgages, and no money whatever passed at the date of the mortgage. The question is one of fact, and great weight should, therefore, be given to the impression of the learned Judge who sat at the trial. The learned Judge declares there was sufficient evidence to shew that the deed was never delivered to the Appellant's until the 10th August. The only witness examined was E. T. Boulton, and his evidence is not unsatisfactory, when we take into consideration the time elapsed since the transaction had taken place. This witness says, that he must have received instructions from Appellants' solicitors to prepare the deed of the 22nd June. It is evident that the Company's solicitors treated the mortgage as subsequent to this sale, and that the deed was not delivered as a deed by Thompson to the Appellants until after he got the conveyance from the Defendants.

There must be two acts coinciding to constitute a good delivery. An intention to accept and also an intention to deliver.

In this case there is no evidence that the corporation ever intended to delegate any right of accepting to Mr. Boulton or Mr. Macdonald. The money was not paid to Thompson till after the making of the deed to him by Respondent, and no person could have had any benefit in treating the mortgage as a deed delivered on the 10th April. The registration is some evidence of that fact, for the latest made instrument, the deed, is registered first, as no. 836, and the mortgage is registered after the deed as no. 837. A deed may be an escrow till after registration. *Parker* v. *Hill* (1).

(1) 8 Met., 447.

The learned counsel relied also on the report of the judgment of the Court of Queen's Bench in this cause (1); *Bell* v. *McKindsey* (2); the opinion of the learned Chief Justice of the Common Pleas, dissenting from the judgment of the Court of Appeal; *Jackson* v. *Phipps* (3); *Washburn* on Real Property (4); one of the Acts of Incorporation of the Appellants (5).

Mr. *Christopher Robinson*, Q. C., for Respondent :—

If it is found that this deed is an escrow, it will be going a good deal further than any other case.

It was not until after the mortgage was made to the Appellants that it was discovered the legal estate was with the Defendants (Ruttan & Covert), and in the absence of any evidence to the contrary, the legal presumption is, that the mortgage was delivered on the date which it bore. *Hayward* v. *Thacker* (6). The evidence of the witness Boulton shewed, that so far as the mortgagor had anything to do with it, he delivered and completed the delivery as far as he could on the 10th April, 1855. He did not, nor was he called upon to do thereafter any act in respect of the execution or delivery of the said mortgage. In ordinary cases of a deed executed, and left with the party's attorney, the deed cannot be an escrow, unless delivered to the attorney as such, not to be delivered till the consideration money is paid or some other condition performed. The deed could not be delivered as an escrow to the party himself. *Cumberlege* v. *Lawson* (7); *Washburn* on Real Property (8).

(1) 32 U. C. Q. B., 222; (2) 3 Grant's E. & App. Rep., 1; (3) 12 Johnson's Reports (N. Y. State), 418; (4) Vol 3, p.262; (5) 7 Vic., c. 63 (Canada), secs. 2 & 68; (6) 31 U. C. Q. B., 427; (7) 1 C. B. N. S., 718; (8) 3 Vol., p. 267, 3rd ed.

A delivery even to a third party is valid and effectual when the grantor parts with all control over the deed. *Doe Garnons* v. *Knight* (1).

Moreover, it must be intended by *both* parties that the delivery should only operate as the delivery of an escrow. *Gudgen* v. *Besset* (2).

Thompson, when he signed and delivered the mortgage to the agent of the Appellants, did all he could, and his estate completely passed. As to power of an agent to accept delivery of an instrument, I refer to *Cincinnati, Wilmington & Zanesville R. R. Co.* v. *Iliff* (3); also *Washburn*, Real Property (4).

Now, the estate of which Thompson divested himself could not remain suspended, but passed at once to the Plaintiffs and became vested in them, subject, however, to be disclaimed by them if they thought fit so to do, which they never did, but until such disclaimer the said estate would remain vested in them. *Cartwright* v. *Glover* (5).

It was quite competent to the Appellants here, on discovering that the mortgagor had no title, to procure a new mortgage, and so obtain the benefit of the covenant in question. Not having thought proper to do so, they cannot infer that the mortgage was only intended to operate as an escrow. The remarks of *Smith, J.*, in *Xenos* v. *Wickham* (6), are here applicable: "That it is better to adhere to plain inferences of fact than to attempt to remedy inconveniences of a negligent mode of doing business by making the facts bend to the exigencies of the negligence."

If actual acceptance, by some overt act of the Plaintiffs, were necessary, in order that the estate, purported

(1) 5 B. & C., 671; (2) 6 E. & B., 992; (3) 13 Ohio State R., 249; (4) 3 Vol., p. 292.; (5) 2 Giffard, 620; (6) L. R. 2 H. L., 306.

to be conveyed by the said mortgage, should be vested in them, a like overt act of actual acceptance by Thompson was necessary, in order that the estate, purported to be conveyed by the said deed, should be vested in him, and none such was proved; a verdict ought, therefore, to have been entered for the Defendant Ruttan, on the plea of *non est factum.*

Admitting that the Plaintiffs had the right to take the mortgage and to keep it until they should have an opportunity to determine whether they would accept it or not, and then to refuse it or accept it, the estate thereby conveyed would nevertheless vest in them, and remain vested in them until such determination was arrived at.

Admitting that the estate purported to be conveyed by the said mortgage did not vest in the Plaintiffs until an actual acceptance thereof by them by some overt act, yet such actual acceptance would be of the estate of which Thompson divested himself by his execution of the said mortgage, and would have relation back to the time when he so divested himself.

The learned counsel also relied upon the following authorities:

Muirhead v. *McDougall, et al* (1); *Mackechnie* v. *Mackechnie* (2); *Exton* v. *Scott* (3); *Muir* v. *Dunnett* (4); *Childers* v. *Childers* (5); *McFarlane* v. *Andes Insurance Company* (6); *Doe Spafford* v. *Brown et al* (7); *Thompson* v. *Leach* (8); *Thompson* v. *Leach* (9); *Butler & Baker's* case (10); *Doe Garnons* v. *Knight* (11); *Xenos* v. *Wickham* (12); *Cumberlege* v. *Lawson* (13).

(1) 5 U. C. Q. B., O. S., 642. (2) 7 Grant, 23. (3) 6 Sim., 31. (4) 11 Grant, 85. (5) 1 K. & J., 315. (6) 20 Grant, 486. (7) 3 U. C. Q. B., O. S., 92. (8) 2 Ventris, 198. (9) 3 Mod., 296. (10) 2 Coke, p. 68, ed. of 1826. (11) 5 B. & C., 671. (12) 13 C. B., N. S., 381; also in 14 C. B., N. S., 435, and 2 L. R., H. L., 296. (13) 1 C. B., N. S., 709.

Mr. *Bethune*, Q. C., in reply :—

Mr. Boulton was not Appellants' agent when Thompson left the mortgage with Boulton, as it was in the hands of a stranger.

June 28th, 1877.

RITCHIE, J. :—

The transaction out of which this controversy arises was an extremely simple one. Thompson, on the 1st day of March, 1855, applied to Plaintiffs for a loan, to enable him to discharge an indebtedness to them, and offered certain property in security. It is obvious, at the outset, that Plaintiffs never intended to make such an advance unless the security was deemed adequate and the title to the property unquestionable; and it is equally clear, that Thompson never intended to convey or incumber the property unless Plaintiffs made the advance. In other words, the making the advance was to be dependent on the adequacy and validity of the security, on the one hand; and the giving the security was to be dependent on the making of the advance, on the other.

With a view to the completion of this very natural and simple transaction, and doubtless for convenience and expedition, Thompson, on the 10th of August, 1855, executed a mortgage to Plaintiffs, which was left with Boulton, a son of a local agent of the Company.

He gives this account of the transaction :—

" I am a Barrister and an Attorney. My father was the " local agent of the Trust and Loan Company here. I " did most of the business. I saw the deed of 22nd " June, 1855, from Defendants to Thompson, and the

" mortgage from Thompson to the Company (10th " April, 1855,) executed. I recollect G. S. Boulton was " Registrar at the time, and he was Deputy Registrar " at one time, and I have no doubt he was Deputy " Registrar at that time. The deed is in the hand " writing of William Henry Van Ingren. The mort- " gage must have been drawn at Kingston and sent up " to me. The name of Mr. Thompson is in my hand- " writing. I must have received instructions to pre- " pare the deed from the Plaintiffs' office at Kingston. " I can't say from which of the Messrs. Macdonald. I " know Mr. Thompson going to Kingston about the " matter. I don't recollect specially anything about " this. In the usual course of business the mortgage " would be registered as soon as possible after I received " it, unless I received instructions to the contrary, " and for that reason *I have no doubt I must have received* " *such instructions or I would not have kept it in that way.* " I looked for correspondence in the matter. Could not " find any. It may be that Mr. Thompson, who went " down several times himself, may have brought up " some instructions which may have been mislaid. I " looked all through the Trust and Loan Company's cor- " respondence and could not find it."

Cross-examined.

"I only recollect going to the *Globe* once and seeing " Mr. and Mrs. Thompson execute this. It was sent by " the Company to us to be executed. I have no doubt " I took it away. I can't recollect if I sent it down to " Kingston, or kept it until it was registered. This " deed from the Defendants to Thompson, I must have " been instructed in some way by the Company to see " it done. To the best of my recollection Thompson " brought up letters. I can't say if the £1000 was paid. " I don't remember if it was."

Re-examined.

"If Mr. Thompson had come to me and asked me to "draw the deed to perfect the title, I think I would "have done it, but I don't think that was the case in "this matter. I could find no trace of any, only the "charges. I think Mr. Thompson got the money at "Kingston himself."

The directions issued by the Company to be observed by applicants contain the following:

"If, however, the applicant is desirous of saving "time and is willing to incur the expenses of obtaining "the Registrar's certificates before the sufficient value of "the property is ascertained, he may transmit to this "office the abstract and certificates with his deeds, when "he sends this application and the receipt for the pay-"ment to the Commercial Bank M. D. In this case the "Title and Registrar's certificate, with the other docu-"ments, will be submitted to the Company's solicitor "for his report, as soon as the Commissioners are satis-"fied of the value of the property, and the information, "&c., regarding the title may be required."

At the time this mortgage was left with Boulton, the report of the appraisers of the Company as to the value of the property had been received by the Company and had been "considered and referred to the Company's "solicitor for his report on the validity of the applicant's "title to the property described in the schedule." It is, to my mind, very clear, that pending this reference and while the transaction was incomplete, the mortgage was not to be recorded, as Boulton's evidence very clearly shows, but to be transmitted, as it appears to have been, to the Company's solicitor (as we find it in his hands as will subsequently appear) obviously to abide the result of his report and the final action of the Com-

pany. On the 6th of August, 1855, the Company's solicitor reported the title good, and expressed the opinion, that a loan to the amount required might be be safely made to the applicant, to pay off his prior loans to the Company. On the 7th day of August the solicitor's report was considered by the Commissioners, and the application was by them again referred to the Company's solicitor to *prepare* and *register* the necessary *deeds and securities*, and to report on the completion; and, on the same day, the applicant gave an order on the Commissioners to pay the proceeds of the loan to the Hon. J. A. McDonald, or a McDonald. All this very clearly shows, that, up to this time, the Company had not accepted any "deeds or securities," or then knew that they had been already prepared or recorded; neither can I discover, that, up to this time, they had, by act or assent, expressed or implied, in any way implicated or bound themselves, nor that they intended to do so till the final certificate of the solicitor was forthcoming. On the 10th of August the solicitor certified that the mortgage had been executed on the 10th April, 1855, but he does not say delivered, and that a memorial for the registry of such deed was executed at the same time, and was duly registered on the 28th July, 1855, and, in conclusion, he certified in these words "that the deeds enumerated in Schedule A are "the deeds *now* delivered by me to the Commissioners "of this Company, together with the mortgage deed "executed by H. H. Thompson, and that the sum of "£450 may *now* be safely advanced and paid to him by "releasing the properties mortgaged in Reg. Nos. 708 "and 945"

This, in my opinion, was the first and only delivery of this mortgage to Plaintiffs, with the intention of

passing the estate to them. When so delivered they were accepted by the Company, and a receipt, signed by the Commissioners, in these words: "We have "*this day* received from the Company's Solicitor the "deeds set forth in the annexed schedule A, and we "have deposited the same, together with a duplicate of "this report, in the strong room of this office. Dated "10th day of August, 1855. (Signed) F. A. Harper, "Commissioner." This was, in my opinion, the first and only acceptance of the deeds by Plaintiffs, and this completed the transaction, which, till then, was, in all its parts, incomplete, that is to say, without binding effect on any party, and up to which time the mortgage was to be held only for the purpose of being delivered to the grantees on the completion and final settlement of the transaction, as it actually was; and this, no doubt, would have satisfactorily terminated the matter but for subsequent proceedings, by which the deed from Ruttan & Covert to Thompson, dated the 22nd June, and registered immediately before the mortgage from Thompson to Plaintiffs, was set aside as being a breach of the trust on which the property was conveyed to them.

I cannot discover in this transaction anything whatever from which I can even infer that Plaintiffs ever intended to accept a delivery of this mortgage as passing the estate, or as being in anyway binding on either themselves or Thompson, until the delivery by their Solicitor, on the final winding up of the matter; nor can I discover the slightest ground for supposing Thompson ever intended to burthen or encumber his property with a mortgage, unless he obtained the loan for which the mortgage was to be the security. Until the application was made, the Plaintiffs satisfied as to

the value and validity of title, loan agreed to be made and mortgage delivered, and accepted as a valid and binding security therefor,—the transaction, and every part of it, was merely in course of negotiation and arrangement, and nothing final or binding on either party. That the mortgage never was intended to operate in any way other than as a security for a loan, and was not to be operative to pass any estate until such loan was made. That it was in the hands of Boulton, or the Solicitor, simply as part of an incomplete transaction, for convenience and to expedite the completion of the business, and that, in so doing, Plaintiffs acquired no right in, or title under, the mortgage, and Thompson parted with no right, title or interest in the property. All the direct evidence and surrounding circumstances of the case negativing, in my opinion, any idea that the delivery to Boulton, or the Company's Solicitor, was a delivery to pass the property to the grantees, the time not having arrived when it was either consistent with the nature of the transaction or the interests of either party that such a delivery should take place.

I have, therefore, no difficulty in arriving at the conclusion that leaving the security with Boulton, and with the Solicitor of the Company, was simply for the convenience of all parties, its ultimate destination being dependent on the final result, to be delivered to the Plaintiffs when the transaction was closed by the loan being made, to be handed back to Thompson if the negotiation failed, and Plaintiffs refused to make the loan; and I think it equally apparent, that it was the intention of all parties that the deed from Ruttan & Covert to Thompson was executed and delivered for the express purpose of passing the property to Thomp-

son and confirming his title therein, and to take effect anterior to the mortgage, to enable him to give a good and valid mortgage to Plaintiffs for the loan he was then endeavoring to obtain from them, any other conclusion being, to my mind, at variance with the accomplishment of the object all parties had in view, and inconsistent with the transaction itself.

I think the principles enunciated by Sir *Charles Hall* in *Watkins* v. *Nash* (1) so very applicable to this case that I quote them at length:

"But, it is said that the deed thus executed could "not be an escrow, because it was not delivered to a "stranger, and that is no doubt the way in which the "rule is stated in some of the text-books—*Sheppard's* "*Touchstone*, for instance—but when those authorities "are examined, it will be found that it is not merely a "technical question, as to whether or not the deed is "delivered into the hands of A B to be held condition-"ally, but when a delivery to a stranger is spoken of, "what is meant is a delivery of a character negativing "its being a delivery to the grantee or to the party "who is to have the benefit of the instrument. You "cannot deliver the deed to the grantee himself, it is "said, because that would be inconsistent with its pre-"serving the character of an escrow. But, if upon the "whole of the transaction it be clear that the delivery "was not intended to be a delivery to the grantee at "that time, but that it was to be something different, "then you must not give effect to the delivery as being "a complete delivery, that not being the intent of the "persons who executed the instrument. As regards "the instrument in question, it might very well, under "the circumstances, be meant and taken as a delivery

(1) L. R. 20 Eq., 265.

"by Watkins to Collins, to be held by him for the pur-
"pose of being delivered over to the grantee when the
"transaction was complete. I see no difficulty what-
"ever in that view being adopted.

"Then, as regards the subsequent delivery, when the
"deed was executed on the 18th April, 1872, by Collins,
"I see no difficulty, if necessary, in holding that, if that
"were a delivery to Skyrme himself, it was a delivery
"to him as an agent for all parties for the purpose of
"that delivery. And in holding that there may be a
"delivery to a third party for the benefit of all parties,
"I am confirmed by the authority of *Millership* v.
"*Brookes*. (1)

"The circumstances of that case are not exactly the
"same as those in the present, and perhaps the person
"to whom the instrument was delivered there was
"really a third person and a stranger; but I consider
"the principle upon which that case proceeded, was
"this: That the delivery was not to the grantee or the
"person who was to have the benefit of the deed, but
"was to some one as the person who was to hold or to
"be considered as holding the deed in an incomplete
"state for the benefit of all parties. Therefore, if it
"be true, as it appears from Mr. Collins's cross-examina-
"tion, that the delivery was to Skyrme, I should not
"feel that to be insuperable evidence against the
"memorandum, which was undoubtedly signed at the
"time, to the effect that the deed was to be an escrow
"and was not intended to be delivered to the grantee.
"But I might go further and say, if it were necessary
"to determine the question, that the document might
"be an escrow, even though there was no particular
"person selected, who, under the circumstances, could

(1) 5 H. & N., 797.

"be considered as being the person into whose hands "it was delivered, it being clear that there was no "delivery at all to the grantee; that the delivery was "not intended to be a delivery to the grantee at all, "and that it was intended to be an instrument incom- "plete as a transfer of the legal estate until the con- "ditions prescribed had been performed. That being "so, it follows that, in my judgment, the Plaintiffs "retain and have the legal estate in the property un- "affected by anything which has taken place.

The appeal, therefore, must, in my opinion, be allowed.

STRONG, J.:—

I have come to the conclusion, that the finding of the learned Chief Justice who tried this case was the correct inference to be drawn from the evidence, and that the appeal ought to be allowed. There is no difficulty about the rule of law applicable to this part of the case.

Although it was formerly essential to make a sealed instrument operate as a mere escrow that express words should be used, such is not now the state of the law, and what would otherwise be an absolute delivery as a deed may be restricted by evidence of the surrounding circumstances shewing that only a conditional delivery could have been intended. Numerous cases, some of which I refer to below, shew this (1). They establish no other rule

(1) *Bowker* v. *Burdekin*, 11 M. & W., 147; *Millership* v. *Brookes*, 5 H. & N., 798; *Pym* v. *Campbell*, 6 E. & B., 370; *Davis* v. *Jones*, 17 C. B., 625; *Gudgen* v. *Besset*, 6 E. & B., 986; *Murray* v. *Ld. Stair*, 2 B. & C., 82; *Christie* v. *Wimington*, 8 Exch., 287; *Furness* v. *Meek*, 27 L. J., N. S., Exch., 34; *Boyd* v. *Hind*, 25 L. J., N. S., Exch., 247.

of law than that I have just mentioned, but they shew the application of the rule to a variety of cases.

I think the whole dealing makes it plain beyond question that there was no delivery of the deed until after the perfection of the title, and that, therefore, the verdict should not have been interfered with.

But for another reason, I think, the Appellants are entitled to succeed on this appeal. Granting that the mortgage deed was absolutely delivered and accepted as a perfect deed as early as the date it bears, I should still be of opinion that the Plaintiffs would be entitled to recover in this action. This mortgage deed of the 10th April, 1855, although it contains no recital, comprises the usual absolute mortgagor's covenants for title. Now, for upwards of 40 years, it has been held in Upper Canada, that covenants for title, especially the usual covenant that the granting party is seized in fee at the date of the deed, a covenant which this deed contains in the absolute not in the ordinary restricted form, are as effectual in working an estoppel as a recital to the same effect would have been. The cases to which I refer, and which are always referred to as the leading cases on this point, are three: *Doe Hennesey* v. *Myers* (1), *Doe Irvine* v. *Webster* (2), *McLean* v. *Laidlaw* (3). Whether these decisions, attributing to the covenants the same efficacy as positive certain recitals are right, it is now too late (4) to inquire, as the principle has become a fixed rule of the law of property in the Province of Ontario, too well established therein to be shaken; and it is, of course, the law of that Province that this Court must administer on an appeal relating to real property situated there, just as

(1) 2. U. C. Q. B., O. S., 424; (2) 2. U. C. Q. B., 224; (3) 2. U. C. Q. B., 222; (4) See *Ram* on legal judgments, p. 292.

much as it is the Scotch law which the House of Lords administers with reference to land in Scotland.

There was, therefore, an estoppel worked by the mortgage deed of the 10th April, 1855, provided nothing passed by the deed. That nothing could have passed is apparent from the history of the title which is in evidence. The legal estate was outstanding in the Defendants, and, assuming that they were trustees for Thompson, he would still have been at law a mere tenant at will by whose conveyance nothing could have passed. It is out of the question to say that, because Thompson was in possession, an interest must be assumed to have passed by his deed; if we had nothing more before us than the fact of Thompson's possession, that would be *primâ facie* evidence of seisin in fee, but we have the whole title before us, from which it appears that Thompson had no estate, except possibly a tenancy at will, which, of course, was put an end to as soon as he assumed to convey. Therefore nothing passed by his conveyance.

That this mortgage deed operated as a conveyance under the Statute of Uses, would make no difference, on the authorities already quoted and some others which I will presently refer to. The estoppel is not worked by the conveyance, as in the case of feoffment or a fine, but by the instrument which is evidence of the conveyance—the indenture. In other words, the estoppel is produced not by the nature of the assurance, —a conveyance by way of bargain and sale operating under the Statute of Uses—but by the nature of the instrument—an indenture—by which that assurance is effected (1). This was the doctrine acted on by Vice

(1.) *Cornish* on Purchase Deeds, p. 7, and *Cornish* Essay on Uses, p. 179.

Chancellor *Leach* in the case of *Bensley* v. *Burdon* (1), upon which *Doe Irvine* v. *Webster* in a great measure proceeded.

In that case it was held that a recital in the release part of a conveyance by lease and release estopped the releasors, though contained in a deed operating as an innocent conveyance.

This decision was afterwards affirmed in appeal by Lord Chancellor *Lyndhurst* (2) and on the same grounds.

It is true, Sir *Edward Sugden*, in *Lloyd* v. *Lloyd* (3) questions this decision, but he does not advert to its having been affirmed in appeal, nor to the distinction between the estoppel having been effected not by the assurance but by the instrument; and he relies on *Right* v. *Bucknell* (4) as having overruled *Bensley* v. *Burdon*, in which he was certainly in error, for a careful perusal of Lord *Tenterden's* judgment in that case will show that though *Bensley* v. *Burdon* is referred to, not a word of disapproval of it is uttered; the decision in *Right* v. *Bucknell* proceeded on the uncertainty of the recital, which was that the grantor was legally *or equitably* entitled. It therefore results from these authorities that the deed of the 10th April, 1855, if it took effect at that date, as a deed duly delivered and accepted, estopped Thompson from denying that he was then seized in fee. Before leaving this part of the case, however, I should add, that the principle of *Bensley* v. *Burdon* and *Doe Irvine* v. *Webster* is affirmed in two New York cases, both decisions of Chancellor *Kent*: *Jackson* v. *Bull* (5) and *Jackson* v. *Murray* (6).

Then, it is a well established principle of the law of

(1) 2 Sim. & Stu., 519; (2) 8 Law Journal, p. 85; (3) 4 Dru. v. War., 369; (4) 12 B. & Ad., 278; (5) 1 Johns. Cases, 80; (6) 12 Johns., 2.

estoppel, that if a man is estopped from denying that he had a particular estate which he has assumed to convey and he afterwards acquires that estate, the estoppel is said to be fed on the accrual of the interest which, by force of the estoppel, is at once carried over to the party in whose favor the estoppel has been created (1).

The leading case *Doe* v. *Oliver*, by which this doctrine was finally established, was a case of a fine where the nature of the conveyance or assurance, not the mere recital in the deed, worked the estoppel; and it was, both in *Bensley* v. *Burdon* and in *Doe Irving* v. *Webster*, denied that this doctrine was applicable to an estoppel by deed merely. In both these cases, however, it was applied to estoppel by indenture; and many cases proceeding on this principle, besides those quoted, are to be found in the reports of the Upper Canada Common Law Courts. This same doctrine has been recognized in a late case in the Supreme Court of the United States, *Irvine* v. *Irvine* (2), where *Strong*, J, says: "It is a general rule that when "one makes a deed of land, covenanting that "he is the owner, and subsequently acquires an "outstanding and adverse title, his new acquisition "enures to the benefit of his grantee, on the principle "of estoppel. As the deed of the Plaintiff in this case "contained an assertion that he was well seized in fee, "and had good right to sell and convey in fee, it would "not be difficult, were it necessary, to show that in "law he was acting for his grantee."

Therefore, the mortgage deed of the 10th April, 1855, assuming it to have been, as the Defendants contend, a

(1) Doe *Christmas* v. *Oliver*, 10 B. & C., 181; 2 Smith's L. C. p. 751; (2) 9 Wallace, (U. S.), 617.

completed instrument, from its date, created an estoppel by the operation of which, when on the 22nd June, 1855, the Defendants conveyed the fee to Thompson, that estate was at once transferred to and vested in the Plaintiffs; in other words, the estoppel was fed by the estate Thompson acquired.

Then, the covenants, being adherent to the estate, were necessarily transferred with it to the Plaintiffs. It is out of the question, that this transfer of the estate to the Plaintiffs, being effected by operation of law by force of the estoppel, that the Plaintiffs are any less or otherwise assignees of the estate than they would have been if Thompson, immediately on the execution of the Defendants conveyance to him, had, *eo instanti*, passed it by an actual conveyance to the Plaintiffs. In truth, the previous mortgage deed creating the estoppel operated as a conveyance by anticipation of the fee which the Defendants conveyed to Thompson, having a continuous effect until it fastened on the estate and passed it to the Plaintiffs. The doctrine of relation has nothing to do with this, and the rule that the operation of the doctrine of relation is not to prejudice third parties is in no way interfered with. It could have made no difference to the Defendants whether the estate vested in the Plaintiffs by force of the estoppel or under a conveyance executed subsequently to the deed to Thompson; in one case, as well the other, the benefits of the covenants ran with the land.

So that, whether the deed of the 10th April, 1855, was a completely executed instrument before or not until after the deed of the 22nd June, 1855, either way the Plaintiffs are entitled to sue on the covenants in the latter deed.

In my judgment, the order of the Court of Appeal should be reversed and the judgment of the Court of Queen's Bench refusing the Rule *nisi* to set aside this verdict and to enter a verdict for the Defendant Ruttan should be restored and affirmed, with costs to the Appellants in this Court and also in the Court of Appeal.

The CHIEF JUSTICE and TASCHEREAU and FOURNIER, J. J., concurred in the foregoing judgments.

HENRY, J.:—

The Appellants, who are the Plaintiffs in this case, seek to recover on a covenant contained in a mortgage to them, signed by Henry Huddleston Thompson and Hannah Eveline Thompson, his wife, dated the 10th day of April, 1855, and on certain covenants contained in a deed of bargain and sale from one Henry Covert and Henry Jones Ruttan, the Respondent, dated the 22nd day of June, 1855, being seventy-three days after the date of the mortgage.

It is contended by the Appellants, that although the mortgage was signed and otherwise executed, it was not, in effect, accepted by the Appellants until *after* the execution of the deed; and that, therefore, the Appellants are entitled, under the mortgage and the covenants therein, to the benefit of the covenants in the deed *subsequently* made to Thompson; and it is also contended for them, that even if the mortgage were fully executed and accepted before the deed, the Respondent is nevertheless liable to them under the deed and covenants to Thompson by *estoppel*. I have given the points involved every possible consideration, and in the view I take

of the law bearing on them, I regret to find myself occupying a position in opposition to the rest of the court. I have endeavoured to reconcile my views with those of my learned brethren, but the more I have investigated and considered them, I am, unfortunately perhaps, the further removed from them. I am somewhat relieved, however, by the reflection that I am not quite alone, and that I am but adopting the views embraced in the judgments of three of the learned judges of the Court of Appeals for the Province of Ontario and, upon the first point, of Mr. Justice *Galt* who, on the first trial, found that the mortgage was *executed before the deed* and therefore found the second issue, which raised that point, for the Respondent.

The appellants, in their declaration, allege the execution of the deed to Thompson, and then allege that Thompson *afterwards* made the mortgage to them. The respondent, in his second plea, takes issue on that most material allegation, and says: "that the said Henry Huddleston Thompson did not *after* the making of the said covenant convey the lands to the plaintiffs as alleged."

That, then, is the simple issue to determine this case, for I cannot but think that a covenant of the Respondent *subsequent* to the mortgage will not render him liable to the *previous* assignees of Thompson, and upon which point I will speak further on. Leaving out of consideration, for the present, the latter point, let us consider the obligations of the contesting parties as to the proof of the issue. The affirmative of it is on the Appellants, and if they fail to give reasonably satisfactory evidence, the result must be against them, they, in that event, failing to prove their case. I have searched

in vain for such evidence. They give in evidence a mortgage dated the 10th of April, 1855. If *no evidence is adduced* as to the execution, the *date* of the instrument *is conclusive as to the time of its execution.* We have, however, the evidence of Boulton, who is a subscribing witness to the mortgage, and also to the deed. He says he saw the mortgage *executed* and that "it must have been drawn at Kingston and sent up to him." His father was then the local agent of the Appellants at Cobourg, and he says: "I did most of the business." He further says: "I must have received instructions to prepare the deed from the plaintiffs' office at Kingston." In his cross-examination, speaking of the mortgage, he says: "*It was sent by the Company to us to be executed*" "I have no doubt I took it away," that is after "seeing Mr. and Mrs. Thompson *execute it.*" "I can't recollect if I sent it down to Kingston, or kept it until it was registered." This, then, is the evidence of what occurred; and the whole evidence as to the execution of the mortgage, and that, too, on the part of the Appellants. The mortgage sent to him by the Plaintiffs *to be executed* is executed, and taken possession of and retained with the full consent of Thompson, by him who was the agent of the Plaintiffs *to get it executed* for them. This, then, is as perfect a delivery as could be, and just as effectual as if Thompson handed the paper to the Plaintiffs personally, and Thompson could not, in any way, have contested the delivery on the ground of non-acceptance, and how then can the Plaintiffs?

A witness, James O. N. Ireland, is examined. He says: "I am in the Plaintiffs' employ," but he does not say in what capacity, whether as a mere *clerk* or *labourer* or it might be a *messenger*. His evidence is not entitled to any weight as he says he knew nothing of

the transaction formerly, but was examined apparently to make evidence of what was not properly receivable evidence, viz: the books and papers of the Appellants; to shew what, *at the time of his giving evidence*, was the course pursued by the Company; leaving to imagination what it might have been at the time the mortgage was executed. I submit that such evidence could only be regularly given by a party cognizant of the practice of the Company at the date of the loan in question. He says: "I have no personal knowledge of the transaction of 1855." "*I have referred to the books and papers as to them.*" How can the *books* and *papers* of the Plaintiffs be evidence in their own favour? "I first became connected with the Company in January, 1856." This witness thus clearly shows his incompetency to state what course the Company pursued in regard to loans in 1855, the date of Thompson's transaction; and what *he* might say as to something taking place in China whilst he was in Canada, would be as properly evidence to bind Thompson or the Respondent. The mortgage, fully executed as far as Thompson and wife could do so, is taken into the possession of the Plaintiffs through their agent at Cobourg—if not by the governing authorities at Kingston—without any condition annexed. It always remained with them afterwards, and there is nothing to show they annexed any condition to their acceptance of it. The mortgage was payable with interest from its date, and if *presumptions* are to govern, I may *presume* that Thompson so paid it, for under the evidence he was clearly liable to so pay it. If we look at the statements of Thompson, who was examined on the first trial, which is more legitimate evidence than that of Ireland, we have the most conclusive evidence

that the delivery to Boulton was *a full execution* of the mortgage. He says: "This mortgage was made in "substitution of two mortgages on lot number five, "which previously existed. No money passed on the "execution by me of the mortgage to the Plaintiffs." In April the mortgage was executed. "*I was not aware* "*that anything further to be done was required at that* "*time.*" What then took place between the Company and Thompson as an intimation that the acceptance of the mortgage was conditional? Nothing in the slightest degree; and I maintain that the interest of Thompson passed immediately and the execution of the mortgage was complete. Thompson's application had been made, and the report of the appraiser received on the 10th of March, and, on the 24th of the same month, referred to the Company's solicitor for his report on the title. The next step is the preparation, by the Appellants, of the mortgage dated the 10th April, and the sending of it *for execution* by Thompson and wife. Why was that done? Why should a mortgage be prepared before the title was found satisfactory? In the absence of any proof explaining that part of the transaction (and it is a matter wholly within the knowledge of the Appellants) the irresistible conclusion of Thompson, or any one in his position, would be, that the title had been reported on favorably; and that, as he says, he had nothing more to do but to expect his other mortgages would be thereupon released; and I feel bound so to presume in the absence of a satisfactory explanation to the contrary. It may be said that it happened a long time ago, and that we ought not now to require such proofs as would be expected in regard to a later transaction. It may be, that it is thus unfortunate for the Appellants; but I know of no statute of limitations under which

they can be permitted to recover when unable to give evidence necessary to maintain their action. The presumptions of law are against them, and they cannot or, at least, ought not, by invoking wild presumptions of fact without proof, be permitted to destroy those legal landmarks that long experience has approved; and, in the words of *Smith*, J., in *Xenos* v. *Wickham* (1), quoted by Chief Justice *Draper* in this case: "It "is better to adhere to plain inferences of fact than to "attempt to remedy the inconvenience of a negligent "mode of doing business by making the facts bend to "the exigencies of negligence." To give effect to the contention that there was no binding acceptance of the mortgage, I think, would be construing the evidence, not according to its legal effect, but indulging in conjecture and speculation as to something that might or might not have been passing in the minds of the Appellants, or their agents, of which there is no proof, and in the absence of any suggestion that anything in opposition to the full acceptance of the mortgage, at the time it was executed and delivered by Thompson and wife to Boulton, was communicated to Thompson. From the whole transaction up to that, Thompson had not the slighest reason to suppose anything but that his two other mortgages would be released; and I have yet to learn that he could not then have, by law, enforced a release, leaving the Appellants for their security to look to the mortgage so fully executed in substitution. It is true, the other mortgages were not released till after the deed from the Respondent, but suppose, even *after the deed was executed*, the transaction was left inchoate by the Appellants, through negligence or otherwise, and some months elapsed, and a valuable build-

(1) L. R. 2 H. L., 306.

ing destroyed without insurance that rendered the security insufficient, and it was then again found the title was defective, could they (the Appellants) then say "we only accepted the mortgage conditionally, and "now we decline the loan?" They might as well, as to say so now. I admit the strength of the case *supposed* by Mr. Justice *Wilson*, that the Appellants, as to the mortgage, if prepared and executed and handed to them might have said "Leave it with us; we will look it over, and tell you whether we will take it or not; or, "Let us enquire into the title first and ascertain the "value of the land, but recollect we will not, and do "not, accept the mortgage at present. If you will do "that, you may leave it; if not, we shall have nothing "to say to it, and you can take it away at once" I freely admit the soundness of the learned Judge's conclusion, that by so receiving the mortgage they would not have accepted the estate; or that there was any delivery binding on them in law. Now, what I allege to be essentially absent is the slighest analogy between the case as thus put and the one presented by the evidence. The first important difference is that the Appellants never said anything of the kind; but, on the contrary, by preparing and sending, through Boulton, the mortgage to Thompson *for execution*, they virtually said what was, in part, the fact: "We have had "your property appraised, and the result, on the 24th of "last month (March) was satisfactory, and on that day we "referred the matter of title to our solicitors, who have "reported favorably," or (as they might have done) "we "are satisfied as to the title, and upon your executing "and returning the mortgage to us we will release your "other mortgages." If they were not in a position to give such an intimation to Thompson they should not

have sent the mortgage for execution and induced him so to believe, and they cannot now be permitted to escape consequences produced by their own negligence. If it was necessary, as the learned Judge properly suggests, that something of the kind should be stated by a party taking the delivery of an executed instrument to avoid the binding legal presumption that he has fully accepted it and the benefits under it, then there is, in this case, a most striking absence of any such; and there is then nothing to rebut the legal presumption of acceptance. The language of Lord *Wensleydale*, in *Bowker* v. *Burdekin* (1), as quoted by Mr. Justice *Wilson*, is, no doubt, now the law: "That in order to "constitute the delivery of a writing as an escrow, it "is not necessary that it should be done by express "words, *but you are to look at all the facts attending the* "*execution—to all that took place at the time, and to the* "*result of the transaction;*" but what is His Lordship's conclusion: "And, *therefore*, though it is in form, an "absolute delivery, if it can be reasonably inferred that "it was delivered not to take effect as a deed *till a certain* "*condition* was performed, it will nevertheless operate "as an escrow." That doctrine does not, however, touch the present case. It is not here a question raised on a contention of the grantor, that he annexed, either expressly or by implication, any condition to qualify the delivery and make the instrument an escrow, nor do the applicants so contend. Their contention is wide apart from that position. They admit it (the mortgage) was *fully executed* by Thompson, but contend that they did not accept it; but in which, I maintain, they have wholly failed to rebut the legal presumption of accept-

(1) 11 M. & W., 147.

ance, which I must characterize as conclusive under the whole of the facts proved.

No sufficient evidence is before us of the application of Thompson. A witness on the trial (Henry Weller, Deputy Registrar and Master in Chancery) produced on the trial several deeds and papers, amongst others one, in respect to which he says: "I have an application for a loan, in a printed "form, dated 1st March, 1855, purporting to be signed "by Henry Huddlestone Thompson, &c." This paper is among the documents in the case, but it was not proved as Thompson's. The witness does not tell where he got it, and all he can say is, that it purported to be signed by Thompson. The execution by Thompson was not, however, disputed. There is nothing, in the application or schedule annexed to it, to show that the mortgage subsequently executed would be understood by Thompson as intended to be received conditionally only. A paper headed "Directions to be observed by the Applicant," also appears amongst the papers. No reference is made to it in the evidence or other documents, but, even if regularly in evidence, there is nothing in it affecting the question or the positions occupied respectively by the parties at the time the mortgage was delivered to Boulton, the agent. After the sending of the mortgage *for execution*, and its execution subsequently, the unconditional acceptance is an estoppel *in pais*, as to any allegation of prior circumstances to qualify the full execution of it. I can come to no other conclusion, under the circumstances, than that it became immediately operative; and, I may add, that I feel bound, in the absence of the evidence to the contrary, to conclude that such, at that time, was the real intention of the parties. *Further light*

may have suggested, and no doubt did suggest the procuring of the deed from the Respondent and Covert, and it is to be regretted that further light still was not thrown upon the title by a perusal of the declaration of trust which it is shown was, at the time of the transaction, in the possession of the Appellants or their solicitors who negligently failed to provide against it and caused the present difficulty.

I have now to consider the second point. Whether the deed to Thompson, being subsequent to the mortgage, the covenants in the former enured to the benefit of the Appellants on the execution of that deed? It is admitted on all sides, that where a party sells and conveys land by deed, to which he has *no* title, and subsequently obtains one, the estate by estoppel previously existing, is fed; and the deed, taking effect in *interest*, it is no longer a title by *estoppel*. The grantee becomes, therefore, the owner in fee—the title of all others being thus centred in him. As regards "Covenants" the law is far different. The conveyance of the legal title and the covenants go *with the land* to a *subsequent* assignee. I maintain, however, that it is only *thus* they pass and not by "estoppel." They pass only by assignment and that, when carrying the *title*, becomes the *conduit pipe* and *the only one*. Thompson made no conveyance *bearing the title*, for he had it not till the subsequent deed gave it to him, and as he, by the mortgage, conveyed *no title*, there was no transfer of the *covenants*. *Washburn* (vol. 3, p. 469) on the subject of "Covenants Running with the Land," says: "In the first place, there is the requisite privity "of estate between the grantor, who is the covenantor, "and the purchaser or holder of the land, in relation "to which the covenant is entered into. In the next

" place the covenant, for the title entered into, and " formed a parcel of the contract by which, and of the " consideration for which, the grant of the land was " made; and whoever purchases the one is supposed to " pay also for the other, and to become thereby con- " stituted in all respects in the place of the first cove- " nantee, so far as the right of being indemnified for " any failure or defect of title."

But before considering the inapplicability of the principles just quoted to the case in hand, I feel it right to test the title of the Appellants—after the deed to Thompson. Their title under Thompson's deed was, at first, one by estoppel only. There may be a question whether the deed to Thompson conveyed the *title* to him, as the Court of Chancery, by its judgment—binding on the Appellants who have adopted it as the groundwork of their action—declared it null and void, so far as we are enlightened by the pleadings and evidence, and that the appellants took no title under it. We have not before us the *nature of the trust*, and it is quite possible, if we had seen the declaration of it, we might have discovered that the Trustees had no power to *convey* or *transfer*, but merely to hold; and it it is quite possible, and even probable, that such was the case. The Plaintiffs had the power of showing the exact position but did not do so, and I do not feel bound to put such a construction as will necessarily favor a party claiming who, with the means of furnishing light, leaves us in darkness as to an important fact. It may, therefore, be contended that Thompson, subsequently to the mortgage, obtained no title by which the estoppel would be fed. In that case, can his position be likened to one who had made a deed and had acquired *a subsequent title*, when the Appellants

contend the deed to him was *ultra vires* and gave him no title, without explaining how? The case is peculiar, but I am at a loss to find, in the absence of the declaration of trust, how the appellants had, under the circumstances, anything more than a title by estoppel; and if they always remained without title, the covenants of the respondent cannot, though said to run with the land, be said ever to have reached them, because no title ever did.

"A covenant real cannot be conveyed to the assignee "of the land unless the assignor has a capacity to con- "vey the land itself to which the covenant is incident.

"Where the grantor is not seized of the land at the "time of conveying, his covenants of warranty do not "attach to the land and run with it"—2 *Sugden* on Vendors (1); citing *Slater* v. *Mason* (2); *Pike* v. *Galvin* (3); *Randolf* v. *Kinney* (4).

The same doctrine will be found in 4 Kent, Com., 556, n. "A."

How then could Thompson convey the covenants, which are said to run with the land, when, at the time, he could not convey the land? If respondent had only the title to hold as trustee, he could not convey, and therefore his covenant did not run with the land.

The law is, no doubt, clear that when a party to a deed is estopped by it, all his privies in estate, such as his heirs, executors, administrators or assigns, according as the estate is real or personal, are also bound by the estoppel, and that when the grantor subsequently *acquires the title* it gives an estate in interest to his assignee against every one except one holding a paramount title. "If a lessor at the time of making the

(1) 8th Amer. Ed., p. 240. Note G. to par. 577; (2) 1 Met. Mass. R., 450; (3) 29 Maine, 186; (4) 3 Rand, 394.

lease hath nothing in the land, but afterwards get it by purchase, this is a good lease by *estoppel*. For the act of the ancestor shall bind the heir; and the act of the principal his substitute, or such as claim under him by any *subsequent* assignment."

"So a privy in estate is bound, as if A demises the manor of D and afterwards purchases the manor and sells it to B. B is estopped (1) If A leases land to B in which he hath nothing, and then purchases a lease for 21 years, and *afterwards* leases the land to C for 10 years, and all is found by verdict the Court will adjudge the title good by the estoppel (2). A stranger to a deed is beyond the influence of estoppels, and if he do not become a privy in estate *afterwards*, he cannot be effected by the conveyance. The Appellants never became privies in estate. They were, I maintain, "strangers to the deed," and not having afterwards becoming privies in estate, they continue to occupy the same position of "strangers to the deed." Suppose the Appellants had been lessees of Thompson, who had no title, with independent covenants by each party to the other, which, in ordinary cases, would run with the land, and that Thompson had subsequently received a title by lease from the owner, would the Appellants, without having accepted a subsequent lease from Thompson, be liable for his covenants to the owner? I think I can safely answer in the negative—for there would be no privity of contract, and, if not, the *owner*, surely, would not be answerable to them under any covenant in his lease to Thompson. In fact, although their title by estoppel would be turned into an estate in interest, there would be *no privity of contract.* Estoppels may be turned into estates in interest, but, unless the *cove-*

(1) 1 Salk., 276; 1 Raym, R., 729; (2) 1 Salk, 276.

nants are assigned, I maintain they remain only as between the original parties to them. To make the Respondent liable, without an assignment by Thompson after his deed, would be about as regular as to make the maker of a promissory note out liable to an action on it, without indorsement, by an assignee of the payee, months or years before the making of the note, and which note was not included in the assignment. The note passes by *subsequent* endorsement and the covenants by *subsequent* assignment with the estate, and I can discover by no case, doctrine or decision, why, on principle, there should be any "relation" by which to sustain an action in the one any more than in the other case. In this case the covenants were not assigned by the previous mortgage of Thompson, for when that conveyance was executed he had none to assign. *Pollexfen*, R. 67, "The law, as it seemeth, is so in cases of obligations, covenants or personal contracts, which cannot be turned into an estate; but in other cases where the estate is bound by the *conclusion* and converted into the interest, although the jury find the matter at large, yet the Court shall judge according to the law and the estate is good by reason of the estoppel."

Here is the proper legal distinction drawn between covenants, obligations, &c., and the creation of an estate by estoppel.

I have thus, by the doctrine cited from *Sugden* and elsewhere, and otherwise shown, that a covenant cannot be conveyed where the assignee has no capacity to convey the land itself. Had a conveyance been made by Thompson *subsequent* to his deed from Respondent, if the latter had the power of conveying the title, there would have been a privity of contract between the latter and the Appellants, and, therefore, Thompson,

having *then* the fee simple under the deed, could have conveyed the covenants of Respondent to the Appellants. I have searched the books in vain for any authority for the doctrine that covenants will pass merely by estoppel, and I can find no case where an attempt was made to enforce a covenant in a deed or lease where there was not a *subsequent* assignment by the grantee or lessee. And, as no assignment was made by Thompson subsequent to his deed from Respondent, (although the Appellants might have compelled one) the covenants in the deed to Thompson did not pass to the Appellants; and they, therefore, cannot have an action on them. The doctrine of "relation" is well put by Mr. Justice *Wilson*, which I fully adopt, and feel it unnecessary to add to what he has said on that point.

Upon the two points in question, I am decidedly in favor of the Respondent, and think that the appeal should be dismissed with costs.

Appeal allowed with costs.

Attorneys for Appellants:—*Macdonald and Patton.*

Attorneys for Respondent:—*Armour and Holland.*

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.. } APPELLANTS;

AND

FREDERICK WYLD AND HENRY WILLIAM DARLING..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire Insurance—Interim Receipt—Description of premises in policy —Authority of Agent—Costs.

On the 9th of August, 1871, the Plaintiffs (Respondents) applied to the Defendants (Appellants) through their agent H., at Hamilton, for an insurance on goods to the amount of $6,000 contained in a store on the south side of King street, described in the application as no. 272 in Defendant's special tariff book, and marked no. 1 on a diagram endorsed in pencil by the Secretary of the Company at Montreal; the diagram being a copy of a diagram on a previous application for policy by insured. The premium was fixed at 62½ cts. on the $100, and was paid on the 10th of August. On the said 10th of August the Plaintiffs gave a written notice to H. that they had added two flats next door to their former premises (which would form part of no. 273 in Defendants' special tariff book), and that part of their stock was then in these new flats. A few days later, H. inspected the building, and said the rate would have to be increased in consequence of the cuttings. On the 29th of August, H. notified Defendants of the opening into the adjoining building, but did not communicate the written notice in its entirety. An increased rate, making it one per cent., was fixed, and paid by the 23rd of September, the agent issuing an interim receipt, dated back the 9th of August for the full premium. The policy issued immediately thereafter, dated as of the 9th of August, describing the premises substantially as in the application of the 9th of August, and referring to the diagram endorsed on the application of the insured, S. T., 272. On the policy there was an N. B. in reference to "an opening in the east end gable of the premises, through which communication is had with the adjoining house occupied by one O——."

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier and Henry, JJ.

The policy was handed to the Plaintiffs in September, 1871, and the loss by fire occurred in March, 1872.

The Plaintiffs brought an action in the Court of Queen's Bench on the policy, but failed on the express ground that the description therein did not extend to or cover goods which were in the added flats. Thereupon the Plaintiffs filed their bill to reform the policy or restrain the Defendants from pleading in the action at law that the policy covered only goods contained in S. T., no. 272.

Held:—That the true construction of the application, written notice and interim receipt, read together, established a contract of insurance between the Plaintiffs and the Defendants, embracing the goods situated in the flats added by Plaintiffs, and that notwithstanding the acceptance of a policy which did not cover goods in the added flats, Plaintiffs were entitled to recover for the loss sustained in respect of the goods contained in such added flats.

(Henry, J., dissenting; and Ritchie and Fournier, J.J., dissenting also, but only on the ground that the evidence did not, in their opinion, establish an application for insurance on the goods in the added flats, nor an agreement for such insurance by the agent, but that the application, interim receipt and agreement were confined to the goods in the premises, S. T., no. 272.)

As to Costs:—The Judges of the Supreme Court being equally divided in opinion, and the decision of the Court below affirmed, the successful party was refused the costs of the appeal.

But (*Per* the Chief Justice) By 38 Vic. c. 11, s. 38, the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the Court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the Judges.

This was an appeal from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a decree of the Court of Chancery in this cause, which declared that "the contract of insurance between the Plaintiffs and the Defendants embraced the goods situated on the flats, added by the Plaintiffs to the building, no. 272,

S. T., in the Bill mentioned, and that the policy in the pleadings mentioned should be reformed, so as to make the same conform to this declaration." It was referred to the master to take an account of the loss of the Plaintiffs in respect of goods situated on the said flats, and to tax the Plaintiffs their costs.

It appeared that the Defendants' agent at Hamilton, through whom the insurance was effected, was one Frederick L. Hooper, and the Chief Agent in Canada was one George F. Smith, resident in Montreal.

The first application for insurance was made in July, 1871. The receipt given for the premium was cancelled because the rate was too low.

On the 9th August, 1871, another application was made for insurance to the amount of $6,000 on the stock of dry goods contained in a stone building, covered with S. & M., marked no. 1 on diagram and owned by one Irvine. To question seven, contained in the application, enquiring as to distance from other buildings, the answer was " see diagram on policy, 1,377,249, expired." The letters S. T. 272, referred to that number in a book which Defendants had relating to buildings in Hamilton called the Special Tariff Book.

The premium was $37.50 and was paid by cheque dated 10th August.

On the 10th August, 1871, the Plaintiffs gave a written notice to Hooper that they had added two flats over Mr. William's store, next door to the former premises, and that part of their stock was then in these new flats. Hooper a few days after inspected the premises, found that large doorways had been cut in the second and third flats between the original premises, and that part of the Plaintiffs' stock of goods was in these flats. The added flats were in the house, no. 273,

in the special tariff book. Hooper told the Plaintiffs the rate would have to be increased in consequence of these cuttings. On the 29th of August, Hooper wrote to Smith in Montreal, informing him that Plaintiffs had cut an opening into the building adjoining on the east side, formerly occupied by Williams' Canada Oil Company and that the lower portion of that building was then occupied by one Onyon as a coal oil store. He also informed him that he had inspected premises, and he had notified the Plaintiffs their rate would have to be increased at least to one per cent. He added: "The Royal and Hartford have agreed to the same. Will "you please let me know if you will accept the risk at "that figure? The British America have a risk on Mr. "Onyon's stock at 1 per cent."

Before this letter, dated on the 23rd September, 1871, Hooper had received from the Plaintiffs $22.50, which with the $37.50 paid on the 9th of August, made $60, viz.: 1 per cent. on the $6,000, for which Plaintiffs wished their stock insured. And, on the same 23rd September, Hooper gave them an interim receipt, dated 9th August, for the $60, for insuring the $6,000 on the stock for one year from that date. If assurance was approved of, a policy would be delivered, or, if declined, the amount received would be refunded, less the premium for the time so insured.

The Plaintiffs afterwards received from Hooper a policy of insurance "on their stock of goods, &c., con- "tained in a building owned by one Irvine and occu- "pied by insured as a dry goods store, on the south "side of King Street, Hamilton, built of stone, covered "with shingles laid in mortar, and marked no 1 on a "diagram of premises endorsed on application of in- "sured, filed in this office, no. 10,995, which is their

" warranty, and made part hereof, S. T., no. 272, six " thousand dollars.

"N.B.—There is an opening in the east end gable of " above, through which communication is had with " the adjoining house, which is occupied by one Onyon " as a coal oil store. Not more than two barrels of re- " fined coal oil permitted in said store, but 10 barrels of " the same are allowed to be kept in the yard."

The policy bore date the 9th August, 1871.

A fire took place on the 11th March, 1872, originating in the coal oil store occupied by Onyon, occasioning a loss to the Plaintiffs' stock in trade of several thousand dollars, the goods damaged and destroyed being partly in the store first occupied by the Plaintiffs and partly in the two added flats. The Defendants refused to pay for the loss sustained on goods in the latter portion.

The Plaintiffs then brought an action in the Court of Queen's Bench on the policy above referred to, but failed on the express ground that the description therein did not extend to or cover goods which were in the adjoining flats, which had been added when the extra premium was paid, and that the Plaintiffs suing upon the policy were bound by the description contained in it (1).

Thereupon the Plaintiffs filed the Bill in this case. The prayer of the Bill was that the policy so issued and dated the 9th of August, 1871, might be amended by inserting therein appropriate words, shewing that it was intended to and did cover the goods in the two upper flats of no. 273, and that the defendants might be restrained from pleading at law that the policy covered only the goods contained in no. 272, and that

(1) 33 U. C. Q. B., 284,

they might be ordered to strike out the pleas raising such defence.

The cause was carried down for hearing at the sittings of the Court at Hamilton in the spring of 1874, and *Blake*, V. C., declared the Plaintiffs were entitled to a decree against the Defendants, with costs (1).

The cause was then re-heard before the full Court during the December sitting, and the decree was affirmed with costs (2).

From that decision the Defendants appealed to the Court of Appeal for Ontario, and that Court dismissed the appeal with costs (3).

The Defendants thereupon carried the case to the Supreme Court.

JANUARY, 23rd, 24th AND 25th, 1877.

Mr. *James Bethune*, Q. C., and Mr. *Alexander Bruce*, for the Appellants:

The Court of Queen's Bench have properly held by their judgment in the suit between these parties (reported 33 U. C. Q. B. 284), that only the goods in the westerly building, described as S. T. 272, were insured under the terms of the policy issued by the Appellants; and the Respondents, by coming into a Court of Equity seeking to have the terms of that policy altered, admit that the Court of Queen's Bench were correct in so holding. The Respondents cannot complain of the judgment in the Queen's Bench, for they never appealed from it.

There is thus an instrument, solemnly executed by the Appellants as their contract with the Respondents, delivered to the Respondents in the month of September,

(1) 21 Grant, 458; (2) 23 Grant, 442; (3) 23 Grant, 442.

1871, and so accepted by them and retained without question until after a fire takes place in the month of March, 1872. The Respondents do not even then question that this policy contains their contract with the Appellants; but, on the contrary, relying on it as evidencing their contract, they bring an action upon it, and it is not until they find that the construction of the policy by the Court of Queen's Bench is contrary to their contention, that they come forward and say that the policy does not truly state their contract.

After such conduct on the part of the Respondents, it should require a case and evidence of the most conclusive character to warrant a Court in interfering, and the Appellants contend that the Respondents have failed to make out such a case, and that their evidence falls short of what is necessary to entitle them to the relief they seek for.

The insurance effected by the interim receipt was superseded by the issuing of the policy.

The Respondents are not seeking to enforce the contract of insurance as expressed by the policy granted to and accepted by them; but, on the contrary, are seeking to vary the same, and the onus is on them to establish this right by the most clear and incontestible evidence.

Now, it is clear, upon the evidence, that it was not within the scope of Hooper's authority for him to enter into an absolute binding contract of insurance with the Respondents, but his powers were limited both as to extent and duration. He could only grant an insurance for a limited period of time, by issuing an interim receipt, showing on its face that it was to be superseded by a policy, and that the issuing of such policy was a matter which had to be determined by the approval of

the Board of Directors at Montreal. When the Board at Montreal acted, by issuing a policy, all that Hooper had done or could do was superseded:—*Davis* v. *Scottish Provincial Insurance Company* (1).

The increased rate of 62½ cents per $100 paid by Respondents, was for the increased risk in consequence of *the opening into the building adjoining on the east side.*

The Company at their office in Montreal had certainly no notice of any desire or intention on the part of the Respondents to have the portion of their goods in the easterly building S. T. 273 covered by Appellants' policy, and it is equally clear that the Appellants had no intention to insure such goods. This is clear from the language used in framing the policy, which is such as to convey an intimation to the Respondents that only the goods in S. T. 272 are intended to be insured by the Appellants, and is borne out by Mr. Smith's evidence; and the policy has a notice, prominently endorsed thereon, particularly requesting the insured to read his policy and to return the same immediately if any alteration was necessary. *Linford* v. *Provincial Horse and Cattle Insurance Company* (2); *Graves v. Boston Marine Fire Insurance Company* (3).

Solins v. *Rutjer's Fire Insurance Company* (4); *Ryan* v. *World Mutual Life Insurance Company* (5).

The most that can be said is, that the evidence does not establish more than this, that the terms of the policy are not in accordance with the wishes and intentions of the Respondents, but this is not sufficient to vary or alter a written document. The mistake must

(1) 16 U. C., C. P., 185; (2) 10 Jur., N. S., 1066; (3) 2 Cranch, Supreme Court, 225; (4) 8 Bosworth's N. Y. R. 578; (5) 4 Bigelow, 627.

be *mutual*, in order to correct a written instrument; or, to put it in another way, there was no concensus to any thing different from what was contained in the policy:—

Fowler v. *Scottish Equitable Insurance Company* (1); *Davega* vs. *Crescent Mut. Ins. Co. of New Orleans* (2).

The evidence to entitle them to a change in the policy must be very strong, for they must not only establish that the policy does not contain the contract intended, but must go further and make out that the Appellants entered into a contract different from that contained in the policy, and in the terms contended for by the respondents And, as the happening of the fire has altered the position of the parties, so that they cannot be placed as they should be according to the Respondents contention there is the stronger reason for not interfering with the contract entered into by the Appellants.

Cox v. *Ætna Insurance Company* (3); *Powell* v. *Smith* (4); *Bleakely* v. *Niagara District Mutual Fire Insurance Company* (5); *Lyman* v. *United States Insurance Company* (6); *Andrews* v. *Essex Fire and Marine Insurance Company* (7).

Moreover, by the terms of the interim receipt, the insurance so effected was partly in the nature of an application for insurance, and was only to be binding upon the Appellants until they had an opportunity of accepting the same by the issue of a policy on the terms of such application, or of declining it. The Respondents were bound to the exercise of reasonable care and caution in ascertaining that the policy was issued in accordance with such application and their intention—and a policy having been issued by the Appellants in

(1) 4 Jur., N. S., 1169; (2) 7 Louisiana, 228; (3) 29 Indiana 72; (4) L. R. 14 Eq., 90; (5) 16 Grant, 204; (6) 2 Johnson, C. C. 632; (7) 3 Mason, 6.

good faith, and in accordance with their understanding of the application, and in terms free from ambiguity—such policy became and was in fact the the only contract of insurance, and it was incumbent on the Respondents to see if it was in accordance with their wishes—and the fire having occurred many months after the delivery of such policy to the Respondents, and after their acceptance of it as representing the true contract between them, they are precluded, after the happening of the loss, and when the Appellants cannot be placed in *statu quo*, by the rules prevailing in a Court of Equity, from any relief.

This is very different from the case of a policy issued in the form desired by the insured and the Company afterwards resisting payment on the ground that their agent had failed to communicate some of the facts to them. In such a case the insured were naturally content with holding a policy which expressed what they desired; but here the policy contained a different contract from what the insured say they intended, and the insured should not have been satisfied with it, but on its receipt, should at once have said to the Company "this is not the insurance we intended to effect," when both parties might have come to a proper understanding; instead of which, by holding the policy without any question or objection, they give the Company to believe that it expresses truly the contract intended.

Atlantic Insurance Co. v. *Wright* (1); *Columbia Insurance Company* v. *Cooper* (2).

It must also be borne in mind that in this case the policy was issued by the Appellants at Montreal, and could be only so issued, and that Hooper had not that extensive power which some local agents have

(1) 22 Illinois, 462; (2) 50 Penn., 331.

who are authorized to fill up and issue policies ; and it will be found that in many of the American cases where Companies have been held liable on their policies, or where policies have been reformed, it has been because the policies were issued by an agent who had these extensive powers, and who combined, as it were, the powers possessed in this case by both Mr. Hooper and Mr. Smith.

Woodbury Savings Bank v. *Charter Oak Insurance Company* (1) ; *Peck* v. *New London Mutual Insurance Company* (2).

All the cases cited by *Blake*, V.C., are cases where the agent had power to issue policies. The agent here was not a party to the contract, and his mistake cannot bind the Company.

The learned counsel also referred to the following authorities :

Patterson v. *Royal Insurance Company* (3) ; *MacKenzie* v. *Coulson* (4) ; *Acey* v. *Fernie* (5) ; *Hendrickson* v. *Queen Insurance Company* (6) ; *Henkle* v. *The Royal Insurance Co.* (7) ; *Rolland* v. *The North British & Mercantile Insurance Company* (8) ; *Motteaux* v. *The London Assurance Co.* (9).

Mr. *Edward Martin*, Q. C., for Respondents :

The evidence shews that Hooper was the Defendants' agent at Hamilton, authorized amongst other things to accept risks for the Defendants, receive the premiums therefor and issue interim receipts in the form set out in the bill, which are binding contracts of insurance ; to receive notice of changes or alterations

(1) 31 Conn., 517 ; (2) 22 Conn., 575 ; (3) 14 Grant, 169 ; (4) L. R. 8 Eq., 368 ; (5) 7 M. & W., 151 ; (6) 30 U. C., Q. B., 108 ; (7) 1 Ves., sen., 317 ; (8) 14 L. C. Jur., 69 ; (9) 1 Atkyns, 547.

in the application for insurance, or in the risk, receive extra. premiums therefor, bind the Defendants by his assent thereto before the issue of the policy; that he was the proper person to receive the notice, dated 10th August, 1871, and to assent thereto, and receive the extra premium therefor, paid on 23rd September, 1871, when the second receipt ante-dated 9th August, 1871, was given, and that, in fact, the Defendants did, by a binding contract prior to the issue of the policy, insure the goods in both the original store "272" and the added flats, as stated in the bill.

The interim receipts granted by Hooper, including the one given to the Plaintiffs, were "subject to the "approval of the Board of Directors, Montreal; the said "party to be considered as insured until the determi- "nation of the said Board of Directors be notified; if "approved of, a policy receipt and afterwards a policy "will be delivered; or, if declined, the amount received "will be refunded, less the premium for time so in- "sured."

The Directors never declined the insurance on the goods in the original premises and added flats, effected through Hooper, nor was the premium ever refunded.

The Directors afterwards issuing a policy, it was an acceptance on their part of the contract entered into by their agent, and Respondents are entitled to a policy in accordance with the terms of the interim receipt.

Until then the Defendants are bound by the interim contract made by Hooper, who was the proper officer to receive the original application for insurance, and the notification of 10th August, 1871, which, together, constituted the application, and to act thereon, as proved by demanding and receiving the extra premium for insuring the whole stock in both the original shop and

added flats, and giving the interim receipt therefor. *English & Foreign Credit Co.* v. *Arduin* (1).

The fact that the Company were bound by the interim receipt distinguishes this case from *Fowler* v. *Scottish Equitable* (2), and that class of cases where the agents of the Company had merely authority to receive and submit applications for insurance, but had no authority to bind the Company to any contract of insurance

The acts, notice and knowledge of Hooper, who admits that he always thought he was insuring the whole stock, are to be treated as the acts, notice and knowledge of the Defendants, and the contract so made through Hooper was never put an end to by the Defendants; but, on the contrary, the acts and conduct of the Defendants confirmed the contract made by Hooper, and the Defendants are bound and estopped by the acts and conduct of Hooper.

Wing v. *Harvey* (3), is a case in point. Also *Patterson* v. *Royal Insurance Co.* (4).

The learned counsel on this point referred also to *Wyld* v. *L., L. & G.* (5), *Penley* v. *Beacon* (6); *Rossiter* v. *Trafalgar Ins. Co.* (7); *Davis* v. *Scottish Prov. Ins.* (8); *Re Universal non-Tariff Co.* (9); *Columbia Ins. Co.* v. *Cooper* (10); *Ellison* v. *Albany Ins. Co.* (11); *Meadowcroft* v. *Standard Ins. Co.* (12); *Phillips* on Insurance (13); *Pimm* v. *Lewis* (14); *Smith* v. *Hughes* (15); as to receiving evidence of what is the subject matter mentioned in the contract—*Macdonald* v. *Longbottom* (16); *Newell* v. *Radford* (17); *Joindes* v. *Pacific Ins. Co.* (18);

(1) L. R. 5 H. L., 64; (2) 4 Jur., N. S., 1169; S. C. 28. L. J. Chy., 225; (3) 18 Jur., 394; S. C. 5 DeG. M. & G., 264; (4) 14 Grant, 169; (5) 33 U. C., Q. B., 284; (6) 7 Grant, 130; (7) 27 Beav., 377; (8) 16 U. C. C. P., 176; (9) L. R. 19, Eq., 500; (10) 50 Penn., 331; (11) 4 Lansing, 433; (12) 61 Penn., 91; (13) vol. 1 p. 222, Ed. of 1867; (14) 2 F. & F., 778; (15) L. R. 6, Q. B., 607; (16) 1 E. & E., 977; (17) L. R. 3, C. P., 54; (18) L. R. 6 Q. B. 674; S. C. L. R. 7 Q. B., 517.

and the cases cited in the judgment in Chancery and in the Court of Appeal. *Brown* v. *British American Insurance Company* (1); *Campbell* v. *National* (2); *Redford* v. *Mutual Insurance Company* (3); *Montreal Assurance Company* v. *McGillivray* (4); *Johnson* v. *Provincial Insurance Company* (5).

The notice to Hooper was in effect the same thing as a notice to the Company and Respondents cannot be made responsible for the neglect or mistake of Hooper, while acting within the scope of his authority, nor for any neglect, error, or omission of Hooper in forwarding or communicating any documents, notices or information to the defendants, or any of their agents, or otherwise; nor for the neglect of any officer of the Company in conveying information to Hooper, or to the Plaintiffs or otherwise. The Defendants are therefore estopped on the facts proved from denying that the Plaintiffs were insured on the whole of their stock, both in original building and added flats.

Laidlaw v. *London and Liverpool and Globe Ins. Co.* (6); *Rowe* v. *Lancashire* (7); *Ross* v. *Commercial Union Ins. Co.* (8); *Gale* v. *Lewis* (9); *Marsden* v. *City Plate Glass Co.* (10); *Hough* v. *City Ins. Co.* (11).

The Appellants knew that the stock was partly in no. 272 and partly in 273, and still they kept the money which was intended to insure the whole stock which interim receipt covered. Then, if the policy differs from the actual agreement, equity will decree relief on the agreement and not on the policy, and this after happening of the loss insured against.

(1) 25 U. C. C. P., 517; (2) 24 U. C. C. P., 133; (3) 38 U. C. Q. B., 538; (4) 13 Moore P. C., 121; (5) 26 U. C. C. P., 113; (6) 13 Grant, 377; (7) 12 Grant, 311; (8) 26 U. C. Q. B., 559; (9) 9 U. C. Q. B., 730; (10) L. R. 1 C. P., 232; (11) 29 Conn., 10.

Collett v. *Morrison* (1); *Jones* v. *Provincial Insurance Company* (2); *Franklin Fire Insurance Company* v. *Hewett* (3).

It cannot either be argued that the Respondents ever agreed to accept a policy on stock in the original building alone. If the agent had thought the additional premium was only for increased danger, he would have given a receipt to that effect as did the Royal, and not a renewal receipt, thinking it a new insurance. In point of fact, the Appellants contend that they had a right to accept the whole risk; to take the premium and retain it, and yet to so frame their policy as to escape liability. Now the policy, not being in accordance with the previous actual agreement between the parties, it could not supersede the interim receipt.

Earl Beauchamp v. *Winn* (4); *Xenos* v. *Wickham* (5); *Cooper* v. *Phibbs* (6).

As to the power to reform a policy after the loss, the learned counsel referred to *Phœnix Ins. Co.* v. *Gurnee* (7); *Phœnix Ins. Co.* v. *Hoffeums* (8); *Manhattan Ins. Co.* v. *Webster* (9); *Philips on Insurance* (10); *Collett* v. *Morrison* (11).

And as to the effect to be given to the finding on the facts by the Judge who heard the evidence and tried this cause in the first instance, to "*The Alice*" (12).

Mr. *Bethune*, Q. C., in reply:—

The meaning of the interim receipt is that the party is insured until another contract is agreed upon. The Company could not have returned the premium, for Mr.

(1) 9 Hare 173 (see page 175); (2) 16 U. C., Q. B., 477; (3) 3 B. Monroe, 231; (4) L. R. 6, H. L., 324; (5) L. R. 2, H. L., 296 & 324; (6) L. R. 2, H. L., 170; (7) 1 Paige's N. Y. C. R., 278; (8) 46 Miss., 655; (9) 59 Penn., 227; (10) 5th edition, p. 71 and 72, ss. 116 & 117; (11) 9 Hare, 173; (12) L. R. 2, P. C., 245.

Smith knew nothing more than that the risk had been increased in consequence of the cutting. The language used in the *N. B.* on the policy is clear and positive, and yet the Respondents keep the policy for six months; and it is only after the loss and after an action on the policy has been decided against them that they come and ask to have the policy reformed. The mere misinterpretation cannot affect this matter unless the Court is satisfied that the mistake is *mutual.*

June 28th, 1877.

The CHIEF JUSTICE:

The first question to be considered is, whether Hooper, the Defendants' agent, had authority to bind the Company by granting interim receipts on taking risks for them, and as to alterations made requiring additional premiums on the substitution of one policy or interim receipt for another. Mr. Smith, the Defendants' secretary and chief agent in Canada, said: "Hooper's duties were to receive proposals or applications for insurance and give interim receipts subject to confirmation by the Montreal office; if not confirmed by that office, the risk was to be cancelled and the premium returned less the amount earned by the Company. His duty was to receive notices of changes in the risk; to inform the Montreal office of them; and his action in these matters was subject to the approval of the head office. On cross-examination, he said changes in the character of the risk take place frequently during the course of the risk, and changes in the stock and its location; and, in these cases, the local agent has the same power

as in the acceptance of a risk in the first instance. If what he does is not approved of, the Company returns the premium less the amount earned. The agent has the same power to make alterations or modifications of an insurance, as he has to make an original insurance. In all cases the agent has a power subject to the control of the head office. The agent has this power of modification, pending the issue of the policy, and Plaintiffs were certainly insured up to the 23rd September. It was within his power to assent to the continuance of this insurance, notwithstanding the change notified by the letter of the 10th of August. He did not make us aware of the fact that a part of the property insured was moved; it was his duty to have done so, &c." * * *

"If Mr. Hooper had insured deliberately the goods "in these buildings, as one risk, it would have been "binding as long as this receipt was in force; that is, "until the receipt is cancelled in some way or other "the risk is binding, notwithstanding it is in violation "of our standing rule as to splitting up the risks."

Mr. Ball, Defendants' agent and inspector, stated that he placed Hooper in charge as agent at Hamilton, and gave him instructions as to his powers and duties.

That Mr. Smith had stated the powers and duties of Hooper, as he (Ball) informed him they were at the time he gave him his instructions.

In addition to this, if the fact be, as is not denied, that Hooper was the Defendants' agent to solicit and receive insurances, and to take the monies therefor, and grant interim receipts, which, on the face, shewed the party paying the money was to be considered insured until the determination of the board was notified, there are decided cases, both in England and in the United States,

which shew that the acts of such an agent, relating to the taking or changing of risks before the issue of a policy, would be binding on the Company.

In what position did the Plaintiffs and Defendants stand in relation to the insurance on the stock of goods owned by the Plaintiffs, which were contained in the premises on King Street, in the town of Hamilton, on the 24th September, 1872, and before the issue of the policy granted to Defendants, bearing date 9th day of August, 1871 ?

The application signed by Plaintiffs, per J. J. Jermyn, is dated the 9th August, 1871, and is for insurance against loss or damage by fire by Defendants' Company on the usual terms and conditions of the Company's policy, in the sum of $6,000 for the term of one year, commencing the 9th day of August, 1871, at noon, on the property specified, to wit: on their stock of dry goods, chiefly clothes and tailor's furnishings contained in a stone building covered S. & M., marked No. 1 on diagram, and owned by Irvine. Amount insured, $6,000 ; rate, 62½c. ; amount of premium, 37.50 ; S. T. No. 272. On the same day, 9th of August, Hooper, in a letter addressed to Plaintiffs, certified that he had received the $37.50 premium for insuring that stock for $6,000 for a year in S. T. 272, and stated that if at the expiration of four months they wished to cancel the policy they might do so, and he would refund the money for the unearned period. The cheque for the premium of $37.50, payable to Hooper, appears to be dated the 10th of August. Whether this date is erroneous or not is, perhaps, of little consequence. On that very day (the 10th of August) Plaintiffs wrote Hooper as follows: "We beg to advise you that we "have added two flats over Mr. Williams' store, next

"door, to our former premises, and *that part of our stock* "*is now* in these new flats." What is the proper effect to give to this notice. It was given within twenty-four hours of the date of the application; had reference to the same goods and the same premises; and it was well known, both to Plaintiffs and Defendants' agent, that no policy at that time had been issued on the application. The interim receipt only had been given. The reasonable view to take was, that the Company would, as to the policy they were about to issue, make it to cover the goods as the premises were when the last notice was given on the 10th August. If the Company required a payment of increased premium, such increase would be for the whole year. It would not occur to any one that the premium for 364 days would be at one rate, and for one solitary day at another and less rate. It seems to me to be absurd to suppose that either Plaintiffs or Hooper thought, that after the letter of the 10th of August, they were to treat the matter in any other way than as virtually a new application for insurance on their goods in the premises as they were on that day. Combining, then, the letter of the 10th of August with the application of the 9th, it would read as follows: Application for insurance against loss or damage by fire, on the usual terms and conditions of the Company's policy, in the sum of $6,000 for the term of one year, commencing on the 9th day of August, 1871, at noon, on their property specified, to wit: On their stock of dry goods, chiefly of cloths and tailors' furnishings, contained in a stone building, and the two flats over Mr. Williams' store added thereto as part of these premises, which stone building is covered with S. in M., marked no. 1 on diagram, owned by Irvine.

It ought to be so read, for this was the true state of

the matter, and it had been so notified to Defendants' agent, who had examined the premises. The delay that arose from giving the new receipt was occasioned by the Hamilton agent wishing to learn at what rate the Montreal office would take the risk as changed. In one of his letters, that of 2nd September, he refers to the Hartford having risks of $5,000, Ætna $10,000, Lancashire $10,000, and Scottish Imperial $10,000, at 1 per cent. on the premises ; at this rate the matter was closed and a new receipt given. It was given on the 23rd of September, though ante-dated. The object of that date being put there by Hooper evidently was that the Company should receive compensation for the time the insurance had been running. It could not have been to confine the Plaintiffs to the description of the premises contained in the application of the 9th August, because they all then knew that a change had taken place. But what is now contended for by the Defendants is that the insurance should be confined to the building marked no. 1, because the application of the 9th August so asks for it. It is admitted that if that application had stated in express terms "We wish insurance on all our "stock contained in the building, marked No. 1 on the "diagram, and the two flats added to our premises," and Mr. Hooper had given a receipt for the premium, based on such an express application, that it would have bound the Company, though their general rule, as they said, was to consider property so situated as being in two or more buildings, and the value to be insured on each should be separately stated ; but the application, modified by the notice of the 10th, does, in effect, ask for the insurance on the whole stock as it was then situated.

Without going beyond the general rule laid down

for the interpretation of agreements between merchants, and men engaged in the every day business of life, I think the proper inference to draw from the letter of the 10th of August, to Mr. Hooper, is that they desired the insurance to continue on their stock in the whole of their premises as they were after the two flats were added to their former premises (the building marked No. 1 on the diagram).

They not only inform him, that they have taken in the two flats, but *that part of their stock was* in those *new* flats.

If the object had been merely to notify the Company of the change that had been made, and to submit whether they should pay additional insurance on that part of the stock in the building marked No. 1 on the diagram, there would have been no necessity of referring to the fact that "*part of their stock was then in the new flats.*"

Suppose the receipt given by Hooper had been dated the 23rd September, the day it was actually made out and signed, and it had been filled up to read:

"Received from Messrs. Wyld and Darling, the sum "of sixty dollars, being the premium of an insurance to "the extent of $6,000 on their stock, consisting chiefly "of cloths and tailors' trimmings, all contained in a "stone building on south side of King Street, Hamilton, "as described in agency order of the 9th of August" (the effect of a description in the agency order, after the notice of the 10th of August, being to include the two flats referred to) "for twelve months *from that date,* "subject to the approval of the Board of Directors, Mont- "real, the said party to be considered insured until the "determination of the said Board of Directors be notified; "if approved of, a policy receipt, and afterwards a

"policy will be delivered, or, if declined, the amount "received will be refunded, less the premium for the "time so insured.

"*N.B.*—This receipt is issued subject to all the conditions of the policy issued by the Company.

"(Signed,) F. L. HOOPER,

"Agent."

If after the granting of this receipt, and before any other was issued, or a policy granted, a fire had occurred, I cannot doubt that Defendants would have been liable to make good their proportion of any loss on the Plaintiffs' stock of goods, whether situated in the two flats or in the other portion of the building, used by them as a dry goods store.

The insurance is on their stock of goods, not on a part of it. There is nothing to shew that at the time the money was paid, or the receipt given, that any of the parties contemplated such an alternative as insuring part of the stock in one part of the premises, and part in another. The probability is, that when Hooper thought he was insuring their stock, it did not occur to him that the Company might consider it in the nature of two risks, and to confine the amount they insured to a particular part of the premises, and so he gave the receipt without so limiting the insurance.

After a good deal of vacillation in his evidence, this seems to me to be the proper deduction from it.

He says: "it never crossed my mind as to the effect "of the change on the goods moved into these two flats; "* * * * the original insurance had been in respect "of the whole stock; it did not occur to me to divide "the risk; if it had, I should have asked that the risk "should be divided; * * * * I swear I did not know "that by this letter the Plaintiffs wanted me *to cover*

"*these* removed goods; I do not now know what they "intended; I conjecture they intended me to cover "these goods by this insurance; I entertained this "conjecture shortly after the fire."

Further on in his examination, he said, if he had stated before the fire that he always considered the stock in both buildings covered by the insurance, it would have been true.

"I could truly have made this statement; I certainly "thought all the goods were insured; I told Mr. "Ball the same thing; * * * I always "thought I was insuring the whole stock; I "thought all the other companies, to which I have "referred, were placed in the same position, so far as "the goods covered were concerned; I thought all the "companies were covering the stock in both build-"ings."

On being recalled he said he thought he told Darling, after the fire that he always considered the stock in both buildings was insured, and that he so intended it.

If it had been the intention of Hooper to receive the additional premium of $22.50, merely to cover the increased risk on a then subsisting insurance, which it was intended to confine to one building, the proper course, as a business man, for him to pursue, was to have given the receipt for that sum, stating what it was for. But the taking up of the first receipt and giving a new one for the full amount, referring to their stock of goods, after he was notified of the adding of the two flats, and a portion of the stock being there, looks like the effecting of an insurance on the premises in the state they then were in, as the other companies did who charged the same rate of one per cent.

If Hooper himself were the insurer, I should say there could be no doubt that he would be liable as for an insurance on the whole stock, up to the time the policy was issued. I think it is satisfactorily shewn that Hooper had the fullest power to bind the Company with regard to all preliminary matters connected with the effecting of an insurance, until what he did was disapproved or affirmed by the company.

Looking at the written application and the notice of the 10th of August as to the alterations in the premises and the payment of the additional premium, making the rate on Plaintiffs' stock one per cent.; the giving up of the old receipt and the granting the new one on the 23rd September, though dated 9th August, I think the insurance under this receipt did cover the Plaintiffs' stock in the whole of the premises, and was not confined to the part of the stock that was not in the flats that had been added.

When, in addition to these written documents, Mr. Hooper himself admits that he considered he was insuring the whole of the stock in both buildings, I am relieved from the feeling that he might possibly have misapprehended the effect of the application and notice, and of the receipt he was signing.

It does not appear that Mr. Smith understood so clearly what was intended, though he seems to have had a lively apprehension of it when he came to prepare the policy. But if Hooper had done his duty, and sent forward the notice to him that part of the stock had been removed into the added flats, I cannot doubt he would have had a clear understanding of what was meant. This omission of Hooper, however, is not a matter of much consequence when considering the construction that should be given to the receipt he signed

on the 23rd September, and certainly it should not prejudice the Plaintiffs. It may have had the effect of inducing Mr. Smith to make out a policy granting an insurance different from that which had been agreed upon, and so have caused the mistake which it is the object of this suit to remedy.

The effect of the receipt, then, being a contract to insure the Plaintiffs on their whole stock in their premises as they were on the 23rd September, how are they to be deprived of the benefit of the contract?

That contract was not accepted by the Company. The policy sent has been held to be not an acceptance of that contract. If it was intended to accept the interim contract and ratify it, that was not done, and there must be a mistake which should be rectified. If it was not intended to accept that contract, then there has not been another made which both parties assented to, and so the one made on 23rd September remains The terms of the interim receipt being: if approved, a policy will be sent; if declined, the proper amount will be refunded. The only evidence of the Plaintiffs having accepted the contract, as contained in the policy, was that the policy was sent to them, and they kept it. That might be *primâ facie* evidence of acceptance, but it seems clear that they thought the policy was such as they had stipulated for, and brought an action on it in that view. Two of the learned Chief Justices, as well as the learned Q. C. before whom the case at law was tried, were not of opinion that the language of the policy so clearly confined the insurance to one building that they would have so decided on reading it.

It would certainly be laying down a very harsh rule to say, that an unskilled person should be held as accepting a contract, created by an instrument framed in such

a way that learned Judges thought it would bear a construction which accorded with that put on it by the party who received the instrument, because a Court of Law, after serious consideration and argument, thought another construction that the framer of the instrument put upon it, was that which was the strictly legal one. In such a case, a party would be held constructively to have assented to an agreement which, in truth and in fact, was the reverse of what he intended to agree to. In this particular case the Plaintiffs were undoubtedly expecting a policy to cover the whole of their stock, and reading over the policy, supposing the Company knew what Hooper knew as to the change of their premises after the 8th of August, they would naturally suppose that the policy referred to their stock contained in a building owned by Irvine, occupied by them as a dry goods store, situated on the south side of King street (as it was occupied when they paid the additional premium), particularly as it referred to the opening into the adjoining house, and the coal oil kept there. They had no reason to anticipate anything different was intended by the policy from the receipt which Hooper had given, nor could they suppose that Defendants, without notice to them, would send a policy which neither they nor the Defendants' agent intended should be sent.

If the policy itself were the only contract, and there was no interim receipt, and no slip or statement showing what the contract was, it might be difficult, if not impossible, for the Plaintiffs either to reform the contract or to enforce their claim on the interim receipt given on the 23rd September. In such a case no binding contract of any kind would be shewn; the policy itself being the only evidence of the contract. The

Plaintiffs might have meant one thing and the Defendants another; and the Defendants could not be bound by a contract they had never entered into or intended to enter into. But if an insurance slip contained the true terms of the intended policy which both parties assented to, and the Insurance Company, in entering the matter in the policy, admittedly made a mistake, then the authorities are clear that the contract should be reformed.

Here, however, Hooper having power to make the interim contract to bind the Defendants, under it Plaintiffs continue insured until the Company have notified the acceptance or rejection of the application. As I have already stated, I do not think they are bound by the terms of the policy because they did not return it; they supposing that it really carried out what they agreed for.

Practically, it is of little consequence whether the decree is to reform the policy so as to make it conform to the insurance effected by the receipt signed on the 23rd of September, or to hold that the Company is bound by the insurance effected by the receipt referred to, and in that way answerable for the loss claimed.

I refer to the opinions expressed in the very able judgments of the learned Judges in the various courts through which this long pending case has passed in the Province of Ontario. All the Judges in the different Courts of Law and Equity before whom this case has been brought, including the trial at *Nisi Prius*, eleven in number, with singular unanimity, have had strong convictions that these Plaintiffs are entitled to recover the amount they claim in this matter.

Were it not that three of my learned brothers in this Court entertain a different opinion I should have thought

that the undisputed facts in this case shewed such a clear right on the part of the Plaintiffs to recover, that any respectable Insurance Company, after the opinions expressed by so many Judges, would not have persisted in refusing to indemnify the Plaintiffs for the loss they have sustained, and to protect themselves against which they had in good faith paid their money to the Defendants, and which they still keep.

The authorities referred to on the argument, many of them cited in the various judgments in the Courts below, seem to me to be sufficient to sustain the conclusions arrived at by the learned Judges.

I shall only refer to two or three cases not referred to in the Courts below, which seem to me to accord with them.

Motteaux v. *The London Assurance Co.* (1); where Lord *Hardwick* amended a policy by a slip which was signed at the time. In subsequent cases he refused to reform the contract of insurance, unless it could be clearly shewn that it was a mere mistake that was to be corrected.

In one of the American cases (2), the doctrine is laid down in these words: "There must be a distinct show-"ing, by clear and unequivocal allegations * * * that "there was, before the policy was framed, an agreement, "a concurrence of the minds of the assured (or his agent), "and the underwriter to protect risks, which were "afterwards, by mistake or fraud of the underwriter, "left out of the formal instrument."

In Phenix Insurance Company v. *Gurnee* (3); the complainant applied to the company for insurance on

(1) 1 Atkyns, 547; (2) *Davega* v. *Crescent Mutual Insurance Company of New Orleans*, 7 Louisiana, 228; (3) Paige's N. Y., Chy. C., 278.

a two story and a half frame grist mill, one run of stones, two bolts, &c, with privilege to use a stove in second story; cost $1750; insurance, $1,200. He signed the application, the policy was made out and delivered to complainant, and the insurance was as follows: "On "his frame mill house, two and a half stories high, "privileged as a grist mill only." The mill was afterwards burnt down, Defendants insisted the policy was on the mill house only. The Complainant applied to them to correct the policy according to the written memorandum; Defendants refused to do so; Complainant filed a Bill to correct the mistake, and the Circuit Judge decided the policy should be corrected agreeably to the written memorandum. There was an appeal to the Chancellor *Walworth*.

He said the difference of description must have been clearly a mistake of the clerk, in filling up the policy, or an intentional fraud upon the insured, and the latter is certainly not to be presumed.

Although the Complainant read over the policy, it is hardly to be presumed that a plain countryman, unacquainted with the law of insurance, would have noticed or understood the difference which was produced by the change of phraseology in the policy from the plain and intelligible memorandum which was probably taken down from the lips of the insured.

The case of *The Franklin Fire Insurance Company* v. *Hewett* (1); in the Court of Appeals, in the State of Kentucky, is in some respects like the case before us. The assured held goods consigned to them, and the question was whether the insurance covered the loss of goods. The effect of the receipt was considered in connection with the facts under which it was granted,

(1) 3 B. Monroe's R., 231.

and the Court came to the conclusion that the certificate or receipt covered that class of goods, though not specially named as such in the contract; the judgment then proceeds: "whatever degree of particularity might be "required in the policy itself, it is sufficient that the "certificate indicates with reasonable certainty, and "without any ambiguity on its face, that the insurance "was in fact made upon goods which the agent knew "were held, and expected to be received on commission. "But the certificate, though it evidences a contract which "the Defendants are bound to comply with by furnish- "ing a policy covering the subject which it indicates as "having been insured or by furnishing the indemnity "which the insurance implies, is enforceable against "them in chancery only (per Woodworth, 4 Cowen, "661). * * * If they had delivered no "policy as, according to the import of their agent's "acts, they were bound to do, the insured would "have a remedy against them in a court of "equity, perhaps for coercing the execution of the "policy before a loss, and certainly for enforcing the "indemnity implied in the insurance, upon the "occurrence of a loss by fire within the period fixed "by the terms of the agreement. And the only "remaining question in this case is, whether, by "reason of the delivery to their clerk of a policy, "materially varying in its effect from the original "contract as evidenced by the certificate, and by their "failure to object to it until after the loss had occurred, "they are precluded from claiming the benefit of the "original contract.

"They allege in their bill, that they had not seen the "policy, and did not know of it until after the fire "occurred which occasioned the loss * * * If, as may

" be assumed, they never saw it, there could have been " no such acceptance of it by them, as would prove that " they had waived the original contract, or taken this " policy as a consummation of it. And although their " neglect to enquire whether it had been delivered, or to " examine it if they knew of its delivery, shows a high " and culpable degree of carelessness, we think it would " be visiting upon them too heavy a penalty for " this neglect, to say by that alone they had forfeited " the indemnity for which they had paid the stipulated " price, and especially as they held the certificate, " which bore evidence of the contract, and as they had " no reason to anticipate a variance from it in any " policy which had been or might be furnished. * * * " It is by no means certain, nor even very probable, " they would have at once detected the variance, or " become aware of its importance until they demanded " payment upon it. * * * * The question is " not whether they (the Plaintiffs) shall be allowed, " after the loss has fallen, to make an election, which " they might not have made before and thus throw a " heavy loss on the insurers, which, if the election " had been made before the event, might nothave fallen " on them; but whether the complainants have, by " their mere delay in examining a policy which they " would undoubtedly have rejected as soon as they " understood it, lost the advantage of their actual contract, " or whether the insurers shall, by that delay, which can " be attributed to no sinister motive, be saved from a loss " of $5,000, which, under the original contract they were " liable to sustain, and which they would have been " bound to sustain under the policy, if, as was their duty, " they had framed it so as to effectuate the object of the " actual insurance. * * * In the view of the case

" which we have taken, we have not deemed it material " to enquire whether the variance in the policy from the " certificate was not occasioned by fraud, accident or " carelessness. We think the policy, as made out, is not " such an instrument as the Defendants were bound to " make in consummation of the contract of the agent, " that the delivery of the policy, as made, did not dis- " charge them from the obligation to comply with that " contract, and that the Complainants are not precluded " by their own acts or conduct from the benefit of that " obligation, but may enforce it in equity. * * * * " Although the facts were not originally within the " knowledge of the Defendants themselves, they were " within the knowledge of their agent, * * * and " his knowledge of facts materially affecting the trans- " action, is to be attributed to them. * * * If he " understood the matter differently (from the Com- " plainants), surely it was his duty to let them know " they were mistaken in supposing they had applied for " insurance on consigned goods, and were negotiating for " such an insurance."

Then *Collet* v. *Morrison*, (1) is a strong case in favor of the Plaintiffs. There, one Richardson, on the 9th September, 1844, went to the office of the Company, of which the Defendant was the managing director, and signed a printed form of a proposal for insurance. It contained amongst other things four enquiries: 1. Name, residence and description of the party proposing the insurance. 2. Name, &c., of party whose life is to be insured. 3. If of sober and temperate habits. 4. If now or ever afflicted with fits or any other of the enumerated disorders, or any other disorder tending to shorten life. Richardson answered the enquiries

(1) 9 Hare, 161.

in the form which he then filled up: To the first, "Mrs. Emma Collett, of, &c., by her Trustee, W. J. Richardson, of, &c." To the second, "daughter of the late Sir Thomas Gage, and wife of John Collett, Esq., M.P." To the third, "both." To the fourth, "not that I know of;" and Richardson signed the proposal. The usual enquiries having been made as to the health of Mrs. Collett, the proposal was, on the 16th September, laid before the directors, who agreed to accept the life and to insure it for the amount proposed. The usual notice having been given to Richardson that the life was accepted, and that the premium was to be paid within 30 days, he, on the 19th September, went to the Company's office, filled up, and signed another of the ordinary printed forms of proposal, in which, in answer to the first of the questions above mentioned, he said not as before, but simply: "W. J. Richardson, of, &c., Esquire;" and to the fourth, instead of: "Not that I know of," the answer was "No." The answers to the other two questions were the same as in the former proposal.

On that occasion Richardson paid them the first year's premium and stamp duty on the policy, for which a receipt was given by an officer of the Company: "Bri-
"tannia Life Office, 1 Prince's Street Bank, London, 19th
"September, 1844. Policy No. 5,194. Date, 9th
"September, 1844. Sum assured, £999; premium,
"£34 9s. 2d."

"SIR: I beg to acknowledge the receipt of £36 9s. 2d.
"being first year's premium and stamp duty for an
"assurance of £999, effected by you with the Britannia
"Life Insurance Company, on the life of Mrs. Emma
"Collett, the particulars of which will be expressed on
"a policy bearing the number and date above men-
"tioned."

The policy was made out in the name of Richardson, without describing him as Mrs. Collett's trustee; and, when completed, was sent to Mrs. Collett, who died in June, 1845. One of the conditions on the policy was, that if it was or should be at any time subject to any trusts, the receipt of the trustee for the time being shall be an effectual discharge to the Company.

On Mrs. Collett's death, Richardson set up a claim to the policy for his own benefit. The Plaintiff, as the personal representative of Mrs. Collett, claimed the policy also. There had been some litigation about the matter, and the Bill was filed to have it declared that the insurance should be treated as an insurance effected by Mrs Collett, through Richardson, as her trustee, for her separate use on her own life, and that Plaintiff was entitled to have the policy rectified accordingly, or treated and considered as if so rectified.

It was argued for the Defendant, there was nothing in the fact of Richardson having at one time made a proposal as a trustee, to prevent the Company afterwards contracting with him on his own account. Vice Chancellor *Turner* in his judgment referred to the cause of *Motteaux* v. *The London Assurance Company* (1) as an authority authorising the amendment of the policy. He said: "This case appears to me fully to establish "that if there be an agreement for a policy in a parti- "cular form, and the policy be drawn up by the office "in a different form, varying the right of the party "assured, a Court of Equity will interfere and deal "with the case upon the footing of the agreement and "not of the policy." The learned Vice Chancellor proceeded to argue on the facts. He asks, did they or did they not take the second proposal and prepare the

(1) 1 Atkyns, 545.

policy in its present form for the purpose of carrying out the first proposal. He arrives at the conclusion that the Directors must be held to have accepted the first proposal wholly, and not in part only, and that at the time the policy was issued, the agreement made with the Directors by the acceptance of the first proposal remained in force. Further on in his judgment he used these significant words: "In dealing with this case I "have abstained from entering into the question of "fraud, as I do not believe that any actual fraud "was intended; but in having taken this course, "I must not be understood to give any coun- "tenance to the notion that insurance companies, "preparing and issuing policies under such circum- "stances as occur in the present case, would not be held "liable in equity on the ground of fraud. The case of "fraud is more strong for the interference of the Court "than the case of mistake. Lord *Eldon*, in *ex parte* "*Wright* (1), refers to the distinction in cases where the "duty of perfecting an instrument rests on the party "who is to become liable under it; and the distinction "is clearly well founded in principle, and, I believe, "supported by authority."

I think, therefore, this appeal should be dismissed.

RITCHIE, J.:—

Commented on the evidence at considerable length, and stated he had been unable to satisfy his mind that the Plaintiffs had made out, beyond all reasonable doubt, that the agreement entered into between Plaintiffs and the agent of Defendants, was for the insuring of the stock in the added premises. But, that as so many

(1) 19 Vesey, 257.

judges had arrived at a different conclusion, he wished to put forward his views on this question of fact with diffidence. Assuming there was a valid contract to insure, and the policy was drawn up in a form different from the agreement, altering the substance of the agreement and varying the rights of the parties assured, he thought the case should be dealt with on the footing of the agreement and not of the policy. The Defendants not having been notified that the risk as so agreed on by the Plaintiffs and Defendant's agent was declined, and there having been no refunding or offer to refund the premium or any part thereof, the Plaintiffs might fairly assume, without examination, that the policy delivered was the policy referred to in the receipt, and not a new or other policy covering a risk which they had not offered the Company; and if the Company inadvertently or intentionally sent a policy not contemplated by the receipt, the Plaintiffs would not be bound by it. That this is not within the privilege conceded to the Company by the receipt of determining the risk under the receipt, but ought to be looked on either as an approval of the risk as agreed on by the agent, or an act *dehors* the receipt altogether; tantamount to a new offer on the part of the Company which the evidence fails to show has ever been acquiesced in by the Plaintiffs, leaving the receipt a valid outstanding instrument till so acquiesced in, and he could not think that the holding of the policy under the circumstances of this case could be considered such an acquiescence in a new agreement. That the mere transmission of the policy and retention by the Plaintiffs, would not as a matter of law, constitute an acceptance on Plaintiffs' part. That the original agreement would continue in force until cancelled or

modified by mutual consent. Whether there had been such consent, was a question of fact; that the keeping the new policy was matter proper for consideration as having some tendency to show an acceptance; but under the peculiar circumstances of this case he thought the Plaintiffs were, without being open to the charge of negligence, or laches, excusable in depositing the policy in their safe without examination, and relying with reasonable confidence, that the policy was transmitted not as a new offer on the part of the Company or as embodying insurance on a new or different subject matter, but as the policy referred to in the receipt, there being no understanding or agreement between the parties directly or through their agents, that any policy whatever was to be transmitted other than one covering the risk indicated in the receipt, and which policy was only to be transmitted on the Board of Directors approving of what the agent had done.

STRONG, J.:—

The Chief Justice has already so fully stated the facts established by the evidence that I need not repeat them.

The first enquiry is as to the extent of Hooper's powers. It is not disputed that he had authority to bind the Company by insurances effected by means of interim receipts, such as those he gave to the Respondents when the original risk was accepted, and subsequently on the 23rd September, 1871, on the payment of the increased premium. It is also conceded by Mr. Smith, the Defendants' chief agent, that notice of an increase in the risk during the currency of the interim insurance was properly given to Hooper. Indeed the

necessary requirements of an insurance business, carried on through an agent at a distance from the head office of the Company, make such a course of business indispensable.

The important question in the cause on which its decision must depend, is that respecting the terms of the contract entered into between the Respondents and Hooper on the 23rd September, 1871, when the interim receipt for the premium of $60 was delivered. That receipt is, in my opinion, consistent with the contract alleged by the Respondents to have been verbally concluded between them and Hooper, for it is written evidence of an agreement for the insurance of the Respondent's stock of goods in the stone building mentioned in the receipt, as that building had, on the 23rd of September, 1871, been altered by the addition of the new premises. The receipt, it is true, contains a reference to a supposed description of the premises contained in a document called an agency order, but Mr. Smith says that the use of these agency orders had been discontinued for some years, so that we must regard the words "*as described in the agency order of this date*" as struck out of the receipt. It is true Mr. Smith says, that in the place of this agency order they had the application, but the Company cannot import the description contained in the application into the receipt, merely because they had made the application serve the purpose of an agency order, there having been no assent on the part of the Respondents that the description in the application should be considered as that referred to in the receipt. The reference being to a document of the latter description, and there being no such instrument, the receipt must be read as though the words were altogether omitted from the printed

form. The receipt should then, if I am right in this view, be read as follows:—"Received from Messrs. "Wyld & Darling the sum of $60, being the premium "on an insurance to the extent of $6,000 on their stock "of dry goods, consisting chiefly of cloths and tailor's "trimmings, all contained in a stone building on south "side of King Street, Hamilton, for twelve months, "subject to the approval of the Board of Directors, "Montreal; the said party to be considered insured "until the determination of the said Board of Directors "be notified—if approved of, a policy receipt and after- "wards a policy will be delivered, or, if declined, the "amount received will be refunded, less the premium "for the time so insured."

A reference to the extrinsic facts, which is always permissible for the purpose of identifying persons or things, would shew that on the 23rd September, 1871, the stone building on the South side of King Street, in the city of Hamilton, which was occupied by the Respondents as a store, and in which was contained their stock of dry goods, consisted of the house originally occupied by the Respondents prior to the 9th of August, with two flats, extending over the adjoining house, added. To warrant the conclusion the Appellants contend for, we should have to read the receipt as though it provided for insurance on "so much" of the Respondents' stock of dry goods as was contained in a stone building, on the South side of King Street; but the fact being that, on the 23rd September, the old and new premises were being used indiscriminately for the storage of the stock, we must, in order to give effect to the agreement to insure the stock, consider the added flats as being included in the description "stone building." This construction is consistent

with the facts, for the added flats had been incorporated with the stone building originally occupied by the Respondents, and notice of the alteration and addition had been given by the Respondents, by the letter to Hooper of the 10th August, 1871, and the place had been inspected by Hooper, who had himself seen that a portion of the stock had been placed in the new premises.

Assuming, however, that the application, Exhibit A., is to be referred to for the purpose of identifying the premises, we must read that document in connection with the interim receipt and as modified, as regards the description of the premises, by the letter of the 10th of August. Then, collecting the agreement from these three documents, the true contract between the parties appears to me to have been precisely that which the Respondents allege, and Hooper admits it to have been. The letter gives notice of the alteration in the premises. The insurance existing at the date of the letter was on the whole stock of goods, which the original premises had up to that time been used for the storage of. The letter is not confined to the notice of the alteration to the premises, but goes further, and shews by the intimation that part of the goods had already been placed in the added flats, that the extended premises were intended to be used for the same purpose as those originally occupied by the Respondents; that their stock, as a whole, which was the subject of the insurance, was intended to be thereafter kept indiscriminately in their newly arranged business premises without distinction between the old and the new parts of the building.

Had this letter read in this way: "And part of our "stock, *on which we have your insurance*, is now in these

"new flats," there would have been, to the satisfaction of the most hypercritical mind, on the face of the letter, an indication of an intention to continue the insurance on the whole stock. But, the fact was, that these goods were originally covered by the insurance existing; that they were parts of a whole so insured; and, in an ordinary letter of business, framed with the conciseness peculiar to such correspondence, and not with the fullness and accuracy of a legal document, there was nothing unusual in the writers leaving their obvious intention to be implied.

I regard the letter of the 10th August, read in the light of the circumstances which preceded and accompanied it, and making those implications and inferences which have always to be made in construing ordinary correspondence between men of business, as indicating a proposal to continue the insurance on the whole of the Respondents' stock, just as clearly as if that intention had been verbally expressed. It is a much more reasonable and natural presumption to make—one more consistent with the well known usages of business, that a merchant, having an insurance on his whole stock in trade, and having enlarged his premises, giving such a notice as the Respondents gave, shall be considered as proposing to the insurers a continuance of the insurance on the same subject matter rather than that he intended to abandon the insurance which originally covered that portion of the constantly fluctuating stock which, from time to time, as convenience and the exigencies of business should require, he might deposit in the new as distinguished from the old portion of the premises.

No reason is suggested for making any such distinction. It would be wholly arbitrary. Let me put a case

identical in principle with this, but, perhaps, more familiar in its circumstances. Suppose an insurance on the household furniture contained in the dwelling-house of the party insured, who, during the continuance of the risk, gives notice that he has built an addition of some rooms to his house, upon which the Insurance Company, after inspecting the premises, make a charge for increased risk which is paid, would any one suppose that on a loss occurring, a distinction was to be made by the Company between the furniture in the old part of the house, and that in the new, the former being treated as insured, and the latter as uninsured? In such a case, the objection of the insurer would surely be treated by a jury, or by any judges of fact, as an unworthy quibble.

Then, in what respect, as regards the inferences to be drawn from the conduct of the parties, does the supposed case differ from that now before us?

Sitting in appeal from a Court of Equity, this Court in dealing with a question of fact, has to make the same deductions and inferences as a jury would be called upon to make in a Court of Common Law, and making these inferences, there is, in my judgment, ample written evidence of the contract which the Respondents have set up and sought to enforce by their Bill.

But even if the written evidence should be deemed an inaccurate expression of a contract between the parties, such as the Respondents contend for, is not the oral testimony amply sufficient to warrant such an alteration of the receipt as will make it accord with the agreement set up by the Bill? There is the direct evidence of Hooper, who still continued at the date of the hearing to be the Appellants' agent at Hamilton, that the contract was as the Respondents alleged it. If it is said

his deposition contains self contradictions, it is to be remarked that he was a hostile witness, and that his admissions were adverse to his own interest. In several portions of his testimony he distinctly states that he intended to insure all the stock without making any distinction with regard to its situation. The question of the sufficiency of this evidence became one of preponderance of testimony—it was for the learned Vice Chancellor, before whom the cause was tried, to weigh the evidence of Hooper. No one can say that there was no evidence to support the finding, and after two judgments in courts below affirming that finding, hardly anything short of that should, I venture to say with sincere respect for the opinion of those from whom I differ, be sufficient to warrant a reversal here.

Then, if the contract as alleged by the Respondents is proved out of the mouth of the agent who made it, to the entire satisfaction of the judge in whose presence the witness was examined, I see no reason why that testimony, taken in conjunction with the evidence of the Plaintiffs' other witnesses, Mr. Darling and Mr. Jermyn, and the circumstantial evidence, which, to my mind, makes a presumption in favor of the probability of the Plaintiffs' case almost irresistible, should not be sufficient to authorize the Court so to reform the interim receipt as to make it express what Mr. Hooper admits to have been the true agreement.

So that, if the construction of the receipt and the letter, read either by themselves or in conjunction with the application for insurance, was, as in my judgment it is not, against the Respondents, they would still have the verbal evidence to fall back upon as a ground for the rectification of the receipt. In saying this, I am not unmindful of the strict principles which Courts of

Equity apply when called upon to grant relief by way of rectification of written instruments in requiring strong, clear, irresistible evidence of mistake; but I think this condition is amply complied with without treating this case as one of exemption from the general rule.

It was Hooper's duty to prepare the interim receipt, and it is a well established principle that Courts of Equity will afford relief by way of rectification much more readily when the preparation of the instrument was the peculiar duty of one of the parties, than in others where the parties are to be regarded as participating in it (1).

Further, if it is the duty of one party to a contract, to prepare the written memorandum, and he does so in such a way as to mistake the real agreement, and then refuses to correct the mistake, such conduct amounts to equitable fraud; that is, fraud in the sense of unfair, unconscionable conduct, and a Court of Equity, on that ground alone as distinguished from mistake, will give relief (2).

The Respondents are, therefore, as it seems to me, entitled to say, first :—That the true construction of the application, receipt, and letter read together is such that the agreement which they insist on is expressed in writing :—Secondly, that even if such is not the true construction, a verbal agreement, such as the Plaintiffs set up, is proved in the clearest possible manner to have been completed between them and Hooper, which Hooper, on this hypothesis, incorrectly expressed in the receipt dated the 9th of August, and delivered on the 23rd September; and that therefore they are entitled, on the

(1) See *Collett* v. *Morrison*, 9 Hare, 162; (2) See *Collett* v. *Morrison* ubi sup. and *ex parte King*, 19 Vesey 257.

ground of mistake, if not of fraud, to have that receipt rectified, and made to accord with the contract really entered into.

The result is, that on the 23rd of September, 1871, there was completed, through the agency of Hooper, a contract, subject to the conditions of the interim receipt, binding the Defendants to an insurance of the Plaintiffs' whole stock, including such portions of it as they might choose to place in the premises which they had added to their original store. From that date all the stock on the premises as forming one building was insured.

Then, when was this contract of 23rd September, 1871, put an end to? By the terms of the interim receipt two alternatives were provided for: if the contract made by the agent was approved of, a policy receipt, and afterwards a policy, was to be sent, if declined the amount received was to be refunded, less the premium for the time insured. Neither of these modes of determining the receipt having been adopted by the Appellants before the loss, it seems clear, on general principles, that the only other mode of putting an end to the interim agreement, was a rescission by the concurring assent of the parties.

There is no pretension of any express agreement to rescind. Therefore, if the Respondents are now to be debarred from setting up the receipt as having been a binding contract of insurance at the date of the loss, it must be on one or the other of these two grounds, either because the assent of the Respondents to the new contract, embodied in the policy, is to be inferred from their retention of that instrument, or because their conduct has been such as to amount to an equitable estoppel, or *estoppel in pais*, precluding them from now insisting on the receipt.

The construction of the policy having been determined by the appropriate court of construction, the judgment of the Court of Queen's Bench, in which the action was brought, is now *res judicata*, and I am therefore bound, whatever my own opinion might otherwise have been, to assume that the goods in the new premises were not assured by that instrument.

Then the facts being that the Appellants delivered a policy, but not one according with the terms or in consummation of the contract entered into with the agent; that this policy, thus containing what, in law, would be no more than a proposal from the Company for an assurance which the Plaintiffs never contemplated, came into the possession of the Respondents' clerk or book-keeper, and was by him deposited in the Respondents' safe, where it remained without ever having been read by either of the Respondents until after the fire, it is out of the question to say that there was ever such an assent on the part of the Respondents to the terms of the insurance embodied in the policy as to constitute an original contract independently of the receipt, and in that way to rescind or supersede the contract evidenced by the receipt. No contract, then, having been entered into between the parties subsequent to that of the 23rd September, 1871, made through the agency of Hooper, on the part of the Appellants, there has never been any rescission of that contract by an agreement, either expressed or implied.

Then, have the Respondents, by their conduct in retaining the policy, induced the Appellants so to alter their position as to entitle them now to set up an equitable estoppel against the claim of the Respondents to treat the policy as inoperative, and to fall back on the receipt? I cannot see that they have. Though it has

been said, that if the Respondents had promptly read the policy, they would have discovered the mistake in time to have returned it, and have given the directors an opportunity of declining the risk and returning the premium before a loss; still, actual knowledge of the contents of the policy is an indispensable element of such a defence; and the evidence not only fails in shewing such knowledge, but the testimony of Mr. Jermyn and of Mr. Darling shows that the policy was never actually read, or even seen, by the Defendants. *Franklin Insurance Co.* v. *Hewitt* (1).

There could be no imputed knowledge of the contents of the policy, inasmuch as there was no obligation binding the Respondents to read it; indeed, on the other hand, the Respondents might well assume that it was sent to them to carry out the only contract of insurance they had with the Appellants, that entered into through their agent, Hooper, and not, as according to the contention of the Insurance Company it must have been, as a proposal for a contract entirely different in its terms from that just mentioned. Moreover, had the Respondents read the policy, it is by no means sure that they, relying as they naturally would upon Hooper having communicated to the Company all the circumstances, including the letter giving notice of the change in the risk and the particulars stated in his evidence, as to the inspection of the premises and the extent of the new insurance, might not have construed the policy, as did the learned Queen's Counsel who tried the action, as covering all they now claim to recover for. The reference to the diagram which had been added to their application by Mr. Smith, the agent at Montreal, after it came into his hands, and the letters and figures "*S. R. no.* 272," which

(1) 3 B. Monroe, 231.

were mere symbols, of which the Defendants alone had the key, would, for the reasons given, have necessarily been without meaning to the Respondents, if they had read the policy. They would, therefore, scarcely have been led to any other conclusion than that the policy was delivered in execution of the contract they had made with Hooper on the 23rd of September, 1871.

The result, in my judgment, is that the original agreement for insurance evidenced by the receipt remained undetermined at the date of the loss, and the Respondents are entitled to enforce that contract. If the Appellants have been greatly prejudiced in having been deprived of the option of rejecting the risk, their loss is attributable to the negligence of their own agent, Hooper, in omitting to communicate to the Company's office, at Montreal, the letter of the 10th August, 1871, in its integrity. The importance of this letter is, it will be seen, conceded by Mr. Smith, who says in his evidence it was Hooper's duty to receive it and forward it to the head office. This was a matter entirely between Hooper and the Appellants. It was not for the Respondents to enquire, either of the Appellants or of Hooper, if the latter had performed his duty to the Company. They had a perfect right to assume that the knowledge and contract of Hooper within the limits of his authority was the knowledge and contract of the Company, and to act accordingly.

In short, the case is one which, as far as legal principle is involved, depends on the application of that familiar rule of the law of agency which throws the loss occasioned by the neglect of an agent on his principal, though innocent, rather than on another equally innocent third party.

As, for the reasons already stated, I am of opinon that

the true construction of the proposal, the letter and the interim receipt read together, establishes the contract which the Respondents set up, I consider no rectification of the receipt is called for.

I do not think there ought to be any rectification of the policy for the reason that the Directors at Montreal, to whom alone the Appellants had given authority to contract by means of policies, never assented to the terms of the contract entered into between the Respondents and the local agent, and, therefore, the Respondents and the Appellants never were "*ad idem*" as to an insurance to be carried out by policy. I think the decree should be slightly varied by striking out in the first paragraph the words directing that the policy should be reformed. The decree so altered will, I think, give the Respondents the relief to which they are entitled. Subject to this formal variation, I am of opinion that the appeal should be dismissed with costs.

TASCHEREAU, J.:—

I think the facts of the case are clear enough, and need no special mention at the present moment.

I think, also, that the Respondents were entitled to have the decree granted in their favor by the Court of Chancery confirmed by the Court of Appeals, and this decree, in my opinion, was warranted both in Law and Equity.

The whole transaction between the Respondents and the Appellants, from the beginning to the end, was conducted through one Hooper, agent for the Company. He (Hooper) was informed by the Respondents, on the 10th August, 1871, that Respondents had added two flats in Mr. William's store, next door to their former premises, and that part of their stock was then in these new

flats, and that they wanted the whole of their stock insured. He gave a clear statement of the premises in which were contained the goods they intended to insure. No two different meanings can be inferred; and I think that this part of the case is so understood. On this information, Hooper, as agent, claimed an increased rate on account of the addition of the flats. The Appellants contend they had only partial notice of such alteration and of the payment of the increased rate, by Hooper's letter of the 10th August, in which he did not fully, as he was bound to do, state that part of the goods were in the flats through which the Respondents had made an opening. The secretary, it is to be remarked, took note of this opening and pencilled it in the application, by these words: "There is an opening on the east end of "the above through which communication is had with "the adjoining house."

The policy was, notwithstanding, issued, in very short and ambiguous wording, as is very frequently the case, I must admit, (very likely to save time, pen and ink); and though the increased premium, after full notice that some change had taken place, has been received by the Appellants, the policy issues without specially alluding to the occupation of the two flats; the Appellants pocket the money, and do not call the Respondents' special attention to the fact that the insurance on that part of the goods in the added premises has been repudiated; but on the contrary, they allow the Respondents to believe, as their own agent did, that they were fully insured, and that the new risk was covered *in toto*. Such conduct, in my humble opinion, should not be countenanced; and I see that the full Bench in Toronto, before whom the case was brought, have entirely sustained this view. But the Appellants further contend

that their only contract was the one expressed in the policy issued, on the back of which was printed a requisition to Respondents, to read that interesting document, and come to the conclusion that this was sufficient notice. I think no intelligent twelve jury men (if such a case had been submitted to them) could come to this conclusion, and that if material alteration was intended, the Appellants should have taken the trouble of informing the Respondents in a more forcible way than by a *banal formule*, which is seen in every policy, and that in default of this, we may infer two things, either that they considered the policy sufficient to cover the risk as described by their agent, or that they repudiated the acts and opinions of their agent, and in such case should have informed the Respondents and their own agent of the fact of their repudiation of the interim receipt, and return the increased premium. They do nothing of the kind; and I infer (taking the most favorable view of their conduct), that they considered the policy sufficient in its terms to meet the intention of the Respondents, and of their own agent, and binding on themselves. To say the contrary, I think, would be an insult to them, and might lead one to question very much the regularity of the Appellants conduct throughout this transaction. I observe that no fraud is reproached to the Respondents, and that they have fully disclosed their true position and intention to the Appellants' agent, Mr. Hooper, who visited the place, and had the most ample power to assent to any change. I think the omission by the Appellants' agent to give them the fullest information, is, notwithstanding, binding on his principals.

But, moreover, the information given by Hooper to

Mr. Smith, by his letter of the 27th August, 1871, must have conveyed to the principal not only a faint idea, but an entire conviction that these flats would be occupied by them in their trade of merchant tailors: for, *cui bono*, open these two flats? Surely it was not for the pleasure of looking through them, and seeing what other people were doing. It certainly was not to sell coal oil, which was not part of their trade, and which seems, as it appears by the record, to have been sold only on the lower flats by Mr. Onyon; and, I remark, that the secretary of the Insurance Company insisted on this gentleman keeping only a certain quantity of oil in his premises. What, then, would be the object of the Respondents in cutting an opening in these flats, if it was not to place their goods in them. This surely must have struck the manager of the Company at the head office in Montreal, and if he did not so understand it, he should have made further enquiries from the agent, Mr. Hooper, at Hamilton. I infer such knowledge from all the surrounding circumstances of the case, and principally from the evidence of Mr. Smith. But, moreover, I think the Company bound by Mr. Hooper's act; he should have communicated *totidem verbis* the frank declaration of the Respondents that they had put in part of their stock in these flats. The authorities, to show that the acts of the agent in the execution of his duties bind his principal, need not be cited here. I am also of opinion that the Appellants were bound by the interim receipt, insuring the whole of Respondents' stock; and that any change, if intended by Appellants, should have been notified by them to Respondents. That interim receipt, in the usual course of business, should have been sent

to the principal office, and the policy issued on it; at least, the Respondents had every ground to think so, and could not suppose that the Company could materially alter their position by sending the full policy with a mention of the flats, without believing that this short allusion to it did not cover the whole of their risk; even taking the most lenient view of the case, I do say that there was a common error—the Respondents wanted the whole of their stock insured in the flats as well as in their other building, they having paid full value, and having their interim receipt to that effect, and the Appellants, by some acts of irregularity of one of their officers, having issued a policy which did not cover all the Respondent's goods, this policy should be so amended as to meet the facts and equity of the case. On the whole, I am of opinion that the Respondents are entitled to the affirmance of the decree, and that the appeal should be dismissed with costs.

FOURNIER, J:—

La question à résoudre en cette cause consiste suivant moi, à savoir quel a été précisément l'objet du contrat d'assurance intervenu entre l'Appelante, d'une part, et les Intimés, de l'autre. Les faits qui ont précédé l'émission de la police d'assurance dont la reformation est demandée en cette cause, sont ainsi: après une première proposition d'assurance, demeurée sans effet, les Intimés en firent une autre en date du 9 août 1871, ainsi conçue.

"Application of MESSRS. WYLD & DARLING, of "Hamilton, of County of Wentworth, (profession or "occupation)———for Insurance against loss or damage "by Fire, by the *Liverpool and London and Globe Insur-*

"*ance Company*, on the usual terms and conditions of the "Company Policy, in the sum of $6,000 (Dollars), for the "term of one year, commencing the *9th day* of *August*, "1871, at noon, on the property specified, to wit:

"On their stock of Dry Goods, consisting chiefly of "Cloths and Tailors' Furnishings, contained in a *Stone* "*Building*, covered with S. in M., marked *no.* 1 on "Diagram, and owned by———

"Amount insured, $6,000. Rate, 62½.

"Amount of Premium, $37.50 S. T., *no.* 272. †."

Cette application était accompagnée de réponses aux questions faites par la Cie. dans lesquelles les Intimés déclarent que le fonds de commerce qu'ils désirent faire assurer se trouve dans une maison située sur le côté sud de la rue King, à Hamilton, entièrement occupée par eux comme magasin de *marchandises sèches*, "The whole as a Dry Good Store." Pour plus ample désignation ils réfèrent au diagramme sur leur police expirée, no. 1, 377, 249. Ils déclarent aussi qu'ils sont déjà assurés à la Compagnie "Royal Insurance Company", pour $6,000, et que c'est comme propriétaires (owners) qu'ils sollicitent cette assurance. Ces réponses sont suivies d'une adhésion formelle aux conditions suivantes:

"And the said Applicant hereby *covenants and agrees* "to and with the *said Company*, that the foregoing is a "just, full and true exposition of all the facts and circum- "stances in regard to the condition, situation, value and "risk of the property to be insured, so far as the same "are known to the applicant, and are material to the "risk; and agrees and consents that the same be held to "form the *basis of the liability of the said Company*, and "shall form a part, and *be a condition of this Insurance* "*Contract.* It is further agreed between the con- "tracting parties, that if the Agent of the Company fill

"up the application, he will in that case be the Agent of "the Applicant, and not the Agent of the Company.
"Dated at Hamilton, 9th August, 1871.
"(Signed,) WYLD & DARLING, *Applicants.*
per T. J. JERMYN."

Cette application fut acceptée par Hooper, l'agent de l'Appelante, lequel donna aux Intimés un certificat daté du même jour, 9 août 1871, constatant qu'il avait reçu d'eux une prime de $37.50 pour l'assurance de leur fonds de commerce, pour un an, *in* S. T. no. 272. Ce paiement, quoique fait en réalité le 10, par un chèque, n'en est pas moins reconnu comme régulièrement fait.

Jusqu'ici point de difficulté ni d'ambiguité. L'application et le certificat de paiement forment un contrat complet, quoique conditionnel, ne pouvant donner lieu à aucun malentendu. Mais la difficulté commence dès le lendemain de l'application, 10 août, par l'avis donné par les Intimés à Hooper, en ces termes.

"MEMORANDUM."

"WYLD & DARLING,
"Hamilton, Ont., "To F. L. HOOPER, ESQ.,
10th August, 1871. Hamilton.

"We beg to advise you that we have added two flats over Mr. Williams store, next door to our former premises, and that part of our stock is now in these flats."

En recevant cet avis, Hooper se transporta sur les lieux pour les inspecter, ce qu'il fit en présence de l'un des Intimés, Darling. Après avoir constaté que des ouvertures (large doors) avaient été pratiquées dans les 2me et 3me étages pour mettre en communication la maison voisine (no 273) avec celle décrite dans l'application, il fit les observations suivantes sur l'augmentation du risque causée par ces changements:

"I think I said that the Plaintiffs had *not improved the* "*risk by cutting these doorways;* I said to Mr. D. that "the former risk was *endangered by these cuttings;* I told "them that I thought their rate would have to be in- "creased; I can't remember any thing else I then told "them; I don't remember telling them how much the "rate would have to be increased; I told them I would "have to satisfy the Head Office, and that they would "have to settle what the extra rate would be; the "Plaintiff said he did not think the risk increased by the "cutting of the doorways."

Par lettre du 29 août, Hooper donne information à M. Smith, l'agent principal, à Montréal, des changements faits à la nature du risque, l'informant en même temps que la partie inférieure de la maison avec laquelle cette communication a été établie est occupée par un nommé Onyon, marchand d'huile de charbon. Il ajoute qu'il avait averti les Intimés que le taux de leur assurance serait augmenté de 1 p. c., que les Compagnies "Royal et Hartford" avaient adopté ce taux.

Dans une lettre du 1er sept., M. Smith l'agent principal demande s'il doit comprendre que le total de l'assurance doit être de $12,000 " *in this S. T. no.* 272," ou si l'application no. 691 doit remplacer celle du no. 680. Il est ensuite informé par Hooper que l'application no. 691 est la seule en force. Dans la même lettre Smith ajoute "if coal oil in any greater quantity than "10 barrels is stored I think we are much better with- "out the risk. I notice the assured has cut an opening "into the adjoining building on the East side, and that "the lower part of said adjoining building is occupied "as a coal oil store." Le 23 sept., Hooper reçut des Intimés la somme de $22.50 formant avec les $37.50, payées le 9 août, la somme de $60.00 pour prime

d'assurance à 1 p. c. sur $6,000, et donna aux assurés le reçu suivant portant la date du 9 août, qui est celle de l'application afin de faire remonter la responsablité de la Compagnie à cette date.

"THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

"Agent's Office, *Hamilton*,

"9th August, 1871."

"$60. Received from *Messrs. Wyld and Darling* the "sum of $60.00, being the premium on an insurance to "the extent of $6,000 *on their stock of dry goods, consist-* "*ing chiefly of cloths, and tailors' trimmings, all contained* "*in a* STONE BUILDING ON SOUTH SIDE *of King street,* "*Hamilton,* as described in the agency order of this "date for *twelve* months, subject to the approval of the "Board of Directors, Montreal, the said party to be "considered as *insured until the determination* of the "said Board of Directors be notified, if approved of, *a* "*policy receipt*, and afterwards a policy, will be deliver- "ed, or if declined the amount received will be refunded, "less the premium for time so insured.

"N. B.—This receipt is issued subject to all the con- "ditions of the *policy issued* by the Company.

"*F. L. Hooper*, Agent."

Après toute cette correspondance qui n'a évidemment pas d'autre objet que celui d'apprécier le risque et d'en fixer la valeur, la Compagnie émet en faveur des Intimés une police d'assurance dans laquelle les prémisses assurées sont décrites comme suit :

"*This Policy of Insurance Witnesseth* that Messrs. "Wyld & Darling, of Hamilton, Ont., Merchants, having "paid to the Liverpool and London and Globe Insurance "Company the sum of sixty dollars, for the Insurance "against loss or damage by fire *subject to the conditions*

"and stipulations endorsed hereon, *which constitute the* "*Basis of the Insurance*, of the property hereinafter "described, to the amount hereinafter mentioned, not "exceeding upon any one Article the Sum specified on "such Article, namely—On their Stock of Dry Goods, "consisting chiefly of Cloths and Tailors' Trimmings, "contained in a building owned by one *Irvine*, and "occupied by the Insured *as a Dry Goods Store*, situated "on the South side of King Street, Hamilton, Ont.; built "of stone, covered with shingles laid in mortar, and "marked No. 1 on a diagram of the premises, endorsed "on Application of Insured, filed in this office as no. "10,995, which is their warranty and made part hereof. "S. R. no. 272. Six Thousand Dollars.

"N. B.—There is an opening in the East End Gable "of above, through which communication is had with "the adjoining house, which is occupied by one *Onyon* "*as a Coal Oil Store*. Not more than two barrels of refined "Coal Oil permitted in said Store, but 10 barrels of the "same are allowed to be kept in the yard."

Enfin le 11 mars 1872, le feu prend au magasin d'huile de charbon et cause des dommages considérables aux marchandises qui se trouvaient dans les bâtisses nos. 272 et 273. Les Intimés prétendent alors que leur contrat d'assurance avec l'Appelante doit s'étendre aux pertes subies dans les deux bâtisses; que par l'avis donné le 10 août, ils avaient l'intention de modifier et que de fait ils ont amendé leur application de manière à comprendre dans l'assurance tout le fonds de marchandises qui se trouvait dans les nos. 272 et 273.

L'Appelante refusant d'admettre cette prétention, les Intimés se sont pourvus contre elle en Chancellerie pour obtenir une réformation de leur police d'assurance

de manière à couvrir les pertes essuyées dans le no. 273.

D'après cet exposé de faits la seule question qui s'élève en cette cause est de savoir quel était l'objet spécial du contrat d'assurance en question. Devait-il seulement couvrir les pertes qui pouvaient être causées au fonds de commerce des Intimés dans le no. 272? ou bien, doit-on considérer l'avis du 10 août comme étant une demande d'assurance pour le no. 273 et en conclure que la police d'assurance s'applique aux deux bâtisses nos. 272 et 273? Telle est la question à décider. Suivant moi elle se borne à une question d'interprétation des écrits rapportés ci-dessus; c'est là principalement que l'on doit chercher la preuve du contrat qui a eu lieu.

Il n'y a pas à contester le fait que par l'application du 9 août et le certificat de paiement de la même date, il y a eu consentement entre les parties pour l'assurance de la bâtisse no. 272. En est-il de même du no. 273 dont les Intimés n'ont fait aucune mention dans leur avis? Ils ont bien pu avoir l'intention par cet avis, comme ils le disent maintenant, de modifier leur application; mais ils ne s'en sont nullement expliqués. Cet avis ne comporte aucune nouvelle proposition d'assurance; le but évident était sans doute, en avertissant la Compagnie des changements faits dans les prémisses, de se conformer à cette condition de la police d'assurance obligeant l'assuré à donner avis de tout changement qui peut affecter la nature et l'étendue du risque. Rien ne fait voir qu'on ait voulu aller au-delà du côté des Intimés, non plus que de la part de l'Appelante, au contraire, cette dernière dans toute sa correspondance n'a pas d'autre chose en vue, et ne parle que du no. 272, auquel seul elle veut limiter ses risques. Comment

les Intimés peuvent-ils prétendre que le no. 273, dont ils ne font pas mention, soit compris dans l'assurance, lorsque la Compagnie n'en fait, non plus, elle-même, aucune mention. S'ils avaient cette intention ils auraient dû en informer la Compagnie. Celle-ci parle du no. 272 et les Intimés ont dans leur esprit l'idée que le no. 272 veut dire l'assurance sur nos. 272 et 273, mais ils se gardent bien de le dire. S'ils ne l'ont point fait, c'est sans doute parce qu'ils s'en sont tenus à leur application, et que cet avis n'était donné que pour se protéger, comme je viens de le dire.

Peuvent-ils maintenant se plaindre d'avoir été induits en erreur lorsque leur demande d'assurance référant au diagramme sur la police expirée qui était pour le même no. 272, indique que c'est encore le no. 272 que l'on veut assurer; le reçu du 9 août réfère à la maison no. 272 désignée dans l'application, enfin la police est aussi émise pour le no. 272. A toutes ces informations précises sur les prémisses particulières que la Compagnie entend assurer, les Intimés n'ont à opposer que leur avis du 10 août. Mais cette notification n'est pas une demande d'assurance. Il n'y est pas question d'ajouter les deux étages de la maison voisine dans l'application de la veille. En a-t-on donné une description; a-t-on fourni à l'assurance les informations demandées par la série de questions auxquelles les Intimés avaient répondu pour obtenir l'assurance sur le no. 272. A ces dernières questions on peut répondre, il est vrai, que Hooper connaissait les nouvelles prémisses et les avait visitées. Mais on a vu par cette partie de son témoignage citée plus haut ce qu'il en a dit. Il observe seulement que les Intimés ont augmenté les risques sur l'assurance demandée et dit qu'en conséquence il faut augmenter la prime; mais ni lui, ni

Darling qui était présent, ne disent alors que le no. 273 doit être compris dans l'application déjà faite. La visite a pour but seulement l'augmentation du risque créé par le changement dans l'état des prémisses et de fixer le montant de la prime additionnelle. Il n'est encore là aucunement question d'assurer le no. 273.

Si l'agent principal Smith qui, seul avait pouvoir d'obliger finalement la Compagnie, avait eu en vue d'assurer le no. 273, aurait-il parlé des prémisses assurées, en les désignant toujours, comme il le fait dans sa correspondance avec Hooper, sous le no. 272. Sa lettre du 1er septembre fait voir qu'il a eu un doute sur le montant de l'assurance, mais il n'en exprime aucun sur les "prémisses" qui devaient en faire l'objet. C'est pour le no. 272 qu'il croit que les deux applications nos. 680 et 691 ont été faites. S'il avait eu en vue le no. 273 se serait-il exprimé comme il le fait dans son observation concernant l'ouverture pratiquée entre les deux bâtisses. Il parle évidemment de la bâtisse voisine (no. 273) comme étant tout-à-fait étrangère à la transaction. "I notice the assured has cut an opening into the adjoining building on the East side." Le côté Est de quoi ? Evidemment celui de la maison no. 272 sur laquelle il est question d'effectuer une assurance. En parlant de la quantité d'huile qui pourra être gardée, Hooper s'exprime de la même manière dans sa lettre du 2 sept., en désignant le magasin d'huile de charbon au dessus des deux étages en question, comme le "*Coal Oil Store* to the East of the risk." Si le risque n'est pas au no. 273, où se trouve le *Coal Oil Store* ; il ne peut donc être qu'au no. 272. Si Hooper eût compris dans l'assurance le no. 273, il ne se serait certainement pas exprimé de cette manière, il aurait dit le "Coal Oil Store under the risk."

Comme les Intimés se sont beaucoup appuyés sur le témoignage de Hooper, je dois dire que j'y ai ajouté peu de foi, préférant, à cause de ses nombreuses contradictions, m'en rapporter plutôt à ses écrits qu'à ses paroles et à l'interprétation qu'il leur a donnée après coup. Comme les Intimés, il s'imagine après l'incendie qu'il a compris dans l'assurance les marchandises transportées au no. 273; mais chose extraordinaire, il ne paraît jamais avoir eu cette idée pendant la négociation de cette assurance qui a duré depuis le 9 août jusqu'au 23 sept.

D'après tout ce qui précède, il me paraît clair que l'intention des agents de la compagnie n'a jamais été d'assurer le no. 273; en admettant que telle ait été l'intention des assurés qu'en résulte-t-il? C'est qu'à aucune époque les deux parties ne se sont entendues sur l'objet précis de l'assurance; que par conséquent il ne peut y avoir de contrat quant au no. 273, puisqu'il n'y à pas eu consentement sur ce qui devait en faire l'objet. Dans le contrat d'assurance comme dans les autres contrats synallagmatiques, le consentement des parties est un élément essentiel, il doit intervenir sur les choses qui sont la substance même des conventions. Pour qu'il y ait eu contrat d'assurance sous les circonstances ci-dessus rapportées, il y a une condition essentielle qui a manqué : c'est l'accord des volontés de l'Appelante et des Intimés sur l'objet du contrat.

La preuve établissant, suivant moi, que les parties ne se sont jamais entendues pour effectuer une assurance sur le no. 273, je crois que la police émise et dont on demande la reformation, contient leur véritable contrat et que par conséquent il n'y a rien à y changer et que l'appel devrait être alloué.

Pour ces raisons, avec toute la déférence possible

pour les opinions exprimées dans un sens contraire par les Honorables Juges qui ont pris connaissance de l'affaire, je suis obligé d'en venir à la conclusion qu'il na pas été fait en cette cause preuve d'un contrat différent de celui que constate la police d'assurance.

HENRY, J.:—

This is an action to reform a policy of insurance so as to include property destroyed by fire in a building adjoining one in which goods were insured, which the Respondents allege should have been, but was not, covered by a policy granted by the Appellants, dated 9th August, 1871.

The law applicable to such a case is, I apprehend, very well settled, and is fairly stated in *Bennett* on Fire Insurance cases at page 334, in the case of *Davega* v. *The Crescent Mutual Insurance Company of New Orleans.* The judgment in that case says: "We do not "doubt that a policy of insurance may be reformed "where it is demonstrated by legal and exact evidence "that there has been a mistake in filling it up, which "has violated the understanding of both parties; but a "petition for such relief should set forth by distinct "and direct averments, not only that the petitioner "contemplated a different protection from that expressed "in the policy, but that his wishes were communicated "with reasonable certainty to the underwriter, and "were by him also understood and assented to, and "that the subsequent failure to embody them in the "policy was the result of fraud or mistake on the part "of the underwriter. There must be a distinct show-"ing, by clear and unequivocal allegations, not, as in "this case, argumentatively and by ambiguous infer-

" ence that there was, before the policy was framed, an " agreement—a concurrence of minds of the assured or " his agent and the underwriter to protect risks which " were afterwards by mistake or fraud of the under- " writer left out of the formal instrument." I have not cited the dicta of the case just referred to as, in itself, an authority binding on us; but as a statement of the law as administered in British courts of justice.

Mr. Justice *Story* in his work on Equity Jurisprudence, s. 157, says: "Relief will be granted in cases of " written instruments, only where there is a plain mis- " take clearly made out by satisfactory proofs," and he quotes a number of English and American cases which sustain that position. He says again: "But the quali- " fication is most material since it cannot fail to operate " as a weighty caution upon the minds of all judges. "See Lord *Eldon's* remarks in *Townshend* v. *Stangroom* (1). " See also *Hall* v. *Clagett* (2); *Leuty* v. *Hillas* (3); and " it forbids relief were the evidenceis loose, equivocal or " contradictory, or it is, in its texture, open to doubt or " *to opposing presumptions.* The proof must be such as " will strike all minds alike as being unquestionable " and free from reasonable doubt" Lord *Thurlow* in one case said that the final evidence must be strong irrefragable evidence. *Shelburne* v. *Inchiquin* (4).

"But in all such cases it must be plainly made out " that the parties meant, in their final instruments, " merely to carry into effect the arrangements designated " in the prior contract or articles. For, as the parties " are at liberty to vary the original agreement, if " the circumstances of the case lead to the supposi- " tion that a new intent has supervened, there can

(1) 6 Ves., 333 & 334; (2) 2 Md. Ch. Dec. 153; (3) 2 DeG. & J., 110; (4) 1 Bro. Ch., 347.

"be no claim for relief upon the ground of mis-
"take. The very circumstance, that the final in-
"strument, of conveyance, or settlement, differs
"from the preliminary contract, affords of itself some
"presumption of an intentional change of purpose or
"agreement unless there is some recital in it, or some
"attendant circumstance, which demonstrates that it was
"merely in pursuance of the original contract. It is
"upon a similar ground that courts of equity, as well
"as courts of law, act, in holding, that where there is a
"written contract, all antecedent propositions, negotiat-
"ions, and parol interlocutions on the same subject, are
"to be deemed merged in such contract."

These propositions are sound law and sense, and are established by numerous reliable English, French and American authorities and cases. I need not have cited authorities or cases to show that conclusive evidence of *mistake* of *both* parties, or fraud on the part of one, must be given ; for it is only in that event relief will be given. Here, it is not the *mistake* of the Respondents, that is relied upon so much after all, for they do not tell us they made one, having left us ignorant of the fact of their having read, or having failed to read, the policy when they received it, or at any time before the loss, but rather leave us to grope our way to the conclusion they did not. In that case, if they, *under the circumstances*, having the policy in their possession for months, (for it is shown Wyld received it), did not take the trouble to read it, by which they would have found (as was patent on the face of it) that the goods in question were not covered, but those only in the building shown on the back of the policy, I feel bound to say that they should have, and the law in my opinion gives them, no redress. The clerk and agent

of the Respondents who made the application for insurance, read the policy, and must, or at least should, have at once seen that it covered only the goods covered by the written application, and not those removed to the other building. To avoid the imputation of culpable negligence, I think parties receiving policies *under such circumstances as are detailed in this case*, should be held bound to use some diligence to ascertain exactly what goods are covered. In this case, however, the Respondents failed to shew that they did not read, and fully understand the policy as given to them. It was their duty to have shown that, and cleared up every doubtful position in regard to it; but they have not done so in any way, and for all that, Wyld, who received the policy, may have read and been quite satisfied with it. I can understand that a party in *ordinary circumstances*, and, in the hurry of business, thinking all has been rightly done, may fail to read a policy, and, *proving that fact*, ask the court for relief; but here we have no such evidence, nor have we any evidence that had they read and fully understood it, they would have been dissatisfied with it. On the contrary, in view of the fact in evidence, that they had other policies to the extent of $25,000 covering the goods in both buildings, it is not at all unreasonable to conclude that previous to the loss they were satisfied that the policy should cover only the goods in the one. They certainly do not show *the opposite*, which I think it was their duty to do, had they so wished. If the policy was not such as they expected, they should have returned it to the agent in Montreal, and requested an amendment of it, and their failure to do so, occasioned by their failure to read it, if such were the fact, or from some other cause, has produced the whole trouble. In the event of their so returning

the policy, the agent would then have had the right, either to have accepted their proposal so changed, in which case he would, no doubt, have required the amount to be covered in each building to be stated, or have declined the risk and returned the premium for the unexpired term. Both of those alternatives he was deprived of, through the retention of the policy by the Respondents, and by what principle of law or justice can a company be made amenable for the negligence, or worse than negligence of others, and thereby have the effects of a policy forced upon them which they or their agent never contemplated issuing, and which, if requested in plain terms, the agent would not, as he alleges, have issued. These views are in accord with the case cited at the argument, *Cooper* v. *The Farmers Mutual Fire Ins. Company* (1). The Respondents were bound to make an application of so definite a character that it could be readily understood, and if, on the contrary, taking everything into consideration, they have not done so, and have even left it doubtful, and in that way misled the agent in Montreal, they, and not the Company, should suffer. It is not hard to understand that a sharp dealer would prefer having the risk on $6,000 worth of goods in *each building*. Should all the loss be in number one, he would recover the amount of it up to the $6,000. If, in number two, he would be equally fortunate; and had the loss in this case been all, or mostly all, in the building covered by the policy, a complaint would never have been heard, that the goods removed from it had not been covered; and no question of average would have been raised as to the latter. Had, however, such a position been clearly asked for, we are bound by the evidence to conclude

(1) 50 Penn. S. R., 299.

that the agent at Montreal would have at once declined to grant it. The applicants would have been required to state the amount in each building, and who knows now how they would have divided the risk? They might possibly have put only a small proportion of the insurance on the goods removed. They give us no evidence on the point, but leave us as completely in the dark as in respect to other important features of the case. How then, can we saddle the Company with a policy, which their agent would certainly not have issued, and which the Respondents, I maintain from the evidence, never asked for, unless indeed, if at all, by doubtful inuendos. It has so happened that the loss on the goods removed was $14,705.14, while on those covered by the policy it was but $1,340. Under the policy in the one case, the Respondent could only recover the latter comparatively small sum; but *after the loss* it was clearly the interest of the Respondents to have had the goods in the "added flats" covered, rather than the others.

The evidence of Darling establishes the fact, that they had in all $37,000 worth of goods covered; and that of that amount $25,000 covered the goods in *both buildings*, independently altogether of the policy of the Appellants. What then became of the Respondents' claims against the other offices for their loss? The whole amount of the loss in the building, not covered by the Appellants' policy was amply covered by the other policies. Did they recover the whole loss, and if not, why not? I have sought in vain for some evidence or explanation on this point, but none has been given, and, as far as the evidence goes, the Respondents may have received the whole of their loss for the goods in the "added flats" from the other

Companies. The case, in many particulars, is very unsatisfactory and much confused, and, on the part of the Respondents, much is left in doubt that should have been cleared up, and which it was clearly easy to have done.

It is, too, rather significant that Wyld, *who received the policy*, was never examined. He was present at the trial at law but gave no evidence. It is true he was, at the time of the last trial "either in England or on his way out," but his evidence could have been taken before he left, and I cannot help expressing my opinion that the Court should at least have had from *him* evidence as to *whether he read the policy*, and if so how he understood it. Jermyn, his clerk, who negociated the insurance in question, says he received it from Wyld, and, to use his own words "did not read it, but examined it casually." The "casual" examination, I presume, had some object, but we are not told to what extent it was made, or how it was understood by those two parties. We have heard nothing to rebut the fair presumption that they not only read the policy, but understood it to cover only the goods in the application as originally made. Are we, therefore, to reform the policy when the interested parties themselves do not tell us they were deceived in any way? Wyld does not give any evidence, and Jermyn does not, in the slightest manner, even hint that the policy did not cover all he expected or intended. Darling, the only other party interested, is equally reticent; all he appears to have known was, that "there were instruct-"ions given to have the insurance effected with the "Defendants; some one was told to do so;" and he further says: "I did not know of the existence of the policy till after the fire." He, therefore, gave no

specific instructions to include *the goods in the "added flats.*" Nor does he, nor could he, say that he expected them to be included. It is true, that on the occasion of Hooper's inspection of the openings made in the walls between the two buildings, and when disputing with him about the extra premium demanded on account thereof, he said that "under any circumstances they must have the stock insured," and added "this has re-"curred to me since the trial at law, when it was not "clearly before my mind." Apart from the suspicious fact, as to his memory, just mentioned, what did such a remark amount to? He had made an application to have "the stock" insured in one building only, and *the amount of premium* was then a matter for adjustment, and his remark would be most suitable and applicable to "the stock" in the application then pending, without any reference to the goods removed; and I think we should so construe it, when the further fact is in evidence that the Respondents, by other policies covered *all* their stock in the "added flats" to the extent of $25,000. If he meant so, he should have expressly said to Hooper, that he wished the policy to cover *both stocks*, and, from not doing so, not leave Hooper in a position to think and believe otherwise. And when we look at the notice of the 10th of August, we find it equally unsuggestive of any desire to have the goods removed to the "added flats" *covered by the policy;* and the Respondents (persons in the habit of effecting insurances) thus fail distinctly to ask it to be done, if they wished it—leaving it open to the most vague surmises, and thus failing to give the parties applied to an opportunity of accepting or refusing insurance on goods more dangerously situated than when in the first building, and as the result fully proved. Taking the whole evidence

together, there is no positive declaration of any of the parties that there was any *intention of having the goods in the added flats covered*, or that there was any mistake or fraud in restricting the policy to the one building. *The parties themselves do not say so*, and why should they expect us to do so ?

If, indeed, as held by Mr. Justice *Story*, Equity refuses to reform an instrument where the evidence is *loose, equivocal, contradictory*, or in its texture *open to doubt* or *to opposing presumptions*, it is irresistibly clear to me that we cannot give relief in this case upon the evidence before us, which is, in every respect, precisely such insufficient evidence.

The only pretence of evidence to sustain the Respondents' case is, that which refers to what took place on or about the tenth of August; whereas the balance of the premiums was not paid till some five weeks afterwards (the 23rd September,) when the final receipt was given for the premium. What then were the views of the Respondents *at this latter date ?*—the really important time! They at one time may have intended that the policy in this case should cover the goods in the two buildings, but during the interim may have changed their minds. They did not, however, say so to the Appellants. We have in evidence the fact that, at the time of the loss, they had $25,000 insured on *all the goods.* When that insurance was effected we are not told. It was certainly *after the 10th of August*, and in the absence of proof to the contrary, the fair inference is that it was before the 23rd of September, and if so, they may have had *at that date*, no desire or intention that the policy of the Appellants should cover any other than the goods in the one building. If the case were otherwise it was the duty of the

Respondents to have given evidence on the point, and, in its absence, I feel bound to conclude against them. That the extra primium was charged and paid *solely for extra endangerment*, because of the openings made into the building in which the oil business was carried on, I have not the slightest doubt. The remarks of Hooper when he saw it "that the former risk was "endangered by these cuttings, this is a bad job or "mess, you have made the risk all one;" that "*the rate* "*would be at least one per cent. on the stock*," and, according to Darling's testimony, "that we (Respondents) "had made the risk all one;" and from what we all know of the dangerous character of the oil business, clearly establishes that position. And, that the Respondents would have had to pay the extra rate, had none of the goods been removed, is further evidenced by the payment of the extra rate to the Royal Insurance Company. The goods had been previously insured by the latter company, to the extent of $6,000, and, on the 5th September, the Respondents paid that company a further premium of $22.17, as appears by the receipt of that date for that sum, "being the premium on an insurance *for extra endangerment* on property described in policy dated 1st August," before then issued. Upon this point we have also the testimony of Darling. He says "We had been insured in the 'Royal' before the "change." "We notified them of the change as *we did* "*the Defendants*." "They *continued* the insurance on the "goods." "We have made a claim which they have not "recognised." "They set up that they only insured the "stock in the old building, and that they charged the "extra premium *for the increased risk covered by these* "openings," &c. What is the meaning of the statement: "they *continued* the insurance on the goods?" On

what goods? Clearly only on those *remaining*. They were not asked to allow the insurance to follow the goods removed, and have such allowance indorsed on the policy, as was necessary. The Respondents could have no legal claim against the "Royal," and I cannot see that, until after the fire, they had any idea the goods removed were covered by the policy of the "Royal," and their claim against the Appellants is, in my view of the law and evidence, equally unsustainable. Having thus disposed of the case upon the testimony of the witnesses examined, so far as I have at this stage thought it necessary to refer, it is proper to consider it as affected by what the Respondents, in their Bill, improperly term the "amended application," of the 23rd of September, but dated the 9th August, the date of the previous one which was cancelled. It is admitted on all sides that the latter covered, and was at first, at all events, only intended to cover, the stock in the building in which the Respondents did business, and which adjoined, to the west, the oil store occupied by Williams, and subsequently by Onyon. On the 9th of August, the application was made for insurance "on their stock of dry goods, consisting "chiefly of cloths and tailors' furnishings, contained in "a stone building, covered with S. in M. (shingles in "mortar), marked one on diagram." On reference to question 7 of the application, the Company, or their agent, is referred again to the diagram. In answer to that question: "State the distance to the nearest build-"ing on the south side; —— feet; of what constructed "——; covered with ——; owned by ——; and occupied "by ———, as ———." Answer: "See diagram on "Pol. 1,377,249, expired." Looking, then, at that diagram, it, in the most satisfactory and certain manner,

points out the location of the goods to be insured, and none of the parties imagined it to cover anything outside of the *one building* as then and previously occupied. It is distinguished by having upon it "Wyld and Darling "(No. 1);" and at the end of this division "S. T., 272." On the adjoining division to the east is marked "Canada "Oil Co., S. in M.;" and at the end "S. T., 273." The two places of business are here plainly distinguished in a way that no person occupying either could be mistaken. The Respondents must, therefore, be held to have known *on the 23rd of September*, that their application of the 9th of August covered only the *one building*. On the previous application, on the day first mentioned, they paid $22.50 extra premium, and deliberately received and took from Hooper a receipt for $60, which included $37.50 previously paid as follows: "Received from Messrs. Wyld and Darling the sum of "$60, being the premium on an insurance to the extent "of $6,000 on their stock of dry goods, consisting chiefly "of cloths and tailors' trimmings, all contained in a "stone building, on south side of King Street, Hamilton, "*as described in the Agency Order* (*clearly meaning the "application*) *of this date* for twelve months, &c." Thus, then, the application previously made is accepted as the measure of the risk as fully and effectually as if written and first used on that day, and binds the Respondents just as fully. By accepting the receipt in that shape they plainly waived anything previously said or understood by them. "This receipt is issued "subject to all the conditions of the policy issued "by the Company." Thus, on the 23rd of September, the Respondents pay for the extra risk demanded, and, knowing that the application only covered the *one building*, accept, without making any attempt

to inform Hooper, or any one else, that they wished a change made, a receipt, *in express terms referring to that application*. The policy is, in terms, in exact agreement with this application so originally made, but not attempted to be altered by the Respondents; and now they seek to reform the policy in opposition to the application, and we are asked to violate every principle of evidence as to written documents, upon the most loose oral testimony, which does not even in any way contradict the written. The Respondents certainly knew the application of the 9th August did not cover goods out of the one building described. Without any amendment of that application, how could they be presumed to have thought it covered any other goods on the 23d September. They either wanted *at that time* the goods in the added flats covered, or they did not. If the former, they were bound *then* to have said so; and the Company could in that event have exercised their alternative rights by accepting or declining the risk; but from the fact of their silence on this important point, at that particular and important time, and by their acceptance of the receipt in the terms stated, I feel the evidence conclusive of the fact that no change was desired by them, or that, at least, we are bound so to decide. They produce this receipt *as a part of their case*, and I feel bound to conclude them by it. Upon every principle of evidence established, for wise and just reasons I would be constrained to uphold that receipt in its most plain and obvious terms and meaning, against evidence of an opposite nature, of conversations and remarks had and made, and even against agreements previously entered into, unless that evidence clearly showed a mutual mistake or fraud. No proof is offered of any misconception as to the terms

of the receipt, but we are asked, *in violation of them*, to reform a policy fairly giving to the insured all the security that the receipt contemplated. The judgment of the Appeal Court at Toronto seems altogether founded on the allegation of an essential difference in terms between the application and receipt and the policy. I must confess my inability to discover the slightest conflict between the former two and the latter. They all unite in describing but the one building, and clearly distinguish it from the other. If a mistake is made in an executory contract, it can be reformed, and compliance with its amended terms enjoined; or, if the final conveyance or other instrument be executed, it, too, may be reformed. The receipt here taken with the application forms the executory contract, and if it failed to provide the necessary security, and was equally defective with the policy—as contended for by the Respondents—the Bill should have so claimed. The Respondents, however, virtually say the receipt is in proper terms, and seek no reformation of it, as forming a part of such executory contract; but even, in that case, they would have to go back a step further still, and seek to reform their own application; for in it, too, will be found evidence conclusively against the Respondents. The latter was the document of the Respondents themselves, and, sustaining the terms of the receipt and policy, it destroys the effect of any statements in August, at least five weeks previous to the receipt, which so pointedly refers to it. It cannot be treated otherwise than as the document of the Respondents, as it distinctly provides that it shall be so considered. Everything done and said previously became merged in what took place on the 23rd of September, when the first receipt was cancelled and an extra premium paid; and the whole

negotiations culminated in the receipt that day given; by which, all previously done was cancelled, except the previous payment of $37.50, and the retaining intact of the application as first made.

If, on that 23rd of September, they (the Respondents) really intended the policy to cover all the goods, they should have altered their application. They knew it referred to but *one building*, and it was a duty incumbent on them to have had it amended, if they so desired, and if they failed to have it done, it would be gross injustice to levy a contribution for their loss upon a company that possibly might never have accepted the extra risk; and that result, too, to arise from the gross negligence of the Respondents to communicate their wishes and seek an adoption of them. Two parties are necessary to make a contract, but if the policy here should be reformed, such will not hereafter be considered necessary. The ground will be clear for a party to enter into negotiations with another calculated to impress him with certain ideas, as to positions to be taken by each. Each having, up to a certain point, the alternative of proceeding or stopping—the one induces the other to proceed—documents are written, executed and acted upon, and months afterwards, when a loss takes place for the first time, the party originally moving, alleging *under the altered circumstances* not that he had made a clear and plain agreement, but, that he was himself guilty of negligence in failing to communicate to the other his intention to have had something done beyond what that other expected, is permitted to obtain a remedy where no contract existed. In vain would the other contend that had his opponent informed him in time he would have broken off the negotiations. That is a correct version of this case, as presented by the

evidence. Smith swears positively he would not have issued a policy, such as it would be if reformed as the Respondents demand.

The application to reform a policy should be sustained by evidence uncontradictory, and, in other respects, satisfactory, so as to leave no reasonable doubt as to the portion of the contract alleged to have been written erroneously or omitted. An applicant seeks to be relieved from the effect, in a large measure, of his own negligence and mistake, and he does so in opposition to the terms of a written document. If the error or omission is capable of proof by written testimony, Equity more readily relieves; but where the mistake is to be otherwise shown, the evidence should be strong and almost irresistible, as well as clear and circumstantial, so, at least, as to leave no reasonable doubt that the contract was fairly made and understood *by both parties.* I am bound to hold that it must have been understood *by both* parties, *and must be so proved.* The active parties in this case were the Respondents and Jermyn, on the one part, and Smith and Hooper, on the other Let us consider for a moment what the evidence is as to *the agreement* to insure the goods in the "added flats." The Respondents' case rests wholly on an alleged *agreement* with Hooper. I have already shown that no evidence of such can be discovered in the testimony of either Darling or Jermyn. It is not pretended by them, or either of them, that Hooper, on the only occasion they spoke to him (in August), ever made any remarks from which they could conclude he would take any risk on goods in the "added flats." They made general remarks as to having the "stock insured," but they did not expressly say anything as to the goods in the added flats. They might, or might not, have intended their

remarks to include them, but if *they* did, how do we arrive at any conclusion as to how *he* understood *them?* He made no reply, and we have, therefore, no statement from *them* to enlighten us. Had he replied, we might have had something from the nature of it to guide us, but this fact is clear, that no express request was made to him as to the goods in the "added flats;" and I cannot conceive how such general remarks, without any reply, can be tortured into *an understanding*, much less *an agreement.*

The power of Hooper to bind the Company, I maintain, is limited, as testified to on the trial; but let us now look at his and Smith's testimony, having already disposed of that of the other witnesses, and, considering it all together, and weighing it, ascertain how far it goes to make out the Respondent's case, admitting, for the present, his (Hooper's) power to bind the Company, but bearing in mind the character of the evidence necessary to sustain such a case.

Hooper, the Respondents' own witness, whose evidence is certainly contradictory, says: "I said nothing to them "about being insured, or not, in respect of the stuff in "the two flats; I did not suppose the insurance "covered the stuff in the two flats; I never considered "whether they were insured or not, in respect of these "goods; *nothing was said on the subject*; I swear I did "not know that by this letter the Plaintiffs wanted me "to cover these removed goods; I do not now know "what they intended; I conjectured they intended me "to cover these goods by this insurance; I entertained "this conjecture shortly after the fire." There is here, not only no evidence of any understanding that the goods in the "added flats" were to be covered, but positive proof to the contrary. This evidence is in

relation to facts and circumstances which took place five weeks before the final agreement, which is evidenced by writing binding on both parties which this evidence sustains; but the greater portion of his testimony, relied on by the Respondents, is to my mind, wholly inadmissible. After all the negotiations had ended in the issue of the policy, founded as it was upon the previous documents, any *opinion* of Hooper as to what the legal effect of them was, or what *he* thought the policy covered, or was intended by the framers of it to cover, or how he read it, was not legitimate evidence, and should have no bearing on the case. The evidence of what he said to Jermyn, and to Ball, after the fire, that *he* considered the stock in both buildings covered by the insurance, is after all but an opinion as to the construction of the policy. He says, "I told him (Mr. Ball), I considered the policy "covered both buildings; that is the way I read the "policy, when I wrote it out in my Registry. "That is "not the way I understood the application, &c." But, he says, "I always thought I was insuring the whole "stock;" and further, "I did not warn the Plaintiffs I "was insuring less goods than formerly." There is, however, nothing in all this evidence (too contradictory to base upon it the reformation of a policy, founded on written agreements) to shew that there was any specific application to him to cover the goods in the added flats. Much less any agreement to cover them. He says unequivocally, "nothing was said on the subject;" if so, there could have been no agreement; and that portion of his evidence, not being in any way contradicted, but sustained by the evidence of Darling and Jermyn, his or their *surmises*, as to what was, or was not, covered can have little bearing on the case. What is wanted is

satisfactory proof of *an agreement* entered into; if the evidence does not establish one understood clearly by both parties, it establishes nothing; and I feel bound to say that, taking Hooper's whole testimony, and considering it with that of Darling and Jermyn, I can come to but one conclusion, and that is, that no *agreement* or *contract* was ever made to insure the goods in the "added flats."

The Respondents depend on Hooper's testimony to make out their case, but if his testimony falls short, it is the Respondents' misfortune. We cannot supply it by receiving one portion of his testimony,and rejecting another, when we have nothing by which we can safely do so; for the part heretofore rejected is probably as correct as that adopted, and, I think, more so. What *either* of the parties individually *thought* or *intended* at the time is not what the law requires, but that they should, by communications between them, have come to a mutual understanding and agreement, that the conclusion at which they arrived should form a portion of the policy to be subsequently issued. Nothing of the kind appears, any more from the testimony of Hooper than from that of Darling or Jermyn.

Let us now look for a moment at the testimony of Smith, upon which much stress has been laid, and but a part of which has been considered. It is somewhat contradictory, but must be taken *as a whole*. I have selected some of the more important passages: He says "I understood the risk was in building no. 272." "If I had supposed the risk was intended to have been on the stock in 272 and 273, *I should not have issued the policy*." "I first heard that the Plaintiffs contended that the policy covered the goods in both buildings after the fire." This witness, so far, does not help the Res-

pondents' case, but the opposite. He says again: "The Plaintiffs were certainly insured up to the 23rd of September." Insured as to what goods? We cannot certainly assume he meant to include those in the "added flats," for, looking at the whole of his testimony and the application and receipt, we are bound to assume the contrary.

I now come to refer to and consider another part of his testimony, evidently given in reply to a hypothetical case put to him, and upon which, in my opinion, too much stress has also been laid. He says: "*If* Mr. Hooper had insured deliberately the goods in "these buildings as one risk, it would have been bind-"ing so long as this receipt is in force, that is, until the "receipt is cancelled in some way or other. The risk "is binding, notwithstanding it is in violation of our "standing rule as to splitting up risks." I cannot see why this statement should be quoted as bearing on the issue. It is not evidence as to any of the governing facts, but merely Smith's interpretation of the legal construction of the receipt, when considered in relation to the character of Hooper's authority under his instructions; and whether or not the part referring to his acceptance of risks, as to goods *in more than one building* should be held to be merely directory or otherwise. Mr. Smith's construction may be quite correct, but it is nevertheless not properly evidence; and certainly not in any way binding on any court—even if, as in this case, against his own company.

After quoting that part of Smith's evidence, Mr. Justice *Patterson* very significantly and properly says: "The important enquiry is, what did Hooper insure?" By which must be understood, not by vague and doubtful remarks, but by a legal and binding contract. In reason-

ing it out the learned judge decides that the goods *in both buildings* were contracted to be covered, but, with all deference, I regret to have to differ with him. He says: "*The application was to insure the whole stock.*" I can find no evidence to sustain this statement. The application at the first and last, and all through, was for insurance on goods in the building no. 1 upon the diagram, with the name of the Respondents' firm on it. The goods were covered by both the interim receipts while they remained *in that building, and no longer.* It must be conceded that when removed from that building the interim receipt ceased to cover them just as the policy would do—for the former provides that it "is issued subject to all the conditions of "the policy issued by the Company." The result of the removal, therefore, into No. 273, was just the same, in law, as if they had been moved a mile away. The insured would be bound, in either case, to give notice of the removal, and, in order to continue the risk, have an endorsement made on the policy, if issued, or, on the same principle, on the interim receipt, if the policy had not been issued, or by some other binding contract. The interim receipt operates in the meantime as a policy. It is a binding contract in writing as much as a policy, and cannot be varied by the act of *one party* in giving a notice of removal. It requires not only the concurrence of the other party, but requires a new *binding contract* to be entered into. Where, I ask, is the evidence of any such to override the contract contained in the receipt? I have sought in vain for it. The notice of the 10th of August does not ask for it, and, for all the Respondents have proved, was not so intended; but, even were it so, it is all on one side. There is not the slightest evidence that Hooper, *then*, so understood it

or in any way agreed that the risk should follow the goods; and had he done so, in the most explicit terms, could his mere words, without any new consideration, be considered as effectual to change and vary the then existing *written* contract? I repeat, however, the objection before taken, that everything which transpired in August became merged in the cancelling of the first interim receipt, the payment of the extra premium and the acceptance of the receipt on the 23rd September, which referred to, and *adopted the application previously made*. A new and binding contract was then made in express substitution of the one previously existing, and to alter the terms of which, evidence of previous words or understanding between the parties cannot be received. By cutting the openings in the walls the Respondents avoided the insurance effected by the interim receipt given on the 9th August, which the notice of the 10th (the day following) could not alone remedy—and the risk had, by their unauthorized act, been increased and thereby cancelled. They had consequently no insurance *on any goods* pending the subsequent negotiations, nor until the new terms as to the extra premium had been agreed upon and the money paid. The transactions of the 23rd of September are the only ones to be relied on as binding the parties. To go behind them would be in complete opposition to the binding acts of the Respondents themselves, which they cannot be permitted to repudiate, but which they don't even ask to be permitted to do. I have read and considered all the cases and books presented for our guidance, and others, and can find none to establish a precedent to sustain the application of the Respondents, but many clearly against it. Before making reference, however, to some authorities, I think it not out of place

to refer to a remark in the judgment of the learned Chief Justice *Hagarty*, as to the evidence and conduct of Smith. His Lordship says: "If he (Smith) thought "the Plaintiffs might have believed that they were so "insured, the straightforward course was to at once "notify them to the contrary. Knowing the proba- "bility of their holding this view, he prepares the "policy as he thinks to prevent their having the benefit "of it." I think that remark is hardly justified by the known facts. In the first place, Smith was only in communication with Hooper. He sent him the policy, and might rightly conclude that if there was any error in it, Hooper or the Respondents would discover it and have it rectified. He did not seek or expect to bind the Respondents in the dark. He knew they would shortly receive the policy, upon the back of which was printed "You are particularly requested to read this "policy and the conditions, and to return the same "immediately, should any alteration be necessary." And in the policy was written: "N. B.—There is an "opening in the east end gable of above through which "communication is had *with the adjoining house, which "is occupied by one Onyon as a coal oil store, &c.*" Smith had no reason to presume that the Respondents would be so negligent as not to look at and read their policy, if they really were so. On the contrary, the correct assumption was that they would do so, and in that case, would, not only from the general description of the premises, but in the note just quoted, see that no goods were covered in the "adjoining house occupied by Onyon," the whole of which was plainly excluded. Smith had every right to conclude the parties meant what they subscribed their names to, and he was not, in any way, called upon, as I think, to ask them direct-

ly if they did not want something else or further. Whatever surmises he may have had, he gave them every opportunity of knowing exactly the extent of the risk undertaken, and led them not astray. Having, in this plain and open manner, given notice to the Respondents, I cannot agree with the suggestion that the course pursued by Mr. Smith was not straightforward, or that he was bound to give notice in any other way.

The language of Vice-Chancellor Sir *W. James*, in *McKenzie* v. *Coulson* (1), is applicable in every way to this case. He says: "If all the Plaintiffs can say is: "We have been careless,—whereas the Defendants have "not been careless,—it is useless for them to apply to "this Court for relief. The Defendants say they would "not have accepted the policy on any other terms. It "is too late, now that the loss has been incurred, for the "Plaintiffs to set aside the policy, &c." That is exactly this case. The "Plaintiffs were careless," not only in respect to the application if they wanted all the goods covered, but in not reading the policy, if such was the case—"but the Defendants were not so." The Defendants in that case say they would not have accepted the policy *on any other terms*. Smith, the agent, swears positively in this case, that he would not have issued the policy in the terms which are now sought to be added. The learned Vice-Chancellor further says: "Courts of Equity *do not rectify contracts*. They may, "and do, rectify *instruments* purporting to be made in "pursuance of the terms of *contracts*. But it is always "necessary for a Plaintiff to shew that there was *an* "*actual concluded contract*, antecedent to the instrument, "which is sought to be rectified; and that such contract "is inaccurately represented in the instrument." And

(1) L. R. 8 Eq., 753.

again: "It is impossible for this Court to rescind or "*alter a contract* with reference to the terms of the nego- "ciations *which preceded it.* The Plaintiffs cannot escape "from the obligation of the contract on the ground that "they verbally informed the junior clerk of the Defend- "ants' agent something different from what they after- "wards, in writing, agreed to. *Men must be careful, if* "*they wish to protect themselves; and it is not for this* "*Court to relieve them from the consequences of their own* "*carelessness.*" If, then, the learned Vice-Chancellor correctly laid down the legal principles applicable to the circumstances before him, we have, in this case, the opportunity and requisition to apply them to circumstances, as far as those principles go, singularly identical.

In *Henkle* v. *Royal Exchange Association Co.* (1), Lord Chancellor *Eldon* lays down the law, which, as far as treatises and reports are to guide us, has ever since been applied. He says: "No doubt but this Court has "jurisdiction to relieve in respect *of a plain mistake in* "*contracts in writing*, as well as against frauds in con- 'tracts. So that if reduced into writing *contrary to* "*intent of parties*, on *proper proof*, that would be recti- "fied. But the Plaintiff comes to do this in the harsh- "est case that can happen of a policy, after the event "and loss happened, to vary the contract so as to turn "the loss on the insurer, who otherwise, it is admitted, "cannot be charged; however, if the case is so strong "as to require it, the Court ought to do it. The first "question is whether it sufficiently appears to the Court "that this policy, which is a contract in writing, 'has been framed contrary to the intent and real agree- "ment? * * * As to the first, it is certain

(1) 1 Ves., 317.

" that to come at that *there ought to be the strongest* " *proof possible*, for the agreement is twice reduced to " writing in the same words, and must have the same " construction, and yet the Plaintiff seeks, contrary to " both these, to vary them, &c. * * * "

How exactly like the case under consideration ?

It is " of a policy," " *after the loss has happened*" " to turn the loss on the insurer," " for the agreement" is not only "twice" but *thrice* "reduced into writing in the same words," or at least words which " must have the same construction," and the Plaintiffs seek, contrary to all these, to vary them. The decisions appealed from, to this Court, in this case, in my opinion, exhibit two important errors. First, the fact of the application *in its original terms* having been recognized by the acceptance of the receipt referring to it on the day the balance of the premium was paid (the 23rd September) is not at all referred to as the binding contract, but loose remarks —without any thing like a *contract entered into* weeks before, are erroneously taken as the ground-work upon which the judgments are based; and second, they are founded on the fallacy *that the receipt and application differ so essentially from the policy*, that while the latter does not cover the goods in the " added flats," the two former do—when, to my mind, they, as to the particular building and risk indicated, are completely identical. The receipt refers us to the application, and the latter is for insurance " on their stock of dry goods * * * contained in *a* stone building covered with S in M marked no. 1 on diagram," and " *the* diagram " is clearly indicated by the answer to question 7, answered in the application in these words and figures. " See diagram on Pol. 1,377,249, expired." No one is rash enough to venture the assertion that that description

has the slightest reference to the goods in the "added flats," of another building particularly referred to as an adjoining building to the one containing the goods to be insured. Away, then, must go the idea that the interim receipt, thus pointing to the application for the location of the goods to be insured, covered such last mentioned goods; and any judgment founded on such a supposition cannot be, in my opinion, anything but erroneous. Had, indeed, notice of opening the walls and removal of part of the stock and the loose conversations, such as they were, been all that took place before the issuing of the policy, there might have been some reason, but still, I think, an insufficient one, for an application to reform the policy—but why should the more important subsequent transactions of the 23rd of September be entirely winked out of sight, when they, as I cannot help concluding, completely estop the Plaintiffs from setting up previous ones, which, on every acknowledged legal principle of law, became merged in the binding documents then executed, received, renewed, and adopted? On the 10th of August the Plaintiffs, although they do not prove it, *may have intended* to cover the goods in the "added flats," but, for the reasons I have heretofore suggested, or others, may not have so intended on the 23rd of September; and on which point they are singularly silent, but whether they did so intend or not, it is not, in my opinion, important to consider; for if they did so intend they were then bound to have so amended their application as to have included them; and that in plain unmistakable terms. See the concluding paragraph of judgment of Lord *Westbury* in *Proprietors*, &c., *of English and Foreign Credit Co.* v. *Arduin* (1). By not

(1) L. R. 5 H. of L., 86.

doing so they led the principal agent of the Appellants to conclude differently ; and they are properly estopped from the effects of what would, *by the suppression of their intentions*, operate as a fraud on the insurers; resulting in (what the Company would not knowingly have issued) a policy covering an oscillating risk between the goods in two buildings to insure to the benefit of the Respondents, as an accident to the one or the other might occur. This is not, therefore, such a position as we should be expected strain our eyes to pick out evidence to establish; much less make guesses, however shrewd they might be, of the unexpressed intentions or wishes of the parties when obtaining the insurance. There is nothing in the whole evidence, apart from the application and receipt, in the shape of an agreement in any terms, that the policy could be reformed by, and, were it desirable that it should be *reformed*, instead of awarding judgment for the amount claimed under the policy, I believe it would be no easy task to supply them from a specific agreement by words spoken at any time by the parties. I am clearly of opinion there is nothing proved to reform by in this case, and that the appeal should be allowed with costs, and judgment given for the Appellant.

The CHIEF JUSTICE:—

As to costs the Court being equally divided:

Under sec. 38 of the Supreme and Exchequer Court Act, this Court has power to dismiss an appeal, or to give the judgment and to award the process or other proceedings which the Court, whose decision is appealed against, ought to have given or awarded; and the

Supreme Court may, in its discretion, order the payment of the costs of the Court appealed from, and also of the appeal or any part thereof, and as well when the judgment appealed from is reversed, as when it is affirmed. By sec. 42 of the Common Law Procedure Act of 1854, "The Court of Appeal shall give such judgment as "ought to have been given in the Court below."

By sec. 42 the Court of Appeal shall have power to adjudge payment of costs, and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process or otherwise.

The practice after the passing of that act was that, when the Court of Appeal affirmed the judgment below, they gave costs to the successful party, but no costs of appeal were given when the judgment below was reversed. *Young* v. *Moeller* (1) so laid down the rule.

Afterwards in the Exchequer Chamber, in 1862, *Archer* v. *James* (2), the question arose, when the Court were equally divided. *Pollock* said, after considering the matter, "the Court being equally divided, there will "be no costs." The judgment of the Court below was affirmed without costs.

In *Anderson* v. *Morice* (3) the matter was discussed, there being an equal division of opinion in the House of Lords, when, in consequence, the appeal was dismissed. It was there decided that nothing should be said about costs. The entry was, judgment affirmed, and appeal dismissed.

In a subsequent case, *Prudential Assurance Company* v. *Edmonds* (4), where there was an equal division of opinion, three of the learned Lords refer to the question

(1) 6 E. & B., 683, (1856); (2) 2 B. & S., 105; (3) L. R. 1, H. L. 752, (1876); (4) L. R. 2, H. L., 498, decided 15 June, 1877.

of costs. Lord *Hatherly* said: "Following the precedent "of a former case, I shall not feel disposed to advise your "Lordships to give costs of the appeal in such a case."

Lord *O'Hagan* said: "We are equally divided, and the "Judgment must stand, but I think, with my noble and "learned friend on the Woolsack, that, with a view to "uphold a decision which we came to last Session, "there should be no costs of the appeal."

Lord *Blackburn* said: "If your Lordships are equally "divided, as I believe you are, the result of the judgment "will not be disturbed, but that no costs will be given "of the appeal to this House." The ruling was, their Lordships being equally divided, the appeal was ordered to be dismissed, but without costs.

The authorities seem to show that, both in the Exchequer Chamber and the House of Lords, when a judgment appealed against is affirmed because of the Judges being equally divided in opinion, the appeal is dismissed, but without costs.

Even if there were no decided cases on the subject, as our Statute authorizes this Court, in its discretion, to order the payment of the costs of the appeal, unless that discretion is exercised in favour of one party or the other, I fail to see how either would be entitled to the costs of the appeal.

The majority of the Court do not order the Appellants to pay the costs of the appeal. The Respondent is therefore not entitled to them.

This view, however, does not necessarily prevent the majority of the Court from ordering the payment of the costs of the appeal in cases where there is an equal division of opinion amongst the Judges which causes the affirmation of the judgment appealed from.

Their Lordships being equally divided, the appeal was ordered to be dismissed, but without costs.

Attorneys for Appellants :—*Bruce, Walker and Burton.*

Attorneys for Respondents :—*Martin and Parkes.*

EDWARD OSCAR BICKFORD .....APPELLANT ;

AND

THE GRAND JUNCTION RAILWAY COMPANY ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Delivery of Railway iron—Right of Property and Lien after contract of sale—Power of Company to mortgage their road—Doctrine of ultra vires.

The Grand Junction Railway Company, a corporate body, having the statutory power to borrow money, issue debentures, bonds, or other securities for the sum so borrowed, to sell, to hypothecate or pledge the lands, tolls, revenues and other property of the Company, and also power to purchase, hold and take any land or other property for the construction, maintenance, accommodation and use of the Railway, and to alienate, sell or dispose of the same, entered into a contract with one Brooks for the construction of their road. When Brooks required the iron necessary for the undertaking, he was unable to purchase it without the assistance of the Company, and he thereupon authorized the officers of the Company to negotiate for its purchase. In consequence, a Mr. Bell, solicitor of the Company, as agent of Brooks, and with the approval, in writing, of the President of the Company, entered into a written agreement, dated Toronto, 9th June, 1874, with the Defendants

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PRESENT :—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, J. J.

(Bickford and Cameron) for the purchase of the iron, which was to be paid for as delivered on the wharf at Belleville by the promissory notes of Brooks, and a credit of six months was to be given from the time of the several deliveries of the iron. By that agreement, also, Brooks agreed to obtain from the Railway Company an irrevocable power of attorney enabling the Bank of Montreal, who advanced to Bickford the money necessary for the purpose of buying the iron, to receive the government and municipal bonuses, and to procure from the Company a mortgage for $200,000 on that portion of their road (44 miles) on which the iron was to be laid—the mortgage to be sufficient in law to create a lien on the 44 miles of railroad, as security for the due payment of the notes of the said Brooks, but not to contain a covenant for payment by the Company. On the 30th of June, 1874, a more formal agreement, under seal, was executed, which did not vary in any material respect the terms of the preceding agreement. On the same day a power of attorney (upon which was endorsed by Brooks a written request to the Company to give the said power of attorney), and a mortgage (upon which also was endorsed by Brooks a request to grant the said mortgage), were executed by the Company under their corporate seal to one Buchanan, then manager of the Bank of Montreal, in Toronto, as a trustee. The Bank of Montreal having made advances to Bickford in the ordinary course of their business dealings to enable him to purchase the iron, it was all consigned to their order by the Bills of Lading, and, when delivered on the wharf at Belleville, was held by the wharfingers subject to the order of the Bank, the whole quantity stipulated for by the contract being so delivered ready for laying on the track as required.

The Bank of Montreal and Bickford caused to be delivered, from time to time to Brooks by the wharfingers at Belleville, all the iron he required to lay on the track, being about 2,000 tons, and about an equal quantity remained on the wharf unused. Brooks having failed to meet his promissory notes for the price of the iron, Bickford recovered judgment at law against him to the amount of $164,852.96. The Bank then sold the iron remaining on the wharf for the purpose of realizing their lien, when Bickford became the purchaser thereof at $33.50 per ton for the rails and $50.50 for track supplies. Bickford was removing the said iron when the Company filed a Bill in Chancery asking for

an injunction to restrain the removal of the iron. A motion to continue the injunction was refused on the 11th October, 1875. The Defendants (Bickford, Cameron and Buchanan) then answered the Bill, and on the 18th January, 1876, by consent, a decree was made referring it to the Master to take the mortgage account, to ascertain and state the amount due to Bickford and Cameron for iron laid or delivered to or for Plaintiff's use on the track, and also the amount due (if anything) in respect of iron delivered at Belleville, but since removed, and to report special circumstances, if requisite.

The Master found due upon the mortgage $46,841.10, the price of iron actually laid on the track, and interest; and that nothing was due in respect of the iron delivered at Belleville but subsequently removed. On appeal to Vice-Chancellor *Proudfoot* the Master's report was affirmed, and on an appeal to the Court of Appeal for Ontario, it was held that the mortgage was *ultra vires*, and the Master's report was affirmed.

Held: On appeal (reversing the judgment of the Court of Chancery) that the proviso in the mortgage was in its terms wide enough to sustain the contention of the mortgagee to claim the price of all the iron delivered on the wharf at Belleville, and that the memorandum endorsed by Brooks on the mortgage should not be construed as cutting down the terms of the proviso, but was intended as written evidence of Brooks' consent to the mortgage and to the loss of priority in respect of the mortgage bonds to be delivered to him under the contract.

Held, also: (reversing the judgment of the Court of Appeal for Ontario) that the statutory power to borrow money and secure loans, cannot be considered as implying that the Company's powers to mortgage are to be limited to that object; and therefore that the mortgage executed by the Company on a portion of their road in favor of the Trustee Buchanan, being given within the scope of the powers conferred upon the Company to "alienate, sell, or dispose" of lands for the purpose of constructing and working a Railway, was not *ultra vires*.

Query? Whether the rights of a corporation to take lands, operating the Railway, taking tolls, &c., are susceptible of alienation by mortgage in this country?

Held, also: That under the Pleadings and Decree in the cause, the objection that the mortgage was *ultra vires* was not open to the Company in the Master's office, or on appeal from the Master's Report.

Bickford vs. The Grand Junction Railway Company.

Appeal from a judgment of the Court of Appeal for Ontario, dismissing an appeal brought by the Defendants, Bickford and Buchanan, from an order of *Proudfoot*, V.C., confirming the Master's report in a suit in the Court of Chancery.

The Respondents, on the 25th March, 1872, entered into a contract with Alphonso Brooks for the construction of the Grand Junction Railway from Belleville to Lindsay. He entered on the work, and had, in June, 1874, done grading and other work on the line to the value of $327,000, according to the certificates and estimates of Mr. Shanly, the Company's Engineer.

The contract provided for payment to Brooks at the rate of $19,000 per mile; being $6,000 in Government or municipal aid or cash, $1,000 in paid up stock, and $12,000 in first mortgage bonds of the Company.

In June, 1874, Brooks required the iron for at least part of the road to enable him to proceed with its construction, and being unable to purchase it without the assistance of the Company, he authorized the officers of the Company to negotiate for its purchase, and accordingly Mr. Bell, the Solicitor for the Company, having at the same time written authority from Brooks to act for him, and Mr. Kelso, the President of the Company, came to Toronto, and, on the 7th of June, 1874, entered into the written agreement with the Defendants, Bickford and Cameron, for the purchase of the iron rails and track supplies for the road from Belleville to Hastings, 44 miles, about 4,000 tons.

On the 30th of June, 1874, a formal contract, under seal, between Brooks and the Defendants, Bickford and Cameron, was executed, and the Respondents then executed in pursuance of the terms of the contract, a power of attorney and a mortgage deed, in favor of the

defendant Buchanan, then the Manager of the Bank of Montreal in Toronto, the Defendant Bickford having arranged with the Bank to obtain advances of money from it to enable him to buy the iron to fulfil the said contract, and the said Buchanan being named as the trustee to receive and to hold the said securities under the said contract.

By the first agreement Bickford and Cameron agreed to sell to Brooks the iron rails required for the 44 miles already referred to, which were estimated at about 4,000 tons, and the fish-plates, &c. The price of the rails was fixed at $47.50 per ton, and of the fish-plates, &c., at the rate of 4¼ cents per pound, "all delivered at the wharf at Belleville, free of duties; Brooks to pay wharfage and harbour dues (if any); a credit of six months to be allowed, but the notes of Brooks at three months to be given and to be renewed for three months, interest being added to all such notes at 7 per cent. per annum, to be given from time to time for the iron as delivered." Brooks also agreed to procure and give as collateral security for the notes, an irrevocable power of attorney, authorizing an officer of the Bank of Montreal to receive the Government and municipal bonuses; and to procure from the Company a mortgage for $200,000 on the 44 miles of railway to be executed, to an officer of the bank as collateral security for the notes to be given as the iron was to be delivered. The agreement contained the following stipulation: "The said mortgage from the Company to be sufficient in law to create a lien on the said 44 miles of railroad, as security for the due payment of the notes of the said Brooks, but not to contain a covenant for payment by the Company." The mortgage was to be the first and only first security or charge on the 44 miles.

The Company's President gave a written approval of this agreement.

The agreement of the 30th June, 1874, which was a more formal document under seal, did not vary in any material respect the terms of the preceding agreement.

The power of attorney authorized Buchanan to receive the Government and municipal grants, and to this power a copy of the contract was annexed.

Upon this document, Brooks indorsed a request to the Company, in the following terms: "I, Alphonso "Brooks, named within, hereby request the Grand Junc- "tion Railway Company to grant the within power of "attorney to said Buchanan, within named, and I hereby "covenant and agree with the said Company, that the "granting said power or anything contained therein, "shall not in any wise prejudice, affect, or waive, or vary "any contract with the said Company for the construc- "tion of their railway; but the same shall in all respects "continue valid, anything herein contained notwith- "standing." The mortgage, bearing date the same day, was executed by the Company under their corporate seal to Buchanan, by which, after reciting the contract for the purchase of the iron, and an agreement by the Company to execute the instrument as collateral security for the due payment of the notes to be given by Brooks for the price of the iron from time to time as it was delivered, which notes were to be received and held by the Bank of Montreal, the Company assumed to grant all the track and right of way and land taken and used by the Company, in and between the Town of Belleville and the Village of Hastings, with all the rights and privileges appertaining thereto, and the franchise and powers of the railway between Belleville and Hastings, subject to defeasance upon payment of the

promissory notes, which Brooks should give in pursuance of the contract of purchase, not exceeding in all a principal sum of $200,000. The mortgage is expressed to be made in pursuance of the Act respecting short forms of mortgages, and contains a proviso authorizing the mortgagee on default, on one month's notice, to enter upon and lease or sell the lands. It contains an express declaration of intention that it should operate as, and be a lien on, all that section of the Company's railway, to secure collaterally the payment of the notes referred to in the contract; and that in case of default, the mortgagee's sole recourse should be against the property included in the mortgage, and not against the Company for the amount of the consideration; and that it was not intended to give the mortgagee or the vendors any right of action against the Company in respect of the purchase money of the iron. Upon this is indorsed a written request by Brooks, exactly similar in effect to that previously extracted.

The shareholders in the Respondents' Company sanctioned the agreement, and authorized the execution of the mortgage.

The Appellant Bickford then promptly commenced the delivery of the iron on the wharf at Belleville, in pursuance of the contract, and ultimately delivered all that was required to complete the road to Hastings, being the quantity mentioned in the Master's Report. The laying of the iron on the track was needlessly delayed by Brooks, notwithstanding Bickford's urgency, as little or none of the iron had been laid at the beginning of November, 1875, although over 3,000 tons had then been delivered at Belleville, and it was evidently useless to deliver more during that season. Brooks was willing to dispense with the delivery of the remaining

1,000 tons at that time, but the Respondents refused to do so, and Bickford was compelled thereby, at a great and useless extra expense, to deliver the said 1,000 tons.

The Bank of Montreal, having made advances to the Appellant Bickford in the ordinary course of their business dealings with him, to enable him to purchase the said iron, it was all consigned to their order by the bills of lading, and when delivered on the wharf at Belleville was held by the wharfingers subject to the order of the Bank. This arrangement was known to the Respondents and contemplated at the time of the original agreement.

Brooks gave his promissory notes, from time to time, for the price of the iron as delivered on the wharf at Belleville, in pursuance of the contract, and Bickford afterwards, on 8th September, 1875, recovered judgment at law against Brooks on these notes and for the balance then remaining due on the whole purchase money of iron delivered, being the sum of $164,852.96.

The Bank of Montreal and Bickford caused to be delivered to Brooks by the wharfingers at Belleville all the iron he required to lay on the track as fast as he required it, and were ready and willing to deliver the whole of it to him as he required it for that purpose, but he only laid about half the quantity delivered at Belleville, and ironed that part of the road from Belleville to Sterling, 20 miles, when in December, 1874, he stopped work on the road, and has never since done anything upon it.

On 3rd June, 1875, the Respondents cancelled and declared at an end Brooks' contract for building the road.

The Bank of Montreal collected, on account of the Appellant Bickford, the sum of $27,500 from the

Municipal Aid Trustees, and $40,000 from the Government of Ontario under the power of attorney from the Respondents, which moneys have been credited on account of the price of the iron.

In the latter part of June, 1875, Bickford, with the assent of the Company, removed 563 tons of the iron from Belleville, and sold it to the Northern Railway Company.

As no arrangements had been made by the Respondents up to September, 1875, for going on with the work, the Bank of Montreal which had delayed any action up to that time, at the request of the Respondents, advertised for sale by auction at Belleville, on the 20th September, 1875, all the iron then remaining there unlaid, and on that day it was offered for public sale and knocked down to the Appellant Bickford at $33.50 for the rails, and $50.50 for track supplies, that being the full value thereof in June and September, 1875, as subsequently found by the Master. Bickford did not pay this price in money to the Bank, but having sold part of the iron to another Railway Company, he transferred to the Bank the moneys and securities obtained from that Company, and, in October, 1875, he removed 1,165 tons of the iron from Belleville to Port Stanley to carry out the last mentioned sale.

About 495 tons of the iron rails and track supplies delivered on the wharf at Belleville under the contract with Brooks have never been removed and still remain there.

Since the spring of 1875 no work of any kind has been done on the railway, and that part of it on which the iron was laid has never been used for traffic.

The Respondents filed their original Bill in Chancery on 2nd October, 1875, praying for a declaration that a

large quantity of railroad iron (about 4,000 tons) had been delivered under the contract already mentioned, and that the Defendants in that suit were not entitled to remove the same, or that the said Plaintiffs (now Respondents) had acquired, by reason of having given certain securities to the Bank of Montreal, an interest in the iron, and for an injunction to restrain the removal thereof.

An injunction was thereupon obtained *ex parte*, restraining the Defendants therein named from removing the railway iron placed upon the wharves of the Plaintiffs at Belleville, until the 8th October, 1875, and until a motion to continue the injunction should be disposed of.

The motion to continue that injunction was, on the 11th October, 1875, refused.

The Defendants Bickford, Cameron, Buchanan and the Bank of Montreal, then answered the said Bill.

It does not appear that the Defendant Brooks, named as a party in the Bill, was ever served with it, and he never put in any answer, or appeared in any proceeding as a party to the suit.

The Defendants Bickford and the Bank of Montreal and Buchanan having, in January, 1876, caused the lands of the Plaintiffs to be advertised for sale, under the power of sale in the mortgage, the Plaintiffs amended their Bill, and prayed that it might be declared that the securities held by the Bank of Montreal and Buchanan had been fully satisfied, and for an injunction to restrain the sale of the said mortgaged premises, and gave notice of motion for an injunction accordingly.

On the 18th January, 1876, a decree by consent was made, referring it to the Master to take the mortgage account to ascertain and state the amount due for iron

laid or delivered to or for the Plaintiff's use on the track, and also the amount due (if anything) in respect of iron delivered at Belleville, but since removed, and to report special circumstances if requisite; and it ordered payment of the amount found due, within thirty days after the making of the report, and that in default of such payment, the mortgagee should be at liberty to use all or any of his rights and remedies.

On the 9th February, 1876, the Master made his report, finding the amount due on the mortgage security to be $46,841.10 for iron laid or delivered, to or for the Plaintiffs' use, on the track of the railway, and finding nothing due on account of iron delivered at Belleville, but since removed, but reported specially that the Defendant Bickford had delivered on the wharf at Belleville 4,036 tons of rails and 295 tons of track supplies, of which 1,983 tons of rails and 144 tons of track supplies were delivered to Defendant Brooks for the use of Plaintiffs' railway, and 1,592 tons of rails, and 135 tons of track supplies were sold by Bickford to other parties and removed from Belleville, and 450 tons of rails, and ten tons of track supplies still remained on the wharves at Belleville, subject to the order of the Bank of Montreal.

From that Report the Defendant Bickford appealed, and the appeal having been heard before Vice-Chancellor Proudfoot, was, on the 15th March, 1876, dismissed for the reasons stated in the judgment of the learned Vice-Chancellor, and which will be hereinafter referred to in the judgment of the Court.

The Defendants Bickford and Buchanan then appealed to the Court of appeal for Ontario.

The Appeal having been argued, the Court of Appeal, by a preliminary judgment, directed it to be re-argued

by one Counsel on each side. The case was re-argued, and on the 15th June, 1876, the Court of Appeal dismissed the appeal, the judgment of the Court being delivered by Mr. Justice *Moss*.

From that Judgment the Defendant Bickford appealed to the Supreme Court.

Mr. *Hector Cameron*, Q.C., for Appellant:

The consent decree in this case was for the purpose of getting a decision of the case made by the Respondents Bill as amended, and that could only be got at after "ascertaining the amount due on the mortgage for iron laid or delivered to or for the Plaintiffs' use on the track, and also the amount due (if anything) in respect of iron *delivered at* Belleville, but since *removed*." The Master, in taking the account of the moneys due to the Apellant under the mortgage, did not charge the Company with the price of the whole amount of iron delivered to the Company pursuant to the contract, giving credit to the Company for the amount realized by the sale mentioned in the pleadings, after default on the part of Brooks and the Company, but charged them only with the quantity actually laid on the track.

On appeal, Vice-Chancellor *Proudfoot* affirmed the report on the construction of the instruments. The Court of Appeal for Ontario held on appeal that the proper construction of the instruments would cover whatever Brooks owed the vendors for iron delivered on the wharf at Belleville, but that the Respondents had no power to pledge their road except for the iron laid down, and for that reason alone declared the report of the Master should be affirmed. The principal point, therefore, to be agreed before the Court is, whether the

mortgage was *ultra vires*, and whether, under the pleadings and proceedings in the cause, it was open to the Respondents to raise on the appeal the contention that the mortgage was *ultra vires.*

The Bill does not in any way impeach the validity of the mortgage, but, on the contrary, affirms it, and by the original Bill claims, that by virtue of having given it, the Company had acquired an interest in the whole of the iron delivered, and a right to prevent the removal of that not laid, while, as amended, it seeks only to raise the question of the amount secured by the mortage and intended so to be, according to the proper construction of the instrument.

The Respondents cannot be allowed at the hearing in appeal to change their attitude and proceed as for the cancellation of an illegal instrument; in other words, they cannot "approbate and reprobate," and a Bill so framed, would have been demurrable. *Cawley* v. *Poole* (1); *Stevens* v. *Guppy* (2); *Rawlings* v. *Lambert* (3).

The rule is that a Bill can only be filed against a mortgagee for the purpose of redeeming the mortgage. *Rogers* v. *Lewis* (4); *Harding* v. *Pingey* (5).

And after decree is pronounced, the accounts are to be taken simply on the footing of what is due under the terms of the mortgage. *Kerby* v. *Kerby* (6); *Pollock* v. *Perry* (7.)

The Bill is not one for relief from a void or illegal transaction on equitable terms, and contains no sufficient submission to such terms as the Court might think fit to impose, without which relief will not be granted.

(1) 1 H. & M., 66; (2) 3 Russ, 185; (3) 1 J. & H., 462; (4) 12 Grant, 259; (5) 10 Jur., N. S., 872; (6) 5 Grant, 587; (7) 5 Grant, 593.

The offer to pay what, if anything, shall appear to be due, upon taking the accounts, is based only on the allegation that the amount secured by a valid mortgage had been paid. See *Parker* v. *Alcock* (1); *Jervis* v. *Berridge* (2); *Athenæum Life Assurance Co.* v. *Pooley* (3); *Re Cork & Youghal R. W. Co.* (4); *Re Durham County Building Society* (5); *Brice* on Ultra Vires (6).

Under the decree, it is not open to the Respondents to contend that the mortgage is *ultra vires*, or that the amount due on it should be reduced to the value of the iron actually laid on the road.

The very fact of taking an account on a mortgage before the Master affirms the validity of the mortgage.

The case of *Penn* v. *Lockwood* (7) relied on by Respondents is not an authority to the contrary, and if it be, it is not supported by principle or the practice of the Court.

In Equity, on taking the account under a mortgage in the Master's office, the amount really advanced under the security was always a matter of proof, and nothing more was done in *Penn* v. *Lockwood* than enquire as to this point.

That was a foreclosure suit, and the mortgagor was Defendant, whereas here the Respondents, the mortgagors, were Plaintiffs, and not only do not question the validity of the mortgage by their Bill or by the consent decree, but actually affirm it.

Corporations should not be allowed to set up their incapacity whenever it is inconvenient for them to carry out their engagements. See *Brice* on Ultra Vires (8), and cases there referred to.

(1) 1 Younge, 361; (2) L. R. 8 Ch., 351; (3) 3 DeG. & J. 294; (4) L. R. 4 Ch., 748; (5) *Wilson's Case*, L. R. 12, Eq., 521; (6) P. 117; (7) 1 Grant, 547; (8) Preface, p. 11.

Nor do the other cases relied upon by the Respondents, in support of their contention that the Company are entitled at any stage to set up the invalidity of the mortgage, apply. All they go to show is, that in appeal, you can urge a new argument, but not a new ground.

The Respondents cannot repudiate their own act, solemnly executed by deed of which they have got the benefit, unless, at any rate, by a substantive proceeding for that purpose, supported by proper allegations and evidence.

Scott v. *Colburn* (1); *Anglo-Australian Ass. Co.* v. *British Prov. Ass. Co.* (2); *In re Electric Telegraph Co. of Ireland*; *Troup's case* (3).

The mortgage in question is a valid security, and within the power of the Respondents to make.

Now the Court of Appeal, although they admit the power to mortgage for securing the price of the iron laid down, yet hold the mortgage to be *ultra vires* because it was not made to secure a loan of money under s. 9, ss. 11, of the Railway Act, and was given on a part of the line only, and that even if the Company had power to make such a mortgage as security for a debt, there was no debt of the Company to be secured, Brooks being the debtor and this mortgage being given as collateral security that he would pay.

The validity of the mortgage connot depend on the proper application to the use and benefit of the Company of money or property acquired on the faith of a mortgage given by the Company.

If this Company had power to mortgage to secure the value of iron delivered at Belleville for the use of their

(1) 26 Beav., 276; (2) 3 Giff. 521, 4 DeG. F & J., 341; (3) 29 Beav., 353.

Railway, provided that iron were laid on their track, they cannot be relieved from liability or their mortgage be held void because their contractor failed and neglected to lay it by his own default.

Re Contract Corporation & Vale Co. (1).

The following cases show, beyond a doubt, that the power to mortgage specially given by the Railway Act does not exclude the power to mortgage for a purpose within the object of the Company's incorporation.

Taylor v. *Chichester & Sandhurst Railway Co.* (2); *Australian S. S. Co.* v. *Mounsey* (3); *Gibbs & West's Case, Re International Insurance Co.* (4); *Re Patent File Co., ex parte Birmingham Banking Co.* (5); *Green's* American edition of *Brice*, p. 127, and the American cases there cited; *Allen* v. *Montgomery Railway Co.* (6); *Mobile & Cedar Point R. R.* v. *Salmon* (7); *Riche* v. *Ashbury Railway Carriage Co.* (8); *Shrewsbury & Birmingham Railway Company* v. *North Western Railway Company* (9); 2 *Redfield* on Railways, (10).

The power given by sub-sec. 2 of sec. 9, ch. 66 Con. Stats. of Canada, to a Railway Company to "alienate, sell and dispose of land, for the purposes of their road, clearly includes a power to mortgage. The Respondents wanted the iron for their road, and being practically the buyers of the iron, they had power to give the mortgage to secure the price without express legislative authority. *Brice* on Ultra Vires (11).

The power to mortgage in order to carry out the purposes of the incorporation, will not be taken away by implication. *Maxwell* on Statutes (12); *Angell & Ames* on Corporations (13).

(1) L. R. 8 Eq., 14; (2) L. R. 2, Ex. 356, and 4 H. L., 628; (3) 4 K. & J., 733; (4) L. R., 10 Eq., 312; (5) L. R. 6 Ch., 83; (6) 11 Ala., 437; (7) 15 Ala., 472; (8) L. R. 9 Ex., 264, 292; (9) 6 H. L. Cases, 113; (10) P. 490; (11) P. 111; (12) P.66; (13) Sec. 191.

The Appellant does not raise any question of franchise in this case, but contends that although this mortgage may be ineffectual to pass the franchise of the Company, it is nevertheless valid to pass the property. The Legislature might, however, recognize a sale or foreclosure of the property under the mortgage and reserve the franchise in favor of the mortgagor. *See* Ontario Act, 38 Vic. c. 47, sec. 7 and 8.

Green's Brice, page 125, and American cases cited there.

Appellant also contends that this Company is not now, and never has been, a completed Railway used by the public, but is merely some land acquired by the Company, (with no evidence that any of it has been taken under the compulsory powers of the Act) on which land the iron of the Appellant has been laid under an express agreement, that he should have a lien upon it, until the price of the iron delivered for the use of the Company to be laid on their land, is paid for in full, which agreement the Company now seek to repudiate. The arguments based on the rights of the public do not apply to such a case. *Greenstreet* v. *Paris* (1); *Angell & Ames* on Corporations (2).

The argument against the validity of the mortgage resting on the consequences of a foreclosure, sale or ejectment, would equally apply against the validity of a mortgage expressly authorized on a loan of money under the Railway Act. The question is not, however, what remedy has a mortgagee, but is the mortgage a valid charge on the property of the Company. 2 *Redfield* on Railways (3); *Mississippi and Missouri Railroad Company* v. *Howard* (4); *Madison, &c. Ry.*, v. *Norwich*

(1) 21 Grant, 229; (2) 10 Edit. s. 191; (3) Page 489, et seq., ed., 1873; (4) 7 Wallace, 392.

Savings Society (1); *East Boston Freight R. R. Co.* v. *Eastern R. Co.* (2); *Bardstown and L. R. R. Co.* v. *Metcalfe* (3).

The fact that there is no covenant by the Company to pay the money secured by the mortgage cannot render it invalid as a charge on the land, and there is no evidence of any improper reason or intention for the omission of the covenant. *See Benjamin* on Sales (4).

The Appellant also submits that as a matter of law, the Appellant, as vendor, either directly or through the Bank of Montreal, had the right and power to remove any part of the iron unlaid on the track, without rescinding the contract of sale, and was only bound to give credit on the contract price for the value at the time of the removal of the iron so removed. *Benjamin* on Sales (5); *Page* v. *Cowasjee* (6).

As a matter of fact he has sustained a loss of $14.00 per ton on the iron so removed. The question is, who is to bear the loss; the Appellant, who, it is admitted, fully performed his part of the contract, or the Company.

Mr. *J. Bethune*, Q. C., for Respondents:—

The power of attorney and mortgage, given at the request of *Brooks*, carefully provide that they shall not prejudice, alter or affect the contract between the Company and *Brooks*, which show that the Company did not mean to undertake any greater liability to *Bickford* than they were under to *Brooks*, and that they would not be liable to pay more than might be coming to *Brooks*, nor until the terms on which it was

(1) 24 Ind., 457; (2) 13 Allen (Mass.), 422; (3) 4 Metcalfe (Ky.), 199; (4) Am. Ed. p. 678, s. 794; (5) p. 643, 689; (6) L. R. 1 P. C., App. 127.

payable were complied with. Greater regard is to be paid to the intention than to the precise words. *Raymond* v. *Roberts* (1); *Strong* v. *Barnes* (2); *Rogers* v. *Kneeland* (3); *Makepeace* v. *Harvard College* (4); *Morss* v. *Salisbury* (5); *Sawyer* v. *Hammott* (6), *Ford* v. *Beech* (7).

Respondents submit that the contract, the power of attorney and endorsement, as also the mortgage and the endorsement on it, must be read and construed together.

The effect of the transaction was an equitable assignment to *Bickford & Cameron*, or for their benefit of what might become due to *Brooks*, and nothing more. It is not reasonable to suppose that the Company would consent to become liable for iron they were not certain of being laid on their track, or that it was intended that the mortgage would be considered as a security for iron to be in *Bickford's* power to remove. Moreover, the Company, not having power to mortgage the property of the Company, except to secure the payment of moneys borrowed to make or maintain the road, the mortgage in question is and was *ultra vires* and void.

Respondents are entitled at any stage to urge arguments to sustain a judgment in their favour, and their right to contend that the mortgage was *ultra vires*, though no such contention was made in the Master's office, cannot be denied. It is, moreover, a legal question arising on the very face of the instrument. *Fitzmaurice* v. *Bayley* (8); *Withy* v. *Mangles* (9); *Bain* v. *Whitehaven and Furness Junction Ry. Co.* (10); *Misa* v. *Currie* (11).

(1) 2 Aiken (Vt.), 208; (2) 11 Vermont, 224; (3) 13 Wendall, 122; (4) 10 Pickering, 302; (5) 48 N. Y., 644; (6) 15 Maine, 40; (7) 11 Q. B., 869-870; (8) 9 H. L. Cases, 78, and 6 E. & B., 869 and 8 E. & B., 664; (9) 10 Cl. & F., 215; (10) 3 H. L. Cases 1; (11) 10 Ex., 153 and L.R. 1 P. C. App., 559.

The question of *ultra vires* was raised merely in order to reduce the amount due under the mortgage, and not to destroy it altogether; and the Company were therefore entitled to urge that point, though not raised by the pleadings. The case of *Penn* v. *Lockwood* (1), is an authority for such a practice.

Also, by referring to the decree, there seems, as Mr. Justice *Moss* says in his judgment, "to be a special "reason for holding that the point might be taken "under the decree. What was the real controversy 'between the parties? Undoubtedly that of the Com- "pany's liability in respect of the iron delivered at "Belleville, but not placed in the road. The decree con- "tains an express reference to find 'the amount due (if "anything) in respect of iron delivered at Belleville, but "since removed.' *Due* by whom or in what manner? "It must mean upon the security of the mortgage, "because the Company had excluded, by the instrument "itself, any other kind of liability."

Further, the Company, while asserting the invalidity of the mortgage, sought relief from the Court upon the usual conditions imposed in such cases by the Court, of paying for the benefits received by them from the transaction. See *Athenæum Life Assurance Co.* v. *Pooley* (2); *Re Cork and Youghal Ry. W. Co.* (3); these are cases which prove that this condition of relief may be imposed in Chancery.

As to the power of mortgaging its corporate property, Respondent contends that it is not a power incident to a Railway corporation, and can only be conferred upon it by express legislative enactment.

Commonwealth v. *Smith* (4); *Hendee* v. *Pinkerton* (5).

(1) 1 Grant, 547; (2) 3 De. G. & J., 294; (3) L. R. 4 Ch., 748; (4) 10 Allen, 455; (5) 14 Allen, 386;

By Con. Stat. Can., cap. 66, sec. 9, sub.-sec. 11, power is given to Railway corporations to borrow such sums of money as may be expedient for completing, maintaining and working the Railway, and to mortgage or pledge the lands, tolls, revenues, and other property of the Company, for the due payment of the said sums and interest thereon.

The Legislature, having expressly given the power to mortgage under certain circumstances, has thereby excluded the right to mortgage under other circumstances.

Where the intention of the Legislature, express or implied, appears to be that a corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void.

Riche v. *Ashbury Railway Carriage Company* (1); *Shrewsbury & B.R.W. Co.* v. *North Western Railway Co. & S. U. Ry. & Car. Co.* (2); *South Yorkshire Ry. & R. D. Co.* v. *Northern Ry.* (3).

The intention of the Legislature seems to have been that a mortgage might be given to secure a debt due by the Company, and for satisfaction of which the shareholders might be compelled to pay the amounts they had subscribed; that such a mortgage should be given upon the whole property of the road as a going concern.

The mortgage in question was given upon a portion of the road only, and was not given to secure repayment of moneys borrowed by the Company.

Even if the Company had power to make such a mortgage as security for a debt, there was no debt of the Company to be secured. The mortgage in question

(1) L.R. 7, H. L., 653; (2) 6 H. L. Cases, 113; (3) 9 Ex., 84.

was simply given as collateral security for the payment by Brooks to Bickford of any liability of the former under his contract with the latter, and was therefore beyond the power of the Company, and invalid.

There was no liability of the Company for satisfaction of which the shareholders might have been compelled to pay the amounts they had subscribed. On the contrary, the mortgage in question contains an express declaration of intention that it should operate as, and be a lien upon, the section of Railway covered thereby to secure collaterally the payment of the notes referred to in the contract, and that in case of default the sole recourse of the mortgagee should be against the property included in the mortgage, and not against the Company.

If the money had actually gone into the road, the mortgage would come within the meaning of sec. 9, sub.-sec. 11, but if the mortgage is for money or iron, as in this case, which has not gone to build the road, it should be declared void. The American cases cited by the Appellant's counsel cannot apply, as each State has its own legislation. The following cases show that a different policy is adopted in the various States. *The Bridgeport City* v. *The Empire Stone Dressing Company* (1). *The Bank of Genesee* v. *The Patchins Bank* (2).

As to the rights of the mortgagees the Respondent refers to the following cases: *Galt* v. *The Erie & Niagara Railway Company* (3); *Peto* v. *The Welland Railway Company* (4); *The Corporation of the County of Welland* v. *The Buffalo & Lake Erie Railway Company* (5); and also to the Common Pleas case of *Galt* v. *The Erie and Niagara Railway Company* (6).

(1) 30 Barbour N. Y. R., 421; (2) 3 Kernan N. Y. R., 309; (3) 14 Grant, 499; (4) 9 Grant, 455; (5) 31 U. C. Q. B., 539; (6) 19 U. C. C. P., 357.

In concluding, Respondent submits that the moment the case was referred to the Master on a consent decree, he is not confined to the facts in the Bill. The case of *Kerby* v. *Kerby* (7) supports this view. Whether the objection that the mortgage was *ultra vires*, not having been raised in the Master's office, could be taken on appeal, is, in fact, a point of practice decided by the Court of Appeal, and this Court is generally supposed not to reverse the finding of the Court of Appeal on a question of procedure and practice, and should not declare the matter not to be properly before the Master.

Mr. *Cameron*, Q. C., in reply:—

This is not merely a question of practice in the Master's office, but one of pleading and legal principle.

It is said the effect of endorsement was to limit the Company's liability to what they might owe Brooks. If so construed, it would actually destroy the value of the mortgage, whilst, in fact, the consideration was for the iron Appellant would deliver at Belleville for the use of the Company. Bickford never guaranteed that the iron would be laid on the track.

JUNE 4th, 1878.

The Court ordered a re-hearing on the following points:—

1st. As to the effect of the provision in the agreement between Brooks and Bickford that the vendors should retain their lien and ownership of the iron until laid on the track.

(1) 5 Grant, 587.

2nd. Supposing the mortgage valid, what was its effect upon the property of a Railway never a going concern ?

Mr. *Hector Cameron*, Q.C. :—

The contract was an executory contract. When the iron was delivered on the wharf at Belleville, it became an executed contract on the part of the vendor, and when vendee gave his notes it was an executed contract on the part of the vendee. The Bank, however, had a perfect right to retain the *jus disponendi*, and, as stated in *Benjamin* on Sales, sec. 794, the Bank had a special property analagous to that of a pawnee, and when the purchaser was and continued in default the Bank had a perfect right to sell the property. See *Ogg* v. *Shuter* (1).

It was never intended the property should pass to Brooks, so that it might be seized for Brooks' debt. It was, moreover, at the Company's express demand that all the iron was delivered ; and the moment a loss was incurred by Brooks' default, the Company became liable, under their mortgage, for the damages suffered, that is the difference between the contract price and the market value on a re-sale (2).

As to the effect of the mortgage, when the Legislature gives the right to a Company to mortgage for a special purpose, there is no reason why their land and property should not pass. Our Courts and Legislature have sanctioned the entire foreclosure of a railway under a mortgage. In any case this mortgage is certainly valid as to lands not compulsorily taken, and there is no

(1) L. R. 1 C. P. Div., 47; (2) *Benjamin* on Sales, secs. 382, 399 & 794.

evidence that any lands were so taken. *Brice* on Ultra Vires, (1).

Mr. *Bethune*, Q.C.:—

The property never passed, and the intention was to always give to the Bank an independent ownership which cannot be said to have ever been transferred to Brooks. See *Benjamin* on Sales (2); *Hilliard* on Sales (3); *Parson* on Promissory Notes, (4); *Stevens* v. *Wilkinson* (5).

Brooks' notes were given for property which never passed, and the Company cannot be said to have ever intended to become responsible for damages. This is clearly shown by the words of the proviso.

As to the second point, the clear intention of the Legislature was that a company might execute a mortgage for the purpose of completing, working *and* maintaining, not *or* maintaining the railway.

The mortgage only seems incident to the mere issuing of the debentures. If you can treat this mortgage as a mortgage of so much land, the result would be that the road would be stopped by getting a specific mortgage on one part of the road. The object of the charter was to have a perpetual running road, and the power of mortgaging is only given by Statute in a modified way, for there is no power of winding up given to the Company.

Mr. *Cameron*, Q C., in reply:—

How the mortgage may be enforced is not in dispute

(1) p. 110. (Edition 1877.) 2 DeG. & J., 453; (2) Secs. 210, 319, 320, 353, 399; (3) 404; (4) Vol. 1 p. 206; (5) 2 B. & Ad., 320.

here. If the power of mortgaging were not given, no Railroad Company in Canada could ever build a railway. There are many reasons why Railroad Companies in this country should be given the power to mortgage what in England it would be illegal to mortgage. In this country railways are often built by the aid of large tracts of land, and surely the power to mortgage them must have been intended to be given by the Legislature.

JANUARY 28th, 1878.

STRONG, J., delivered the Judgment of the Court.

The judgment of the learned Vice-Chancellor, on the appeal from the Master's Report, proceeded upon the ground that the liability of the Railway Company under their mortgage was to be subject to the state of the accounts between Brooks and the Company, and that they were not to be liable to the Bank to any greater amount than that in which they should be found indebted to Brooks under the contract of the 25th of March, 1872. This restriction of the mortgage to a mere subrogation to the rights of Brooks against the Company was, in the opinion of the Vice-Chancellor, the proper construction of the agreement, power of attorney, mortgage and memorandum endorsed, all read together. We are unable to concur in this view, and, we think, the true answer to it has been given by the learned Chief Justice of the Court of Appeal in his judgment. The memorandum endorsed is not to be construed as cutting down the terms of the proviso in the mortgage deed, by the stipulation that the contract was not to be varied, but was intended to conserve written evidence of

Brooks' consent to the mortgage and to the loss of priority in respect of the mortgage bonds to be delivered to him under the contract, which the mortgage would, of course, have taken precedence of.

All the surrounding circumstances point to this as the natural construction, and it is no strain upon the words of the memorandum itself so to interpret it. This reading makes the memorandum consistent with the sealed agreement; the restrictive interpretation adopted by the Vice-Chancellor would give rise to a conflict of meaning between the memorandum and the agreement, both executed on the same day. It is needless to dwell further on this point, for we entirely adopt the reasoning of the learned Chief Justice on this part of the case.

The objection that promissory notes, secured by the mortgage, were only to be given by Brooks and Bickford, under the agreement, as the iron was delivered into Brooks' possession, to be laid on the railway, and not when the iron was delivered at Belleville, is also, in our opinion, correctly answered by the judgment delivered in the Court of Appeal. The first informal memorandum of agreement, that of the 9th of June, 1874, made between Brooks and Bickford and Cameron, makes it clear that what was then intended was that the notes should be given on the delivery on the wharf at Belleville, for it contains these words "all delivered on the wharf at Belleville free "of duties, the said Brooks to pay wharfage and harbour "dues (if any), a credit of six months to be allowed, but "the notes of the said Brooks at three months to be given "and to be renewed for three months, interest being "added to all such notes, at 7 per cent per annum, to be "given from time to time as delivered." This was the agreement of which the contract under seal of the

30th June was intended to be a more formal expression. The argument in support of this contention, founded on the provision that the mortgage was to stand as a security only for the balance uncovered by the bonuses, and Government grant, which were not payable until the iron was laid, is, as the Chief Justice demonstrates, sufficiently refuted by the terms of the agreement "and all moneys received from such bonuses and aid "to be credited on the amount secured by said "mortgage." We are at a loss to see that Brooks' covenant with Bickford to proceed with diligence in laying the track has any bearing on the point. This objection, therefore, also fails; it was indeed but faintly pressed in argument here.

The objection that the mortgage ought not to be considered as a security for the iron removed by Bickford, appeared at first more serious than either of those before alluded to. The agreement for the sale of the iron was, of course, a mere executory agreement, not amounting to a bargain and sale of specific chattels, but so soon as the iron was deposited on the wharf it became appropriated to the purposes of the agreement, and, if no contrary intention had been expressed in the contract, the property would have passed to Brooks, the vendors retaining merely a lien until the time arrived for laying the iron on the railway, and it was delivered to Brooks for that purpose.

The contract, however, did control the passing of the property, for it contains this stipulation in favor of the vendors:—"The said vendors to hold their lien "and *ownership* on the iron until laid down on the "track, when the several grants and bonuses are "payable." In the face of this provision no property passed, unless the word "*ownership*" is to be read

otherwise than in its primary meaning, a construction there is no ground for. The law on this subject is clear. On an agreement for the sale of chattels ascertained at the time of the contract, or afterwards specifically appropriated to the purposes of the contract, the property ordinarily passes at the time of sale or as soon as the appropriation takes place, but this is only a presumption of intention, which may be controlled by the express provision of the parties. In the present case the parties have clearly expressed their intention, that the property should not pass to the vendee, until it was delivered to him to be laid upon the railway. The case of *Page* v *Cowasjee* (1), referred to in the judgment of the Court of Appeal, is therefore inapplicable. It was argued that the removal of the iron constituted a failure of the consideration of the notes *pro tanto* which could have been set up in defence to an action on the notes, and that if the whole price had been paid, a proportion could have been recovered back in an action for money had and received. The case, however, being that it was too late to set up the failure of consideration, as judgment had been recovered whilst the money had not been paid, a Court of Equity would, it was suggested, restrain execution on the judgment, in order to obviate the needless circuity of first paying the money, and then suing for its recovery; in other words, it would be inequitable to enforce execution under such circumstances.

We are of opinion, however, that this contention is not entitled to prevail, inasmuch as the consideration for the promissory notes was the vendors' covenant contained in the sealed contract of the 30th June, 1874, as distinguished from the performance of that covenant,

(1) L. R. 1 P. C. App., 127.

and, as this covenant was partly performed by the delivery at Belleville, that is, performed as far as the vendors could perform it, there was not such an entire failure of consideration as would have entitled Brooks, if the money had been actually paid, to recover back, in an action for money had and received, an amount equal to the proportion of the price paid for the iron removed. The recovery of that money would not have left the parties *in statu quo*, and therefore the purchasers' remedy would be a cross action on the agreement. The rights of the parties would be therefore properly adjusted, in taking the mortgage account, by charging the full amount of the promissory notes against the mortgagor, and then, under the general direction to make just allowances, deducting the reduced value of the iron at the time of its removal.

The question which next arises relates to the jurisdiction of the Master, to whom the reference was made by the decree, to entertain the question of the validity of the mortgage. In point of fact, at least as far as we can see on the face of the record, that point was not raised before the Master, but this can make no difference, for it was quite competent to the Court below to consider any objection which could have been set up in the Master's office. It has been objected that this is a point of practice on which this Court, as an appellate jurisdiction, should not disturb the decision of the Court below; but, without conceding that this objection has any force, it must be remembered that the decision appealed from is not that of the Court of Chancery, which is the Court whose practice is in question, but of the Court of Appeal, before which the point was discussed for the first time. However, we do not consider that any authority would warrant us in declining to

review the judgment of the Court below on this head, for the single reason that it is not confined to a mere question of discretion, or even a pure point of practice, but involves the decision of a very substantial question —one going to the very merits of the cause—the proper construction and effect of the terms of compromise which the parties had agreed to and had embodied in the decree. The general practice of the Court of Chancery of Ontario, according in this respect with that which prevailed in England before the abolition there of the office of Master, is, that a question such as this, the invalidity of a mortgage deed, should be raised by the pleadings and adjudicated on by the Court at the hearing of the cause. We can find no exception to this cardinal rule of equity procedure save in some few respects, where the general orders of the Court of Chancery in Ontario have authorized the Master to deal with matters of account which formerly required special directions in the decree, and which have no relation to the present case. If the doctrine of the Court of Appeal were to prevail, it is hard to suppose any case in which the Master, under a reference to take the account in a mortgage suit, might not assume the jurisdiction to decide on the validity of the mortgage deed. If the mortgagors are to be at liberty to say in the Master's office, there is nothing due on this mortgage deed, because it was beyond the powers of the Respondents as a corporation to make it, why should they not also be heard to say, there is nothing due because the deed was obtained by fraud? Unless some arbitrary line is to be drawn, the right of the Master, under such a reference, to enquire into the validity of the deed would, according to the doctrine of the Court below, be co-extensive with that of the Court at the hearing, em-

bracing every case in which a mortgage might be impeached upon a ground which would have entitled the mortgagor to have had it wholly set aside by decree or to have had the mortgagee's bill for foreclosure dismissed. We know of no authority for any such delegation of the functions of the Court to the Master. The case of *Penn* v. *Lockwood* (1) has been relied upon as an authority for such a mode of procedure, but we are unable to see that it has any application. That was a case, in which, under a former practice of the Court of Chancery in Upper Canada, the Defendant, having made default in answering the Bill in a foreclosure suit, a decree was issued on præcipe, as of course, from the Registrar's office without any judicial intervention. The terms of the decree were those appropriate to a foreclosure suit directing the Master to take the usual accounts. This was at a time long anterior to the repeal of the usury laws. On proceeding with the account in the Master's office it appeared that the mortgage had been given to secure a loan of money, but that it covered an amount in excess of the money actually advanced and legal interest, whereupon the Master reported the actual loan with interest at six per cent. alone, as the amount due, disallowing to the mortgagee the illegal interest. This was the only course the Master could have pursued; strictly confining himself to the account, he enquired into the consideration for the mortgage, and finding that the amount secured on its face comprised usurious interest, he disallowed it; if he had proceeded otherwise and taken the amount secured as the true mortgage debt, he would have unjustly charged the mortgagor with money which was not recoverable. If the principle which the Court of Appeal have applied

(1) 1 Grant, 547.

in this case had been acted on in *Penn* v. *Lockwood*, the Master would have found that the mortgage being illegal nothing was due, for it was only in suits for redemption, where the mortgagor asked the aid of the Court, that the payment of principal and legal interest was imposed as a conditional term of relief; in forclosure suits the Court, if usury were proved, dismissed the Bill. The practice of imposing such terms in redemption suits was an exception to the well established general rule that the measure of a party's equities is the same in all cases without regard to his position on the record as Plaintiff or Defendant. *Hanson* v. *Keating* (1); *Gibson* v. *Goldsmid* (2). Had the Master in *Penn* v. *Lockwood* gone to the extent which the Court below have gone in the present case, he must have found that the mortgage was wholly void, and have reported that nothing was due in respect of it. Therefore, for the reason alone that the principle on which the Court of Appeal proceeded was at variance with the established practice, and that no authority has been cited in support of the decision but the case of *Penn* v. *Lockwood*, which is distinguishable on the ground that the Master was there dealing with the account, and so within the limits of his jurisdiction, we should be prepared to reverse the order under appeal.

There is, however, the further objection that the terms of the decree in the present case, read and considered in connection with the proceedings in the cause, and with what had taken place between the parties excluded any such power in the Master.

At the date of the consent decree, the Respondents had amended their Bill, and given notice of motion for

(1) 4 Hare, 1; (2) 5 DeG. McN. & G., 757.

an injunction to restrain the sale under the power in the mortgage, upon the ground that having regard to the fact that a portion of the iron had, as already mentioned, been removed and sold by Bickford, the mortgage was a satisfied security. Whilst this motion was pending the parties agreed to terms of compromise, which the decree in question was intended to carry out. The first clause of the decree directs the Master to ascertain and state the amount due on the mortgage security in the Bill mentioned, and to find the amount due for iron laid or delivered to or for the Plaintiffs' use on the track, and also the amount due (if anything) in respect of iron delivered at Belleville, but since removed, and to report special circumstances if requisite. The object obviously being to get a decision, under this consent decree, of the case made by the last amendment to the Bill—namely, that the Appellants were not entitled to recover for the iron removed, the only point remaining in dispute, a decision which, as involving matter of account, could be more conveniently arrived at on an appeal from the Master than on a motion for the injunction. If, therefore, the general rule of practice had warranted the setting up of the defence of illegality in the Master's office for the first time, we should have thought that this decree, having regard to its peculiar wording and to the circumstances under which it was made, ought to be construed as excluding any enquiries but those specifically mentioned in it.

We have also to differ from the learned Judges of the Court below in the opinion which they formed as to the validity of the mortgage. The objection to it, which has been sustained by the Court of Appeal, is that it was beyond the powers of the Railway Company to create such a security. It cannot be success-

fully contended, in the face of many decisions to the contrary, both in England and America, of Courts of the highest authority, that a statutory corporation is incapable of mortgaging its property, unless its incapacity to do so is either expressly declared, or is to be gathered by implication from the terms of the Act of Incorporation. In other words, no enabling power is requisite to confer the authority to mortgage, but *primâ facie* every corporation must be taken to possess it. *Ashbury Carriage Co.* v. *Riche* (1); *Re Patent File Company* (2); *Scott* v. *Colbourn* (3); *McCormack* v. *Perry* (4); *Pennock* v. *Coe* (5); *Dunham* v. *Railway* (6); *Galveston Railway Co.* v. *Cowdry* (7); *Australian Steamship Co.* v. *Mounsay* (8). If its rights in this respect are limited, it must be by force of some disability imposed by the instrument creating it, whether that instrument be a Statute or a Royal Charter; and such a disability may be deduced either from the object of the corporation being limited to certain specific objects, or from its property being subject to charges or trusts in favor of the public with which a mortgage would be inconsistent. The deed of charge in question in the present case, purports to give, in security for the payment of iron to be used in the construction of the Respondent's railway, all the lands of the Company, as well as its franchises and powers. The Act of Incorporation, which creates the Company and authorizes the construction of the railway, neither confers upon nor takes away from the Company the power to mortgage its lands or other property. It incorporates with it, however, the

(1) L. R. 7 H. L., 653; (2) L. R. 6 Ch., 83; (3) 5 Jur., N.S., 183; (4) 7 Exch., 355; (5) 23 How., 128; (6) 1 Wall., 267; (7) 11 Wall., 474; (8) 4 K. & J., 733.

provisions of the General Railway Act (1), including that contained in section 9 sub-section 11 of that Act which authorizes the Company to borrow money, issue debentures, and to mortgage the lands, tolls, revenues and other property of the Company for the payment of such loans and debentures, and also that contained in section 9 sub-section 2, giving the Company authority to "alienate, sell and dispose of lands acquired for the "construction, maintenance and accommodation of the "Railway." The power to borrow money and secure the loans cannot, we think, be considered as implying that the Company's powers to mortgage are to be limited to that object, but it indicates that, in the view of the Legislature, borrowing money was not so obviously within the necessary general powers of the Company as to be considered as conferred without express words. Another reason for not attributing any such effect to the express power to mortgage just referred to is this: at the date of the passing of the original Railway Act, from which the clause in question in the Consolidated Act has been taken, the usury laws were in force, and this section gives authority to borrow at the rate of eight per cent. interest. Again, it is not merely a power to mortgage to secure loans which is created by the section in question, but it authorizes the borrowing on debentures which are to be secured by mortgage. Further, it empowers the Company to "hypothecate, mortgage, and pledge" not merely its lands, but also its tolls, revenues and other property; thus giving enlarged powers as to the property which may be subjected to the mortgage. It seems to us, therefore, out of the question to say that this sub-section can either be

(1) Con. Stat. of Canada, cap. 66.

construed so as to exclude the general power of the Company incidental to its existence as a corporation to deal with its property by way of mortgage, or, that it can have any restrictive influence on the express powers conferred by sub-section 2 of section 9 of the same Act.

The next enquiry must be, if this mortgage was within the scope of the powers conferred upon the Company to construct and work a railway. In other words, was it given for a purpose tending to effect the objects for which the Company was called into existence? The iron rails, for the price of which the mortgage in question was actually given, were indispensable to enable the Company to carry out its undertaking. This iron the Company might, if they had so chosen, have purchased directly from the vendors. It was found more convenient, however, to make a contract for the construction of the railway, by which the contractor undertook to furnish the iron. There was nothing, however, in the circumstance that the construction and completion of the line of railway had been made the subject of contract, which took away from the Company the power which they originally possessed of purchasing iron, and, if they thought fit, of securing the payment of the price upon any property which, in other respects, they were free to give as security. Then, on what principle could it be suggested that having this power of purchasing iron directly and giving security for the price, the Company were disabled from mortgaging their property as a collateral security in aid of their contractor. This, it must be borne in mind, does not concern the powers of the directors merely, but it is a question of the powers of the corporation itself in its dealings with strangers. The

answer to the enquiry before made seems included in this statement of the powers of the Company. They have power under the general law of corporations to mortgage for any purpose in furtherance of the object of incorporation; the object of the incorporation being the construction of a railway for which iron rails were absolutely requisite, they had power to give a mortgage to secure the price of rails, and they have done no more than that in the present case. That they have given the mortgage as sureties for the contractor, and not as the direct purchasers of the iron, can make no difference; indirectly, they having given it to secure the price of the rails, and the secondary liability, to which they have subjected their property, is as much in furtherance of their undertaking as if no contractor had been interposed between them and the Appellants; in short, the Company were, in effect, the sub-purchasers from Brooks of the iron which the latter had purchased from the Appellants, and in order to obtain the property instead of paying money, they gave the mortgage to secure the original price.

Had the mortgage been given for any object foreign to or inconsistent with the purposes of of the incorporation, then, no doubt, it would have been *ultra vires* of the Company. A familiar instance of a Railway Company exceeding the limits of its undertaking, is afforded by a well known case, in which such a corporation added to its legitimate business that of a line of steamships. Had this mortgage been given in aid or furtherance of any similarly unauthorized enterprise, it would, of course, have been *ultra vires*, but it is manifest that such was not the case here, and that the sole object of the corporation was to attain the end for which it had been created.

There remains the further enquiry: Was this mortgage inconsistent with any statutory destination of the property of the Company subject to the mortgage? In this connection it must be borne in mind that the single question before the Court is that concerning the validity of the mortgage, and that it is premature to discuss the nature and extent of the remedies to which the Appellant may be entitled. We have only to recall the terms of the decree under which this contention has arisen, and which consist of a reference to ascertain the amount due, to be satisfied that the question of the Appellant's right to any particular remedy has been excluded by the decree, which expressly concedes the right to sell, if the money found due should not be paid within thirty days from the date of the Report. That the Appellant may have threatened and actually intended to offer for sale the franchises of the Railway Company is therefore immaterial in the consideration of this appeal; in short, it is not under the judicial notice of the Court. I apprehend the Respondents will not be precluded from enforcing any remedy which they may have ever possessed to restrain any illegal act, which the Appellant may purpose to commit under color of availing himself of his legal remedies to realize the money secured by his mortgage. But the question of what these remedies may consist is wholly beside the present controversy.

If the mortgage comprises any property which the Company were free to give in security, it can make no difference that it also includes other subjects, which were so impressed with a charge or trust in favour of the public, that it was beyond the power of the Company to deal with them.

The Court below have determined that this deed was

wholly void, but if it creates a good charge on any single parcel of land which it purports to affect, this cannot be the correct conclusion. The charge is on all the lands of the Company situate in the town of Belleville, and Villages of Sterling and Hastings, and in the several townships designated, and on the franchise and powers of the Railway between the town of Belleville and the Village of Hastings. Then are all the lands of a Railway Company so dedicated to public uses, or so impressed with a public trust that it is *ultra vires* of the Company to deal with them by way of mortgage? On the answer to this must depend the correctness of the decision appealed from. Assuming for the present purpose that the principles enunciated by the English Court of Chancery in the case of *Gardener* v. *The London, Chatham & Dover Railway Company* (1) are applicable to the permanent way, station houses, and station grounds actually required for the use and purposes of the Railway, it surely cannot be said that a Railway corporation, constituted as the Respondents' Company is, may not legally acquire and hold other lands, which it requires for no such uses. All practical experience demonstrates that a company of this kind, at the completion of its works, usually finds itself to have acquired property in land not required for the purposes of its working, lands which it may have been compelled to acquire as part of other property which it could not dispense with, or which, though purchased or taken as necessary for the use of the railway, have, in the event, been found to be superfluous. Is the Company, then, to be prohibited from dealing with such lands, the retention of which, in their hands, as so much unproductive stock, can subserve no possible purpose of public

(1) L. R. 2 Ch., 201.

utility? The answer to this enquiry in the negative would be obvious on general principles, even if a specific enactment did not afford it. But we have this answer embodied in the written text of the law itself, for by section 9 sub-section 2 of the General Railway Act (1), express power is conferred upon the Company to alienate, sell and dispose of lands which they may have acquired for the construction, maintenance, accommodation and use of the railway. This right of alienation includes lands acquired in the exercise of compulsory powers as well as those obtained by conventional purchase. That the words "alienate, sell or dispose" include a power to mortgage as well as that of absolute disposition, requires no demonstration.

Mr. Justice Ritchie has suggested how important a power of mortgaging surplus lands is in this country, for a reason which would have no existence in England. The practice has prevailed, in all the Provinces, of making large statutory grants of wild lands from the public domain in aid of the construction of railways, Were Railway Companies disabled from mortgaging, the use of such grants would be greatly diminished. The power of mortgaging lands so granted, has been expressly recognized as one of the ordinary powers of a Railway Company by the Supreme Court of the United States. *Tucker* v. *Furgusson* (2); *Farnsworth* v. *Minnesota and Pacific Railway Co.* (3).

For these reasons it is impossible to maintain the order of the Court of Appeal in the absence of evidence establishing the fact that the Company had no lands other than those required for the permanent way and

(1) Con. Stat. of Canada, cap. 66; (2) 22 Wall., 572; (3) 2 Otto., 49.

station grounds, and otherwise for the efficient working of the railway. The mortgage cannot be pronounced wholly void on the ground now under consideration, unless this is shown. It lay upon the Respondents, who seek to avoid the mortgage, to prove this, but there is not the slightest evidence of it.

Therefore, conceding for the present that the mortgage, if confined to the franchise, and to the railway and its adjuncts, would have been void as being a charge on subjects *extra commercium*, it does not follow that it may not be a good charge on other lands over which the Company had power of free disposition, and for that reason alone the order of the Court below should be reversed.

It is proper, however, to guard against the supposition that we express any opinion as to whether, if this mortgage had been confined to the railway itself and its franchises, it would have been wholly void and inoperative. Speaking for myself alone, and without expressing any decisive opinion, I think there was much force in the argument that a Court of Equity would give effect to such an instrument, at least to the extent of treating it as a good equitable charge upon the net earnings of the railway, a view which would have been quite sufficient to have sustained this appeal.

Further, the use of the word "franchise" seems to have led to some confusion in considering the rights of mortgagees of railways in this country. Strictly, the expression is not accurate as applied to a corporation constituted by Act of Parliament; it should be confined to corporations created by Royal grant or charter, the word "franchise" meaning a privilege granted by the Crown in the exercise of the Royal prerogative (1). It has,

(1) *Chitty* on Prerogatives of the Crown, pp. 118, 119.

however, been sometimes applied to statutory corporations in a more extended signification than even analogy warrants, as meaning not only the right conferred on a number of individual persons to constitute a corporate body, but also as importing powers in derogation of private rights of property conferred on such a body by Statute.

The right to be a corporation is not, of course, susceptible of alienation by mortgage or otherwise, but it is not easy to find any conclusive reasons why other powers, such as those of taking lands, operating the railway, taking tolls, and exercising the other rights and powers usually conferred on railway companies, should not be susceptible of transfer, the transferees being, of course, subject to all trusts and burdens in favor of the public which the original Company was liable to. Very high American authority, including that of the Supreme Court of the United States (1), points to one solution of this difficult question, whilst English decisions maintain the opposite view ; and it was contended by Mr. Cameron, in his very able argument on behalf of the Appellant at this bar, that the circumstances of this country and the conditions under which railways are constructed here, warranted the adoption of the American in preference to the English doctrine, as being more favorable to the rights of the holders of bonds and debentures issued for borrowed capital. We express no opinion on this point, other grounds suffice to decide this appeal, but it was thought right to notice the argument and to say that we still consider it an open question which this Court may yet be called upon to decide

(1) *Hall* v. *Sullivan*, 21 Law Reporter, 138. Judgment of *Curtis* J., in U. S. Circuit Court ; *Wilmington Railway Co.* v. *Reed*, 13 Wall., 268.

without any prejudice from the present determination.

The same may also be said of the point much pressed by Mr. Cameron, that a mortgagee of a railway which has been abandoned and become an abortive undertaking before its construction has been completed, and which remains nothing more than so much land, may be entitled to very different remedies from those to which the holder of such a security may be restricted upon a completed line—a going concern—such as Lord *Cairns* in his judgment in *Gardener* v. *The London, Chatham & Dover Railway Company* (1) likens to "a fruit-bearing tree," a simile very inapplicable to land in this country, originally designed for a railway which has been abandoned. When such a case is presented for decision, it will, in my opinion, deserve attentive consideration.

The judgment of the Court being to reverse the order of the Court below, the minutes of the order to be drawn up on this appeal will be as follows:

REVERSE the order of the Court of Appeal of the 15th day of June, 1876, and also that of the Court of Chancery of Ontario, of the 15th day of March, 1876.

REFER it back to the Master of the Court of Chancery to review and alter his report by finding the amount due on the mortgage security in the pleadings mentioned to be the balance remaining due for principal and interest for the price of all the iron delivered on the wharf at Belleville by the said defendant Bickford, for the defendant Brooks, which said price was found by the said Master in his report, to be the sum of $219,830, after

(1) L. R. 2 Ch. 201.

deducting from the said sum the value of the iron mentioned in the said report of the Master, as having been removed from Belleville by the said defendant Bickford, at the rate already found by the said Master, and specified in his Report, with liberty to the Master to report any special circumstances material to the question of damages.

ORDER that the Respondents pay to the Appellant his costs of this appeal, and also the costs in the Court of Appeal, as well as those of the motion by way of appeal from the Master's Report in the Court of Chancery.

Attorney for Appellant:—*Hector Cameron.*

Attorneys for Respondents:—*Bethune, Osler & Moss.*

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