REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTED BY

GEORGE DUVAL, Advocate.

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Honorable Sir William Johnstone Ritchie, Knight, C. J.

" " Samuel Henry Strong, J.

" " Télésphore Fournier, J.

" " William Alexander Henry, J.

" " Henri Elzéar Taschereau, J.

" " John Wellington Gwynne, J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable Sir Alexander Campbell, K.C.M.G., Q.C.

ERRATA.

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

Page 2—in line 8 from bottom, instead of *Henry*, J. dissenting read "*Fournier* and *Henry*, JJ. dissenting."

" 105—in line 13 from from bottom, instead of "I" read "T."

" 133—in line 5 from top, omit "23 of."

" 225—in line 6 from top, instead of "Supreme," read "Equity."

" " —in line 11 from top, instead of "is" read "are."

" 415—in note (1) instead of "Cor." read "Con."

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

Appeal Cases

BEFORE THE

SUPREME COURT OF CANADA.

THE QUEEN (DEFENDANT)..... .....APPELLANT; 1882

AND

JAMES N. SMITH, *et al.*, (SUPPLIANTS)..RESPONDENTS.

*Dec. 2.

1883

*June 19.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government Contract—Clause in—Construction of—Assignment—Effect of—Damages.

On 2nd August, 1878, *H. C. & F.* entered into a contract with Her Majesty to do the excavation, &c., of the Georgian Bay branch of the Canadian Pacific Railway. Shortly after the date of the contract and after the commencement of the work, *H. C. & F.* associated with themselves several partners in the work, amongst others *S. & R.* (respondents,) and on 30th June, 1879, the whole

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

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contract was assigned to *S. & R.* Subsequently on the 25th July, 1879, the contract with *H. C. & F.* was cancelled by Order in Council on the ground that satisfactory progress had not been made with the work as required by the contract. On the 5th August, 1879, *S. & R.* notified the Minister of Railways of the transfer made to them of the contract. On the 9th August the Order in Council of July 25th was sent to *H. C. & F.* On the 14th August, 1879, an Order in Council was passed stating that as the government had never assented to the transfer and assignment of the contract to *S. & R.*, the contractors should be notified that the contract was taken out of their hands and annulled. In consequence of this notification, *S. & R.*, who were carrying on the works, ceased work, and with the consent of the then Minister of Public Works, realized their plant and presented a claim for damages, and finally *H. C. & F.* and *S. & R.* filed a petition of right claiming $250,000 damages for breach of contract. The statement in defence set up *inter alia*, the 17th clause of the contract which provided against the contractors assigning the contract, and in case of assignment without Her Majesty's consent, enabled Her Majesty to take the works out of the contractors' hands, and employ such means as she might see fit to complete the same; and in such case the contractors should have no claim for any further payment in respect of the works performed, but remain liable for loss by reason of non-completion by the contractor.

At the trial there was evidence that the Minister of Public Works knew that *S. & R.* were partners, and that he was satisfied that they were connected with the concern. There was also evidence, that the department knew *S. & R.* were carrying on the works, and that *S. & R.* had been informed by the Deputy Minister of the department that all that was necessary to be officially recognized as contractors, was to send a letter to the government from *H. C. & F.*

In the Exchequer, *Henry*, J., awarded the suppliants $171,040.77 damages. On appeal to the Supreme Court of *Canada* it was

Held, reversing the judgment of *Henry*, J. (*Henry*, J., dissenting,) That there was no evidence of a binding assent on the part of the Crown to assignment of the contract to *S. & R.*, who therefore were not entitled to recover.

2. That *H. C. & F.*, the original contractors, by assigning their contract put it in the power of the government to rescind the contract absolutely, which was done by the Order in Council of the 14th August, 1871, and the contractors under the 17th clause could

not recover either for the value of work actually done, the loss of prospective damages, or the reduced value of the plant.

APPEAL from the judgment of *Henry*, J., in the Exchequer Court of Canada.

The petition of right, the pleadings and the facts are set out at length in the judgment of *Henry*, J., in the Exchequer Court and in the judgments delivered in the Supreme Court.

The suppliants were represented in the Exchequer Court by the Hon. Mr. *McDougall*, Q.C., and Mr. *A. Ferguson*, and the respondent by Mr. *Lash*, Q.C, and Mr. *Hogg*.

The following is the judgment of the Exchequer Court delivered by

HENRY, J.:

The suppliants claim to recover damages under an agreement entered into by three of the suppliants, namely, *John Heney*, *Alphonse Charlebois* and *Thomas Flood*, on the 2nd of August, 1878, with Her Majesty the Queen, represented by the Minister of Public Works of *Canada*, for "the excavation, grading, bridging, fencing, track-laying and ballasting of that portion of the *Canada* Pacific railway known as the Georgian Bay branch and consisting of 50 miles, extending between section O of location of 1877 on the west of *South* river near *Nipissingan* post office to the head of navigation on *French* river"—the works to be performed as set out or referred to in the specifications annexed to said contract and set out or referred to in the plans and drawings then prepared, and thereafter to be prepared for the purpose of the works, the contractors to execute and fully complete the respective portions of such works and deliver them to Her Majesty, on or before the 1st day of July, 1880.

The petition alleges that the total sum agreed to be

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paid for the performance of said work was about eight hundred and fifty thousand dollars.

From the petition and evidence it appears that the site of the railway in question was through an almost inaccessible wilderness, and that it was only accessible during a part of the year, and that in order to put on the ground the necessary supplies of plant, food and other things required the contractors were obliged to spend large sums of money in building and providing a tram railroad, steam and other boats, and other means of communication. That shortly after the contract was entered into they commenced works in that direction and carried them on in such a manner that they were enabled the following spring to proceed with the actual work contracted for. That they had procured and had on the ground in the summer of 1879 large quantities of supplies, horses, machinery and materials necessary for the works and a large number of men employed, and had made a large expenditure in the construction of steam mills, houses, steamers and boats of different descriptions, which, from the rescinding of the contract by the acting Minister of Railways in August, 1879, resulted in a heavy loss to them.

The suppliants pray to be paid for all damages arising directly or indirectly in consequence of the cancellation of the contract, as set forth and referred to in the 10th, 11th and 14th paragraphs of their petition, and also for all profits which they were thereby prevented from earning and deriving in respect of the works to be by them performed under the contract, with interest, and also all moneys payable in respect of unpaid estimates in their favor: and they claim two hundred and fifty thousand dollars.

The statement in defence put in by the Attorney-General on behalf of Her Majesty in the second para-

graph admits the contract as set out in the first, second and fourth paragraphs of the petition.

The third paragraph of the statement in defence has no bearing on the case.

The fourth, fifth and sixth paragraphs of the statement have reference to the fourteenth clause of the contract, which provides that in the event of the works not being diligently continued to the satisfaction of the engineer for the time being, after six days' notice in writing, to be given by the engineer, Her Majesty might take the works out of the contractors' hands and employ such means as she might see fit to complete the work. No proof was given under the allegations in these paragraphs. In fact, it was shown that no such notice was given, and that at the time of the cancellation of the contract the engineer was fully satisfied with the progress of the works. He himself, in his evidence, says so.

The seventh and eighth paragraphs of the defence allege that the cost of the works contracted for would be about $850,000, and that they were to be completed on or before the 1st August, 1880—that for a long time previous to the 30th of June, 1879, the contractors had made default in advancing the works and up to that time had performed work upon the railway only to the amount of $24,800.90 or thereabouts, whereby it became and was impossible for the said contractors to complete the work within the time limited by the contract, and that owing to the default of the contractors in the execution and performance of their said work and the impossibility of their completing it within the time specified in the contract, and time being of the essence of the contract, Her Majesty rescinded the contract on Her part and notified the contractors that it had been cancelled and annulled, and took the work out of their hands. It further alleges that up to the time of the giving of that notice, or soon after, a certain sum was due under the

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engineer's certificates to the contractors on account of which payments had been made, leaving a balance due them of $13,807.94, which Her Majesty's Attorney was willing to pay and thereby tendered, provided the same should be accepted in full of all demands against Her Majesty in respect of the said contract.

The suppliants, as to the last, as also to the sixth, ninth and fourteenth statements of defence, reply that the said contract was not cancelled, or the works taken out of the contractors' hand, for the reasons stated in said paragraphs, or for any of said reasons, but that the contract was so cancelled and annulled and the works taken out of the contractors' hands because of the determination of Her Majesty, long before said cancellation took place, to abandon and proceed no further with the works contemplated and contracted to be done under and by virtue of the contract in question herein.

I am of opinion that the grounds stated in the paragraphs in question are not an answer in law to the suppliants claim in their petition, unless indeed government contracts are to be construed upon principles wholly different from those between non-governmental parties, which I cannot admit. The contract itself contains no provision for the cancelling of it for the reasons stated. All the contractors bound themselves to do was to complete the contract by a certain time; until that time elapsed there was no breach. The contractors had given security for the due performance of the contract, they had the legal possession of the roadway for the purposes of their contract, and, in the absence of any provision in it to allow of its cancellation and the taking away from them of the road bed during the running of the contract for the particular reason assigned, any person interfering with that possession, even if authorized by the government or the

Minister of Railways, would be a trespasser. At the request of the learned counsel who conducted the case on behalf of the defence, and in the absence of any objection from the counsel of the suppliants, I admitted evidence to be given upon the issue raised. A large number of witnesses were examined on both sides as the possibility of the contractors being able to complete the contract within the prescribed time. Most of those for the defence had never been on the ground, or seen the works, or the preparations made to perform the balance undone, and there was hardly any of them went so far as to say that it was impossible to finish the contract by the specified time. It seemed from the language they used that they considered it not impossible with the proper means and appliances to finish the work within the prescribed time, but that it was their opinion that it was doubtful if it could be done. On the other side evidence was given by competent contractors and others who had inspected the works, who had seen the amount of work done and the means and arrangements that were apparent on the ground for the completion of it, that the work could have been fully completed by the specified time, and I feel bound to find in favor of the latter.

The ninth paragraph of the defence alleges: "that by the seventeenth section of the said contract it is provided that the contractors shall not make any assignment of the contract or any sub-contract for the execution of the works thereby contracted for, and in any event no such assignment or sub-contract, though consented to, shall exonerate the contractors from liability under the contract for the due performance of all the works thereby contracted for, and in the event of any such assignment or sub-contract being made without such consent, Her Majesty might take the work out of the contractors' hands and employ such means as she

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might see fit to complete the same, and in such case the contractors should have no claim for any further payment in respect of the works performed, but should nevertheless remain liable for all loss and damage which might be suffered by Her Majesty by reason of non-completion by the contractors of the works."

The tenth, eleventh, twelfth and thirteenth paragraphs of the defence allege that certain assignments of the contract and individual interests therein were made at different times, by the last of which, dated the 30th of June, 1879, the sole interest therein became vested in the suppliants, *James N. Smith* and *Josiah D. Ripley*, subject to the terms thereof and of the several preceding assignments to them.

The fourteenth paragraph of the defence alleges "that the said several assignments above recited were made without the consent of Her Majesty and in violation of the provisions of the seventeenth clause of the said contract above set out, and Her Majesty, under the powers contained in the said seventeenth clause, took the work out of the said sub-contractors hands by reason whereof the suppliants have no claim against Her Majesty in respect of the works performed, as alleged in the said petition."

The paragraphs of the defence from nine to fourteen, both inclusive, have reference to the suppliants' claim for the balance due for work done and certified by the engineer. They are, as I read them, inapplicable to the damages claimed for the cancellation of the contract.

The fourteenth paragraph is but a statement of the legal result of the statements and allegations contained in the five preceding ones. The defence embodied in the sixth paragraph in question is in substance this: that the assignments were made without the consent of Her Majesty and that for that reason Her Majesty took the work out of the contractors' hands.

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In construing that clause of the contract it is necessary, first, to consider its object. Any one letting a contract for work has a right to prescribe against an assignment or sub-letting of it without the consent of the party so prescribing—many reasons may actuate such a party. He may have confidence in particular persons capable and willing to perform the work contracted for, whilst at the same time he would not deal at all with others. The right to veto an assignment or sub-letting of the contract is often provided for in agreements. The contractors in this case took the contract with the condition that if they assigned or sub-let it without her consent Her Majesty should have the right to take the works off their hands, and employ such means as she might see fit to complete the same, "and in such case the contractors should have no claim for any further payment in respect of the works performed."

The suppliants reply to this fourteenth paragraph of the def nce, "that the said assignments were not made without the consent of Her Majesty, but that Her Majesty had full notice and knowledge before said assignments were made and also immediately thereafter, and before said order in council of the 25th day of July, 1879, was passed, and gave her consent thereto; and after such notice and knowledge Her Majesty recognized the said assignees as contractors under the said contract and allowed them to go on with the work thereunder and to incur a large outlay and expenditure thereupon, on the faith of such assignments, and the recognition thereof by Her Majesty; and the suppliants further say that Her Majesty did not, under the powers and for the reasons alleged in the fourteenth paragraph take the said work out of the contractors' hands."

If Her Majesty, through the minister of the proper department, or those acting for him, either agreed to

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the assignments before they were made, or recognized and dealt with the assignees subsequently as the contractors for the completion of the works contracted for, and in that relation allowed them to go on with the work and to incur a large outlay and expenditure thereupon, in the belief that they had been recognized as the contractors instead of the original ones, there is I think no defence under the paragraph in question. If the last assignment, which vested the sole interest in the contract in the suppliants *Smith* and *Ripley*, was recognized by the Minister of Railways, or those from time to time acting for him, that virtually recognizes the previous ones, and, if agreed to before such last assignment, the defence must fail under the 17th clause of the agreement. If, however, such was not the case, but subsequently the suppliants last named were recognized by the Railway Department as the contractors instead of the original ones, and were thereby induced to spend large sums of money in the work contracted for, it would be unjust to them to set up that provision of the 17th clause of the contract, and Her Majesty would be estopped from setting up such a defence. It would in this case be inequitable. The evidence shows plainly that the cancellation of the contract was not in the slightest degree decided upon because of the alleged assignments of the contract. The route of the Canada Pacific Railway, of which the work contracted for formed a portion, was decided upon and the contract entered into by one government and the work favorably progressing when a change of government took place. After the formation of the new government it was decided by it to change the route of the railway and abandon the line contracted to be built. An order in council was passed to stop the further progress of the work and to take the same out of the hands of the contractors, and a notice, directed to the original contractors,

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of the order in council was served upon the agent and manager of the works of and under Messrs. *Smith & Ripley*, which had the effect of stopping the work on the contract. It is not a little singular that neither the notice nor the order in council should assign any reason for cancelling the contract, and it is but reasonable to assume that if any legitimate reason existed within the terms of the contract the contractors would have been notified of it. It may therefore be fairly concluded that, if at that time there existed any legal excuse for cancelling the contract, such would have been stated, and it is but reasonable therefore to conclude that none existed. I have no reason to say that the policy of the government in changing the route was not a wise one, and I am not called upon to give any opinion on the subject. Assuming, however, that the change was in the public interest, who should bear the cost? No private individual or company should be made to bear the consequences of a mere change of policy of the government; and if it became necessary to make the change solely on the question of route, independently of the position of the contractors as assignees or otherwise, common honesty and equity would call for the necessary contribution from the interests to be benefitted and not from those in no way immediately interested in the route. Whatever may be the legal questions involved and upon which the rights of the parties must be ascertained, there is little doubt that the contractors were induced to go on with the work, and but for the matter of the change of route they would no doubt have been permitted to finish it, and as far as reliable evidence goes would have made a handsome profit from it. It is, therefore, by the decision to change the route and the consequent stoppage of the work that the damage was done to and the loss occasioned to the contractors. Should they be called

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upon to bear it? or should not the public, who we must assume to have been benefitted by the change of route, bear the cost? Apart from questions as to the legal right of the contractors to recover, they are, in my opinion, equitably entitled to compensation for the losses sustained by the cancelling of the contract. It is therefore necessary to ascertain what under the evidence are their legal rights.

The evidence bearing upon the issue in question is chiefly that of Mr. *Ripley*, one of the suppliants, who says:

In September, 1878, I purchased for myself and *Smith* an interest in the contract from *Charlebois, Flood & Co.*, within 30 days after I saw Mr. *McKenzie*, Minister of Public Works. He expressed satisfaction that we had become interested with them as he had known us previously, and that there was additional capital and experience added to the cont act. I acquainted him with the fact that I had gone into the contract and he expressed pleasure.

The work on the contract was commenced after that interview, and some time afterwards he (*Ripley*) visited *Ottawa* and saw Mr. *Trudeau*. He came, as he states, to see the government for the purpose of "getting a larger interest so that we might make better progress with the work" He inquired for the Minister, but he was absent, and he says:

I saw the Deputy Minister, Mr. *Trudeau*, in his office. I stated to him my views with regard to the work and what I proposed to do at that time. He answered, that the government were very glad to add strength to any contract that they had with any party either by capital or skill. I asked the commissioner *Trudeau* what would be necessary for me to be recognized by the government. He stated that a simple letter from my partners, Mr. *Charlebois* and Mr. *Flood*, who were recognized by the government, would place me the same as themselves with the Government.

Witness adds:

That a simple letter from Mr. *Charlebois* and Mr. *Flood* who were recognized by the government would invest me with all the rights they had with the government. I understood him to say that

distinctly. In answer to this question, what did you tell Mr. *Trudeau* was your specific object in coming to visit him on that occasion? the witness said, "That I had in view the buying out of these parties, I spoke more particularly of Mr. *Charlebois*. I do not remember the words, but he gave me the impression emphatically that it would be agreeable to the government.

The witness returned to *Collingwood* and bought out for himself and *Smith* the interest in the contract of *Charlebois*, *Flood* and others.

Before the interview with *Trudeau*, the witness stated that he had heard a rumor at *Collingwood*, and also after he came to *Ottawa*, that the government had some idea of stopping the works. He stated to Mr. *Trudeau* what he had heard and "wanted to know if the government had any thought of stopping the work? He (*Trudeau*) said there was no foundation for the rumor. That reply satisfied the witness and relying on it, he bought out the whole interest in the contract for himself and *Smith*. That was in the spring of 1879.

It appears in evidence that Messrs. *Smith & Ripley* had been previously very successful railway contractors, possessing capital, credit and means abundantly sufficient for the purposes of the contract, while the original contractors seem to have been wanting in that respect; and these facts being known, it is not strange that the railway authorities were, not only not opposed to the assignment of the contract, but pleased with it, as the assignees of the contract were so much better able and more likely to complete it satisfactorily than the original parties. The foregoing statements of Mr. *Ripley*, if not true, could have been contradicted by Mr. *Trudeau*, but as he was not called for that purpose I feel bound to accept them as reliable.

In that evidence there is sufficient to show the consent of the railway department to the assignments to Messrs. *Smith & Ripley*, and the payment subsequently to them of between $10,000 and $11,000 on account of

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work done was also evidence of the ratification of the assignment and the recognition of them as the substituted contractors.

I think the issue raised upon the point in question must be found in favor of the suppliants.

It appears to me, too, that the object of the provision was to assure the completion of the works by the prescribed time, and it was made to enable the government to secure that result. It is, to my mind, very questionable if the contract could be legally cancelled when the government had decided to stop the works and change the route.

The merits of the case I consider wholly with the suppliants, and the defence, to be effectual, should establish a clear, legal right to avoid the contract within its provisions, which I think it has failed to do.

The remaining statements of defence do not raise any issue of importance, and I have now only to consider the question of damages.

The evidence as to the total expenditure on account of the contract up to the date of its cancellation is not very satisfactory, but rather confused. Statements were given by the book keepers of the suppliants *Smith* and *Ripley*, and the latter also gave evidence as to the expenditure. I have endeavoured to dissect the statements made, so as if possible to obtain a satisfactory result. It appears the whole expenditure for cost of plant and everything was $120,144.04, on account of which the government paid $10,050, and for the plant sold there was got $10,053.27. That would leave a balance of $100,040.77.

It is shown that of this balance there was included the cost of the purchase of the assignments of the contract, $29,000.00.

The balance for work done and unpaid for therefore is $71,040.77.

If entitled to recover at all, it seems clear to me that the suppliants are entitled to be paid this sum under any circumstances. If the government illegally ended the contract, as I think it did, I am of opinion the question of profit and loss on the whole contract does not necessarily arise and that the suppliants to recover that amount need not show how the whole contract would have resulted. It would be only necessary I think to show the balance expended above payments and receipts. That question, however, does not arise in this case, for the evidence largely preponderates to show that had the suppliants been permitted to finish the contract there would have been a profit instead of a loss. There is therefore no reason that the suppliants should not recover that amount. They however claim damages for the loss of the profit they allege they would have otherwise made, and sustained their allegations by a great many witnesses. Those witnesses were all well acquainted with the works done and to be done. They are experienced contractors, the most of them, and capable of estimating the cost of such works. They state that a profit would undoubtedly have resulted, and some estimated it as high as $220,000.

It was shown by three or more witnesses that a reliable railway firm (Messrs. *Loss & McRae*), after a careful inspection of the works, and shortly before the cancellation of the contract, made an offer to Messrs. *Smith & Ripley*, to take the works off their hands and finish them as required by the contract and pay them a profit of ten per cent. on the work to be done. This would be equal to about $75,000. That offer was refused by *Smith & Ripley* because, as they allege, they believed they would have made a larger profit by doing the work themselves. Evidence was, however, given on the other side by five witnesses, all of whom are engineers, but only two had been contractors, none of them

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but one had been on the ground, and their evidence was founded on estimates made from the working plans. Having heard the examinations of all the witnesses I feel that the evidence of the large number of witnesses capable of estimating the cost of the works, and who made the estimates referred to by them from actual and careful personal inspection, who gave evidence on the part of the suppliants, is entitled to much more weight than that of four gentlemen who had never seen the works or the appliances and means at hand for completing them. While some of the suppliants' witnesses estimated the profit on the contract would have been over $200,000, the five witnesses for the defence give it as their opinion that there would have been none. I have no doubt but that the witnesses on both sides gave their opinions on the point conscientiously. I think I could not be expected to trust to the opinion of gentlemen who never saw the locality of the works, in preference to that of double the number who had a thorough knowledge of them. It is not so much a question of credibility as of reliability in the judgment of the witnesses. The evidence taken altogether has left me impressed with the firm belief that a large profit would have resulted, and I am of opinion that the sum of $100,000 is not too high a sum at which to put it according to the weight of the evidence. That sum, added to the sum expended on the works, would amount to $171,040.77, and I assess the damages to the suppliants at the latter named sum and give judgment in their favor for that amount with costs.

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

Mr. *Lash*, Q.C., for appellant:

The contractors were informed of the exact effect

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of the order in council of the 25th July, 1879, and although the words "cancel and annul" are not to be found in the order in council, the effect of the order in council, which was enclosed in a letter, was plainly to inform the contractors that they were to stop work. Upon receipt of this notice the contractors simply stopped work and discharged their hands. The defence raised the point that one of the terms of the contract was, that if contractors made default and continued for a number of days in default, the government could take the contract out of their hands. By clause 14 of the contract this power is given to the government. True, the evidence failed to establish notice in writing, but, in addition to this, the contract provided that the work had to be completed by the 1st July, 1880, and although *Smith & Ripley*, after the assignment, made large preparations and went to great outlay and could have performed their contract within the delay, still, at that time, the contractors, *Heney, Charlebois & Flood*, had practically abandoned the contract, they had sold out and by themselves would have been unable to complete it before the time, and, therefore, I submit that the contractors having made default, the Crown had the right to rescind the contract. Then, if my proposition is correct, this contract came to an end on 9th August, 1879, when the Department of Railways notified the contractors, and if at an end, then no action can be brought upon an executory contract, and as it is only upon an executory contract that the suppliants can succeed, the judgment cannot stand. Their answer to this contention is, that the original contractors had the right to assign and did assign their contracts to *Smith & Ripley*, and the evidence showing that they (*Smith & Ripley*) had incurred large expenditure to prosecute the work, there was no default by *Smith & Ripley*, and, therefore, the notice of

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the 9th August did not cancel the contract. If their premises be correct their conclusion is correct.

[THE CHIEF JUSTICE. Do *Heney, Charlebois & Flood* set up that they were carrying out their contract through the instrumentality of *Smith & Ripley ?*]

No, my lord, and if they did it could not be supported by the evidence.

This brings me to the main point of the defence, viz., the effect of the transactions which took place between the original contractors and *Smith & Ripley.* [The learned counsel then read clause 17 of the contract.]

Now, what the Crown says is this: "You made an assignment of this contract without the consent of the Crown, and, therefore, Her Majesty had the right to take the contract out of your hands and cancel it." Their answer is two fold:

1st. That the assignments to them of the contract were assented to by the Crown.

2nd. Even though it were assigned without having obtained the assent of the Crown, clause 17 of the contract does not give the right to Her Majesty to take the contract out of their hands, unless it is with the intention of completing the work, and that as in this case the true reason for taking the work out of the contractor's hands was not on account of the assignment, therefore clause 17 cannot be relied on.

The first question is: Did Her Majesty assent to the assignment?

The first notice which the Crown received of these assignments was by letter of the 5th August, 1879, written by Messrs. *Smith & Ripley's* attorney. This was answered by a letter dated August 11, 1879.

Now the order in council ordering the stoppage of the works was passed on the 25th July, and was communicated to them on the 9th August.

The evidence relied on by suppliants as proving the

Crown's assent is contained in the evidence of Mr. *Ripley*. The first interview by Mr. *Ripley* with Mr. *McKenzie* was in September, 1878. It appears that Messrs. *Smith & Ripley* had tendered for this work, and, as their tender was too high, they afterwards made overtures to the successful tenderers Messrs. *Heney, Charlebois & Flood* and took an interest in this contract. On the 14th September, 1878, by a notarial deed a partnership was formed, comprising the original contractors and some others, for the purpose of carrying out the contract, and on the same day Mr. *Ripley*, one of the suppliants, and others were admitted into the partnership by notarial deed.

By this instrument there was no assignment of the contract. Under the terms of the contract there could be no objection to the contractors taking in associates for the purpose of getting capital. Mr. *Ripley*, therefore, having obtained this interest in the contract came to *Ottawa* and had this interview, and it is on this interview they rely as bearing out the contention that the government assented to the assignment. [The learned counsel then read part of the evidence which is referredto in the judgments.] Now, this conversation had only reference to the partnership agreement and not to the assignment of the contract, as provided in the 17th clause of the contract.

The next interview relied on as containing the assent of the Crown took place between Mr. *Ripley* and Mr. *Trudeau*, the Deputy Minister of Public Works, in the spring of 1879. This was when Mr. *Ripley* came to *Ottawa*, not for the purpose of taking an assignment of the whole contract, but for the purpose of getting a larger interest in it.

On the cross-examination some reference is there made to this conversation.

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[THE CHIEF JUSTICE: What does Mr. *Trudeau* say on this point?].

He was not called. There is no doubt that what Mr. *Ripley* states there is correct. At this interview, also, he only refers to getting a larger interest and not a total assignment. That is all the respondents can rely upon as proving an assent on the part of the Crown to the assignment upon which they now base their claim. I submit it cannot have that effect, and if it could be construed to mean an assent or a promise to give an assent, it cannot bind the Crown. Mr. *Trudeau's* position as Deputy Minister of Public Works did not qualify him to bind the Crown. If he had any authority at all, it was in virtue of his position, and that position, it cannot be denied, does not authorize him to alter a written contract. But it is far better to hold that Mr. *Trudeau* never did anything of the kind.

[THE CHIEF JUSTICE—If you rely on this, it would have been far better to have the oath of Mr. *Trudeau.*]

If *Ripley* had proved anything at variance with the contract, it might have been the duty of the Crown to call him as witness, but I submit he did not.

I now come to the titles of Messrs. *Smith & Ripley* whereby all interest in this contract became vested in them. The first instrument is a release by *John Heney*, dated 2nd August, 1878, to the other original contractors *Charlebois* and *Flood*, by which the former releases his interest to the latter gentlemen.

Then, on the 16th May, 1879, *Flood*, together with others, assign their interest to *Smith & Ripley*, and finally, on the 30th June, 1879, *Charlebois* and others assign their interest to *Smith & Ripley*. At that time the suppliants had obtained the control of all interests in the contract, but inasmuch as there might be some complications in consequence of the numerous transfers, they all joined together; and by a further instrument,

made on the 30th June, 1879, the suppliants obtained a complete assignment of the contract. Now, how can it be successfully contended that the conversation which took place with the Minister of Public Works in 1878, constitute the Crown's assent by anticipation to all these transactions?

They also allege that because the government had given notice to the original contractors that the work should be stopped, they were debarred from the right of relying upon the covenant in the contract, and of refusing their assent to an assignment.

If the notice given had not the effect of cancelling the contract, then the contract remained as it was, and one of the terms of the contract is that if the contractors assigned without the consent of the Crown, it should be null and void. But in addition to this, I also rely upon evidence which, I say, disproves that the Crown knew of this arrangement.

The notice was given on the 9th August, 1879, and all payments up to that date had been made to the original contractors by cheques payable to their order, but to the bank of *Montreal*, who had a power of attorney to receive all moneys coming to these contractors under that contract, and which power of attorney had not been revoked. Then, on the 13th Aug., 1879, the contractors write to the government, showing that they at that time considered themselves the proper parties to be notified.

[THE CHIEF JUSTICE:—When was the notice of the assignment given to the government?]

By letter dated 5th August, 1879. But it is said Messrs. *Heney, Charlebois & Flood* are suppliants, also, and therefore the suppliants are still entitled to recover.

I will now deal with the petition, as a petition of the original contractors. I submit, so far as Messrs. *Heney, Charlebois & Flood* are concerned:

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(*a.*) That they cannot recover for balance of work done, because under the terms of the contract they forfeited their claims by assigning the contract.

(*b*) That they cannot recover anything under the contract as an executory contract, because:—

1. It was rescinded on account of being assigned.

2. It was rescinded on account of the contractors' default in going on with the work and of their inability to complete the contract on their part.

3. If not rescinded, there was no breach of any of its terms by Her Majesty by the giving of the notice relied on as such breach.

Dealing as between *Smith & Ripley* and the Crown, I contend:

(*a.*) That they cannot stand in any better position than their assignors, the contractors, and that if the contractors cannot recover, neither can their assignees.

(*b.*) That *Smith & Ripley* have not any right against the Crown, because:—

The contract attempted to be assigned to them was one which could not be assigned so as to give them any rights against the Crown under it unless with the consent of the Crown.

(*c.*) Any executory rights (if any,) which they may have acquired through the assignment to them expired upon the cancellation of the contract.

The statute of *Ontario* passed in relation to *choses in action* is not binding upon the Crown, and cannot be relied on in a contract between the Crown and a subject.

I will now come to another branch of my argument under another clause of this contract, to wit: That the letter of August the 9th, 1879, and the order in council relied upon as being a breach of the contract, did not constitute any breach on the part of Her Majesty. This is a unilateral contract by which the contractors bind

themselves to do certain work, for which, when done, they are entitled to receive certain monies. This raises practically the same point as in *MacLean* v. *The Queen* (1). There is, I submit, no express contract on the part of the Crown that the work will be given, the contract only says there shall be certain moneys paid when work done. I admit there would have been an implied contract to give the suppliants the work, in order that they might perform the work and earn the consideration, but for clause 34 of the contract. By this clause:

> It is distinctly declared that no implied contract of any kind whatever by or on behalf of Her Majesty shall arise or be implied from anything in this contract or from any position or situation of the parties at any time, it being clearly understood and agreed that the express contract, covenants and agreements herein contained and made by Her Majesty, are and shall be the only contracts, covenants and agreements upon which any rights against her are to be founded.

Now, the only contract of which the letter of the 9th August, 1879, constitutes a breach, must be an implied contract and that contract is expressly excluded by clause 34

As to the damages, the learned judge who tried the case gave judgment in favor of the suppliants for $100,040 anticipated profits. and $71,040 outlay incurred in preparing to go on with the works, in all $171,000. I do not find fault with the mode adopted for arriving at this amount, but the evidence does not sustain the amount awarded.

[The learned counsel then commented on the evidence.] Under these circumstances I submit that the judgment of the Exchequer Court is wrong in awarding to the suppliants $171,040, as the evidence does not sustain such a finding and the suppliants are not in law entitled to it.

(1) 1 Can. S. C. R. 210.

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Mr. *Hector Cameron*, Q.C., for respondents :

I will not take up the question of damages, as Mr. *McDougall*, who was engaged in the case in the court below, will discuss this matter more at length.

Now, assuming this contract to have been made between a private individual and a corporation to build fifty miles of a railway, it would strike one at first view as strange to find that, on a question of assignment of the contract, the assignees, who at first had been taken in as partners in order to increase the working capital, and afterwards had been induced by the corporation to take a larger interest, and had, as in this case, expended some $70,000, should be met with this answer: "You are not entitled to any remuneration at all, and, although we gave you work to do, and induced you to put your money in this contract and buy out your co-contractors, now we have changed our minds, we will not pay." Such a defence on behalf of a corporation, I say, would almost shock one's ideas of justice, but that such a defence should be put forward by the Crown, because the Crown subsequently refused to consent to the assignment, is, to say the least, singular. Of course there is no merit in such a defence First, it is admitted that Messrs. *Smith & Ripley* had a perfect right to go in as partners in this contract. They did so, and afterwards, being encouraged by the officers of the Crown to take a larger interest, they brought out their co-contractors, and then they are told: "Oh! you have taken an assignment of this contract, now, because you have done so, we will not pay you one cent." If, I repeat, a corporation came into any court with a defence like that, there would be some very hard language used, and the corporation would be estopped from putting forward such a defence. However that may be, that seems also to have been the view taken by Mr. *Sandford Fleming*, the Chief Engineer for Government

Railways, for, it appears, he advised the Government and reported that Messrs. *Smith* and *Ripley's* claim should be considered and be referred to some one in order to decide what compensation should be offered to him ; but this course was not adopted, and afterwards, due to some afterthought, the Crown was advised to put in this defence, and finding it there, I must stigmatise it as a dishonest defence.

The appellant contends, that under the provisions of the seventeenth clause of the contract, and by reason of the alleged transfers of the interests of the original contractors to the suppliants *Smith* and *Ripley* by various assignments, the contract was cancelled and taken from the contractors.

By that clause it is provided that the contractors shall not assign, and, even if they assign and government consent, such assignment shall not exonerate the contractors from liability, and, if assigned without Government's assent, then Her Majesty may take the work out of the contractor's hands and employ such means as she may see fit to complete the same.

It is a mere covenant, and what is the result ? The utmost power given to the appellant is that, upon certain events happening, the Crown may take the work out of the contractor's hands, provided it is " for the purpose of prosecuting it by some other means," and for no other purpose. There is no authority there given to cancel the contract, or permanently to put a stop to the work on account of an assignment. This clause must be construed strictly, and a forfeiture is never favored, and will not be assumed unless expressly declared. The object of this clause, evidently, was not to create a penalty for assignment, nor to provide an excuse for forfeiting the contract should the Government not wish to go on with it, even if it were being ably prosecuted, but to

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ensure its satisfactory completion by preventing the work from getting into the hands of weak or irresponsible contractors.

I submit therefore that an assignment without consent under this clause creates no forfeiture, but a mere breach of convenant at the most, for which, if the Crown could have any remedy, it would simply be by action on the covenant. See *Paul* v. *Nurse* (1); *Roe* v. *Harrison* (2); *British Waggon Co.* v. *Lea* (3)

Then I say the suppliants have the right to recover in the name of the original contractors.

Paragraph 5 of the petition alleges that the contractors procured *Smith* and *Ripley* to expend the amount for them. But the contract had been assigned, when the order to stop work and cancel the contract was communicated to the contractors on the 9th August. The passing of the subsequent order in council of the 14th August, 1879, alleging the assignments as a reason for the cancellation, could not validate a breach of contract already wrongfully committed. I say the second order in council was a farce. If the first reason given was right, there was no necessity for the second order in council. It was unfair, I contend, on the 14th August to set up this reason, when they had already cancelled it on the 25th July, because it was the policy of the government not to go on with the work. And inasmuch as the previous ground arose from no fault of the contractors, I say it is a technical reason which is now set up and ought not to prevail. The clause now inserted in government contracts is very differently worded, and shows that when the intention of the government to stop work is communicated to the contractor reasonable com-

(1) 8 B. & C. 486. (2) 2 T. R. 428.
(3) 5 Q. B. D. 149.

pensation is provided for. It is an equitable clause and the contractor goes in with his eyes open.

There is one case to which I wish to call the attention of the court, in which all the cases bearing on this point are thoroughly discussed, it is *McIntosh, et al.* v. *Samo* (1), and establishes clearly the principle that a clause of that kind will not be read to work a forfeiture unless expressly so provided. Then, again, this 17th clause does not provide for a consent to be in writing. It being a mere license under the contract, and not in any way a variation of the sealed instrument, a verbal sanction from the officer representing Her Majesty as Minister, or from the temporary head of the department, would be sufficient. It might be by acquiescence.

[THE CHIEF JUSTICE: Could there be a consent before there was an assignment?]

Yes, if a contractor came to the Minister of Railways and told him he was going to take an assignment of a contract, and the minister answered he was very glad, and the contractor then asked in what form should he do it, and the proper directions were given, assuming all that, would not the Crown be estopped from saying that the assignment must be treated as a forfeiture of the contract? The Deputy Minister of Public Works, who was then the departmental officer who could give the necessary information to the suppliants, told them what to do, and they complied with his directions. 31 *Vic.*, ch. 12, secs. 2, 4 and 7, specify the powers of the Deputy Minister.

As to the contention that the Crown was under no obligation to give the contractors the work to do, because there was no express covenant to that effect in the contract, and therefore Her Majesty committed no breach in stopping the work and cancelling the contract, I submit that there is no necessity on our part

(1) 24 U. C. C. P. 625.

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to establish that there existed an express or implied covenant, because the moment Her Majesty, through her officers, put the contractors in possession of the location of the work, gave them the requisite plans and bill of works for the execution of the contract, and directed them to commence operations, Her Majesty did all that she would have been obliged to do under an express covenant by her that the contractors would be given the work.

Although there are, in the general description of the subject of the contract above set forth, several different branches or classes of work required, yet they all constitute one entire and undivided undertaking; that is to say, the construction of fifty miles of railway known as the *Georgian Bay* branch in such a way as to make it complete and ready for traffic

This case differs entirely from the case of *McLean* v *The Queen*, lately decided in this court, and from the authorities upon which that decision was based.

In each of these cases it was necessary to establish, in order that the plaintiff should succeed, that there was an implied covenant on the part of the defendant to give the work in question therein, or to do some other precedent act, and to continue these acts from time to time, because the subject of contract did not consist as in this case of one entire work, but of several separate and distinct undertakings. See *McLean* v. *The Queen* (1); *Churchward* v. *The Queen* (2); *McIntyre* v. *Belcher* (3).

If, however, it were necessary in order to make the appellants liable in this case, that an implied contract on Her Majesty's part should be established, it is submitted on behalf of the respondents, that the thirty-fourth clause relied upon by the appellants would not prevent such being done.

(1) 8 Can. S. C. R. 210. (2) L. R. 1 Q. B. 184.
(3) 32 L. J. C. P. 255.

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That clause must be construed to mean only that no covenant or contract by Her Majesty should be implied inconsistent with, or further than is necessary to carry out, the intention of the parties to the written contract.

The object of the parties in making the contract must be kept in view in construing it, and as provided in the first part of the fourth clause the several parts of the contract must be taken together to explain each other. See *Mallan* v. *May* (1) and *Ford* v. *Beach* (2).

Then, as to the question of damages, the learned counsel for the appellants treated all the witnesses on behalf of the respondents as being interested. Now, not one of them had any interest left in this contract, but all of them, from their knowledge of the locality and experience in such matters, could speak with much more weight than any of the witnesses for the defence, not one of whom had been there, except Mr. *Lumsden*, and against his evidence we have the evidence of contractors who had examined the road and made a *bonâ fide* offer of ten per cent. profit on the bulk sum of the contract.

Then, as to the point whether the contract could have been completed within the time provided for in the contract, to begin with, it is in evidence that the government were themselves in default, and, under clause 29 of the contract, the contractors would have been entitled to further time, and then the evidence for the suppliants clearly proved that with the large outlay that had been made, and considering the position of the suppliants who were practical and experienced contractors with unlimited means, the work would have been completed. There is no doubt of the fact that the suppliants are out of pocket some $70,000, and that in addition to that they would have made a large sum of profits. These profits would have flown from this contract, and the

(1) 13 M. & W. 517. (2) 11 Q. B. 866.

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evidence fully sustains the amoun awarded See *Mayne* on Damages (1).

Hon. Mr. *McDougall*, Q.C., follows :—

As I had to do with the evidence, and have been engaged in the case since the commencement, I would ask your lordships to follow me in order to understand the *rationale* of the case.

The case is important, not only in regard to the amount involved, which is large, but also as regards the position of contractors generally in Government contracts, and will, therefore, justify a careful consideration.

This contract was made with the authority of parliament and was for the execution by the contractors of the work described as "the excavation, bridging, grading, fencing, track-laying, and ballasting of that portion of the Canadian Pacific Railway known as the *Georgian Bay* branch," consisting of fifty miles. Money had been voted by parliament, and I presume it was the lowest tender which was accepted. The contractors, therefore, became entitled to perform their contract and get their pay. I deny, as is contended for by the crown, that this is an unilateral contract.

The contract in this case is under seal, signed by both parties and is reciprocal. There are express covenants and agreements by both parties. The performance of the contract by the respondents was dependent upon, and impossible without, the previous performance of certain things by the appellants—such as location of the line, staking out the work, cross-sectioning the cuttings, supplying drawings and plans for bridges, &c.

The Crown notified the respondents (9th August, 1879,) to "cease all further operations," and, thereafter,

(1) P. 27.

refused to perform the covenants, &c., on its part. The Crown committed a wilful breach and made it impossible for the respondents to proceed with the work under the contract. As under the circumstances they could not compel specific performance, their only remedy was an action for damages.

It is a rule of the common, as well as of the civil law, that "if one man is to pay money to another upon an act being done, and the other is ready and offers to do the act, and the party hinders him, this is tantamount to performance." *Addison* on Contracts (1); *Domat* (2); *Jones* v. *Judd* (3). And the party hindered acquires a complete right to the money, as if the contract on his part had been performed. *Pedan* v. *Hopkins* (4); *Shaw* v. *Turnpike Co* (5).

The contract contains no provision for the suspension or abandonment of the work. The two clauses referred to by the appellants (14th and 17th) provide for the completion of the works by the respondents in certain events —not abandonment—and are evidently inserted *in terrorem*, and not to work a forfeiture.

"The law does not favour forfeiture. Strict proof of breach of condition or covenant working forfeiture is always required" (6).

The 14th clause requires six days' notice in writing to the contractors before it can be acted upon. The Crown admits that the required notice was never given. This admission disposes, also, of all that part of the defence which alleges "default or delay in diligently continuing to execute the works."

The 17th clause restrains the assignment "of this contract," *i.e.*, the entire contract, without consent. It

(1) 4th Ed. p. 880.
(2) Liv. 1, tit. 1, s. 4, p. 18.
(3) 4 Comstock N.Y. 411.
(4) 13 Searg. & Rawle, 45.
(5) 2 Penn. 461
(6) 1 William's, Saunders ed. 1871, p. 445, and cases there cited; Addison on Contracts, 4th ed., 383.

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does not, and was not intended to restrain the transfer of an interest to persons of means and skill, who might advance capital or supplies. The universal practice had been and still is, to admit partners to "strengthen the firm." The original contractors and their securities remained liable to the Crown up to the very moment of cancellation or abandonment. But assignment without consent does not work a forfeiture. This clause merely gives an option to the government to take the works out of the hands of the contractors and "complete the same" themselves. This is evident from the condition that the contractors shall remain liable for all loss sustained by the government in such case, and shall leave all materials, horses and plant, on the ground for the purpose of, and until, the work is so completed. The option was not availed of, nor was the work completed by the government. The 17th clause, therefore, cannot be invoked by the Crown.

The respondents proved an actual consent by the Minister of Public Works, and subsequently by the Deputy Minister, to the partnership arrangements between *Smith & Ripley* and the original contractors made prior to the 25th July, 1879, the date of the so called concellation.

They also proved notice to the Crown of their presence upon and interest in the work as partners of the original contractors. (Evidence of engineer *Brunel*, Report of *Sandford Fleming*, admitting that *Smith & Ripley* had received payments for work executed. Letter of *Brunel* to *Fleming* of June 30, 1879.

The recognition of respondents by the engineers in charge, by giving them directions as to the work, paying estimates to them instead of the original contractors, as well as the statements of Mr. *McKenzie* and Mr. *Trudeau* to Mr. *Ripley* when he visited *Ottawa*, before he had concluded negotiations with *Charlebois & Co.*,

amount in law to a waiver of the condition of clause 17, even if its breach should be held to work a forfeiture. The government misled the respondents and cannot take advantage of their own wrong. *Doe* v. *Rowe* (1); 1 *William's Saunders* (2) and cases there cited.

That is the character of the contract. While work was progressing, it was discovered on the one hand that some of the contractors had not sufficient capital, on the other that the Government were in default in omitting to do certain things, and a proposal was made by the suppliants to take an interest in this contract. These gentlemen had large capital, extensive plant and machinery and were practical and extensive contractors, and in fact few men were better able to do this work than they were, and labor being cheap, they had the hope of making a handsome profit. The Minister of Public Works, and he surely was capable of binding his department in matters of this kind, knew these gentlemen, and on hearing of their intention, said without hesitation, that he was glad to have such men in the contract. It was then a matter of public policy to build this road, and we can understand how readily the Government acquiesced in having Messrs. *Ripley* and *Smith* interested in this contract.

There never was, I contend, an assignment of the contract in the sense of the seventeenth clause. First of all Mr. *Ripley* became a partner of the original contractors. This did not require an Order in Council, nor was it an act of state; every day parties are added to contracts, even banks become interested; in fact public works, which require large outlay and expense, could not be carried on unless this were done, yet I find the Crown in this case objects to pay money justly due. I confess this seems to me unjustifiable. There is a case which came before the Privy Council, *Kirk* v.

(1) 2 Car. & Payne 246. (2) P. 445.

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The Queen (1), where it was held that the receipt of rents by the Government waived the clause of forfeiture. I refer your Lordships to that case, which shows how such a defence as the one here set up is regarded by the Privy Council. My contention is, that Messrs. *Smith & Ripley* became parties to this contract with the approval of the Government, and that they have never altered their character in that respect; they simply increased their interest, and that with the Government's assent, so far as was necessary, and therefore, I say, clause seventeen cannot be relied upon by the Crown. Then, if there is no ground for cancelling the contract, under clause seventeen, what is the position of the parties? The Government have assumed to cancel this contract, it may be in the public interest, but then they must pay; in matters of public policy, private individuals should not be made to suffer, the public can afford to pay: no one asks that these gentlemen should suffer, except the learned counsel representing some one behind him. Now, the contract being cancelled, what do these contractors—foreigners to us—do? They put in their claim, and finding they could not have it settled at once, but being still anxious to close up this transaction, they make a proposal to refer their claim to any one of three public officers. I happen to know there was a strong disposition in certain quarters to favor this mode of settlement, but some how or other the matter dragged along, and finally, these gentlemen had to come before the Exchequer Court and got there a verdict which I claim is in accordance with justice and right, and which I respectfully submit should be sustained by this court.

[The learned counsel then reviewed the evidence, and contended that it fully sustained the verdict.]

(1) 3 App. Cas. 115.

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RITCHIE, C. J. :—

The appeal in this case is on behalf of Her Majesty, from the judgment of the Exchequer Court of *Canada*, in the matter of the petition of right of *James N. Smith* and others, by which judgment the said petitioners are declared entitled to be paid by Her Majesty the sum of $171,040.00, for damages consequent upon the cancellation of a contract for the building of a portion of the Canadian Pacific Railway.

The contract in question was entered into on the day it bears date, between the petitioners, *Heney*, *Charlebois* and *Flood*, and Her Majesty, represented by the then Minister of Public Works of *Canada*, for the execution by the contractors of the work described as "the excavation, bridging, grading, fencing, track-laying and ballasting of that portion of the Canadian Pacific Railway known as the Georgian Bay Branch, and consisting of fifty miles, extending between Section O." of location 1877, on the west of South River, near *Nippissigan* Post Office, to the head of navigation on *French* River, in consideration of the covenant for payment on the part of Her Majesty set out in clause 24 of said contract.

There are numerous conditions, provisoes and powers mentioned in the contract, all of which are set out in full in the case.

The following clauses more immediately bear on this case:

17. The contractors shall not make any assignment of this contract, or any sub-contract, for the execution of any of the works hereby contracted for; and in any event no such assignment or sub-contract, even though consented to, shall exonerate the contractors from liability, under this contract, for the due performance of all the works hereby contracted for. In the event of any such assignment or sub-contract being made, then the contractors shall not have or make any claim or demand upon Her Majesty for any future payments under this contract for any further or greater sum or sums than the sum or sums respectively at which the work or works so

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assigned or sub-contracted for shall have been undertaken to be executed by the assignee or sub-contractor; and in the event of any such assignment or sub-contract being made without such consent, Her Majesty may take the work out of the contractors' hands, and employ such means as she may see fit to complete the same; and in such case the contractors shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage which may be suffered by Her Majesty by reason of the non-completion by the contractors of the works; and all materials and things whatsoever, and all horses, machinery, and other plant provided by them for the purposes of the works, shall remain and be considered as the property of Her Majesty for the purposes and accordiug to the provisions and conditions contained in the twelfth clause hereof.

18. Time shall be deemed to be of the essence of this contract.

24. It is distinctly declared that no implied contract of any kind whatsoever, by or on behalf of Her Majesty, shall arise or be implied from anything in this contract contained, or from any position or situation of the parties at any time, it being clearly understood and agreed that the express contracts, covenants and agreements herein contained and made by Her Majesty, are and shall be the only contracts, covenants and agreements upon which any rights against Her are to be founded.

25. Cash payments equal to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractors monthly on the written certificate of the engineer that the work for or on account of which the certificate is granted, has been duly mentioned; and upon approval of such certificate by the Minister of Public Works, for the time being for the Dominion of *Canada*, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractors to be paid the said ninety per cent. or any part thereof. The remaining ten per cent. shall be retained till the final completion of the whole work to the satisfaction of the chief engineer for the time being, having control over the work, and within two months after such completion the remaining ten per cent. will be paid. And it is hereby declared that the written certificate of the said engineer certifying to the final completion of said works to his satisfaction shall be a condition precedent to the right of the contractors to receive or be paid the said remaining ten per cent., or any part thereof

26. It is intended that every allowance to which the contractors

are fairly entitled, will be embraced in the engineer's monthly certificate; but should the contractors at any time have claims of any description which they consider are not included in the progress certificates, it will be necessary for them to make and report such claims in writing to the engineer within fourteen days after the date of each and every certificate in which they allege such claims to have been omitted.

27. The contractors in presenting claims of the kind referred to in the last clause must accompany them with satisfactory evidence of their accuracy, and the reason why they think they should be allowed. Unless such claims are thus made during the progress of the work, within fourteen days, as in the preceding clause, and repeated, in writing, every month, until finally adjusted or rejected, it must be clearly understood that they shall be forever shut out, and the contractors shall have no claim on Her Majesty in respect thereof.

28. The progress measurements and progress certificates shall not in any respect be taken as an acceptance of the work or release of the contractors from responsibility in respect thereof, but they shall at the conclusion of the work deliver over the same in good order, according to the true intent and meaning of this contract.

The following are the dates respectively of the documents in evidence:

2nd August, 1878—Contract between *Heney, Charlebois & Flood* and *The Queen.*

14th September, 1878—*Jas. Ripley et al* obtain a third interest in the contract, *Charlebois & Co.* having one-third, and *Flood & Cooper*, the other third.

19th September, 1878—A new partnership is formed between *Charlebois, Flood & Co.*, and *Heney's* interest is purchased.

16th May, 1879—*Flood & Co.* and *Cooper* assign their third interest to *J. Ripley*, acting for *Smith & Ripley.*

30th June, 1879—*Charlebois & Co.* assign their third interest to *Smith & Ripley.*

On same day, 30th June, 1879, a dissolution of the previous partnerships takes places, leaving the Messrs. *Smith & Ripley* the sole interested parties in the contract.

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On the same day, 30th June, district engineer informs engineer in chief that *Ripley*, one of the principal contractors, intends pushing work and buying out minor partners.

On the 25th July, 1879, Order in Council passed recommending that the contractors be notified to stop work.

On the 5th August, 1879, *Smith & Ripley* notify the Minister of Railways of the transfer of the contract and their readiness to substitute their security for that given by *Charlebois*.

On the 9th August, the Order in Council of July 25th is forwarded to the original contractors.

On the 11th August, Acting Secretary of Department of Railways and Canals acknowledges receipt of Messrs. *Smith & Ripley's* letter, and informs them that the Crown does not consent to the assignment, and will not consent.

On the 13th August, 1879, the original contractors acknowledge the receipt of the letter of the 9th August, enclosing copy of Order in Council of July 25th, 1879.

On the 14th August, 1879, Order in Council cancelling the contract with *Heney, Charlebois & Flood.*

On the 27th August, *Smith & Ripley* acknowledge receipt of letter of 11th August, enclosing order in Council of July 25th, 1879, and state they only received it on 26th August, 1879.

Then follow letters by *Smith & Ripley* to the Minister of Railways, dated respectively 20th September, 1879, 30th September, 1879, December 15th, 1879, and November 22nd, 1880.

I cannot discover a tittle of evidence to show that either before or after the contract was assigned Her Majesty ever consented to such assignments, or had any knowledge of such assignments, or in any way directly or indirectly recognized the assignees as contractors under the said contract, but, as I read the evidence, the

very contrary was the case, from the commencement of the work and until the contract was put an end to, the original contractors continued to deal with the government and the government with the contractors under the contract, entirely independent of any third parties whatever. All the payments for work done under the contract before and after the alleged assignments were made to the original contractors, *Heney, Charlebois & Flood*, on the monthly certificates issued to them in accordance with the provisions of the contract, who, through their duly authorized attorney, received the same and gave receipts therefor, as follows :

PAYMENTS MADE ON ACCOUNT OF CONTRACT.

Official Cheque (for work done per estimate No. 1 to 31st ult., contract 37, Pacific Railway,) No. 1521, for $550, issued in favor of *Heney, Charlebois & Flood* and received by *A. Drummond*, manager of Bank of *Montreal*, on 20th December, 1878, under power of attorney granted to *A. Drummond*, manager of the branch of Bank of *Montreal, Ottawa*, to receive all sums due, or may hereafter become due by the Government of *Canada* to Messrs. *Heney, Charlebois & Flood.* The power of attorney is dated and signed 18th December, 1878.

Official Cheque (for work done per estimate, No. 20, contract 673, Pacific Railway,) No. 1985, for $880, in favor of *Heney, Charlebois & Flood*, received by Mr. *Drummond* on 20th December, 1878.

Official Cheque (for work done per estimate to 31st December, 1878, contract 37, Pacific Railway,) No. 2335, for $1,600, in favor of *Heney, Charlebois & Flood*, received by Mr. *Drummond* on 16th January, 1879.

Official Cheque (for work done per estimate to 31st January, Pacific Railway, contract 37, P. W. Cert. 878,) No. 2726, for $3,050, in favor of *Heney, Charlebois & Flood*, received by *J. W. de C. O'Grady*, for manager Bank of *Montreal*, 17th February, 1879.

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Official Cheque (for work done per estimate to 28th February, Georgian Bay branch, P. W. Cert. 979,) No. 3075, for $2,050, in favor of *Heney, Charlebois & Flood*, received by *J. W. de C. O'Grady*, for manager Bank of *Montreal*, on 15th March, 1879.

Official Cheque (for work done per estimate to 31st May, contract 37, *South River* to *Cantin's Bay*,) No. 4179, for $1,950, in favor of *Heney, Charlebois & Flood*, received by *J. W. de C. O'Grady* on the 16th June, 1879.

When notice that the contract was put an end to, such notice was by the government given to the said original contractors, and on the 13th August, 1879, these contractors (*Heney, Charlebois & Flood*) write to the Hon. Mr. *Pope*, acting Minister of Railways and Canals, as follows:—

Hon. John Pope,

Acting Minister of Railways and Canals.

SIR,—We have to acknowledge yours of the 9th instant covering a copy of an Order in Council of the 25th of July, authorizing you to cancel our contract for the construction of the Georgian Bay Branch of the Canadian Pacific Railway. Also your notice of August 9th to us to discontinue operations under said contract. In pursuance to your notice I immediately transmitted your order to discontinue operations to the parties temporarily in charge of the work by telegraph to *Collingwood*, the executive office of our firm. Should there be a failure of full compliance to your order by the parties temporarily in charge of the work, on account of certain efforts to negotiate with us, for the entire control of said work; we would hereby inform and notify you, that such negotiations were never completed or deemed sufficiently likely to become so, to cause us to ask your official sanction thereto. Therefore we shall only enumerate, subject to amicable settlement, such charges as have become chargeable to the work previous to the receipt of your notice to discontinue operations.

We have the honor to be, Sir,

Your obedient servants,

Heney, Charlebois & Flood.

Montreal, 13 August, 1879.

Thereby entirely repudiating by anticipation the rights

of any other parties, and stating why they had never asked any official sanction.

Nor can I find in the case the slightest evidence that *Heney, Charlebois & Flood* ever directly or indirectly sought the consent of the crown to an assignment by them, or ever intimated to the government that they had parted or desired to part with their interest in the said contract, or that the same had been assigned to *Smith & Ripley*, or to any other parties. All the transactions with reference to the different assignments and transfers which now appear to have taken place, so far as they actually did take place, were between the parties themselves, without the knowledge or consent of any person whomsoever authorized or empowered by the crown to give such consent. The only evidence relied on of any such consent is that of *Ripley* himself, which is as follows:

Q. Did you visit *Canada*, and, if so, when for the purpose of taking contracts for public works? A. In September, 1878.

Q. You came to what place? A. To *Montreal*.

Q. Was any one associated with you as a railway contractor at that time? A. Yes, Mr. *James N. Smith* was my partner at that time.

Q. And had been your partner for some time previously? A. Some ten years or more.

Q. When you visited *Canada* did you become aware of a public contract called the Georgian Bay branch of the Pacific Railway contract? A. Yes.

Q. Did you take any steps to obtain an interest in that contract or to obtain control of it? A. I purchased an interest at that time in the contract.

Q. From whom? A. From Messrs. *Charlebois, Flood & Co.*

Q. Is this document, now produced and fyled as suppliants' exhibit "B," signed by them and by you, in connection with that contract? A. I recognize that as the contract.

Q. Does this instrument set out the interest which you were to acquire in the contract? As. It does.

Q. After obtaining an interest in the contract with these parties, as shown in this instrument, did you visit *Ottawa*? A. I did.

Q. How long after this instrument was executed? A. I should say within thirty days: I do not remember the exact time.

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Q. What was your object in coming to *Ottawa?* A. To acquaint the government with the fact of my becoming interested in this work, more particularly to ascertain if the contract was all right and properly made.

Q. What was your object in coming to *Ottawa*, and did you accomplish that object? A. I did. It was to look over the contract and see if it was made as they stated with the government, and also to acquaint the Government with the fact of my having become interested.

Q. What member of the government did you see? A. I saw, amongst others, Mr. *McKenzie*, the Premier and Minister of Pubic Works.

Q. Did you state to Mr. *McKenzie* what your object was and what you had done? A. I did.

Q. What did you learn from him? A. He expressed satisfaction that we had become interested with them as he had known us previously.

Q. Satisfaction that you had done what? A. That we had become interested in the work—that there was additional capital and experience added to the contract.

Q. He made no objection, did he? A. Not at all. I had made efforts previously to obtain work and had failed, and now I acquainted him with the fact that I had gone into the contract, and he expressed pleasure.

Q. You had tendered, I suppose? A. Yes.

Q. Were your tenders too high? A. In all cases.

Q. Did anything further transpire between you with reference to it? A. Nothing that I remember at that time.

The witness then stated that he had seen Mr. *Trudeau*, the Deputy Minister of Public Works, three or four months afterwards—a different season of the year.

Q. Then, you visited *Ottawa* for what purpose on that occasion? A. To see the government with regard to other changes which I proposed making with regard to my partners.

Q. What were those changes for, speaking generally? For the purpose of getting a larger interest, or what? A. Getting a larger interest so that we might make better progress with the work.

Q. Did you see the Minister of Public Works on that occasion? A. I enquired for the Minister of Public Works and they stated that he was absent.

Q. You mean absent from *Ottawa*? A. Yes, I took it so. I could not see him.

Q. Who then did you see? A. I was recommended to see the Deputy Minister, Mr. *Trudeau*. I did see him. I was introduced, and had a conversation with regard to this work.

Q. Did he express any opinion or give you any answer to your inquiries on behalf of the government on that occasion? Did you see him in his office? A. I did. I stated to him my views with regard to the work and what I proposed to do at that time, and he answered me that the government always took pleasure in strengthening a contract—in adding strength to it (I think these were the exact terms that he used) and that they were always glad to see additional skill and capital contributed.

Q. (By Mr. *Lash*.) What was his reply? A. He answered that the government were very glad to add strength to any contract that they had with any party, either by capital or skill—that I would have no difficulty in satisfying the government with regard to that fact.

Q. Had you at that time been formally recognized by the government, in the contract, by any writing? A. Not by any writing.

Q. Were you anxious to be so recognized? A. I was. I asked Commissioner *Trudeau* what would be necessary for me to become recognized by the government. He stated that a simple letter from my partners, Mr. *Charlebois* and Mr. *Flood*, to the government would place me the same as themselves with the government.

Q. And that the assent of your co-partners would be sufficient to enable the government to recognize you, or that they would recognize you? A. He made that statement—yes.

Q. Did you make any further efforts to consummate that arrangement at that time? A. I did. I spoke to Mr. *Charlebois* and Mr. *Flood* about the letter.

Q. I am now speaking of your interview with Mr. *Trudeau*; what was the conclusion of that interview? Was there any definite statement as to your future relations with the government in connection with it, or any reason why he could not do so mentioned? I do not remember. I spoke to him about the stopping of the work at that time.

Q. What did Mr. *Trudeau* say to you as the concluding result of your interview with him? You have stated the purposes for which you came and the conversation; what was his final statement—his assurance to you as to your position? A. As I said before, that the government were very glad to strengthen their position in any contract by additional capital or skill.

Q. And that a simple letter from your partners would—what? A. That a simple letter from Mr. *Charlebois* and Mr. *Flood*, who were

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recognized by the government, would invest me with all the rights they had with the government. I understood him to say that distinctly.

Q. Did the interview end there? Did you have a second interview with him or any one connected with the Department on that occasion? A. No.

Q. What did you tell Mr. *Trudeau* was your specific object in coming to visit him on that occasion? A. That I had in view the buying out of these parties.

Q. Which parties do you mean now? A. I spoke more particularly of Mr. *Charlebois*.

Q. And you wished to know what? A. I wished to know if that would be satisfactory to the government, as I was not acquainted with their method of procedure.

Q. And was it in answer to that specific statement of yours that Mr. *Trudeau* made the observation which you have just mentioned? A. I do not remember the words, but he gave me the impression emphatically that it would be agreeable to the government.

The witness speaks of a visit to *Ottawa* in the spring of 1879:

Q. Did you return to the works after that visit? A. Yes.

Q. Without anything more definite in the way of writing or contract than you have mentioned? Was there anything put in writing? A. Nothing.

Q. After you returned to the works? A. Not that I remember.

Q. (By the Court). Was that before your last purchase of the interest? A. Yes, that was previous to my last purchase.

Q. You returned, then, under the impression that there was no difficulty whatever, you being strong and experienced capitalists, in securing the sanction of the government? A. Yes, I returned with that impression.

CROSS EXAMINED.

Q. You first visited *Montreal* in September, 1878? A. Yes.

Q. Had you at that time purchased the interest in the contract? A. I purchased it at that time.

Q. The exhibit is dated 19th September, 1878: was it before or after that you were in *Montreal?* A. Previous to that, I had been there several days. I think you will find the twentieth is the latter part of the contract.

Q. You stated here "I visited *Ottawa* within thirty days afterwards to acquaint the government that I had become interested in the contract." A. Yes.

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Q. You had become interested, then, before you visited *Ottawa?* A. Yes.

Q. In what way did you become interested before you visited *Ottawa?* A. By taking a third interest with *Charlebois, Flood & Co.*

Q. By this document of the 19th September? A. Yes, and assuming one-third of what they had paid out, or were supposed to have paid out.

Q. You saw Mr. *McKenzie?* A. Yes.

Q. Where did you see him? A. I saw him in the department.

Q. In his own room? A. In his own room, as I remember, I sent in my card and was admitted.

Q. What did you tell him? A. I had seen him previously about other work I had tendered for. He was acquainted with our firm.

Q. What did you state to him when you saw him in his room? A. I stated to him that I had finally secured work with the government by becoming connected with this firm of *Charlebois, Flood & Co.*

Q. You did not then produce any document to him? A. Not at all.

Q. What more did you say to him? Did you tell him the particulars of your agreement with the firm? A. I do not remember all the conversation that we had.

Q. Did you tell him the particulars of your agreement with the firm? A. I think I told him that I had taken a third interest with the firm.

Q. Did you tell him that Mr. *Smith* was with you? A. I did not state that fact—I presume not, I had always represented *Smith & Ripley* here.

Q. What did he say in answer to that? A. He expressed satisfaction that we were to be connected with the concern; I cannot give his language.

Q. Can you not state what he said at all? A. Simply that he was well satisfied that we had become connected with that concern from his knowledge of us.

Q. How long did your interview with Mr. *McKenzie* last? A. I think not over twenty minutes or half an hour.

Q. Was any one else present? A. I do not remember any one else being there. No.

Q. No writings passed between you at that time? A. No writings.

Q. You did not ask from Mr. *McKenzie* any letter consenting to your interest? A. No.

Q. This was some time after the 19th September, 1878? A. Yes; I do not remember the date?

Q. Was it in September or October? A. I have an impression it

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was immediately after. I have an impression it was within a few days afterwards, but I am not satisfied to swear to that.

As to his second visit:

Q. And when you came to *Ottawa* Mr. *McKenzie* was not in the city? A. Not that I know of.

Q. You did not see him on that occasion? A. No.

Q. You saw Mr. *Trudeau*? A. Yes.

Q. In his own room? A. Yes.

Q. Was anyone present besides yourself? A. Not at the time I was talking to him.

Q. Tell me what you first said to him? A. I could not give the words, I came for the purpose of explaining to him my position on the work there and what I was about to do.

Q. That was the purpose you came for: tell me what you said? A. Well, I said, I talked of buying out my partners and also asked him what was necessary in order to have us recognized by the government. I entered into those matters.

Q. You had not, at that time, bought out your partners? A. No, I had not.

Q. You contemplated doing so? A. Yes.

Q. And asked what was necessary to have you recognized? A. Yes.

Q. And what did Mr. *Trudeau* say? A. He said very emphatically that the government never objected to strengthening a contract those were the words he used, as I remember, either by capital or skill and that he should be glad to know that the contract had been made better and stronger, and that I would have no difficulty with the government on that ground.

Q. You did not at that time inform him of the nature of the arrangements which were to be made, of course, because you did not know what arrangements would be made? A. Except that I talked of buying them out.

Q. But you did not tell him of the nature of the arrangement at that time? A. No.

Q. How long, do you think, your interview with Mr. *Trudeau* lasted? A. I should say about an hour?

Q. There would be a good deal said, then, during the hour? A. Yes.

Q. Can you not tell us something more about it than what you have said? No; that was impressed, more particularly, on my mind.

Q. Was the whole hour taken up in just stating what you have told us? A. Oh no.

Q. What was the rest of the hour taken up in? A. I do not remember at all.

Q. You do not remember what happened besides what you have stated? A. No.

Q. Mr. *Trudeau* said that a simple letter from your partners would be all that was necessary—necessary for what? A. To place me with the government equal to my partners—to have me recognized in the contract.

Q. A simple letter from your partners to whom? A. From Messrs. *Charlebois & Flood* to the government.

Q. That would be all that would be necessary to have you recog nized as a partner? A. Yes, to the contract.

Q. Did that refer to your then position as a partner? A. Yes.

Q. So that up to that time you had not been recognized by the government as a partner. A. Not in writing.

Q. Was that letter sent? A. It was not—not that I am aware of.

Q. Did Mr. *Trudeau* tell you anything about what would be necessary in the event of your buying out your partners? A. I cannot remember distinctly but I know that he gave me to understand that I had better have my papers up with the government as soon as possible.

Q. What papers? A. Any new papers that I might have.

Q. With what object were they to be sent to the government? A. In order that we might be properly placed there, in this contract.

Q. In order that the assent of the government might be got? A. Yes.

Q. I find that the first agreement which you signed after leaving Mr. *Trudeau* is dated the 16th of May, 1879. That is the agreement whereby you bought them out. Now, will that fix your mind as to the date of your interview with Mr. *Trudeau?* A. No.

Q. Where was that agreement of the 16th of May signed? A. I could only tell by looking at the agreement, I see that it was drawn up and signed in *Collingwood.* (Document fyled as exhibit "C-1)."

Q. You say that this exhibit C-1, was signed in *Sandy Hill, New York* state? A. Yes.

All this, so far from establishing a consent by the government to any assignment, shows that no application was really ever made for such consent, and that no such consent was ever given. Who were the persons to apply for this consent and to whom to be given but the contractors themselves? And if there could be any doubt that consent was ever asked for or obtained,

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the letter of *Heney, Charlebois & Flood* of 13th August, 1879, before referred so, and the letter of *Smith & Ripley* to the Minister of Railways and Canals, dated 5th August, 1879, clearly establish no application was ever made by *Heney, Charlebois & Flood*, that the letter was the first and only effort made by them to obtain the consent or recognition of the crown to any assignment to them.

It is as follows :—

Ottawa, August 5th, 1879.

To the Hon. the Minister of Railways and Canals:

Sir,—We have the honor to inform you that we have purchased from the contractors for the "Georgian Bay Branch" of the Canada Pacific Railway, all their right, title and interest in said contract and in all monies and benefits payable or receivable and now accrued or to accrue thereunder and that in so far as said contractors had any power or authority to assign said contract and their interest thereunder or to substitute any other person or persons in their place with reference thereto we have been so substituted for said original contractors and have undertaken the burden and execution of said contract. The original contractors have transferred to us, as will be seen by the accompanying documents, all their respective interests in said contract and benefits thereunder, and we have been and now are engaged with a large force in the execution of the works under the contract in question. We beg to forward herewith (5) five original documents, denominated in a memo, endorsed hereon, which documents along with the assignment from *Heney*, one of the original contractors, to *Charlebois & Flood*, on file in your Department, shows clearly our title as assignees of the original contractors, and as the only parties now actually interested in the benefits of said contract, we desire to be recognized by your Department as the successors of the original contractors and to be dealt with as such by the Department, as well as to receive instructions in any matter relating to the said contract. You will observe on reference to the agreement "B" dated 30th June last, between *Charlebois & Co.* and ourselves that we undertook to replace the $20,000 cheque deposited by *Charlebois & Co.*, as part security on said contract with your Department, by a security of our own of a similar amount satisfactory to your Department and to get the cheque deposited by *Charlebois & Co.* released and given up to *Charlebois & Co.* on or by 1st August instant. In order to carry out our agreement in

reference to this matter we applied to your Department on 1st of August, for leave to substitute said security of *Charlebois & Co.* by security of our own for a like amount, and for the delivery up of said cheque deposited by *Charlebois & Co.*, but we were informed in reply that no answer could be given to our request on that day. We are so far without an answer to the above request and we understand the delay is owing to some change of policy either contemplated or resolved upon by the Government in respect of the works under the contract in question. We would respectfully suggest that in the meantime the return of the security deposited by *Charlebois & Co.*, as above mentioned, would relieve us from liability (if any) in respect of the return of said security, and also from double interest, that is to say, interest on the *Charlebois* cheque and our own security for a like amount which we are holding in readiness for substitution, and so far as we are concerned such return would not interfere with any future arrangements which may be in contemplation. We would request that if it is not absolutely necessary to retain the original documents sent herewith after recording them in the books of the Department, that they should be returned to us, we having no other copies.

We have the honor to be,

Very respectfully yours,

Ripley, Smith & Co.

By *A. Ferguson*, their Attorney.

Ottawa.

MEMO. OF DOCUMENTS.

30th June, 1879, agreement *A. Charlebois, et al & J. N. Smith, et al.*

" " " " " " " *J. D. Ripley, et al.*

19th Sept., 1878, Articles of Partnership.

16th May, 1879, agreement *Flood & Co.*, and *J. D. Ripley.*

30th June, 1879, Power of Attorney, *Heney & Co.*, to *Ripley.*

Ripley, Smith & Co.,

per *A. Ferguson.*

On the 9th August the original contractors are informed that the contract is taken out of their hands.

Copy No. 12,191.

Ottawa, 9th August, 1879.

GENTLEMEN,

By direction of the acting Minister of Railways and Canals, I have to inform you that, by an Order in Council dated 25th July last, a copy of which is herewith enclosed, the contract made with you for the construction of that portion of the Canadian Pacific Railway known as the Georgian Bay Branch Railway was by virtue and in

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pursuance of the terms of the said Order in Council cancelled and annulled, and you are hereby notified that the said work is on behalf of Her Majesty taken out of your hands and you will accordingly cease further operations under or by virtue of said contract.

I have the honor to be, gentlemen,

Your obedient servant,

(Signed) *F. H. Ennis,*

Actg. Sec.

Messrs. *Heney, Charlebois & Flood.*

And on the 11th August, 1879, the consent is refused to *Smith & Ripley*, and they are notified of the cancelling of the contract.

Copy.

August 11th, 1879.

GENTLEMEN,

I am instructed by the Minister of Railways and Canals to acknowledge your letter of the 5th inst. with assignment to you by Messrs. *Heney, Charlebois & Flood*, contractors, of all their right, title and interest in their contract for the Georgian Bay branch of the Canadian Pacific Railway, and to inform you that the contract of Messrs. *Heney, Charlebois & Flood* had been cancelled before the receipt of your letter.

I am also to say that by terms of their contract Messrs. *Heney, Charlebois & Flood* are prohibited from making such assignment without the consent of Her Majesty, and that such consent has not been given nor will be given to any assignment of the said contract.

I have the honor to be, gentlemen,

Your obedient servant,

(Signed) *F. H. Ennis,*

Actg. Sec.

Messrs. *Smith, Ripley & Co.,*
Care of *A. Ferguson*, Esq., *Ottawa.*

We have seen by the letter of *Heney Charlebois & Flood* of 13th August, 1879, their acquiescence in such cancellation of the contract.

It is therefore abundantly clear, to my mind, that *Smith & Ripley* have not and never had any contract whatever with the Queen, nor is there the slightest evidence of any privity of contract between the suppliants *Smith & Ripley*, and the Crown, nor have *Smith*

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& Ripley established any claim against Her Majesty, that this or any other court can recognize; for, to my mind, it is impossible to conceive upon what principle *Smith & Ripley* can maintain an action against the Crown for plant and materials supplied by them to carry out in the future a contract of *Heney, Charlebois & Flood* with the Crown, or for anticipated profits by reason of a breach of that contract on the part of the Crown (assuming there has been any such breach). It is clear that at the time the first notice was given, though the government profess to act under the clauses of the agreement relating to the progress of the work which they could not sustain, still a good cause existed to justify the notice; but in this case it is not necessary to inquire whether, though the motive of the government in putting an end to the contract might be because they had determined not to proceed with the work, they could not now rely on a good, though different cause existing at the time, as in the case of a master dismissing his servant, when it is immaterial whether or not it was the best cause of dismissal, for if a good cause existed, though unknown to the master at the time, he would be justified; or as also in the case of a distress where a man may distrain for one cause and avow for another. For in this case, immediately after the notice of the 9th August, 1879, when knowledge of the assignment comes to the government for the first time through the Minister of Railways, the government immediately act and refuse consent, and notify *Smith & Ripley* that they had put an end to the contract; so that if the first order in council and notice did not do so, this last clearly did; but the original contractors, as has been shown by their letter, appear to have readily assented to a putting an end to the contract, and this equally cuts down and destroys any claim of *Heney, Charlebois & Flood*, and, indeed, the letter of

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the 13th August, 1879, assumes the right of the government to stop the work and repudiates anything like the claim now put forward by *Smith & Ripley*, and which the judgment appealed from adjudges to them, viz., $171,000, for they say—

> Should there be a failure of full compliance to your order by the parties temporarily in charge of the work on account of certain efforts to negotiate with us for the entire control of said work, we would hereby inform and notify you that such negotiations were never completed nor deemed sufficient or likely to become so, to cause us to ask your official sanction thereto.

There is no pretence for saying there was any outlay made for preparing to do the work by *Heney, Charlebois & Flood*, nor do they claim any by their petition, any such outlay is alleged to have been made by *Smith & Ripley*, which neither *Heney, Charlebois & Flood*, nor *Ripley & Smith* can recover—the former, because they did not make the outlay, and under the terms of the contract, after its termination, they cannot recover, if they had ; and the latter, for the simple reason that they had no contract with the Queen, justifying the outlay.

The case of *Robson* and *Sharpe* v. *Drummond* (1), shows that without any express stipulation, where a contract is a personal one, and one of the parties has by selling his interest in the contract and assigning it to another party become incapable of performing his part of it, the other party to the contract may on that ground treat the agreement as at an end.

> *A.*, a coach maker, entered into an agreement to furnish *B* with a carriage, for the term of five years, at seventy-five guineas a year. At the time of making the contract, *C.* was a partner with *A.*, but this was unknown to *B.*, the business being carried on in the name of *A.* only. Before the expiration of the first three years the partnership between *A.* and *C.* was dissolved, *A.* having assigned all his interest in the business, and in the contract in question to *C.*, and

(1) 2 B. & Ad. 303.

the business was afterwards carried on by *C.* alone. *B.* was informed by *C*, that the partnership was dissolved, and that he (*C*) had become the purchaser of the carriage then in his (*B's*) service. The latter answered that he would not continue the contract with *C*, and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought in the names of *A.* and *C.* against *B.*, for the two payments which, according to the term of contract, would become due during the last two years of its continuance, it was held, that the action was not maintainable, the contract being personal, and *A.* having transferred his interest to *C*, and having become incapable of performing his part of the agreement.

Lord *Tenterden*, C.J. :—

Here, after the partnership between *Robson & Sharpe* had ceased to exist, and after *Sharpe* had ceased to carry on the business of a coach maker, the defendant offered to continue the job with *Sharpe*, but he replied that that was impossible. Now the defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in *Sharpe*, and therefore agreed to pay money in advance. The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with *Sharpe* alone, and not with any other person.

Littledale, J. :—

I think this contract was personal, and that *Sharpe* having gone out of the business, it was competent to the defendant to consider the agreement at an end. He may have been induced to enter into the contract by reason of the confidence he reposed in *Sharpe;* and at all events had a right to his services in the execution of it.

* * * * * *

Parke, J. :—

This appears to me to be a very clear case. The defendant made his contract with *Sharpe* by name, and not knowing that any other person had an interest in the subject-matter; and although *Robson* had an interest in it so as to entitle him to sue jointly with *Sharpe*, the defendant has the same rights against *Sharpe* and his partner, and may make the same defence to this action brought by them as if he had contracted with *Sharpe* alone, and the action had been brought by him. The contract was to continue for five years. At the end of the third year there was a dissolution of partnership between *Sharpe* and *Robson*, and notice of that dissolution, and

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of *Sharpe* having assigned all his interest in the contract to *Robson*, was given to the defendant, who said he would not continue the contract with *Robson*. The very fact of *Sharpe's* having transferred his interest in the contract to *Robson* (a mere stranger as far as the defendant was concerned) was equivalent to saying (that which he did afterwards say) "I will not perform my part of the contract;" and that is an answer to the present action brought in the names of *Sharpe* and *Robson;* for the defendant had a right to have the benefit of the judgment and taste of *Sharpe* to the end of the contract, and which, in effect, he has declined to supply. It is true that the defendant will have an advantage which he would not have had if the contract had continued for the whole five years; for he will have had the use of the carriage during the first three, and will not be bound to keep it during the last two, when it must be worse for wear; but this arises from the default of one of the plaintiffs in not performing his part of the contract.

Patteson, J.:

This case appears to me to admit of no doubt. It is, in substance, a case where a person having made a contract in his own name, attempts to back out of it, and transfer it to a third person. That he had no right to do. The rule for setting aside the nonsuit must be discharged.

Under these circumstances I think *Smith & Ripley* have no *locus standi* whatever before this court, and therefore this petition should be dismissed. As to *Heney, Charlebois & Flood*, all they could reasonably ask from the favour of the Crown would be for the amount of work they had done up to the time when the contract was put an end to, and that, I understand, the Crown were willing to allow, and which I hope the Government will not now refuse.

STRONG, J.:—

Apart altogether from any objection founded on the 17th clause of the contract, it is plain, on elementary principles of the law relating to contracts, that the suppliants *Smith & Ripley* are not entitled to recover damages against the Crown for any breach of contract,

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for the simple reason that no contract ever existed between them and the Crown, unless indeed the evidence shews such an assent on the part of the Crown to their substitution for the original contractors *Heney, Charlebois & Flood* as was sufficient to constitute a new contract.

That a party who enters into a contract for the performance of work is not entitled by a mere assignment to another person to substitute the assignee for himself, so as to delegate to the assignee his own rights and liabilities under the contract, without the consent of the other party to the agreement, is a proposition of law so well established that it requires scarcely any authority to support it. In such a case there is no privity of contract—no contractual relation of any kind—between the assignee and the party for whom the work is to be performed. I will, however, refer to one or two cases which place the law on this head beyond dispute.

In the case of *Schmaling* v. *Thomlinson* (1), the defendants had employed *Aldibert, Becker & Co.* to transport goods to a foreign market, who, without the assent of the defendants, delegated the employment to the plaintiff, and the latter having, without the privity of the defendants performed the service contracted for, sued the defendants for the payment of the money which the defendants, had contracted to pay *Aldibert, Becker & Co.* It was held by the Court of Common Pleas that, there being no privity between the parties, the action would not lie, *Gibbs*, C.J., saying that the defendants looked to *Aldibert, Becker & Co.* only for the performance of the work, and *Aldibert, Becker & Co.* had a right to look to the defendants for payment, and no one else had that right. In the case of *Cull* v. *Backhouse*

(1) 6 Taunt. 148.

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(1) Lord *Kenyon*, at *nisi prius*, on a similar state of facts, determined the law in precisely the same way.

In Robson v. *Drummond* (2), *A.* and *B.* were partners as coachmakers. *C.*, who knew nothing of *B.*, entered into a contract with *A.* for the hire of a carriage for five years at so much a year, and *A.* undertook to keep the carriage in proper order for the whole five years. Before the five years were out, *A.* and *B.* dissolved partnership, and *A.* assigned the carriage and the benefit of the contract relating to it to *B.* *B.* gave *C.* notice of the dissolution and arrangement respecting the carriage, but *C.* declined to continue the contract with *B.*, and returned the carriage. An action was then brought by *A.* and *B.* against *C.* for not performing the contract, but it was held that the action would not lie, the contract having been with *A.* alone, to be performed by him personally, and he having disabled himself from continuing to perform it on his part.

This doctrine is a necessary consequence of the essential principle of all contracts that a man cannot be made liable *ex contractu* without his assent, and, as I have said, it is not in any way dependent on such a stipulation as that embodied in the 17th clause of the contract in the present case, since, without any express provision to the contrary, one contracting party has no right to delegate the obligations arising out of a contract made with him personally to another to whom he may think fit to transfer them. But the contract in the present case places the matter beyond all doubt or question, if doubt or question could be possible in so plain a case, by distinctly expressing in the 17th clause what the law would without it have implied.

Next arises the question, is there evidence of assent

(1) Stated in a note in 6 Taunt. 148.

(2) 2 B. & Ad. 303.

on the part of the Crown to the delegation which the original contractors have assumed to make to the suppliants *Smith & Ripley*, or, in other words, does the evidence establish that there was a novation, a new contract, by which the Crown accepted *Smith & Ripley* in lieu of the original contractors and entered into a similar contract with them?

The elements necessary to constitute novation are thus stated by Mr. *Pollock* in his work on Contracts (1):

> Another branch of the same general doctrine which on principle is scarcely less obvious, is that the debtor cannot be allowed to substitute another's liability to his own without the creditor's assent. Some authorities which illustrate this are referred to in a subsequent chapter where we consider, from another point of view, the rule that a contract cannot be made except with the person with whom one intends to contract. When a creditor assents at the debtor's request to accept another person as his debtor in the place of the first, this is called a novation. Whether there has been a novation in any particular case is a question of fact, but assent to a novation is not to be inferred from conduct, unless there has been a distinct and unambiguous request.

Lord *Selborne*, L. C., in *Scarf* v. *Jardine* (1) thus describes novation:—

> In the court of first instance the case was treated really as one of what is called "novation," which, as I understand it, means this—the term being derived from the Civil Law—that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.

Has it then been sufficiently proved that the Crown ever assented to the substitution of *Smith & Ripley* for the original contractors, and the discharge of the latter from the liabilities which they had undertaken by the contract? The only evidence which can be pointed to as affording the slightest foundation for such a proposition is that contained in the testimony of Mr. *Ripley*,

(1) Ed. 2, p. 210.

(1) 7 App. Cases, 351.

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one of the suppliants, who refers to two conversations which he had at *Ottawa*, one with Mr. *McKenzie*, the then Minister of Public Works, and the other with Mr. *Trudeau*, the Deputy Minister of that department. The first of these conversations with Mr. *McKenzie* is alleged to have occurred in September, 1878, and what passed between Mr. *Ripley* and Mr. *McKenzie* is thus stated by the former. After Mr. *Ripley* had said that he called on Mr. *McKenzie* at the department, and there saw him in his own room, the evidence proceeds thus:—

Q. What did you state to him when you saw him in his own room? A. I stated to him that I had finally secured work with the government by becoming connected with this firm of *Charlebois, Flood & Co.*

Q. You did not then produce any document to him? A. Not at all.

Q. What more did you say to him? Did you tell him the particulars of your agreement with the firm? A. I do not remember all the conversation we had.

Q. Did you tell him the particulars of your agreement with the firm? A. I think I told him I had taken a third interest with the firm.

Q. Did you tell him that Mr. *Smith* was with you? A. I did not state that fact. I presume not. I had always represented *Smith & Ripley* here.

Q. What did he say in answer to that? A. He expressed satisfaction that we were to be connected with the concern. I cannot give his language.

Q. Can you state what he said at all? A. Simply that he was well satisfied that we had become connected with that concern from his long knowledge of us.

Now, assuming for the present that Mr. *McKenzie* had power to bind the Crown by a mere verbal assent, there is clearly not sufficient in this evidence to establish the fact of a novation, that is, a consent by the Crown to a delegation by *Heney, Charlebois & Flood* to *Ripley & Smith* of their rights and liabilities under the contract entered into by them on the 2nd August, 1878. In point of fact, Messrs. *Ripley & Smith* did not acquire

a complete assignment of the whole interest in the contract in respect of which they now sue until some months afterwards, and it was impossible that, at the date of this conversation, Mr *McKenzie* could have assented to an arrangement which was not even proposed or suggested to him. Moreover, even had this conversation been subsequent to the final assignment of the contract by *Heney, Charlebois & Flood*, and had the Minister had authority to waive the rights of the Crown under the contract by a mere verbal assent, there is nothing to show that he ever intended to do so. It is not proved that the clause against the assignment was brought to Mr. *McKenzie's* notice, or that it was present to his mind, and before we could determine that there was either novation or waiver, we should have to be satisfied of this. In truth the evidence only shows that Mr. *McKenzie* received the information communicated to him by Mr. *Ripley*, that his firm had become interested in the contract, by some expression of common courtesy, and altogether falls short of showing that he intended by it to assume the responsibility of altering a solemn contract with the Crown, which had been entered into under the seal of the department and with the sanction of the Governor in Council.

The conversation with Mr. *Trudeau* took place in the spring of 1879. It is said that Mr. *Trudeau*, who was the Deputy of the Minister of Public Works, had power to bind the Crown under the provisions contained in the 4th section of the Public Works Act, 31 *Vic.* ch 12. That section is in these words :—

> It shall be the duty of the said deputy, and he shall have authority (subject always to the Minister) to oversee and direct the other officers and servants of the department; he shall have the general control of the business of the Department, and such other powers and duties which may be assigned to him by the Governor in Council, and in the absence of the Minister and during such absence, may

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suspend from his duties any officer or servant of the department who refuses or neglects to obey his directions as such deputy.

I am at a loss to conceive upon what construction of this clause it is contended that Mr. *Trudeau*, as Deputy of the Minister, has authority to enter into any verbal contracts binding on the Crown, or to alter by verbal agreement solemn formal contracts in writing entered into by the Minister under the official seal of the department, and authorized by order of the Governor in Council. There is no suggestion that any such power has ever been conferred on him by the Governor in Council. The authority to oversee and direct the officers, and to control the general business of the department, is to be subject to the directions of the Minister, and without that condition would be insufficient to empower him to bind the Crown by verbal contracts. The additional powers given to him to act in the Minister's absence are confined to the suspension of officers and servants. It is, therefore, out of the question to say that the Crown could in any way be affected by what Mr. *Trudeau* may have thought fit to assent to in derogation of the rights of the Crown derived under a formal contract entered into under the seal of the department, and approved by the Governor in Council, at a time, too, when for all that appears to the contrary the Minister of Public Works was present at the seat of government, and possibly in the department itself at the very time this conversation took place.

But a conclusive answer to the argument that there was novation founded on any verbal assent, either by the Minister, or the Deputy Minister, is afforded by the 7th section of the Public Works Act. That clause is as follows :

> No deeds, contracts, documents, or writings, shall be deemed to be binding upon the department, or shall be held to be acts of the said Minister unless signed and sealed by him or his Deputy and countersigned by the secretary.

If, therefore, the Minister of Public Works for the time being had written a letter expressly assenting to a substitution of Messrs. *Ripley & Smith* in the place of the original contractors, it would, by the express terms of this enactment, have been wholly ineffectual to bind the Crown, or to alter the rights or liabilities of the Crown, or the original contractors, under the formal contract.

As already stated, an assignment of the contract implies a novation, and novation means a new contract. Then, if such a new contract could not be validly entered into, so as to bind the Crown, by a writing under the signature of the Minister, it is surely idle to contend that an oral agreement of the Minister could have that effect. It is true the 17th clause of the contract implies (for it does not distinctly express it) that there might be an assignment by consent. There was no need for such a provision, for, of course, parties may always by consent alter and rescind their contracts; but although I am at present discussing the case on the general rules of the law of contracts without reference to the 17th clause, I think it right to refer to it here to point out that it does not contain any sanction or recognition of a mere verbal consent to be given by the Minister. The contract was entered into under the authority of the Public Works Act and was executed according to the requirements of that act, and it was beyond the powers of the Minister to provide, even by an explicit stipulation to that effect, that it should be in his power to supersede it by another contract executed without the formalities prescribed by the 7th section of the act. The consent referred to in the 17th clause of the contract must, therefore, mean a consent in writing executed in conformity with the law, and not the mere verbal assent of the Minister, which, in the face of the statute,

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could have been of no avail, even if the contract had expressly stipulated it should be sufficient.

I am, therefore, of opinion that on the general principles of law applicable to all contracts, and without reference to the 17th clause, the Crown is right in saying that it never entered into any contract with Messrs. *Ripley & Smith*, and never came under any liability or obligation to them, and that the petition of right, so far as it is the petition of the last named suppliants, wholly fails.

The original contractors, Messrs. *Heney, Charlebois & Flood*, have however been joined in the petition of right as co-suppliants with Messrs. *Ripley & Smith*, and even though it appears that the latter may be entitled to no relief, yet if the former can make out a right to recover damages, they are entitled to maintain the petition notwithstanding the joinder of the other suppliants having no interest. We have, therefore, next to enquire if a case is made entitling the original contractors to damages. I am of opinion that the answer to this enquiry must also be in favor of the Crown, and that the objections to the petition, regarding it as the suit of *Heney, Charlebois & Flood* exclusively, are quite as insurmountable as those which apply to the case made by the other petitioners. Had it not been for the 17th clause of the contract there would have been grounds for saying that the original contractors might have called upon the court to treat the assignment as in the nature of a sub-contract, and to have awarded them damages, upon the same principles as would have applied had they proceeded with the work personally. The general rule for the performance of contracts for work, such as that which is the subject of the contract in the present case, is that in the absence of any stipulation against assignments or sub-contracts, it may be performed by the agency of sub-contractors. If, in-

deed, it appears that the personal skill or taste of the contractor for the performance of the work has entered into the consideration of the other party, or that he has been chosen for some other personal qualification, he must perform the contract personally. But in building and railway contracts such a *delectus personæ* is not presumed, and the substitution of a sub-contractor is, in the case of there being no stipulation to the contrary, considered unobjectionable. This is well shewn by the case of *Lea* v. *British Waggon Co.* (1), where it was held that a contract by a waggon company to furnish waggons for a term of years might be assigned to another company, and that on the performance of the contract, the original company, jointly with the assignee company, were entitled to recover the contract price. This decision, as is explained by *Cockburn*, C. J., in his judgment, proceeded upon the ground that in the absence of any special provision against assignment, it was to be presumed from the nature of the contract that actual performance by the first company was not contemplated.

The contractors in the present case are, however, expressly excluded from the right to perform the contract through the medium of assignees or sub-contractors by the 17th clause of the contract, which, as already shewn, in the observations before made on the question of novation, has never been effectually waived or dispensed with, and they are therefore precluded from recovering under the contract, unless they can show personal performance, and this, upon the evidence, is, of course, entirely out of the question.

Then it does not appear that these suppliants have suffered any substantial loss from the refusal of the Crown to proceed with the contract which entitles them to damages The damages awarded by the judgment

(1) 5 Q. B. D. 149.

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appealed from were made up of the value of work actually performed, the loss on the plant provided for the work and the loss of prospective profits, and I quite agree that, if in other respects the suppliants *Smith & Ripley* had been entitled to recover, the measure of damages adopted by the Exchequer Court was a correct one. But in respect of none of these items of damage can the original contractors pretend to have any right to recover. The work on the contract was not done by them, but by *Ripley & Smith*, or by the original contractors and several other persons whom they took into partnership with them immediately after the execution of the contract, and who are not before the court as parties to the petition of right, and for this work Messrs. *Heney, Charlebois & Flood* have been fully indemnified by the money which they received in consideration of the transfer of the contract by them to the other suppliants. As regards the plant, none of it belonged to them, it was the exclusive property of Messrs. *Smith & Ripley*, who were alone damnified by the loss resulting from its being re-sold or rendered useless by the refusal of the Crown to proceed with the contract. And for the loss of prospective profits, it is clear they can have no claim, since all right to these profits had been absolutely relinquished by them in favor of the assignees of the contract.

Another and distinct ground upon which the original contractors must be considered as incapacitated from claiming damages from the Crown is that they had themselves, by the assignment of the contract, voluntarily put it out of their power to proceed to perform their part of the obligations created by it. They could only entitle themselves to damages from the Crown by showing that they were personally ready and willing to proceed in the performance of the contract on their part. Then how can it be said that they have brought

themselves within this indispensable condition and shown a readiness and willingness to carry out the contract, when they have entirely abandoned it to other persons.

Again, the 17th clause of the contract authorized the Crown, in the event, which had occurred, of an assignment by the original contractors, to rescind the contract absolutely, for, although rescission is not in terms provided for, such is beyond all doubt or question the legal effect of the stipulation on behalf of the Crown contained in that clause; and the order of the Governor in Council of the 14th August, 1879, passed pursuant to its terms, operated as a rescission accordingly. By this clause it was expressly provided, not merely that the Crown should, in the event of an assignment, have power to take the work out of the contractors' hands, but also that, in that case, the contractors should be entitled to no further payments in respect of work actually performed, and further, it was provided that the contractors' plant employed on the work should be liable to be forfeited to the Crown. The Order in Council of the 14th of August, 1879, therefore affords a conclusive answer to any claim for recovery in respect of the three heads under which the damages awarded by the judgment of the Exchequer Court are distributed —the value of work actually done, the loss of prospective profits, and the reduced value of the plant.

Lastly, there can be no right on the part of the original contractors to recover as upon an implied contract for the value of any work actually done by them arising from the benefit accruing to the Crown from work so performed; the case in this respect is exactly analogous to work done under a building contract which has been broken and abandoned by the default of the builder; in that case it has been distinctly held, and is settled law, that the possession of the land does

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not warrant an inference of acceptance so as to give rise to an implied promise by the landowner to pay on a *quantum meruit*, without some proof of positive assent or acquiescence (1). These cases are undistinguishable in all respects from the present in point of law, and it cannot be pretended there ever has been any actual assent or promise by the Crown to pay for any work left on the ground by the original contractors Moreover, the 17th clause by its express terms excludes any such pretence of an implied contract arising from the retention of the work by the government.

The case made by the petition of right is not that the contract had been absolutely assigned to Messrs. *Smith & Ripley*, but that the moneys to become payable under it had alone been so assigned, thus stating it as the case of an equitable assignment only of the payments to arise from the performance of the work by the original contractors. Had the proof borne out this case, and had it appeared that the assignment was so limited, the suppliants would have been undoubtedly entitled to recover in respect of work actually performed by the original contractors, for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts. The evidence, however, has disclosed that the assignment made was in fact of a totally different character.

The appeal must be allowed with cost, the judgment of the Exchequer Court reversed, and the petition of right dismissed with costs.

FOURNIER, J.:—

This is an appeal from a judgment of the Exchequer Court by which the suppliants, *J. N. Smith* and *J. D.*

(1) *Munro* v. *Butt*, 8 E. & B. 738, and cases collected in Leake on Contracts, P. 60.

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Ripley, were awarded $171,040.77 damages in consequence of the cancellation of the contract for the building and construction of that portion of the Canadian Pacific Railway, known as the Georgian Bay Branch.

By the agreement entered into by three of the suppliants, namely, *John Heney*, *Alphonse Charlebois* and *Thomas Flood*, on the 2nd of August, 1878, with Her Majesty the Queen, represented by the Minister of Public Works of *Canada*, the said *Heney*, *Charlebois* and *Flood* agreed and contracted to perform the works "of excavation, grading, bridging, fencing, track-laying and ballasting" of said Georgian Bay Branch Railway, in consideration of the fixed prices for said works as provided in the 24th clause of the agreement, and amounting to a total sum of $850,000. The works were to be performed as set out in the specifications, plans and drawings annexed to said contract, and the contractors were to fully complete the respective portions of such works and deliver them to Her Majesty on or before 1st July, 1880. The original contractors, for the purpose of being able to prosecute the works with greater vigor, and to assist them pecuniarily in purchasing the necessary supplies, associated with themselves in said contract other parties, and caused the works to be proceeded with and preparations to be made for the further prosetion thereof, and expended large sums of money, and while the work was so being proceeded with, several progress estimates, as provided by the contract, were made in favor of the said original contractors.

On the 30th June, 1879, the suppliants *Smith & Ripley*, who had made the largest advances on said works, took a transfer from all the parties to the said contract of all their interest, "*subject to the terms set out in the "said contract and in the said several assignments there-"of*;" and previous to this transfer and immediately after the said *Smith & Ripley* in their behalf as well as in

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that of the original contractors incurred large expenditure in respect of the construction of steam mills, houses and preparations for future works, and prosecuted the works vigorously and employed a large number of men. They had also made arrangements to complete the works within the time prescribed for the completion of the works by the contract, and had offered to the government good and valid security instead of that given by *Heney, Charlebois & Flood*, when the latter on the 12th August, 1879, received a notice from the Department of Public Works that the contract had been cancelled and annulled. The petition of right in this case is brought in the name of the original contractors as well as that of Messrs. *Smith & Ripley*, who had acquired the sole interest in the contract by the indenture of the 30th June, 1879, *subject to the terms of the contract.*

The first prayer of the petition is as follows:—

1. That it may be declared that the said contractors and your other suppliants claiming through or under them were entitled upon the cancellation of said contract by your Majesty to be paid by your Majesty all damages arising directly or indirectly in consequence of the cancellation of said contract such as are set forth and referred to in the tenth and eleventh paragraphs of this petition, and also for all profits which they, the said contractors, and your other suppliants claiming under them, were prevented from earning and deriving in respect of the works contemplated to be done under said contract and material therefor, and which were lost to them by reason of the cancellation thereof, and to interest upon both damages and profits.

In answer to the suppliants *Heney, Charlebois & Flood's* claim, the Crown sets up that the contract has been cancelled, because they have assigned it to suppliants *Smith & Ripley* in violation of the provisions of the seventeenth clause of the contract; 2nd, because they did not proceed diligently with the work, and were unable to complete it; 3rd, that the notice given by the Government of the cancellation of the contract was not a breach of the contract; 4th, without admitting

any liability to the said contractors, that they had tendered them the sum of $13,807.94, provided the same should be accepted in full of all claims and demands against Her Majesty in respect of the said contract.

In answer to the suppliants *Smith & Ripley's* claim, the Crown alleges that they can be in no better position than the contractors who assigned to them; that the said suppliants have no claim against the Crown under the transfer, because the Crown has refused to consent to such an assignment; if they have acquired any rights under said transfer, they have been forfeited by the cancellation of the contract.

Admitting that the suppliants *Smith & Ripley* are not entitled to recover by petition of right the moneys sought to be recovered by them, because the Crown has not consented, as provided for in the 17th clause of the contract, to the assignment of the said contract by the original contractors to said suppliants *Smith & Ripley*, are not the original contractors, also suppliants, entitled to recover, and should not the first prayer of the petition be granted?

The 17th clause of the contract, which is relied upon by the Crown is as follows:

17. The contractors shall not make any assignment of this contract, or any sub-contract, for the execution of any of the works hereby contracted for; and in any event no such assignment or sub-contract, even though consented to, shall exonerate the contractors from liability, under this contract, for the due performance of all the works hereby contracted for. In the event of any such assignment or sub-contract being made, then the contractors shall not have or make any claim or demand upon Her Majesty for any future payments under this contract for any further or greater sum or sums than the sum or sums respectively at which the work or works so assigned or sub-contracted for shall have been undertaken to be executed by the assignee or sub contractor; and in the event of any such assignment or sub-contract being made without such consent, Her Majesty may take the work out of the contractors' hands, and employ such means as she may see fit to complete the

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same; and in such case the contractors shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage which may be suffered by Her Majesty by reason of the non-completion by the contractor of the works; and all materials and things whatsoever, and all horses, machinery, and other plant provided by them for the purposes of the works, shall remain and be considered as the property of Her Majesty for the purposes and according to the provisions and conditions contained in the twelfth clause hereof.

Now, in order to construe this clause correctly, it is necessary that we should read it very attentively to ascertain what was the real intention of the contracting parties, and the effect which should be given to it.

It first contains a stipulation that there shall be no assignment of contract or sub-contract of the work to be performed. "The contractor shall not make any assignment of this contract, or any sub-contract, for the execution of any of the works hereby contracted for." What penalties have been stipulated in reference to this provision? There are several, but nowhere can I discover that the contract shall be cancelled for having been assigned. One of the penalties provided is that the contractors, in the case of an assignment, even with the consent of the government, shall not be exonerated from liability: "And in any event, no such assignment or sub-contract, even though consented to, shall exonerate the contractors from liability, under this contract, for the due performance of all works hereby contracted for."

Then it is provided that there shall be no claim for the payment of any further sums than the one stipulated in the assignment. "In the event of any such assignment or sub-contract being made, then the contractors shall not prove or make any claim or demand upon Her Majesty for any future payments under this contract for any further or greater sums than the sum or sums respectively at which the work or works so

assigned or sub-contracted for shall have been undertaken to be executed by the assignee or sub-contractor." This portion of the clause cannot be said, any more than the first part, to provide for the cancellation of the contract in the event of an assignment of the contract or the giving of a sub-contract.

To my mind it is conclusive that the government, knowing that transfers and assignments and sub-contracts were inevitable, took the necessary precautions in order that the due performance of the work should not suffer thereby. It was well known by experience that large public works cannot be completed by the original contractors themselves, and that they must get the services of other contractors to perform certain portions of the work. There is such a variety of work to be performed in the building of a railroad that it must be difficult to find a contractor who can perform all these works. It would almost be necessary for him to be a man proficient in all trades. For this reason, when there is masonry to be done, he will sub-contract with a mason, and if he has stations to put up, he will employ a carpenter or master builder, and thus with the different and varied works which have to be done in completing a railway.

The Government has admitted this necessity, but, in order to avoid all inconvenience, has stipulated that in cases of assignments or sub-contracts the Government should only deal with the original contractors. Thus there is a provision, that the contractors shall not be exonerated from liability ; that the contractors shall not receive more for the work done than what they get it done for, and this was no doubt in order to prevent parties tendering for public works with the view of speculating by assigning the contract. These provisions therefore, instead of providing for the cancellation of the contract, have, in reality, admitted that transfers

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and sub-contracts would necessarily take place, and have declared what would be the consequences of such transfers.

The 17th clause contains a third and last stipulation in reference to the assignment of the contract, or a sub-contract being made, without such consent, and that is, that Her Majesty may take the works out of the contractors' hands (not cancel the contract), and employ such means as she may see fit to complete the same. And in such a case the contractors shall have no claim for further payment, but shall nevertheless remain liable for loss and damage which may be suffered by Her Majesty by reason of the non-completion of the contract. This is certainly not a stipulation that the contract shall be put an end to and cancelled, in the event of an assignment, or of a sub-contract being given subject to the terms of the contract, one of which is the consent of the Government, without having obtained the previous consent of the Government. Then can it be said this option was given to the Government in order that they might arbitrarily cancel the contract, and stop the construction of a public work which had been ordered by statute? For it must be here remarked, that in construing this clause of the contract, this court must take judicial notice of the statute authorizing the construction of this public work, viz.: 37 *Vic.*, ch. 14, and that this branch railway formed part of the Canadian Pacific Railway, and that the only power which was left with the governor in council, after the work had once commenced in reference to this branch of the Canadian Pacific Railway, was to suspend the progress of the work until the then next session. The sections relating to this work are the following:

37 *Vic.* ch. 14, sec. 13:

The branch railways shall be constructed as follows, that is to

say: That section of the first branch extending from the eastern terminus of the first section of the said railway to some point on the *Georgian Bay* to be fixed as aforesaid, &c., under such contract as may be agreed upon and sanctioned by the Governor in Council.

Sec. 20:

The Governor in Council shall have the power to suspend the progress of the work until the then next session of parliament.

The option of taking the work out of the hands of the contractors was evidently inserted with the intention of giving to the government and the public further security that the works would be completed with all possible despatch.

Therefore, if the works are to be taken out of the hands of the contractors at all, after they have given good and satisfactory security for their due completion, it can only be for the purpose "of employing such means as the Crown may see fit to complete the same," and not with the intention of stopping the work altogether.

The proper construction to be put on this seventeenth clause, is, in my opinion—1st. That the prohibition to assign the contract, or give sub-contracts, is not absolute, but is restricted or qualified as I have stated; 2nd. That in such a case the contractors are not exonerated from liability for the due performance of all the works contracted for; 3rd. That the contractors are not entitled to receive any further or greater sum from the government than they agreed to pay their assignees or sub-contractors; 4th. That Her Majesty may take the works out of the hands of the contractors and complete the same. No words in this clause give Her Majesty the arbitrary right of taking the works out of the hands of the contractors and to cancel the contract. To take the works out of the hands of the contractors and stop the construction of work for other public or private reasons

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than those provided for, would be contrary both to the spirit and letter of the contract as well as of the statute authorizing the construction of said work. Although adopting this view of the contract, I have no hesitation in saying that the suppliants *Smith & Ripley*, having taken an assignment *subject to the terms and conditions of the contract*, one of which was that the consent of the government should be obtained, and another that the security given by the original contractors *Heney, Charlebois & Flood*, for the due performance of the works, should be replaced by their own security, did all in their power to comply with their agreement. They were led to believe by the principal officers of the department, as well as by the engineer in charge of the works, that the consent of the Crown had been given. Under these circumstances it was not unreasonable for them to think that privity of contract between Her Majesty and themselves existed, but the Crown having denied the giving of said consent, and there being no legal evidence of such consent I must come to the conclusion that no assignment binding on the Crown has been effected. The *condition* of obtaining the *consent* of the Crown having failed the transfer must be considered as void and of no effect. The parties thereto are in consequence reinstated in the position in which they stood before such transfer. The contract, therefore, must be considered as having always been and as being still in force, and the original contractors as entitled, not only to be paid for the works done by themselves, but also the price and value of those executed by *Smith & Ripley* in their stead. At the time of the stoppage of the works and cancellation of the contract, the work was being proceeded with vigorously in accordance with the plans and specifications, and under the direction of the government by the Messrs. *Smith & Ripley* for and on behalf of the original contractors.

This stoppage has not been justified either by the contract or by the evidence of any neglect on behalf of the contractors, and must be treated as a breach of contract on the part of Her Majesty.

After a careful perusal of the evidence I think the amount awarded by the learned judge of the Exchequer Court for work done and received by the government for the benefit of the people of *Canada*, and also the amount of damages should be paid to the suppliants Messrs. *Heney, Charlebois & Flood.* The judgment appealed from should, therefore, be varied by awarding the amount to the suppliants *Heney, Charlebois & Flood*, contractors, reserving to the other suppliants Messrs. *Smith & Ripley* whatever legal rights they may have against the original contractors under the transfers made to them.

HENRY, J. :

Having given judgment in this case in the Exchequer Court, I have very little to add. The law which has been propounded by the Chief Justice and my brother *Strong* as to contracts I have never for a moment doubted, but as regards novation I think the evidence in this case was such as would be a proper question of fact to be left to a jury to ascertain whether or not the Department knew of this transfer, had acted on it, and by its action adopted it. It is in evidence, that the head of the department under which this public work was being constructed knew that, after a certain date, the suppliants, *Smith* and *Ripley*, were doing all the work ; it was known by the chief engineer, under whose immediate direction the works were being carried on ; and it is in evidence that it was officially communicated by him to the department, and he, with the knowledge and sanction of the department, continued to superintend the works done by them. Under these

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circumstances, the law would assume, if such an assumption was necessary, that what was known to these officials was known to the Government. It was perfectly well known that *Smith* and *Ripley* were carrying on the works, and although there is no express agreement in writing to show that they had been adopted by the Government as the contractors of that public work, still there is sufficient evidence in the case for a jury to assume that the Government not only knew of the transfer but had adopted it.

It is true one man cannot assign work which he has contracted to perform to another man without the consent of the party with whom he has contracted, but if *A.* transfer to *B.* work he has contracted to do for *C.* and *C.*, having been informed of it, allows *B.* to complete and finish the work *A.* contracted to do, and makes payment to *B.* on account of work done by him, would not *C.* be estopped from saying: "I have never consented to this transfer, and will not pay B or A.?" This was exactly the point in this case, and I think that not only law but common sense tells us that in such a case the party is estopped.

Then the question has been raised as to whether there ever has been an assignment? It must be admitted that no legal transfer could be made without the assent of the government, but if it was withheld, then the original contract remains in force. How, then, do these parties stand? Instead of *Heney, Charlebois & Flood* doing the work, it was done for them by *Smith & Ripley*, with the knowledge of the department; for it is in evidence that they knew that Messrs. *Smith & Ripley's* plant, machinery, supplies, &c., were being put on the ground and the work being done by them. The department must either say, "we have withheld our assent, and *Smith & Ripley* are but sub-contractors," or we adopt

the transfer. It cannot lie in the mouth of the department to say two things. First, to the suppliants, *Smith & Ripley*, "the contract has not been legally transferred, therefore you have no claim;" second, to the suppliants, *Heney, Charlebois & Co.*, "you have assigned without our consent, therefore you have no claim."

Would such a defence be considered honorable on the part of an individual? Would a jury say to a defendant, "you have allowed this work to "be done, you have accepted it as far as it was "performed, but you need not pay for it?" Such a finding could not be sustained, nor would you find a jury so to decide. The contract was not to be affected by an order in council to the extent contended for. The contract was with Her Majesty, represented by the Minister of Public Works. It was with him, as such representative, that the contractor had to deal, and not immediately with the government.

My brother *Strong* has expressed the opinion that the consent of the Minister to the assignment could only be valid when under seal. The order in council authorized the Minister of Public Works to make the contract, and in that contract all I find is that it shall not be assigned without the consent (it does not say in writing) of the Government. It therefore cannot be said it must be in writing and under seal. Reference has also been made to the repudiation of the transfer of the contract by *Heney, Charlebois* and *Flood*, after the contract had been cancelled by the Government. The first Order in Council put an end to the contract. This Order in Council was passed on the recommendation of the Minister under whose control the works were being carried on. By comparison of dates, it will be found that the Department of Public Works was aware of this assignment before the Order in Council was passed to determine the contract; still,

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it was not given as a reason that the transfer of the contract had been made. Now, if the Government had power at all to cancel this contract, the first order took effect, and the second was not necessary or called for. In the first order the reason given is not because the contract had been assigned, nor, indeed, any other, because the Government had come to the conclusion to abandon the line altogether. The reason given in the second order in Council cannot avail, as the contract had already been put an end to by the first order.

All the equities of the case are certainly in favor of the suppliants. The law certainly entitles some one to be paid for the work done for and received by the Goverment. How can it be said, under these circumstances, that there has been no novation, and that no payment should be made for these works, or for consequential damages?

I maintain that if the Government did not assent to the transfer, then *Charlebois & Co.* are entitled to recover for the work done by *Smith* and *Ripley*—and also entitled to recover damages.

I have listened very attentively to the reasons given by my brother Judges for reversing the judgment, but I have heard nothing to alter my view of the case, and therefore think the appeal should be dismissed.

TASCHEREAU, J.:—

I find it impossible, for the reasons given at full length by the Chief Justice and by my brothers *Strong* and *Gwynne*, to sustain the judgment given by the Exchequer Court in favour of the respondents, or to give judgment in favour of *Charlebois, et al.*, the former contractor, as suggested by my brother *Fournier*. I have come to this conclusion with great reluctance, for I see that an injustice is done to the respondents by such a judgment. I am sure, however, that the govern-

ment will not avail itself of this judgment and of the strictness of the law to refuse to the respondents the justice they are entitled to at their hands.

GWYNNE, J.:—

The construction which I put upon the pleadings in this proceeding and upon the matters put in issue thereby is different from that put upon them by some of my learned brothers, but nevertheless leads to the same conclusion.

The petition of right filed in this case is presented by *James N. Smith* and *Josiah D. Ripley* as the sole persons beneficially interested in the several amounts claimed to be recoverable from the government in respect of the matters set forth in the petition, the other persons joined as co-suppliants, being so joined only as being persons through whom *Smith & Ripley* claim, and because of an apparent doubt in the mind of the pleader whether the claim of *Smith & Ripley*, being through the other suppliants *Heney, Charlebois & Flood*, could be sustained unless those original contractors should be joined as co-suppliants with *Smith & Ripley*.

The short material contents of the petition are that by an indenture dated the 2nd of August, 1878, a contract was entered into between *Heney, Charlebois & Flood* as contractors with Her Majesty, represented therein by the Minister of Public Works for *Canada*, for the construc- of certain public work therein mentioned. That the said contractors, for the purpose of being able to prosecute such work with greater vigor, and to assist them pecuniarily in carrying on the works required to be done under the said contract, associated with themselves the suppliants *James N. Smith* and *Josiah D. Ripley* to assist them by advancing large sums of money for the purposes of said works, &c., &c. That after considerable work had been performed under

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the contract, and upon the 12th August, 1879, the said contractors received from the Department of Public Works a letter of the date of the 9th August, informing them that by an order in council of the 25th July then last, a copy of which was enclosed, the contract made with the contractors was annulled, and the contractors were thereby notified that the work was taken out of their hands, and that they should accordingly cease all further operations under the said contract. The petition then alleges, in paragraph 11, that the said contractors and the other suppliants on their behalf sustained very heavy damages by the cancellation of the said contract, that of several progress estimates made both before and after the receipt of said notice of cancellation there remained still unpaid, in respect of work done prior to the receipt of such notice, the sum of $13,874.94; that under the said contract there would have been realised by the contractors and the other suppliants large profits, if the said contract had not been cancelled, amounting to $100,000 or thereabouts. The petition then, in the 15th paragraph, sets forth the foundation upon which the claim of the suppliants *James N. Smith* and *Josiah D. Ripley* to the relief claimed is rested, as follows: "That your suppliants, the said *Smith & Ripley*, being at the time of the receipt by said contractors of the said notice (above mentioned) heavily interested in the said contract under the said contractors, and in the profits to be made therefrom, by virtue of the money advances and pecuniary liabilities incurred by them in respect of the said works, did, for valuable consideration, procure to be assigned and transferred by the said contractors, by an instrument in writing duly executed and dated on or about the 25th day of October, 1879, all their claims, demands, rights, debts and choses in action against Her Majesty in respect of the said contract, together with all moneys

payable by or recoverable from Her Majesty in respect thereof, including moneys payable according to estimates made by Her Majesty's engineers in respect of work actually done under said contract, and also all moneys owing by or recoverable from Her Majesty to said contractors for damages and loss of profits in consequence of the cancellation of said contract, to which they, the said contractors, or any person claiming under them, ever were, or could be entitled against Her Majesty, and that they, the said *Smith & Ripley*, are now solely in equity, if not in law, entitled to said demands, rights, debts and choses in action and to the moneys payable or recoverable in respect thereof." Then, in paragraph 16, it is submitted that the suppliants, *Smith* and *Ripley*, are entitled to be paid all sums payable to or recoverable by said contractors according to estimates made under said contract, and still unpaid, and also to all damages and loss of profits and interest thereon to which the said contractors, or any of them, or any one claiming under them, ever were or could be entitled in respect of the matters aforesaid; and the petition prayed 1st, that it might be declared that the said contractors and the other suppliants claiming through or under them, were entitled upon the cancellation of said contract by Her Majesty to be paid all damages arising directly or indirectly in consequence of the cancellation of said contract, and also for all profits which the said contractors and the other suppliants claiming under them were prevented from earning in respect of the works contemplated to be done under said contract and material therefor, and which were lost to them by reason of the cancellation thereof, and to interest upon both damages and profits, and 2nd. That the suppliants, the said *Smith* and *Ripley* might be declared entitled to be paid, and may be paid all moneys payable by and recoverable from Her

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Majesty in respect of the matter aforesaid, &c., &c. 3rd. That the sum of $250,000, or such other sum as might, upon a reference for that purpose, be found payable to the suppliants, the said *Smith* and *Ripley*, in respect of said matters, and 4th. That, if necessary, a reference might be directed to ascertain the amount of damages caused to the said contractors and the other suppliants claiming under them, arising in any manner, directly or indirectly, in consequence of the cancellation of the said contract, and also to ascertain the amount of profits which could have been earned and realized by said contractors and the other suppliants claiming under them, if the said works contemplated under said contract had been gone on with, and which were lost to said contractors, and the other suppliants claiming under them, in consequence of the cancellation of said contract, and for costs and further relief.

Now, upon this petition, it is apparent that the foundation upon which the claim of *Smith & Ripley* is based is the instrument of the 25th October, 1879, executed after the cancellation of the contract for the purpose of assigning to *Smith & Ripley* all the rights, debts and choses in action of the original contractors *Heney, Charlebois & Flood* under the contract; in order, therefore, that *Smith & Ripley* should succeed it was necessary that they should aver and prove what the rights, debts and choses in action of *Heney, Charlebois & Flood* so assigned, were, but such rights, debts and choses in action are only averred as subsidiary to the right of *Smith & Ripley* to recover to their own use whatever they may be able to establish such rights, debts and choses in action to be.

Before alluding to the answer of the Attorney General for the Dominion filed to this claim, it will be necessary to draw attention to certain matters constituting a portion of the defence set up in such answer.

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By a letter dated the 5th August, 1879, addressed to the Minister of Railways by *Smith & Ripley* by their attorney, *A. Ferguson*, they inform the minister that they had purchased from the contractors for the Georgian Bay branch of the Canadian Pacific railway all their right, title and interest in said contract, and in all moneys and benefits payable or receivable and now accrued or to accrue thereunder,

And that in so far as said contractors had any power or authority to assign said contract and their interest thereunder, or to substitute any other person or persons in their place with reference thereto, we have been so substituted for said original contractors and have undertaken the burthen and execution of said contract. The original contractors have transferred to us, as will be seen by the accompanying documents, all their respective interests in said contract and benefits thereunder, and we have been and now are engaged with a large force in the execution of the works under the contract in question. We beg to forward herewith five original documents, which documents, along with the assignment from *Heney*, one of the original contractors, to *Charlebois* and *Flood*, on file in your department, show clearly our title as assignees of the original contractors, and to be dealt with as such by the department as well as to receive instructions in any matter relating to the said contract. You will observe on reference to the agreement "B," dated 30th June last, between *Charlebois & Co.* and ourselves, that we undertook to replace the $20,000 cheque deposited by *Charlebois & Co.* as part security on said contract with your department by a security of our own of a similar amount satisfactory to your department, and to get the cheque deposited by *Charlebois & Co.* released and given up to *Charlebois & Co.*, on or by 1st August instant. In order to carry out our agreement in reference to this matter, we applied to your department on 1st of August for leave to substitute said security of *Charlebois & Co.*, by security of our own for a like amount, and for the delivery up of said cheque deposited by *Charlebois & Co.*, but we were informed in reply that no answer could be given to our request on that day.

We are, so far, without an answer to the above request, and we understand the delay is owing to some change of policy either contemplated or resolved upon by the government in respect of the works under the contract in question. We would respectfully suggest that in the meantime the return of the security deposited by *Charlebois & Co.*, as above mentioned, would relieve us from liability (if any) in respect of the return of the said security, and also from

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double interest; that is to say, interest on the *Charlebois* cheque and our own security for a like amount, which we are holding in readiness for substitution, and so far as we are concerned such return would not interfere with any future arrangements which may be in contemplation. We would request that, if it is not absolutely necessary to retain the original documents sent herewith, after recording them in the books of the department, they should be returned to us, we having no other copies.

We have the honor to be, &c.,

Ripley, Smith & Co.,

By *A. Ferguson*, their attorney.

It is unnecessary to refer to all the points of defence raised in the answer of the Attorney General, for it was admitted, after the argument, that the evidence failed to establish that the contractors had made such default in proceeding with the work as justified the taking the contract out of their hands under a clause in the contract to that effect, and the defence was rested upon the fact of the assignment of the contract by the original contractors to *Smith & Ripley* contrary to an express provision of the contract. The defence upon this point commences at paragraph 9 of the answer, wherein the Attorney General alleges—that by the seventeenth section of the contract it is provided that the contractors should not make any assignment of the contract or any sub-contract for the execution of any of the works thereby contracted for, and in any event no such assignment or sub-contract, even though consented to, should exonerate the contractors from liability under the contract for due performance of all the works thereby contracted for, and, in the event of any such assignment or sub-contract being made without such consent, Her Majesty might take the work out of the contractors' hands and employ such means as she might see fit to complete the same, and that in such case the contractors should have no claim for any further payment in respect of the works performed, but should nevertheless remain liable for all loss and damage which

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might be suffered by Her Majesty by reason of the non-completion, by the contractors, of the works. The tenth paragraph then alleges the execution of the indenture under seal, dated the 2nd day of August, 1878, the day upon which the contract was entered into, whereby *Heney* assigned, transferred and set over unto *Charlebois* and *Flood* all his interest in the said contract. In the eleventh paragraph the Attorney General alleges that by an instrument or agreement which the Attorney General cannot particularly set forth the said *Flood* assigned and transferred to *George Shannon*, *Daniel M. Monty*, *John C. Monty* and *William B. Cooper*, some part or interest in the said contract, and that by the indenture bearing date the 15th of May, 1879, the said *Flood*, *Shannon*, *Daniel M. Monty*, *John C. Monty* and *William B. Cooper* assigned and transferred to the suppliant *Josiah D. Ripley* all their interest in the said contract, and all right, title and interest in the benefits and advantages to the derived thereunder. In the twelfth paragraph it is alleged that by some instrument or agreement, the particulars whereof Her Majesty's Attorney General has been unable to ascertain, the said *Alphonse Charlebois*, assigned and transferred to *Edward Shanly* and *Louis Théophile Mallette* some part or interest in the said contract, and by an indenture bearing date the 30th day of June, 1879, the said *Charlebois*, *Shanly* and *Mallette* transferred and assigned to the suppliants *Smith & Ripley* all their right, title and interest in the said contract, together with all powers, privileges and emoluments derivable or to be derived from the said contract. In paragraph 13 it is alleged that by certain agreements, the particulars of which Her Majesty's Attorney General has been unable to ascertain, the said *Charlebois*, *Flood*, *Heney*, *Shanly*, *Mallette*, *Shannon*, *Dl. M. Monty*, *John C. Monty* and *William B. Cooper* did assign and transfer to the suppliants *James N.*

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Smith and *Josiah D. Ripley* all their respective rights and interests in the said contract, and to further evidence and define the rights and interests of all parties with respect to the said contract the said contractors, that is to say, *Heney*, *Charlebois* and *Flood*, and the said *Shanly*, *Mallette*, *Shannon*, *Dl. M. Monty*, *John C. Monty* and *William B. Cooper* did by indenture, dated the 30th June, 1879, among other things in effect declare that the sole interest in the said contract was then, at the date of the said indenture, absolutely vested in the suppliants *James N. Smith* and *Josiah D. Ripley*, subject to the terms of the said contract. Then, in the 14th paragraph, the Attorney General alleges that the said several assignments were made without the consent of Her Majesty, and in violation of the provisions of the 17th section of the said contract, and Her Majesty, under the powers contained in the said 17th section, took the work out of the said contractors' hands, by reason whereof the suppliants have no claim against Her Majesty in respect of the works performed, as alleged in the petition. The answer then admitted that,according to the estimates of the engineer, the work done prior to the work being taken out of the contractors' hands amounted to $24,807, of which $11,000 had been paid to the contractors, leaving a balance of $13,807.94, which, however, the Attorney General insisted was not, under the circumstances, payable to the contractors. However, notwithstanding that he insisted it was not recoverable, he thereby offered on behalf of Her Majesty, and without prejudice to Her Majesty's position and defence to the said petition, and without admitting any liability in the premises, to pay, provided it should be accepted in full of all claims and demands against Her Majesty in respect of the said contract.

To this answer, besides joining issue upon the statements by way of defence therein alleged, the suppliants

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reply that the contract was not cancelled, or annulled, or the works taken out of the contractors' hands, for the reasons stated in the answer, or for any of such reasons, but that the said contract was cancelled and annulled and the work taken out of the contractors' hands because of the determination of Her Majesty, long before said cancellation took place, to abandon and proceed no further with the works,contemplated and contracted to be done under the contract ; and for a further replication, the suppliants say that the said assignments were not made without the consent of Her Majesty, but that Her Majesty had full knowledge before said assignments were made and also immediately thereafter, and before the said Order in Council of the 25th July, 1879, was passed, and gave her consent thereto, and after such notice and knowledge Her Majesty recognised the said assignees as contractors under the said contract, and allowed them to go on with the work thereunder and to incur a large outlay and expenditure thereupon on the faith of such assignments and the recognition thereof by Her Majesty ; and the suppliants further say that Her Majesty did not under the powers and for the reasons alleged in the fourteenth paragraph, take the said work out of the contractors' hands.

Issue was joined upon these replications.

This replication displays a singular departure from the claim as set up in the petition. There the claim of *Smith* and *Ripley* is based upon an assignment of the rights, debts and choses in action, whatever they were, of the original contractors executed to *Smith* and *Ripley*, in October, after the cancellation of the contract which is complained of, whereas in this replication the claims of *Smith* and *Ripley* are based upon an absolute assignment of the contract itself, together with the rights of the original contractors thereunder,

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coupled with an averment that such assignment was assented to by Her Majesty, who accepted *Smith* and *Ripley* as the contractors in lieu of *Heney*, *Charlebois* and *Flood*, long before the alleged cancellation, and so that the cancellation did not take place for the reason alleged in the 14th paragraph of the statement, by way of defence, namely, the assignment to *Smith* and *Ripley* without the consent of Her Majesty.

Now, as to all of the assignments spoken of in the statement by way of defence and in the evidence, it may be here observed that it is not necessary to refer to any of them except that to *Smith* and *Ripley*, perfected by the indentures of the 30th June, 1879, for, upon production, it appeared that none of the others purported to assign the contract itself, but merely to transfer to the assignees thereof certain shares and interests in the profits and loss of the work in partnership together with the original contractors ; but as to the assignment to *Smith* and *Ripley* in June, 1879, there can, I think, be no doubt that it was such an assignment as is pointed at in the 17th paragraph of the contract, in the event of which being made without the consent of Her Majesty, it became competent for Her Majesty to take the contract out of the contractors' hands, and that thereupon the provision that in such case the contractors should have no claim for any further payment in respect of work performed would come into operation. Upon the assignment becoming known it was competent for the government to assent thereto or under the provision of the 17th section to take the contract out of the contractors' hands, and to annul it in so far as to deprive them of all benefit thereunder, while their liability to the government for all loss or damage, if any, which might be occasioned to the government by reason of the non-completion of the works by the contractors would still remain.

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The evidence, I think, leaves no doubt that the fact of the assignment of the 30th June, 1879, first became known to the government by the letter of the date of the 5th August, 1879, addressed to the Minister of Railways by Mr. *Ferguson* as attorney of *Smith & Ripley*. Then it appears that on the 9th of August the acting Minister of Railways, the minister himself being absent, laid a report before the Privy Council of the Dominion in which he alleges that subsequently to the passing of the order in council of the 25th July, 1879, referred to in the petition of right, it came to his knowledge that prior to the said 25th July, namely, on the 30th June, 1879, the contractors *Heney, Charlebois & Flood* had without the knowledge or consent of Her Majesty, or of the Minister of Railways and Canals acting in that behalf for Her Majesty, assigned and transferred the said contract to Messrs. *Smith, Ripley & Co.* That he was not aware when he recommended the order in council of the 25th of July that such assignment had been made in contravention of the 17th article of the contract, that on the 5th of August he was notified by letter purporting to be signed by the said Messrs. *Smith, Ripley & Co.*, that said assignment had been made to them, and at the same time a paper purporting to be an assignment of the said contract duly executed was deposited in the Department of Railways and Canals. That such assignment was never assented to by Her Majesty, or by the Minister of Railways and Canals, acting for Her Majesty, and he, therefore, recommended that the contractors *Heney, Charlebois & Flood* should be notified that the said contract is taken out of their hands and annulled. Upon this report action was taken by the Council on the 14th August, and an order in council was passed in pursuance thereof authorizing the taking the contract out of the hands of the contractors accordingly. It was contended upon the part of

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the suppliants that this assignment to *Smith & Ripley* was not in fact the true cause for the passing of this order in council, and that the true cause was that the government had changed their policy with respect to the work in progress, and intended to go no further with it. With the motive of the government in passing the order we have nothing to do, and cannot inquire into it. The fact of the assignment, of which the government were not aware at the time of the passing the order in council of the 25th July, when it came to their knowledge, authorized them, in the terms of the contract, to rest upon it as affording sufficient ground for taking the contract wholly out of the contractors' hands, notwithstanding the passing the previous order; and the assignees of the contract who, without the consent of the government, can derive no benefit from the assignment, can have no *locus standi* to call in question the motives of the government, so neither could the original contractors, who, for valuable consideration, had parted voluntarily with all their interest therein. There can, therefore, I think, be no doubt that the government can, as a defence to this petition, rest upon the assignment without their consent, as terminating all interest of the contractors, and of *Smith & Ripley* as claiming through them, under the contract.

It is, however, not improper, I think, that we should say that the evidence seems to establish the most perfect integrity and good faith upon the part of these gentlemen, and such as to entitle them to expect and to receive the most favorable consideration of their claims by the government—unless, indeed, good faith upon their part may be said to be the cause of the loss occasioned to them by the consent of the government to the assignment to them being withheld; that they were influenced in taking the assignment by encouragement held out to them, or what they not unreasonably

believed to be encouragement held out to them, in conversation with persons supposed by them to have authority, there is reason, I think, to believe, and that they *bonâ fide* believed that by taking the assignment they were promoting the objects the government had, or were believed to have in view, as well as securing their own interest there can, I think, be no doubt; so that, in view of all the circumstances attending their acquiring the assignment, and their frankness and good faith in communicating it to the government, which they did in the hope, and not unreasonable expectation, that it would be without hesitation assented to by the government, although they cannot succeed upon their petition in this case by the judgment of the court, they certainly appear to be entitled to the most favorable consideration of their claim out of court.

The Attorney-General, in his answer upon behalf of the Government, has, without admitting any liability, submitted to pay $13,807.94, the unpaid balance of the progress estimates, up to the time of the contract being taken out of the contractors' hands. We might award this sum to be paid upon this submission, but that would be only on the condition of its being accepted as tendered in satisfaction of all claims. The suppliants may, perhaps, prefer to urge their whole claims upon the favorable consideration of the Government unembarrassed by the acceptance of the above sum on such conditions. If, however, the suppliants should be willing to accept the amount as tendered in the answer a decree, in my opinion, may be made for that amount, but it would have to be without costs.

Appeal allowed with costs.

Solicitors for appellant: *O'Connor & Hogg.*

Solicitor for respondent: *A. Ferguson.*

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CONFEDERATION LIFE ASSOCIATION OF CANADA..... } APPELLANT;

AND

EDMUND O'DONNELL.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life Assurance—Policy, delivery of—Policy not countersigned, effect of—Premium, proof of payment of—Delivery of policy insufficient—Escrow.

On an action on a policy, the appellant company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from *Toronto* to the agent at *Halifax*, to receive the premium and countersign the policy and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed: "This policy is not valid unless countersigned by ——— agent at ———, countersigned this —— day of ———. Agent."

The agent, in his evidence, said he delivered the policy to *W. O'D.* (the party assuring) not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among *W. O'D's* papers after his death, not countersigned. The policy was dated 1st October, 1872, and the first premium would have covered up the year up to the 1st October, 1873. *W. O'D.* died the 10th July, 1873. The case was tried before *McDonald*, J., without a jury, and he gave judgment in favor of respondent for the $3,000, and this judgment was confirmed by the Supreme Court of *Nova Scotia.*

On appeal to the Supreme Court of *Canada*, it was

Held (*Fournier* and *Henry*, JJ. dissenting) that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore Company was not liable.

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

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Per *Gwynne*, J., that the instrument was delivered as an *escrow* to the agent, not to be delivered as a binding policy to *W. O'D.* until the premium should be paid and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument of its original character of an *escrow*, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed.

Mr. *Beatty*, Q.C., and Mr. *Lees*, Q.C., for appellants:

Before arguing the case, Mr. *Lees*, on behalf of the appellants, applied to have an affidavit added to the case.

[THE CHIEF JUSTICE.—The case has been settled and you cannot now amend it by adding what would be equivalent to new evidence.]

Mr. *Beatty*, Q.C.:

The real point in this case is, was the premium ever paid? The fact of the respondent of having the policy in his possession is the chief point on which he relies But as the policy has, on its face, a fatal defect, it not being countersigned by the agent, it was for the plaintiff to prove why it was not countersigned. The printed memorandum is evidence for the appellants that they have not received the premium, and corroborates the evidence and books of the agent. Then, again, we have the fact that the premium was tendered after the death of the assured. The acknowledgment of the receipt of the premium which appears in the policy is only provisional, and is only valid after the agent has countersigned the policy. See *Bliss* on Life Insurance (1); *Wood* v. *Poughkeepsie* (2); *Bigelow* (3). If this instrument was a completed contract we would be liable unless we proved fraud. The memorandum is notice to the applicant that the agent has no

(1) 2 ed. pp. 252 & 637. (2) 32 N. Y. R. 619.
(3) 2 vol. 35.

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right to deliver the policy until the premium has been paid. This instrument we have proved was not delivered as a completed contract.

[The learned counsel then reviewed the evidence, contending there was no evidence of payment of the premium, and that, under the circumstances, the *onus* was on the plaintiff to prove payment.]

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

The evidence given by the company's agent is contradicted on material facts, and therefore it ought to have no weight. There is evidence that the policy was in the assured's possession several months prior to his death, and the fact of its not being countersigned does not invalidate the policy. This was not a condition of the policy. The statute incorporating the company declares in what way the policy should issue.

RITCHIE, C. J.:

I think this instrument was on its face an incomplete instrument for want of the signature of the agent, and therefore, though produced by the other side, does not authorize an inference of delivery. To give any force or effect to the receipt in the policy it must first be established that the policy was duly delivered, for, if not duly delivered, nothing is established. The policy on its face shows that, though signed by the president and manager, it was not, and was not intended to be, either a complete or a binding instrument; and thefact is unequivocally made apparent to all parties dealing with agents of the company to whom the policy may be transmitted, that the instrument is not to be delivered or received as a valid, binding policy, unless countersigned by the agent to whom it may have been transmitted to be dealt with, that is to say, to be delivered as a valid, binding policy only on payment of the

premium, and on being countersigned. Until these conditions were complied with, there was no contract binding on the company, and by the deed and other provisions of the policy before there had been a compliance with these precedent requirements of the company, the deceased only obtained possession of an incomplete instrument which the agent had no right to deliver, or the deceased to accept, as a binding contract. The words, "This policy is not valid unless countersigned by agent," are words, I think, that must be read as part of the policy.

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In *Reg.* v. *Aldborough* (1), Lord *Denman*, C. J., says:

It is almost superfluous to cite authorities to shew all that is written on the instrument, according to the intention of the parties, before execution, constitutes the deed, and that matters subscribed or endorsed may be incorporated; *Broke* v. *Smith* (2) is in point; and the doctrine has been uniformly acted on since.

For these reasons, I am in favor of allowing the appeal.

STRONG, J.:

After some fluctuation of opinion, I have come to the conclusion that we ought to allow this appeal. The question appears to me to be entirely one of fact, for I do not regard the memorandum in the margin to the effect that the policy was not to be valid until countersigned by some agent, as forming part of the policy, or as being a condition to which it was subject. The policy, in my opinion, was *primâ facia* a completed instrument in the hands of the plaintiff, a valid deed under the seal of the defendants, and signed as their act of incorporation required, and as such it estopped them from denying the payment of the premium for which a receipt and discharge was contained in the body of the policy. It was, however, competent for

(1) 13 Q. B. 196. (2) Moore 679.

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the defendants to shew that the policy had never been delivered, and that it had come into the possession of the assured in such a way that it never was the deed of the defendants, and, in fact, never was a completed instrument,

The question is, do they sufficiently shew this? The evidence relied on to establish the non-delivery is that of the defendants' late agent at *Halifax*, Mr. *Allison*. He swears that the premium never was paid. This, however, is not the vital question, for, although the premium never was paid, the defendants might be bound by the policy, and the question of payment or non-payment is only important as bearing on the fact of delivery. But then Mr. *Allison* adds, that for the reason that the premium never was paid he had not countersigned the policy, but had retained it in his hands until the month of May, 1873, when he had handed it to the assured that he might read the conditions; and he says he did not "deliver it as a binding contract, and did not on that account countersign it." Now, this is clear and positive evidence from a party who must have known all the facts, and who is not directly interested, and, moreover, evidence confirmed by the state of the instrument itself, which, however technically complete as a deed, as I think it was, still appears upon its face never to have received the additional sanction of the countersigning, which, it is apparent, was intended should be given to it, and which the witness tells us he withheld for the express purpose of not making it a binding instrument, a very natural reason for finding the policy in the state in which it is now produced. In short the witness swears that the policy never was delivered because it was never paid for; that it was lent to the assured to read the conditions, and he points to the unsigned memorandum,

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which it was his duty to countersign, as proof confirmatory of his testimony.

Then I cannot agree with the learned judge below that this explicit statement is to be overthrown because the plaintiff and two witnesses, to whom the learned judge gives credit, impeached Mr. *Allison* on a collateral point by proving that they saw the policy in the hands of the deceased in the preceding November, 1872, whilst Mr. *Allison* says he retained it in his possession until May, 1873. There may be a mistake on one side or the other as to the dates, but, assuming that the mistake is Mr. *Allison's*, this does not show that he is in error when he says "the premium on this policy "was never paid. I never delivered it to take effect as "an executed instrument, and I know that this is so "because I did not countersign it as I should have done "if I had delivered it as a completed policy." I think the learned judge attributed too little weight to the fact that this policy had not been countersigned, not as a matter of law, but as a fact confirming the testimony of *Allison* and giving it a great preponderance over that of the plaintiff's witnesses.

I think this appeal should be allowed, but I am not inclined to give costs, and I think it should, therefore, be without costs, and a new trial should be granted without costs in the court below.

FOURNIER, J. :—

L'intimé, en sa qualité d'administrateur de la succession de *W. A. O'Donnell*, son fils, décédé *ab instestat*, réclame la somme de $3,000, montant d'une police d'assurance émise par l'appelante sur la vie du dit *W. A. O'Donnell*. Pour rendre cette police obligatoire du 1er octobre 1872 au 1er octobre 1873, la prime à payer était de $48.06. Cette police fut envoyée de *Toronto* à un M. *Allison*, agent de la compagnie à *Halifax*, qui

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devait, après avoir touché le paiement de la prime, contresigner la police et la délivrer à qui de droit. Le contreseing de l'agent n'y a jamais été apposé.

A cette demande, la compagnie a opposé comme moyens de défense le défaut de paiement de la prime et l'omission du contreseing de l'agent.

Quant au paiement de la prime, il n'y en a pas d'autre preuve que la déclaration contenue dans la police elle-même, qui est signée, scellée et revêtue de toutes les formes exigées par l'acte d'incorporation de l'appelante (34 Vict., ch. 54) pour en former un contrat parfait. Quelques jours après le décès de l'assuré, cette police a été trouvée dans ses papiers. L'intimé s'étant adressé à l'agent pour obtenir le paiement de l'assurance, celui-ci lui répondit qu'il aurait à télégraphier à la compagnie et lui demanda de revenir dans une semaine—ce que fit l'Intimé ; mais l'agent n'ayant pas eu de réponse de la compagnie, lui demanda encore de revenir dans une autre semaine. Ce n'est qu'à la troisième visite à l'agent que l'intimé reçut pour la première fois avis que le paiement de la prime était mis en question. N'est-il pas étrange que cette prétention n'ait pas été émise à la première entrevue. Quelle nécessité y avait-il d'en référer au bureau principal pour constater ce fait. La seule explication que l'on puisse en donner, c'est que l'agent n'avait pas foi dans la régularité de ses livres ; que n'y trouvant pas l'entrée de la prime qu'il avait reçue, il a pensé alors qu'il l'avait transmise au bureau et qu'il en trouverait là la preuve. Cette preuve faisant défaut, il a cru devoir s'en rapporter à ses livres pour déclarer que la prime n'avait pas été payée et que la police n'avait été remise que pour examen. Mais que vaut cette preuve contre la déclaration contenue dans la police ? En admettant même quelle fut admissible et légale, il est clair que reposant uniquement sur la déclaration d'un témoin formellement contredit dans

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une des parties principales de sa déposition, cette preuve est insuffisante. Si l'agent *Allison* se trompe ou manque a la vérité lorsqu'il dit qu'il n'a remis la police que pour examen; dit-il plus la vérité ou ne se trompe-t-il pas aussi lorsqu'il dit qu'il n'a pas touché la prime. Lorsqu'il dit qu'il était en possession de la police dans le mois de mai 1873, son erreur est incontestable. Il est contredit par le père de l'assuré qui a vu cette police entre les mains de son fils le 29 novembre 1872. Il l'est également par *John MacDonald* qui dit aussi l'avoir vue entre les mains du défunt dans l'automne de 1872; il l'est encore par *E. C. Mumford* qui se trouvait avec *MacDonald* lorsque le défunt leur montra sa police. On peut conclure avec certitude de ces témoignages que la police était entre les mains de l'assuré dans l'automne de 1872. Elle ne pouvait donc pas être entre les mains d'*Allison* dans le mois de mai 1873, à moins de lui avoir été rendue par *O'Donnell*, qui l'aurait ensuite, après l'accomplissement de toutes les conditions, reçue une seconde fois des mains d'*Allison*. Je ne vois d'autre conclusion à tirer de ces faits que celle que la police a été remise comme un contrat obligatoire de part et d'autre, et comme elle fait preuve du paiement de la prime, je crois que l'Intimé a établi son droit de réclamer le montant de l'assurance. On a voulu tirer argument contre lui du fait qu'il s'est déclaré prêt à payer la prime, mais cela ne peut tirer à conséquence. On conçoit qu'il ne pouvait guère avoir de doute sur le fait du paiement. C'est lui-même qui en avait compté le montant exact à son fils qui partît avec cette somme et revînt avec la police. Il devait naturellement croire que le paiement avait été fait. S'il offrait de payer une seconde fois, ce n'est donc pas parce qu'il voulait remédier au défaut de paiement, mais plus tôt pour éviter les conséquences de l'erreur de l'agent. Le sacrifice qu'il aurait fait était insignifiant comparé au bénéfice

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qu'il lui aurait assuré. Concluant de toutes les circonstances de cette cause au paiement réel de la prime, je crois inutile de m'occuper de la question de savoir si les autorités justifient la proposition que même dans le cas où la prime n'aurait pas été payée, la remise d'une police en règle contenant la déclaration de paiement, la compagnie n'aurait pu prendre avantage de ce défaut.

L'autre moyen opposé à l'intimé est l'omission du contreseing de l'agent, qui devait être mis au bas de la note suivante qui se trouve au dos de la police :

This policy is not valid unless countersigned by agent at countersigned this day of

Agent.

La condition de nullité comprise dans cette note n'est ni signée par le président et le gérant général de la compagnie, ni revêtue du sceau de la compagnie, qui, en vertu de la 16e sec. de l'acte d'incorporation, sont les conditions requises pour la validité d'une police d'assurance. Une condition de cette importance ne peut être rendue obligatoire sans l'accomplissement de ces formalités, à moins d'être insérée avec les autres conditions dans le corps de la police. Dans ce cas, comme la police est revêtue de toutes les formalités voulues par la 16e sec., cette condition serait devenue obligatoire comme les autres. Les pouvoirs donnés au bureau de direction par la ss. 7 de la sec. 13 de l'acte d'incorporation sont assez étendus et généraux pour conférer à la compagnie le droit de faire de cette formalité du contreseing une condition de la validité de la police, bien que cette condition ne puisse avoir d'autre effet que d'assurer à la compagnie un contrôle plus complet sur ses agents. Mais il n'est pas établi en preuve que cette formalité ait été exigée par aucun règlement du bureau de direction, ni qu'elle ait été mise au dos de la police par son ordre comme une condition de sa validité. Pour ces motifs, je suis d'avis que l'appel doit être rejeté avec dépens.

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HENRY, J.:—

The main question raised by the counsel of the appellants was upon the point of evidence given on the trial on their part that the premium had not been paid. That evidence, supplied only by the local agent of the company, was substantially contradicted by three witnesses, and the learned judge who tried the case decided in favor of the respondent. The policy acknowledges the receipt of the premium and to negative such receipt clear and satisfactory evidence is required; such, in my opinion, has not been given, and I could not under such circumstances feel justified in reversing the finding of the learned judge. It is, however, also denied that the policy was delivered and the contradictory evidence on that point was resolved by the learned judge also in favor of the respondent, and I think properly so for the reasons given by my learned brother *Fournier* in his judgment read to-day. I agree with my learned brother *Strong* that the failure of the agent to countersign the policy cannot be raised to invalidate it. The point as an objection was only incidentally referred to in support of the contention that the premium had not been paid and that the policy had not been delivered.

I think the appeal should be dismissed and the judgment below affirmed with costs.

TASCHEREAU, J., concurred.

GWYNNE, J.:—

I think a new trial should be granted in this case. The defendants plead among other pleas: 1st. That the policy declared upon is not their deed; and 2nd. That the premium payable on the policy was never paid by *Wm. A. O'Donnell*, deceased, in his life time nor any one on his behalf.

The defendants have, therefore, put the plaintiff to

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legal proof of the execution and delivery of the policy, and the question is was the policy which was declared upon executed in the manner required by law to be binding upon the company, defendants, and so executed was it ever delivered to *Wm. A. O'Donnell*, in his life time, or to any one on his behalf with the intention of its being finally binding upon the company as a policy completely executed? If not issued by the company with the intention of being finally binding upon them, there is not, as is said by Mr. Justice *Blackburn* in *Xenos* v. *Wickham* (1), any magic in the law to make it binding contrary to their intention.

The defendants are a company incorporated by the Dominion Statute 34 *Vic.*, ch. 54, by which Act it is provided that the head office of the association shall be in the city of *Toronto*, and that the company should have a common seal. They were empowered also through a board of directors to make by-laws, rules and regulations for (among other things) the issuing of policies and in what form and with what conditions, restrictions and limitations; and it was enacted that all policies of insurance should be sealed with the common seal of the association, and should be signed by the president or a vice-president and the general manager or such officer as the general board may appoint for that purpose. The policy which was declared upon when produced purported to have the signature of a person signing it in the character of president, and of another purporting to be signed in the character of general manager. It also had a seal attached to it, but the plaintiff offered no evidence of the fact of the execution of the policy either under the common seal of the company or by the persons competent to sign policies on behalf of the company.

The document produced had no attestation clause

(1) L. R. 2 H. L. 314.

purporting that it was "signed, sealed and delivered," in the presence of any one, but in lieu thereof there was printed near the place where such clause is usually inserted, and opposite the names of the persons signing as president and general manager; and on one side also of the seal attached to the instrument the following clause: "This policy is not valid unless countersigned "by ———, agent at———;" and underneath, the place for countersigning, is indicated thus: "Countersigned "this———day of———

"———, agent."

Now, this printed matter appears to me to be as much authenticated by the seal and signatures attached to the instrument as is any other matter in the instrument, and although the blanks are not filled up so as to define precisely the person and place by whom and where the countersigning was to be done, it amounts to a declaration made by the parties, whose names are to the instrument, that before the policy could become a valid instrument, binding upon the defendants, it should be countersigned by some person filling the character of agent of the defendants at some place; and as the head office of the company was situate at *Toronto*, where the seal of the company is kept, and as the application of *O'Donnell* for the insurance was made to an agent of the company at *Halifax*, whose business would be to receive the premium, *O'Donnell* could have had no difficulty in understanding that the person to countersign the instrument, in order to give it validity, was that agent through whom he had applied for the insurance.

The only evidence which the plaintiff offered to disprove the defendant's plea, that it was not their deed, was the mere production of the policy with the above declaration printed alongside the signatures and seal which appeared attached, and evidence that the instrument in this condition was found among the

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papers of the deceased, *M. A. O'Donnell*, in whose possession it had been seen during his life.

The defendants, however, produced as a witness a Mr. *Allison*, their agent at *Halifax*, who had applied for the policy for *O'Donnell*, and he proved that the policy had been sent to him from the head office at *Toronto*, and that he held it in his hands as an *escrow*, not to be issued or delivered to *O'Donnell* until the premium should be paid, and he, *Allison*, should countersign the policy; and he swore that the premium never was paid, and that for this reason he never did countersign the policy; that he never issued it as a policy binding upon the defendants, but had let the deceased have it to read the conditions, and that as a fact the policy was never delivered to him as a contract. The only evidence relied upon to defeat this positive evidence, is the inference relied upon as proper to be drawn from the fact of *O'Donnell* having had the policy in his possession in his lifetime and until his death. This evidence is, in my opinion, quite insufficient for the purpose. I think it is sufficiently clear, upon the evidence, that the instrument was delivered as an *escrow* to *Allison* not to be delivered as a binding policy to *O'Donnell* until the premium should be paid, and until *Allison* should, in testimony thereof, countersign the policy; and that as these conditions have not been proved to have been fulfilled, there is no sufficient evidence to divest the instrument of its original character as an *escrow*, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed.

I think, therefore, the appeal should be allowed, and a new trial ordered, with costs. The exigencies of the defendant's business as a company, whose head office is at *Toronto*, make it not only reasonable, but necessary, that they should protect themselves

in this manner when they send policies to be issued at a remote agency; and the necessity for pursuing this course, and the object of the notice printed, as this is, alongside the signature, must be well understood by all persons effecting policies through agents.

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Gwynne, J.

Appeal allowed with costs.

Solicitor for appellants: *C. H. Tupper.*

Solicitor for respondent: *John L. D. Thompson.*

SARAH MARIA GRASETT (PLAINTIFF)..APPELLANT;

AND

JOHN CARTER (DEFENDANT).....RESPONDENT.

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*Mar. 13.

1884

*June 16.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Boundary line—Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries—Conflicting evidence—Duty of Appellate Court.

T. was the owner of lot 9, and *C.* was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. F. being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked *C.* where he claimed his northern boundary was. *C.* pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, *C.* not objecting. A few days afterwards, *T.*, with his architect and builder, went on the ground, and, in the presence of *C*, the builder again marked out the boundary by means of a line connecting the surveyor's marks, *C.* not objecting. Excavating was commenced according to that line immediately, and *T's* house was built according to the line

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

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on the extreme verge of *T*'s land. The first time that *C.* raised any objection to the boundary so marked was when the walls of *T*'s house were up and ready for the roof and considerable money had been expended in building.

Held,—That *C.* was estopped from disputing that the line run by the surveyor, was the true line.

Per *Strong*, J.: When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description. In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents which do not agree with those in the deed.

In 1861, *W. D. P.*, who owned a piece of land bounded on the south by *Queen* street, on the east by *William* street, on the west by *Dummer* street, and running north some distance, laid out the southerly portion into lots depicted upon a plan, which plan showed the boundary line between the plaintiff's and defendant's lots to be exactly 600 feet from *Queen* street. There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of the land so laid out. Many years afterwards the remaining land to the north of the parcel so laid out, was laid out into lots so depicted on another plan, and a street was shewn between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from *Queen* street was greater than the first plan on its face shewed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if *Queen* street and the street on the north of the first plan were actual limits of the plan.

Per *Strong*, J.: 1. The true boundary line between the plaintiff's and defendant's lots was a line commencing at a point 600 feet from *Dummer* street, as measured on the ground at the time when the plan was made; but in the absence of evidence showing a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary in question.

2. Inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots so conveyed.

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Where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanor while under examination.

APPEAL from a judgment of the Court of Appeal for *Ontario* reversing a decree of Vice-Chancellor *Blake* in favor of respondent.

The plaintiff and the defendant owned adjoining properties abutting on the west side of *Simcoe* street, in the city of *Toronto*, and running through to the east side of *William* street. The plaintiff's lot was known as No. 9, and is north of those of the defendant which are Nos. 7 and 8. *Simcoe* street was formerly called *William* street, and the street now called *William* street was formerly called *Dummer* street.

The plaintiff, in his bill of complaint, alleged that he acquired lot No. 9 from one *J. A. Temple*, who had upon it a brick house, which he had built close to the southern boundary of the lot as ascertained for him by a surveyor named *Wadsworth*, but which the defendant alleges encroaches 4 inches on his lot No. 8; and that the defendant had commenced to erect walls, which, to the extent of 4 inches, come across the line to which the said house extends.

The bill also alleged that the defendant was aware of *Wadsworth's* survey, and of the erection of the house by *Temple* on the faith of the correctness of the boundary then ascertained, but did not object until the walls of the house were nearly, if not quite completed, when, for the first time, he informed *Temple* that he claimed that the wall encroached on him 4 inches; and it sets out attempts, on the part of the plaintiff, to arrange the matter without litigation. The prayer was (1) for a declaration that the 4 inch strip is part of lot 9, and belongs to the plaintiff; or (2) that, if part of lot 8, it

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now belongs to the plaintiff in consequence of *Temple's* improvements, and the defendant's conduct; or (3), that in any event it may be declared to belong to the plaintiff, subject only to his paying its value; and (4), that defendant may be ordered to deliver up possession, and may be restrained from continuing to build or from otherwise trespassing; and (5), for further relief.

The defendant by his answer asserted that the encroachment, by the plaintiff's wall, is $4\frac{3}{4}$ inches at the east and 4 inches at the west part of it.

By the 3rd paragraph, in answer to the 4th paragraph of the said bill, he says: "before the survey therein referred to was made, I told the gentleman who was making the same that a fence which was then standing, and which ran east and west from a point distant about 77 feet, 8 inches from *Simcoe* street to the eastern boundary of *William* street (formerly *Dummer* street), was claimed by me as the true line between the land claimed by me, and that which I claim to belong to the plaintiff; and that there was a space of 5 feet 10 inches between the north wall of my house and the land which I claim to belong to plaintiff; and I also pointed out to the said surveyor a post which was then and I believe and charge the fact to be, had been since the year 1855, standing on the west side of *Simcoe* street, and which I then told the said surveyor I claimed to be the north-east boundary of my land, and I believe and charge the fact to be that the said surveyor made his survey on the line of such fence, and that on the plan which the said surveyor made, and which was furnished to *James A. Temple*, in the said bill named, the said space of 5 feet and 10 inches was shown thereon as being the distance between my said wall and the south boundary of the plaintiff's land."

"4. In answer to the fifth paragraph of the said bill, I believe, and charge the fact to be, that the said *Temple*

did not adopt the said survey made for him as shown on the plan when he commenced to erect the brick dwelling in the said bill referred to, but that the said *Temple*, with the aid of the builder whom he had employed, laid out a new line which the said *Temple* adopted as the south boundary of his land."

The defendant also denied the charge of dilatoriness in giving notice to *Temple*, and alleged that he notified him promptly, and before he had begun to build the walls of his house, that he was encroaching; and he tells a very different story from that told by the plaintiff, about the exertions made to come to an amicable settlement. He admitted building his walls on the four inch strip, but said he did not interfere with the plaintiff's wall, and had no intention of injuring it. The answer stated a survey made at the instance of the defendant, at which *Temple* and his surveyor were present by appointment, by which the boundary was ascertained, as now claimed by the defendant. That was after *Temple's* house was built. Other facts were alleged for the purpose of showing acquiescence by *Temple* and by the plaintiff in the result of that survey. The defendant also set up title under the Real Property Limitations Act.

The cause was heard in November, 1880, before *Blake*, V.C., who made a decree for the plaintiff, from which the defendant appealed to the Court of Appeal for *Ontario*, which court reversed the decree. V. C. *Blake* dismissed the plaintiff's bill.

The documentary and oral evidence is reviewed at length in the judgments hereinafter given.

Mr. *Robinson*, Q.C., and Mr. *Armour*, for appellant, contended that the conduct of the respondent before, at, and about the time of running the line and building estops him from now disputing the said line, even if it ever encroached upon his land, and from, in fact, attack-

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ing the quiet possession of the land, having by his former acts, induced the appellant's predecessor in title to believe such land was his own, and to incur great expense; that the evidence showed the line was a conventional one, and that the finding of the learned judge of the facts upon which he made his decree should not have been disturbed by the Court of Appeal.

Dr. *McMichael*, Q.C., and Mr. *Hoskin*, Q.C., for respondent, contended that as the evidence showed that the respondent never consented to any deflection from the true boundary line, and as there was evidence that the true line had not been followed, he cannot be held to have assented because he believed their representation or to be estopped from claiming the true line.

RITCHIE, C. J.:—

The action in this case was brought in consequence of the defendant's interfering with the southerly wall of the plaintiff's house. The defendant and the plaintiff were proprietors of lots of land in the city of *Toronto*, adjoining each other, and the difficulty arises between them as to the dividing line between those lots. A great deal of evidence was gone into in the case for the purpose of discovering, if it were possible, (which might not be a very easy task) exactly to an inch where the dividing line of those lots was, but I think that was a discussion wholly foreign to this case, which I think should be determined on another point altogether. I think it is clear law, well established at any rate in the Lower Provinces where I came from, and I believe it must be established everywhere, that where there may be a doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of the two lots, and, upon the strength of that agreement and determination,

and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that that is the true dividing line between the two properties.

[The learned Chief Justice after reviewing the evidence and Vice-Chancellor *Blake's* judgment concluded as follows :—]

I think, what took place in this case between the parties amounted to the establishment of a convential boundary or division line, of the respective properties of plaintiff and defendant, from rear to front, and I think the evidence clearly shows that the building of plaintiff's was erected on such line, so agreed on as such dividing line, and that the plaintiff's building is therefore now on plaintiff's lot.

I therefore think that the judgment of Vice-Chancellor *Blake* was right, and that it should not have been reversed.

STRONG, J.:

The dispute which has led to the litigation out of which the present appeal arises is in respect of a piece of land 4 inches in width, and 120 feet in depth, the value of which, according to the respondent's estimate, is ascertained by the fact that he offered to sell 5 feet of the land, of which this 4-inch strip forms part, at the price of $50 per foot. On the part of the appellant's testator (the original plaintiff by whom this suit was instituted), the contention had a substantial object, and there can be no reproach against him of having acted in a spirit of unreasonable litigiousness, for had he conceded to the respondent the claim which he makes to this four inches of land, it would have involved the necessity of either pulling down the south wall of the dwelling house, which has been built to the extent of 15 feet and 9 inches, on this 4-inch strip, or of accept-

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ing the offer which the respondent made of allowing the house to stand as it had been built, on the condition that it should never be used for any purpose but that of a dwelling house, the plaintiff, however, in this last alternative not to have an absolute title, but merely a license to use the 4 inches as a site for the wall of the house, the acceptance of which would have seriously interfered with the plaintiff's title to the house, and might have rendered it unmarketable, so far as the plaintiff and his predecessor in title are concerned. There does not seem, therefore, to be anything unreasonable in the position which he assumed; and as regards the respondent, if he is able to show that the four inches in question were originally his property, he is, as the Court of Appeal say, entitled to insist that the evidence which would deprive him of it and vest it in his neighbour should be very full and convincing.

The land in dispute is part of park lot number 12, in the city of *Toronto*, which was originally granted by the Crown to the Hon. *William Dummer Powell*, who, in 1831, caused a plan to be prepared by Mr. *Chewett*, a surveyor, showing a sub-division of a portion of this park lot into streets and building lots. This plan is registered in the registry office of the city of *Toronto*, and it shows a street now called *Simcoe* street, running north from *Queen* street (formerly *Lot* street) and another street, originally *Dummer* street, to the west of *Simcoe* street, also running north from *Queen* street, and between these two streets two ranges of 23 lots each, one range fronting on the west side of *Simcoe* street, and the other on the east side of *Dummer* street, each lot being 60 feet in width and 120 feet in depth, and each tier of lots commencing at a distance of 120 feet from *Queen* street, this intermediate space of 120 feet being taken up by a tier of lots fronting on *Queen* street, 100 feet in depth, and a lane 20 feet wide in the

rear. To the north no boundary whatever was shown in the original plan, *Anderson* street, now the assumed northern boundary of lot 23, not having been laid out until many years after the original survey and plan of 1831. The 23 lots are numbered consecutively, from south to north. The appellant has proved a clear paper title (the execution of the deeds being admitted) to lot number 9, and the respondent to lots numbers 7 and 8. The only description of the lands contained in any of these deeds is by a reference to the plan made by Mr. *Chewett*, in 1831. In none of the deeds forming part either of the plaintiff's or defendant's title do I understand (for I have not seen any of these deeds) is there a more specific description, either by giving the courses and distances of the lines of the particular lots, or by a reference to stakes or monuments, or other actual boundaries, laid down upon the ground. All these 23 lots are now enclosed and occupied, and most of them have been built upon by their respective owners. Long after the date of the original survey and plan, a street to the north of the range of 23 lots, now called *Anderson* street, was laid out by the trustees under the will of the Hon. *W. D. Powell*, upon an open and unenclosed space, designated as *Caer Howell Place* upon the plan of 1831, lying immediately to the north of the northerly side line of the last lot, No. 23; and to the north of *Anderson* street another range of lots was laid out, and to the north of this again another street, called *Caer Howell* street. These two streets, *Caer Howell* street and *Anderson* street, are described, upon the plan made by Mr. *Howard* to show this later survey, as running at right angles with *Simcoe* and *Dummer* streets. The land held under a title to lot 23 is enclosed and occupied up to the south line of *Anderson* street, and it now appears, by actual measurement on the ground, that from the north

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side of *Queen* street to the south line of *Anderson* street, or the north line of lot 23, the distance is 1,509 feet 3 inches instead of 1,500 feet, as it would be if the side lines of the 23 lots and the lines of the lane and the depth of the lots on *Queen* street, as shown by the plan of 1831, had been strictly adhered to. No surveyor's stakes or monuments of the original survey have been found, and there is no evidence of any kind to show that the lines of the lots were ascertained at the time of the original survey and marked upon the ground. Upon this state of facts, I agree in the conclusion come to by the Court of Appeal, that it is now impossible to ascertain, with the exactitude requisite to determine the present controversy, what was the side line between lots 8 and 9, according to the description in the deeds referring to the original plan.

When lands are described, as in the present instance, by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then, the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question of law by the judge, and not as a question of fact by the jury. In construing the description contained in the deed, in cases where land is conveyed by a private owner, and where no statutory regulations apply, but the deed has to be interpreted according to common law rules of construction, extrinsic evidence of monuments and actual boundary marks found upon the ground, but not referred to in the deed, is inadmissible to control the deed, but, if reference is made by the deed to such monuments

and boundaries, they govern, although they may call for courses, distances, or computed contents which do not agree with those stated in the deed.

If we apply these well known principles of construction in the present case, it is apparent that the boundary now in question, between lots 8 and 9, would be a line drawn from a point on the west side of *Simcoe* street, at a distance of 600 feet north of the north line of *Queen* street, according to the result obtained by such a measurement in the state in which the ground to be measured was at the time or immediately after the plan of 1831 was made. It is, however, obvious, that such a measurement, now taken along the level planked side walk on the west side of *Simcoe* street, would not correspond (unless it did so accidentally) with a like measurement made when the plan and survey were made in 1831, at a time when the land was still in its natural state, probably not unreclaimed from the original forest, and long before the street or sidewalk had been levelled, graded and planked, as it is at present. It is impossible, therefore, now to ascertain this division line between lots 8 and 9, in the manner prescribed by the description in the deeds, with sufficient exactitude to determine the question in dispute, unless we can find some evidence of what the result of such a measurement would have been before the street was made and the sidewalk levelled.

No sufficient direct evidence of this kind has been produced. It is said, however, that it is impossible to suppose that the different purchasers of lots took possession at random, without having the boundaries of their lots properly defined, according to the plan, and that we must presume, accordingly, that the existing fences and enclosures show the true original boundaries of the lots.

Whatever force this argument might have in a ques-

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tion between the owners of adjoining lots, which were originally, and before the sidewalk was levelled, acquired and enclosed by different purchasers, I cannot see that it has any application in the present case. These lots 7, 8 and 9 were conveyed by *William Dummer Powell*, the grantee of the Crown in 1833, to *Caroline Jarvis*, by her in 1855 to *Mathew C. Cameron*, and by the latter, in April, 1856, to *W. H. Pim*, from whose devisees the respondent purchased and took a conveyance of lots 7 and 8, in 1869. Lot 9 was conveyed by the devisees of *Pim* to *Priestman*, in 1873, and by *Priestman* to Dr. *Temple* in 1874. Dean *Grassett* purchased from Dr. *Temple*, and obtained a conveyance in 1877. It thus appears that these lots 8 and 9, the boundary line between which is now in question, were always held by the same owner, from the date of the original grant by the Crown to *William Dummer Powell*, long before 1831, until the ownership was first severed by the conveyance to the respondent in 1869. The three lots, therefore, formed one piece of land, having a frontage of 180 feet or thereabouts on *Simcoe* street, with a depth of 120 feet. The ownership and possession of lots 8 and 9 having thus been consolidated in one hand and the land held under the same title, I cannot regard any interior division by enclosures made or fences erected during the continuance of such a state of things as evidence of boundaries between the different lots. Such fences are rather to be presumed to have been put up in order to subserve the convenience of the common owner, than with the view of indicating land marks.

The exterior fences of the piece of land owned by *Pim* and formed by the three lots 7, 8 and 9, have no bearing on the question, since it is shown that a measurement between the fence forming the southern limit of respondent's lot 7 and the fence between lots 9 and 10,

forming the boundary line between lots 9 and 10, gives the distance of 181 feet and ½ an inch, being 1 foot ½ inch more than the full width of the lots, in the present state of the land. The existing fences then do not in any way furnish evidence of the fact sought for, where was the original line between these lots called for by the deed, namely, a line drawn westward from a point distant 600 feet from *Queen* street, according to a measurement taken before the level of the ground was altered by street making or other improvements.

Had there been any evidence of the original boundaries as ascertained at the time of the survey, shown either by a discovery of the stakes or by the testimony of witnesses who had seen such monuments and were able to fix their exact locality, it would have been good evidence, not to alter or control the description in the deed, but as circumstances tending to show what was the state of things at the time to which the plan refers and which no longer exists. No such evidence, however, has been produced. I therefore come to the conclusion that it is now impossible to ascertain with the minute degree of accuracy required to determine this dispute, as to four inches of land, where the exact boundary line prescribed by the deed is to be drawn. I can very well answer the question, what is the boundary between these lots? That is a matter of legal construction of the deed and is very plainly shown by the plan to be a line drawn at 600 feet from *Queen* street, but when I proceed to inquire where is this line now, I can only say, having regard to the changes made on the surface of the land and to the entire absence of any evidence identifying the line as it was originally, that it is now and was, in 1875, when Dr. *Temple* began to build his house, utterly impossible for any one to tell. Then the difficulty cannot be met, as is suggested in the appellant's factum, by saying that the line intended by the plan was what

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is there called a "net line," which I take to mean a perfectly level line and, therefore, one the measurement of which would, from the beginning, have corresponded with a line along the level sidewalk. What the deeds and plan call for is an actual measurement of the land itself as it was in 1831, which such a mode of measurement would not be. Again, it could not be said that we are to presume that a measurement of 600 feet at the present time will give the same result as in 1831, in the face of the facts that the levelling of the land for street and other purposes would necessarily have the effect to bring the side lines further to the south than they were when the lots were first laid out.

I also agree with the Court of Appeal in their determination that the method of proceeding adopted by Mr. *Passmore*, at a survey made for the respondent in 1877, to ascertain the boundary, was an erroneous one. The course adopted by Mr. *Passmore* is thus described by him in the report of his survey:

> I measured the total distance from *Queen* street to *Caer Howell* street, taking the two surveys, viz.: the survey made by Mr. *Chewett*, and the survey made by Mr. *Howard*, as one continuous survey, and finding a large surplus over and above the aggregate width of all the lots, as shown on the plans, I divided such surplus equally between the lots, as required by section 33 of the Survey Act before mentioned, and having by this method of procedure ascertained the front limit of lots 8 and 9 on the west side of *William* street, I ran the division line from thence westerly between the said lots, parallel to the line of *Queen* street, with the result shown as the plan now in the possession of Mr. *Carter*.

The objections to this are: 1st. That it is an entire departure from the terms of the description in the deed under which both parties claim title. The streets and land laid out by Mr. *Howard* many years after Mr. *Chewett's* survey of 1831, could on no principle be included, even if the statute which Mr. *Passmore* refers to had applied. *Caer Howell* street was not the northern

boundary of this range of 23 lots, shown in Mr. *Chewett's* plan, nor was *Anderson* street either. No northern boundary of any description was shown by that plan, and the only mode of ascertaining the location of the 23 lots was by admeasurement from *Queen* street.

Further, as Mr. Justice *Patterson* points out, there is no ground for saying that the statute applies to any cases except to those of surveys of lands included in grants by the Crown made before there had been any government survey.

The Statute of Limitations can have no application. The plaintiff's lots, as well as those belonging to the defendant, were all owned by *Pim* up to 1860, when, on his conveyance to the defendant, the ownership of the three lots was for the first time severed, and Dr. *Temple* took possession of lot 9 and began to build in the spring of 1875. It would, therefore, seem that, if no conventional line had been adopted, the only mode of ascertaining the division line open to the parties would have been by a resort to the jurisdiction of a Court of Equity to settle boundaries.

The judgment of the learned Vice-Chancellor before whom the cause was originally heard, and who made the decree which the Court of Appeal has reversed, proceeded upon the doctrine of equitable estoppel. When Dr. *Temple* was about proceeding to build on the lot 9 in the spring of 1875, being desirous of ascertaining the boundaries of his land he employed Messrs. *Wadsworth & Brown*, surveyors, to make a survey for that purpose. Mr. *Brown* accordingly went to the land and there found an old fence which was, as he says, in his evidence "standing part of the way through from *Dummer* street "towards *William* street,"—this fence as it then was, did not run through to *Simcoe* street, but stopped at a a distance of some 70 feet from *Simcoe* street, where it was joined by a sloping fence to the north-west corner

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of the respondent's house on lot 8. At the lot Mr. *Brown* saw Mr. *Carter*, the respondent, and what then took place is thus stated by Mr. *Brown* on his examination as witness at the trial:

Q. Did Mr. *Carter* give any information as to where the post was? A. Yes; he pointed out the old fence above him on *William* street, that that was the north boundary of his lot, that he considered the north boundary of his lot.

Q. Did you make your line agree with that? A. I produced the line of the fence and I found it agreed with that fence post very well, and I adopted that and made a mark there, and Mr. *Carter* was present at the time I made the mark, and I asked him if he was satisfied with it as I made it at present, and he said he was.

Q. Did he see you as you ran the line across? A. Yes, but not all the time; he saw the line I was going to adopt.

Q. Did you picket the line across then? A. No.

Q. How did you indicate the point on *Dummer* street? A. The old fence was standing part of the way through from *Dummer* street towards *William* street.

Q. But it did not go all the way through? A. No.

Q. *William* street is the street we speak of as *Simcoe* street? A. Yes.

Q. How was this fence, in a straight line or zigzag? A. It was bent over.

Q. Did you get the correct starting point on *Dummer* street? A. I got the centre as near as I could.

Q. And you drew a line from that to the place already indicated on *Simcoe* street as being the correct boundary there? A. Yes.

Q. He saw you make the mark on *Simcoe* street, and said he was satisfied? A. Yes.

Q. Were you there after the building of Dr. *Temple* was there? A. Yes.

Q. Will you say whether he had crossed that line you drew? A. He had not.

Q. And no part of the building was upon Mr. *Carter's* ground if that is the correct line between them? No.

Q. Had the dispute at the time you were there, arisen between Mr. *Carter* and Dr. *Temple* about this line, at the second time you were there? A. Yes.

Did you see Mr. *Carter* there? No; I did not.

The witness, though rigorously cross-examined, adheres throughout to this statement.

Further, the statements of the witnesses are, in my opinion, entirely confirmed by the respondent himself in the 3rd paragraph of his answer, when he says:—

In answer to the fourth paragraph of the said Bill, I say that before the survey therein referred to was made, I told the gentleman who was making the same, that a fence which was then standing, and which ran east and west from a point distant above seventy-seven feet eight inches from Simcoe street to the eastern boundary of William street (formerly *Dummer* street) was claimed by me as the true line between the land claimed by me and that which I claim to belong to the plaintiff, and that there was a space of five feet and ten inches between the north wall of my house and the land which I claim to belong to the plaintiff; and I also pointed out to the said surveyor a post which was then, and I believe and charge the fact to be, had been since 1855, standing on the west side of *Simcoe* street, and which I then told the said surveyor, I claimed to be the north-eastern boundary of my land, and I believe and charge the fact to be, that the said surveyor made his survey on the line of such fence, and that on the plan which the said surveyor made, and which was furnished to *Jas. A. Temple*, in the said Bill named, the said space of five feet and ten inches was shown thereon as being the distance between the said wall and the south boundary of the plaintiff's land.

I cannot but regard this as a distinct admission that the line laid down by the surveyor was the correct line of the fence, the boundary which the respondent himself claimed and had pointed out to the surveyor, who relying on the representation of the respondent assumed the fence, so far as it went, to indicate the line of division between the lots and produced it accordingly to *Simcoe* street to the post there, also shown to him by the respondent. The respondent clearly admits that this line was properly produced by Mr. *Brown*, when he says:

I believe and charge the fact to be that the surveyor made his survey on the line of such fence.

From the 4th paragraph of the answer it appears that the point intended to be raised by the answer was, not that the line of the fence was incorrectly carried out to the

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post, but that that line had not been adhered to by Dr. *Temple* in building his wall, and that Dr. *Temple* had for that purpose, with the aid of his builder, laid out a new and different line. The answer does not then impugn the correctness of the line from the fence to the post, as drawn by Messrs. *Wadsworth & Brown*, and the issue raised by it was whether this line had been disregarded by Dr. *Temple* in building his house, and whether he had not in fact carried the wall to the south of the line as determined by the surveyor, and thus committed a deliberate fraud on the respondent. That this was the true issue between the parties, was the view taken by the Vice-Chancellor who finds, after having heard and seen the witnesses, that this line was properly drawn, and was assented to by the respondent as correctly defining the boundary which he claimed, a line produced from the easterly end of the fence to the post, running in the same course and direction as the line of the portion of the fence then standing. Had there been nothing further done beyond running the line, I do not think there would have been an estoppel, or that the respondent could have been, on any acknowledged principle of law, debarred from afterwards shewing either that he was mistaken in supposing that the line of the fence was the proper dividing line between the lots, or that that line had been erroneously produced by the surveyor. It is said by Lord *Hardwicke* in *Penn* v. Lord *Baltimore* (1), that a settlement of boundaries is not an alienation, because if fairly made without collusion, the boundaries so settled are presumed to be true and ancient limits. From this it would appear that an agreement to a conventional line is not within the Statute of Frauds, and as the mutual agreements of the parties to abide by such a line would constitute a valuable consideration, there

(1) 1 Vesey 444.

is no reason why an agreement of this kind should not be carried into effect by a decree in equity, in the nature of a decree for specific performance. But, as according to the ordinary principles which regulate the exercise of the jurisdiction to decree specific performance, mistake is a good ground of defence, I take it that such mistakes as I have indicated, subsequently discovered, either as regards the direction of the line or in properly laying it out upon the ground, would be sufficient to induce the court to withold relief. This seems to be the view taken in the *Massachusetts* case of *Thayer* v. *Bacon* (1), though it is to be remarked that that case was in an action at law. Had the building then not been erected by Dr. *Temple* on the faith of the respondents' assent to the line, and had the respondent been able to show that the surveyor's work had been improperly done, he would probably not have been held bound by his assent to the line as marked out by Mr. *Brown*. This, however, is not now the question to be decided, for matters did not rest there; Dr. *Temple* proceeded to build, and before doing so, the line which had been designated by Mr. *Brown*, and indicated by the stakes he had planted, was further marked out by a chalk line by his builder, Mr. *Crozier*, as the line for the foundations of the house, in the presence of the respondent and of Dr. *Temple* and of Mr. *Windeyer*, his architect. What then occurred is thus stated by Mr. *Windeyer* in his evidence:

Q. Were you present when the foundation lines were laid? A. I was.

Q. Who were present at the same time? A. I believe Mr. *Carter*, Dr. *Temple*, and Mr. *Grasett*.

Q. Did you see any stakes there? A. I saw the surveyor's stakes.

Q. Just tell us what was done on the morning that the excavations

(1) 3 Allen 363.

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were commenced? A. Before I came up to the ground the surveyor had staked out his lines, and I cast my eye over them to see if they were in accordance with the stakes.

Q. What took place on the ground at *Simcoe* street—what did the builder do? A. He commenced to build.

Q. Did he run any line? A. Yes, by a chalk line.

Q. How did he join the two ends—what were the two ends? A. He brought the line from *Simcoe* street up to the fence.

Q. What point on *Simcoe* street? A. It was a post enclosed by a board.

Q. Was there any mark on it? A. A surveyor's mark.

Q. And what was the other mark at the hind end—another surveyor's mark? A. Yes.

Q. And did they agree with the stakes as they were? A. Yes.

Q. Mr. *Carter* was present? A. Yes.

Q. Did he object to the line? A. No; he did not make, as far as I heard, any objection to the line.

Q. If there had been any objection raised by Mr. *Carter* at that time, would you have heard it? Yes, I think so.

Q. And would you have remembered it? Yes.

Q. You say the excavations were commenced then? A. Yes.

Q. Did you see him turn the earth? A. Yes.

If this evidence is to be relied on, and it is confirmed by that of *Crozier* the builder, and also by Dr. *Temple*, and the judge who heard the case in the court of first instance has found that it is reliable, it establishes that Mr. *Carter*, not only assented to the correctness of the surveyor's line, but also further acquiesced in the adoption of that line as the line to be observed by Dr. *Temple* in building his house; and further, Mr. *Brown*, Mr. *Windeyer* and Mr. *Crozier*, all swear that it was the line actually observed in excavating the foundations and building the walls. The respondent, it is true, denies this. But any direct conflict of testimony between him and the other witness must be considered as finally decided by the finding of the Vice Chancellor, before whom the witnesses were examined, and there is no foundation for the respondent's contention that Dr. *Temple* and his builder

fraudulently, or even erroneously, laid out a different line from that which had been designed by Mr. *Brown*, and built accordingly.

In the short hand writer's notes of the Vice Chancellor's judgment, this finding is most distinctly stated, he says:—

> Now, so far as that is concerned, there is no doubt whatever that Dr. *Temple* put his building up exactly where that line was run—there is no doubt whatever that the builder and Dr. *Temple* did not assume a different or other line from that which the surveyor had laid down, and it is equally clear that that line was then known by the defendant, that he was present when the earth was dug for the foundation, and instead of dissenting from, he assented to that as being the true line. I must come to this conclusion as a question of fact, unless I am to cast aside the evidence of the architect *Windeyer*, and the evidence of *Crozier* the builder, who were present.

The judgment in this court in the case of the *Picton* (1) and the authorities there referred to, especially the case of *Gray* v. *Turnbull* (2) in the House of Lords, which are binding upon us, show that in a case of direct conflict of testimony, such as we have presented here between Mr. *Carter* on the one side, and Dr. *Temple* and his architect and builder on the other, as to what was done on the morning on which the excavations for the foundations of the house were began, the finding of the primary judge is to be regarded as decisive, and should not be overturned in appeal by judges who have not had the advantage, as the judge at the trial had, of seeing the witnesses and observing their demeanor under examination.

The respondent, however, not only acquiesced in the line adopted by the builder in excavating the foundations, but he remained silent and induced Dr. *Temple* to suppose he continued to acquiesce, until the walls of the house were actually built, and were so far completed as to be ready for the roof; never uttering a sin-

(1) 4 Can. S. C. R. 648. (2) L. R. 2 Sc. App. 53.

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gle complaint until upwards of $200 had been expended. It is true that the respondent and Mrs. *Carter* also assert that Mr. *Carter* did give early notice of his objection to the line upon which Dr. *Temple* was building; but this fact depends, like the other, altogether on the testimony of witnesses, and Dr. *Temple* denies ever having heard any of the complaints which Mr. *Carter* speaks of.

Upon the same principle as that already adverted to, the judgment of the Judge who heard the cause must be considered final upon this point also. What the Vice-Chancellor says in his judgment upon this is as follows:

> Then the question is as to whether there was anything done on the part of the defendant to notify the plaintiff of the position that he was taking; supposing now that there was a mistake. I merely deal with that, though it is not necessary to my mind to the disposition of the case, but to deal with the question as to whether there was any notifying of the plaintiff or of Dr. *Temple* of the fact, that he did not assent to this line. The principal evidence on that point is that of Mr. *Carter*. He says that on one occasion he, out of the window, addressed Dr. *Temple* upon that question. Mrs. *Carter* says she was aware of that being done three times by Mr. *Carter*. Mr. *Carter* forgets that he was present on the occasion of the commencement of the work. There has been a great deal of talk, no doubt, and letter writing and so on, but I do not think that when Mr. *Carter* says:—"I gave you that notice," and when Dr. *Temple* says:—"I never heard one word on the subject from you," and when Mr. *Carter's* memory is shown to be very defective upon the statement of persons entirely disinterested, and upon a point which one would think rested very distinctly in his mind—the matter of where this house was to be located—I cannot see that I would be justified in putting his evidence against the statement by Dr. *Temple*, who says that no such notice was given him, and I find as a fact this affirmatively proved. It is clear that when the notice was given to Dr. *Temple* upon which something was done, it was at a period long subsequent; and as Mr. *Brown* says, the very moment notice was given, he was at once anxious; he at once went to the surveyor and demanded: "Are you correct in this?" And at once Mr. *Brown* went up, and at this time the roof was on the house.
>
> Therefore the first time I can find upon the evidence that any objection was made by the defendant as to the place when the house was put, was when the roof was being put upon it, and when it would be too late for him to make this objection.

The law applicable to this state of facts is clear, the respondent was estopped from setting up another line to the prejudice of Dr. *Temple*. I take the law to be well settled, that if adjoining land owners agree to a dividing line between their respective properties, and one of them, knowing that the other supposes the line so established to be the true line, stands by and allows him on the faith of such supposition to expend money in building upon the premises according to the line assented to, he is estopped from showing that he was mistaken, and from denying that he is bound by the line which he has thus induced the other party to rely upon. I take the law, as laid down in the cases of *Ramsden* v. *Dryson* (1) and *Willmott* v. *Barber* (2), to warrant this proposition as a correct definition of the principle upon which Courts of Equity act in such cases, and according to the *Massachusetts* case of *Thayer* v. *Bacon*, before cited, the same effect may also be attributed to acquiescence under the same circumstances by a court of law, as operating by way of estoppel in *pais*. The salient point of the defence, as presented by the answer, that the line designated by Mr. *Brown* had not been followed by Dr. *Temple*, being conclusively disproved, it seems to me that the defence wholly failed and that it was too late, after the house had been built and the expenditure incurred, to turn round and impeach the correctness of the surveyor's work in running out that line. I do not, however, mean to say that the respondent has succeeded in demonstrating that Mr. *Brown* did not run the line with perfect accuracy. It is, it is true, said in the court below, that the difference in the angles of the line of the fence as run by *Brown* at *Dummer* street and *Simcoe* street shows that this work was incorrectly performed, but before assenting to this as a conclusive

(1) L. R. 1 H. L. 129. (2) 15 Ch. D. 104.

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demonstration of error on the surveyor's part, it ought to be established that the lines of *Dummer* street and *Simcoe* street are exactly parallel, and this has not been done.

Mr. Justice *Patterson* says that he was unable to discover anything warranting the insertion in the decree of the distance of 603 feet 3 inches from *Queen* street, as the location of the post planted by Messrs. *Wadsworth* and *Brown*, to show the line of the fence. This may have been the result of a measurement made after the judgment was pronounced, but before the decree was drawn up; if so, it should have been shown on the face of the decree, but in the absence of any mention in the decree of a reference to the surveyor for this purpose, I cannot assume that it is so. I think that a variation of the decree must be made to meet this objection, which may be by striking out so much of the decree as is contained in the passage beginning with the words "And which said boundary line may be further defined," and ending with the words, "until it strikes the westerly boundary of said lot number 9." Subject to this alteration of the decree, I am of opinion that it ought to be restored as pronounced by the Vice Chancellor, and that the order of the Court of Appeal must be reversed with costs to the appellant in this court as well as in both the courts below.

FOURNIER, J.:

Le Dr. *Temple*, avant de construire la propriété dont l'appelant est actuellement propriétaire et à raison de laquelle s'est élevée la contestation en cette cause, fit constater, par arpenteur, la ligne de division entre sa propriété et celle de son voisin le Dr. *Carter*, intimé. C'est sur cette ligne, tracée et marquée, qu'il fit construire. Les arpenteurs paraissent avoir pris, à la suggestion du Dr *Temple*, toutes les précautions pour

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s'assurer de l'exactitude de cette ligne. Ils acceptèrent, comme base de leurs opérations, un point de départ que l'intimé déclara être une ligne de convention entre son lot et celui du Dr *Temple*. L'opération faite comme il l'avait indiquée, il s'en déclara satisfait. Connaissant le but que le Dr *Temple* avait en vue en faisant tirer la ligne de division, ayant été présent lorsque le creusement des fondations a été commencé sur cette ligne qu'il avait lui-même indiquée, et donnant son assentiment au lieu de protester contre son adoption,—l'intimé peut-il être maintenant reçu à s'en plaindre ? Non, en loi il est lié par ses déclarations (*estopped*) et par ses actes à cette époque. Son acquiescement peut lui être opposé avec succès. Il devait savoir qu'en laissant ériger ces constructions à sa connaissance et avec son assentiment, il faisait un abandon des prétentions qu'il aurait pu avoir alors. La preuve a établi ces faits. Je les interprète comme l'a fait l'Honorable Vice-Chancelier qui a décidé cette cause en première instance, et pour les raisons qu'il a données je suis d'avis que le présent appel doit être alloué.

HENRY, J.:

I have very little to add to what has been said by my learned brethren who have preceded me in this case. I have, ever since I heard the argument, held the same view that they have expressed. There is no doubt in my mind on the evidence, that that line was agreed upon. The law applicable to conventional lines, I take to be, that if a line is agreed upon and one party acts upon it and erects a house, or an expensive fence, or holds and improves the land, the other party is estopped from saying that the line is not the right one. If, however, nothing is done on the land, and there is no change of position in any way, it is, I take it, within the power of one party or the other to prove that a mistake was

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made in the running of the lines or the adoption of them. In this case, before the house was put up by Dr. *Temple*, the defendant might have been authorized to show that the line was not the correct one.

I have looked at the evidence on the part of the defendant. and I am far from being satisfied that he has shown that. In fact, I have arrived at the conclusion that it has not been shown. Both parties claim by the same title, to a certain extent, but they claim by a fence. Now, we all know that four inches is a slight deviation where a line has to be run several hundred feet, so that the slightest variation of the compass in running from one street to another along these lines would make a variation of several inches. There is evidence that the fence was not straight, and it would depend very much on the position of that fence and the part of it where the line was run from, whether that would be a correct extension of the line that was to form the line of the lots of which that fence was formerly a boundary. Under these circumstances, then, it is very easy to understand that two surveyors running from one street to another, and taking that fence as a guide, might make a difference of three or four inches. I am of the opinion, however, under the circumstances in evidence, that there was a conventional line proved. The one party adopted and acted upon it, and and the other party did not, within sufficient time, indicate his objections to the boundary. We have seen that up to a certain time there was an oblique line made from the fence, which at one end was said to have deflected from the other parts of the line one way or the other, to Mr. *Carter's* house, and then on *Simcoe* street the fence again was brought out in a similar manner. That fence, and the house of Mr. *Carter*, constituted the only line then existing between the portion of land that was occupied by Dr. *Temple* and Mr.

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Carter. The space up to that house in the possession of Dr. *Temple* was shut out from the possession of Mr. *Carter*. But independently of that, the objection that was first made, as I take it, from the evidence of Dr. *Temple*, was not to the line, but to the fact that the putting up of the house would interfere with the lights of Mr. *Carter's* dwelling house. Then negotiations took place and Mr. *Carter* offered to pay one-half the amount that would be necessary to make a change to the north side of Dr. *Temple's* house, to give additional light. That was estimated at $200, one-half of which Mr. *Carter* offered to pay. Dr. *Temple* objected to pay the other half and the work proceeded. The next objection that was taken was that the line was wrong, but that was taken after the house was put up, and was in a position to receive occupants. I think, under the circumstances, that the parties were bound by it. There is no doubt that if there is a question as to the correctness of a line between two properties, and one party sees the other going over what he claims to be the true line, and building beyond it, and does not object, he is estopped from saying afterwards that it is in the wrong place. He is estopped independently of any conventional line agreed upon from saying that the line would take a portion of the building if correctly run. Under all the circumstances of the case, and especially in the absence of satisfactory evidence as to the true line, that agreed upon between the parties ought to be established as the true line. I think, therefore, that the decision of the Vice Chancellor ought to be changed as suggested by my learned brother *Strong*.

TASCHEREAU, J. :—

I am of opinion to allow this appeal with costs.

Appeal allowed with costs.

Solicitors for appellant: *Leith, Kingstone & Armour.*

Solicitors for respondent: *McMichael, Hoskin & Ogden.*

1882 GEORGE S. PAGE *et al*.....APPELLANTS;

*Dec. 4.

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*Mar. 8. JAMES AUSTIN.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—27 & 28 Vic., ch. 23—Shareholder, liability of—Estoppel—Mortgagee of shares.

The *Ontario Wood Pavement Company*, incorporated under 27 & 28 *Vic.*, ch. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from $130,000 to $250,000 before the original capital stock had been paid in. *P. et al*, execution—creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of *sci. fa.* against *A.* as holder of shares not fully paid up in said company. It appeared from an examination of the books that the shares alleged to be held by *A.* were shares of the increased capital and not of that originally authorized.

Held (affirming the judgment of the Court of Appeal) that as there was evidence that the original nominal capital of $130,000 was never paid in, the directors had no power to increase the stock of the company, and as the stock held by *A.* consisted wholly of new unauthorized stock, *P. et al* were not entitled to recover. (*Gwynne*, J., dissenting, on the ground that the objection not having been taken by the defendant or tried, the court, under sec. 22, ch. 38 R.S.O., should put the questions of fact upon which the validity and sufficiency of the objections suggested by the court rested, into a course for trial in due form of law.)

Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock.

Per *Strong* and *Henry*, JJ., (*Gwynne*, J., *contra*), that although *A.*,

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

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a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. (23 of sub-sec. 19, of sec. 5, 27 & 28 *Vic.*, ch. 23).

APPEAL from a judgment of the Court of Appeal (1) for *Ontario*, reversing the judgment of the Court of Common Pleas (2). The facts and pleadings are fully stated in the opinions of the judges on the present appeal.

Mr. *Bethune*, Q.C., for appellants, and Mr. *Robinson*, Q.C., and Mr. *MacLennan*, Q.C., for respondent.

The points relied on and the cases cited are reviewed in the judgments.

RITCHIE, C. J. :

This is an action brought by writ of *scire facias* by the appellants, who are creditors of the *Ontario Wood Pavement Company of Toronto*, a body corporate, to recover against the respondent the amount unpaid by him upon the one hundred and eleven shares held by him in the stock of the company.

The company was incorporated under a statute of the late Province of *Canada*, passed in the 27th and 28th years of Her Majesty's reign, chap. 23. The appellants recovered judgment on the 28th of July, 1874, against the company.

An execution issued by them against the company was returned *nulla bona*, and this action was commenced on the 22nd September, 1875, by *scire facias*.

To the said *scire facias* the respondent pleaded, amongst other defences:

1. For a first plea to the plaintiffs' declaration,

(1) 7 Ont. App. Rep. 1. (2) 30 U. C. C. P. 108.

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that he was not a stockholder of the said "*The Ontario Wood Pavement Company, Toronto*," as alleged.

2nd. And for a second plea, the defendant says that there is not still due and unpaid by him on the capital stock of the said company the sum of $8,880 or thereabouts, or any sum whatever, as alleged.

3. And for a third plea, the defendant says that one *George Arthurs* was the holder of 111 shares of the capital stock of the said company, amounting to the sum of $11,100, and was entered on the books of the said company as the holder thereof, and on the said books the said shares were entered as shares fully paid up; and the defendant says that he purchased the said shares from the said *George Arthurs* in good faith and for valuable consideration, believing the same to be fully paid up shares, and without any notice or knowledge that the same were not, in fact, so fully paid up, and the defendant says that the last mentioned shares are the same shares as in the declaration mentioned.

4. And for a fourth plea, the defendant says that the said writ of *fieri facias* has not been returned "*nulla bona*" by the said sheriff, as alleged.

5. And for a fifth plea, the defendant says that the stock held by him, and referred to in the declaration, was and is so held by him as trustee merely and not otherwise; and other than such stock so held by him as aforesaid, the defendant never had and has not now any shares or stock in the said company.

6. And for a sixth plea, the defendant says that one *George Arthurs*, being indebted to the defendant in a large sum of money, and being the holder of the shares in the declaration mentioned, transferred the same to the defendant as collateral security merely for such indebtedness and not otherwise; and the defendant accepted the said shares, and has always held and now

holds the same as such collateral security merely and not otherwise; and other than the said shares, the defendant never held and has not now any shares or stock in the said company.

Issue was joined upon these defences, and the cause came on to be tried before Mr. Justice *Galt*, at *Toronto*, on the 20th June, 1878.

The appellants proved their judgment, writ of *fi. fa.* and return *nulla bona*, and that shares of the stock in the company stood in the defendant's name as holder in his own right on the books of the company.

The following is the certificate of stock held by defendant:

Organized under 27-28 *Vic.*, ch. 23, statutes of *Canada*.

No. 69 111 shares.

Shares $100 each.

The *Ontario Wood Pavement Company*, of *Toronto*.

This is to certify that James *Austin*, Esq., of *Toronto*, is owner of one hundred and eleven shares in the capital stock of the *Ontario Wood Pavement Co.*, of *Toronto*, transferable only on the books of the company, in person or by attorney, in the presence of the president or secretary, on the surrender of this certificate.

In testimony whereof the said company have hereunto caused their corporate seal to be affixed, and these presents to be signed by the president and secretary.

Toronto, Ont., September 29th, 1871.

H. Lloyd Hime, Secretary. *John Lamb*, Vice-President

{L. S.}

LIMITED.

The learned judge at the trial found that the stock in the books of the company appeared to be paid up, but in reality there was only ten per cent. in money paid on the stock.

He further found that the stock was only transferred to the respondent by way of security for the amount of Mr. *Arthurs*' debt, and that the respondent never intended to incur any responsibility with regard to any unpaid balance that might be due upon the stock.

A verdict was entered for the respondent.

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A rule *nisi* was obtained in the Court of Common Pleas to set aside that verdict, which rule is as follows :

It is ordered that the defendant, upon notice to be given to his attorney or agent, do show cause on the first day of Michaelmas Term next why the verdict for him, obtained in this cause, should not be set aside, and a verdict entered for the plaintiffs for $1,603, and interest from July, 1874, upon the ground that the verdict is contrary to law and evidence, and pursuant to leave reserved and the Law Reform and Administration of Justice Acts, or why a new trial should not be had between the parties, on account of the improper admission of evidence as to an alleged arrangement among the original shareholders as to the stock in question, and as to the terms on which the defendant accepted the stock.

And in the meantime that all proceedings be stayed.

That rule was made absolute on the 27th of June, 1879.

The Court of Common Pleas then gave judgment (1).

Wilson, C. J., states that the questions for decision are :

Firstly. Did the defendant take the shares from *Arthurs* as collateral security for the debt which *Arthurs* owed to him, and continue to hold them as such until the commencement of this action?

Secondly. If he did, should the fact that he was not absolute owner of the stock have appeared in the transfer of such stock to him or in the books of the company?

Thirdly. If it should, then, inasmuch as it did not so appear, had the defendant notice of these shares being in fact unpaid?

And the learned Chief Justice held :—1st. That the defendant took the shares as collateral security; 2nd. That the fact that he was not absolute owner should have appeared on the books of the company; 3rd. As this did not appear, and assuming as found by the judge who tried the case, that the stock had not been paid up, and that the defendant had notice of this fact, he decided that, in accepting an absolute transfer, defendant took upon himself the full responsibility of a shareholder.

Mr. Justice *Galt* concurred in this view, and the rule was made absolute.

(1) 30 U. C. C. P. 108.

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On appeal to the Court of Appeal for the province of *Ontario*, that court avowedly decided the case on a point not taken in the courts below nor in the reasons of appeal. It is thus stated by Mr. Justice *Burton*:

The defendant is sued in this proceeding by a judgment creditor of the *Ontario Wood Pavement Company*, whose execution was returned unsatisfied. It was claimed that the shares which had been transferred to the defendant by a transfer absolute in form, but which was intended to be as security only, were issued as paid-up stock to some of the contractors. It was not made very apparent upon the first argument how this was; but after the argument, Mr. Justice *Cameron* sent for the transfer book, from which it clearly appears that the stock held by the defendant consists wholly of new stock under the by-law of the 6th February, 1871, which recited that the whole of the original capital stock, amounting to $130,000, had been allotted and paid in, and that the company had determined to increase the capital stock to $250,000, and enacted that it should be increased accordingly.

Of the original stock of $130,000, $70,000 was first subscribed, and $7,000, or 10 per cent., paid. The subscription was subsequently made up to the full amount, of which the patentees took 920 shares, and in consideration of the other shareholders paying an additional 10 per cent., they agreed to pay up the balance of their shares.

This was carried out in the manner described in *Scales* v. *Irwin* (1).

In point of fact then the recital was untrue. The original stock was not fully paid up, and the right to pass the by-law increasing the capital stock never arose.

The question is, how far the present defendant, who pleads that he never was a stockholder, is in a position to raise that defence.

The power of the directors to increase the capital stock is derived from sub-sections 16, 17 and 18, of section 5 of the Act 27th and 28th *Victoria*, ch. 23, and arises only after the whole capital stock has been allotted and paid in, but not sooner, so that the by-law itself was in excess of the power of the directors; and it would seem by the 18th sub-sec. that the by-law, even when passed, is not to have any force or effect whatever, until after it has been sanctioned by a two-thirds vote of the shareholders at a meeting duly called, nor until a copy has been filed with the provincial secretary, and notice under his signature inserted in the *Gazette*, and from that time the new stock becomes subject to all the provisions of law in like manner

(1) 34 U. C. Q. B. 545.

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as though the same had formed part of the stock of the company originally subscribed.

The directors have no power to issue these shares, and there is no proof of the steps preliminary to the by-law becoming operative having been taken; and no shares having been legally issued, it is impossible to say that the defendant was a shareholder, unless on the ground of estoppel.

And on this question of estoppel the court held that the defendant was not estopped, by acceptance of the transfer, from questioning the legality of the issue, and on the ground that the plaintiff here is asking for a statutory remedy against a shareholder, and has failed to show that the defendant comes within the statutory definition they thought the case failed, and it became unnecessary to consider the points argued upon the appeal as opened.

Mr. Justice *Patterson* says:

This appeal turns upon a question not raised in the court below, and only suggested after the first argument before us. Had we only to consider the questions dealt with in the court below, my present opinion is that we ought to dismiss the appeal. The consideration which I have given to those questions has not led me to doubt the correctness of the judgment pronounced upon them. I cannot say, however, that I have considered them as maturely as if they were now to govern our decision.

Upon the newly suggested point, viz., the status of the defendant as a shareholder, I do not see how the plaintiff can succeed.

It is plain from the evidence in *Scales* v. *Irwin* (1), which is taken as evidence in this case, that the original nominal capital of $130,000 was never paid. The power to make a by-law for increasing the capital stock was, by sub-sec. 16 of sec. 5 of the statute 27 and 28 *Vic.*, ch. 23, to arise "after the whole capital stock of the company shall have been allotted and paid in, but not sooner."

It also appeared from an examination of the books of the company, and the correctness of the deduction has not been impugned, that the company assumed to increase the capital, notwithstanding that the original capital had not been paid, and that the shares alleged to be held by the defendant are shares of the increased capital, and not of that originally authorized.

Mr. Justice *Cameron* concurred, without fully con-

(1) 34 U.C.Q.R. 545.

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sidering whether defendant might not have shown he was a mortgagee not liable to calls.

The judgment proceeds solely on the ground that the defendant is not a shareholder.

This is arrived at by assuming that it clearly appears that the stock held by defendant consisted wholly of new stock. And assuming that the old stock was not all paid up as plaintiff contends, and as the court below, and I think he, has established, the court held that the directors had no power to issue new shares till the old were all paid up; and also because section 18 requires a by-law increasing the capital stock to be sanctioned by a two-third vote of the shareholders and a copy to be filed with the provincial secretary and notice under his signature inserted in the *Gazette* before such a by-law could have any force or effect.

Had this case rested on the facts as they appeared in the Common Pleas, I should not, as at present advised, be disposed to disturb the judgment of that court. But, I cannot see how the difficulty suggested in the Court of Appeal, on which the judgment of that court is based, can be got over.

It seems to be clear, that Mr. Justice *Cameron* was right in the conclusions he arrived at, that the stock held by *Austin* was new stock issued under the by-law of 6th February, 1871, on the assumption that the old stock or previous issue had been allotted and paid in; if this was not all so allotted, as plaintiff now contends and claims to have established, the issue of the alleged new stock was clearly invalid and bad, and the defendant was not a shareholder in the company. But independent of this, the issue of the so-called "new stock" was also invalid and of no effect, by reason of a non-compliance with the provisions of the Act of Incorporation, without which a by-law such as that of the 6th February, 1871, for increasing the capital, could

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have, by the express terms of the Act, no effect whatever.

I quite agree with the court below, that when a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped, by the mere fact of having received transfers or certificates of stock he supposed to be in existence, from questioning the legality of the issue of such stock and from showing that he never was in law a shareholder liable to the debts of the company, because there never was any legal stock by which he could become a legal shareholder, so that he never filled the character to which alone the statutory remedy was given. The issue is clearly raised by defendant's second plea, in which he alleges "that there is not still due and unpaid by him on the capital of the said company the sum of $8,880, or thereabouts, or any sum whatever, as alleged," and which is necessarily so, if he is not a stockholder in the company.

STRONG, J.:—

This is a proceeding by *scire facias* by the appellants as judgment creditors of the "*Ontario Wood Pavement Co., of Toronto*," a joint stock company incorporated under the statute 27 and 28 *Vic.*, ch. 23, to have execution against the respondent as a shareholder whose stock has not been paid up for the amount of their judgment; a writ of *fieri facias* issued against the company having been returned wholly unsatisfied. The declaration alleges the respondent to be the holder of one hundred and eleven shares of $100 each in the capital stock of the company, upon which there still remains unpaid $8,880 or thereabouts. The respondent pleaded several pleas to the following effect: That he was not a shareholder as alleged. That no

sum whatever remained due and unpaid on his stock. That the shares were entered on the books of the company as paid up. That the respondent purchased the shares in good faith, believing the same to be paid up shares, and without notice that they were not so paid up. That the writ of *fieri facias* against the company had not been returned *nulla bona*. That the respondent held the shares as a trustee only. That one *George Arthurs*, being indebted to the respondent in a large sum of money, and being the holder of the shares in question, transferred the same to the respondent by way of collateral security to secure the debt, and the respondent now holds the shares as collateral security, and not otherwise. Upon these pleas issue was taken. At the trial before *Galt*, J., it was proved that the respondent took a transfer of the shares as collateral security for a debt due to him by *George Arthurs* and held them as a mortgagee, and not absolutely, and other facts as hereinafter stated were established in evidence. The learned judge before whom the cause was tried without a jury found a verdict for the respondent, reserving leave to the appellants to move to enter a verdict for the amount of their judgment, $1,603, and interest, if the court should be of opinion that, under the evidence given, the respondent was liable. A rule *nisi* having been obtained to enter a verdict accordingly, it was made absolute by the Court of Common Pleas. From this decision the respondent appealed to the Court of Appeal for *Ontario*, which court reversed the judgment of the Court of Common Pleas and ordered the rule *nisi* to be discharged. The present appeal is from the latter judgment.

The Court of Common Pleas, whilst holding that the respondent was, in fact, a mere mortgagee of the shares, held he was nevertheless in law liable as an absolute holder of them, inasmuch as it did not appear on the

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books of the company that they had been transferred to him by way of security, and that he was not entitled to avail himself of the provision contained in the latter part of clause 29 of the general provisions for the regulation of companies, prescribed by section 5 of the Act under which the company was incorporated, by which it was enacted that no person holding shares as collateral security should be personally subject to liability for calls, but that the person pledging such shares should be considered as holding the same, and should be liable as a shareholder accordingly. The Court of Appeal expressed no opinion upon the point which formed the *ratio decidendi* of the judgment of the Common Pleas, but founded their judgment upon a ground which does not appear to have been taken in the court below, viz. that there could be no liability upon the shares in question, even assuming the respondent to be an absolute holder of them, for the reason that they were void as having been illegally issued, being shares not in the original and legal capital of the company, but in an addition to the original capital which the directors had purported to make, but which increase or addition not having been made in conformity to the provisions of the statute but in direct violation of its terms, was wholly void.

The facts relating to the formation of the company, the increase of the capital, and the issue and transfer of the shares in question, as they appeared in evidence at the trial of this action, and upon the trial of the cause of *Scales & Irwin* (1), a proceeding similar to this, and the evidence in which was, by consent, read at the trial of the present case, may be summarised as follows: *The Ontario Wood Pavement Co* was incorporated in February, 1871, by letters patent issued under the authority of the statute already referred to (2).

(1) 34 U. C. Q. B. 546. (2) 27 and 28 Vic. c. 23.

The capital of the company was originally fixed at $130,000. Of this amount $70,000 was subscribed before the issuing of the patent, viz.: $35,000 by *William Wallace Perkins* and *Francis B. Fisher*, the owners of the patent for the invention which the company was formed to work, and $35,000, by seven subscribers of $5,000 each. *George Allan Arthurs* and *Humphrey Lloyd Hime*, hereafter to be mentioned as the persons from whom the respondent acquired the shares in respect of which he is sued in this action, were original subscribers each for $5,000. Ten per cent. upon the original subscriptions for shares was paid in in cash previously to the issue of the patent. Subsequently to the issuing of the charter of incorporation, and on the 6th of February, 1871, at a meeting of shareholders of the company held at the *Rossin* House, in *Toronto*, a resolution was passed which stands recorded in the minute book of the company in the following words:

Ordered that the offer of Messrs. *William W. Perkins* and *Francis B. Fisher*, representing the patentee of the Monitor Wood Pavement, to sell to this company the exclusive right to use and enjoy all the benefit of the said invention in the city of *Toronto*, for the sum of thirty-one thousand dollars in cash and nine hundred and twenty shares of the paid up capital stock of this company, be accepted, and the secretary-treasurer is hereby authorized to pay over to the said *W. W. Perkins* and *F. B. Fisher*, for the said assignment of the said patent, the said sum of thirty-one thousand dollars and nine hundred and twenty shares of paid up stock of the said company (such shares to include the three hundred and fifty shares subscribed by the said *W. W. Perkins* and *F. B. Fisher*) are hereby allotted to the said *W. W. Perkins* and *F. B. Fisher*, to be issued to them upon the due execution and registration of an assignment to the company of the said patent right for *Toronto*.

The following by-law for the increase of the capital stock of the company was then introduced and adopted:

No. 13—*A By-law to increase the Capital Stock of the Ontario Wood Pavement Company of Toronto.*

Whereas the whole capital stock of the said company, amounting

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to one hundred and thirty-thousand dollars, has been allotted and paid in; and whereas the said company have determined to increase the capital stock to the amount of two hundred and fifty thousand dollars, in order to the due carrying out of the objects of the company;

It is therefore enacted by the said the *Ontario Wood Pavement Company of Toronto*, that the said capital stock of the said company shall be and is hereby increased from the sum of one hundred and thirty thousand dollars, or thirteen hundred shares of one hundred dollars each, to the sum of two hundred and fifty thousand dollars, or two thousand five hundred shares of one hundred dollars each.

Dated this 6th day of February, A.D., 1871.

Confirmed. (Signed), *JOHN LAMB*, Vice President.
H. LLOYD HIME, Sec.-Treas.

At the same meeting a transaction was agreed to and carried out, which is thus described by Mr. *Hime*, who acted as the secretary of the company, in his evidence already referred to given in the case of *Scales* v. *Irwin*

The seven shareholders, that is all the members of the company but the two holders of the wooden pavement patent right, were to pay in an additional ten per cent. upon their stock, which would be equal to $3,500, and in consideration of that being done, the patentees of the right, who it was said had a large cash claim against the company for the price of the right which they had sold to the company, over and above their paid up stock of $35,000, were to pay up the balance of the unpaid stock of the seven shareholders, equal to $28,000, out of this cash claim. In pursuance of that arrangement each of the seven shareholders gave his cheque for the balance of his unpaid stock. The cheques were handed to Mr. *Hime*, the secretary, at that meeting. The secretary passed in the cheques to the patentees who accepted them and gave receipts to the company, or the shareholders, for the amount of the cheques. The patentees then handed back the cheques to the secretary with the receipts and the secretary delivered back the cheques to the shareholders who gave them.

The original subscribers for shares other than *Perkins* and *Fisher*, and three other persons, Messrs. *McMullin*, *Attwell* and *Smith*, who would appear to have become subscribers for original shares after the charter was obtained, paid in in cash an additional ten per cent. on the nominal value of their shares, making in all 20

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per cent. Each of the original subscribers of 50 shares thus paid in $1,000, but, except in the manner described in the passage from Mr. *Hime's* evidence in *Scales* v. *Irwin*, above extracted, there never was any payment of the residue of the amounts for which the shares were issued. There is no proof that the patent or patents which *Perkins* and *Fisher* were to assign to the company in consideration of their 972 shares, and of the $31,000 in cash, out of which the unpaid balances due upon the shares of the other original subscribers were to be considered as paid, were ever so assigned. The only evidence on this point is an instrument dated the 9th of February, 1871, which has been put in evidence and is printed at p. 25 of the case. It purports to be an agreement between the respondent, *James Austin*, of the first part, and the seven original shareholders, *Perkins* and *Fisher* the patentees, and the three other persons already named, Messrs. *McMullin*, *Smith* and *Attwell*, who, it is to be inferred, became subscribers for shares after the letters patent of incorporation were issued; and after a recital that *Edgar McMullin* had executed a transfer of even date to the said *James Austin* of the exclusive right to make use and vend in and for the whole of the Province of *Ontario*, except the city of *Toronto*, the new and useful improvement in the article now in use for paving streets, called or known as "The Monitor Wooden Sectional Pavement," for which letters patent were granted to the said *Edgar McMullin* on the 6th December, 1870, and that the said *James Austin* had agreed to hold the transfer of the letters-patent upon the trusts thereinafter contained, it was witnessed (amongst other things), that the said *James Austin* did thereby covenant and agree with the parties to the said agreement of the second part, that he, the said *James Austin*, should and would hold and stand possessed of the transfer and assignment of the said

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letters patent and all rights thereunder in trust for the sole benefit of the parties of the second part severally and their executors, administrators or assigns, in equal portions or shares. The company was no party to this instrument, and it contained no trust in favor of the company but an absolute and exclusive trust for the several individual shareholders, and the company consequently acquired no interest or benefit under it. This, for all that appears, may not have been the only patent assigned, and there may have been other assignments of the right to use and vend this patent as regards the city of *Toronto*, but I repeat there is no evidence of any such assignment and nothing to show that the company ever acquired any right to an interest in any patent, or that the agreement to assign the patent to the company referred to in the resolution of the meeting at the *Rossin* House was in any way carried out. At the time of the passing of the by-law of the 6th February, 1871, the whole of the shares in the original capital stock of $130,000 had been allotted, $35,000 of it having been taken up by the seven original shareholders who subscribed before the issue of the letters patent incorporating the company, $92,000 by the patentees, and the residue of the $3,000 it must be presumed had been allotted to the gentlemen who had become shareholders subsequently to the original sub scription. All subsequent issues of shares are, therefore, to be ascribed to the additional capital of $120,000 which this by-law of the 6th February, 1871, assumed to authorize the directors to raise.

Mr. *George Allan. Arthurs* was one of the original shareholders and, from the evidence, he appears to have acquired subsequently to the organization of the company and the adoption of the by-law relating to the increase of its capital, a large number of other shares in addition to those he originally held. Being indebted

to the respondent and being pressed by him for security, Mr. *Arthurs*, on the 29th September, 1871, executed a transfer to the respondent of 83 shares in this company then standing in his name in the books of the company, and also procured Mr. *Atwell* to execute a transfer to the respondent of 28 shares. Both these transfers were absolute on their face, but as well the learned judge before whom the action was tried, as the Court of Common Pleas, have, upon satisfactory and conclusive evidence, determined them to have been intended by way of security only. Neither the transfers nor the certificates for the shares which were delivered to the respondent describe the shares as fully paid up, and the only reasons which the respondent gives for the belief which he states he had, that the shares were paid up shares upon which he could incur no liability, are that they were represented by Mr. *Arthurs*, and also by *Perkins*, one of the persons interested in the patents, to be so paid up, and further, that he had a conversation about the shares with Mr. *Hime*, the secretary of the company, or some one in his office, which the respondent, in his evidence, states as follows:

> I think I spoke to Mr. Hime about it, and he told me it was paid up stock; I think it was in his office; I think I asked if it was paid up stock. I do not know whether it was Mr. *Hime* or the young man in his office that I asked. I never addressed any communication on the subject to the board of directors as a board.

All of these one hundred and eleven shares transferred to the respondent are clearly shown, by the exhibits which had been put in evidence at the trial, and which the Court of Appeal called for, to have been shares, not of the original capital, but of the additional capital which was assumed to be authorized by the by-law of the 6th February, 1871. At the time this by-law was passed, the original capital had, as before stated, all been taken up. It therefore follows that all

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shares originally issued subsequent to that date are *primâ facie* at least, to be presumed to be attributable to the added capital. All the one hundred and eleven shares in respect of which it was sought to make the respondent liable in this action are easily traced to original issues of shares made subsequently to the 6th February, 1871.

For the 83 shares directly transferred to the respondent by *Arthurs*—the latter held and handed over two certificates, Nos. 37 and 38—for 60 shares and 23 shares respectively. The counterfoil of the certificate book shows that these 83 shares were shares which had previously been held under certificate No. 52, which had been cancelled, the following words being printed and written on the counterfoil:—"This certificate is issued "on account of cancelled certificate No. 52." Then the counterfoil of No. 52 shows that certificate to have been for 550 shares, issued by the company as original shares to *H. L. Hime*, on the 20th February, 1871, the same day as that on which the transfer to *Arthur* was made. As regards the other 28 shares, the counterfoils of the same book show that for the shares which were originally issued to *Atwell* on the 20th February, 1871, three certificates Nos. 47, 48 and 49 were given, comprising respectively 9, 10 and 9 shares, and that these shares were transferred directly by *Atwell* to the respondent. Upon presenting the certificates for the 111 shares, of which he had secured a transfer from *Arthurs*, they were, according to the ordinary course of business, cancelled, and a new certificate was issued to the respondent—the counterfoil of the latter showing, as in former cases, that it was issued on account of the previous certificates Nos. 37, 38, 47, 48 and 49. In this way the shares which the respondent now holds under the transfer from *Arthurs* and *Atwell*, are clearly traced and identified as shares which were allotted and issued for the first time subsequent to the

passing of the by-law of the 6th February, 1871, and consequently at a date subsequent to that at which the whole of the original capital of $130,000 had been subscribed for and allotted. The conclusion is, therefore, inevitable, that these were shares in the increased amount of capital which the by-law was intended to authorize as an addition to that provided for at the time of the formation of the company.

The company, having performed some small contracts in the latter part of 1871, stopped their operations and virtually failed. The appellants are judgment creditors of the company, who, having had an "execution on their judgment against the company returned *nulla bona*," have taken this proceeding by *scire facias*, under sub-sec. 27, sec. 5, of the Act, to enforce their judgment against the respondent, as a holder of unpaid shares.

It was contended at the argument that these shares were, in the hands of the respondent, to be considered as paid up shares, and that the case of *McIntyre* v. *McCracken* (1), as decided in this court, was an authority for the respondent in this respect. A consideration, however, of the principle of the decision in that case, will show that it can have no application to the facts before us in the present appeal. *McIntyre* v. *McCracken*, following many English authorities, merely decided that the holder of shares which had been originally issued by the company as paid up in full could not be made liable, either to the company or to the creditors of the company, as for a debt due in respect of the shares, regarding them as having been issued as unpaid shares. In such a case, the directors who issue the shares are no doubt guilty of a breach of trust, and the shareholder who takes them is a participator in such breach of trust, and may be made jointly liable with the directors therefor. But the remedy is the usual equitable

(1) 1 Can. S. C. R. 479.

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remedy in such cases, of a decree for the restoration of the property (the shares) illegally alienated, or of their value in the event of their having passed into the hands of a *bonâ fide* purchaser without notice (1). This remedy can be enforced by a suit in the name of the company and, in the case of a winding up under the English Companies Act, by the official liquidator suing in the name of the company. It cannot, however, be made available by a judgment creditor against a holder of shares improperly issued as paid up, by treating such shares as unpaid, and making the holder thereof liable thereon under the 27th clause of the general provisions of sec. 5 of the Act under which this company was incorporated. That clause is as follows:—

> 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 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.

It is manifest that this provision cannot entitle a creditor of the company to enforce a payment against a holder of shares issued as paid up, though such issue was a breach of the duty of the directors of the company. There can be no liability to payment unless there is a debt to be paid, and there can be no debt if there is no contract to pay. Then, in the case of an agreement to take unpaid shares, and an issue of the shares upon the terms of such agreement, it cannot be said that there was any contract to pay for the shares so issued. To fix the shareholder with a liability in such a case would be to impose upon him a contract he never entered into. The only contract is to take paid up shares, and, as shown by *Mellish*, L.J., in *Carling's* case, no other contract can be presumed

(1) *Carling's* case, 1 Ch. D. 115. Per Mellish, L. J.,

in order to make the shareholder liable. The principle is concisely stated in the following passage extracted from the judgment of *Mellish*, L. J., in the case just referred to, he says:—

> If, therefore, the case depends on a contract between them and the company, the contract must either be approbated or reprobated. If the contract was a contract that they would take paid up shares, we cannot convert that into a contract to take unpaid shares.

This, also, appears to be one of the *rationes decidendi* of the case of *Waterhouse* v. *Jamieson* (1), although that case may also be supported on another ground hereafter to be considered, for Lord *Chelmsford*, in his judgment, rests the decision expressly on the ground that no shareholder can be called upon to do more than perform his contract with the company, and "that you cannot, alter the terms of the agreement under which you seek to fix a person with liability" (2). This was also the the ground of Lord Justice *Turner's* decision in *Currie's* case (3).

There are, no doubt, American authorities which, at first sight, are contradictory to those just mentioned. But on examination it will be found that, so far from controverting these principles, they proceed upon a doctrine which is not applicable in our law. In a very recent case in the Supreme Court of the *United States*, *Scovill* v. *Thayer* (4), this question was under consideration, and Mr. Justice *Woods*, in delivering the judgment of the court, says:—

> No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid on a fair understanding, and that bound the company. In fact, it has been held in recent English cases that not only is the company, but its creditors also, are bound by such a contract.

And he refers to *Carling's* case, *Currie's* case, and

(1) L. R. 2 Sco. App. 229.
(2) Campbell on Sales p. 550.
(3) 32 L. J. Ch. 57; 3 DeG. J. & S. 367.
(4) 15 Otto 154.

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Waterhouse v. *Jamieson*, already cited and then proceeds :—

> But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside ; that when their rights interfere and their claims are to be satisfied, the stockholders can be required to pay their stock in full. The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors.

And the learned judge then refers to cases in support of this last proposition ; and, amongst others, to *Wood* v. *Dummer* (1), which is the leading authority. In the case of *Wood* v. *Dummer*, Mr. Justice *Story*, for the first time, determined that the capital and assets of a corporation were to be considered as a trust fund for the payment of its creditors. It follows, as a necessary consequence of this principle, that any unauthorized application of the capital or assets is a breach of trust as regards the creditors, and is of no avail against them, though authorized by all the shareholders of the corporation, and not merely by the directors or governing body, and that holders of unpaid shares, though issued as paid up, can still be made liable by creditors for the nominal value of the shares. This doctrine has not been adopted by the English courts as part of the general law, and, except in so far as the Companies Acts and the enactments relating to the winding up of insolvent companies have otherwise provided, the property of a corporation or joint stock company is not regarded as a trust fund for the payment of its general creditors—nor have creditors any other or greater rights in respect of such property than every creditor has against the property of an individual debtor (2). This being the state of the law, it is out of the question to say that the American rule, sound and wholesome as it undoubtedly is, can be applied here

(1) 3 Mason 308.

(2) *Mills* vs. *Northern Ry. Co.*, L. R. 5 Ch. 621 ; Taylor on Corporations secs. 658 and 749.

without legislative authority—a legislative provision applying it to all corporations and joint stock companies might perhaps be considered a very beneficial alteration of the law—but without statutory authority it is beyond the power of the courts to adopt and act upon it. To do so would be nothing less than to assume legislative powers. The result is, that whilst in *England*, when a winding-up order has been made, the official liquidator as representing the company can, by a proceeding in equity, make directors, who have, by gratuitously issuing shares as paid up, been guilty of a breach of trust, liable for the value of the shares, and also make the holders of such shares who have taken them directly from the company, or with notice, liable to the same extent as participators in such breach of trust, and thus recover the value of the shares as part of the assets to be applied for the benefit of creditors, and whilst in the *United States* the creditors, as *cestui que* trusts of the assets, have a direct remedy against unpaid shareholders, though they have contracted to take paid up shares and nothing else, in the present state of our law neither of these remedies is attainable, and creditors have neither a direct remedy to compel holders of paid up shares to make good the breach of trust in which they have concurred, nor can they, for the reason already given, make the shareholders liable as upon a contract to the terms of which they never agreed.

If the statute contained anything which would enable the court to say that either expressly or by implication a holder of shares issued as paid up, though in truth unpaid, should be liable, then, undoubtedly, there would be a liability, not founded on contract, but on the statute. The statute does not, however, contain any provision, either expressly or by implication, which can be so construed. The words "not paid up," in the 27th

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sub-sec., must mean and are to be read as implying a debt to the company "not paid up," and it is out of the question to say, upon the reasoning already stated, that there can be any debt to the company when the contract has been to take paid up shares and nothing else.

There is, however, another ground of defence in the present case, for which *Waterhouse* v. *Jamieson*, *McCracken* v. *McIntyre*, and other cases, are invoked as authorities. It is said the respondent took the shares in question for valuable consideration, believing them to be paid up, and without notice to the contrary. *Primâ facie* all purchasers and transferees of shares take them *cum onere*, and are bound by all legal and equitable liabilities attached to them.

When, however, shares improperly issued as paid up have come into the hands of a subsequent transferee as a *bonâ fide* purchaser for value, who has taken them upon the representation of the proper officers of the company made to him directly, either in answer to enquiries or otherwise, or upon the faith of a written representation appearing on the certificates, that the shares are paid up, it is well established that no liability, either at law or in equity, attaches to the shares in the hands of such an innocent purchaser. Numerous cases, both in *England* and the *United States*, warrant the decision of this court in *McCracken* v. *McIntyre*, to the effect just mentioned, and it is manifest that were it not for such a rule the transfer of property in shares would be so affected as greatly to impair its value (1).

The right to the benefit of this protection thus afforded to *bonâ fide* purchasers is, however, liable, as in all other similar cases, to be defeated by notice, pro-

(1) *Steacy* v. *Little Rock*, 3 Dill. 348; *Forman* v. *Bigelow*, 4 Cliff. 508; Morawitz on Corporations, pp. 556, 557.

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vided such notice emanates from a person qualified to give it, and is sufficient to convey to the purchaser before he pays his money a knowledge of facts which constitute a *primâ facie* case of liability. There is, however, no necessity for notice, unless the transferee can show that he took the shares as paid up shares upon the faith of representations to that effect, not representations by his vendor or immediate transferor, but upon representations by the company, made through its properly authorized officers, either in writing on the certificates or otherwise, or verbally in response to enquiries. If the shares are purchased as paid up, in reliance merely upon the assurance of the transferor or of some third person, that they are paid, it is manifestly impossible that such representations can have any effect on the liability of the purchaser to the company or its creditors. In such case, as *primâ facie* in all cases, he takes the transfer subject to all liability which attached to the shares in the hands of the transferor. In order to require notice there must be an equity in favor of the purchaser which notice is required to countervail, and that can only arise from some representations made by the company in the way already indicated.

Then, coming to the application of these principles of law to the facts of the present case, it is at once apparent that they afford no defence to the respondent. Assuming that the shares in question were part of the original capital of $130,000, it cannot be disputed as a fact that these shares were not originally issued as unpaid; that, on the contrary, they were shares, as were all the shares of the original capital, allotted on the understanding, agreement and contract that they were to be paid for in full, and the only pretence for saying that they were subsequently paid up, is the fraudulent and illegal contrivance of a colorable payment which was resorted

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to at the meeting at the *Rossin* House; which, upon its face was, as all the courts below have held, no payment at all, and of which, as I shall have to consider it a little more fully hereafter in connection with another part of the case, I need say no more about at present. This is sufficient to show that the first point adverted to before, as established by *Carling's* case, *McCraken* v. *McIntyre*, and other cases, that the shares having been originally issued as paid up shares there never was any contract, express or implied, to pay for them, is entirely inapplicable here. Equally clear is it that the defence of purchase for valuable consideration without notice, pleaded by the third plea on the record, is not established. That plea may possibly not be good on general demurrer, and it may be said, as issue has been taken on it, and as this is an appeal from a decision on a motion for a new trial, or to enter a verdict, and as there has been no motion for judgment *non obstante*, it is only open to us to enquire if there was, in fact, notice to the respondent, and that it is not open to this court to determine that the facts proved do not show a case entitling the respondent to notice as a condition of his liability. The answer to this, however, appears to be, first, that we must so construe the plea as to read it as setting up a good legal defence, which would require us to add to the allegation that the respondent purchased believing the shares to be paid up shares the implied allegation, "and having good reason for so believing," or some equivalent statement. But it would seem that we are relieved from all difficulty on this head by the 1st section of the statute of 1880, which would authorize us now, if the decision of the appeal depended on it, to make all such amendments of the record as might be necessary to raise the substantial questions of law as well as of fact which are essential to the determination of the real questions in dispute between the parties.

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Then, if the propositions of law which have been before stated are correct, it was incumbent on the respondent, before he was in a position to say that he purchased the shares under such condition as entitled him to hold them free from all liability which had attached to them in the hands of the persons from whom he acquired them unless notice could be proved by the appellants, to show that he purchased on the faith of a representation made by the company or its officers that the shares had been paid up. There is, however, no proof that any such representation was ever made. The respondent clearly was not justified in relying on the statement of Mr. *Arthurs* to that effect, nor was *Perkins*, if he ever in fact told the respondent that the shares were paid up, in a position to make such a representation. He was merely one of the directors, not a managing officer entitled to speak for the company on such a matter, and a statement made by him did not warrant the respondent in neglecting the obvious means of ascertaining the fact by an enquiry of the secretary or other proper officer of the company.

There is nothing to be found in the evidence shewing that any such enquiry was made, except the following passage in the respondent's own evidence. He says:

I think I spoke to Mr. *Hime* about it and he told me it was paid up stock. I think it was in his office I think I asked if it was paid up stock. I do not know whether it was Mr. *Hime* or the young man in his office that I asked. I never addressed any communication on the subject to the board of directors as a board.

This is entirely insufficient to show that any representation was, in fact, made by Mr. *Hime* or by any official of the company. Mr. *Hime* was examined as a witness, but says nothing about any inquiry of this kind by Mr. *Austin*. There is, therefore, an entire absence of evidence to show that Mr. *Austin*, the respondent, when he took the transfer, had any just grounds for believing the stock to have been paid up. He must,

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therefore, be considered, so far as he is to be treated as an absolute transferee of valid shares, as having taken the transfer subject to the same liabilities the shares were subject to in the hands of *Arthurs*, and it was not requisite to prove notice to him in order to fix him with liability.

In the case of *Waterhouse* v. *Jamieson*, it will be found that the certificates for the shares transferred expressly stated that they were paid up, and in every case, when notice to the transferee has been considered requisite, there was either this fact, or a representation to the same effect, shown to have been made by some authorized officer of the company.

If the shares transferred to Mr. *Austin* have been successfully identified as shares not of the original capital of $130,000, but of the additional $120,000, by which the stock was pretended to be increased by the by-law of the 6th February, 1871, passed at the *Rossin* House meeting, there is really no shadow of a pretence for saying that they were paid up. As regards the shares in the original $130,000 stock, it is true that there was a simulation of payment by the transaction relating to the transfer of the patents, and the alleged assumption of the liability for the debts of the original subscribers by the patentees over and above the 20 per cent. actually paid in cash. But as regards the added amount of $120,000 it is not shown that there was even a resolution of the shareholders, or even of the directors—ineffectual though they would both have been—that the shares were to be considered as paid up. Nothing is said as to it except the statement of Mr. *Hime* that all the shares were entered as paid up in the books of the company, which have so mysteriously disappeared. The evidence of *Perkins* as well as that of Mr. *Hime* himself, shows that these shares were not paid up in cash. There is nothing to show that the shareholders, as a body, or

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the directors, ever authorized such an entry, and we must, in the absence of the books, regard it as extremely improbable that any such entry was ever made, or come to the conclusion that if it was made it was false and fraudulent. These considerations, coupled with the fact that the shares are most satisfactorily traced back and ascertained to form part of the pretended additional stock under the authority of the by-law, make the presumption inevitable that no representation was ever made to Mr. *Austin*, by any one having authority from the company to make it, that the shares he was about taking a transfer of were actually paid up.

This disposes conclusively of the points which were made at the argument, based on the authority of *Carling's* case and *McCracken* v. *McIntyre*, and of the propositions that the shares were either issued as paid up, or were, in fact, paid up subsequently to their issue, as well as of the argument founded on the insufficient proof of notice.

There remains to be considered the two questions which were discussed in the courts below; the legal consequences of the transfer having been by way of mortgage or security merely—which was alone argued and adjudicated upon in the Court of Common Pleas—and the question of the respondent's liability in case it appears as a fact that the shares were part of the added capital provided for by the by-laws, this latter being the only point decided by the Court of Appeal.

The learned judge before whom the cause was tried found that the "transfer was made to Mr. *Austin* as security for Mr. *Arthurs*' debt to him," and this finding was confirmed by the Court of Common Pleas. The evidence, that of the respondent himself and of Mr. *Leys*, who acted as the solictor of Mr. *Arthurs*, was amply sufficient to warrant these findings.

The fact being then established that the respondent

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was a mere mortgagee of the shares and not an absolute holder, and the statute (sub-sec. 29, sec. 5), containing the express enactment—

> That no person holding such stock as collateral security shall be personally subject to such liability, but the person holding such stock shall be considered as holding the same and shall be subject to liability accordingly—

the question arises whether the respondent has, by taking a transfer absolute in form, though intended to operate as a security merely, and by causing it to be entered in the books of the company as an absolute transfer, incurred liabilities to the company and its creditors which the statute in the provision just cited expressly declares he shall not be subject to as a mortgagee merely. The Court of Common Pleas determined this point against the respondent, and held that, as he had caused this transfer to be entered on the books as an absolute transfer, he must be held to be an absolute holder of the shares, and that it was not open to him to show, in answer to the action of the appellants, that he was but a holder of it for the purposes of collateral security. A careful consideration of the statute has led me to form a contrary opinion, for the following reasons. The statute contains nothing expressly requiring that the entry or registry in the books of the company should show the nature of the transaction to be a mortgage or pledge in order that the mortgagee or pledgee should be able to entitle himself to the protection accorded by the 29th clause of sub-sec. 19 of sec. 5. If, therefore, we are to hold, as the Court of Common Pleas has done, that the respondent was bound to see that his transfer was registered as a mortgage, and that by not having done so he has lost the right to avail himself of the exemption from liability conferred on mortgagees by the 29th clause, it can only be on the principle that such registration is required by implication, or because the respondent is

estopped from showing the facts as they really were. To warrant us in adding a clause to the statute by implication, something more than mere inconvenience must be shown. It must appear that such proposed addition is a necessary incident or a logical consequence of the express enactments of the statute, but nothing of the kind is established here. It is said that the transfer must be taken to be an absolute transfer unless it is registered in the books of the company as a mortgage only, for the reason that the right to vote would appear by the books to be in the transferee, and not, as the statute says it shall be, in the mortgagor. This, however, is merely to suggest an inconvenience. The statute does not say that the entries of transfers on the books of the company shall be conclusive as to the ownership of shares, for the purpose of determining the right to vote. Therefore, to say that a mortgagor or pledgor is to be excluded from voting because the transfer to the mortgagee or pledgee is registered as an absolute title, is to assume the very question now in dispute, which is, whether the mortgage character of the transfer may be shown by parol evidence, although it is absolute in form, and has been registered as such. In the case of the right of a registered holder of shares to vote being challenged on the ground that he is a mere mortgagee, the right, as in many other cases to be easily supposed, must, for the reasons to be presently given, depend upon actual facts *aliunde* the entry in the company's books.

The 23rd clause of sub-section 19, however, seems to be decisive in favor of the respondent. It enacts that :

> Such books shall be *primâ facie* evidence of all facts properly purported to be thereby stated in any suit or proceeding against the company or against any shareholder.

The statute itself, therefore, contains an enactment which destroys the argument that the entry or registry

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as an absolute transfer is to be conclusive and binding on the transferee ; for in saying that the books are to be *primâ facie* evidence only, it necessarily implies that they may be controverted or explained by other proof. It is therefore impossible, in the face of this express declaration that the books are to be *primâ facie* evidence, to say that they are to be conclusive evidence.

The whole argument, which appears to me to be fatal to the appellants' contention, may be resumed thus: The respondent's liability depends upon whether he was an absolute holder of the shares, or a mortgagee merely. If there was nothing in the statute as to the effect of the books as evidence, and apart from the question of estoppel, to be considered hereafter, that question would have to be determined like every other question of mortgage or no mortgage, by the proof of facts according to the general rules of evidence, and in the circumstances of the present case, by the parol testimony of witnesses. The statute, however, does make an exception to the general rules of evidence, by declaring that the books shall be evidence of all facts purporting to be thereby stated in any suit or proceeding against any shareholder, but only to a limited extent ; that is to say, they shall be *primâ facie* evidence, which expression *ex vi termini* necessarily implies that a fact established by them may be rebutted. Let us suppose that the converse case had arisen and that instead of being, as it is in the present case, the mortgagee whom the creditor seeks to make liable, it was *Arthurs*, the mortgagor, could it for be a moment pretended that he was not liable, under the express provision of the statute that the holder of shares who transfers them by way of pledge or mortgage only shall be considered as being still the holder, and shall continue liable in respect of them accordingly, merely by reason of the transfer being absolute in form, and the

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entry or registry being limited to the particulars of the transfer? Surely not. Then, if parol evidence would be admissible to show that *Arthurs* was liable as mortgagor, it is clear that the same kind of evidence must be admissible to prove that the respondent is not liable as mortgagee, the only alternative being one that the statute does not contemplate, save in the single case provided for by clause 21, of a transfer executed but not registered—a double liability to creditors on the part of both mortgagor and mortgagee. It appears to me, therefore, not only that the proper construction of the statute is that which the learned counsel for the respondent have contended for, but that, having regard to the exigencies of business, which frequently make it necessary, in the course of transactions entered into upon sudden emergencies and requiring immediate despatch, that shares shall be transferred by way of security by informal instruments, prepared without professional assistance, it is a more convenient construction than that which would make the intervention of a legal agent indispensable in every case for the due protection of the mortgagee. In the late case of *Burgess* v. *Seligman* (1) the Supreme Court of the *United States* held that parol evidence was admissible to show a transfer of shares, absolute in form to have been intended by way of security merely.

Another and distinct ground for the same conclusion is that, whilst the statute by sec. 5 sub-sec. 29 provides in the terms already mentioned that the mortgagee shall not be liable, it also provides by sec. 5, sub-sec. 25, that the company shall not be bound to see to the execution of any trust, whether express, implied, or constructive in respect of any shares. The just inference from this is that the company are entitled to refuse to register a transfer of shares as a mortgage, as they certainly are

(1) 107 U. S. 20; See also *McMahon* v. *Macey*, 51 N. Y. 155.

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entitled to refuse to register a transfer as being made in trust—for I am of opinion that the word "trust" in this 25th sec is not used in any technical or narrow sense, but generally as embracing all transfers other than those for the behoof of the transferee absolutely. The transfer in the present case was therefore registered in the only form in which the company could have been legally compelled to register it.

The objection that the respondent is estopped by the registry of the transfer as an absolute assignment, seems as little founded as the one already discussed and disposed of. Indeed, the answer already given to the contention based upon the statute, involves a refutation of this one also. The indispensable elements of an estoppel *in pais* are well established to be that there must be a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he is dealing, and the additional fact that the latter shall have so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it. It may be conceded that if it had been shown that the respondent had actually represented himself to be an absolute holder of the shares in question, and the appellants, creditors of the company, had brought their action relying on the truth of that assertion, the respondent would have been concluded from contradicting his representation and from showing the facts as they really were, upon the ground that the bringing the action was such an acting on the representation induced by the conduct of the respondent in making it as to constitute an estoppel (1).

(1) *Finnehan* v. *Canaher* on Estoppel, 47 N. Y. 493; *Hall* v. *White*, 3 C. & P. 136; Bigelow on Estoppel Ed. 3, p. 557.

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But granting that the second ingredient of an estoppel *in pais*, that just adverted to, is sufficiently established, the very foundation upon which such a mode of concluding the rights of parties rests is wanting, for where is to be found the representation or statement of the respondent which must be the basis of the estoppel? The only pretence of which the facts admit for saying that the respondent ever represented himself to be an absolute holder of the shares in question is, that he in effect did so by causing himself to be entered on the books of the company as a transferee of them, without showing by the same entry that the transfer was by way of mortgage merely. But the effect to be given to such an entry or registry is, as already pointed out, expressly declared by the 23rd clause of sub-sec. 19 to be, that it shall be *primâ facie* evidence only against the shareholder, the words *primâ facie* indicating, as already shown, that it is not to be conclusive or binding, but may be contradicted, qualified, or explained by evidence on the part of the shareholder. Consequently, such an entry can have no greater effect than a written representation directly made by the shareholder to the creditor, that he was a transferee of the shares, but reserving to himself the right of showing in what character he held them, and of thus qualifying or explaining the instrument of transfer, could have had, and in the case supposed there could, of course, be no ground for saying that any binding representation had been made. In short, the argument by which it is sought to show that the respondent is concluded by an estoppel is directly met by the clause of the statute already referred to, which expressly warns the creditor not to rely on the entry in the books as a statement intended to be conclusive.

To establish an estoppel, it is indispensable that the appellants should show that a binding representation of

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the character in which the respondent held the shares should be made. The only evidence of such a representation is the entry in the books, and the statute expressly says that such an entry shall be only *primâ facie* evidence, which is equivalent to saying that it shall not have a conclusive or binding effect. Therefore to give it such a conclusive operation would be directly to contravene the statute.

It is not pretended that the plaintiffs became creditors upon the faith of the appellant's name appearing in the shares' account contained on the books, or that they ever inspected the books before permitting the company to incur liabilities to them. Indeed, they had no right to inspect the books until after they became creditors. There is a marked difference in this respect between the provisions of the English Companies Act and the statute, which applies in this case, for by the English Act the shares registers are made public records and are open to public inspection on the payment of a very small fee; but by this statute of 27 and 28 *Vic*, ch. 23, as already noticed, a public inspection is not authorized, and a party must be a creditor before he has a right to examine the share book.

The reasons given in the American cases for holding that the mortgagee—transferee of shares who registers absolutely is liable upon the principle of estoppel as holding himself out as an absolute owner of the shares cannot apply in the present case. This doctrine is apparently derived from the law of partnership, which, although affording an analogy in the case of a joint stock company which is said to be a compound of a partnership and a corporation, can have no application to the case of a corporation whose creditors in certain events are entitled to a statutory subrogation to the rights of the corporation against the shareholders, since the liability of the shareholders de-

pends upon the letter of the statute. But if such a principle was generally applicable to a corporation it could not apply to a company incorporated under this statute in the face of the warning contained in the provision that the books were to be *primâ facie* evidence only; that they were not to be conclusively relied on; and in the present case at all events it could not be said that there was any holding out a representation sufficient to found an estoppel, since the transfer was registered in the only form in which the company was bound to register, and, as it must be assumed, would have consented to register a transfer by way of security.

The consequence is, that neither by the statute nor by the application of the doctrine of estoppel is the respondent precluded from showing, by parol evidence, the fact that he was a mere mortgagee of the shares and as such not liable for further payments, and that fact he has, to the satisfaction of all the courts before which this cause has come, sufficiently established by evidence which could leave no doubt in any judicial mind.

For these reasons I come to the conclusion that if the decision of this appeal depended upon the single question which the Court of Common Pleas considered, I should be compelled, with great respect, to differ from the opinions of the learned judges of that court.

The Court of Appeals, however, decided in the respondent's favor, upon another ground already stated, and I concur with that court, for the reasons which they gave, in holding that the appellants were not entitled to recover. It requires very little in the way of argument to show that the pretended increase of the capital stock of the company from $130,000, the amount at which it was originally fixed by the charter, to $250,000, under the by law of the 6th February, 1871, was wholly illegal and void. The 16th clause of the general provisions which the statute enacts this com-

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pany shall be subject to, and which it requires to be set forth and embodied in the letters patent, is as follows:

The directors of the company, if they see fit at any time after the whole capital stock of the company shall have been allotted and paid in, but not sooner, may make a by-law for increasing the capital stock of the company to any amount which they may consider requisite, in order to the due carrying out of the objects of the company, but no such by law shall have any force or effect whatever, until after it shall have been sanctioned by a vote of not less than two-thirds in amount of all the shareholders, at a general meeting of the company duly called for the purpose of considering such by-law, nor until a copy duly authenticated shall have been filed, as hereinbefore mentioned, with the Provincial Secretary or such other officer as the Governor in Council may direct.

These requirements were beyond all question not complied with. First, it does not appear that the meet- of shareholders at which the by-law was adopted or confirmed, was called for the purpose of considering the by-law. Then it is not shown that a copy was filed with the provincial secretary. But even if these objections could have been surmounted by supplying the defects in the evidence, there would remain the fatal and insurmountable objection that an indispensable condition precedent to the right of the company to increase its capital had not been complied with. The whole of the original capital had not been paid in.

From the statement of the evidence already given, it is apparent that there is no pretence for disputing this fact. The pretended payment of the amounts of the shares which had been allotted at the date of the *Rossin* House meeting, the 6th February, including the 920 shares subscribed for by the patentees, was, as it was found by the learned judge before whom the action was tried, wholly illusory. Had it been found that the patentees actually assigned to the company valuable patents for the price agreed on, and that they had then agreed that their account should be debited with the amounts due in respect of the shares held by the other

subscribers as well as themselves, there might have been some ground for considering whether there had been a *bonâ fide* payment in full or not. But there is not a scintilla of evidence to show that the patents were ever transferred to the company. From the only assignment given in evidence, it appears that the contrary was the fact, for instead of being an assignment to the trustees in trust for the company in its corporate capacity, it was an assignment to the trustees in trust for certain named shareholders of the company. It does not, therefore, appear that any property in the patents ever passed to the company. This being so, it is manifest that the handing of the cheques to the patentees (as they have been called) and by them back to the company, as described in Mr. *Hime's* evidence, was a mere manipulation of pieces of paper in the form of cheques and which were never intended to be used as cheques, and could have had no legal effect whatever. It therefore follows that the entries made in the books showing that the shares were paid up were fraudulent, and if so the officers making the same incurred the penalties enacted by the 24th clause of the 19th general provisions of the charter for making false entries in the books of the company. The by-law purporting to provide for the increase of the capital stock was, therefore, wholly *ultra vires* and void, and there never was any increased capital, and the pretended shares which the compay afterwards assumed to allot, and which are referable to the increased capital, never had any real existence.

Then the Court of Appeal have found that the respondent's shares are attributable to this illegal capital, and a careful examination of the evidence will demonstrate that this conclusion is entirely correct.

It appears very clearly from the exhibits called for by the Court of Appeal, and particularly from the

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counterfoil of the certificate book, that all the 111 shares held by the respondent, and which were transferred to him by *Arthurs*, either directly or procured by him from *Attwell*, were shares which had been originally allotted and issued by the company on the 20th February, 1871. Then it is also shown by the books of the company, which, as already repeatedly shown in discussing another branch of the case, are by force of the statute *primâ facie* evidence in any suit or proceeding against the company or any of its shareholders, that the whole of the original shares amounting to $130,000 had been subscribed and allotted at the time the by-law of the 6th of February was passed, for this fact is recited in the by-law, and the by-law is duly recorded in the minute books of the company. Moreover, Mr. *Hime* in his evidence states the same thing. There being no evidence to controvert this, the conclusion is inevitable that all of the certificates delivered to the respondent were for shares in the void and illegal capital.

It only remains therefore to enquire what must be the legal effect of this state of facts. Upon this point also I entirely concur in the conclusion of the learned judge of the Court of Appeal, for nothing can be clearer that no legal liability can be attached to the mere holding of certificates for void shares—which are nothing more than certificates for shares which do not exist and which never existed.

This is a proposition of law so self-evident that it seems superfluous to cite authority in support of it. I may, however, refer to Lord Justice *Lindley's* work on Partnership (1), where it is laid down that:

> The holders of shares which the company have no power to issue in truth hold nothing at all and are not contributories. The only possible ground for holding them to be contributories would be by applying to them the doctrines by which a person who holds himself

(1) P. 1349 Ed. 4.

out as a partner incurs liabilities as if he were a partner. These doctrines would probably suffice to render an apparent member of an unincorporated insolvent company liable as a contributory in it; but they have little if any bearing on the statutory liability of persons to be made contributories in incorporated companies, in respect of shares which do not exist in point of law.

And that the doctrine of estoppel has no application in such circumstances is apparent from the case of the Bank of *Hindustan* v. *Alison* (1), a case which, it is true, was subsequently found to have been decided on in an erroneous statement of facts, but which has not, so far as I have been able to ascertain, ever been questioned as an authority for the doctrine in support of which it is now referred to. In *Scovil* v. *Thayer* (2), the Supreme Court of the *United States* decided this point in the same way.

For the foregoing reasons I am of opinion that the judgment of the court below must be affirmed and this appeal dismissed with costs.

FOURNIER, J. :—

Il est clair que l'émission des actions dont il est question en cette cause a été illégalement faite. Le pouvoir donné aux directeurs, en vertu de l'acte 27 et 28 *Vict.*, c. 23, d'augmenter le stock d'une compagnie ne peut être exercé, en vertu des sub-sections 16, 17 et 18 de la section 5, qu'après que le capital originaire a été entièrement réparti (*allotted*) et payé. Il est bien établi que tel n'a pas été le cas pour le montant du capital originaire de $130,000. Les actions de *Austin* sont démontrées faire partie de la nouvelle émission du stock, en vertu du *by-law* du 6 Fév. 1871, et sont en conséquence nulles, parce que le *by-law* lui-même est nul comme fait en contravention au statut. *Austin* n'a jamais été de fait légalement actionnaire dans la compagnie. Pour cette raison, je suis d'avis que l'appel doit être renvoyé,

(1) L. R. 6 C. P. 54 and 222. (2) 105 U. S. 143.

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HENRY, J.: —

There are two issues joined on the pleadings in this case to which I turn my attention. In the first place, to ascertain whether under these two issues the plaintiffs in this action have established a right to call upon the defendant to pay the judgment debt set out in their declaration. Having satisfied my mind as to those two issues, I concluded that it was unnecessary to go into any of the subsiduary ones, I therefore did not perhaps sufficiently consider the question of estoppel, but still at the same time I formed the opinion that the doctrine of estoppel was not applicable to the position of the respondent here. He had received shares as paid up shares, and there was no action taken by him which the plaintiffs in this action could say affected their conduct, and therefore one of the principles on which the doctrine of estoppel was set up was wanting; the evidence on one point was altogether absent.

There are two points, however, of importance to be considered, and I so thought on the argument—that was in the first place whether this respondent was the holder in his own right of shares of the company. My learned brethren who have preceded me have decided that he was not, and in that conclusion I entirely concur. The whole of the stock he held was stock issued which subsequently was shown, on the evidence that was given in another case, referred to, and part of the evidence in this case, to have been issued irregularly and illegally, and it is clear that the party holding stock can in such case say to the company: "You had no right to issue that stock, I am not a stock holder," and if he can say that to the company, he can say it to the creditors of the company, and it is a good answer to an action brought by the creditors, for it is only the owner of stock—that is stock legally issued—that can be made answerable. Now in the

case of the Bank of *Hindustan* v. *The Imperial Bank of China* (1), the court allowed interest on money had that been paid by the party who purchased stock from one of the companies, that stock having been illegally issued. The decision of the court was, that he was entitled, not only to get back the money that he had paid for it, but also interest upon that money. I consider, then, that the party here was not answerable to the parties in this action for the stock, but, after the exhaustive judgments that have been read, I will not go into the matters referredto in the judgments which have preceded mine.

As to the second point I may say generally I consider that under the law, the mortgagee of stock is not answerable to the creditors, he is the mere holder of stock undera lien, and is not the owner, and that the owner is not discharged from his liability to pay up the balance of the stock to the company or for the debts due by the company. I think, therefore, that *Arthurs* is the owner of the stock here, with a legal lien upon it by the transfer. The question is, was the evidence here sufficient to establish legally that proposition? I consider that it was. I do not consider that it was necessary that it should have been so entered in the books of the company. As my learned brother *Strong* said, there is *primâ facie* evidence of what they contend, but the mere fact of its being made *primâ facie* evidence shows that it is capable of being rebutted. Here the party has rebutted it by oral testimony. Now, it is well known that a deed absolute on its face may be shown by parol evidence to have been as between the parties only, a mortgage. I consider here, then, that as between *Arthurs* and the respondent, notwithstanding what was entered in the book, and notwithstanding that he became by the issue of a certificate to him subsequently nominally the owner of the stock, it was competent for *Arthurs* at any time

(1) L. R. 6 Eq. 91

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to have said to the respondent, "Return me this stock. Here is the money you advanced me on account of it, and here is the amount for which I gave it to you as security." It was therefore to all intents in law a mortgage. I do not think the intention of the statute was to hold persons in that situation answerable for the debts of the company. That principle is well seen in the legislation in regard to mortgages on ships. There it is declared specially that mortgagees shall not be considered owners for the purpose of debts, or for any other purposes than as the mere holders of security. The same principle that we find in the legislation on this point, I think, is perfectly applicable in cases of joint stock companies. So, to say that if it should become necessary to alter the dealings between *Arthurs* and the respondent, that that should be shown in the books, I do not think is a proposition that is well grounded. It can be shown independent of the books altogether, and no matter what the entries in the books are, the true position between *Arthurs* and the respondent, I consider, can be and has been established by oral evidence. Therefore, I think, in the first place, this party was not the owner of the stock, because it was not good stock. It was stock that was issued illegally for several reasons that have already been pointed out in the judgments in the court below, and in the judgments that have been delivered here to-day, and that I consider would be sufficient to answer the plaintiffs claim, but as mortgagee again I consider he was not answerable. Under all the circumstances, the appeal should be dismissed with costs.

TASCHEREAU, J.—I am of opinion to dismiss this appeal with costs.

GWYNNE, J.:—

I have been unable to bring my mind to the same

conclusion as that arrived at by my learned brothers in this case.

The action is in the nature of *Scire facias quare executionem non*, brought by the plaintiffs as judgment creditors of the *Ontario Wood Pavement Co.* against the defendant as a shareholder in the company, and claiming satisfaction of their judgment out of the monies remaining unpaid upon the shares held by the defendant in the capital stock of the company under the provisions of the Statutes of *Canada*, 27th and 28th *Vic.*, ch. 23, the 27th section of which enacts 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; 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.

To an action alleging the defendant to be a holder of shares in the company upon which a sum still remained unpaid more than sufficient to satisfy a judgment recovered by the plaintiffs, which remained unsatisfied, and that a *fieri facias*, issued to obtain satisfaction of the judgment out of goods and chattels of the company, had been returned *nulla bona*, the defendant pleaded as follows:

1. That he was not a stockholder in the said company as alleged.

2. That there is not still due and unpaid by him on the capital stock in the said company any sum whatever.

3. That one *George Arthurs* was the holder of 111 shares of the capital stock of the said company amounting to the sum of $11,100, and was entered on the books of the said company as the holder thereof, and on the said books the said shares were entered as shares fully paid up, and that the defendant purchased the

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said shares from the said *George Arthurs* in good faith and for valuable consideration, believing the same to be fully paid up shares, and without any notice or knowledge that the same were not so fully paid up.

4. That the said writ of *fieri facias* in the declaration mentioned, has not been returned *nulla bona* as alleged.

5. That the stock held by him and referred to in the declaration was and is held by him as trustee merely and not otherwise, and other than such stock so held by him as trustee, the defendant never had and has not any shares or stock in the said company.

6. That one *George Arthurs* being indebted to the defendant in a large sum of money, and being the holder of the shares in the declaration mentioned, transferred the same to the defendant as collateral security merely for such indebtedness and not otherwise, and the defendant accepted the said shares and has always held and now holds the same as such collateral security merely and not otherwise, and other than the said shares the defendant never held and has not now any shares or stock in the said company.

Issue having been joined upon these pleas, the case came down for trial before Mr. Justice *Galt*, without a jury, under the provisions of the consolidated statutes of Ontario (1). At the trial a Mr. *Hime*, who had been one of the directors, and also secretary of the company, was called as a witness, and the transfer of shares book kept by him as secretary of the company having been produced, it appeared that the shares held by the defendant were shares assigned to him by prior holders. The transfers assigning the shares to the defendant were as follows:

TRANSFER No. 27.

For value received, I, *George A. Arthurs*, of *Toronto*, do hereby assign and transfer to *James Austin*, of *Toronto*, eighty-three shares

(1) Ch. 50 sec. 253.

of capital stock of the *Ontario Wood Pavement Co.*, of *Toronto*, standing in my name in the books of the company.

In testimony whereof I have signed these presents at *Toronto* this twenty-ninth day of September, A.D. 1871.

Witness—*H. Lloyd Hime.* *Geo. A. Arthurs.*

TRANSFER No. 28.

For value received, I, *William J. Attwell*, of *Montreal*, do hereby assign and transfer to *James Austin*, of *Toronto*, twenty-eight shares in capital stock of the *Ontario Wood Pavement Co.*, of *Toronto*, standing in my name in the books of the company.

In testimony whereof I have signed these presents at *Toronto* this twenty-ninth day of September, A.D. 1871.

Witness—*H. Lloyd Hime.* *W. J. Attwell*, per his Attorney. *Geo. A. Arthurs.*

The evidence given by this witness in another case of *Scales* v. *Irwin* (1), was read as if taken in this suit. From that evidence and the evidence given by him in the present suit it is sufficient to say that in substance it was to the effect that Mr. *Arthurs* was an original shareholder in the company. In fact he was one of the original subscribers named in the agreement upon which the letters patent issued. That agreement was signed by him as a subscriber for fifty shares of $100 each in a capital stock of $130,000, and, at the time of the transfer of the 111 shares to the defendant, *Arthurs* appeared in the books of this company to be holder of 163 shares. That, in fact, although the capital stock of $130,000 as originally contemplated had not been paid up in full, nor had more than 10 per cent. thereof been paid, an arrangement was come to by and between the original subscribers, of whom *Arthurs* was one, whereby the original capital stock should appear to be paid in full, although, in fact, no more than 10 per cent. had been paid upon it, in order that the company should pass a by-law, which accordingly they did pass, increasing the capital stock to $250,000.

(1) 34 U. C. Q. B. 545.

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This arrangement, it may be added, was decided in *Scales* v. *Irwin* to have been in substance a fraudulent device to defeat the claims of creditors of the company, like the plaintiffs in this suit, obtaining payment of their just demands against the company. The defendant having been called upon to produce, did produce the certificate issued to him by the company upon the assignment to him by *Arthurs* of the 111 shares, which certificate is as follows:

This is to certify that James *Austin*, Esquire, of *Toronto*, is owner of one hundred and eleven shares in the capital stock of the *Ontario Wood Pavement Co.* of *Toronto*, transferable only on the books of the company in person or by attorney in the presence of the president or secretary on the surrender of this certificate.

In testimony whereof the said company have hereunto caused their corporate seal to be affixed, and these presents to be signed by the president and secretary.

Toronto, Ont., September 29th, 1871.

{L. S.} *H. Lloyd Hime*, Secretary. *John Lamb*, Vice-President.

A Mr. *Perkins* was examined as a witness to show *Arthurs'* connection with the company, and the manner in which, and the extent to which, he became interested therein, and also to show the defendant's knowledge of the condition in which the stock held by *Arthurs* stood when the defendant took an assignment of the one hundred and eleven shares. The witness was himself one of the original promoters of the company, and a subscriber to the agreement upon the strength of which the letters patent issued incorporating the company, to the amount of $18,000 dollars, or 180 shares. He says that *Arthurs* was one of the original promoters of the enterprise of the company, and was a shareholder at the outset. He received about ten or eleven thousand dollars of the stock par value, he subscribed for it, over one hundred shares, the fact is his actual subscription did not exceed ten thousand dollars of the stock par

value, but he had more stock than he subscribed for, and he paid on that subscription not to exceed 10 per cent. in cash, that was all he ever paid in any shape. Again he says:

Mr. *James Austin* was solicited by Mr. *George A. Arthurs* and myself to become one of the parties to the organization of the company, to become one of its directors and stockholders. Mr. *Arthurs* and myself told Mr. *James Austin* repeatedly how the company was to be organized, and how it was organized. I was in the habit of visiting Mr. *Austin's* and Mr. *Arthurs'* houses in *Toronto*, during the winter of 1870 and 1871 and nearly always meeting Mr. *Austin* at Mr. *Arthurs'* house when I was there. Mr. *Arthurs* was Mr. *Austin's* son-in-law.

Again he says:

On several different occasions in the presence of Mr. *Arthurs* I requested Mr. *Austin* to become one of the directors of the company and to invest money in the enterprise. I stated to him that only 10 per cent. of the amount of the subscription would be called for in cash, as that was all any of the subscribers were to pay; that the balance of the subscriptions to stock would be considered paid by the conveyance of the patents to the company. Mr. *Austin* always declined to become one of the shareholders, stating that he had no time to give to it, and that he was engaged in the organization of a banking company at the same time. He asked during these conversations how this stock was to be paid and made all enquiries as to its conditions, and I told him, and Mr. *Arthurs* told him that with the exception of the 10 per cent. in cash, the balance was to be paid by patents—the transfer of patents to the company. Mr. *Austin* did not at that time become a shareholder. The organization of the company was perfected and the stock issued upon the basis I have stated. Mr. *Arthurs* was one of the directors of the company and received the amount of stock subscribed for by him. The 10 per cent. paid in was by arrangement with Mr. *Austin* deposited to the credit of the company in the *Dominion* bank, of which Mr. *Austin* was president, the arrangement was made with Mr. *Austin* for this deposit by Mr. *Arthurs*, Mr. *H. L. Hime* and myself. Mr. *Austin* was told by me and the others were with me that this 10 per cent. so deposited was all the money that was to be paid on account of stock subscriptions. The deposit was placed there to the credit of the *Ontario Wood Pavement Co.*, of *Toronto*. Late in the summer, or early in the fall, I think it was in September, (I am not certain) of the year 1871, Mr.

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Austin came to me and stated that Mr. *Arthurs* was owing him a considerable sum of money, I think $10,000. I am not certain that he did state any sum, and Mr. *Austin* stated that Mr. *Arthurs* wanted him take or had offered him this *Wood Pavement Co's.* stock as a payment or part payment on account of his indebtedness, and asked me what I thought of it, the prospects of the company, and the value of the stock. He asked me how *Arthurs* obtained the stock and if it was fully paid stock. I told him that it was issued as fully paid stock, and that the certificates so stated on their face, that the company had some valuable contracts, or were about getting them. I do not remember whether at that time the contracts had been actually obtained by the company, but they were obtained at about that time. Mr. *Austin* knew at that time whether the contract had been obtained at the time or not, he was perfectly conversant with the operations of the company and its prospects. At this interview, that is at its conclusion, Mr. *Austin* stated to me that he considered the stock a good investment at fifty cents on the dollar, and that he thought he should take the stock from Mr. *Arthurs.*

And being asked:

Did Mr. *Austin* advance any money to Mr. *Arthurs* to help him to make the 10 per cent. payment on his, *Arthurs'*, stock?

The witness answered as follows:

When Mr. *Arthurs* made his last payment on account of the 10 per cent. that he paid on his stock subscription, he handed me a cheque for an amount considerably less than the amount that would have completed his payment, with the request that I would hand it to Mr. *Austin* for deposit in the *Dominion* bank to the credit of the *Wood Pavement Co.*, and to ask Mr. *Austin* to deposit for him Mr. *Arthurs'*, the balance to make up the sum required to be paid. It was necessary that the full amount should be paid that day, in order to answer the requirements of the charter of the company, so much had to be deposited, subsequently Mr. *Austin*, as president of the *Dominion* bank, certified that the amount required by law to be deposited had been deposited within the time required.

The defendant having been called as a witness on his own behalf, the following question was put to him:

Did you know anything about whether this stock was or was not paid up?

To which he replied:

I knew nothing about it, when I took the stock I asked *Perkins* and *Arthurs*, and *Perkins* told me that there was nothing but paid up stock, that it was all paid up.

To the following question:

Mr. *Perkins* in his evidence says that he told you all about the details of the company's affairs, is this correct?

He replies:

I do not think he ever told me anything about it, I had no reason to ask him. He may have talked over a lot of things that I took no interest in. I do not know, I have no recollection of it. He told me that the stock was paid up; whether he had reference to the directors or the shareholders stock, I do not know. That was just before I took this stock. No one told me before I took it that the stock was not fully paid up. I never heard that. If I had been told I would have been a little more particular in having it marked on the thing itself.

And being asked:

Have you not ascertained since this matter has been under discussion that you did arrange to get the 10 per cent. that he (*Arthurs*) paid in to get it from your bank?

He answers:

I know nothing of it, I have heard it stated so in *Perkins's* evidence, but it is not true.

To the question:

Can you swear positively that it is not true?

He answers:

No, I cannot. I have not looked into the bank books to ascertain. Without search among my bank books and papers. I will not swear that I did not, but I believe that I never did. It is a good many years ago. I have still my cheques. I am still president of the *Dominion* bank. I may have given Mr. *Arthurs* a cheque for some money, but for what I do not know. I cannot swear positively that there is no material there to show that I did.

Being asked:

Why did you not search when you saw what *Perkins* stated?

He replied:

I did not think his evidence was reliable. I do not think he is a reliable man. I took this stock only as security, and I thought it was paid up stock. I did not think there was any liability on my part, or I would not have touched it at all.

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And being asked:

Did you think, as a matter of fact, that he (*Arthurs*) had put $10,000 or $11,000 into that concern in money to pay that stock up?

He replies:

I did not think so at that time. I thought the probability was that there was some arrangement between them. I did not know what that arrangement was. Probably that he should be paid something for his services. I had heard that. I thought he had paid some cash on it, but I did not know what he had paid. I did not think he had paid the whole $10,000 or $11,000. I did not know anything about it, and therefore I had no right to think. He might or he might not. I do not know that it was that which made me enquire from *Perkins*. I never saw the books of the company. I think I spoke to Mr. *Hime* about it, and he told me it was paid up stock. I think it was in his office. I do not know whether it was Mr. *Hime* or the young man in his office that I asked. I never addressed any communication to the board of directors as a board.

Being asked:

Will you swear that *Perkins* did not say to you that it was issued as paid up stock, was not that the way of it?

He replied:

He said it was all paid up stock, I could not undertake to remember the very words that *Perkins* used; I will not swear what was the expression he used, but I know that he led me to believe that the stock was paid up. He intended to convey that idea to me I know, because I told him that I was going to take the stock as security. I took the stock because I could get nothing else. I did not think it was worth much, I thought it was worth probably thirty cents on the dollar, at all events I thought it was better to take that than take nothing. There was no arrangement between my son-in-law and me about this stock.

Again he says:

There was no instrument in writing showing the arrangement between Mr. *Arthurs* and myself.

Arthurs' solicitor, through whom the arrangements had been completed, having been asked as a witness by the defendants, said:

Mr. *Arthurs* was indebted to Mr. *Austin*, and wanted to give him security for what he owed him. He had an interest in his father's

estate and some other claims. The proposal was that he should transfer these to Mr. *Austin* as security for what he owed him. The transfer was made. The bargain itself was not put in writing. The transfers of the different properties were put in writing, Mr. *Arthurs* would transfer the stock and interest in his mother's estate; there was no writing showing the transaction except the transfers.. There was no writing to show that it was a security.

Witnesses were called by the defendant to impeach the credibility of the witness *Perkins*, but nothing turns now upon this evidence, for Mr. Justice *Galt*, before whom the case was tried, considered such evidence to be unimportant, as he said it was not upon *Perkins'* evidence he should decide the case.

A document was given in evidence by the plaintiff, dated the 9th February, 1871, and made between the defendant of the first part, *John Lamb*, *James David Edgar*, *John Day Irwin*, *David Galbraith*, *James Sauin McMurray*, *Humphrey Lloyd Hime*, *James Edward Smith*, *George Allan Arthurs*, *Edgar McMullan*, *William Jesse Allswell*, *William Perkins*, and *Francis Burton Fisher*, of the second part, whereby the respondent became trustee of the letters patent for the "new and useful improvement on the art now in use for paving streets called the "monitor wooden sectional pavement," upon the trusts therein declared in favor of the several parties of the second part, the persons then constituting the *Ontario Wood Pavement Co.*, of *Toronto*.

At the close of the trial Mr. Justice *Galt* rendered a judgment in the following words:

I find that by the books of the company the stock appeared to be paid up, but that in reality there was only 10 per cent. in money paid on the stock. I find that the transfer was made to Mr. *Austin* as security for the amount of *Arthurs'* debt to him. I find that the defendant never intended to incur any responsibility with regard to any unpaid balance that might be due upon this stock. This finding and the one before it are subject to the objection taken by Mr. *Bethune*, that parol evidence is not admissible to prove that Mr. *Austin* held it

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merely as security. Therefore I find a verdict for the defendant, but the plaintiff, of course, can move to enter a verdict for the amount of $1,603 and interest from July, 1874, if the court shall be of opinion that under the evidence given Mr. *Austin* is liable.

Upon a rule *nisi* obtained to set aside this verdict for the defendant and to enter a verdict for the plaintiff, pursuant to leave reserved and the Law Reform and Administration of Justice Acts, the Court of Common Pleas, in which court the action was brought, after argument, made the rule absolute whereby it was ordered that the verdict be set aside and a verdict entered for the plaintiffs for $1,603, with interest thereon from the 25th day of July, 1874, the court being of opinion that the defendant was liable to the plaintiffs under the provisions of 27th and 28th *Vic.*, ch. 23, as the transfer to him was absolute and not stated to be by way of security, and as the defend ant had procured to be issued to him a certificate to the effect that he was absolute owner of the stock; and the court held that he did not come within the protection of the final clause of sec. 29 of the Act. The court were also of opinion that upon the evidence the defendant, at the time of the transfer of the shares to him, had actual notice that they were not, in fact, paid up in full Mr. Justice *Galt*, who tried the case and who also gave judgment upon the rule, when pronouncing his judgment, said (1):

> I entered a verdict for the defendant at the trial on the ground that the transfer was made to him as security for the amount of Mr. *Arthurs'* to him, and because he never intended to incur any responsibility with regard to any unpaid balance that might be due upon the stock. The transfer of the stock in question was absolute on its face, and there was nothing on the books of the company to show that Mr. *Arthurs* retained any interest in it. He had, as far as the books of the company were concerned, ceased to be a shareholder, and the stock is in the name of the defendant.

The learned judge might have added, that no instru-

(1) 30 C. P. 119.

ment, or writing of any nature, had ever been signed by either of the parties to the transfer to show that any intention was entertained by either of them at the time of the transfer that the transfer should be anything different from, or have any effect different from, what upon its face it purported to be, and to have—that is to say, to be, and to have the effect of, an absolute unconditional transfer to the defendant as sole owner of the shares in his own right and to his own sole use The learned judge, drawing attention to the clauses of the Act, arrives at the same conclusion as the learned Chief Justice of the court had done, that the defendant, by accepting an absolute transfer of the shares, took upon himself the responsibility of a shareholder.

From this judgment the defendant appealed to the Court of Appeal for *Ontario*, in which court it was contended that the judgment was erroneous for the following reasons: that, as contended upon behalf of the defendant, the stock was, in fact, shown to have been fully paid up; that the mode of payment was a matter of agreement between the company and the shareholder; that it was for the company to say what equivalent they should accept for stock, whether money or money's worth, property, services, &c., and that it was not disproved that in some way or other the stock in question was paid and satisfied to the company; that if, as between the shareholder and the company, the stock is paid up or satisfied, there is no principle upon which it can be questioned by a creditor; that if questionable for want of *bona fides* between the company and the shareholder, yet it is not so against a transferee for value in good faith without notice; that the defendant had no notice that the shares were not fully paid up; that the stock was held by the defendant as security only, and that he is protected by section 29 of the Act; that the judgment complained of pro-

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ceeds upon the assumption that the Act required that the fact that the stock is held as security should be in writing and appear in the company's books; that there is no such requirement in the statute—nor does the law require it; that the intention of the legislature was to make beneficial ownership the condition of liability to creditors; that the restriction adopted by the judgment is unnecessary and productive of inconvenience and injustice, and would interfere with that freedom in the use of property which trade and commerce require.

Now, from the above statement of the matter presented by the defendant himself to the several courts for adjudication, it is obvious that his sole contention at the trial, and on the argument of the rule *nisi* to set aside the verdict then rendered for the defendant, and upon the appeal from the rule absolute of the Court of Common Pleas setting it aside and ordering a verdict to be entered for the plaintiffs, was that the shares transferred to the defendant were shares which were paid up in full and which were acquired by him as such and as collateral security only for a debt due to him by the assignor of the shares, and that under these circumstances he was, by the 29th section of 27 and 28 *Vic.* ch. 23, exempt from liability.

Such a point as that upon which the Court of Appeal for *Ontario* proceeded, while declining to express any judgment upon the point which was submitted to it by the defendant in the case as settled upon his appeal, never had been suggested in any stage of the cause, and the facts, upon the assumption of the establishment of which, by entries in the books of the company unexplained, the judgment of the court is rested, never had been tried in the court below, or found to be existing facts, nor had any question been submitted by the defendant in the action (the now appellant) relating to the point upon which the judgment of the Court of Appeal

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was given. The point, in fact, first suggested itself to one of the learned judges of the Court of Appeal, who, after the argument had taken place upon the case as settled between the parties and the reasons of appeal submitted therewith, sent for the transfer book of the company, from a perusal of which the court arrived at the conclusion, that the shares which the defendant insists he holds in good faith, as fully paid-up shares and as security for a debt due to him, are in reality no shares at all, and that his security for his debt, equally as his responsibility to the plaintiffs, is a delusion. In pronouncing the judgment of the Court of Appeal, Mr. Justice *Burton* shows how the point arose. He says there :—

After the argument Mr. Justice *Cameron* sent for the transfer book from which it clearly appears that the stock held by the defendant consists wholly of new stock, under the by-law of the 6th February, 1871, which recited that the whole of the original capital stock, amounting to $100.000, has been allotted and paid in, and that the company had determined to increase the capital stock to $250,000, and enacted that it should be increased accordingly. Of the original stock of $130,000, $70,000 was first subscribed, and $7,000 or 10 per cent. paid. This subscription was subsequently made up to the full amount of which the patentees took 920 shares, and, in consideration of the other shareholders paying an additional 10 per cent., they agree to pay up the balance of their shares. This was carried out in the manner described in *Scales* v. *Irwin*, reported in 34 U.C.Q.B. 545. In point of fact then the recital was untrue, the original stock was not fully paid up, and the right to pass the by-law to increase the capital stock never arose.

Then at the close of the judgment he says :

The defendant is entitled upon this objection to have the judgment reversed and this appeal allowed, but, as the point upon which we have decided the case was not taken in the court below nor in the reasons of appeal, it should be without costs.

Now, assuming it to have been clearly established, as alleged in this judgment, and in that of Mr. Justice *Patterson*, that the shares transferred to the defendant consisted wholly of new stock, purported to be issued

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under the authority of the by-law of the 6th February, 1871, it does not appear to me to be so clear that the court was justified in giving to the defendant, as against the claim of the plaintiffs, the benefit of an objection never made by him, but suggested by the court itself, while certain matters of fact upon which the validity and sufficiency of the objection must necessarily rest had never been brought into contestation and tried. Assuming that there does appear in the books of the company sufficient to warrant the conclusion at which the court arrived as a conclusion of fact, the utmost which, under the circumstances, I think, the court should have done was under the provisions of the 22nd sec. of ch. 38 of the Revised Statutes of *Ontario* to have put the questions of fact upon which the validity and sufficiency of the objection suggested by the court rested into a course for trial in due form of law, as they never had been tried, and to have thus given to the plaintiffs an opportunity to produce evidence, if they could, for the purpose of establishing that the defendant had such knowledge of the acts of *Arthurs* in the organization of the company, and of his participation in the acts of the members of the company which made the issue of the shares illegal, as should preclude him from setting up the illegality of those acts to deprive himself of the shares for the purpose of defeating the plaintiffs' action. The plaintiffs have, as it apppears to me, just reason to complain that the objection taken by the Court of Appeal upon which the plaintiffs'action has been dismissed never was taken by the defendant or tried, and that they have been deprived of all opportunity of offering evidence of the defendant having had such knowledge of the participation of *Arthurs* in the illegality attending the issue of the shares as should deprive him of all benefit from the objection. The objection to the

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stock issued under authority of the by-law of the 6th February, 1871, whereby the capital stock of the company was increased from $130,000 to $250,000 is, that the increase was made contrary to the provisions of the 16th sec. of 27th and 28th *Vic.*, ch. 23, whereby the directors were authorized to pass a by-law for increasing their capital stock beyond the amount of $130,000 originally authorised when the whole of the original capital should be allotted and paid in, and not sooner. The reason, therefore, for the second issue having been *ultra vires* of the directors is, that the whole of the original capital was not paid in, although it was recited in the by-law that it was, and such recital was untrue. Now the evidence in this case and in *Scales* v. *Irwin*, which was read by agreement in this case, is in my judgment sufficient to establish, as it appeared to the court in that case, that the device whereby it was sought to make it appear that, contrary to the fact, the whole original capital was paid up, was a fraudulent device designed for the express purpose of endeavouring to protect the shareholders in this company from the claims of judgment creditors of the company like the plaintiffs. *Arthurs* was a party to that fraudulent contrivance, and if the plaintiffs' claim were now asserted against him, if he were now the holder of the shares which he transferred to the defendant, I am not prepared to assent to the proposition that he could be heard to set up as a defence to the plaintiffs' claim the nullity of the issue brought about by his own participation with his co-directors in the fraud which caused the nullity of the issue; and if the defendant had notice of the fraud of *Arthurs* and his co-directors, and took the transfer of the shares with knowledge of such fraud, I am not prepared to say that it would be competent for him, any more than it would be for *Arthurs*, to set up and rely upon the fraudulent

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conduct of the latter for the purpose of defeating the plaintiffs' claim. Whether the defendant had or had not notice of the fraudulent design and contrivance of *Arthurs* and his co-directors, is a question which never has been tried, and, in my opinion, it should be tried before the defendant can be relieved from liability to the plaintiffs upon the ground upon which the judgment of the Court of Appeal has proceeded.

Mr. Justice *Burton*, in his judgment above quoted from, says:

> If, in the present case, the defendant had known all about the manner in which the increased stock had been issued, and with that knowledge had accepted the transfer, it might well be that he might be estopped from setting up the want of power in the directors as a defence to an action by the company, or on an application to place him on the list as a contributory on winding up, but nothing of the kind is established here.

But that nothing of the kind is established here may well be attributed to the fact that no such objection as that under consideration was ever made by the defendant, who alone could make it if it could be made at all. The plaintiffs had only to give—as they did give—evidence that the defendant appeared to be a holder of shares in the capital stock of the company, the whole of which was not paid up, and the unpaid amount of which was sufficient to satisfy the plaintiffs' judgment in whole or in part. Having presented such a *primâ facie* case the *onus* lay upon the defendant to make such a defence as he intended to rely upon as displacing such case. Not having made any of the nature of the objection to the plaintiffs' recovery which was taken by the Court of Appeal for *Ontario*, and upon which that court gave their judgment, it is not surprising that matters which would be only applicable for the purpose of displacing such objection do not appear in the evidence which was taken in respect of an wholly different defence, and upon an wholly different

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issue. But without going so far as to say that sufficient does appear to attribute to the defendant knowledge of the fraudulent design of the original shareholders in making arrangement for the distribution of the original capital stock and, for its increase, I think I am justified in saying that there does appear much in the evidence as taken which, unless it should be satisfactorily explained, tends to such a conclusion, and which should be submitted to a proper tribunal for enquiring into the truth of the matter before the defendant should have the benefit of being considered to be, equally as if he had been proved to be, a transferree of the shares without notice of such fraud, upon an issue raising that question. The evidence of Mr. *Perkins* is of a nature, as it appears to me, to require a better answer than has been offered to it. Mr. *Hime* was referred to by *Perkins* as having been present at some or one of the conversations testified to by *Perkins*, as having been had between him and *Arthurs* and the defendant, and if called, as he might have been by the defendant, he could have confuted or confirmed *Perkins* upon the matter in connection with which he had referred to *Hime*; and, if *Perkins* be a credible witness, theextent of the defendant's knowledge of the organization of the company, and of the distribution of the shares and of the number originally agreed to be taken by *Arthurs*, and upon which he paid the 10 per cent. thereon through the defendant, as is said, into the *Dominion* bank, has to be considered before the defendant can be relieved from liability in this action, if knowledge should be brought home to him of facts which would subject *Arthurs* to liability to the plaintiffs if he was the defendant in this action, and still the holder of the shares transferred by him to the defendant. The answers of the defendant to the questions put to him relative to his assistance to *Arthurs* to enable him to pay the 10 per

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cent. on the stock subscribed for by him, and of which he agreed to become the holder are, to my mind, by no means satisfactory.

In the absence of any contention having been raised by the defendant of the nature of that suggested by the Court of Appeal on his behalf as against the plaintiffs' claim, I am of opinion that that court should have given to the plaintiffs, and that they should now have, if they desire it, an opportunity to have an enquiry made and issue joined and tried, as to the knowledge or notice the defendant had, if he had any, of such acts of *Arthurs* in connection with the organization of the company and the distribution of the shares therein, as if he (*Arthurs*) was still the holder of the shares in question and defendant in this action would deprive him of the right to insist that the shares were illegally issued, and that he was not, for that reason, liable to the plaintiffs in respect of them. The liability or non-liability of the defendant, in case he had such knowledge, raises a question which I do not think the record and evidence as they stand warrant the expression of an opinion upon, and as the defendant himself never suggested the defence now relied upon on his behalf, I think he should be ordered to pay all the costs of the former trial and of this appeal; for considering the case upon the basis upon which it was presented by the defendant himself for trial and was tried, and upon which it was argued in the Court of Common Pleas, upon which basis alone it was also presented to the Court of Appeal, I am of opinion that the judgment of the Court of Common Pleas is put upon sound principles and ought to be sustained.

I am of opinion that the 29th section of 27th and 28th *Vic.*, ch. 23, applies only to mortgagees or trustees appearing upon the books of the company so to be, and to cases where shares appear to have been pledged as collateral security, the owner of

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the shares still appearing on the books of the company to be the proprietor thereof, subject to the pledge, and does not apply to the case of shares absolutely transferred upon the books of the company from one person to another, as the unconditional owner thereof, whatever secret understanding there might be between the parties, that the transferee should hold the shares so transferred as a pledge only, and collateral security for a debt. I am of opinion, however, that the proper inference to be drawn from the evidence in this case, is that there was no agreement between *Arthurs* and the defendant, that the latter should hold the shares transferred to him as a pledge only, or as a collateral security for the debt due to him by *Arthurs*, but that the intention of both parties to the transaction was, that the defendant should be, in fact, as upon the books of the company he appeared to be, absolute proprietor of the shares transferred, the transfer of which, as of the interest in lands, transferred in like manner, the defendant took in substitution for the original debt, and as he himself says in his evidence, "because he could get nothing, and that it was better to take what he got than take nothing."

Appeal dismissed with costs.

Solicitors for appellants: *Bethume, Moss, Falconbrigde Hoyles.*

Solicitors for respondent: *Rose, Macdonald, Merritt & Coatsworth.*

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*Dec. 12.
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*April 28.

MARY EMILY JOSEPHINE LAWLOR AND MARY LOUISE AUGUSTINE LAWLOR (PLAINTIFFS)..... } APPELLANTS;

AND

JOHN LAWRENCE LAWLOR (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Estate tail—Mortgage of, in fee simple—Statutory discharge, effect of—R. S. O. ch. 111, *sec.* 9 *and* 67.

Held,—(Reversing the judgment of the Court below, Henry, J. dissenting) that the execution and registration, in accordance with the Revised Statutes of *Ontario*, ch. 111, sec. 67, of a discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail.

APPEAL from a judgment of the Court of Appeal of *Ontario* (1), on appeal to that court from the decree of Vice-Chancellor *Blake*, on a bill filed by the heirs general of *Michael Lawlor*, deceased, other than his eldest son, against his eldest son, for a declaration that the estate tail of *Michael Lawlor* had been barred by the execution by him as tenant in tail of a mortgage in fee simple in pursuance of the *Ontario* Short Forms of Mortgages Act, which mortgage had been paid off by the mortgagor, and discharged by the registration of a certificate under R. S. O. ch. 111, sec. 67.

The case came on by way of motion for decree before his lordship Vice-Chancellor *Blake*, who held that under R. S. O. ch. 100, sec. 9, the estate tail was absolutely barred by the execution of the mortgage.

On appeal, the Court of Appeal held that the giving

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

(1) 6 Ont. App. R. 312.

of the mortgage vested the fee simple in the mortgagee, and that if it had not been redeemed that estate would have remained in him, but (reversing the decision of *Blake*, V.C.,) that the execution and registration of the discharge above referred to operated as a valid and effectual reconveyance to the mortgagor and those claiming under him of the original estate of the mortgagor under R. S. O. ch. 111, sec. 67.

The pleadings are set out at length in the judgments hereinafter given.

Mr. *J. Stewart Tupper* for appellants:

There is no dispute as to the facts, and the sole point for decision is, whether the payment of the mortgage by *Michael Lawlor* in his life-time, upon a day later than the day provided for payment in the mortgage, and the execution by the mortgagees of a statutory certificate of discharge, and the registration of such certificate, had the effect of revesting in *Michael Lawlor* the lands in fee tail or in fee simple.

The appellants submit that *Michael Lawlor* died seized in fee simple of the lands, and that they descended to all his children in fee simple as tenants in common, and not to the eldest son as sole heir of his body: *Re Lawlor* (1); *Leith's* Real Property Statutes (2); *Coote* on Mortgages (3); *Hayes* on Conveyancing (4); *Sugden's* Real Property Statutes (5); *Trust and Loan Co.* v. *Fraser* (6); *Ostrom* v. *Palmer* (7).

R. S. O. ch. 100, sec. 3, enables a tenant in tail to dispose absolutely of the lands entailed for an estate in fee simple. Section 9 provides that a mortgage in fee simple by a tenant in tail is an absolute bar in equity as well as at law against all persons referred

(1) 7 U. C. P. R. 242.
(2) P. 338.
(3) 4th Ed. 330.
(4) 5th Ed. 183, 184, 185.
(5) 2nd Ed. 196, 200.
(6) 18 Grant 19.
(7) 3 Ont. App. R. 61.

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to in section 3 which includes the heir-at-law of the tenant in tail. Section 9 further provides that the execution of a mortgage in fee simple shall have such effect, "notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected." It is also provided by the same section that if the estate created by the mortgage is only an estate *pur autre vie* or lesser estate, then in that case it shall only be a bar so far as may be necessary to give full effect to the mortgage.

The learned judges of the Court of Appeal as well as the learned Vice-Chancellor, agree in the opinion that the land was, by the execution of the mortgage, disentailed, and that the fee simple was in the mortgagees. The judgment of the Court of Appeal is based upon the fact that a statutory certificate of discharge was given by the mortgagees instead of a re-conveyance of the fee simple, which the court admits would have vested it in the mortgagor.

Now the fee simple was in the mortgagees, even after the mortgage money had been paid, and the mortgagor, *Michael Lawlor*, had the right to call for a conveyance of the fee simple. He and his heirs general had the equity to a conveyance of all the estate that was in the mortgagees. His equity of redemption prior to payment was an equity of redemption in him and his heirs general. After the making of the mortgage, there was no right or title left in the original settlor who had created the fee tail, or his heirs, or in those whom he may have indicated in the settlement to be the remainder men, in case the issue in tail should fail. By the creation of the fee simple their interest had been absolutely barred at law and in equity. If the judgment of the Court of Appeal be right, what has become of the fee simple? It was in the mortgagees. They have not reconveyed, it but have carved out of it a lesser estate, and

given it to *Michael Lawlor* and the heirs of his body only. The effect of this would be that upon the failure of direct lineal issue of *Michael Lawlor*, the estate would revert to the mortgagees in fee simple for their own benefit. It is submited that such could not be the intention of the Act. If the statutory form of discharge fell short in law of operating as a conveyance of the fee simple, *Michael Lawlor* nevertheless had the right and equity to have the fee simple re-conveyed, and could have declined to accept the simple discharge prescribed by the statute: *McLennan* v. *McLean* (1). The right is not lost to his heirs general. For the purposes of this suit, it is immaterial that the attempted re-conveyance fell short of what *Michael Lawlor* could demand; just as in the case of no re-conveyance and no certificate of release whatever having been given, the heirs general would be entitled to call for a re-conveyance, and to maintain this suit.

In the case of *Michael Lawlor* dying before redemption, it is submitted that the heirs general would have had the right to redeem, as the estate to be redeemed was a fee simple. If they had after payment by them, taken a statutory certificate of discharge, it is submitted that the effect could not be to give to all of them an estate in fee tail; *a fortiori*, it could not enable the eldest son to step in and say it gave him an estate in fee tail; and yet the statute R. S. O. ch. III, sec. 67, says the registration of such discharge shall be as valid and effectual in law as a release of such mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming, by through or under him or them, of the original estate of the mortgagor. It is evident that a wider meaning must be given to the words, "conveyance of the original estate of the mortgagor," than the interpretation put upon them by the Court of Appeal

(1) 27 Grant 54.

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The intention clearly was that, upon payment of the mortgage and registration of the discharge, all the estate which the mortgagor conveyed to the mortgagee should revest in the mortgagor, and that the words "original estate" will include where necessary any estate that the mortgagor has conferred upon the mortgagee; also, that they will include the estate which, in the present instance, the mortgagor had potentially and virtually in him—viz., a fee simple: 35 *Geo.* III, c. 5; 4 *Will.* IV, c. 20; R. S. O. C. III, sec. 67; *Caledonian Railway Co.* v. *North British Railway Co.* (1).

If it were not so, what would be the effect in the following case? The owner in fee gives his mortgagee a term of ninety-nine years as security for repayment of a loan. The money is paid at the end of ten years. A statutory discharge is given. It cannot be contended that this is "a conveyance of the original estate of the mortgagor," for that would be the conveyance of a fee by the mortgagee who has only a term of years.

Take the case also of one who has only a term of years, and who purports to give a mortgage in fee simple. The mortgagor subsequently acquires the fee simple, and the mortgagee thus also acquires by estoppel the fee. Upon a discharge, it is the fee simple that is conveyed to the mortgagor, and not his *original estate*, which was only a term of years.

Or suppose that Michael Lawlor, after giving the mortgage, had conveyed his equity of redemption in the said lands to A.B., who then redeemed and took a statutory discharge. Could it be contended that such discharge would operate as a conveyance to A.B., not of the fee simple, but of the original estate of Michael Lawlor, which was an estate in fee tail?

Mr. *McIntyre* for respondent:

The respondent's contention on this appeal is two-

(1) 6 App. Cases, 114.

fold, and the establishment of either branch of his case, irrespective of the other, is sufficient to his success.

The first branch is that the former half of R. S. O, sec. 9, ch. 100, does not apply to a mortgage conditioned to be void upon payment, but that such an instrument is within the exceptions enumerated in the latter half of the same section, and, therefore, is only a bar of the estate tail "so far as may be necessary to give full effect to the mortgage."

The usual form of mortgage in *England* contains a proviso for a reconveyance from the mortgagee to the mortgagor upon payment (1). Our Act (R. S. O., ch. 104, schedule B, sec. 2,) provides that upon payment, "these presents and everything in the same contained shall be absolutely null and void."

Now, it is explained by Lord *St. Leonards* (2) that the object of the statute was to put an end to questions of resulting trusts, where the prescribed destination of the estate does not follow the state of the title as existing at the time of the mortgage, and while, therefore, as the lesser of two evils, it is in the general case in the first half of the section provided that the specific intention shall not be the measure of the substantial disposition (as it would be under the established rule in equity,) care is taken in the excepted cases in the latter half to remove from the operation of the statute all dispositions by way of mortgage which do not involve the question of a resulting trust. See also *Hayes* on Conveyancing (3); *Davidson's* Prec. (4).

It is laid down by Mr. *Shelford* in his work on the real property statutes (5), that where a mortgage is intended to be an absolute bar of the entail under the

(1) See Crabb, 4th Ed. ii., 922, and the English text writers passim.

(2) Sugden's R.P. Stats. 199, 200.

(3) 3rd Ed., Vol. ii. 582-3.

(4) 5th Ed. Vol. i, 184-5.

(5) P. 330-1.

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statute the proviso of redemption should not be drawn so as to make the estate of the mortgagee void upon payment, but to direct that he shall re-convey it, (which is the usual form in *England*) to the uses intended.

Again the proviso of redemption in the usual form of copyhold mortgages (1), is that the mortgage shall be void upon payment. A mortgage of copyhold is effected by conditional surrender to be followed by admittance upon default of payment; and it is the opinion of the text-writers that if a legal tenant in tail of copyhold mortgage by conditional surrender which is not followed by admittance, but the money is paid off and the surrender vacated by entry of satisfaction, the estate tail remains unaffected. but that the estate tail would be barred if surrender were followed by admittance (2). Conditional surrender and admittance are corresponding terms and transactions to mortgage under our Act and foreclosure. In other words, our form of mortgage is only a bar of the entail so far as may be necessary to give full effect to it (*i. e.*, in the event of default and foreclosure), and is within the excepted cases enumerated in the latter half of section 9, R. S. O., ch. 100, as to which effect is denied even to an express declaration extending the operation of the charge beyond its immediate purpose, so that the covenant to pay by the mortgagor, his heirs and assigns, which may be urged contra, has no weight or significance.

That payment was made after the day on which it was due is no objection, inasmuch as such payment was made before foreclosure proceedings and was accepted by the mortgagee. *Fisher* on Mortgages (3): "Whether the money be paid or not at the proper time, it is considered sufficient in practice to enter satisfaction on the rolls."

(1) Grabb 4th Ed. ii. 938.
(2) Davidson's Prec. 3rd Ed. ii. 583 note q; Shelford's R. P. Stat. 331.
(3) Vol. ii. S. 1716.

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The second branch of the respondent's contention is, that the registration of the certificate of discharge operated as a re-settlement of the estate to the former uses by virtue of section 67 of the Registry Act (1), which provides that "such certificate so registered shall be as valid and effectual in law as a release of such mortgage and a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming, by, through or under him or them, of the original estate of the mortgagor.

Let us assume for the purpose of argument that we are within the general case provided for by the first half of section 9, R. S. O., ch. 100. Neither the Imperial Act nor our own, although denying effect to an intention of the mortgagor expressed or implied, lays any prohibition of the estate to the former uses which may be effected by the same or another instrument (*Davidson's* Prec.) (2).

Our legislature has declared that the registration of a certificate of discharge shall have that effect *videlicet*, a re-conveyance to the mortgagor, his heirs, etc., or any person lawfully claiming by, through, or under him or them of the original estate of the mortgager. Here is express statutory provision for the re-settlement of the estate to the former uses in the events which have happened, and the parties must be presumed to have acted with a knowledge of the law. *Leith's* Real and Personal Property (3); *Smith's* Real and Personal Property (4).

It is urged by the other side against thus reading the Registry Act, as meaning what it says, that the effect of thus re-settling the estate tail by statute would be to leave the reversion in the mortgagees.

But so would the reversion be left in the mortgagees,

(1) R. S. O., c. 111.
(2) 3rd Ed. s. 2, p. 583.
(3) P. 338.
(4) P. 363.

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in case of a re-settlement to the former uses by deed—which it is indisputable may be done and is done.

RITCHIE, C. J.:—

Michael Lawlor, now deceased, was tenant in fee tail in possession of a certain parcel of land in the City of *Toronto*.

In his lifetime, on the 8th February, 1867, he conveyed by indenture of mortgage to the Freehold Permanent Building Society, their successors and assigns for ever, *inter alia*, the said land, and by the said indenture covenanted that he had a good title in fee simple to the said land, and that he had the right to convey the same to the said society.

On the 6th June, 1870, the said *Lawlor* paid off the mortgage,and a certificate of discharge of the same was registered in the Registry Office of the city of *Toronto* on the same day.

The said *Michael Lawlor* died on the second day of June, A.D. 1874, leaving him surviving the following, his only children, *Arthur René Patrick Lawlor*, *Mary Emily Josephine Lawlor*, *Mary Louise Augustine Lawlor*, and *John Lawrence Lawlor*.

The eldest son, *Arthur René Patrick Lawlor*, made a ease to *Moses Staunton*, bearing date the sixteenth day of October, A.D. 1875, for twenty-one years, of the parcel of land firstly described, at the annual rent of three hundred and five dollars per annum.

Moses Staunton died in the year 1877, after having first made his last will and testament, and appointed the said defendants, *James Staunton* and *Sarah Staunton*, his executors thereunder.

Arthur René Patrick Lawlor died on the fourteenth day of September, A.D. 1880, being then in his ninth year.

The defendant, *John Lawrence Lawlor*, is the eldest

brother of *Arthur René Patrick Lawlor*, and his heir-at-law in respect of any entailed estates, and the said *John Lawrence Lawlor* claims to be entitled to the rents and profits under the said lease.

The plaintiffs are willing to confirm said lease and be parties thereto, but submit that the said lease should be reformed and corrected by the plaintiffs being with the defendant, *John Lawrence Lawlor*, made parties thereto, as to the said land secondly described, as lessors, and declared entitled to a proportionate part of the rent. Until the month of January, A.D. 1881, the fact of said mortgage having been given was unknown to the plaintiffs, and to the guardian of the plaintiffs, who was also the guardian of the said *Arthur René Patrick Lawlor*; and it was also unknown to the said *Moses Staunton*.

The plaintiffs pray that it may be declared that the estate tail of said *Michael Lawlor* in the said secondly described lands by said mortgage became enlarged to an estate in fee simple, and that said *Michael Lawlor* at the time of his death was seized in fee simple of said lands, and that the plaintiffs and defendants, *John Lawrence Lawlor* and the deceased *Arthur René Patrick Lawlor*, were entitled to the same as tenants in common in fee simple.

That the said lease may be reformed, and the plaintiffs and defendant, *John Lawrence Lawlor*, be made parties thereto, as lessors, and that the said lease may be amended in all necessary respects, and the plaintiffs declared entitled to a proportionate part of the rent.

That the plaintiffs may have such further and other relief as may be requisite.

That the plaintiffs may be paid their costs of suit out of said property.

Mr. V. C. *Blake* held that the estate tail of *Michael*

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Lawlor (deceased) in the lands in question, was absolutely barred by his execution of the said mortgage in fee simple, and that his children were entitled to the same as tenants in common.

Long previously to the year 1834, mortgages could be released or discharged on the records of the county by a certificate, the form of which was given by statute, but the effect of such certificate as affecting the title was not declared by statute, so that, notwithstanding such certificate discharging the mortgage, the estate conveyed to the mortgagee, in the absence of a reconveyance, if the condition on which the estate had been conveyed had not been fulfilled, remained in him. To obviate this difficulty and save the necessity of a reconveyance, the 4 *William IV.*, ch. 16 (1834), was passed to deal with the estate conveyed by the mortgagors to the mortgagees and is entitled "An Act concerning the release of Mortgages," and after reciting that

> Whereas it may have happened that by reason of the non-payment of the sum of money, or of the non-performance of the condition mentioned in any mortgage at the time therein limited for payment or for performance of the same, the original estate in law may have become vested in the mortgagee, his heirs or assigns:

(which, be it remarked, could only have been the estate actually conveyed to the mortgagee).

> And whereas after such estate shall so have become vested, the money secured by such mortgage, or the condition therein expressed as a defeasance of the same, may have been paid or performed respectively, and the mortgagee, his executors, administrators or assigns, may have executed a certificate of payment or performance of the condition of such mortgage: And whereas such certificate so given does not in law so operate as a re-conveyance of the original estate of such mortgagor, or as a release or defeasance of such mortgage.
>
> * * * *
>
> It is enacted: That any certificate by any mortgagee, his heirs, administrators or assigns, heretofore given and registered under the provisions of an act passed in the thirty-

fifth year of the reign of His Majesty King *George III*, intituled "An Act for the public registering of deeds, conveyances, wills and other incumbrances which shall be made or may affect any lands, tenements or hereditaments within the province, or which may be hereafter registered under the provisions of this Act, whether the same shall have been given or shall hereafter be given, either before or after the time limited by such mortgage for payment or performance as aforesaid, shall be and the same is hereby declared to be valid and effectual in law as a release of such mortgage, and as a reconveyance of the original estate of the mortgagor therein mentioned: Provided that such certificate, if given after the expiration of the period within which the mortgagor had a right in equity to redeem, shall not have the effect of defeating any title other than a title remaining vested in the mortgagee, or his heirs, executors or administrators.

The registry laws were consolidated and amended by the 9th *Vic.*, chap. 34, in which the provision, as regards such certificates, was in the very words of the 4th *Wm. IV.*, chap. 16. In that same year the 9th *Vic.*, chap. 2, was passed in reference to estates in tail.

The sections of these two acts as affecting the question now under consideration, are as follows:

9th *Vic.*, chap. 34, section 24:

Provided always, and be it enacted: That any certificate of payment or performance of the condition of any mortgage by the mortgagee, his heirs, executors, administrators or assigns heretofore given, and registered under the provisions of the Act herein first above cited and repealed, or which having been given under the provisions of the said Act may be registered under this Act, or which may be hereafter given and registered under the provisions of this Act, whether the same shall have been given or shall hereafter be given either before or after the time limited by such mortgage for payment or performance as aforesaid, shall be and the same is hereby declared to be valid and effectual in law as a release of such mortgage, and as a reconveyance of the original estate of the mortgagor therein mentioned.

* * * * * * * * *

9th *Vic.*, chap. 2, section 3:

And be it enacted: That after the first day of July, one thousand eight hundred and forty-six, every actual

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tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute or for any less estate, the lands entailed as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in, or might have been claimed by the person making the disposition, at the time of his making the same, and also as against all persons, including the Queen's Most Excellent Majesty, Her heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail, saving always the right of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this Act authorized to be made.

Section 9:

Provided always, and be it enacted: That if a tenant in tail of lands shall make a disposition of the same, under this Act, by way of mortgage, or for any other limited purpose, then, and in such case, such disposion shall, to the extent of the estate thereby created, be an absolute bar in equity, as well as at law, to all persons as against whom such disposition is by this Act authorized to be made, notwithstanding an intention to the contrary may be expressed or implied in the deed by which the disposition may be effected.

The policy and object of these acts relating to mortgages was to enable a mortgagee on payment of the mortgage money by a simple and short process to revest in the mortgagor the estate conveyed by him to the mortgagee, that is to say to give to a registered certificate the force and effect of a conveyance, but not to give to such a certificate any other or greater operation. The policy and object of the legislature in regard to estates tail was to discourage estates tail and to get rid of such estates by a simple and easy process, and therefore power was given to a tenant in tail to bar the entail by a conveyance in fee, and, though the conveyance in fee was only by way of mortgage in fee, the statute made such a conveyance operate as a bar of the estate tail both at law and in equity. It is stated in the judg-

ment of Mr. Justice *Burton* that the framers of the enactment relating to the effect of the discharging of a mortgage had in their mind such a case as the present and that the parties here have contracted also on that assumption. I cannot appreciate the force of this observation, as applied by the learned judge. If the parties here referred to are the mortgagor and mortgagee, it is clear from the mortgage itself that they contracted not only without reference to an estate tail, but unquestionably with reference to an estate in fee, for not only does the mortgage by express words convey a fee, but the mortgagor covenants that he has a good title in fee simple to the said lands and has a right to convey the same as he does by said mortgage. As to the assumption that the framers of the act relating to the effect of the registered certificate of discharge of a mortgage had in their mind such a case as the present, it is, I think, very plainly rebutted by the fact that when the original act was framed, there was no such Act as the 9 *Vic.*, ch. 34, relating to estates tail, and therefore it could not have been then contemplated that the language used would have any reference to or bearing on a case like the present. But apart from the consideration of the scope and object of the act, I think it is still more strongly rebutted by the language of the act itself, because, I think, so far from the literal words of the 9 *Vic.*, ch. 34, and the act of which it was a consolidation, supporting the view for which the learned judge was contending, the literal words of those statutes are in exact accordance with the contention of the appellants. As to the policy and object of the act, the only estate of the mortgagor which the legislature could have contemplated should pass by operation of law by virtue of a registered discharge of the mortgage and revest in the mortgagor was the estate he had conveyed to the mortgagee, because in the absence of any such act as the 9 *Vic.*, ch. 2, relat-

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ing to estates in tail, the effect of any deed the mortgagor could at that time execute could only have the effect of conveying the title and estate he himself had and could give the mortgagee no other or greater estate, and no deed back from the mortgagee could give the mortgagor any other better or greater estate than he had received, and the literal words of these acts show the release was to be equivalent to a re-conveyance, which, if this word means anything, I take to be a conveyance back of what had been previously conveyed; the term re-conveyance would be unsuitable and inconsistent, if instead of the mortgagee conveying back the estate he had received, he was to convey another and different estate, or as has been suggested, that notwithstanding the literal words of the statute, the effect of his release was not to operate as a re-conveyance to the mortgagor, but was to operate as a re-settling of the estate, in other words conveying back to the original settlor, living or dead, the estate in fee, and carving thereout an estate tail to the mortgagor: certainly a very large departure from the literal words of the statute. In this same statute the intention is not alone indicated by the term "re-conveyance," nor in the fact that at the time of its passage the original estate of the mortgagor, capable of being re-conveyed, could only be the estate conveyed by him, but there is to be found a clear meaning given to the words "the original estate of the mortgagor," in the words which immediately follow "mentioned therein," and the sentence reads thus: "shall be and the same is hereby declared to be valid and effectual as a release of such mortgage and as a re-conveyance of the original estate of the mortgagor therein mentioned." As the matter being dealt with was the estate and not the personalty of the mortgagor, it seems to me the words in this sentence "mentioned therein," taken in

connection with the word "re-conveyance," may be read as applying to the estate and not to the mortgagor.

This then was the position of matters up to the Revised Statutes O. c. 111 sec. 27 and Consolidated Act 31 *Vic.*, ch. 20. Though the word "conveyance" is substituted for "re-conveyance," and the words "therein mentioned" are omitted in the revised and consolidated statutes, I have searched in vain to discover one word indicating any intention on the part of the legislature to give to a registered certificate any greater or other effect than it was intended to have, and could only have had, under the original Act and the 9th *Vic.* But, apart from mere verbal phraseology, the statute unequivocally declares that a mortgage shall bar the estate tail both at law and in equity, and that it shall destroy the estate tail and convert it into an estate in fee, and this is to be accomplished notwithstanding any intention to the contrary, express or implied, in the deed by which the disposition is effected, clearly establishing the policy of the law as unfavorable to estates tail; and, such an estate having been got rid of by this statutory operation, it is not, I think, unreasonable, before an estate tail is held to be re-established by virtue of the statute, to ask that an intention that such should take place should be very clearly manifested. An estate in fee having been, by virtue of the mortgage, created and vested in the mortgagee, its continuance is, in my opinion, alone consistent with the policy of the law and leads to no inconsistencies or incongruities; and recreating an estate tail on the contrary, is inconsistent with such policy involving possible and probable anomalies and inconsistencies which never could have been intended by the legislature.

If the words "original estate" refer to the tenancy in tail of the mortgagor, it is not difficult to suggest circumstances of by no means improbable occurrence

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which would lead to complications and anomalies of an inconsistent and unreasonable character.

If the effect is simply to vest in the mortgagor an estate in tail, should the issue in tail fail, to whom is the estate to go? Is it to revest in the mortgagor or his heirs, or to go to the original owner in fee or his heir? If the former, surely such a state of things could never have been intended; if the latter, to accomplish this you must depart from the literal language and construe it so as to make the registered certificate amount, not to a conveyance to the mortgagor of his original estate, but to a conveyance to the settlor, whose tenant in tail the mortgagor was, if living, or his heirs, if dead, of his original estate, while, by virtue of the statute and the mortgage, all his estate, both at law and equity, has been taken from him, so that, if the literal words of the statute are to prevail, no words are to be found clothing the settlor with his original estate, or with his original estate with a tenancy in tail carved out of it? Or, in case of the death of the mortgagor, is the eldest son alone entitled to redeem? Or, if the mortgagee elects to reconvey, to whom is the reconveyance to be made, and what is the estate he is to reconvey, and to whom? Or, again should the mortgagor die and the mortgage money is paid out of his personal estate, which would be the fund primarily liable, are the shares of all the children in the personal estate to contribute to such payment, and the eldest son take the whole mortgaged premises released from the mortgage debt? Or, is their money to be taken and they compelled to look to him for reimbursement? Or, in view of the contingencies so pertinently suggested by Mr. *Tupper* in his very clear and very able argument, what would be the effect in the following case:—The owner in fee gives his mortgagee a term

of ninety-nine years as security for repayment of a loan. The money is paid at the end of ten years. A statutory discharge is given. Can it be contended that this is "conveyance of the original estate of the mortgagor," for that would be the conveyance of a fee by the mortgagee who has only a term of years.

Take the case also of one who has only a term of years, and who purports to give a mortgage in fee simple. The mortgagor subsequently acquires the fee simple, and the mortgagee thus also acquires by estoppel the fee. Upon a discharge, it is the fee simple that is conveyed to the mortgagor, and not his original estate, which was only a term of years.

Suppose that *Michael Lawlor*, after giving the mortgage, had conveyed his equity of redemption in the said lands to *A. B.*, who then redeemed and took a statutory discharge. Could it be contended that such discharge would operate as a conveyance to *A.B.*, not of the fee simple, but of the original estate of *Michael Lawlor*, which was an estate in fee tail.

But assuming the words used have the literal meaning attributed to them in the court below, and are to be read and construed without reference to the previous statutes *in pari materiâ*, which I think ought not to be, I cannot think that as opposed to the policy and object of the Act, they are so inflexible that they cannot be read as conveying the intention of the Legislature, that the release was to operate as a conveyance to the mortgagor of all the estate the mortgagor at the time of the making of the mortgage had the power and ability of conveying, and which he by the mortgage did actually convey to the mortgagee. I cannot think this is a forced or constrained construction. It is a well established principle that in construing acts of Parliament the literal signification of the words is not to be

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adhered to, if such a construction would involve a manifest inconsistency or absurdity.

And in the *Caledonian Railway Co. v. North British Railway Co.* (1) it was said by Lord *Selborne*, L. C.:

> The more literal construction ought not to prevail, if it is opposed to the intention of the Legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.
>
> * * * * * * * *

And by Lord *Blackburn*:

> The matter turns upon the construction of an Act of Parliament which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing, we are to consider what the facts were in respect to which it was framed, and the object as appearing from the instrument, and taking all those together, we are to see what is the intention appearing from the language, when used with reference to such facts, and with such an object.

In *Ex parte Walton*; *re Levy* (2), *Jessel*, M. R. says:—

> This case raises a very important question as to the proper construction to be put upon the 23rd section of the Bankruptcy Act, 1869. Before considering the exact words of the section in question, I should like to say a word or two as to the rule which is binding on all courts when they are concerned to construe statutes or other instruments. Whatever may have been the rule in times past as to the interpretation of statutes, the rules which are to be applied are now well recognized. In order to show what those rules are, I am about to cite some passages from the last case on the subject, that of the *Caledonian Railway Company* v. *The North British Railway Company* (3), decided by the House of Lords on the 17th of February last. That is not only the last decision as to the construction of statutes, but it is a very recent decision. It was an appeal from the Court of Sessions in *Scotland*, but it is an authority binding on this court inasmuch as the law on the subject is the same both in *England* and *Scotland*. The appellants there said that the literal effect should be given to the words of the statute, although by such a construction effect would not be given to the preamble of the statute. But in his judgment the Lord Chancellor, Lord *Selborne*, said: "The more literal construc-

(1) 6 App. Cases 114.

(2) 45 L. T. N. S. 2.

(3) 6 App. Cases 114.

tion ought not to prevail if (as the court below has thought) it is opposed to the intention of the legislature as apparent by the statute; and if the words are sufficiently flexible to admit of some construction by which that intention will be better effectuated." And Lord *Blackburn* cited with approval the opinion of Lord *Wensleydale* which he called the golden rule for construing all written engagements, and which in the case of *Grey* v. *Pearson* (1), he stated thus: "That in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further."

Believing, therefore, that the construction of this act contended for by appellant is in accordance with the intention of the legislature as expressed in the original enactments, and with the policy of the law, and leads to no inconveniences or inconsistencies whatever, while the opposite construction would in a great variety of cases be anomalous and inconsistent, and is not warranted by the literal language of the act, I think the appellants contention should prevail.

I am of opinion that the legislature intended that the release should be equivalent to and have the same effect as a conveyance by deed, that it was not intended that the mortgagor should receive back from the mortgagee an inferior or lesser estate than he had conveyed to him; in other words, that the legislature intended that the release should, by operation of law, take out of the mortgagee all the estate vested in him, and vest the same in the mortgagor, thus giving back to the mortgagor just what the mortgagee received from him—no more nor less.

When the case was first opened I must say I was impressed with the observations of the court below upon the wording of the Act, but, on a critical and further

(1) 29 L. T. Rep. O. S. 71; 6 H. of L. Cases 106.

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consideration of the case and the consideration of Mr. *Tupper's* clear and, I now think, conclusive argument, all doubts have been removed from my mind.

STRONG, J.:—

This is a suit instituted in the Court of Chancery of *Ontario* by the appellants, who are the heirs general of *Michael Lawlor*, deceased, other than the respondent, against his eldest surviving son, the present respondent, as heir in tail of his father, praying a declaration by the court that the estate tail of *Michael Lawlor* in the lands in question had been barred and converted into a fee simple by the execution by *Michael Lawlor*, when tenant in tail in possession, of a mortgage in fee simple, and that his children were therefore entitled as heirs general to the same as tenants in common in fee simple.

There was no dispute as to the facts, and the only point for decision is whether the payment of the mortgage debt by *Michael Lawlor* in his lifetime upon a day later than the day of payment appointed in the mortgage deed, and the execution by the mortgagees of a statutory certificate of discharge and the registration of such certificate under the provisions of the Registry Act, had the effect of revesting in the mortgagor the legal estate in fee simple or in fee tail.

The appellants contend that *Michael Lawlor* died seised in fee simple of the lands in question, and that they consequently descended to all his children as tenants in common in fee simple. The respondent on the other hand insists that, although the effect of the mortgage by *Michael Lawlor*, a tenant in tail in possession, was to vest an estate in fee simple in the mortgagees, yet that by force of the Registry Act, declaring the effect to be given to the registration of the discharge of a mortgage, the fee simple which had been acquired by the mortgagees did not pass to the mort-

gagor, but the original estate tail which he had up to the date of the execution of the mortgage was revived and revested in him. The cause was originally heard before Vice Chancellor *Proudfoot*, who made a decree in accordance with the prayer of the bill. This decree was afterwards reversed by the Court of Appeals, from whose decision the present appeal has been brought.

By the act respecting the Assurance of Estates Tail, Revised Statutes of *Ontario*, ch. 100, sec. 9, which is a transcript of the 21st section of the English Act for the abolition of Fines and Recoveries, 3 & 4 *W. IV.*, ch. 74, it is enacted that:

> If a tenant in tail of lands makes a disposition of the same under this act by way of mortgage or for any other limited purpose, then such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition is effected.

The effect of this provision was, therefore, to make the mortgage in fee executed by *Michael Lawlor* an absolute bar to his heir in tail, in other words, to convert his estate tail into a fee simple as effectually as if he had executed a disentailing assurance under the statute by granting the estate to a grantee in fee limiting the use to himself in fee simple. The mortgagees, therefore, took a legal estate in fee simple, and *Michael Lawlor* could, upon payment, have insisted upon a reconveyance to himself in fee, and if the mortgagees had refused so to re-convey, they could have been compelled to do so by the decree of a Court of Equity in a suit instituted for that purpose. The re-conveyance was, however, not carried out by a formal deed, but by means of a discharge of the mortgage in the form prescribed by the 67th section of the Registry Act, (Rev. Stat. *Ont.* ch. 111,) which enacts that the registration of

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a certificate by the mortgagee of the due payment of the mortgage money shall be as "Valid and effectual in law as a release of such mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by, through, or under him, or them, of the original estate of the mortgagor."

The Court of Appeals determined that by the operation of this provision in the present case the effect of registering the certificate was to revive in *Michael Lawlor* the estate tail, which by force of the section of the act relating to estates tail already quoted had been absolutely barred by the execution of the mortgage in fee. This decision is based entirely upon the construction given to the words in the clause of the Registry Act before quoted: "the original estate of the mortgagor." I am unable to concur in this conclusion, for I am of opinion, that the effect of the registered certificate must be to vest in the mortgagor the entire legal estate held by the mortgagee, and of which, after payment, he was a mere trustee for the mortgagor.

The sole object of the provision in the Registry Act was manifestly to afford a cheap and simple method of enabling mortgagors to obtain a re-conveyance; it was originally enacted long before the statute relating to the abolition of estates tail, having been first contained in a statute of *Upper Canada* containing this provision relating to the discharge of mortgages alone, which was passed in 1834, and it has been embodied in its original terms in the subsequent Registry Acts and in the three successive revisions of the statute law of *Upper Canada* and *Ontario* which have since been made. I think we are called upon to construe the words "release" and "conveyance of the original estate of the mortgagor," as meaning that the whole estate which originally passed to the mortgagee, and of which the equity

of redemption remains in the mortgagor, should be deemed to pass by the effect of the registration. To give the words the strict verbal construction ascribed to them by the court below, would be to prevent the manifest intention of the framers of the Act, which could have been no other than that I have mentioned, to substitute for a formal reconveyance a less expensive and more expeditious mode of revesting the estate in the mortgagor. Could it be pretended that in case a tenant for life, having also a power to appoint the fee simple, should have made a mortgage by executing the power and appointing the fee simple to the mortgagee, also conveying his life estate for the same purpose by the same instrument and limiting the equity of redemption to himself in fee, thus not merely executing the power for the purpose of the mortgage but absolutely, were to take a statutory discharge and register it, that would have the effect of revesting in the mortgagor, not merely the life estate, but also of restoring the power which would be exhausted and gone. This, however, would be the effect of the strict construction given to the words "original estate of the mortgagor," by the Court of Appeals, for the operation of a conveyance by a tenant in tail in possession in passing a fee under the statute is strictly the execution of a statutory power, and the analogy between it and a conventional power in the case which I put is for all present purposes perfect.

Further, the words of the section of the Registry Act prescribing the effect of the discharge have not, as it appears to me, been sufficiently considered; the discharge is to be valid and effectual as "a release of such mortgage." I do not construe the release here meant as a mere release of the debt, for a release of a debt already paid and declared to be paid and satisfied by the certificate would be useless. I consider this expression as having refer-

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ence to the legal estate held by the mortgagee, and I read it as being used in the same sense as the term "release" is applied to a conveyance of the legal estate by a trustee to his *cestui que trust*—not used, it is true, as the strict technical definition of the legal conveyance adopted to pass the estate, but including in a generic sense any conveyance by which the estate of the trustee is re-conveyed to the *cestui que trust*. I think, therefore, that by force of the words "release of such mortgage," the statute clearly enough expresses that the whole estate held as a trustee by the satisfied mortgagee shall pass to his *cestui que trust*, the mortgagor, in as large an estate as that which the latter has in the equity of redemption vested in him at the time the certificate is registered. Any other construction than this, it appears to me, would be in direct contravention of the policy of the act relating to estates tail, which, by the strong provision of the clause in question, enacting that the conveyance of a fee simple for a limited purpose merely shall constitute an absolute bar, an effect which no expression by the parties of a contrary intention shall control, is shown to be the principle that an estate tail once discharged or enlarged into a fee simple for any purpose is not to be kept alive or revived.

If the words of this provision for the registry of the discharge were so strong as to admit of no other construction than that adopted by the Court of Appeals, I should consider that that enactment, originally passed long before the statute relating to the assurances of estates tail, had no application to the case of a mortgage of such an estate vesting the fee simple in the mortgagee. For the reasons, however, which I have before stated, I am of opinion that this statutory mode of reconveyance is applicable alike to a case such as the present, as well as to the case of a mortgage in fee created by a tenant for life having power to appoint

the fee, and that in both cases the effect of registering the certificate is to clothe the equitable estate vested in the mortgagor with the legal estate of the mortgagee, although that legal estate may not be the same estate as that held by the mortgagor prior to the execution of the mortgage, but only the estate originally acquired by the mortgagee under the operation of the mortgage.

I think the Vice Chancellor took a correct view of the construction to be placed upon the clause in question, and that his decree ought to be restored by reversing the order of the Court of Appeals, which must of course be with costs.

FOURNIER, J., concurrred with *Ritchie*, C.J.

HENRY, J.:

The tenant in tail of the land in question in this suit made a conveyance by way of mortgage, and thereby under the provisions of section 9 of chapter 100 of the revised statutes of *Ontario*, converted the estate into one of fee simple, which was held during the currency of the mortgage by the mortgagee. The mortgage was paid off by the tenant in tail and a certificate of discharge as provided by the Registry Act was obtained and duly registered, as provided by sec. 68 of ch. 111 of the revised statutes.

The question then is, what estate had the mortgagor after the mortgage was so discharged? Upon the settlement of that question the rights of the parties in this suit depend.

There is no doubt but the mortgagees held for the time an estate in fee simple and the rights of all parties were barred for the time.

The mortgage not having been paid off when due I consider of no consequence. The mortgagees received payment, and it matters little at what time provided it was done in the lifetime of the mortgagor. They gave a certificate which put an end to any title they at any time had.

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Section 6 of ch. 99 of the revised statutes provides that a certificate of payment or discharge of a mortgage "at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall, if in conformity with the Registry Act, be valid to all intents and purposes whatsoever."

There was no re-conveyance from the mortgagees, and therefore I think it unnecessary to consider what the effect of such might be. One statute enabled the tenant in tail to convey in fee by a mortgage, and another statute—passed twenty-two years afterwards—provides for the release and discharge of the mortgage, thereby determining the title and estate of the mortgagees whatever it was. The 68th sec. of ch. 100 of the revised statutes (enacted 31 *Vic.*, ch. 20, sec. 60), provides that the "certificate so registered shall be as valid and effectual in law as a release of such mortgage and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or of any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor."

By the provision of the statute the tenant in tail is enabled to mortgage in fee and thereby convey a higher title than he held, but in the absence of a conveyance back to him of the higher estate he could not claim to have such, particularly when the statute provides otherwise. The mere payment of the mortgage has not the qualities of a conveyance, and the section of the Registry Act expressly provides that the only effect of the certificate is to give him the original estate he held. To decide otherwise would be to turn his life estate into one of fee simple to the manifest injury of those in remainder, and to defeat the object of the creator of the estate. It is true that in a plain case we could not be influenced by those considerations, but in one in which there is doubt they should not be ignored.

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Were there the provision in the mortgage for a reconveyance, the mortgagor, having conveyed an estate in fee simple, might, on payment of the mortgage, have insisted upon a reconveyance of the same estate, but under the mortgage in this case all that could be asked for was a release or discharge. Such was given, but by operation of the statute it only remitted the title the party originally held, and nothing more nor less.

There is no doubt that the mortgage unredeemed would have barred all parties, but I cannot arrive at the conclusion that the Legislature intended the provision to apply to a case where the mortgage is redeemed and discharged, nor can I see upon principle how any one can become entitled to an interest in real estate without a conveyance.

If the tenant in this case obtained the title in fee simple, whom did he get it from? Certainly not from the mortgagees, for they made no conveyance to him, and no one else gave it to him. If he did not hold it the appellants cannot recover, and it is not necessary to decide by whom else it is held.

I am of opinion there was not an estate in fee in the mortgagor at the time of his death, and therefore I think the appeal should be dismissed with costs.

GWYNNE, J.:

I am of opinion that the appeal should be allowed, and that the judgment of the Court of Chancery be restored. Any other judgment would, in my opinion, constitute a repeal of the Disentailing Estate Act. The costs of all parties in appeal should be ordered to come out of the estate.

Appeal allowed with costs out of the estate.

Solicitors for appellants: *Foy & Tupper.*

Solicitors for respondent: *McCarthy, Hoskin, Plumb & Creelman.*

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*Feb'y. 26, 27,
*May 1.

THE QUEDDY RIVER DRIVING BOOM CO. AND HUGH R. ROBERTSON AND LAMBTON L. L. BEEVAN..... } APPELLANTS;

AND

WILLIAM DAVIDSON.....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF THE JUDGE IN EQUITY OF THE PROVINCE OF NEW BRUNSWICK.

Obstructions in tidal and navigable rivers—45 *Vic. ch.* 100 (*N. B.*) *ultra vires*—*B. N. A. Act*, 1867, *sec.* 91.

Professing to act under the powers contained in their act of incorporation, 45 *Vic.*, ch. 100 (*N. B.*), the *Q. R. B. Co.* erected booms and piers in the *Queddy* river which impeded navigation—the *locus* being in that part of the river which is tidal and navigable.

Held,—(Affirming the judgment of the court below,) that the Provincial Legislature might incorporate a boom company, but could not give it power to obstruct a tidal navigable river, and therefore the Act 45, ch. 100, *N. B.*, so far as it authorizes the acts done by the Company in erecting booms and other works in the *Queddy* river obstructing its navigation, was *ultra vires* of the *New Brunswick* Legislature.

APPEAL from a judgment of *Palmer*, J., the Judge in Equity of the Province of *New Brunswick*.

The plaintiff in this case filed a bill for an injunction to restrain the defendants from erecting and maintaining piers and booms in the *Queddy* river, and alleging that by erecting the said piers and booms and filling the stream with logs, the said plaintiff was prevented for a length of time from having access to the shore and using the stream for the purposes of navigation.

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

This coming on for argument on demurrer, it was agreed that the only question that should be raised upon the argument should be the authority of the Provincial Legislature under the provisions of the *B. N. A. Act*, 1867, to pass the Act incorporating the said company, and to confer the powers contained therein, and that all other matters stand to the hearing; and for the purpose of raising the question relating to the said Act the following case was agreed upon between the counsel for the respective parties:—

"1. The plaintiff is the owner of certain lands situate at the outlet or mouth of the *Queddy* river, which empties into the *Bay of Fundy*. The said river is situate in the parish of *St. Martins*, county of *St. John*, in the province of *New Brunswick*.

"2. The *Queddy* river is a public navigable river; the tide ebbs and flows for about a mile and a half from the mouth or outlet; and schooners or boats can, at the proper time of tide, go up to the head of the tide. The stream above the flow of the tide is and can only be used for floating and driving logs when the water permits.

"3. The rise and fall of the tide is about thirty feet, and at low tide the water is very low in the stream, almost dry, and vessels can only ascend it under and at certain states of the tide.

"4. The said river flows through the plaintiffs land for the distance of a mile from its mouth, he owning the shore on either side.

"5. The defendants, *Robertson* and *Bevan*, own or control lands at the head waters of the river adjacent thereto, from which they cut logs and drive them down the stream—the only practicable mode of getting them to market.

"7. The defendants, the *Queddy River Driving Boom Company*, is a company incorporated by an act passed at the last session of the legislature of the province of

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New Brunswick, intituled 'An Act to incorporate the *Queddy River Driving Boom Company*' (1).

"8. In pursuance of and professing to act under the powers contained in the said Act, the said company have erected and placed piers and booms in the said river attached to the shores at the places on map annexed hereto at the points marked *A*, *B*, *C*, *D*.

"9. These booms as erected under the Act impede navigation, but at the times when the tides serve they are capable of being swung open to admit rafts passing down or craft up stream.

"10. The plaintiff has erected a steam saw mill on his land at the point marked.

"11. Without booms being placed in the river at some point in the tide-way near the mouth, logs driven down the stream or a great portion thereof, would escape into the bay, and be practically lost and swept out to sea.

"12. The defendant company claim the right to erect the piers and booms as shown on the plan, and maintain the same under the powers contained in the said Act, and that the said booms are erected there in accordance with the powers given by the said Act."

The questions for the opinion of the court are:—

First, can the legislature of the province of *New Brunswick* give the powers claimed by the defendant company under which they have erected and maintain the said piers and booms?

Second, are the acts done by the company, as above set out, within the powers given by the said Act.

If these questions are answered in the affirmative, then judgment to be given for the defendants; but if in the negative, then the demurrer to be overruled.

"13. It is admitted that the plaintiff has sustained such special and particular damages by the operations

(1) 45 Vic., ch. 100, N.B.

of the company as would entitle him to an order of injunction restraining the proceedings of the company and the other defendants if the above powers conferred by the Act of the legislature of *New Brunswick* are *ultra vires.*"

The Supreme Court of *New Brunswick* delivered judgment in favor of the plaintiff; and in reply to the first question declared that the powers conferred by the Act of the legislature of *New Brunswick* upon the defendants authorizing them to erect piers and booms and maintain the same as stated in the special case is *ultra vires* and beyond the powers of the legislature of the province of *New Brunswick;* and as to the second question in the said special case declared it was unnecessary to answer it in view of the decision upon the first question.

Mr. *Weldon*, Q.C., for appellants:

It is contended for the respondents that the legislation incorporating this company is *ultra vires* of the legislature of *New Brunswick*, as being legislation indirectly controlling navigation and shipping.

It cannot be disputed that at first sight it would so seem, but it is submitted that it is not, but an exercise of a power necessarily vested in the legislature to carry into effect the requisite legislation to incorporate this company, being a matter within the class over which it has legislation.

Legislation, whether of the Dominion or Provincial legislatures, over certain classes or subjects falling within the classes respectively assigned them, in order to be effective must, in many cases, not only apparently but actually trench or infringe upon matters exclusively assigned to the other legislature, and that the power to do this arises by necessary implication. The instance of bankruptcy and insolvency is perhaps the most familiar.

Applying the principle laid down by Sir *Montague*

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E. Smith in delivering judgment in the case of *Cushing* v. *Dupuy* (1) to the classes assigned to provincial legislation it would seem to be a necessary implication that when it is necessary to render the legislation effective and of value and benefit to the people of the province, or a portion of it, that it was intended to confer on it legislative power for that purpose, even if to some extent it apparently infringes upon classes of subjects exclusively assigned to the Dominion Parliament.

By the 10th sub-section of section 92, local works and undertakings, such as certain classes of railway, canal, telegraph and other works, are, upon the principle *inclusio unius exclusio alterius*, within the power of the local legislature.

Again, works of a local character, for instance, bridges to connect the great or bye-roads and to facilitate local communication through the province and to open it up for settlement, it must be conceded are within the legislation of the provincial legislature. Many of these bridges necessarily cross rivers within the flow of the tide below the head of navigation; in fact many do, as may be instanced upon the rivers flowing into the bay of *Fundy*, such as the *Musquash* in the county of *St. John*, the *Petitcodiac* and *Memramcook* in the county of *Westmoreland*—over the latter not less than three bridges below the head of navigation,—the bridges over the *Shediac*, *Cocagne*, *Buctouche*, *Richibucto* and *Miramichi* rivers, flowing into the Gulf of *St. Lawrence*, are all below the head of navigation, many of these erected since the union, and are constructed with draws to enable vessels to pass up and down, but necessarily to some extent interfere with the navigation. If the local legislature have no authority to authorize such an erection or bridge, then it would be "illegal and a nuisance." *Hole* v. *Sittingbourne and Sheerness Railway Co.* (2).

(1) 5 App. Cases 409. (2) 6 H. & N. 489.

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Angell on Watercourses (1). "All hindrances to navigation, whether by bridges or in any other manner, without direct authority from the legislature, are public nuisances." See also *Original Hartlepool Collieries Co.* v. *Gibb* (2).

If in the course of navigation a vessel injured such bridge or boom, if illegal, no action would be maintainable. *Colchester* (*Mayor, &c.*) v. *Brooke* (3).

I submit that the legislation complained of by the respondent is legislation affecting property and civil rights, and falls within that class. *L'Union St. Jacques de Montreal* v. *Belisle* (4).

The judgment of the judicial committee of the Privy Council in the case of *Queen Ins. Co.* v. *Parsons* (5) supports the principle I am now contending for, and applying the rule there laid down, to ascertain the intention of the framers of the Act of Union, legislation of the provinces prior to the union is to be looked to. The legislation of the province of *New Brunswick* on the subject will be found in the 3rd Vol. Public Statutes, under the head of boom companies, and all the subsequent statutes up to 1867.

While it may be contended that the relation of the dominion to the provinces is not in entire analogy to that of the *United States* with the respective states of the union, yet it is only in the decisions of their courts we can find the question of conflict of legislation discussed, and principles of constitutional law discussed and expounded, and considering that from the same source as ourselves the common law of our mother country, the federal courts, and as a general rule the state courts, derive their principles of jurisprudence, and also taking into consideration the similarity of circumstances in each federation, it may be fairly urged

(1) Sec. 555.
(2) 5 Ch. D. 712.
(3) 7 Q. B. 339.
(4) 7 App. Cases 96.
(5) L. R. 6 P. C. 31.

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that even if their decisions are not followed in their entirety, they may afford light and information upon these questions discussed before their courts.

In *Harrigan* v. *The Connecticut Navigation Company* (1), the court illustrates the regulation of rivers even navigable as in the analogous case of highways. (See judgment delivered by *Lord*, J.)

After the decision in *Gibbons* v. *Ogden* (2), the question arose before the same judges in the case of *Wilson* v. *The Blackbird Creek Marsh Co.* (3), where the doctrine of the several rights of the Congress and the State is discussed by that eminent jurist Chief Justice *Marshall.*

Subsequently in the Supreme Court of the *United States* in *State of Pennsylvania* v. *Wheeling Bridge Co.* (4), where Chief Justice *Taney* delivered a dissenting opinion. The following decisions of State Courts were also referred to: *Nelson* v. *Cheboyan Nav. Co.* (5); *County of Mobile* v. *Kimball* (6).

Dr. *Barker*, Q. C., and Dr. *Tuck*, Q. C., for respondent:

The question involved in this appeal is whether the act of the Legislature of *New Brunswick*, 45 *Vic.*, ch. 100, intituled "An Act to incorporate certain persons to be known as *The Queddy River Driving and Boom Company*," is *ultra vires*, so far as it authorizes the acts done by the Company in erecting booms and other works in the *Queddy* River, obstructing its navigation and preventing the respondent from having access to his lands fronting on the river. The powers conferred upon the Company to which exception is taken will be found principally in the 3rd and 4th sections of the Act. The construction of the works thus authorized, we contend, must interfere with the public right of

(1) 129 Mass. 580.
(2) 9 Wheaton 1.
(3) 2 Peters 250.
(4) 13 Howard 518.
(5) 38 Mich. 204.
(6) 12 Otto 691.

navigation, and that in reference to a navigable river, such as the one in question, the local legislature has no power to confer the right professed to be given by this act.

By section 91 of the *B. N. A.* Act, the right to legislate on the subject of navigation and shipping is given to the Dominion Parliament; and if the powers conferred belong to any of the classes of subjects in section 92 of that Act, or are included in any of them, the local legislature has, to that extent, exceeded its powers, even though the act may relate in other respects to some subject comprised within section 92. It is contended by the appellants that the act in question relates solely to a local work and undertaking, and to matters of a merely local or private nature, and as such it comes within section 92 of the *B. N. A.* Act. This contention cannot prevail. In the first place it cannot be said that the construction of works which in their intended use necessarily take away or abridge a right in the public, such as that of navigation, is in any sense a matter of a merely private nature; and in the second place, any work or undertaking local in its nature ceases to be such in the sense in which the term is used in section 92, when its use or the result of its operation, is to interfere with any right which is included in a subject-matter within the legislative authority of the Dominion Parliament. For while the latter Parliament has, by force of the concluding clause of section 91, in addition to its express powers, such an implied legislative authority over the subjects mentioned in section 92 as may be requisite for complete legislation in reference to the subjects mentioned in section 91, there is no such implied authority in the local legislature in reference to the classes of subjects mentioned in section 91. Any such implied authority would obviously lead to conflict, and it is contended that except in the cases provided for by

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sections 94 and 95 of the *B. N. A.* Act, there is no concurrent power of legislation in the two parliaments.

The cases decided by this and other courts in reference to the powers of the respective legislatures, so far as they bear on the subject under discussion, are as follows:—*City of Fredericton* v. *The Queen* (1); *Cushing* v *Dupuy* (2); *Citizens' Ins. Co.* v. *Parsons* (3); *Russell* v. *The Queen* (4); See also *The Queen* v. *Burah* (5).

Admitting for the sake of argument that the Act in question *primâ facie*, as Sir *Montague Smith*, in *The Citizens' Ins. Co.* v. *Parsons* (6), says, falls within one of the classes of subjects enumerated in section 92, does it not, or do not the powers conferred on the appellant company fall within the subject of navigation, inasmuch as they interfere with the public right in reference to it. If the Dominion parliament enacted a statute simply authorizing *A* to enter upon and occupy the land of *B*, to his entire exclusion, it could scarcely be contended that this was not legislation as to the civil rights and property of *B*, and therefore *ultra vires* of that parliament. Why? Not because it in words took away *B's* right of enjoying his own premises, but because that was the natural and necessary result of acting on the authority conferred. So in this case, the prevention of the public in the enjoyment of their right of navigation and its incidents, is the natural and necessary result of the use of the powers conferred. The legislation therefore does fall within the subject of navigation, and by all the authorities is void on that account.

The Dominion Parliament in its legislation has acted on the principle contended for by the respondent, and though this fact could in no way confer a right not given by the constitution, it is a question which, in

(1) 3 Can. S. C. R. 505.
(2) 5 App. Cases 415.
(3) 7 App. Cases 108.
(4) 7 App. Cases 829.
(5) 3 App. Cases 904.
(6) 7 App. Cases 109.

such a case as the present, "may," as Sir *Montague Smith*, at page 116 of the case last cited, says, "properly be considered." These statutes are numerous and refer, as will be seen, to almost every description of work which might interfere in any way with the rights of the public in navigable rivers. These statutes are as follows:—32-33 *Vic.*, ch. 42; 35 *Vic.*, ch. 94; 36 *Vic.*, ch. 65; 37 *Vic.*, ch. 29; 39 *Vic.*, ch. 15; 42 *Vic.*, ch. 9; 43 *Vic.*, ch. 44; 43 *Vic.*, ch. 61; 43 *Vic.*, ch. 29, s. 2, art. 27; Sec. 71 of Railway Act—42 *Vic.*, ch. 9.

The provision in the Act, section 22, that the works shall not unnecessarily interfere with navigation, admit that the right of navigation will necessarily be abridged, but beyond that it has no bearing on the case. Who is to judge of the necessity, or how is it to be determined? Is it by the quantity of logs to be taken care of? If so, then it follows that if the quantity of logs to be boomed requires the whole river to be occupied by the company's works, the right of navigation is taken away altogether and necessarily so.

Then, it was argued in the court below that at all events the legislation in question was good until some act conflicting with it had been passed by the Dominion parliament, and cases decided by courts in the *United States* were cited in support of this contention.

Under the *British North America Act* the only question that can arise is one simply of construction, and the power of either the Dominion Parliament or a provincial one to legislate on any subject is defined and limited by the act itself, and must be determined by the rules of construction applicable to any other case where the meaning of a statute is to be settled.

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

RITCHIE, C. J.:—

Piers and booms may be very useful on the *Queddy*

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river, may, in fact, be almost essential for the preservation of logs driven down the river, to prevent their escaping into the bay and swept out to sea. But that cannot affect the legal question in this case, which is, to which legislative power, that of the Dominion Parliament or the Assembly of *New Brunswick*, belongs the right to authorize the obstruction by piers or booms of a public tidal and navigable river, and thereby injuriously interfere with and abridge the public right of navigation in such tidal navigable waters. It is not disputed that this legislation interfered with the navigation of the river, indeed this appears clearly from the language of the Act itself which says (1):

> It shall be the duty of the said company to place and maintain all their works upon the said river in such a way as not to unnecessarily interfere with the navigation of the same.

I think there can be no doubt that the legislative control of navigable waters, such as are in question in this case, belongs exclusively to the Dominion Parliament. Everything connected with navigation and shipping seems to have been carefully confided to the Dominion Parliament, by the B. N. A. Act. Thus, in addition to "Navigation and Shipping," generally, we have "beacons, buoys, lighthouses, and *Sable Island*;" then we have quarantine, and the establishment and maintenance of marine hospitals; and lastly we have in the list of provincial public works and properties which are to become the property of *Canada*, canals with lands and water power connected therewith, public harbors, lighthouses and piers, and *Sable Island*, steamboats, dredges and public vessels and rivers and lakes improvements. All this seems to me to indicate very clearly that the words "navigation and shipping" are to be read in no restricted sense. The question of the interference with the navigation of public tidal waters is by no means matter of

(1) 45 Vic., ch. 100, sec. 22 (N.B.).

purely local or private concern, it affects the shipping of the Dominion generally, as indeed also foreign as well as domestic; and, therefore, in view of the general scope of the Act, legitimately belongs to the Dominion Parliament rather than the local legislatures.

The objects of incorporation of companies with power to interrupt, impede, or abridge the rights of foreign or domestic shipping in the navigation of any of the tidal navigable waters of the Dominion cannot be said to be provincial any more than the works and undertakings under such powers can be called local; on the contrary, though the corporation may be private, the object to be accomplished affects the public as well within as without the province.

But if the objects of the incorporation could strictly speaking be called provincial, or the works and undertakings local if thereby navigation and shipping, and the legislative powers conferred on the Dominion Parliament are interfered with, then by virtue of the latter clause of section 91, they are not to be matters coming within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces.

If the Provincial Legislature can authorize the obstruction of the navigable tidal waters at the mouth of the *Queddy* River, why may they not do the same at the mouth of the other large rivers of the Dominion, as in *New Brunswick* the mouth of the *St. John*, at the head of the *St. John* harbor, and so prevent or impede the free navigation of that great river by the numerous steamboats, wood boats and seagoing craft that daily navigate from the sea to *St. John* and from *St. John* and *Indian Town* to *Fredricton*, or that large and important river *Miramichi*, navigated for miles from its mouth by sea-going ships to the towns of *Chatham* and

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Newcastle? And if they have the right to interfere with and abridge the rights of navigation, why should they not be able to authorize total obstructions? for, if they can authorize partial obstructions, I can see no reason why they might not authorize obstructions which would render any navigation impossible, the question not being one of degree, but whether they can or cannot interfere at all.

And these views are, in my opinion, strictly in accordance with the principles heretofore enunciated in this court, and sustained by the Judicial Committee of the Privy Council.

I think, therefore, this appeal must be dismissed with costs.

STRONG, J.:—

There cannot, in my judgment, be any doubt as to the correctness of the decision of the court below, and I should have been prepared to have dismissed the appeal without hearing counsel for the respondent. The *Queddy* river is shewn to be a navigable tidal river, and the appellants have obstructed the navigation and thus committed an act which is *primâ facie* a public nuisance, and which the respondent shows to be specially injurious to him as a riparian proprietor. The respondent was therefore entitled to an injunction to restrain the continuance of the obstruction, unless the appellants were able to show some legal justification for the interference with the navigation of the river, caused by the construction and maintenance of these booms. They, however, show nothing but an act of the Provincial Legislature of *New Brunswick* incorporating them as a boom company (which so far was entirely within the powers of that legislature), and which also assumed to confer power upon the company so incorporated to obstruct

the navigation of the *Queddy* river. The powers so conferred are, in my opinion, in excess of the authority given to local legislatures by the *British North America Act*. This is a conclusion which requires no elaboration of argumentation for its demonstration, for no one can deny that by sub-sec. 10 of sec. 91 of the *British North America Act*, exclusive power to legislate respecting navigation is conferred on the Parliament of *Canada*, and as little is it open to any one to dispute that this power respecting navigation includes the exclusive right to legislate so as to authorise an obstruction in a navigable public river where the tide ebbs and flows. A much less distinct power given by the *United States* Constitution to Congress to legislate respecting inter-state commerce, has, as is well known, been held to include the power to control the use of navigable waters on which inter-state commerce is carried on. And the powerful reasoning of the great judges who decided these cases, would, if there could be any doubt upon the point now presented, be conclusive in the present case.

Even if the provision in sub-sec. 10 of sec. 91 had been omitted, I should have thought that the authority of the *Wheeling & Bridge Company* case (1) would have been sufficient to show that under sub-sec. 2, giving Parliament power to regulate trade and commerce, the Act of the *New Brunswick* Legislature in question here would have been an encroachment on these exclusive powers of the Dominion, and so void.

For these reasons, which are substantially the same as those assigned by the Chief Justice for the same conclusion, I concur in the deposition of this appeal which has been proposed.

FOURNIER, J., concurred.

(1) 13 Howard 518.

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HENRY, J.:

I entirely concur in the views expressed by the Chief Justice and my learned brother *Strong*. The legislature of *New Brunswick*, of course, had the power to incorporate the company for a local object, but the question is raised here whether they had the right to confer on the company so incorporated the right to place obstructions in tidal navigable waters. My opinion is, that under the constitution they have no such right. If a local legislature could interfere to the extent of one quarter of a mile in tidal water, they might interfere to the extent of a mile, and there would be no limit. The maritime provinces are so situated that the inhabitants on one side of the bay of *Fundy* are entitled to navigate the other side, and *vice versâ*. If one province, therefore, had the right to interfere with navigable tidal waters they would interfere with the rights of the other province. I do not undertake to say whether that power is inherent in the Dominion Parliament either. There may be cases even in which the Dominion Parliament could be restrained. There are certain rights of fisheries which are common, not only to the province in which they are, but to all the British public and some foreigners, and if the right is conceded to a province to interfere with navigable waters by allowing companies to place obstructions in them, they might largely interfere with rights outside of the province altogether. I have no doubt the local legislature does not possess that power, it has only the power given to it under the Confederation Act, which gives them no power to interiere with tidal waters. The whole power of the local legislature is shown to be restricted. They have the power of organizing companies for local objects alone, but it must be taken into consideration that these local objects shall not interfere with public rights outside. I consider, therefore, under

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all the circumstances of the case, that the Boom Co. had no authority by the act to place obstructions in the place they did on this navigable river where the tide ebbed and flowed, and where parties were in the habit of taking vessels up and down. My judgment is to dismiss the appeal with costs, and to confirm the judgment that was given by the court below.

TASCHEREAU, J.:—

I will not dissent from the judgment of the majority of the Court, but I have great doubts on the question submitted. There are very strong grounds, it seems to me, in support of the contention that this boom is a local work or undertaking in the Province of *New Brunswick*. Navigation and shipping are left under the control of the Federal authority, it is true, but this, under sub-sec. 10 of sec. 92 of the *B. N. A.* Act does not extend to, for instance, a line of steamers or other ships entirely within the province, that is to say, plying from one part of the province to another part of the same province. That would, I presume, be a local undertaking under the control of the local legislature. May it not be said that the boom in question is also a local undertaking?

Can it be said that the incorporation of this company was for federal objects? If it was for Provincial objects was it not legally incorporated by the *New Brunswick* Legislature?

GWYNNE, J., concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitors for appellants—*The Queddy River Driving and Boom Co.: Charles H. Skinner.*

Solicitors for appellants—*Hugh Robertson et al: Weldon, McLean* and *Devlin.*

Solicitors for respondent; *Allen & Chandler.*

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*Nov. 3, 4.
1882
*Mar. 24.

THE DOMINION TELEGRAPH CO.....APPELLANTS;

AND

JOHN SILVER AND ABRAHAM MARTIN PAYNE..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Telegraph message—Liability of Telegraph Company—Special damages—Inadmissibility of evidence as to, when not alleged—Excessive damages.

S. et al. (respondents) partners in trade, sued the *D. T. Co.* (appellants) for defamation of the respondents in their trade. In the declaration it was alleged:—1. That they were wholesale and retail merchants at *Halifax*. That appellants wrongfully, falsely and maliciously, by means of their telegraph lines, transmitted, sent and published from their office at *Halifax* to their office in *St. John*, and there caused to be printed, copied, circulated and published the false and defamatory message following:—"*John Silver & Co.*, wholesale clothiers, of *Greenville* street, have failed; liabilities heavy." 2nd. That same message was caused also to be published in other parts of the Dominion. 3rd. That the appellants promised and agreed with the proprietor or publisher of the *St. John Daily Telegraph* newspaper, and entered into an arrangement with him, whereby the appellants agreed to collect and transmit, by means of their telegraph lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages and should publish them in his newspaper, and that in pursuance of said agreement the appellants wrongfully, maliciously and by means of said telegraph, transmitted, sent and published from their office in *Halifax* to their office in *St. John*, and there falsely and maliciously caused to be written, printed, copied, circulated and published the above message, whereby many customers who had heretofore dealt with plaintiffs ceased to do so, and their credit and business, standing and reputation were thereby greatly damaged.

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

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The *D. T. Co.* denied the several publications charged, and also the entering into the agreement mentioned in the third count and the forwarding of the messages as alleged. At the trial it was proved that the telegram which was published in the morning paper was corrected in the evening edition, and that the publisher's agreement was with one *Snyder*, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatch was not produced. The only evidence as to damage was the evidence of two witnesses, who proved that by reason of the publication they ceased to do business with the respondents as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange and sometimes discounting their notes. The counsel for the defendants moved for a non-suit which was refused and the case was submitted to the jury who, upon the evidence, rendered a verdict for the plaintiffs with $7,000 damages. On appeal to the Supreme Court of *Canada*, it was

Held,—1. (*Taschereau*, and *Gwynne* JJ., dissenting,) That the appellants, the *D. T. Co.*, were responsible for the publication of the libel in question.

Per Taschereau and *Gwynne*, JJ., dissenting: assuming the agreement in question to be one within the scope of the purposes for which the defendants were incorporated, and that *Snyder* had sufficient authority to enter into it on behalf of the defendant company, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the said proprietor and publisher of said news, for which the damages were awarded.

2. (Sir *W. Ritchie*, C.J., doubting, and *Henry*, J., dissenting) that the damages were excessive, and therefore a new trial ought to be granted.

Held also per *Strong*, *Taschereau* and *Gwynne*, JJ. No special damages having been alleged in the declaration, the evidence as to such damages, having been objected to, was inadmissible, and therefore a new trial should be granted.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* (1).

This action was brought by the plaintiffs as partners

(1) 2 Russ. & Geldert 17.

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in trade against the defendant company for defamation of the plaintiffs in the way of their trade.

The first count of the declaration, consisting of three counts, alleges that the plaintiffs before and at the time of the committing the grievance hereinafter alleged, were merchants carrying on business by wholesale and retail at *Halifax*, under the name of *John Silver & Co.*, and the defendants were at the said time proprietors of, and by their servants and agents managed and conducted a certain system of electric telegraph upon, along and over certain lines of, and owned by, the defendants; and the plaintiffs say that whilst the plaintiffs were such merchants and carrying on business as aforesaid, the defendants, wrongfully, falsely and maliciously, by means of the said telegraph so owned and used by them, transmitted, sent and published from the office of the said defendants in the said city of *Halifax* to their office in the city of *St. John*, in the Province of *New Brunswick*, and there falsely and maliciously caused to be written, printed, copied, circulated and published, the false, malicious and defamatory message following of and concerning the plaintiffs, that is to say: "*John Silver & Company*" (meaning the plaintiffs), "wholesale clothiers of *Granville* street, have failed, liabilities heavy," meaning thereby that the plaintiffs had failed and become bankrupt and unable to pay their debts in full, and were unable to continue their business, whereby and by reason and means whereof the plaintiffs' credit was impaired, and their business and reputation seriously injured.

The second count alleged—that the defendants on or about the 6th day of January, 1879, by means of said telegraphic lines owned and used by them, and by means of the facilities possessed by them for the transmission of intelligence by telegraph, wrongfully, falsely and maliciously transmitted, sent and published from their office in

the city of *Halifax* to their office in the city of *St. John*, in the Province of *New Brunswick* and to their office in the city of *Montreal*, in the province of *Quebec*, and to other cities in the Dominion of *Canada* and in the *United States of America*, and there falsely and maliciously caused to be written, printed, copied, circulated and published in divers ways, amongst others, by copying, publishing, or causing to be copied and published, in the *St. John Daily Telegraph* newspaper and other newspapers and circulating sheets in said city of *St. John* and elsewhere, the false, malicious and defamatory message following of and concerning the plaintiffs; that is to say—(as in first count,) whereby, and by reason and means whereof, the plaintiff's credit was impaired, and their business and reputation seriously injured, and they otherwise suffered great loss and damage by reason of the premises.

The third count was as follows:—And also for that the plaintiffs were both before and at the time of the committing of the grievances hereinafter alleged, dry goods merchants, carrying on business in *Halifax*, under the name and style of *John Silver & Co.*, and the defendants were, when, &c., the proprietors of, and by their servants and agents managed and conducted a certain system or line of electric telegraph upon and along certain lines of telegraph owned or used by them, and upon and along and over certain other lines of telegraph connecting with the defendants said lines for the purpose of enabling defendants to transmit messages from place to place in the Dominion of *Canada* and in the *United States of America*, and plaintiffs say, that the defendants promised and agreed to and with the proprietor or publisher of the *St. John Daily Telegraph* newspaper, and entered into an arrangement with such proprietor or publisher, whereby the defendants agreed to collect and to transmit by

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means of their said line or system of electric telegraph, news despatches to the said newspaper from time to time, and it was also further agreed, arranged or understood by and between the said parties last named, that the said proprietor or publisher would pay the defendants for all such messages as said defendants would transmit to them, and such proprietor or publisher should publish in said newspaper; and plaintiffs say that in pursuance of said arrangement and agreement the defendants wrongfully, maliciously, and by means of the said telegraph so owned and used by them transmitted, sent and published from the defendants' office in *Halifax* to their office in *St. John*, and there falsely and maliciously caused to be written, printed, copied, circulated and published, the false, malicious and defamatory message following, of and concerning the plaintiffs, that is to say,-(as in first count), whereby and by reason and means whereof, many customers who had theretofore dealt with plaintiffs ceased to do so, and plaintiffs credit and business standing and reputation were thereby greatly damaged.

To this declaration the defendants pleaded, denying the several publications charged in the respective counts, and denying the entering into the agreement mentioned in the third and the forwarding the message therein stated in pursuance of any such agreement.

Issues being joined on these pleas, the case went over for trial before a jury. At the trial, the depositions of the proprietor and publisher of the *St. John Daily Telegraph* Mr. *Elder* taken upon an examination *de bene esse* before a commissioner were read, subject to objections taken at the examination to the admissibility of the evidence and its sufficiency. The substance of his evidence was—that he had never seen any telegram containing the matter complained of as libellous; that telegrams are received by officials at the office of the

paper and are not generally seen by him, and are destroyed the morning after their receipt; that his attention was first drawn to the telegram in question by a telegram received from the *Dominion Telegraph Co.*, saying that "the prior telegram was not correct," whereupon he wrote an article which was published in his paper. By the copy of depositions printed in the case it appears, however, that he produced at his examination a copy of the *St. John Daily Telegraph* of the 7th January, 1879, from which an extract was taken and annexed to the depositions and marked Exhibit B, which is as follows :—

The Daily Telegraph,
St. John, N.B., Tuesday, January 7, 1879.

Halifax, January 6.

John Silver & Co., wholesale clothiers of *Granville* street, failed to-day; liabilities heavy.

Howard C. Evans & Co., commission merchants and lobster packers, failed; liabilities about $20,000.

John S. McLean & Co., of this city, are large creditors of *Carvill Brothers, Charlottetown, P.E.I.*, who failed on Saturday, with liabilities of $100,000.

The steamer *Carroll* arrived from *Boston* and the *Cortes* from *Newfoundland* this morning.

That telegram was corrected he said in the evening edition of his paper of the same day, for he got the telegram saying that the prior telegram was incorrect on the same day in time for the evening edition: whereupon he had a conversation with *Mr. Snyder*, a person in the employ of the defendant's at *St. John*, and who, as witness said, appeared to be at the head of defendant's office there. Witness complained to him of the telegram which witness had to correct, whereupon *Mr. Snyder* expressed his regret that it had occurred. Witness's complaint was that the telegram he had received from *Snyder* was not correct, and that it was a serious matter for witness that it should not be correct. His reply was that they were very sorry for it, and would caution

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the party who had transmitted it to be more careful in future, or words to that effect. *Snyder*, as witness said, informed him that he had received the news in the telegram from the party in *Halifax* who compiled the news for him. Witness also said that he took a good deal of news from the defendant company from the Upper Provinces and from the Maritime Provinces including *Halifax*. The terms upon which he received these telegrams were arranged with *Mr. Snyder*, and were so much for every hundred words, but that he only paid for such as he used, unless they came from a special correspondent of his own. That he had at the time a friend in *Halifax* who was authorized to send him news, but that the telegram in question was not from him. He also said that he was in the habit of paying *Snyder* for tolls for the compiling and transmission of news by telegram on bills presented to witness in the name of the company, and he added that his transactions were entirely with *Snyder*, and that he did not think that in them the name of the company was used at all, but witness took it that *Snyder* was agent and manager of the defendants' company from seeing him in the office and paying him the tolls for the telegrams on the bills of the company. A reporter, Mr. *Thompson*, employed in the office of the *Daily Telegraph* newspaper, was also called, who testified to the news under the head of "*Halifax*," in exhibit B, published in the *Daily Telegraph* having been taken from a telegraphic despatch delivered to him at the *Daily Telegraph* office by a boy who he understood to be a messenger of the defendants, and he also said that this despatch so received by him was not now forthcoming because telegrams after they were used were either thrown into the waste paper basket or on the floor. That after proof reading they are not preserved.

The evidence offered as to damage was the evi-

dence of one *George McKeen*, partner in a firm of *Carvell, McKeen & Co., St. John*, and an agent of theirs named *Mathers* residing at *Halifax*, who were called for the purpose of showing that by reason of the publication complained of Mr. *McKeen's* firm ceased to do business with the plaintiffs as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was nevertheless received, and was in substance as follows:

Mr. *McKeen* stated that his firm, through Mr. *Mathers* as their agent, had done business in *Halifax* for many years. That he, Mr. *McKeen*, took the *St. John Daily Telegraph*, and that in it he saw a telegraphic report of the plaintiffs failure, but he could not state the date; that in consequence of seeing that report, he communicated with Mr. *Mathers*, his agent at *Halifax*, once in writing and once verbally; that the verbal communication was to the effect that the publication of the telegram would affect the credit of the plaintiffs, and that he did not wish to have any further dealings with them; that his dealings consisted in selling them exchange, for which he had been in the habit of receiving plaintiffs promissory notes, and sometimes he discounted their notes; but after that he had no dealings with them; that it was in February or the latter end of January that he had the conversation with *Mathers*.

Mathers evidence was to the effect that the plaintiffs of their own accord, without any solicitation, were in the habit of purchasing exchange from him as agent of *Carvell, McKeen & Co.;* that his principals wrote to him, as he thinks, upon the 9th January, asking "what about *Silver*?" to which he says he replied, after making enquiries himself, that he thinks the saw *Hedley* about it; who *Hedley* is did not appear, nor does the witness say what the result of his inquiries was or what he replied to the inquiry made of him by

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by his principals. The second communication which he had with his principals upon the subject, that is to say, the verbal one, was a week or ten days afterwards, and, he says, he received instructions from his principals, in the verbal communication not to deal with the plaintiffs. The witness never had any dealings with the plaintiffs in the way of their trade as dealers in dry goods, nor otherwise than as selling them exchange as above stated when they applied for it, and, he adds, that the firm had since failed.

The learned counsel for the defendants moved for a non-suit, which was refused, and the case was submitted to the jury who, upon the above evidence, rendered a verdict for the plaintiffs with $7,000 damages.

In the following term a rule *nisi* was obtained to shew cause why this verdict should not be set aside and a new trial granted upon the following grounds:

1. Because said verdict is against law and evidence.
2. For the improper reception of evidence.
3. Because the damages found by the jury are excessive.

Upon argument, this rule was discharged, *Weatherbe*, J., dissenting, and it is against the rule discharging this rule *nisi* that this appeal was taken.

Mr. *Dalton McCarthy* and Mr. *Rigby*, *Q. C.*, for appellants:

The action is for libel, in a press despatch sent by the Company from *Halifax* to *St. John*, and the jury gave a verdict for the plaintiffs with $7000 damages. The action was brought by two partners, and could only be brought by them as co-partners and with respect to damages resulting to them as co-partners, and the verdict must be limited to such damage.

The publication, inuendo and damage alleged in the declaration are denied by the pleas, and also the al-

leged agreement with the *St. John Daily Telegraph*, and the transmission and publication in pursuance thereof of the alleged libel. In the first place, if there was publication by the company, it was at a much earlier period than when it reached *St. John*, and plaintiffs have given no evidence of publication in *Halifax*. If, however, they contend that we were guilty because the alleged libel was published in *St. John*, we say the only evidence on which they can rely is the newspaper containing the alleged libel. Now, that is not sufficient evidence of publication of the libel by defendants.

The original message sent from *Halifax* to *St. John* was not produced, and no sufficient basis laid for secondary evidence of it.

Elder never saw it and never looked for it. The original document which should have been produced or accounted for was the manuscript in the defendants' office in *Halifax* from which the message was sent over the wires to *St. John*, and no evidence of any kind of or concerning it was given by the plaintiffs.

There was no evidence that the words published in the newspaper were the same as the despatch sent over the defendants' line, even if the newspaper was admissible in evidence.

Moreover the copy of the newspaper produced by *Elder* was not admissible as evidence against the defendants, and was no proof of publication by them of the alleged libel. It might have been evidence against *Elder* himself, but not against the defendants.

The court below sought to connect this evidence with *Snyder's* statements or admissions, but they could not be admissible against the defendants.

There was no evidence that *Snyder* had any authority from or agency for defendants for the publication of the alleged libel, or the delivery of the message to the newspaper, and his general agency as manager of the defen-

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dants' business in *St. John* would not extend to such acts, which are not within the scope or functions of a telegraph company. *Harding* v. *Greening* (1); *Parkes* v. *Prescott* (2).

There was no evidence either that the company ever recognised or ratified what *Snyder* did, and without evidence of this kind there can be no liability attached to defendants.

Then, again, the collection of news paragraphs and their transmission from place to place by telegraph, and the selling of them to the newspapers, is not within the business or corporate powers of the defendants, and it would also appear from the evidence of *Elder* that this business was done by *Snyder* personally, in connection with some person in *Halifax*, and that the wires of the defendants were only used by these persons for conveying such messages. *Cooley* on Torts (3); *Poulton* v. *The L. & S. W. Ry. Co.* (4); *Edwards* v. *The L. & N. W. Ry. Co.* (5); *Erb* v. *Gt. W. Ry. Co.* (6).

We also contend that the parties in the suit are not identified with the parties mentioned in the alleged libel.—

Our next point is that the damages are grossly excessive, and there was no evidence of any damage whatever having been sustained by the plaintiffs from the alleged publication by the defendants of the libel, nor in fact of any damage whatever to the plaintiffs.

The plaintiffs gave no evidence themselves, or by any witness, of the nature and extent of their business, of their solvency or position at the time the alleged libel was published, or that their subsequent failure was in any way attributable to the alleged libel. The contradiction of the statement of the firm referred to in the

(1) 1 Moore 479.
(2) L. R. 4 Ex., 169.
(3) P. 119.
(4) L. R. 2 Q. B. 534.
(5) L. R. 5 C. P. 445.
(6) 5 Can. S. C. R. 179.

alleged libel appeared in the evening edition of the paper on the same day, and again in the next morning's edition, and no damage was shown to have resulted, or could have resulted. There was no malice shown or suggested. In the absence of any evidence of any substantial damage on which the jury could rationally found such a large verdict, it is evident that they must have acted on some prejudice, or from some motive or opinion not justified by the evidence, which is a sufficient reason for granting a new trial for excessive damages. *Folkard* on slander and libel (1); *Smith* v. *Frampton* (2); *Kelly* v. *Sherlock* (3).

Mr. *Thompson*, Q. C., for respondents :—

The point that plaintiffs were not identified was not taken at the trial. If raised at the trial such objection would have been instantly disposed of by evidence available to the plaintiffs at the time. *Robertson* v. *Dumaresq* (4); *Burgess* v. *Boetfeur* (5); *Donnelly* v. *Bawden* (6).

It has been argued that there is no evidence of special damage. My answer is that by the pleadings it was admitted that plaintiffs were doing business, and the jury had the right to find that the libel complained of referred to plaintiffs. See *Nova Scotia* Rev. Stats. 4 series, ch. 94, sec 152 and 144. *Marsden* v. *Henderson* (7); *Hamber* v. *Roberts* (8).

As to the reception of the telegram contained in the newspaper in proof, the appellees contend that it was out of their power to give better evidence as to the loss of the original. Its loss was sufficiently accounted for to let in the evidence offered, and such evidence was

(1) P. 565.
(2) 2 Salk. 644.
(3) L. R. 1 Q. B. 686.
(4) 2 Moo. P. C. N. S. 87.
(5) 7 M. & G. 481.
(6) 40 U. C. Q. B. 611.
(7) 22 U. C. Q. B. 585.
(8) 7 C. B. 861.

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properly received. *R*, v. *Johnson* (1); *Kensington* v. *Inglis* (2); *Roscoe's Nisi Prius* (3); *Stowe* v. *Querner* (4). *Snyder's* admission was sufficient, and his agency was clearly proved.

The evidence of *Elder* and *Thompson* established, to say the least, that the loss or destruction of the telegram was probable, and therefore very slight evidence was required. See *Freeman* v. *Arkell* (5).

The evidence given satisfied both judge and jury that the telegram was lost or destroyed, and there being no degrees in secondary evidence, the newspaper was therefore admissible. If no such message was sent, or if it never existed, the onus lay on defendants of interposing before the newspaper was offered and giving evidence to establish that there never was such a messsage and none such was sent.

I will now take up the question of *ultra vires*.

It was open to appellants to prove what *Snyder's* duties and powers were, and in the absence of such proof on their part, it must be assumed he was their agent, especially as the evidence shows that *Snyder* was in charge of defendants' office, transacted their business and received the tolls on telegraphic messages. The act in question, viz., transmitting and delivering for publication the message in question, was a matter within the duty of *Snyder* and defendants' operators, and it must therefore be assumed that the transmission, copying and delivery to the *Telegraph* newspaper was the act of defendants. Assuming, however, that *Snyder* was not defendants' agent and the message was procured, sent and delivered at his instance, yet inasmuch as defendants' wires and servants, within the scope of their duties, were used in

(1) 7 East 66.
(2) 8 East 273.
(3) 13th Ed., page 6.
(4) L. R. 5 Ex. 155.
(5) 2 B. & C. 496.

transmitting, copying and circulating the libel, they are liable, especially as they received pay for what they did. A corporation is liable for a tort even when *ultra vires*. *Brice* on *Ultra vires* (1); *Tench* v. *The G. W. Ry. Co.* (2); *Angell* and *Ames* on Corporations. (3).

The amount of damages was a question purely for the jury, and the direction of the judge is not complained of. Nor was it contended that the verdict was perverse. *Riding* v. *Smith* (4); *Kelly* v. *Sherlock* (5); *Blanchard* v. *The Windsor and Annapolis Ry.* (6).

RITCHIE, C.J.:

This was an action for an alleged libel. The declaration contained three counts. [The learned Chief Justice then stated the pleadings.]

I think the evidence in this case fully justified the jury in finding all the issues raised by the pleadings in this cause in favor of the plaintiffs, the evidence satisfactorily establishing—1st. That defendants were owners and proprietors of certain telegraphic lines, and by their servants and agents transmitted over such lines, as a part of their business, for pay and reward, telegraphic news to be published in the public newspapers, the proprietors of which may have agreed to receive and pay for such news; and as to the paper *Daily Telegraph*, published in *St. John*, in which it was alleged the libel in question was published, the proprietor, Mr. *Elder*, says with reference to his paper and his dealings with the defendants:—

It is an important part of the business of my paper to publish telegraphic news. I take a good deal of news from the defendants' company from the Upper Provinces and Maritime Provinces, including *Halifax*. That practice has existed from soon after the defendant's company was established—prior to 7th January, in the year

(1) P. 474.
(2) 32 U. C. Q. B. 452.
(3) Sec. 387 (Edn. of 1871).
(4) 1 Ex. Div. 91.
(5) L. R. 1 Q. B. 686.
(6) 1 Russ. and Ches. 8.

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1879. The terms were so much per hundred words, according to the quantity. I cannot specify the exact price we paid for those telegrams. We only pay for such telegrams as we are able to use. We get a large quantity which we often do not use from want of space or having other more interesting matter, and then we only pay for what we use unless they are from our own correspondent. In the case of telegrams supplied to us by the *Dominion Telegraph Company* we only pay for such as we use. The *Dominion Telegraph Company* has an office at *Saint John, N. B.* Mr. *Snyder* is the head man there. He has been there from the first establishment of the company, before the 7th of January, 1879. I do not know his Christian name. The paper now produced and shown me is a copy of my paper. The "*Daily Telegraph*" of seventh January, 1879, published at *Saint John.* It is marked by me *Bc. M. T.* That paper has a large circulation for the Maritime Provinces. It circulates outside of the Province of *New Brunswick*, in *Nova Scotia, P. E. Island, Quebec, Ontario*, and *United States*, with a small circulation in *England.* I take it that *Snyder* was acting as agent of the company. The tolls for our telegrams are paid to Mr. *Snyder.* They are settled weekly or monthly when the bills are sent in. There is not any other telegram published in my paper of January 7th, 1879, under the head of "*Halifax*," except that already referred to. The evening edition of my paper does not circulate so largely as that of the morning. It circulates outside of *New Brunswick* in the Upper Provinces by night mail but not so largely as that of the morning. The paper marked by the Commissioner is one of the morning edition of my paper.

On his cross-examination he says:

I only know that *Snyder* is the manager of the defendants' company from seeing him in their office and paying him the bills of the telegraph company. I only know that they are bills of the *Dominion Telegraph Company* from the fact that they are rendered in their name by *Snyder.* (Objected to by *Thompson, W. T.*) I paid *Snyder* a certain sum for tolls for the compiling and transmission of the news by telegram. *Snyder's* telegram (for, say one hundred words,) might cost less than the same number from my own correspondent, because of the large quantity we get from *Snyder.* I also get telegrams from the *Western Union Telegraph Company*, which are published in both editions of my paper. *Snyder* appears to me to be the head of the office of defendants in *St. John*, and there are other operators there also.

As to the telegram in question, Mr. *Elder* says:

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My attention to this telegram was first called about January 6, 1879, by a telegram from the *Dominion Telegraph Company*, saying "That the prior telegram was not correct." I have no direct knowledge of the second telegram coming from the defendant company, except that it was brought to me, and I had to write a paragraph on it. Neither of those telegrams was preserved.

And again:

My attention was called to the telegram under the head of "*Halifax*" on first page of seventh of January, 1879, on the same day. It was corrected in the evening edition. I got the telegram from the defendants stating the prior telegram was incorrect on the same day in time for the evening edition. I had a conversation with Mr. *Snyder* afterwards about the first telegram. I complained to him of that telegram which we had to correct. He expressed his regret that it had occurred. I complained that the matter we had received from him by telegram was not correct, and that it was a serious matter for us that it should not be correct. His reply was "that they were very sorry about it and would caution the party who had transmitted it to be more careful in future," or words to that effect. I had at that time in *Halifax* a friend who was authorized to send me news. The telegram in question of the 7th January, 1879, was not transmitted by him. *Snyder* informed me that he had received the news in the telegram from the party in *Halifax* who compiled the news from him. I do not think the name of the company was used at all. My transactions were entirely with Mr. *Snyder*.

On cross examination:

Both of the telegrams already referred to, came from the same sources as far as I know. (This paper also put in, subject to objection by Attorney General marked "C" *W. T.*) I do not know where these telegrams came from, except from conversation with members of my staff and with Mr. *Snyder*. I never saw the originals of these telegrams. The first telegram received and published in the *Daily Telegraph* was as follows:—

The *Daily Telegraph*,

St. John, N. B., Tuesday, January 7th 1879.

Halifax, Jan. 6.

John Silver & Co., Wholsale Clothiers, of *Granville* Street, failed to-day, liabilities heavy. *Howard C. Evans & Co.*, Commission Merchants and Lobster Packers failed: liabilities about $20,000.

John S. MacLean & Co., of this City, are large creditors of *Carvell Bros., Charlottetown, P. E. I.*, who failed on Saturday with liabilities of $100,000.

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The Steamer *Carroll* arrived from *Boston* and the *Cortes* from *Newfoundland* this morning.

Mr. Thompson says as to this telegram :—

I am employed in the office of the *Daily Telegraph* newspaper. Have been in that office since some time in 1875. I was there on the 6th and 7th of January last. I was a reporter and attended to the despatches that came to the two evening editions. I saw the despatch headed "*Halifax*" which was published in the evening editions of the *Telegraph* of 7th January, 1879, (already put in evidence, *W. T.*), I received it from the *Dominion Telegraph* carrier. I suppose I may call him the boy who brings the despatches from the *Dominion Telegraph Company's* office. (Objected to by Mr. *Rigby.*) I opened it. I think that telegram appeared in the first evening edition of the paper of the 6th. It appeared in the second evening edition, I read the proof of it with copy. The print in the paper is a true copy of that telegram, except that the word "of" before *Granville* street may have been inserted. That telegram was written on manifold paper. That is the kind of paper which the telegrams furnished by the *Dominion Company* (without being from any correspondent) are on. I do not think it had any signature (Objected to by Mr. *Rigby, W. T.*) The telegrams after they are printed or used are either thrown in the waste paper basket or on the floor. That is after proof reading. They are not preserved. The first evening edition of the *Telegraph* is published at three o'clock, p.m.; the next one at five p.m.

Cross-examined by Mr. *Rigby* :

I was in the office when the first telegram was received. It was a paper with a despatch on it; not in an envelope. We get despatches from the *Western Union Telegraph Company* on manifold paper, but on a different kind of paper from that which we get from the *Dominion Telegraph Company.* I only know that the boy who delivered the messages was in the employ of the *Dominion Telegraph Company,* from the fact that he brought their messages and that the other boys told me so. Also received the second telegram correcting the first one. Knew that the matter of the evening edition is transferred to the morning edition. The corrected telegram was on the same kind of paper as the first. I do not know the boy's name, or his appearance, who delivered those telegrams. The defendants company have two or three messengers I know it was a *Dominion Telegraph* message from the fact that it was brought by one of the same messengers, and on the same kind of paper on which their messages were usually written, as we usually get messages from them.

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Re-examined by Attorney General:

There are only two telegraph companies doing business in *St. John*. The *Western Union Telegraph Company* and the *Dominion Telegraph Company*. I know that the paper on which these telegrams were written was the *Dominion Company's* paper, from the fact that I have been in their office and received messages on similar paper.

A notice to defendants to produce the original telegram was proved and its production called for, but it was not forthcoming and no excuse or explanation appears to be offered for its non-production. This is the whole evidence in the case in reference to the transmission and publication of this telegram. A motion for a nonsuit appears to have been made on two grounds only: no evidence of publication by the defendants; no evidence of malice. The defendants called no witnesses. I am at a loss to conceive how a plaintiff could give stronger *primâ facie* evidence of the company themselves having collected and transmitted this news for publication. Surely, if what Mr. *Elder* and Mr. *Thompson* say is not correct, who had the means within themselves of correcting or contradicting it but the defendants? The cause was tried at *Halifax*. If that telegram was not transmitted by defendants from *Halifax*, who could so well have shewn that but they themselves? If it could have availed them to have shown that the material forming this telegram was transmitted by a third party, with whom they had nothing to do, which I do not think, except, possibly, as affecting the question of damages, who could have shown that fact and the circumstances connected with the sending of that message but themselves? Defendants' office at *Halifax* contained all the information that could be had on this point, why did they not produce the original telegram? Why was the telegram without a name subscribed to it? In the absence of such evidence, is it possible that any jury could come to any other conclusion than that the tele-

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graph company, with a view to its business, caused this information to be procured, and that the person referred to by Mr. *Snyder*, when he said "he would caution the party who had transmitted it to be more careful in the future," was a servant of the company. If he was not, who knew who he was but the company, and therefore who could show this fact but the company? If they have not chosen to do so, can they complain of an inference which appears to be irresistible being drawn against them? So with reference to what took place at *St. John* the same observations apply. The company have an office in *St. John* doing business there. Mr. *Elder* deals with them through a man who is their manager or head man in that city, and who has been there from the first establishment of the company. He receives bills rendered by *Snyder* in the name of the company for his tolls; they are settled weekly or monthly. The tolls are paid to *Snyder* for the compiling and transmitting of the news by telegraph by the company. He receives these telegrams from the company. He has an arrangement by which the terms on which he receives them are fixed; he receives these telegrams written on defendants' paper, delivered by defendants' messenger, and when the incorrectness of this telegram is discovered, it is communicated to him by a message from the company. He complains to *Snyder* as manager of the company, who expresses regret, for this is the effect of Mr. *Elder's* testimony, and all this is allowed to go to the jury uncontradicted and unchallenged; and as in the doings at *Halifax* so here as to those in *St. John*; who but the defendants had the means of showing that this telegram never was sent from defendants' office to the "*Daily Telegraph*" office for publication? who but the defendants could have shown that *Snyder* was not the head man or manager and had nothing to do with the com-

pany, or that they were in no way responsible for his acts, or that no messenger of the company ever delivered the message, in other words, that the company had nothing to do with the transmission, delivery or publication of the message, but the company themselves through their officers, agents and servants in *St. John*? If Mr. *Elder's* view was incorrect, all this information being solely within the possession of the company's agent's and servants, they have not offered a tittle of evidence to contradict, alter, or explain this evidence. What jury, I ask again, could honestly come to any other conclusion than that this message, compiled and transmitted by the company at *Halifax*, was in due course of the business of the company received at the defendant's office at *St. John* and was, under the defendants' agreement with Mr. *Elder*, sent by the servants of the company to the *Dominion Telegraph* office for publication, and that all Mr. *Elder's* dealings with this company were through Mr. *Snyder*, the head man and accredited agent at *St. John*, and for all whose acts and doings in the course of such dealings they were responsible. If this be so, I am at a loss to understand how they are to escape liability for the publication of this clearly libellous matter any more than the proprietor of the paper could be, had he been sued. What better scheme could be devised that would ensure the circulation of a libel, than thus putting it in the shape of a telegram and sending it to a newspaper to be published as a piece of news in which the public were interested? It has been suggested that the transmission of news for publication in newspapers is not within the legitimate business for which telegraph companies are incorporated. I fail to appreciate the force of this objection; as newspapers are now a necessity, so at this day is telegraphic news for publication in newspapers. No newspaper published in a city such as *St. John* could

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exist as a leading influential journal without telegraphic news. To say that the transmission of such news by telegraph companies over telegraphic lines is not a legitimate branch of their business, and a large source of revenue is to ignore what is presented before our eyes every day, when we take up a morning or evening paper. To say that we can suppose that all such news is transmitted by such company gratuitously for the pleasure of operating, or for any love the company bear either the publishers who print or the public who read newspapers, or from any philantrophic desire to spread intelligence, and to say that they can transmit, not correct statements, but whatever so called news or rumours they may collect, or what may be collected for them by others of a sensational character, without regard to its truth or falsity or libellous character, and so derive a large revenue and not be responsible to those who may be injured, or possibly ruined by such participation in the publication of gross libels, and which libels would not and could not be published but through their instrumentality, would be simply to stultify ourselves. Can it be possible that the character and business of innocent persons can be destroyed because the libellers, with a view to gain and the extension of their business, choose to transmit over their lines statements and rumors unfounded in fact in relation to the private character or business standing of individuals with whom they have no connection, and with whose character or business they have no right to meddle, and when no duty, legal, moral or social is cast upon them to promulgate the statements or rumours, and the aggrieved parties shall have no remedy against them? The law has not, and I am full well assured never will, sanction such an idea. The legislature never meant, as said by *Brett*, J., in *Williamson* v. *Freer* (1),

(1) L. R. 9 C. P. 395.

"that the facilities for telegraphic communication should be used for the purpose of disseminating libels." To exempt telegraph companies from liability as now claimed would be to clothe them with an irresponsible power for the perpetration of injustice and wrong wholly opposed to every principle of law or right.

I am at a loss to understand how a newspaper proprietor can be liable for the publication of a libel and the party who prepares the libel and delivers it at the office of the newspaper for publication, and without whose acts no publication of the libellous matter could take place, can escape an equal liability with the printer or publisher of the paper: they are all engaged in one and the same transaction, viz: collecting, transmitting and publishing matter collected, the aid and participation of all being necessary to the publication.

That a libel may be published by transmission through the Electric Telegraph is a proposition for which I should think no authority was required, but the case of *Whitfield* v. *S. E. Ry. Co.* (1) is clear on this point, though not so strong a case in its circumstances as this. Plaintiffs were bankers carrying on business as such and issuing notes under the firm of the *The Lewes Old Bank;* the defendants were proprietors of, and by their servants and agents, managed a certain system of electric telegraph upon and over their line of railway for the purpose of enabling, and so as to enable, the defendants to transmit messages from one to another of their stations, and the defendants transmitted messages thereby and had the care and custody of all messages transmitted, yet defendants while plaintiffs were such bankers, &c, by means of said telegraph transmitted, sent and published from, to wit:

(1) E. B. & E. 115. (See also *The Phil. &c. R.R.* Co. v. *Quigley* 21 Howard, U.S., 202 pp. 212 and 213.

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Ticehurst Road Station to wit to *Hastings Station* and there falsely and maliciously caused to be written, printed, copied, circulated and published the false, &c., words and message following that is to say:—"The *Lewes Bank*," thereby meaning and intending the old *Lewes Bank*, "has stopped payment."

On demurrer, judgment was delivered by Lord *Campbell* in favor of plaintiffs.

In *Edwards* v. *Midland Railway Co.* (1), *Fry*, J., said:—

Those who deny that the company can be made liable (the question being whether a railway company can be made liable in an action for malicious prosecution), rely principally on Baron *Alderson's* judgment in *Stevens* v. *Midland Counties Ry.* Co. (2), where he held that in order to support such an action it must be shewn that the defendant was actuated by a motive in his mind, and that a corporation has no mind. The two other judges, Barons *Platt* and *Martin*, did not agree with Baron *Alderson's* reasons, but decided in the company's favor on other grounds.

Has Baron *Alderson's* opinion, which in that case stands alone, been followed by other judges? In *Rex* v. *City of London*, which is cited in a note to *Whitfield* v. *South Eastern Ry.* Co. (3) it was held on demurrer that an action would lie against the corporation of the city of *London* for maliciously publishing a libel, and though that decision is not of the greatest weight, being affected no doubt by political as well as legal considerations, still it was assented to by Chief Justice *Saunders*, an able and experienced judge. In *Yarborough* v. *Bank of England* (4), Lord *Ellenborough* referred to an earlier case of *Argent* v. *Dean and Chapter of St. Paul's* (5), and said that the instances of actions against corporations for false returns to writs of mandamus must be numberless. Again in *Whitfield* v. *South Eastern Ry.* Co. (6) Lord *Campbell* says that "the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails," and "considering that an action of tort and trespass will lie against a corporation aggregate and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in saying that, under certain circumstances,

(1) 6 Q. B. Div. 288.
(2) 10 Ex. 352.
(3) E. B. & E. 122.
(4) 16 East 6.
(5) 16 East, 7 note (a).
(6) E. B. & E. 122.

express malice may not be imputed to and proved against a corporation." In *Green* v. *London General Omnibus Co.* (1), it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. There Chief Justice *Erle* says: "The ground of the demurrer is, that the declaration charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie." In the case before me it is similarly argued that a corporation cannot act maliciously or intentionally, because malice and intention imply mind. Chief Justice *Erle* continues: "The doctrine relied on that a corporation having no soul cannot be actuated by a malicious intention is more quaint than substantial." In other words, the *ratio decidendi* of Baron *Alderson* was in this case disregarded, and as his decision has not been followed in English Courts, I am at liberty to decide in conformity with the later decisions, and I hold, therefore, that the action will lie in this case.

In *Scott & Janrigan's* law of Telegraphs (2), it is said:

A side from the statutory and common law duty of good faith in the transmission of messages for the public, there is another sense in which telegraph companies may become responsible for *mala fides* and malicious use of its functions. A libel is any false, malicious, and personal imputation effected by any writings, pictures, or signs tending to alter the party's situation in society or business for the worse, and a corporation may become responsible for its publication even in punitive damages. Citing many cases.—

In the transmission of messages for publication, especially letters and news for the public newspapers, it would seem that telegraph companies assume a responsibility similar to that of the publishers. By this agency libellous matter would be necessarily brought to the knowledge of operators who otherwise would not have cognizance of it. By their immediate and indispensable agency, "press despatches" and the like are brought before the public. In communications specially designed for the press, we see no reason why they should not stand on the same footing with publishers. But in strictly private messages the reason for so stringent a

(1) 7 C. B. (N. S.) at p. 301. (2) P. 167, sec. 138*a*.

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rule does not obtain, perhaps should not be applied at all. See *White* v. *Nicholls* (1).

I assent to a new trial, on the ground of the damages being excessive, with great doubt and some reluctance. The evidence may not be as full and precise as it might have been, but the extent of plaintiff's business as a wholesale importing house in *Halifax*, where the cause was tried, was doubtless well known to the jury, and they were, I should think, competent to estimate the injury to such a business by the promulgation of such a report, and to give, as I think they have done, general damages.

In *Russell et al* v. *Webster* (2), *Bramwell*, B., says:

When it is left to the jury to say whether a statement is defamatory, and they find it to be so, then they may give general damages, that is, I suppose, damages, according to their discretion, under all the circumstances of the case.

Pigott, B., says:

As it is a libel on the conductors of the newspaper, there is no need to prove either malice or special damage and the jury are justified in finding general damages: *Ingram* v. *Ingram* (3).

But this is immaterial, as the rest of the court think there should be a new trial on the ground of excessive damages.

STRONG, J.:—

This being an action for libel, or written slander, actual damage is not an element of the cause of action, and consequently no allegation or proof of any was requisite to entitle the plaintiff to maintain the action. Even words spoken imputing insolvency to traders are actionable *per se* (4), and in such cases the plaintiff can recover substantial damages without alleging or proving any special damage (5).

(1) 3 How. U. S. 286.
(2) 23 W. R. 60.
(3) 8 Scott, 471.
(4) *Brown* v. *Smith* 13 C.B. 596; Odgers on Slander and Libel, p. 78, and cases there cited.
(5) *Tripp* v. *Thomas*, 3 B. & C. 427; *Ingram* v. *Lawson*, 6 Bing. N. C. 212; *Highmore* v. *Harrington*, 3 C. B. N. S. 142; Odgers on Slander and Libel, 543.

If, however, the plaintiff, either in libel, or in actions for defamatory words actionable *per se*, seeks to prove any special damage, this must be alleged in the declaration, and in the absence of such an allegation evidence of it is not admissible (1).

In *William's* notes to *Saunder's* (2) it is said:

> But if the plaintiff has sustained any special damage he must state it, for it is an established rule that no evidence shall be received of any loss or injury which the plaintiff has sustained by the speaking of the words, unless it be specially stated in the declaration. In 1 St. 666, *Browning* v. *Newman*, Lord *Raymond* took a distinction between the case when the special damage is the gist of the action and when the words are in themselves actionable; that in the former evidence of special damage is allowed, though the particular instances of such damages are not specified in the declaration, but in the latter case particular instances of special damage shall not be given in evidence unless particularised in the declaration. * * * However, modern practice does not warrant this distinction, for it seems now fully established that in each case the special damage must be alike particularly specified in the declaration.

And this principle applies where the damage relied on is the act of a third party to the prejudice of the plaintiff, induced by the slander or libel complained of. In such a case evidence of the prejudicial act of the third person ought to be rejected if it is not pleaded in the declaration.

The declaration in the present case contains no averment of special damage caused to the plaintiffs by reason of the refusal of *Carvell, McKeen & Co.*, to sell them exchange in consequence of the publication of the alleged libel. The evidence of Mr. *Mather* and Mr. *McKeen* was, however, notwithstanding the silence of the declaration in respect of the damage which they were called to prove, admitted against the objection of the defendant's counsel to its reception. It appears to me, therefore, that there was an improper reception of

(1) Wms. notes to Saunders, vol. 1, p. 322 and cases cited; Odgers 543. (2) P. 322 (1871).

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evidence which was sufficiently objected to at the trial, and that the rule *nisi* which was granted on these, as well as on other grounds, ought for this reason, if for no other, to have been made absolute; and consequently that this appeal should be allowed with costs

FOURNIER, J.:—

As we have power now, by the last amendments to the Supreme Court Act, to order a new trial, we ought to exercise that discretion in this case. I may say that I have seldom seen any case in which there was so little evidence as in this. Certainly there is none to justify the verdict that has been given for $7,000. I take the view that it is excessive, and that a new trial ought to be ordered.

HENRY, J.:—

I agree with brother *Strong* and the learned *Chief Justice*, and, I presume, with a majority of this Court, that the evidence of publication by the defendant company was fully established. I think the party was entitled to recover damages and I do not feel that I should set aside this verdict on the ground stated by my brother *Strong*—that is, on the improper reception of evidence. I cannot recollect now exactly whether that was objected to or not, but whether it was or not I consider that it was legitimate evidence that might be given in the case. I am of opinion that the statute does not alter, nor was it intended to alter, the principles on which this court could set aside the verdict of a jury where the whole duty of finding damages is, as in cases of libel and slander, with the jury. There is nothing to shock one as to the extent of these damages. There is evidence here that the plaintiffs were extensive importing wholesale merchants in the city of *Halifax*, and it is in evidence that shortly after the publication of

this libel they failed. Now the jury, taken from the city of *Halifax* where the plaintiffs reside, would have a much better opportunity of knowing what damages they should receive than strangers a thousand miles away, sitting in this court. I do not think it was the intention of Parliament, in that amendment to the statute, to alter the law with respect to the prerogative right of a jury to assess damages in a case like this. I think we have no right to interfere with the damages on that ground, and I think we have no evidence upon which we can arrive at the conclusion that these damages were improperly given by the jury. I think, therefore, that the appeal should be dismissed.

TASCHEREAU, J.:—

I concur in Judge *Gwynne's* observations, and have come to the same conclusion upon the same grounds.

GWYNNE, J.:—

In my opinion this appeal should be allowed, the verdict should be set aside and the Rule *Nisi* for a new trial be ordered to be made absolute in the Court below.

I do not see how this verdict can be sustained, nor how the defendants can be held responsible for the publication in the *St. John Daily Telegraph*, which is the publication complained of, unless they are responsible in all cases for the use which the receivers of telegraphic messages transmitted over the defendants' line may make of such messages when received, and so to hold would, as it appears to me, be subversive of the telegraphic system and destructive of the benefits conferred upon the public by an invention without which it would be impossible that the affairs of the world could in the present age be conducted. The company by their charter are bound to transmit all despatches received by them for transmission in the order in which

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they are received, (subject to certain specific exceptions,) under heavy pecuniary penalties. It would be impossible for them to comply with this provision of the statute if they should be compelled, or it was a duty imposed upon them by law in order to their own protection, to enquire into the truth of matter stated in the despatches delivered to them for transmission at the peril, in case of neglect to do so, of being responsible in damages if such matter should be libellous.

The Legislature, alive to the fact that improper use might be made by the company's servants of the information received by them through the medium of telegraphic messages, affecting the private affairs of individuals, have made a provision which appeared to them to be adequate to prevent the injury by enacting that any operator or person employed by the telegraph company divulging the contents of a private despatch should be guilty of a misdemeanor and on conviction should be liable to a fine not exceeding $100, or to imprisonment not exceeding 3 months, or both, in the discretion of the court before whom the conviction should be had.

The third count of the declaration seems to be framed with the view of meeting the objection which I have suggested as to the company being made responsible for the use made by the receivers of telegraphic despatches of the information therein contained, for it is there alleged that the defendants themselves, that is that the corporate body, entered into an agreement with the proprietor of the *St. John Daily Telegraph* to become in effect his agents to collect, compile, and to transmit to him over the defendants' line of telegraph, news items, which, in case such proprietor should make use of them by publishing in his paper, he would pay the defendants an agreed upon sum for every hundred words used. The defendants file a plea denying that

they made any such agreement, and they are entitled to have that issue disposed of by being found either in their favor or against them, and if the making of that agreement by the defendants be necessary to entitle the plaintiffs to recover under their third count, it is incumbent upon them to prove that such agreement was entered into in such a manner as to be binding upon a corporate body; a point which involves the necessity of proof that the collecting and compiling news items for the proprietor of a newspaper constituted part of the corporate purposes for which the defendants were incorporated.

The gist of this count seems to be that the plaintiffs contend that the telegraphic message containing the matter complained of was not delivered to the defendants by any individual, to be transmitted over their line by the defendants in the ordinary course of business, as transmitters merely of telegraphic messages delivered to them for transmission, but that the defendants themselves, as the agents of the proprietor of the *Daily Telegraph*, originated the message and delivered it, as it were to themselves for transmission, and so that it was not a message which it was incumbent upon them to transmit under the provisions of their Act of incorporation, as to the transmission of despatches in the order of their receipt by the defendants.

The plaintiffs offer no evidence to prove, nor does the witness called by them, viz., the proprietor of the *Daily Telegraph* allege, that the defendants entered into the agreement of which he spoke in his evidence under their corporate seal, or that it was entered into in pursuance of any resolution of the board of directors, nor even with any officer of the company at their head office. He says that his transactions were entirely with Mr. *Snyder*, and that he does not think the name of the company was ever mentioned. Neither was

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there any evidence offered to show what the duties attached to the office which Mr. *Snyder* filled in the service of the company were, so as to enable the court or jury to say whether they were such as to enable him to bind the company to the extent which is claimed. It might well be within the limits of his ordinary duty in the employment in which he was engaged as a servant of the defendants to agree with the proprietor of the *Daily Telegraph* for the amount which he should pay for all telegraphic despatches coming over the defendants' line without his having any authority to enter into a contract such as that alleged whereby the defendants should become the agents of, and the compilers of news items for, the proprietor of the *Daily Telegraph* and chargeable therefore with all the consequences attaching by law to the assumption of such agency. It might even well be that, while Mr. *Snyder* should himself assume the agency and all the responsibilities attaching thereto, the defendants should permit him to contract upon their behalf as to the tolls which they should receive for the transmission of the messages brought to their office by *Snyder* or persons employed by him, without the defendants assuming any responsibility as to the collecting or compiling the news. The evidence of the proprietor of the *Daily Telegraph* is in my judgment quite consistent with this having been the nature of the arrangement. I can see nothing in the evidence from which it can, I think, be said as matter of law or of fact that the collection of news items by the defendants for the proprietors of newspapers and as their agents, is clearly part of the business for conducting which the defendants were incorporated, or which can make the act of *Snyder*, in entering into the agreement spoken of, the act of the defendants, or which would make the act of *Snyder*, or of any person employed by

him, in collecting and compiling the news and bringing it to the defendants' office for transmission, the act of the defendants themselves. The plaintiffs should at least have offered evidence to show who it was that brought the message to the defendants' office at *Halifax* for transmission. *Snyder* (as the witness called, said) informed him it was a person employed by him to collect the news—however the *onus probandi* lay upon the plaintiffs, and they and not the defendants must bear the consequences, whatever they may be, of the want of such evidence.

But assuming the agreement for the collecting and compiling the news items for the proprietor of the *Daily Telegraph* to be one within the scope of the purposes for which the defendants were incorporated, and that *Snyder* had sufficient authority to enter into it on behalf of the defendants, and that the latter assumed the agency, a question still remains which appears to be equally applicable to all the counts.

If the defendants collected, compiled, and transmitted news items for the proprietor of the *Daily Telegraph*, they did so as his confidential agents and at his request, just as if any individual and not the defendants had become agent of the proprietor of the paper for the like purpose. The agency of the defendants then was at an end when they delivered the despatch in question to the proprietor and publisher of the *Daily Telegraph* at *St. John*. The publication complained of, and for which the damages have been awarded against the defendants, is not the delivery of the despatch, but the publication of it in the paper. The defendants are charged with having published and caused to be published the matter complained of in the *St. John Daily Telegraph*, and the grievance is the circulation which it thereby obtained. Now, with that publication the defendants had, in fact, nothing to do. They did not request or procure the

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proprietor of the paper to publish it in his paper, nor was it inserted therein to gratify any purpose of the defendants. The proprietor admits that he, himself, exercised sole power to deal with these news despatches, as seemed fit to him in the sole and uncontrolled exercise of his own discretion. He, alone and for his own purposes, inserted the intelligence in his paper. He alone can be made responsible to third persons for acts done by him in the uncontrolled exercise of his own discretion. The case is wholly different from that of a person paying for, or for his own purposes requesting and procuring a publisher of a newspaper to give the benefit of the circulation of his paper to some matter which may prove to be libellous. There the publisher is the agent of the person so procuring the matter to be published and the maxim *respondeat superior* may well apply; but here the publisher, without any request or procurement of the defendants, and in the sole and uncontrolled exercise of his own discretion, for his own purposes, namely, the credit and profit obtained by his showing himself to be an industrious collector of news items, inserts the matter in his own paper—that is his act for which he alone is responsible (1); and such, his act cannot, as it appears to me, be said to be the act of the defendants, nor for such publication can the defendants be held responsible, unless as I have at the outset suggested, they are to be held responsible to all persons for whatever use the receivers of telegraphic despatches passing over their line may, for their own purposes and in the pursuit of their business, make of such despatches—a responsibility for subjecting the defendants to which I think there is no warrant. These points, do not seem to me, to have received that consideration in the court below which the gravity of

(1) *Ward* v. *Weeks*, 7 Bing. 211.

the liability sought to be imposed upon the defendants seems to demand.

However, assuming the action upon the evidence given to lie against the defendants, this verdict upon the point as to damages alone cannot, in my opinion, be permitted to stand. The damages have not only been awarded in error upon evidence which was not admissible, but the enormous sum of $7,000 has been arbitrarily awarded to compensate injury alleged to be done to the plaintiff's trade, in the absence of any evidence whatever, that such trade was as matter of fact in any respect injured or diminished by the alleged slander, which was proved to have been corrected in the same paper the same day that it was published, and such correction repeated again in the issue of the same paper on the following day. The verdict is, in my judgment, irreconcilable with the idea that the jury proceeded upon any principle which should govern them in the discharge of their duty of estimating the damages, so as to make them bear some rational proportion to the evidence laid before them of the amount of injury done to the plaintiff's trade for recompensing which the action was brought.

It is said that the words complained of, having reference to the plaintiffs trade, are actionable *per se* without proof of any special damage, but though true it is that to impute insolvency to persons in trade is actionable *per se*, yet that does not relieve a plaintiff who seeks substantial damages for an alleged injury from the obligation of giving to the jury some evidence of the extent of that injury, so as to enable them to discharge the duty devolving upon them of apportioning the damages to the injury as shown to them to have been sustained. Where the injury complained of is injury to a trade of which the jury can know nothing without evidence, it is impossible for them intelligently to discharge their

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duty unless some general evidence be given of what the business was before, and that it became diminished after the publication, from which the jury can form some rational opinion of the extent of the injury for which they are called upon to give compensation. To hold that upon the mere allegation by the plaintiffs in their declaration that their trade has sustained an injury, to establish which allegation they offer no evidence, a jury may arbitrarily give as damages any sum however large, as for example $7,000, merely because words imputing insolvency to persons in trade, are actionable *per se*, would, as it appears to me, be a mockery of justice; and is a proposition in support of which I have not been able to find any reported decision.

In 3 B. & C. 427 is reported a case of *Tripp* v. *Thomas* where the words for which the action was brought imputed to the plaintiff a very grave indictable offence, namely, subornation of perjury, and the defendant allowed judgment to go by default. The jury assessed the damages at £40. Upon a motion to set aside the assessment of damages, the rule was refused because the words being actionable *per se* and the charge was admitted by the judgment by default, and there was nothing in the small amount of damages given from which it could be presumed that the damages were estimated upon erroneous grounds. There, it is to be observed, from the nature of the charge itself which was admitted on the record by the judgment by default, a jury could form some estimate of the damages proper to be awarded, and they gave a moderate sum, which could not be said to be disproportionate to the injury naturally flowing from the words complained of and admitted; but in an action which (although for words which are actionable *per se*) is nevertheless brought to recover compensation for an injury alleged to have been sustained in the plaintiffs trade, how can a jury say what

damage a trade has sustained if they are given no evidence of what the extent of the trade was before and what after the publication of the libel, which is said to have injured it? In actions of this nature it is always customary to give some general evidence of loss of trade following upon the publication, and I think it will be found that the contention has most frequently arisen upon attempts by plaintiffs to give evidence of what the defendant has insisted was particular damage not alleged and therefore inadmissible.

In *Ingram* v. *Lawson* (1), which was the case of a libel charging that a ship of, which the plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not seaworthy, the plaintiff gave proof at the trial of what was the average profit of the Captain of a ship on an East Indian voyage and that upon his first voyage after the publication of the libel his profits were nearly £1,500 below the average and the jury awarded £900. In that case upon a motion for a new trial, it having been objected that the evidence should not have been received, *Coltman*, J., said:—

> With respect to damages the jury must have some mode of estimating them and they could not be in a condition to do so unless they knew something of the nature of the plaintiff's business and of the general return from his voyages.

And *Erskine*, J., said:—

> In order to enable the jury to form some judgment as to the effect the libel was calculated to produce I think it was reasonable to let them know the nature of the plaintiff's business and the amount realized by him in his various voyages.

The established rule in all cases, whether of actions for words actionable *per se* or actionable only when accompanied by special damage, is, that no evidence of particular damage can be given unless it is alleged in the declaration, and the general allegation of loss of

(1) 6 Bing. N. C. 212.

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customers is not sufficient to enable a plaintiff to shew a particular injury or the loss of a particular customer. This also is the law as laid down by the Supreme Court of the State of *New York* in *Tobias* v *Horland* (1). In *Rose* v. *Groves* (2), *Cresswell*, J., says:—

> In actions for slandering a man in his trade, where the declaration alleges that he thereby lost his trade, he may shew a general damage done to his trade, though he cannot give evidence of particular instances.

In *Evans* v. *Harries* (3), which was an action for slander of plaintiff in his business of an inn-keeper, the plaintiff was permitted to prove that his business was less and that many customers, not particularizing any, had ceased to come to his house since the utterance of the slander. The jury gave a verdict for £20. Upon a motion to set aside this verdict upon the ground that the evidence was, as was contended, special damages not averred, *Martin*, B., said:

> How is a public house keeper, whose only customers are persons passing by, to show damage resulting from the slander unless he is allowed to give general evidence of loss of custom.

In *Dixon* v. *Smith* (4), which was an action by a surgeon for slander, by reason of which *D.* would not employ him as an accoucheur, and that the plaintiff was otherwise injured in the way of his business—it was proved that the words were spoken by the defendant in conversation with *D.* The plaintiff's fee for attendance on *D.* would have been a guinea or two guineas, and the plaintiff also proved that since the utterance of the slander his business, particularly in midwifery cases, had fallen off to the extent of one-third. The learned judge, who tried the case, directing the jury as to their duty, told them that:

> They might take into consideration how much the plaintiff's business fell off in consequence of what the defendant said, but that

(1) 4 Wendell 540.
(2) 5 M. & Gr. 618.
(3) 1 H. & N. 252.
(4) 5 H. & N, 450.

they must be cautious not to give damages for any injury not arising from the words of the defendant, and that he was not answerable for damage arising from repetitions of the slander.

The jury having found a verdict for the plaintiff with £50 damages, a rule *nisi* was obtained to set it aside on the ground of the improper reception of evidence of general loss of patients and diminution of business; 2nd, for misdirection in telling the jury that they might take into consideration such loss in assessing the damages; and, 3rd, on the ground that the damages were excessive.

All the judges constituting the court were of opinion that the jury were not at liberty to give such general damages as they had given; that the evidence was admissible and the charge unobjectionable, but they were of opinion that the decline of plaintiff's business as spoken of in evidence could not have arisen from the speaking of the slanderous words by the defendant to *D.*, and that for repetitions of the slander the defendant was not responsible, and therefore the damages were pronounced to be excessive. This case has a most important bearing upon the present case as establishing the duty of the jury to be to apportion the damages to the extent of the injury proved before them to be attributable to the act of the defendant, and as showing that the defendants here are not responsible for the act of the proprietor and publisher of the *Daily Telegraph* in publishing the information the defendants had given him, that being the uncontrolled and independent act of the publisher of the paper himself for which he alone was responsible. In *Riding* v *Smith* (1) the authority of *Evans* v. *Harries*, that general evidence of loss of business in an action of slander for words spoken of a plaintiff in reference to his trade is proper and admissible is recognised, and indeed such evidence to enable a jury intelligently to discharge their duty

(1) 1 Ex. Div. 94.

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seems to me to be necessary to this extent that, although without any such evidence some moderate damages might be given as recoverable in law by reason of the words being actionable in themselves, yet if the jury should give damages of a large amount, such as the damages of $7,000 given here, their verdict cannot be supported but must be set aside as evidencing either ignorance or disregard of their duty on the part of the jury. This verdict therefore must be set aside as given in error upon the evidence of *McKeen* and *Mathers* which was inadmissible as pointing to a particular or special damage not complained of in the declaration. But the verdict should be equally set aside even if that evidence had been admissible, for that evidence, properly considered, does not warrant the attributing *McKeen's* direction to his agent *Mathers* to cease dealing with the plaintiffs to the publication in the *Daily Telegraph* of the 7th January, 1879, which is complained of, for granting the paper of that date to be the one which *McKeen* saw, all that it induced him to do was to write to his agent to make enquiries as to its correctness—he asks him in his letter written upon seeing the publication—"what about *Silver?*" and what Mr. *Mathers* did upon the receipt of this was to make private enquiries himself about the plaintiffs, and although he does not tell us what was the result of his enquiries, he, no doubt, did imform his principal, *McKeen*, who, as I gathered from the evidence, thereupon, and nine or ten days after the item now complained of had been corrected in the same paper in which the first and objectionable publication had appeared, forbids him to deal any more with the plaintiffs.

Now, *McKeen & Co.* were never customers of the plaintiffs in the sense of being purchasers from them of any of the articles of their trade. Their sole business connection consisted in *McKeen & Co.* selling

exchange to the plaintiffs, when the latter applied for it, taking the plaintiffs' promissory notes therefor. That the plaintiffs had any occasion for or wanted to purchase exchange, or applied to *McKeen & Co.* for that purpose after the 7th January, 1879, was not suggested. That they, in fact, failed shortly afterwards is admitted from causes, it may be presumed, which existed prior to the 7th January, for it has not been suggested that the publication of that date in the *Daily Telegraph* contributed in the slightest degree to that event. The effect of *McKeen & Co's.* instructions to their agent *Mathers* was not to sell any more exchange to the plaintiffs, if they should apply for it, and it is obvious that if they should not want to purchase exchange, or should not apply for that purpose to *McKeen & Co.*, the latter's instructions to their agent *Mathers* could do no injury to the plaintiff's trade, and these instructions, not having been given until after the expiration of several days after the publication complained of had been corrected in the same public manner in which the libel had been published, and after *Mathers* had made his own private enquiries into the affairs of the plaintiffs, and after, as we may presume, he had communicated the result to his principals, a strong presumption is raised that *McKeen's* prohibition to *Mathers* to deal any more with the plaintiffs is attributable to the result of *Mathers* enquiries being unfavorable to the plaintiffs, rather than to the publication in the *Daily Telegraph*, which had been corrected, so that, as it seems to me, it is impossible to regard the $7,000 given by the jury, even though the defendants should be liable for that publication, otherwise than as exorbitant in the extreme and unwarranted by any evidence.

Appeal allowed with costs.

Solicitors for appellants: *Rigby & Tupper.*

Solicitors for respondents: *Meagher, Chisholm & Ritchie.*

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*Jan. 18.

*Mar. 8.

MARTHA A. ST JOHN *et al*.....APPELLANTS;

AND

JOHN CHARLES RYKERT.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Account—Payment under pressure—Imputation of payments—Appropriation by debtor—Statute of Limitations—Interest on judgment debt—Interest on covenant in mortgage—Evidence.

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between *St. J.*, the plaintiff, and *R.*, the defendant. The master found that $453.20 was due to the defendant by the plaintiff. The master disallowed to the plaintiff the amount of a note for $510, and interest thereon as barred by the Statute of Limitations; andreduced the interest on a sum of $3,000 advanced from twenty-four per cent. to six per cent. after judgment had been recovered. The note of $510 was dated 18th November, 1861, and was payable with interest at the rate of $10 per week from the 23rd November, 1861. On the 6th March, 1867, the defendant, who had been sued by the plaintiff for certain other claims, entered into agreement with him in order to relieve him from the pressure of execution debts, paid him $2,000 on account of his indebtedness, and got time for the balance. The plaintiff made no demand at the time to be paid this note, and did not instruct his attorney who acted for him to seek payment of it until 1870.

Held,—That the evidence shewed an appropriation by respondent of the $2,000 on account of the debts for which he was being pressed, and as the note for $510 was not included in such debts, the master was right in treating it as barred by the statute of limitations.

Another note dated 11th January, 1862, payable to and endorsed by one *S. H.*, was for $3,000 with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of

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

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$3,000 on the 11th day of July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment.

Held,—That the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid.

APPEAL from two judgments of the Court of Appeal for *Ontario*, the first of such two judgments having been delivered on the 20th day of May, 1879, allowing (in part) the appeal of the above-named respondent from the judgment of the Hon. Vice-Chancellor *Proudfoot* dismissing an appeal by the said respondent from the report of the master at *St. Catharines*; and the second of such judgments having been delivered on the 28th day of November, 1881, dismissing the appeal of the above-named appellants, from an order made in chambers by the Hon. Mr. Justice *Patterson*, amending the certificate issued by the Registrar of the court pursuant to the above first recited judgment.

The facts and pleadings sufficiently appear in the judgment of *Strong*, J., hereinafter given.

Mr. *Dalton McCarthy*, Q.C., for appellants, and Mr. *James Bethune*, Q.C., for respondent.

In addition to the cases reviewed in the judgments hereinafter given the learned counsel cited and relied on the following cases:—*Morrison* v. *Robinson* (1); *Mills* v. *Fawkes* (2); *Simpson* v. *Ingham* (3); *Keene* v. *Keene* (4); *Howland* v. *Jennings* (5); *Dallby* v. *Humphrey* (6); *New Marsh* v. *Clay* (7); *Peters* v. *Anderson* (8).

(1) 19 Grant 480.
(2) 5 B. & C. 461.
(3) 2 B. & C. 65.
(4) 3 C. B. N. S. 144.
(5) 11 U. C. C. P. 272.
(6) 37 U. C. Q. B. 6 4.
(7) 14 East 239.
(8) 5 Taunt. 596.

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The judgment of the court was delivered by

STRONG, J.:—

This suit was originally instituted in the Court of Chancery for *Ontario* by the appellants' testator against the present respondent, *John Charles Rykert*, and *Thomas Burns*. The Bill alleged that the plaintiff had recovered a judgment against the respondent and had issued execution against lands thereon, and that certain lands which had been conveyed to *Burns* by one *Page* were so conveyed in trust for the respondent and in fraud of the plaintiff. It was declared by the decree that the lands in question were held by *Burns* as trustee for the respondent, subject only to the amount due by the respondent to *Burns* in respect of money advanced by him to the respondent for the purpose of the purchase of these lands, and that subject to that amount the lands were liable to a charge for the amount of the plaintiff's execution. The decree then directed an account to be taken of the sum due to *Burns* and for redemption by the respondent, and in default a sale to raise the amount found due, and also for an account of all the dealings between the plaintiff and the respondent, and for a sale of the lands in default of payment of any balance found due to the plaintiff. The sum found due to *Burns* has been paid off, and his rights are no longer in question. The Master proceeded to take the account directed by the decree between the plaintiff and the respondent, and found that the sum of $458.20 was, at the date of the report, (the 12th of November, 1877,) due to the respondent by the plaintiff. The accounts were complicated, and the Master's duty was rendered very difficult by the irregular and confused manner in which the accounts had been kept by the plaintiff. The report, however, is very full and clear, and is further elucidated by a judgment which the Master has appended to it.

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Both the plaintiff and the respondent appealed to the Court of Chancery against this report. The respondent's grounds of appeal were all disallowed by the learned Vice Chancellor by whom the appeal was originally heard, and there was no further appeal from his decision in this respect, save as regards the respondent's first exception to the report. But upon this point, which related to the amount for which a mortgage for $3000 was to stand as security, the Court of Appeal confirmed the Master's finding, which, as mentioned, had been approved by the Vice Chancellor, and this last decision is not impugned upon the present appeal to this Court. The plaintiff's grounds of appeal were three in number and were as follows:—

(1.) Upon the ground that the Master should have allowed to the plaintiff the amount of the $510 note and interest thereon.

(2.) Because the Master should not have reduced the interest upon the $3000 advanced, to six per cent., after judgment had been recovered upon the note given as one of the securities therefor, but should have allowed interest at the rate of 24 per cent. upon such advance.

(8.) Because the Master should have allowed to the plaintiff the costs of the various actions brought by the plaintiff against the defendant *Rykert*.

The last of these grounds was disallowed by the Vice Chancellor, and his judgment in that respect was not appealed from. The first and second grounds of appeal were allowed, and against that decision the respondent appealed to the Court of Appeal, whose decision upon these points is the subject of the present appeal.

I will consider the questions thus raised in the order in which they have been stated. The promissory note for $510 was dated the 18th of November, 1861, and was payable with interest at the rate of $10 per week

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from the 23rd November, 1861. The Master found that this note was barred by the Statute of Limitations, and that the plaintiff failed to show that it was taken out of the operation of the statute by the application of part of a sum of $2,000 paid by the respondent to the plaintiff on the 6th March, 1867. The Vice-Chancellor held that the appropriation made by the plaintiff of a portion of the $2,000, as indicated by the plaintiff's books, to the payment of the note in question was a valid appropriation, and that the evidence was insufficient to establish a prior payment or satisfaction of the note, The Court of Appeal, though expressing no opinion upon the Statute of Limitations beyond an intimation favourable to the view taken by the master, determined that the circumstantial evidence sufficiently established a presumption of payment long before the payment of the $2,000 on the 6th March, 1867.

The circumstances which the court rely on as warranting this inference are that the note was evidently intended to be a short transaction from what appears on its face, that the interest was to begin to run five days after its date, thereby implying that it was to be paid in the five days, and also from the fact admitted by the plaintiff, that he had held a bundle of collateral securities for this note which he had given up to the respondent for the reason alleged by him that he considered them of little or no value, and from the keeping back the note, when all other demands held by the plaintiff were put in suit, as well as the plaintiff's silence regarding this note when the arrangement of the 6th March, 1867, was completed, and the omission of this note from the statement on which that agreement was based. I am far from saying that these circumstances are not sufficient to justify the conclusion which the court came to, that there had been a payment. I am of

opinion, however, that the Statute of Limitations is a much more satisfactory basis for the decision of this objection to the master's report. For I think with the master, and upon the authority of the cases referred to in his judgment, particularly that of *Shaw* v. *Picton* (1), that the proper conclusion from the evidence is that there was an appropriation by the respondent of the $2,000 to the payment of the judgments which excluded any right of the plaintiff to make another subsequent application. The law as to the imputation of payments is well settled to be that a debtor owing several debts has, in the first place, the option of ascribing a payment which he makes to any of the several debts as he may think fit, the rule being *solvitur in modum solventis*. This general rule is, however, subject to certain limitations, one of which is, that the appropriation by the debtor, must be made at the time of payment, and that he cannot make a subsequent appropriation as the creditor may. But the specific appropriation need not be shown by any express declaration, it may be inferred from facts and circumstances, and in such case it becomes a question of fact to be determined by a jury in the action at law, and in every case by the tribunal to which the decision of questions of fact is referred. In the present case it was therefore for the master to say upon the evidence whether the respondent, when he made the payment of the $2,000, on the 6th March, 1867, intended with the knowledge of the plaintiff to apply that payment to the judgments which the plaintiff had recovered against him, or whether he paid it on account of his general indebtedness to the plaintiff, as well demands in judgment as those not so included, leaving the plaintiff to make such specific application of it as he might think fit. The master has found that the respondent did intend an application of the payment

(1) 4 B. & C. 715.

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to the judgments, and I think there is ample evidence to support his finding. The arrangement for giving the respondent time, of which the payment of this $2,000 formed part, was made with Mr. *Currie*, the attorney of the plaintiff, in the actions on which the judgments had been recovered. Mr. *Currie* knew nothing of this note for $510; it had not been put in his hands for collection by the plaintiff, and was not mentioned to him by the plaintiff in the course of the negotiations which led to the agreement of the 6th March, 1867. The respondent is proved to have applied to Mr. *Currie* for a statement of the plaintiff's claims, and Mr. *Currie* accordingly gave him the memorandum, exhibit H, which specifies certain claims, all of which had passed into judgment. Mr. *Rykert* swears that he supposed this note was paid, and although he may have been wrong as to the fact, there is nothing to induce the supposition that he considered the note was then an existing debt, which is sufficient for the present purpose. When therefore Mr. *Rykert*, in the words of the agreement of the 6th March, 1867, "paid the plaintiff the sum of $2,000 on account of his indebtedness," it is a fair assumption, and an inference which a jury would be justified in making, and I have no doubt would make, that the indebtedness referred to was that stated in Mr. *Currie's* memorandum, exhibit H, save the judgment against Mrs. *Rykert*, and the costs which were to be paid to Mr. *Currie*, and were expressly excepted from the agreement. I think this conclusion is also confirmed by the agreement itself, which provides that if any of the instalments shall not be paid on the day the same becomes due, all the indebtedness in arrear may at once be "enforced." The word "enforced," thus used, implies a reference to debts upon which judgment had already been recovered, rather than to general liabilities never put in suit. In the case of *Shaw* v.

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Picton (1), Messrs. *Howard & Gibbs*, solicitors, having themselves large demands against Lord *Alvanley* upon bill transactions with himself, and also as agents for several other persons to whom Lord *Alvanley* had granted annuities, for which Lord *Foley* was surety, caused an application to be made to Lord *Alvanley* and Lord *Foley* on behalf of the annuitants, and Lord *Alvanley* in consequence of that application paid to *Howard & Gibbs* certain sums of money without making any express appropriation of them at the time of payment. It was held by the Court of King's Bench that Lord *Alvanley* ought to be considered as having appropriated the payment on account of the annuitants. The principle of that decision may be generalized by saying, that where there are several debts and in consequence of pressure in respect of one of them the debtor makes a payment, without expressing any specific appropriation, he will be implied to intend an application of the payment to the debt for which he was being pressed. And applying the principle so extracted from the case of *Shaw* v. *Picton* to the facts of the present case, it seems very clear that the respondent making the agreement of the 6th March, 1867, and the payment of the $2,000 in pursuance of its terms, in order to relieve himself from the pressure of execution debts, must be taken to have intended that payment to be applied to those debts, and not to a debt which was not brought to his attention, which he swears he believed to have been paid, and for the payment of which the plaintiff made no demand, and which he had not even instructed the attorney who acted for him to seek payment of. Therefore, even assuming that this note for $510 had not been paid previously to the 6th March, 1867, a point upon which I express no opinion varying from the conclusion arrived at by the

(1) 4 B. & C. 715.

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Court of Appeal, I am of opinion that there never was any partial payment on account to take it out of the Statute of Limitations, and that the master was consequently quite right in treating it as barred by that statute.

The remaining question which we are called upon to decide is that raised by the plaintiff's second objection to the report, upon his appeal to the Court of Chancery, relating to the rate of interest to be allowed upon a promissory note for $3,000, upon the judgment recovered on that note, or upon a collateral covenant of the same tenor as the note. The note in question was dated the 11th January, 1862, was payable to and endorsed by one *Sheldon Hawley*, and is for $3,000 "with interest at the rate of 2 per cent. per month, until paid." The covenant for payment contained in the mortgage deed of the same date given by Mr. *Rykert* as collateral security for the payment of the same amount, is for payment of "the said sum of $3,000 on the 11th day of July, 1862, with interest thereon at the rate of 24 per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed the plaintiff for interest in respect of this debt, 6 per cent. only from the date of the recovery of the judgment. The Vice-Chancellor held that the plaintiff was entitled to interest on the judgment at the rate of 24 per cent. and directed the report to be varied accordingly. The Court of Appeal, however, determined that this was incorrect, and upon the authority of *Cook* v. *Fowler* (1), held that upon the judgment the plaintiff must be restricted to the statutory rate of interest from the date of signing judgment. If the true construction of the contract as to interest embodied in this promissory note was, that interest should be paid at the rate of 24 per cent. after the date

(1) L. R. 7 H. L. 27.

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of payment fixed in the instrument itself and up to the date of actual payment, it may, upon the authority of *Popple* v. *Sylvester* (1), decided since the judgment of the Court of Appeal, be doubted if *Cook* v. *Fowler* authorised such a decision, for according to this case of *Popple* v. *Sylvester* it would seem that the recovery of the judgment only merged the principal and interest due at the date of the judgment, leaving the contract to pay interest at the larger rate still operative as to subsequently accruing interest. This, however, is a point which I merely notice in passing, for it does not call for any determination in the view which I take of the proper constructions of the terms of both the note and covenant as to the payment of interest at the rate of 24 per cent. The question as to the rate of interest recoverable on the covenant was not originally before the Court of Appeal at all. The master's report was final as to all matters of account between the parties, and it had not been objected to by the plaintiff, as one of his grounds of appeal, that the master had omitted to bring this covenant into account.

But upon the court determining that the plaintiff was only entitled to 6 per cent. interest on his judgment, it was suggested by counsel, that he was at all events entitled to 24 per cent. in respect of the collateral covenant contained in the mortgage which had never passed into judgment, and upon this the court, at the request of the parties, and in order to make a final disposition of this long pending litigation, and assuming (erroneously, I think,) that the plaintiff's claim on the covenant was not concluded by the report, undertook the decision of the question of the rate of interest recoverable under the covenant, and held that upon the covenant the plaintiff was entitled to receive 24 per cent. until actual payment. I am not able to

(1) 22 Ch. Div. 98.

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agree with the Court of Appeal in the construction which they place upon the stipulation as to interest contained in this covenant. It appears to me that the proper construction of the words in which that provision is expressed, "The said sum of $3,000 on the 11th day of July, 1862, with interest at the rate of 24 per cent. per annum until paid," is that interest, at the specified rate, is to be paid up to the 11th day of July, 1862, the day fixed for payment by the terms of the covenant, and that it is not to be interpreted as a covenant for payment of interest at the rate of 24 per cent. after the 11th day of July, 1862, if the principal should then remain unpaid. I should have arrived at this conclusion without authority, for I take it that in the absence of express words showing that the parties contemplated payment, not *ad diem* but *post diem*, we ought not to presume that they intended to make provision for a breach of the covenant, and I should have thought that a proper and salutary construction, requiring as it does parties who stipulate for a larger amount of interest than the usual and legal rate to make clear by precise and unambiguous language what their intention was. The point, however, seems to be covered by direct authority. In the case of the *European Central Railway Co.*, the Court of Appeal (1), speaking through *Bramwell*, L. J., determined that a debenture by which a joint stock company covenanted for the payment of the principal on the 11th of October, 1865, and the interest (at the rate of 6 per cent) to be payable in the meantime half yearly at the several dates, "expressed in the interest warrants thereunto annexed until the repayment thereof," meant interest at the rate of 6 per cent. until the day fixed for payment of the principal, and was not to be construed as a covenant for the payment of interest at that rate after a default in

(1) 4 Ch. D. 33.

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the payment of principal at the day named. So far as I can see, this decision did not proceed either upon the expression "in the meantime" or upon the reference to the interest warrants attached to the debenture, but determined broadly that the words "until the repayment thereof" meant payment at the day fixed. That this is the true exposition of the case referred to is, however, conclusively shown by Mr. Justice *Fry* in the late case of *Popple* v. *Sylvester* (1) (which was cited for the plaintiff upon the point that interest was recoverable upon the note notwithstanding the recovery of judgment), for in that case the learned judge distinguishing the case of the *European Central Railway Co.* from that before him, where he held that a covenant very differently worded was sufficiently comprehensive to embrace subsequent interest, says:—

> I ought, perhaps, to make a remark upon the case of the *European Central Railway Co.* (2). There the covenant being to pay the principal sum, with interest, "until repayment thereof," the court held that these words meant "until the day fixed for payment," and therefore they held that there was no covenant to pay beyond the day fixed for repayment of the principal. Here I have held that there is an express covenant to continue the payment of interest so long as the security should continue.

Then applying the decision in the *European Central Railway Co.*, as explained by *Fry*, J., to the present case, we must come to the same conclusion, for it is impossible to found any argument upon any difference or distinction between the words "until repayment thereof," which were those of the covenant then under consideration, and the words "until paid," which are those of the covenant before us in the present case. The result is that all the objections taken by the plaintiff to the master's report on the appeal to the Court of Chancery ought to have been disallowed and the order of the Court of Chancery of the 29th day of June, 1878, and

(1) 22 Ch. Div. 98. (2) 4 Ch. D. 33.

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the certificate of the Court of Appeal must both be varied accordingly.

The point which arose before the Court of Appeal on the motion to vary the certificate, and on the appeal from the order on that motion as to the credit to the respondent for the $912.70 and the interest on it, does not in this disposition of the appeal arise, and need only be noticed for the purpose of pointing out that all question as to it, must be considered as now concluded by the master's report, and I do this only to prevent any future misunderstanding and further delay in ending this long, protracted litigation. The question as to this $912.70 only became incidentally of importance upon the adjudication of the Court of Appeal, that the plaintiff was entitled to 24 per cent upon the covenant until payment. It appeared that the master had given credit to the respondent for a sum of $912.70, as having been received by the plaintiff, on the 20th May, 1862, being the balance of a mortgage made by one *Servos* to the respondent, and by the respondent transferred to the plaintiff as collateral security for a less sum than was secured by the original mortgage by *Servos*, that this balance was the surplus remaining in the plaintiff's hands after he had realized the mortgage, and paid himself out of the proceeds the debt which it was given to secure. In other words, and in the language of the judgment of the Chief Justice in the Court of Appeal, this amount of $912.70 should, in fact, be treated as a payment made by the respondent on the 20th May, 1862, and applicable as such upon his mortgage to the plaintiff for $3,000. It further appeared that the master instead of making a rest at this date of 20th May, 1862, and deducting this credit of $912.70 from the amount of principal then due, in respect of the $3,000 debt, carried on the interest account at 6 per cent. on the full amount of the latter debt, and also calculated

interest at 6 per cent. on the payment of $912.70. There was no appeal against the report in respect of this disposition of this surplus of the *Servos* mortgage, and the report in respect of it, and as regards the date at which the master gave the credit, stands confirmed. When, however, the Court of Appeal altered the report as to the rate of interest to be calculated on the debt secured by the note and covenant from 6 to 24 per cent., upon the submission of the parties already noticed, it became a matter of justice to the respondent and properly incidental to this variation of the report in that respect, that in order to give the respondent the benefit of the master's finding of the payment of this amount at the date named, that they should direct an equivalent rate of interest, (at 24 per cent.,) to be calculated on this payment, and this was done by an order made in chambers by Mr. Justice *Patterson* to that effect, which was subsequently affirmed on appeal to the full court. In the view which I have stated as to the construction of the covenant and the plaintiff's right to interest under it at 24 per cent., no necessity arises for varying the report by calculating interest at 24 per cent. on this credit of $912.70.

The conclusion is that, in my opinion, the report should stand in all respects confirmed, and that for the reasons given by the learned master.

The orders of both courts below should be varied in the manner already indicated, and the plaintiff's appeal from the report should be dismissed with costs in the Court of Chancery, and the respondent should also have his costs of the appeals both in the Court of Appeal and in this court.

HENRY, J. :—

This is an appeal from two judgments of the Court of Appeal for *Ontario*—the first of such two judgments

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having been delivered on the 20th day of May, 1879, allowing (in part) the appeal of the above named respondent from the judgment of the Hon. Vice-Chancellor *Proudfoot*, dismissing an appeal by the said respondent from the report of the master at *St. Catharines*, and the second of such judgments having been delivered on the 28th day of November, 1881, dismissing the appeal of the above named appellants, from an order made in chambers by the Hon. Mr. Justice *Patterson*, amending the certificate issued by the registrar of the court pursuant to the above firstly recited judgment.

The matter in controversy in the suit having been referred to a master, he gave a judgment which was appealed from by both parties, and a judgment was subsequently given by Vice-Chancellor *Proudfoot*. From that judgment both parties appealed, and after argument the Court of Appeal for *Ontario* passed judgment, as appears by the following certificate of the registrar of that court:—

This is to certify that after hearing counsel on the thirteenth day of May, 1879, as well for the appellant as for the respondent, upon the petition and appeal of the above-named appellant complaining of an order of the Court of Chancery of *Ontario*, bearing date the twenty-ninth day of June, 1878, and praying the same might be reversed or varied, or that such other order in the premises might be made as to this court should seem meet; whereupon and upon hearing read the reasons of appeal filed by the appellant, as also the reasons against such appeal filed by the respondent, this court was pleased to direct that the matter of the said petition and appeal should stand over for judgment; and the same having come on this day for judgment it was ordered and adjudged by the said court that the said petition and appeal should be and the same were allowed as to the five hundred and ten dollars ($510) note mentioned in the fourth reason of appeal put in by the said appellant. And this court doth declare that the said note was paid by appellant, and this court doth dismiss all the other grounds of appeal mentioned in the said reasons of appeal, but declares and directs that the sum of nine hundred and twelve dollars and seventy cents (912.70), being the amount received by the respondent in respect of the *Servos*

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mortgage as stated and shown in the master's report, be applied in reduction of the three thousand dollar ($3,000) loan in the master's report mentioned and interest thereon, and be credited to the said appellant upon the said mortgage as and when the same was received by the respondent, and with these declarations and directions this court doth refer the said cause back to the Master of the said Court of Chancery at *St. Catharines*, to review his said report as directed by the order appealed from. And this court doth not see fit to give to either party any costs of or in respect of this appeal.

On an application of the respondent to correct the foregoing certificate made to Mr. Justice *Patterson*, he, after hearing counsel for both parties, made the following order:—

Upon the application of the above-named appellant, upon reading the notice of motion served herein on the ninth day of November, A.D., 1880, for an order correcting the certificate, signed by the registrar of this court, setting forth the judgment of this court upon this appeal. Upon reading the said certificate and the various proceedings in connection with this appeal, and upon hearing counsel for the parties;

It is ordered that the certificate signed by the registrar of this court, setting forth the judgment of this court upon this appeal be amended by substituting the words "of the twentieth day of May, A.D. 1862," for the words "and when the same was received by the respondent."

Dated this 20th day of November, 1880.

An appeal was taken from that order and after argument the court gave judgment against the appellant, as will appear by the following certificate:—

Monday, the twenty-eighth day of November, 1881.

This is to certify that after hearing Counsel on the twenty-first day of December, 1880, as well for the appellant as the respondents, upon the application of the above named respondents by way of appeal from the order made herein in Chambers by the Hon. Mr. Justice *Patterson*, on the twentieth day of November, 1880, directing the amendment in certain particulars of the Certificate signed by the Registrar of this Court, setting forth the judgment of this Court upon this appeal, whereupon and upon hearing read the notice of this application and the various proceedings had and taken in connection with this appeal, this Court was pleased to direct that the matter of

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the said application by way of appeal as aforesaid, should stand over for judgment and the same having come on this day for judgment,—

It was ordered and adjudged by the said Court that the said application by way of appeal as aforesaid should be, and the same was, dismissed with costs to be paid by the respondents to the appellant forthwith after taxation thereof.

The appeal to this Court is therefore from these two judgments.

The first of the judgments disposed of the claim of the appellant on the note for $510 of the respondent declaring that the same was paid. It also declared that $912.70, being the amount received by the (then) respondent, the present appellant, in respect of the *Servos* mortgage, as shown and stated in the master's report, be applied in reduction of the $3,000 loan in the master's report mentioned and interest thereon, and to be credited to the appellant (now respondent) upon the said mortgage, as and when the same was received by respondent (now appellant,) and the cause was referred back to the master to review his report as directed by the order appealed from.

There was no appeal from that judgment, and I think it must stand, under any circumstances, as respects the question of the $510. The present appellants, or rather the original plaintiff, submitted to that judgment, and but for the motion on the part of the respondent to amend the certificate the cause would have been immediately remitted back to the master. It appears, therefore, that the only question open is the one raised by the appeal from the order of Mr. Justice *Patterson*.

Before considering that matter I may say that the real merits of the controversy as to the $510 are not easily ascertained, and if the question were open, I would incline to sustain the judgment. A plaintiff to recover should prove his claim in such a manner as to leave no reasonable doubts as to right to recover, and that has not been done in this case.

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I consider the matter opened up by the appeal in this case is but the question of the date from which the present respondent should be allowed interest on the $912.70 before mentioned. The judgment that he was to be so allowed from the time "when the same was received by the respondent," (now appellant,) was not appealed from by the appellant, and is not therefore open for consideration. Is then the judgment to amend the certificate or formal judgment within the power of the court? It seems that the certificate in question was not in accordance with the view of the Court as to the point in question, and the amendment was made to bring them into harmony. It was, as I understand it, a mistake of the Registrar in certifying the judgment of the Court of Appeal to the court below, and if he made a mistake in stating the judgment, I am of opinion for the reasons given in the judgment of Mr. Justice *Patterson* and that of Mr. Justice *Burton* for the full Court, that the amendment is justifiable.

We are then to consider the matter as if the certificate had been originally right, and as there was no appeal from the judgment, but merely from the judgment as to the amendment, there is nothing further in my opinion to be considered. I think, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs

Solicitors for appellants: *St. John & O'Connor.*

Solicitors for respondent: *Rykert & Ingersoll.*

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*Mar. 19.

*June 23.

GEORGE T. SLATER.....(DEFENDANT) APPELLANT;

AND

WILLIAM BADENACH.....(PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

Assignment for benefit of creditors—Power to sell on credit—Fraudulent preference—Rev. St. O. ch. 118, *sec.* 2.

In a deed of assignment for the benefit of creditors, the following clause was inserted:—"And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, &c., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown.

Held,—affirming the judgment of the court below—that the fact of the deed authorizing a sale upon credit did not, *per se*, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O., ch. 118, sec. 2.

APPEAL from the Court of Appeal for *Ontario* (1), dismissing an appeal from the judgment of the Court of Common Pleas refusing a rule *nisi* to set aside the verdict entered for the plaintiff.

This was an interpleader issue.

The defendant sued *Cornish & Co.*, and on the sixth day of January, 1881, obtained judgment against them for $1,032.21. On the twenty-eighth day of December, 1880, and before the defendant obtained his said judg-

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

(1) 8 Ont. App. R. 402.

ment, *Cornish & Co.* made and executed a deed of assignment of their property to the plaintiff as trustee, for the benefit of their creditors, and plaintiff contended that he entered into possession under the said deed. On the sixth day of January, 1881, the defendant issued execution on his said judgment, and placed the same in the sheriff's hands. The sheriff seized the goods mentioned in the deed of assignment to the plaintiff, and the plaintiff claimed to be entitled to them as against the defendant. Upon the application of the sheriff an interpleader issue in the Common Pleas was directed. The issue was tried before Chief Justice *Wilson* at the *York* spring assizes, 1881, and a verdict entered for the plaintiff. The defendant moved for a rule *nisi* to set aside said verdict, and to enter a verdict for the defendant, which rule was refused. The defendant appealed to the Court of Appeal, which court gave judgment in favor of plaintiff and dismissed the appeal. The defendant then appealed against such last-mentioned judgment to the Supreme Court of *Canada*.

Mr. *Gibbons* for appellant:

The assignment is invalid, because it permits the trustee to sell on credit.

This permission in such deed has been held by the Supreme Court of *New York*, and by decisions in various other states, to invalidate the deed. See *Perry* on Trusts (1) and cases there cited.

If the trustee is allowed to sell "on credit," there is no certainty that the creditor will ever get anything.

The debtor may name his own trustee; transfer all his estate to him; and that trustee may sell the whole out to some one else on credit, and the creditor must stand still and wait the result of the new risk.

It is submitted that he is not called upon to take this risk, and that the result of the American authorities is

(1) 3rd Ed., p. 143.

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founded on the best of reasons, and that the safe rule is, "that the law will not uphold the transaction when "it attempts to confer an authority or discretion upon "the assignee more extensive or liable to greater abuse "than that which the law itself possesses through its "agents and ministers. The assignment to be good, "must devote the debtor's estate unreservedly and un- "conditionally to the payment of his debts." *Murphy* v. *Bell* (1).

In no class of trusts should the powers of trustees be more strictly limited than in the case of trusts for creditors. Experience has taught that it is not wise that trustees should sell on credit, without being personally responsible in case of loss.

It is submitted also that creditors holding securities upon property of the debtor, should only rank for the deficiency over the value of such security. All bankrupt laws, which profess to make an equal distribution of the insolvent's estate, contain provisions for the valuation of such securities; and it is submitted that an assignment which makes no such provision, is not within the meaning of the provision in the statute.

The usual answer to this contention is, that the creditor holding security has his remedy on the covenant for the full amount, and so should rank.

If that rule were to govern, there is no reason why, as is provided in this deed, the joint creditors should not rank on the private estates of the respective partners, until after private creditors are paid in full. They have the covenants of both partners, and would, if they obtained prior execution, have priority as to the separate estates over creditors of such separate estates.

If the equitable doctrine is to be followed, then it is unjust that the secured creditor should rank for his

(1) 8 Howard Practice, Sup. Ct., N. Y., p. 468.

whole debt; and the legislature has always, when it attempted an equitable distribution, so viewed it.

The learned counsel referred also to the following cases: *Nicholson* v. *Leavett* (1); *In re Swoyer's* Appeal (2); *Porter* v. *William* (3); *Mussey* v. *Noyes* (4); *Sutton* v. *Hanford* (5); *Pierce* v. *Brewster* (6); *Barney* v. *Griffin* (7); *Hutchinson* v. *Lord* (8).

Mr. *Foster* for respondent:

The assignment is valid. The objection that the assignment empowers the trustee to sell on credit or for cash, and so enables him to delay creditors, was not taken at the trial or on the application for the rule *nisi*, or as a ground of appeal, but was started, for the first time, in the reply on the argument in appeal. It is not open to the appellant; at least, the respondent is entitled to the benefit of this on the question of costs.

But admitting the appellant is at liberty to avail himself of this ground of objection at this stage, it is not tenable. A power to sell on credit is and has been in unquestioned use in the English forms of assignment for the benefit of creditors. See *Janes* v. *Whitebread* (9); *Forsyth* on Composition (10). Such a sale by an assignee may be an act of good faith and a proper exercise of discretion. *Bump* on Fraudulent Conveyances (11). The power to sell on credit does not necessarily delay creditors; it more frequently facilitates the distribution of the assigned property; it increases the amount of the fund beyond what would be produced by a sale for cash only; it is in some cases essential to the due execution of the trust; it would be implied on the

(1) 2 Selden 510.
(2) 5 Barr. 377.
(3) Seldon App. 142.
(4) 26 Vt. 426.
(5) 11 Mich. 513.
(6) 32 Ill. 268.
(7) 2 Comst. 366.
(8) 1 Wisc. 286.
(9) 11 C. B. 466.
(10) P. 191.
(11) P. 418, 3rd ed.

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ordinary principles which govern the duties of trustees, were it not given; and an authority which the law would give by implication cannot be regarded as illegal and fraudulent when given in terms. *Nicholson* v. *Leavitt* (1).

But the power in question is coupled with a stipulation that in selling the assignee is to have regard to the object for which the assignment was made; so that his discretion is not unfettered as regards the term of credit. Nor is he relieved from the responsibility of taking adequate security; so that an abuse of trust in this particular would expose him to personal liability for loss. Fraud depends not on the fact so much as on the character of delay and the motive which actuated it.

Though *Nicholson* v. *Leavitt* (2), decides against the validity, in the State of *New York*, of an assignment containing a power to sell on credit, yet *Rogers* v. *DeForest* (3) is an adverse decision of great weight. The former case was expressly dissented from by the *Ohio* Court of Appeals--*Conkling* v. *Conrad* (4), and is contrary to the decisions in many other States. See also *Burrill* on Assignments (5); *Perry* on Trusts (6). But the decisions against the validity of the power in question are inapplicable to the present case owing to the difference between Rev. Stat. Ont., ch. 118, and the statutes under which they were pronounced.

The *bonâ fides* of the assignment not being impugned, the power to sell on credit does not take the assignment out of the saving clause in the Act.

Metcalf v. *Keefer* (7); *Gottswalls* v. *Mulholland* (8); *Greenshields* v. *Clarkson* (9); *Meux* v. *Howell* (10).

(1) 6 N. Y. Sup. Court Rep. 252.
(2) 2 Selden 510.
(3) 7 Paige 272.
(4) 6 Ohio 611.
(5) 3 Ed., secs. 453, 466 & 786.
(6) 3rd Ed. p. 154.
(7) 8 Grant 394.
(8) 3 U. C. E. & A. 194; affirming 15 U. C. C. P. 62.
(9) Per Wilson, C.J., Feb. 1883.
(10) P. 4 East 9.

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Then as to the objection that the deed does not provide for a proper distribution of the surplus assets of the partnership among the private creditors of each creditor, the clause is the usual one given in precedents.

Moreover, in directing that the separate creditors of the individual partners shall be satisfied primarily from the separate estate of each partner respectively, and restricting them to such separate estate, unless the joint estate be more than sufficient to pay the joint creditors, then the assignment provides not only a just and reasonable mode of distribution, in accordance with relative legal rights, but also that which the law sanctions and requires—*Baker* v. *Dawbairn* (1), and which prevailed under the Insolvent Act (2). Were the assignment silent as to the mode of distribution, the mode set forth would be taken to have been intended. *Murrill* v. *Neil* (3). That the rights enforceable by the joint creditors by execution are restricted, is not a valid objection in the face of the statutory recognition of assignments for the benefit of creditors. The form adopted is usual. *Burrill* on Assignments (4).

RITCHIE, C. J.:—

This is an appeal from the Court of Appeal for *Ontario*. It is an interpleader issue to test the ownership of a certain stock of goods, formerly the property of the firm of *Cornish & Co.*, retail dealers, carrying on business in the city of *Toronto*. The plaintiff claims under an assignment from *Cornish & Co.*, for the general benefit of creditors, dated the 28th December, 1880. The defendant claims under an execution placed in the sheriff's hands on the 7th January, 1881. The issue turns on the validity of the assignment to the plaintiff.

(1) 19 Grant 113.
(2) 6 Ont. App. R. 169.
(3) 8 How. 414.
(4) P. 773.

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The defendant contends that the assignment is invalid, because it permits the trustee to sell on credit.

The clause in question is as follows:

> And it is hereby declared and agreed that the party of the third part, his heirs, executors or administrators, shall, as soon as conveniently may be, collect and get in all outstanding credits and sums of money due to the parties of the first part, or either of them, and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the objects of these presents.

I cannot think that this clause necessarily invalidates this deed. Would any prudent man convey his property for the benefit of his wife or child and require that the property should, on sale, be sold for cash? Is it not for the benefit of the estate and of the creditors that the trustee should have this discretionary power, which he can only exercise in good faith and having due regard to the object of the conveyance. Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price, and that in the execution of the trust they will pay equal and fair attention to the interests of all persons concerned. If they fail in reasonable diligence; if they contract under circumstances of haste or improvidence; if they make a sale to advance the purpose of one party interested at the expense of another, or in contravention of the fair and honest object of the deed, they would be amenable to the law. So far from this power, honestly and fairly acted upon, defeating or delaying creditors, it might be the means of enabling the trustee to realize on the property, when compelling him to sell for cash might not only delay creditors for want of cash purchasers, but defeat creditors by causing the property to be sacrificed for less than its value by selling for cash when a sale on credit would enable its fair value to be obtained.

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Assuming the transaction to be *bonâ fide* and the trustee honest, I think the insertion of such a clause can be looked on in no other light than a prudent precaution to enable the property to be realized to the best advantage for the benefit of the creditors.

I desire by no means to be understood as saying that such a clause as this, taken in connection with other circumstances, may not be matter proper to be considered in determining the intention and effect of the deed as bearing on the rights of creditors; but in this case no fraud in fact is attempted to be shown; and, I think, this deed, so far from exhibiting on its face a fraudulent intention of defeating or defrauding creditors, exhibits an honest intention by the debtor of appropriating his property to be distributed for the benefit alike of all his creditors, and as Lord *Ellenborough* remarked of the assignment in *Pickstock* v. *Lyster* (1) so it may be said truthfully of this: "such an assignment is to be referred to an act of duty rather than of fraud, when no fraud is proved. The act arises out of a discharge of the moral duties attached to the character of the debtor, to make the fund (here the property) available for the whole body of creditors;" and as *Bayley*, J., says:

> This conveyance so far from being fraudulent was the most honest act the party could do. He felt he had not sufficient to satisfy all his debts, in the absence of a bankrupt law, he proposes to distribute his property in liquidation of them, and so prevent one execution creditor from sweeping away, (as this execution creditor proposes doing,) the whole to be detriment of his co-creditors."

And in this case it would be most unreasonsonable to set aside this deed, made for the equal benefit of all the creditors, at the instance of this judgment creditor, and allow him to come in and sweep the whole property into his own pocket.

(1) 3 M. & S. 37.

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In this case no inference whatever can be drawn that this assignment was intended to defeat or delay creditors and therefore void. The property, it is admitted, is insufficient to pay the creditors in full; there can therefore be no resulting trust for the benefit of the debtor, except a benefit can enure to the debtor and his creditors from realizing as much as possible and as soon as possible from the property. There are no reservations to the debtor, no exclusion of creditors who do not comply with certain conditions, and no release insisted on by the debtor; all the property is devoted to the payment of the creditors, and in the realization of it no other discretion is vested in the trustee than that which every prudent owner desiring to realize the largest amount would exercise. The clause complained of under these circumstances was but to enable the property to be made available in the most judicious manner, for the benefit of the creditors, by not compelling the trustee to sacrifice the property for cash when a much more judicious and profitable disposal might be made by selling on credit, whereby the fair value of the property might be obtained, when by selling for cash there would be a ruinous loss, such as too often results from a forced cash sale, or by delaying creditors by keeping the property on hand till a suitable cash purchaser could be found, when a fair sale on reasonable credit could be readily effected. This amounts to no more in effect than giving a trustee power to sell in such manner as he may think proper, and we have the case of *Boldero et al.* v. *The London and Westminster Loan & Discount Co., limited* (1,) where such a deed was held not to be void under the 13 *Eliz.*, ch. 5.

Debtors in insolvent circumstances executed a deed by which they conveyed all their estate to trustees

(1) 5 Ex. Div. 47.

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on trust to sell in such manner as they might think proper, and to divide the residue of the proceeds, after paying expenses, rateably among the creditors, parties to the deed, and, if the trustees thought fit, creditors who refused or neglected to execute, and, if the trustees thought proper, but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors. The deed provided for the payment of maintenance to the debtors, if the trustees thought fit, and the executing creditors respectively indemnified the debtors and the trustees in respect of the bills of exchange and promissory notes made or endorsed to them respectively by the debtors in respect of the schedule debts:—and *Pollock*, B., said:

The defendants further rely on the general tendency of the deed itself and argue that on the whole the deed sweeps away all that the creditors have to look to, and so defeats the claims of such of them as are not assenting. But we are here dealing, not with the Bankruptcy law but with the statute of *Elizabeth*, and without going back to older cases, as Lord Justice *Giffard* pointed out in *Alton* v. *Harrison* (1), the statute of *Elizabeth* does not touch the question of equal distribution of assets; this assignment, therefore, though it preferred certain creditors and tended to defeat the others might be good.

If such a deed as the one objected to in this case was held good, surely the one we are dealing with cannot be complained of.

To use the language of *Ashhurst*, J., in *Estwick* v. *Caitland* (2), "it appears to be a fair transaction calculated to answer a fair and legal purpose by legal means. I can discover no evidence of fraud or design to defeat or delay creditors in any part of the transaction" but the exact opposite.

All the other points were disposed of on the argument and satisfactorily in the court below.

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

(1) L. R. 4 Ch. 622.

(2) 5 T. R. 425.

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STRONG, J.:—

At the argument, I had some doubt upon the point raised by this appeal, which subsequent consideration has however entirely removed. *Pickstock* v. *Lyster* (1) having shown that an assignment for the benefit of creditors generally was not avoided by the 13 *Elizabeth*, but was good against a particular execution creditor of the assignor, I think it must necessarily follow that every power or trust conferred upon the trustee for creditors which is for their benefit must also be valid. I cannot agree that a clause which invests such a trustee with a discretionary power, which so far from being necessarily prejudicial to the general body of creditors is actually essential to their protection, renders the assignment invalid merely because it "hinders and delays" them. It is to be presumed that the trustee will do his duty, in other words, that he will execute the trust in the interest of the creditors exclusively, and that he will not sell on credit unless it is for their benefit that he should do so. If he fails in his duty, or proposes to act in contravention of it, his conduct can be controlled by a Court of Equity, who can also supersede him in the office of trustee.

Every argument adduced in support of the contention that such a clause as this necessarily makes an assignment fraudulent strikes at the doctrine of *Pickstock* v. *Lyster*, for so soon as it is once admitted that a particular creditor may lawfully be hindered or delayed by an assignment for the whole body of creditors, it necessarily follows that every reasonable and useful power for the protection of the whole body of creditors must also be valid. It would, therefore, be impossible to hold this deed void for the reasons assigned without impugning the authority of *Pickstock* v. *Lyster*, which

(1) 3 M. & S. 371.

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I am not prepared to do. Whilst I thus hold as to the effect of such a clause as this in the abstract, I do not of course mean to say that a clause authorizing a sale on credit may not, coupled with other circumstances, lead to an inference of fraud which would invalidate the deed of assignment: all I mean to determine is, that by itself such a provision does not make the deed illegal. I am of opinion that this is the law under 13th *Elizabeth*, and that we need not seek the aid of the Provincial statute to enable us to reach such a decision.

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

FOURNIER, J., concurred.

HENRY, J., stated that as no case of fraud or collusion had been made out, he was of opinion that the appeal should be dismissed with costs.

GWYNNE, J.:—

I concur in the opinion that this appeal should be dismissed.

The clause at the end of the second sec. of chap. 118 of the Revised Statutes of *Ontario* appears to me to have the effect of giving statutory recognition to a doctrine already well established by the decisions of the courts, viz.: that a deed of assignment made by a debtor for the purpose of paying and satisfying rateably and proportionably, and without preference or priority, all the creditors of such debtor their just debts, shall not be construed to be a deed made either to defeat or delay the creditors of such debtor, or to give one of such creditors a preference over another. Unless then there be something on the face of the deed which is assailed here as being void against creditors which *ex necessitate rei* has the effect of raising a presumption *juris et de*

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jure that the intention of the debtors in executing the deed was to defeat or delay their creditors in the sense in which such an act is prohibited by the statute—for there is no suggestion that the deed gives to any creditor a preference over another—the question of intent was one of pure fact to be passed upon by the jury who tried the issue, and the proper way of submitting that question to them would be to say, that if they should find the intent of the debtors in executing the deed was for the purpose of paying and satisfying rateably and proportionably and without preference or priority all the creditors of the defendants their just debts. they should find that it was not made with the faudulent intent which is prohibited, and that they should render their verdict for the plaintiff.

The words of the deed as affects the selling on credit in short substance are, that the trustee shall, *as soon as conveniently may be*, collect and get in all sums of money due to the debtors and sell the real and personal property assigned by auction or private contract as a whole or in portions *for cash or on credit* and generally on such terms and in such manner as he shall deem best *or suitable having regard to the object of these presents*; such object, as expressed in another part of the deed, being to pay and divide the proceeds among all the creditors of the grantors rateably and proportionably according to the amount of their respective claims.

This language, as it appears to me, merely expresses an intention that the trustee may at his discretion, sell for cash or on credit, accordingly as he shall deem best calculated in the interest of the creditors, to realize the largest amount for general distribution among them rateably and proportionably, according to the amount of their respective claims.

To hold that this clause in the deed operates so as to compel the court to hold as an incontrovertible conclu-

sion of law that the deed was not made and executed as in its terms it professes to be for the purpose of paying and satisfying rateably and proportionably all the creditors of the debtors their just debts, but was made and executed with intent to defeat and delay such creditors, appears to me to involve a manifest perversion of the plain language of the deed, and such a construction of the clause in question is not warranted by any decision in the English Courts, or in those of the Province of *Ontario*, from which this appeal comes, and there is in my judgment nothing in it which so recommends it as to justify us in making a precedent by its adoption. If it be said that the clause in question, although not operating as such a conclusion of law, at least affords evidence of the deed having been executed with an intent to defeat and delay creditors, and not for the purpose of paying and satisfying the creditors their just debts rateably and proportionably, and for that reason was proper to have been submitted to the jury to be taken into consideration by them, the answer is, that such a point should have been made at the trial, and not for the first time, as it was here, in the Court of Appeal for *Ontario* in the argument of the counsel for the appellant in his reply. And as the jury have rendered a verdict for the plaintiff, they must on this appeal be taken to have found as matter of fact that the deed was not executed with intent to defeat and delay creditors, but was executed for the purpose of paying and satisfying them their just debts rateably and proportionably.

Unless there be something on the face of the deed which in law nullifies and avoids it, the verdict of the jury in maintaining its validity must be upheld. Upon this appeal nothing as it appears to me is open to the appellant to contend but the points contained in his motion in the Common Pleas Division of the High

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Court of Justice for *Ontario* for a rule for a non-suit or judgment to be entered for the defendant, the judgment of which Court refusing such rule, sustained by Court of Appeal for *Ontario*, is what is before us, and I am of opinion that the verdict of the jury should be upheld, and that the rule moved for was properly refused.

I have, however, carefully perused the judgments in the case of *Nicholson* v. *Leavitt*, so much relied upon by the learned counsel for the appellant, as it was decided in the Court of Appeals for the State of *New York*, as reported in 6 N. Y. R. 510, and also the same case as decided in the Superior Court of that State and reported in 4 Sandf. 254. The Court of Appeals when reversing the judgment of the Superior Court seem to me to rest their judgment in a great degree upon a proposition which they lay down, to the effect that a debtor might with equal justice prescribe any period of credit which to him should seem fit, as that which the trustee should give upon sales of property assigned to him, as assume to vest in him a discretion to sell upon credit, if such a mode of selling should seem reasonable and proper and in the best interests of the creditors.

With the utmost respect for the high authority of the Court of Appeals for the State of *New York*, this seems to me to be equivalent to saying, that to express an intent of vesting in the trustee authority and permission to exercise his best judgment by selling on credit, if such mode of disposing of the property should seem to be in the interest of the creditors, whose trustee he is made, and to express an intent of *divesting* such trustee of all such authority and to *prescribe* to him a rigid unalterable course, which, in the discharge of his trust, he must pursue against the dictates of his own judgment, and against the will of the creditors whose trus-

tee he is made, are one and the same thing. There are other parts of the reasoning upon which this judgment is rested which seem to me to lead to the conclusion that delaying a creditor in obtaining satisfaction of his debt by the particular process of execution in a suit at law is equally a defeating and delaying of him within the prohibition of the statute as the vesting the trustee with authority in his discretion to sell upon credit, if such would be a reasonable and proper course to pursue in the interest of the creditors, would be, and that the former is not within the prohibition of the statute is established in our courts beyond all controversy.

Upon the whole, therefore, after a careful perusal of both judgments, I must say that that of the Superior Court is, in my opinion, based upon much sounder reasoning, and is more reconcilable with the English authorities than is that of the Court of Appeals, and I think it to be a sound rule to lay down as governing all cases like the present, that an assignment of property by an insolvent debtor can never be declared void under the statute in question here, if in the opinion of the tribunal for determining matters of fact in each case, the actual intent of the debtor, as matter of fact, in executing the deed was, as the jury must be taken to have found to be the fact in this case, to provide for the payment and satisfaction of the creditors of the debtor rateably and proportionably without preference or priority according to the amount of their respective claims; and, in my opinion, the mere fact that the deed contains a clause authorizing the trustee in his discretion to sell the property assigned, or any part of it, on credit, if such a mode of selling it should seem reasonable and proper and in the interest of the creditors, does not justify as a conclusion of law an adjudication that the grantor's intent in executing the deed was not to provide for such payment, but on the contrary, in violation of

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the provisions of the statute in that behalf, was to defeat and delay his creditors.

Appeal dismissed with costs.

Solicitors for appellant: *Gibbons, McNab & Mulkern.*

Solicitors for respondent: *Foster, Clarke & Bowes.*

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*Nov. 13, 14, 15, 17.

1885

*March 16.

THE MERCHANTS' BANK OF HALIFAX..... } APPELLANTS;

AND

GILLESPIE, MOFFAT & Co..... ...RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Winding up Company.—45 Vic., ch. 23 (D).—Foreign Company.

The *Steel Company of Canada (Limited)*, incorporated in *England* under the Imperial Joint Stock Companies Acts, 1862-1867, and carrying on business in *Nova Scotia*, and having its principal place of business at *Londonderry, Nova Scotia*, was, by order of a judge, on the application of the respondents and with the consent of the company, ordered to be wound up under 45 *Vic.*, ch. 23 (D). The appellants, creditors of the *Steel Company*, intervened, and objected to the granting of the winding-up order on the ground, that 45 *Vic.*, ch 23 was not applicable to the company.

Held—reversing the judgment of the Supreme Court of *Nova Scotia*, *Fournier*, J., dissenting—that 45 *Vic.*, ch. 23, was not applicable to such Company.

APPEAL from the judgment of the Supreme Court of *Nova Scotia*, rendered on the 31st March, 1884, granting an order for winding-up of the *Steel Company of Canada (Limited)*.

The *Steel Company of Canada (Limited)*, is a joint stock company, incorporated in *England* in 1874, under

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

the Imperial Joint Stock Companies' Acts of 1864 and 1867.

The said company was never incorporated in *Nova Scotia*, nor in the Dominion of *Canada*. The chief place of business of the company in *Canada* is at *Londonderry*, in the county of *Colchester*, in the Province of *Nova Scotia* aforesaid, where the company have for some years past owned and operated extensive iron mines and iron and steel works, and the company's property at *Londonderry* constitutes almost entirely its assets. The company owned no real estate or premises elsewhere than in *Canada*, but occupied an office in *Great Britain*.

The objects of the company, according to the memorandum of association, were as follows:—

1. The carrying into effect of the agreements following, or any modifications of the same, respectively, which may be agreed upon by the several parties and the company; that is to say:

(*a*.) An agreement, dated the 13th day of March, 1874, made between *Charles Tennant*, of the one part, and *Edward Faulcknor Tremayne*, of the other part, for the purchase of certain iron works, properties, lands and hereditaments, situate at or near *Londonderry*, in the Province of *Nova Scotia* and Dominion of *Canada*, formerly belonging to the *Intercolonial Iron Company (Limited)*, and other works and hereditaments held in connection therewith.

(*b*). An agreement dated the 13th day of March, 1874, and made between *Charles William Siemens*, of the one part, and *Edward Faulcknor Tremayne*, of the other part, for the grant of a license or right to use, free of royalty, the patent process of the said *Charles William Siemens*, for the production of iron and steel, and their subsequent working into merchantable forms.

2. The purchasing, leasing, or otherwise acquiring of

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iron works, collieries, coal mines, iron mines, or any other mines, mining ground or minerals, and particularly the purchasing, leasing, or otherwise acquiring of the iron works and collieries, coal and ironstone mines, and other properties, lands and hereditaments mentioned or referred to in the said agreement, and other works and hereditaments held in connection therewith; and the searching for, and getting, and working, raising and making merchantable and selling and disposing of iron, coal, ironstone, and all ores, metals and minerals whatsoever.

3. The carrying on the trades or businesses of iron masters, coal masters, miners, smelters, engineers, steel converters and manufacturers, iron founders and general contractors, in all their branches, and the making, purchasing, hiring and selling railway and other plant, fittings, machinery and rolling stock.

4. The purchasing and selling as merchants, iron, steel, coal, metals and other materials, articles or things on commission, or as agents, or otherwise.

5. The purchasing or taking in exchange or on lease, renting, occupying, or otherwise acquiring of any works, collieries, lands, hereditaments, premises, properties, estates and effects, or any grants, concessions, leases, or other interest therein, and purchasing or working of any patent or patent rights which may be considered desirable for the interests of the company.

6. The purchasing the goodwill or any interest in any trade or business of a nature or character similar to any trade or business which the company may be authorized to carry on.

7. The draining, paving, planting, building on or otherwise improving and realizing of all or any parts of the lands from time to time purchased, taken in exchange, or on lease, or otherwise acquired by the company, and the managing, farming, cultivating,

maintaining, improving, under-letting, setting, leasing, exchanging, selling and otherwise dealing with and disposing of all or any parts of the lands, hereditaments, and real and personal estates and properties and effects of the company, and in such manner, and on such terms, and for such purposes as the company think proper.

8. The construction of any waterworks, ponds, reservoirs or watercourses, and the promoting, making, providing, acquiring, leasing, working, using and disposing of railways, tramways, and other roads and ways, for the more convenient access to any parts, or otherwise for the benefit, or supposed benefit, of any property of the company, or for any other purpose.

9. The contributing to the expense of constructing, making, providing, acquiring, working and using the same.

10. The applying for and obtaining on behalf of the company of patents for processes to be used in any of the works or operations of the company, and the purchasing and acquiring of any patents for like processes granted to any other person or corporation, or any license for the using of the same.

11. The making and carrying into effect of arrangements with landowners, railway companies, shipping companies, carriers and other companies and persons, for the purposes of the company.

12. To sell the undertaking, assets and property of the company, or any portion of the same, to any other company or companies, or any person or persons, for such price in money or shares in any purchasing company or other firm, and on such terms as the company shall sanction, and to acquire the whole or any part of the undertaking, assets and property of, or otherwise to amalgamate with any other company or companies established for objects similar in general character to the objects of this company.

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13. The establishing and regulating of agencies for purposes of the company, whether in the *United Kingdom* or abroad; and

14. The doing all such other things as are incidental or conducive to the attainment of the above objects.

In May, 1875, an Act (ch. 3) of the Legislature of *Nova Scotia*, was passed in reference to the said *Steel Company of Canada* (*Limited*), and that Act was to be read as a part of the case on appeal.

The business of the company was managed by directors, whose meetings took place in *Great Britain*. Two at least of the directors always resided in *Canada*. At the commencement of these proceedings, and for some time prior thereto, the managing director resided in *Canada*.

On the 29th day of November, 1883, *Gillespie, Moffat & Co.*, of the city of *Montreal*, creditors of the said company, presented before the Supreme Court of *Nova Scotia*, a petition to wind up the said company.

The company consented to the winding up, as prayed for in the said petition, but the *Merchants Bank of Halifax*, creditors of the said company, and the appellants in this appeal, appeared and opposed the granting of a winding-up order. The court made the winding-up order, from which order an appeal was taken.

The only question argued on this appeal was as to whether the Act (ch. 23) of the statutes of *Canada*, 1882, in reference to insolvent banks, insurance companies, &c., is applicable to the *Steel Company of Canada* (*Limited*).

Mr. *Henry*, Q.C., for appellant:

As appears by the case, the only question to be argued in this appeal is as to whether the statute (ch. 23) of the *Canada* Acts of 1882 is applicable to the *Steel Company of Canada* (*Limited*).

This is not a mere bankruptcy act but a winding-up act. A company may be wound up when not insolvent at all, and the act is expressly made applicable to companies which are not insolvent. *Lindley* on Partnership (1).

The Act contains many provisions which it would be impossible to carry out against this company. The following are referred to here as examples of these inapplicable and unworkable provisions:

Section 19 is intended to prevent the company from carrying on business except in so far as the liquidator may think beneficial for the winding up. It also restricts, after the making of the winding-up order, transfer of shares by shareholders in *England*, who in no view of the matter can be regarded as subject to Canadian legislation. Contributories are to be consulted in reference to the winding-up, although they live thousands of miles away, and in a different jurisdiction. Under section 38 the powers of the directors end at the beginning of the winding-up proceedings, although the board sits in another country and acts under the authority of an Imperial Legislature. Section 44 purports to work a complete dissolution of the company, although by virtue of an Imperial statute its organization and powers remain intact.

The rights of contributories who are in no wise subject to any jurisdiction in *Canada* are to be adjudicated upon and settled by a Canadian court or judge. Contributories in *England* may be called upon to pay money into our court. The liquidator may compromise all calls and liabilities to calls.

Creditors in *England* are to be restrained from suing the company, and must ask leave of the court here before they can sue even there. Section 34 provides that the liquidator is to take into his hands all the assets of the company.

(1) (Ed. 1878) 2 vol. 1486.

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By various clauses, provisions are made for proceedings against absconding directors, and for the punishment of fraudulent directors. The franchises conferred by the Parliament of *Great Britain* are to be limited and cancelled by certain proceedings under an act of the Colonial Dominion of *Canada*.

Independently of these provisions of the Act and of its general frame and tenor, which so strongly indicate that it was not intended to apply to an English incorporated company, some light upon the question of construction is afforded by the consideration that by the comity of nations the jurisdiction in which this company should be wound up in insolvency would be in *Great Britain*, where it may be said to be domiciled and where there actually exist ample provisions for so winding it up. *Bulkeley* v. *Shultz* (1).

The English cases which have been relied upon by the respondents to establish that under this Act the court should entertain jurisdiction to wind up foreign companies, were based upon the 199th section of the English Act, which provides that any partnership association or company, except railway campanies incorporated by Act of Parliament, consisting of more than seven members, and not registered under this Act, and hereinafter included under the term "unregistered company," may be wound up under this Act. And all the provisions of this Act, with respect to winding up, shall apply to such company.

There is no such provision in the Canadian Act, and it is obvious, from the English cases in question, that the jurisdiction would not have been entertained in the absence of this 199th section.

See specially *in re Commercial Bank of India* (2).

If the act in question is to be construed as applicable

(1) L. R. 3 P. C. 769. (2) L. R. 6 Eq. 517.

to such a company as the *Steel Company of Canada*, it is so far *ultra vires* of the Parliament of *Canada*.

If this act is to be read as extending to this company, its provisions are so far essentially inconsistent with those of the Companies Acts, 1862 and 1867, under which the company is constituted, that they must be considered repugnant, and therefore to that extent, at all events, void.

The Companies Acts, 1862 and 1867, were passed by the same Imperial Legislature which enacted the *British North America Act*, and if the Canadian Act of 1882 purports to deal with this company in a manner inconsistent with the operation of the Imperial legislation, under which the company was constituted, and to which it is clearly subject, then the Canadian Act is *ultra vires* to the extent of the inconsistency involved.

Then, finally, I submit that the act of 1884, expressly stating that it is applicable to foreign companies, shows that the Dominion Parliament did not intend that the Act of 1882 should apply to English companies.

Mr. *Laflamme*, Q.C., and Mr. *Sedgwick*, Q.C., for respondents:

The first section of the *Canadian Winding-up Act* is wide enough to include and does include foreign corporations. "This act applies to incorporated trading companies." Sections 13, 106, 109 and 116 show that parliament intended the act to apply to foreign as well as to home companies. Sections 107 and 108 refer to the statutes relating to life insurance, and provide for the payment of claims against life insurance companies that are being wound up. *The Consolidated Insurance Act*, 1877, one of these statutes, is expressly referred to, and upon reference to that act it will be seen it unquestionably includes within its purview foreign corporations.

The English "Companies Act, 1862," provides for the

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winding up of corporations. It applies to "any partnership association or company" (sec. 199). This section is the only authority which gives the Imperial Courts jurisdiction to wind up foreign corporations under that act, and that power is unquestioned and has been repeatedly exercised.

See *re Madrid & Valencia R. Co.* (1); *re Union Bank of Calcutta* (2); *Reuss* v. *Bos* (3); *re Commercial Bank of India* (4).

The words in the Canadian statute "any incorporated company" are as comprehensive as those of the Imperial, "any partnership association or company," and, if so, then the authority of the English cases is wholly in favor of the respondents. See also *Parsons* v. *The Queen Insurance Co.* decided by this court (5).

The Canadian Act is not, strictly speaking, a winding-up act, but a bankrupt act. In contradistinction to the English statute it relates only to insolvent companies—a company can be wound up only when insolvent. It cannot of its own motion be wound up. Its contributories cannot invoke the aid of the act; creditors are the only persons entitled to do so. No such provision is made for its total extinguishment as that contained in section 143 of the Companies Act, 1862; and it is submitted that should all its debts be paid under liquidation proceedings it might then proceed with its business under its original charter. The only object the act has in view is equal distribution of the company's assets among its creditors, an object peculiarly within the powers of the Parliament of *Canada*. That parliament had shortly before repealed the Insolvent Act, and this act was simply in effect a re-enactment of that act, so far as it related to corporations, but without any provisions for discharge.

(1) 3 De Gex & S. 127.
(2) 3 De Gex & S. 253.
(3) L. R. 5 H. of L. 176.
(4) L. R. 6 Eq. 517.
(5) 4 Can. S. C. R. 115.

Then viewing the act in question simply as an Insolvent Act, there can be no question as to its application to a foreign insolvent company doing its principal business in *Canada*. In *France* companies having foreign legal personality are continually declared bankrupt. See *Westlake's* Private International Law (1).

The legal principles applicable to a foreigner, or person not domiciled in *Canada*, but doing business in *Canada*, cannot be different from those applicable to a foreign company doing business in *Canada*. By comity of nations English courts extend to foreign corporations, in matters of trading, the same protection and privileges as they shew to foreign individuals.

The *Steel Company of Canada* was formed for the purpose of operating iron mines in *Canada* and carrying on business there. It became insolvent there. It committed an act of bankruptcy there. Can it be said it is not to be subject to the bankrupt laws existing there?

The argument that Parliament could not have intended the Act in question to apply to foreign companies, inasmuch as the collection of its assets abroad is difficult, if not impossible, is not, it is submitted, tenable, for the following among other reasons: –

Because, assuming the act is an Insolvent Act, foreign courts will recognize the rights of the statutory assignee to property abroad. *Westlake* on Private International Law (2).

Because the difficulty of realizing property or of the company's liquidator obtaining a status in foreign courts, is not conclusive as to Parliament's intention. In *England*, *Ontario* and *Nova Scotia* statutes have been passed providing for service of process on foreigners abroad and for obtaining judgments against them. If the defendants do not submit to the jurisdiction of the courts out of which the process issues these judgments

(1) P. 133 and ss. 123 & 124. (2) 1 Sec. 125.

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have no validity in the defendant's domicile, and yet the constitutionality of these statutes cannot be questioned. They are binding at home, and the moment the defendant comes within the reach of the arm of the court they are effective.

In like manner a liquidator can settle in this country the list of contributories, and thus can obtain what is in effect a judgment against each of them—such judgment is as efficient as any judgment obtained in this country against a foreigner. The difficulty of realizing the fruits of it does not affect its validity, as far as our courts are concerned.

The case of *In re Matheson Bros. & Co. (Limited)* (1) was referred to and commented on as being conclusive in favor of appellant's contention.

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

RITCHIE, C. J.,:—

The Steel Company of Canada (Limited) is a joint stock company incorporated in *England* in 1874 under the Imperial Joint Stock Companies Acts 1862 and 1867.

The said company was never incorporated in *Nova Scotia*, nor in the Dominion of *Canada*.

The only question argued on this appeal was whether the Act, ch. 23 of the statutes of *Canada*, 1882, in reference to insolvent banks, insurance companies, &c., is applicable to the *Steel Company of Canada (Limited)*.

This is a case of winding up pure and simple. I do not think that the Dominion Parliament intended that the 45 *Vic.*, ch. 23, should apply to winding up companies incorporated under the Imperial Joint Stock Companies Acts, 1862, and 1867. The provisions of the Dominion Act and the Imperial Acts as to winding up are in so many most important particulars inconsistent the one with the others, that if the Dominion Parliament

(1) 32 Week. Rep. p. 846.

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had intended the 45 *Vic.* to apply to companies incorporated under the Imperial Acts, there would have been in the Dominion Act some distinct intimation indicated to that effect, or some reconciliation of the conflicting or inconsistent provisions, so that the act with respect to such companies might be effectively carried out in its integrity, which cannot now be done.

I am confirmed in this opinion by the action of the Dominion Parliament in passing the first section of the 47 *Vic.*, ch. 39, which repeals the 1st sect. of 45 *Vic*, ch. 23, and substitutes the 1st sec. of 47 *Vic.* in lieu thereof, the only alteration being the addition to the enumeration of the companies to which the 45 *Vic.* is to apply of the words: "which are doing business in *Canada* no matter where incorporated," conveying, it appears to me, a very clear intimation that the 45 *Vic.* did not so apply.

The 47 *Vic.* was passed after the proceedings in this case were taken, and there is no indication that the added words should have a retrospective operation.

Therefore I think the Act, ch. 23 of the statutes of *Canada*, 1882, in reference to Insolvent Banks and Insurance Companies, &c., is not applicable to the *Steel Company of Canada* (*Limited.*)

This renders it quite unnecessary to discuss the question as to the extent of the power of the Dominion Parliament to pass laws for winding up, or otherwise dealing with foreign insolvent trading companies doing business in the Dominion, or in reference to the disposition of their property and assets in this country or elsewhere if insolvent.

STRONG, J.:—(ORAL.)

The first point to be decided in this case is, whether the statute of the Dominion known as the Winding up Act of 1882 applies to a company incorporated in *Eng-*

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land under the companies Act of 1862, as the *Steel Company of Canada* was.

The effect of the winding up under this statute is to settle the rights and equities of the shareholders, or *quasi* partners, as between themselves, and to dissolve the company.

By the Imperial Act of 1862, under which this company was organized, winding up is provided for, and the effect of such a winding up is thus described by Lord *Romilly*, M. R., in *re Philips* (1):—

> The object of the winding up acts was only to settle the equities between the partners in order that when the partnership was wound up they might obtain contribution from each other.

This then being a company having its domicile in *England*, and being subject to an express statutory provision for its winding up in the appropriate forum for such a purpose, viz., the forum of its domicile, a colonial statute providing for the winding up of the same company would be *ultra vires* and void, not merely upon the interpretation of the clauses as to the general powers of the Dominion Parliament in the *British North America* Act, but by the express provisions of a paramount law, the Imperial statute 28 and 29 *Vic.*, ch. 63, which enacts:—

> That any Colonial law repugnant to any Act of Parliament extending to the Colony to which such law may relate shall be void to the extent of such repugnancy.

I therefore consider that, as we are not to give any statute a construction which would make it repugnant to a higher law, and so void upon principles of constitutional law, neither this statute of 1882, nor the subsequent Act, which declares that foreign corporations are to be included in its provisions, applies to this company—for no one can doubt but that the Imperial statute of 1882 is binding throughout the empire;

(1) 18 Beav. 169.

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therefore upon this principle, even if this statute had expressly in words included this company incorporated under the *English* Act of 1862, I should have equally held it to have been void,

But supposing the statute of 1862 to have made no specific provision for winding up, I should still hold that this act of 1882 did not apply to a joint stock company domiciled in *England*. All statutes are to be construed so as not to conflict with well established rules of international law.

Then it is a universally recognized principle that a company or partnership is only to be wound up, *i. e.* the rights of partners *inter se* and the dissolution are only to be judicially brought about, in the forum of its domicile.

We must, therefore, construe this statute so as to be consistent with and to give effect to this rule, as to which there is a general consensus of authority, English, American and Continental. This last position does not, of course, affect the validity of the statute of 1882 but merely its construction, for the rules and canons which govern the comity of nations and make up what is called Private International Law do not in any way control the legislature, and, therefore, so far as the mere question of construction is concerned, the difficulty would have been obviated if the statute, as originally expressed, had been declared to be applicable to foreign corporations, as it is by the subsequent act of 1883, but in that case, as I have already said, I should have considered it *ultra vires* as in conflict with the Imperial Act of 28 and 29 *Vic.*, ch. 63. Lastly, the very fact of the 47 *Vic.*, ch. 39 (1883), having made the statute of 1882 applicable to foreign corporations, is conclusive to show that it was not the intention of the Legislature to include them in the first instance in the Act of 1882, upon which the winding up order in this case is alone dependent.

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Nothing in the foregoing statement of the reasons for this decision is intended to impugn the power of the legislature to enact bankruptcy and insolvency statutes applying to foreign corporations, or even to provide for the winding up of such corporations, provided in the case of the latter the statutory provision is express, and does not conflict with any Imperial legislation.

FOURNIER, J.:

La seule question soulevée en cette cause est de savoir si " l'acte relatif aux banques et corporations de commerce en état d'insolvabilité " peut être appliqué à la compagnie " *The Steel Company of Canada (Limited)*."

Cette compagnie a été incorporée en *Angleterre* en 1874, conformément aux dispositions des actes impériaux de 1862 et 1867, concernant l'incorporation des compagnies à fonds social. Mais le chef-lieu de ses affaires est à *Londonderry*, dans le comté de *Colchester*, *Nouvelle-Ecosse*, où elle fait une exploitation considérable de mines de fer, ainsi que la manufacture sur une grande échelle d'ouvrages en fer et en acier.

Il est admis que toutes les propriétés de la compagnie sont situées en *Canada* et qu'elle n'a qu'un bureau d'affaires en *Angleterre*.

Les opérations de la compagnie devaient comprendre non seulement l'exploitation des mines de fer et de charbon, mais presque tous les travaux qui se rattachent à ces industries, aussi l'exploitation de mines en général, ainsi que la construction d'une grande variété d'ouvrages, tel que le tout est énuméré dans un mémoire adopté par la dite compagnie pour indiquer et pour définir les objets qu'elle avait en vue d'atteindre par son incorporation.

Les affaires étaient conduites par des directeurs qui tenaient leurs réunions en *Angleterre*, deux de ces direc-

teurs ont toujours demeuré en *Canada*. Le principal gérant n'a cessé d'y demeurer que depuis le commencement des procédés en liquidation.

Le 29 Novembre 1883, les intimés, créanciers de la dite Compagnie, ont présenté à la Cour Suprême de la *Nouvelle-Ecosse*, une requête demandant la liquidation de la Compagnie suivant les dispositions de l'acte ci-dessus cité.

La Compagnie a donné son consentement à cette procédure, mais l'appelante s'y est opposée. La cour ayant accordé la demande des intimés, c'est de l'ordre rendu à cet effet qu'il y a présentement appel.

La seule question débattue devant la cour de première instance, comme devant celle-ci, a été de savoir si l'acte 45 *Vict.*, (1882,) ch. 23, concernant les banques insolvables, etc., etc., est applicable à la Compagnie dont il s'agit. Ayant été incorporée en *Angleterre*, cette Compagnie se trouve ici une corporation étrangère. L'acte ne faisant pas une mention spéciale des corporations étrangères, on en conclut qu'elles ne pouvaient être soumises à son opération. C'est le principal argument invoqué contre son application à la présente Compagnie ; le second est fondé sur l'insuffisance de ses dispositions pour atteindre les débiteurs et contributaires de la Compagnie résidant en pays étrangers.

Quoique l'acte 45 *Vict.*, ch. 23, ne fasse pas une mention particulière des corporations étrangères, les termes qui le déclarent applicable aux corporations de commerce (*Trading Corporations*) en état d'insolvabilité, ne sont-ils pas assez étendus pour les comprendre ? Les expressions employées par notre statut sont au moins aussi étendues et compréhensives que celles de l'acte impérial (*Winding Up Acts of* 1862 *and* 1867), qui se sert des termes : "*any partnership, association or company,*" pour désigner les sociétés ou compagnies soumises à son opération. Si sous cette désignation, qui me paraît plus

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vague encore que celles de notre statut, les tribunaux en *Angleterre* ont cru devoir faire application des dispositions de l'acte impérial aux corporations étrangères, je ne vois pas de raison qui puisse nous empêcher de déclarer que ces corporations seront également soumises aux dispositions de notre statut.

D'ailleurs, indépendamment de la généralité des termes qui devrait suffire pour les comprendre, on voit par la sec. 13, que le statut les avait en vue en adoptant une disposition spéciale à l'égard des compagnies qui n'ont pas le siège de leurs affaires en *Canada*.

Dans ce cas, le statut donne la faculté aux créanciers d'intenter leurs procédés contre telles compagnies dans la province où elles ont leur principal ou un de leur principaux établissements. La section 109 qui concerne, il est vrai, plus spécialement les compagnies d'assurance, fait mention de l'avis à donner à un créancier étranger. La section 116 prescrit le mode de donner avis au créancier étranger du dépôt de la liste des créanciers. Il est bien évident par ces dispositions que l'intention du législateur était d'atteindre les corporations étrangères aussi bien que celles du pays.

Ceci n'est pas douteux du moins par rapport aux compagnies d'assurance qui, par la section 108, sont obligées d'adopter le mode d'estimation de la valeur des polices, indiqué dans "l'Acte d'assurance refondu de 1877," dont les dispositions sont déclarées s'appliquer aux corporations étrangères.

Dans la cause de "*The Queen Insurance Company* v. *Parsons*," (1) cette cour a décidé que les corporations étrangères étaient soumises à l'opération du ch. 162 des statuts revisés d'*Ontario*. "*An act to secure uniform conditions in policies of fire insurance.*"

Cependant cet acte ne faisait, pas plus que la 45me *Vict.*, ch. 23, mention des compagnies étrangères. Le

(1) 4 Can. S. C. R. 215.

sommaire de la décision de la cour sur ce point est ainsi qu'il suit :—

That "the Fire Insurance Policy Act" R. S. O., ch. 162., was not *ultra vires* and is applicable to insurance companies (whether foreign or incorporated by the Dominion) licensed to carry on insurance business throughout *Canada*, and taking risks on property situate within the province of *Ontario*.

Dans les conclusions de son jugement Sir *William Ritchie*, C. J., s'exprime de manière à ne laisser aucun doute sur cette question.

I am, therefore, of opinion that this Act applies to all insurance companies that insure property in the province of *Ontario*, whether local, dominion or foreign.

Les raisons qui ont amené cette cour à comprendre les compagnies étrangères dans les dispositions du "*Fire Insurance Policy Act*" d'*Ontario*, me paraissent aussi concluantes dans cette cause que dans celle de *Parsons*.

Un mot d'un argument qu'on a fait valoir contre cette interprétation, c'est que le parlement, par un acte subséquent en amendement, ayant fait mention spécialement des corporations étrangères, semble avoir reconnu qu'il y avait eu omission.

Je ne crois pas que l'on puisse en tirer cette conclusion, car tout en tranchant la question pour l'avenir, il est spécialement déclaré en ces termes :

Nothing in this act contained shall affect any pending suit or action or any right of action now existing.

La décision de la question doit donc dépendre uniquement de l'interprétation à donner au ch. 23, 45 *Vict.*, et les raisons invoquées plus haut ne perdent aucunement de leur force par la passation de l'acte d'amendement mentionné plus haut.

Il n'est pas contesté que la compagnie dont il s'agit est une corporation commerciale. Elle devait donc en cette qualité être soumise à l'opération du ch. 23, malgré qu'elle soit une corporation étrangère.

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Mais on oppose encore une autre raison à son application dans le cas actuel, c'est la difficulté d'atteindre les débiteurs et contributaires de la compagnie résidant en pays étranger, et la difficulté de mettre à exécution plusieurs de ses dispositions contre une compagnie étrangère. Ainsi la section 19 ordonnant de cesser, à dater de l'ordre de mise en liquidation, toutes opérations et transferts d'actions ne pourrait être mise à exécution dans le cas d'une compagnie dont le bureau de direction est à l'étranger, non plus que la section 38 mettant fin, dans ce cas, au pouvoir des directeurs. Il serait sans doute difficile d'arriver à une liquidation aussi complète et définitive que celle visée par la section 44. Mais est-ce une raison suffisante pour empêcher les créanciers d'exercer leurs droits sur tous les biens possédés dans le pays par cette compagnie. Celle dont il s'agit, quoiqu'elle ait son bureau en *Angleterre*, ne semble pas posséder d'autres biens mobiliers ou immobiliers que ceux qu'elle a dans la *Nouvelle-Ecosse*. Pourquoi dans ce cas les créanciers ne pourraient-il pas se prévaloir des dispositions de l'acte qui sont suffisantes pour faire ordonner la vente et la distribution de tous ces biens? On pourrait ne pas arriver, il est vrai, à une liquidation aussi complète que celle qu'exige l'acte impérial avant que la dissolution d'une corporation en liquidation puisse être ordonnée. Mais comme notre statut a pour objet la liquidation des corporations insolvables, et non leur dissolution dont il ne parle pas, cette liquidation complète n'est pas aussi nécessaire en vertu de notre acte qu'en vertu de l'acte impérial. Les créanciers n'ont aucun intérêt à l'annulation de la charte; ce qu'ils recherchent avant tout, c'est d'exercer leurs droits sur les propriétés les plus facilement réalisables de la compagnie. Quoiqu'il y ait à cela des difficultés sérieuses, je n'y vois cependant pas d'impossibilité légale. Je partage à cet égard l'opinion

de l'honorable juge *Thompson* qui, après avoir signalé toutes les difficultés, n'a pu s'empêcher d'en venir à la conclusion suivante :

They would present to my mind insuperable obstacles against adopting the view that Parliament intended the Act to apply to foreign companies if it were not for this fact. The same difficulties exist in *England* in applying the winding up provisions of the English Companies Act of 1862, to *a foreign company*, and yet, by a succession of decisions the English Courts have held that these provisions do apply to foreign companies, provided such companies carry on *business in England*, or have *their management* there. The provisions which suggest these difficulties are there worked out as nearly as may be in all such cases, or left not worked out at all, according to the exigencies of the case that may be in hand.

Puisque les difficultés sont les mêmes dans l'application de l'acte impérial, je crois que nous devons les surmonter en adoptant le mode suivi par les tribunaux anglais. D'ailleurs, les difficultés sont de nature à ne pouvoir être surmontées par la législation. On n'en a fait disparaître aucune en déclarant par l'amendement que le ch. 23 comprendrait les compagnies étrangères. Notre parlement, pas plus que celui d'*Angleterre*, ne peut atteindre le débiteur ou contributaire étranger par les dispositions législatives ; et les jugements des tribunaux d'*Angleterre* ne sont pas plus faciles à exécuter à l'étranger que ceux de nos cours. Dans un cas comme dans l'autre ils ne reçoivent d'exécution que conformément aux règles de la courtoisie internationale. Puisque l'acte d'amendement n'a pu, et qu'aucun acte législatif ne peut, faire disparaître ces difficultés, il faut donc se contenter d'exécuter notre acte qu'autant que la nature de ses dispositions le permet. C'est l'opinion que l'hon. juge *Rigby* a exprimée de la manière suivante.

If a foreign corporation carries on business in this country through an agent or otherwise it seems to be not more unreasonable to hold that such corporation was amenable to our insolvent laws than a foreign individual trader under the same circumstances. Even if

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the effect of a winding up order in the case before us would be nothing more than to enable the liquidator to take possession of, realize and distribute the assets of the Company within the jurisdiction of the Canadian Courts; that alone would be sufficient in my opinion to justify us in putting the Act in operation, but I cannot see why the liquidator could not go to England and by the aid of the English Courts collect the calls which by Sec. 38 of "The Companies' Act, 1862," (under which Act this Company was incorporated, (1) form an asset of the company and release the other assets of the corporation within their jurisdiction, just as could be done by the Canadian assignee of an Insolvent Englishman who had traded in *Canada*.

C'est aussi celle que je crois devoir adopter. Comme les deux honorables juges dont j'ai cité l'opinion, je crois que notre statut 45 *Vic.*, ch. 23, est applicable aux corporations étrangères et que pour surmonter les difficultés de son application à ces corporations, on doit adopter les décisions des tribunaux anglais qui ont eu à vaincre les mêmes difficultés dans l'application des *Winding Up Acts of* 1862-67, aux corporations étrangères.

Dans tous les cas la compagnie en question ne peut soustraire ses propriétés à l'opération des lois de la *Nouvelle-Ecosse*, parce que son existence a été reconnue par un acte de la législature de cette province qui l'a autorisée à acquérir et posséder des propriétés dans les limites de sa juridiction. Cette reconnaissance de son existence par la législature a pour effet de soumettre ses propriétés à l'effet des lois de la *Nouvelle-Ecosse* et nullement à celles du lieu de son incorporation qui dans ce cas serait celles d'*Angleterre*. Ce principe qui ne saurait être mis en doute est exprimé par *Thring on Joint Stock Cos.* (2).

It (a company) may possess property in foreign countries, but it has no legal existence in such countries, unless it is recognised by the proper authorities, and when so recognised, it holds its property in subjection to the law of the country where the property lies, and not to the law of the country where the company resides.

(1) See Sec. 1 cap. 111, Acts of 1875 N. S..

(2) P. 74.

Pour ces raisons je suis d'avis que l'appel devrait être renvoyé.

HENRY, J.:—

I am of opinion that the true construction of ch. 23 of 45 *Vic.* is that it was intended to apply only to local companies.

I cannot think the legislature intended to confer any jurisdiction upon any court to do that which the court would have no power to do.

The company in this case is incorporated under the Imperial Joint Stock Companies Acts of 1862 and 1867, and the rights of the creditors of that company depend upon that charter, and the shareholders hold their stock under the terms of the Imperial statute, and they can only be called upon to pay for their shares by the board of directors, or, in case of liquidation, by order of a court; and, if so, how can this court, or any other in the Dominion, have authority to make further calls on these shareholders? These parties enter into a partnership under the articles of the Imperial statute, but our statute would come in and say "you shall not be amenable to these articles, the terms of your contract shall be changed and your liabilities extended, and instead of the winding up taking place under the English Act, according to the contract, such winding up shall take place under a Dominion Act, making other provisions."

I entirely agree with the observations of my brother *Strong* when he questions the power of the Dominion to pass a law affecting the rights of shareholders of a company incorporated under the Imperial statute, for the very moment the registration of the articles of a co-partnership takes place the law in England is applicable to every transaction of a company until it is finally wound up. But we are told this is the law of the land and that parliament is supreme over all the subject

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matter over which it has control, but I take the ground as part of my judgment in this case, that if the provisions of a Dominion statute (as in this case) contravene an English statute regulating an English incorporated company, such provisions would be *ultra vires*—and that appeared to me to be the difficulty when the Dominion Parliament undertook to deal with this subject-matter. To say that a company organized in *England*, such as the Bank of *British North America*, doing business in *England*, in *Canada* and elsewhere, with an immense capital, can be subject to a winding up order from a local judge or court, who shall declare who shall be contributories or not, seems to me extraordinary, and I say it is assuming a strong power which I cannot adjudge to exist. Then is it to be concluded that parliament intended to make provision for an act to be done when the requisite authority cannot be given to perform it, when such intention is not conveyed in express terms. Suppose a company has assets in *England*, what power has a court in the Dominion or a liquidator to order them to be realized, and if I have not the power to wind up all the estate, I have no power at all. If a call should be made upon the shareholders of a company registered in *England* under an order of a court in this country, could such call be enforced? Would not the shareholder very properly invoke the statutes in *England* as the only ones binding on him? That would at once bring the legislative power of the two countries into contact, and it is quite unnecessary to say which must prevail. It is possible that a company chartered in the *United States* or other foreign country doing business here might be wound up under the Dominion Act, if such could be done without interfering with the terms of the constating articles, but I see serious difficulties in the way, even in such a case; but to wind up a company chartered by

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registry of articles of association in *England* under the statute, I think to be beyond the legislative power of the Dominion to provide for. I, therefore, am of opinion that the court in this case had no power to take the procedure it did, and that the appeal should be allowed with costs.

TASCHEREAU, J., was also of opinion to allow appeal with costs.

Appeal allowed with costs.

Solicitors for appellants: *J. N. & T. Ritchie.*

Solicitors for respondents: *Meagher, Chisholm & Drysdale.*

THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY..... APPELLANTS;

AND

THE QUEEN AND THE WESTERN COUNTIES RAILWAY CO..... RESPONDENTS.

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*Nov. 5.

1884

*Nov. 3, 4.

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*Feb'y. 16.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Petition of right—Agreemcnt with Government of Canada for continuous possession of railroad—Construction of—Breach of, by Crown in assertion of supposed rights—Damages—Joint misfeasor—Judgment obtained against—Effect of, in reduction of damages—Pleading—*37 *Vic. ch.* 16.

By an agreement entered into between the *Windsor & Annapolis Railway Company* and the Government, approved and ratified by the Governor in Council, 22nd September, 1871, the *Windsor Branch Railway, N. S.*, together with certain running powers over the trunk line of the *Intercolonial*, was leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under said agreement went into possession of said *Windsor Branch* and

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

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operated the same thereunder up to the 1st August, 1877, on which date *C. J. B.*, being and acting as Superintendent of Railways, as authorized by the Government, (who claimed to have authority under an Act of the Parliament of *Canada*, 37 *Vic.*, ch. 16, passed with reference to the *Windsor Branch*, to transfer the same to the *Western Counties Railway Company* otherwise than subject to the rights of the *Windsor & Annapolis Railway Company*,) ejected suppliants from and prevented them from using said *Windsor Branch* and from passing over the said trunk line; and four or five weeks afterwards said Government gave over the possession of said *Windsor Branch* to the *Western Counties Railway Company*, who took and retained possession thereof. In a suit brought by the *Windsor & Annapolis Railway Company* against the *Western Counties Railway Company* for recovery of possession, &c., the Judicial Committee of the Privy Council held that 37 *Vic.*, ch. 16, did not extinguish the right and interest which the *Windsor & Annapolis Railway Company* had in the *Windsor Branch* under the agreement of 22nd September, 1872.

On a petition of right being filed by suppliants, claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the said agreement of the 22nd September, 1871, the Exchequer Court of *Canada*, (*Gwynne*, J., presiding,) held that the taking the possession of the road by an officer of the Crown under the assumed authority of an act of parliament was a tortious act for which a petition of right did not lie.

Held,—On appeal to the Supreme Court of *Canada*, (*Strong* and *Gwynne*, JJ., dissenting,)—The Crown by the answer of the Attorney General did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious they were justified. But, as the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence failed. Therefore the Crown, by its officers, having acted on a misconception of or misinformation as to the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach become possessed of the suppliants property, the petition of right would lie for the restitution of such property and for damages.

Prior to the filing of the petition of right, the suppliants sued the

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Western Counties Railway Company for the recovery of the possession of the *Windsor Branch*, and also by way of damages for monies received by the *Western Counties Railway Company* for the freight or passengers on said railway since the same came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the Crown, but was proved on the hearing by the record in the Supreme Court of *Canada*, to which Court an appeal in said cause had been taken and which affirmed the judgment of the Supreme Court of *Nova Scotia*.

Held, *Per Ritchie*, C.J., and *Taschereau*, J.—That the suppliants could not recover against the Crown, as damages, for breach of contract, what they claimed and had judgment for as damages for a tort committed by the *Western Counties Railway Company*, and in this case there was no necessity to plead the judgment.

Per Fournier and *Henry*, JJ., that the suppliants were entitled to damages for the time they were by the action of the Government deprived of the possession and use of the road to the date of the filing of their petition of right.

APPEAL to the Supreme Court of *Canada* from the judgment of Mr. Justice *Gwynne*, in the Exchequer Court of *Canada*, in favour of Her Majesty the Queen.

The suppliants are a company incorporated by an act of the Legislature of the Province of *Nova Scotia*, and owners of a line of railway running from *Windsor* to *Annapolis* in that province.

On the 22nd day September, 1871, an agreement was entered into between the Government of the Dominion of *Canada* and the suppliants, whereby the *Windsor Branch Railroad*, extending from *Windsor* Junction, on the *Intercolonial Railway*, to the suppliants' railroad at *Windsor* aforesaid, together with running powers over the trunk line of the said *Intercolonial Railway*, to and from *Halifax*, were leased to suppliants for the period of twenty-one years from the 1st January, 1872.

The suppliants, under said agreement, went into possession of said *Windsor Branch* and operated the same thereunder up to the 1st day of August, 1877,

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on which date *Charles J. Brydges*, being and acting as Superintendent of Government Railways, and acting for the Government of *Canada*, ejected suppliants from and prevented them from using said *Windsor Branch* and from passing over the said trunk line; and shortly afterwards said government gave over the possession of said *Windsor* Branch to the defendants, the *Western Counties Railway Company*, who took and retained possession thereof.

Under the proceedings taken the suppliants sought to recover from Her Majesty the Queen damages for the said breach of the agreement of September 22nd, 1871.

After answers had been put in on behalf of Her Majesty and the *Western Counties Railway Company*, respectively, evidence was adduced and an argument was had thereon in the Exchequer Court before Mr. Justice *Gwynne*, and judgment given in favor of Her Majesty, with costs, as follows:—

GWYNNE, J.:—

"This is a petition of right wherein the suppliants claim relief against Her Majesty in respect of the same matter as was the subject of complaint in a bill filed by the suppliants, as plaintiffs, against the *Western Counties Railway Company*, as defendants, in the Supreme Court of the Province of *Nova Scotia*, and decided in favor of the plaintiffs, and carried from thence by appeal to the Privy Council, where the judgment of the Supreme Court of *Nova Scotia* has been confirmed and is reported in L. Rep. 7 App. Cases 178. Upon the hearing of the case before me, the only points raised and discussed were: Whether proceedings by petition of right could be taken against Her Majesty to obtain satisfaction in damages for the pecuniary losses alleged to have been sustained by the suppliants by reason of the conduct which is the subject of the sup-

pliants' complaint, and, if a petition of right does lie in such a case, what is the proper and reasonable amount which is recoverable by them from Her Majesty under the circumstances and for which judgment should be rendered in this case.

"The petition alleges that the suppliants are a company incorporated by an Act of the Legislature of the Province of *Nova Scotia*, passed prior to the passing of the *British North America Act*, for the purpose of constructing a railway from *Windsor* to *Annapolis*, in the Province of *Nova Scotia*, under the provisions of the said Act, and of an agreement of the 22nd November, 1866, therein recited, and incorporated into and made part of the said Act, whereby among other things it was provided that prior to the opening of the railroad a traffic arrangement should be made between the suppliants and the Provincial Government for the mutual use and enjoyment of their respective lines of railway between *Halifax* and *Windsor* and *Windsor* and *Annapolis*, including running powers, or for the joint operations thereof on equitable terms, to be settled by two arbitrators to be chosen by the said parties in the usual way in case of difference. That the suppliants, in pursuance and exercise of the powers vested in them by the Act, completed the said railway from *Windsor* to *Annapolis*, with a junction at *Windsor* communicating with a railway called the *Windsor Branch Line* and thereby with another railway called the *Trunk Line* into *Halifax*, both of these last mentioned lines being sections of the provincial railways, afterwards known as the *Nova Scotia Railway*, which at the time of passing the said Act was the property of the Government of *Nova Scotia* and so continued, subject to the rights claimed by the suppliants therein, until the 1st July, 1867, when by operation of the provisions of the *British North America Act* the said

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railway lines so far as they were the property of the Province of *Nova Scotia*, and subject to the rights of the suppliants therein, became the property of *Canada*. That an agreement between the Government of the Dominion of *Canada*, acting therein by the Minister of Public Works, under the authority and sanction of His Excellency the Governor General in Council, and the suppliants was, upon the 22nd day of September, 1871, entered into making provision for the use by the suppliants of the *Windsor* and *Branch Trunk Line* upon certain terms therein provided, by which agreement it was provided that the same should take effect on the first day of January, 1872, and continue for 21 years, and be then renewed upon like conditions as in the said agreement mentioned or upon such other conditions as might be mutually agreed upon. That in pursuance of such agreement of the 22nd September, 1871, and upon the 1st of January, 1872, the Government of *Canada* delivered to the suppliants, and they thereupon entered into the exclusive use and possession of the said branch line, with the stations, etc., in use thereon, subject, however, to the right of the Dominion Government to have access thereto for the purpose of maintaining the railway and works as provided in the said agreement, and the government likewise gave to the suppliants, and they thereupon took and exercised such use of the said trunk line and the accommodation specified in connection therewith in Article 3 of the said agreement of the 22nd of September, 1871, as they were under such agreement entitled to have and exercise; and that from the time when such use and possession of the said premises respectively were so given to them as aforesaid the suppliants continued to hold and enjoy the same and to work and operate their own railway line from *Windsor* to *Annapolis*, and the said branch and trunk lines from *Windsor* to *Halifax* until the first day

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of August, 1877. The petition then alleges, and herein is involved the gist and gravamen of the suppliants' complaint, that on day, namely, the 1st day of August, 1877, one *Charles John Brydges*, then being, and acting as, the superintendent of Government Railways, and acting on behalf of the Government of *Canada*, forcibly ejected the suppliants and their servants and railway stock from, and afterwards forcibly prevented them from coming upon or using or passing over the said trunk and branch lines, and he continued in possession thereof, and to prevent your suppliants from coming upon or using or passing over either of such lines, until shortly afterwards the said Government gave over the possession of the said Branch Line to another railway company, known as the *Western Counties Railway Company*, incorporated under an Act of the Legislature of *Nova Scotia* for the purpose of making a railway from *Annapolis* to *Yarmouth* in *Nova Scotia*, and that such company thereupon took and has ever since held possession of, and excluded the suppliants from, and from any use of the said Branch Railway, and that the said government have continued to the present time in possession of the said Trunk Line and to exclude the suppliants therefrom and from any use thereof. That by being so expelled and excluded as aforesaid the suppliants have been prevented from further performing their obligations or exercising the powers and privileges undertaken by and required of them under the said agreement of the 22nd of September, 1871, of operating and using the said Trunk and Branch Lines from *Halifax* to *Windsor* in connection with their own line from *Windsor* to *Annapolis*, and that save in so far as they have been so prevented by the said government from so doing the suppliants have duly operated the said railways and done and performed all other acts and conditions required to be done and

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performed on their part under and in respect of the said agreement of the 22nd September, 1871. The petition then states the passing of an Act of the Parliament of *Canada*, 37 *Vic.*, ch. 16, for the purpose of raising the contention that it did not profess to give any authority to the Government of *Canada* to transfer the said branch railway to the *Western Counties Railway Company* otherwise than subject to the suppliants said rights, and that if the said act did purport so to do it was *ultra vires* of the Parliament of *Canada* and inoperative. The petition further alleged that by the acts so committed by the Government of *Canada* as aforesaid in forcibly expelling and excluding the suppliants, and by their breach of and failure to perform the said agreement of the 22nd of September, 1871, they had caused to the suppliants great injury, loss and damage, and the suppliants submitted that they had no effectual remedy in the premises against Her Majesty's government but by petition of right, but that they had been advised that they are entitled to recover possession of the said Branch Line from the *Western Counties Railway Company*, and that they had accordingly commenced a suit against them for the purpose in the Supreme Court of Equity in *Nova Scotia;* and the suppliants, among other things, prayed that the sum of one hundred and fifty thousand pounds sterling, or such sum as might be reasonable, might be paid to them in compensation and by way of damages for the breach and losses occasioned to them by the breach and failure of the Government of *Canada* to perform the said agreement of the 22nd of September, 1871.

"The judgment of the Privy Council, on the appeal of the *Western Counties Railway Company* from the judgment of the Supreme Court of *Nova Scotia* in the suit in Equity brought against that company by the *Windsor & Annapolis Railway Company*, has established that the

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latter company had a good title to the possession of the *Windsor Brauch Railway* under the agreement entered into with them by the Government of *Canada*, dated the 22nd day of September, 1871, and the result of the success of the *Windsor & Annapolis Railway Company* in that suit has been to restore to them the possession of that branch railway from which they had been wrongfully evicted. The judgment has further decided that the agreement of the 22nd September, 1871, was an implement of the obligation to make a traffic arrangement which was contained in the agreement of November, 1866, and which was incorporated into and made part of the act incorporating the *Windsor & Annapolis Railway Company*. The Government of *Canada* therefore, which by the *British North America Act* became owners of the *Windsor Branch Railway*, subject to the rights and interest of the *Windsor & Annapolis Railway Company* therein, under the agreement of November, 1866, and their act of incorporation, specifically performed the agreement entered into with the *Windsor & Annapolis Railway Company* by the government of the old Province of *Nova Scotia* prior to Confederation and perfected the title of that company to the use, possession and enjoyment of the *Windsor Branch Railway*, under the agreement of the 22nd September, 1871, for the term of 21 years from the 1st day of January, 1872, unless that term should sooner become forfeited or extinguished by due process of law or determined by contract between the parties. The judgment of the Privy Council also determined that the Dominion Act 37 *Vic.*, ch. 16, did not extinguish the right and interest which the *Windsor & Annapolis Railway Company* had in the *Windsor Branch Railway* under the agreement of the 22nd September, 1871, even if the Dominion had under

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the circumstances power so to do, a point which is not determined.

"The consequence is that at the time of the committal of the acts of trespass complained of by the suppliants, and which are made the foundation of the claim for indemnity in damages relied upon in this petition of right, the suppliants had full statutory right and title to maintain their possession of the *Windsor Branch Railway*, and had therefore ample power in the law, and the same power as all other owners of property have, to protect themselves against the wrongful acts of all persons whomsoever, whether such persons assumed to act in an official capacity as servants or agents to the Dominion Government or otherwise; the act therefore alleged to have been committed by Mr. *Brydges*, although he was invested with the character of superintendent of Government Railways, was, as indeed it is upon this petition charged to have been, a plain act of trespass for which he was liable to an action, so likewise the *Western Counties Railway Company* upon their entering and taking possession were equally wrongdoers, and as such responsible to the suppliants, and liable to indemnify them in damages for the injury which the latter thereby sustained, and they have been adjudged so to be by the judgment of the Supreme Court of *Nova Scotia*, which judgment has been affirmed by the Privy Council. Now what is sought to be obtained by this petition of right in addition to restitution of the property is merely compensation in damages to be paid by Her Majesty for the trespass and eviction so committed by persons acting under the authority of the Government of *Canada*, or professing so to do, in taking possession of the *Windsor Branch Company*, evicting the suppliants from the possession thereof and putting the *Western Counties Railway Company* into possession thereof, and for the mesne profits received by

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the *Western Counties Railway Company* during their possession. For the damages sustained by the suppliants by this trespass and eviction, the judgment recovered by the suppliants as plaintiffs against the *Western Counties Railway Company* renders that Company responsible, but the suppliants nevertheless claim the right to recover the same damages by a judgment to be rendered against Her Majesty upon the petition of right.

"To this petition the *Western Counties Railway Company* have been made parties under the provisions of the 6th section of the Dominion statute, 39 *Vic.*, ch. 27, which is similar in its terms to the 5th section of the Imperial statute 23rd and 24th *Vic.*, ch. 84, and the company have filed a statement in defence under the provisions of the statute, whereby they assert title to the property in dispute upon the same grounds as were unsuccessfully urged by them in the suit brought against them in the Supreme Court of *New Brunswick*, that is to say, under the provisions of an Act of the Dominion Parliament, 37 *Vic.*, ch. 16. Her Majesty's Attorney General for the Dominion of *Canada* has also under the provisions of the statute 39 *Vic.*, ch. 27, filed an answer to the suppliants' petition, wherein, while admitting the agreement of the 22nd November, 1866, referred to in the petition, and the execution of the instrument of the 22nd September, 1871, disputing however its validity and effect, and setting up a resolution of the House of Commons and certain resolutions passed by His Excellency the Governor-General in Council upon certain reports of the Minister of Public Works relating to the property in question, and setting up also the Dominion Act 37 *Vic.*, ch. 16, proceeds to say in the 12th paragraph of such answer—that on or about the 25th July, 1877, the Government of *Canada* having completed arrangements with the *Western*

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Counties Railway Company for giving to them possession of the said branch, a minute of His Excellency the Governor General in Council was passed ordering and directing that the arrangements then existing with the suppliants with respect to the said branch should be terminated on the 1st day of August, 1877, and the Minister of Public Works on behalf of Her Majesty was directed to resume possession of the said branch on that day and to put the *Western Counties Railway Company* in possession thereof, pursuant to the said Act 37 *Vic.*, ch. 16.

"That in pursuance of the said minute of council and of the said act the officers of Her Majesty did on or about the said first day of August, upon the refusal of the suppliants to give up the possession of the said branch, take possession thereof and afterwards gave possession of the same to the *Western Counties Railway Company*, which is the ejection and giving over of possession complained of in the fifth paragraph of the said petition.

"And he submitted (14th) that in taking possession of the said branch, in giving over such possession to the *Western Counties Railway Company*, no wrong was committed against the suppliants which entitles them to any relief against Her Majesty by petition of right; and he denied (15th) that the suppliants were excluded by the government from the trunk line between *Halifax* and *Windsor* or from any use thereof, but he submitted that no relief could be decreed against Her Majesty upon the said petition with respect to the said trunk line, inasmuch as the instrument of the 22nd September, 1871, upon which the suppliants base their claim to relief, if ever binding, was based upon a single and indivisible consideration, viz: One-third of the gross earnings from all traffic carried over the *Windsor Branch* and the Trunk Line; and that if the said instrument can-

not, and he submitted that it cannot, under the circumstances referred to in his answer, be enforced with respect to the said branch, neither can it be enforced with respect to the Trunk Line; and submitted (16) that the relief prayed for in the first and second paragraphs of the prayer of said petition cannot be decreed against Her Majesty, nor can any injunction for the purposes prayed for be ordered by the court; and he submitted, lastly, that it should be declared that the suppliants are not entitled to any portion of the relief sought by their petition and that they should be ordered to pay the costs incurred by Her Majesty in the matter.

"Now the case of *Tobin* v. *The Queen* (1), decides that the Imperial statute 23rd and 24th *Vic.*, ch. 34, alters only the form of procedure to be adopted by suppliants resorting to petition of right, and does not alter the laws relating to the subject for which the petition can be maintained.

"The Attorney General in that case, the present Lord *Selborne*, argued that the proceeding authorized by the statute, requiring a party in possession under title derived from the Crown of property claimed by a petition of right to be made a party thereto, was in the nature of bill of interpleader, wherein the party claiming the right to the possession and the party in actual possession can assert their respective rights.

"The case which has been already decided in the Supreme Court of *New Brunswick*, and in the Privy Council at the suit of the *Windsor & Annapolis Railway Company* against the *Western Counties Railway Company*, has decided that the right of former company to the possession of the property in question could as against the latter company be effectually adjudicated upon and determined in a suit instituted and conducted according to the ordinary practice of the

(1) 16 C. B., N. S., 310 & 10 Jur. N. S. 1032.

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courts of justice between subject and subject; and that redress can be thus obtained against the *Western Coun'ies Railway Company* for the wrongs complained of by the suppliants, and the damages occasioned to them thereby. It was not suggested upon the hearing before me of this petition of right, that the judgment rendered in that case was not sufficient for the purpose of establishing as against the Crown the rights of the suppliants to the restitution and possession of the property under the agreement of the 22nd of September, 1871. It seemed rather to have been assumed to be sufficient for that purpose; for the only question, as I have already said, which was opened and discussed before me was as to the right of the suppliants to have a judgment in this case for the recovery from Her Majesty of the damages occasioned to the suppliants by the wrongs complained of.

"The case of *Tobin* v. *The Queen* establishes that a petition of right cannot be maintained to recover unliquidated damages for a tort.

"It does lie to obtain restitution of property wrongfully taken on behalf of the crown, or wrongfully withheld, but the judgment in favor of the suppliant upon such a petition only enabled him to recover possession of the specific property, or the value of it if it had been converted to the Sovereign's use. As against the Sovereign, the only redress to be obtained is restitution. If damages are sought they are to be obtained from the individual who did the wrong. In the present case the suppliants have already obtained a judgment against the *Western Counties Railway Company* entitling them to an account of the receipt from traffic, which but for their wrongful possession of the suppliants' property the latter would have received, and this was the nature of the damages claimed before me, but there is no pre-

tence that any sum of money from such source ever came to the possession of Her Majesty.

"The case made by the petition is that what was done, although professed to be done under the authority of an Act of Parliament, was not authorized by the Act, and was in fact a trespass unlawfully and forcibly committed: now when public servants of whatever rank commit an act of trespass in the erroneous belief that the act is authorized by an Act of Parliament, *Tobin* v. *The Queen* is an express authority that the Sovereign cannot be made responsible on a petition of right for such an act for two reasons: 1st. because in such case the act is not done by command of the Sovereign but under the assumed authority of an Act of Parliament; and 2nd, if it were done by command of the Sovereign, the command to commit a trespass being unlawful, it is no command in law, so that, as is decided in that case, the doctrine of *respondeat superior* does not apply to the Sovereign. I have no doubt therefore that under the circumstances which are relied upon by the suppliants a petition of right could not be maintained in *England* to recover damages from Her Majesty, and that therefore by the express provisions of the Act. 32 *Vic.*, ch. 27, sec. 19, no damages can be recovered against Her Majesty upon this petition In so far therefore as this petition claims compensation in damages from Her Majesty, the petition must be dismissed with costs, leaving the suppliants to pursue their remedy for such compensation against the *Western Counties Railway Company* under their judgment already recovered against that company.

"If the suppliants think it necessary that they should have a declaration of their rights, upon the petition, upon the basis upon which they have been established by the judgment in the suit in the Supreme Court of *Nova Scotia* affirmed by the Privy Council, the case may

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be set down to be spoken to before me upon the minutes. As the question of damages was all that was opened or discussed before me, I have confined my judgment to that question."

This appeal was from the refusal of Mr. Justice *Gwynne* to grant a rule for a new trial.

The case in appeal was first argued before five judges, Mr. Justice *Taschereau* being absent, but was subsequently re-argued before the full bench.

Mr. *Dalton McCarthy*, Q.C., and Mr. *H. McD. Henry* Q.C., for appellants:

The acts complained of are distinctly admitted to have been done by Her Majesty, and therefore the argument need not be complicated by any questions as to the responsibility of the Sovereign for acts of her servants.

These acts must be regarded as constituting a breach of contract and not as a "mere tort," or indeed as a tort in any sense; not a "mere tort," because a breach of contract was also effected; and not a tort at all, seeing that since the "Queen can do no wrong" what was done must be regarded as a breach of contract only.

There is no decided case nor any authority for the position (involved in the judgment appealed from) that the act or acts complained of are to be regarded as wrongs properly so-called. In other words, there is no authority for the position that where a clear and direct breach of contract happens also to involve an element which in some respects might be regarded as tortious, the Crown shall be protected in its breach of agreement by the maxim that "the Queen can do no wrong;" and it is further submitted that there is no good reason why such a result should follow.

The theory of the judgment appealed from in this behalf involves the anomalous result that, while

petition might lie if the Queen had simply refused to let the suppliants into possession under their agreement, yet they are remediless where, after being in possession for a time, they are, in breach of the agreement, prevented from continuing that possession.

But even if the expulsion from the *Windsor Branch* could, upon true principles, be regarded as a "mere tort," the refusal of Her Majesty to execute her part of the contract as to the running powers over the Trunk Line can be nothing but a breach of contract. In that there was no trespass, no invasion of property right. There was in law nothing but a refusal to perform Her Majesty's part of the agreement in that behalf.

It is a mere coincidence that Her Majesty, in breaking the agreement, did what might have been characterized as a tort if it had not been a breach of agreement.

So far as the present subject of discussion is concerned, the judgment appealed from is based on the case of *Tobin* v. *The Queen* (1).

Now, the case of *Tobin* v. *The Queen* is distinguishable from the present in the following important particulars, and it cannot, therefore, govern the rights of the suppliants in this petition.

In *Tobin* v. *The Queen* there was no contract nor even a pretence of the existence of a contract, much less any breach of contract. The act complained of constituted nothing but a tort. It was not only unauthorized by the Crown, or any department of Government, but was expressly repudiated in the answer as being so unauthorized. The benefit to the Crown of the seizure was remotely contingent upon the vessel in question being condemned in the Admiralty Court, and that never occurred, so that nothing of the suppliants, or arising from his property, ever came to the Crown. In the

(1) 16 C. B. N. S. 310.

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present case, on the other hand, there was a breach by the Crown of a contract made with the Crown.

Her Majesty has admitted in Her answer that the act which constitutes the breach of contract was done for Her.

The property in question was actually used by Her Majesty for nearly two months, the proceeds received by Her, and the rights and privileges of the suppliants were then let to third parties, who held them under and for the Crown, until they were restored to the suppliants.

With regard to the portion of the judgment appealed from, which suggests that redress for the suppliants is available against the *Western Counties Company* we submit it is erroneous for the following reasons :

1st. Because in no view can the *Western Counties Railway Company* be held answerable for the loss to the suppliants represented by the period during which the Crown actually received the profits of the property in question, that is, from 1st August to 24th September, 1879.

2nd. Because this case cannot be regarded merely as practically giving rise to an interpleader between the suppliants and the *Western Counties Railway Company* joined as claiming under the Crown, inasmuch as the claim is for compensation for a specific breach of a contract of the Crown, for part of which compensation, at least, the *Western Counties Railway Company* can in no view be held liable.

3rd. No such defence has been pleaded, nor was any such defence urged at the trial of the petition.

4th. No compensation has ever been decreed or recovered from the *Western Counties Railway Company*. This portion of the judgment appealed from would indeed appear to involve a mere speculation as to the effect of the equity suit brought in the Supreme Court of *Nova Scotia*, the judgment in which still remains

entirely without form, as will appear by reference thereto.

On the re-argument the following cases were cited: *Rigby* v. *The Great Western Railway* (1); *Manly* v. *St. Helens Canal and Railway Co.* (2); *Wall* v. *The City of London Ry. Pro. Co.* (3); *Wigsell* v. *The Corporation of the School for the Indigent Blind* (4); *McMahon* v. *Field* (5); *Taylor* v. *Dunbar* (6); *Lock* v. *Furze* (7); *Earl of Warwick* v. *Duke of Clarence* (8); *Banker's Case* (9); *The British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Co. (Limited)* v. *Nettleship* (10).

Mr. *Lash*, Q.C., for the respondent, Her Majesty's Attorney General:

The Petition of Right Act does not give to a suppliant any additional remedy against the Crown which would not have existed in *England* prior to the Imperial Act 23 and 24 *Vic.*, ch. 34, but merely relates to the form of procedure, and in *England* the relief prayed for against the Crown in this matter could not have been granted upon a petition of right.

The petition in this matter in effect seeks to recover from the Crown damages for trespasses unlawfully and forcibly committed by servants of the Crown, contrary to the well established doctrines laid down in the case of *Tobin* v. *The Queen* (11); *McFarlane* v. *The Queen* (12); *MacLeod* v. *The Queen* (13); and cases therein referred to.

The suppliant's rights to the possession of the property in question and to the damages for the wrongs complained of could have been established and adjudi-

(1) 14 M. & W. 811.
(2) 2 H. & N. 357.
(3) L. R. 9 Q. B. 249.
(4) 8 Q. B. D. 357.
(5) 7 Q. B. D. 591.
(6) L. R. 4 C. P. 210.
(7) L. R. 1 C. L. 441.
(8) P. 9 Hen. 6, fol. 4, p. 7.
(9) Howell's State Trials 1.
(10) L. R. 3 C. P. 499.
(11) 16 C. B. N. S. 310.
(12) 7 Can. S. C. R. 216.
(13) 8 Can. S. C. R. 1.

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cated upon in a suit or suits instituted and conducted according to the ordinary practice of the courts of justice between subject and subject. And so far as relates to the connection of the *Western Counties Railway Co'y* with the matter, their rights were so established and adjudicated upon in the suit brought against that company. The only ground upon which judgment was or could have been given in the suppliants' favor in the last mentioned suit is that the acts complained of were torts, which rendered all persons concerned in them liable to the suppliants in unliquidated damages; such being the case, it follows, under the authorities above mentioned, that such acts cannot be relied on in support of a claim against the Crown by petition of right.

The petition of right, in addition to seeking damages, prays for specific performance of the agreement of 22nd September, 1871, and for an injunction to restrain Her Majesty's officers and servants from doing certain acts. No such relief can be given against the Crown.

[The learned counsel relied principally upon the judgment of the Exchequer Court, and the reasons therefor given by Mr. Justice *Gwynne*, and on the reargument cited *Bird* v. *Randall* (1); *Gosman, in re* (2), and *Woodfall* on Landlord and Tenant (3).]

Mr. *Gormully* was present on behalf of the *Western Counties Railway Company*, but was not heard.

RITCHIE, C.J.:—

In discussing this question I am free to admit to the fullest extent the doctrine that a petition of right, founded on a tort in the legal sense of that term, cannot be entertained against the Crown, and also that the Crown cannot be prejudiced by the misconduct, laches, or negligence, of any of its officers, either with respect to the rights of persons or of property.

(1) 3 Burr. 1354.
(2) 17 Ch. D. 771.
(3) 11th Ed. 629.

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But I think it clear that matters of contract and grant made on behalf of the Crown are within a class of subjects legally distinct from wrongs, such as those from which the Crown is exempt by reason of the maxim that the Crown can do no wrong, and, therefore, with all respect, it does not seem to me that *Tobin* v. *The Queen* (1), relied on by the learned judge in the Exchequer Court, is any authority for applying the maxim invoked to this case, the great distinction being that that was not a case of a claim against the Crown, for acting by its servant in the assertion of a supposed legal right, but it was a claim for compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty.

On the contrary, *Erle*, Chief Justice, at page 355, very clearly propounds a doctrine so consonant with common sense that I should long hesitate before repudiating it, viz.:

That claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs.

So in *Seddon* v. *Senate* (2):

Lord *Ellenborough*, C. J., observed that the argument of the defendant's counsel, [which he repudiated,] went further; that the defendant having conveyed all interest in the subject-matter out of himself, the plaintiff had no remedy on the covenant, but only the same remedy as against any wrong-doer. That if one sold and covenanted to another an estate with the common covenants, and afterwards went on it to sport, the purchaser could not maintain covenant.

LeBlanc, J., says:

And that brings it to the question, whether, when it appears that the defendant had agreed to part with his whole interest in the medicines, and he does convey in terms large enough to cover his whole interest, the law will not imply a covenant that he shall not himself vend that for his own profit which he had agreed to sell and had sold to another; and it appears to me that the breach assigned

(1) 16 C. B. N. S. 310.

(2) 13 East 71.

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against him in that respect is not like a mere tort committed by a stranger; but is a breach of that right which he had conveyed to another. He has done that which is the exercise of an assumed right over a subject-matter which he had before covenanted to convey and had conveyed to the plaintiff; and I also think that the manner in which that breach is assigned is not merely as in the case of a tort by a stranger, but as of a right conveyed to the plaintiff by the deed of the defendant.

Bayley, J., says:

A covenant is nothing more than an agreement, in construing which we have only to look to the fair meaning of the parties to it; and if the agreement were in substance and effect that the defendant would sell and assign to the plaintiff the sole right of making and vending the medicine for his profit, and that the defendant would not interfere with him in making and vending it, that raises an implied covenant on the part of the defendant that he would not make and vend it; and if he do afterwards make and vend it, it is a breach of that implied covenant.

* * * * * *

It appears, therefore, by the language of the third deed alone, that the defendant contracted with the plaintiff that he should have the sole exercise of the right of making and selling these medicines for his own benefit; and then the question is, whether the conduct of the defendant, in interfering with that right which he had before conveyed to the plaintiff, be not a breach of his covenant. As in *Pomfret* v. *Ricroft* (1) *Twysden*, J., (who differed from the rest of the court upon the case in judgment) agreed that the grant of a water course implies a covenant by the grantor not to disturb, by any act of his own, the grantee in the enjoyment of it; and, therefore, that a subsequent act of disturbance by the grantor in stopping the water course would give the grantee an action of covenant against him. And if one make a lease of a house and estovers, and afterwards cut down all the wood out of which the estovers were to be taken, the lessee shall have his remedy by action of covenant against him; it being a misfeasance in him to annul or avoid his grant. So in *Russel* v. *Gulwel* (1) it was agreed that if one make a lease of lands, reserving a right of way, or common, or other profit a prender, if the lessee disturb him in the enjoyment of the way, &c., covenant will lie for such disturbance. To apply the same principle to the present case: the defendant assigns by deed all his right, title, and interest in the making and vending of a certain medicine to the plaintiff, and afterwards he disturbs him in the enjoyment of it by making and

(1) 1 Saund. 322.

selling it on his own account; that, therefore, is in breach of his covenant.

Lord *Ellenborough*, C.J., afterwards observed that no argument could be drawn from the opinion delivered by the court to authorize the extension of the doctrine to the wrongful act of a stranger.

So in *Jones* v. *Hill* (2), an action on the case in the nature of waste, which is an action founded on tort:

The declaration stated that the defendant held certain messuages, as tenant to the plaintiff, for the remainder of a term of years, upon a general condition to repair and leave the premises in as good plight and condition as the same were in when finished under the direction of a surveyor.

Breach for not repairing during the term and yielding up the premises in much worse order than when the same were finished under the direction of the surveyor.

Lord Chief Justice *Gibbs* says:

Where there is an express stipulation or contract between two parties, this species of action is not maintainable, for such contract is a total waiver of tort, and it therefore ceases to bear the character of waste.

That a petition of right is the suitable and proper remedy for the subject, when by misinformation (as in this case) or inadvertence the Crown has been induced to invade the private rights of any of its subjects, or where the Crown has in its hands property to which the subject has a legal title, ancient and modern authorities, in my opinion, unquestionably establish.

As to the ancient authorities.

Petition says *Staundeforde*, Prerog., is all the remedy the subject hath when the King seizeth his land or taketh away his goods from him, having no title by order of his laws so to do, in which case the subject for his remedy is driven to sue unto his sovereign lord by way of petition only; for, other remedy hath he not; and, therefore, is his petition called a petition of right, because of the right the subject hath against the King by the order of his laws to the thing he sueth for.

* * * * * *

That petitions did lie for a chattel as well as for a freehold, does

(1) Cro. Eliz. 657. (2) 1 Moore 100.
(3) Ch. 22, p. 72.

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appear 37 Ass. pl. 11, Bro. Abr. Petition, 17. If tenant by statute, merchant be ousted, he may have a petition, and shall be restored; vide 9 H. 4, Bro. Petition, 9. If the subject be ousted of his term, he shall have his petition; 9 H. 6, fo. 21, Bro. Petition, 2. Of a chattel real, a man shall have his petition of right, as of his freehold; 7 H. 7, fo. 11. A man shall have a petition of right for goods and chattels; and the king indorses it in the usual form: 34 H. 6, fo. 51. Bro. Petition, 3. He adds: It is said, indeed, 11 H. 7, fo. 3, Bro. Petition, 19, that a petition will not lie of a chattel.

The whole tenor of Lord *Somers'* argument in the *Banker's* case shows that he was clearly of opinion that a petition of right would lie for a chattel, and even for unliquidated damages.

In 4 Ins. 241 Lord *Coke* says:

It is holden in our books that in restitutions the king himself has no favor nor his prerogative any exemption, but the party restored is favored.

In *Manning's* Exchequer practice (1), it is said:

By the law of *England*, no personal wrong can, for obvious reasons, be imputed to the sovereign. But, when the property of the subject is invaded or withheld, the prerogative does not prevent the injured party from obtaining restitution or payment. Where, however, a right is sought to be established against the crown itself, it would be absurd, as well as indecent, to adopt the mandatory forms of common process. The course, therefore, prescribed by the common law, is, to address a petition to the King in one of his courts of record, praying that the conflicting claims of the crown and the petitioner may be duly examined. * * * * * * * It is called a petition of right, and is in the nature of an action against the King, or of a writ of right for the party, though chattels real or personal, debts or unliquidated damages may be recovered under it.

In *Blackstone's* Commentaries, p. 254, it is said:

That the King can do no wrong, is a necessary and fundamental principle of the English constitution, meaning that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the Sovereign, nor is he, but his ministers, accountable for it to the people; and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. When

(1) Ch. 10, s. 1, p. 84.

ever, therefore, it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign (*Jenkins*, 78) (for, who shall command the King?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the Crown of the true state of the matter in dispute; and, as it presumes, that to know of any injury and to redress it are inseparable in the royal breast, it then issues as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved. * * * *

The common law methods of obtaining possession or restitution from the Crown of either real or personal property are:—1. By petition *de droit*, or petition of right, which is said to owe its origin to King *Edward the First* (1); 2. By *monstrans de droit*, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer. The former is of use where the Sovereign is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the Crown, or otherwise the petition shall abate; and then, upon this answer being indorsed or underwritten by the king *soit droit fait al partie* (let right be done to the party), a commission shall issue to enquire of the the truth of this suggestion; after the return of which the king's attorney is at liberty to plead in bar, and the merits shall be determined upon issue or demurrer, as in suits between subject and subject.

As to the more modern authorities.

In delivering the judgment of the Court of Queen's Bench in Baron *de Bodes* case (2), Lord *Denman* says:

There is nothing to secure the Crown against committing the same species of wrong, unconscious and involuntary wrong, in respect of money, which founds the subject's right to sue out his petition when committed in respect to lands or specific chattels; and there is an unconquerable repugnance to the suggestion that the door ought to be closed against all redress or remedy for such wrong.

Erle, C.J., in *Tobin* v. *The Queen*, says:

We come now to the authorities showing where the petition of right will and where it will not lie. We pass the class of claims founded on contracts and grants made on behalf of the Crown with

(1) Bro. Abr. T. Prerogative, 2. (2) 8 Q. B. 208, 273.

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brief notice, because they are within a class legally distinct from wrongs.

* * * * * *

Again:

We pass from the class of claims on contract, in all systems of law distinguished from claims founded on wrong, and proceed to the more numerous class of claims where petitions of right have been brought in respect of property either wrongfully taken on behalf of the Crown, or wrongfully withheld.

As a general principle, property does not pass from the subject to the Crown without matter of record. In the time of feudal tenures, rights in property accrued to the Crown on very many occasions, and officers had the duty of enforcing the rights of the Crown. The right accrued on some of these occasions by matters of record, and on other occasions powers existed for the making the right matter of record by office found. The officers seized, or justified seizures, under these records; and their right to seize was a subject of frequent contest, tried either by petitions of right, *monstrans de droit*, or traverse of office found.

But, whatever was the form of procedure, the substance seems always to have been the trial of the right of the subject as against the right of the Crown to property or an interest in property which had been seized for the Crown; and, if the subject succeeded, the judgment only enabled him to recover possession of that specified property, or the value thereof, if it had been converted to the King's use. The form for trying this question has gone through several changes. Traverse of office found, *monstrans de droit*, and petition of right were the forms in most frequent use. Amendments of the procedure were made by the statutes 34 E. 3, c. 14, 36 E. 3, c. 13, and 2 E. 4, allowing many questions to be raised by traverse, in cases where theretofore a petition of right was necessary; and much learned discussion is to be found in the books relating to these different forms. Lord *Coke* has much learning thereon, both in his commentary on the statutes of substituting traverse for petition (1), and in his judgment in the case of *The Saddlers' Company* (2). In *Conyngsby* and *Mallom's* Case (3) all the judges gave separate judgments of much research, to the effect that a *monstrans de droit* was wrong in that case, and that the plaintiffs ought to have had a petition.

In *Feather* v. *The Queen* (4) *Cockburn*, C. J., says:

How can you distinguish between the seizure of goods by a servant

(1) 2 Inst. 68.
(2) Temp. H. 8, Keilway, 154.
(3) 4 Rep. 58.
(4) 6 B. & S. at p. 282.

of the Crown where it is admitted a petition of right lies and the improperly interfering with his liberty.

And at page 293, *Cockburn*, C. J., delivering judgment of the court says:

We think it right to state that we can see no reason for dissenting from the conclusion arrived at by the Court of Common Pleas (in *Tobin* v. *The Queen*). We concur with that court in thinking that the only cases in which the petition of right is open to the subject are where the land, or goods, or money of a subject have ound their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given compensation in money, or where a claim arises out of a contract as for goods supplied to the Crown or to the public service. * * * *

In considering this case let us start with the now unquestionable proposition that for breach of contract unliquidated damages can be recovered against the Crown by petition of right. This was clearly established in *Thomas* v. *The Queen* (1) in which *Blackburn*, J., thus states the principle:

Contracts can be made on behalf of Her Majesty with subjects, and the Attorney General suing on her behalf can enforce those contracts against the subjects, and if the subject has no means of enforcing the contract on his part there is certainly a want of reciprocity in such cases.

The controversy in this case has never, that I can discover, as between the Crown and the suppliants, been, whether its officer, who evicted the suppliants, was or was not guilty of a tort, and therefore the Crown on that ground not liable for his act; no such defence is set up by the answer of the Attorney General, nor any evidence offered on the part of the Crown in support of such a defence. It would appear to have been stated at the hearing in this case and adopted by this court, but in my opinion it is entirely opposed to the whole action of the Government and the line of defence on record, where the real substantial true matter in

(1) L. R. 10 Q. B. 33.

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controversy between the suppliants and the Crown is clearly put forward by the Attorney General; the suppliants claiming that the contract of 22nd September, 1871, is valid and binding, in full force and effect, and under which they were by the agreement of the Crown entitled to the continuous enjoyment and possession of the *Windsor Branch* and running privileges over the trunk line from *Windsor* junction to *Halifax* for a period of 21 years from the 1st day of January, 1872, and that the Crown in breach of this agreement evicted the suppliants, took possession of the *Windsor Branch* and prevented them from exercising running powers over the trunk line. The Crown, on the contrary, contending that it had the legal right to put an end to the agreement, avers that it did so, and therefore the agreement, being thus terminated, the eviction and taking possession was lawful, and so no breach thereof.

The Crown, by the answer of the Attorney General, does not attempt to get rid of their liability by setting up that the act of taking possession and evicting the suppliants was a wrongful act of trespass by the manager of the railway, for which the Crown is not responsible; on the contrary, the Crown admits the doing of the act and justifies it on the ground that the legal right existed in the Crown to put an end to the contract and resume possession, and that a minute of the Governor in Council was passed ordering that the agreement with the suppliants should terminate on the 1st August, 1877, and directing the Minister of Public Works, on behalf of Her Majesty, to resume possession; in pursuance of which minute the officers of Her Majesty did, upon refusal of the suppliants to give up possession, take possession thereof and afterwards gave possession to the *Western Counties Railway*, which taking possession the Crown submits was no wrong

committed against the suppliants. The words of the Attorney General's answer are as follows :

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11. I submit that the said instrument of 22nd June, 1875, was not and is not binding upon Her Majesty in so far as the same purported to confer upon the suppliants any rights with respect to the said branch other than such as were determinable by further order of the Governor in Council, and in so far as the same purported to confer upon the suppliants any right with respect to the said branch beyond the time when arrangements might be completed for giving possesssion thereof to the Western Counties Railway Company, as referred to in the second section of the said Act of May, 1874. I say that the insertion of any clause in said instrument of 22nd June 1875, purporting to confer upon the suppliants rights other than such as were determinable by further order of the Governor in Council was an error on the part of the person who prepared said instrument, and the same was signed by the said Minister of Public Works in error and without knowledge on his part that such clause was contained therein.

12. I say that on or about the 25th of July, 1877, the Government of *Canada*, having completed arrangements with the *Western Counties Railway Company* for giving to them possession of the said branch, a minute of His Excellency the Governor General in Council was passed ordering and directing that "the arrangements then existing "with the suppliants with respect to the said branch should be ter- "minated on the first day of August, 1877," and the Minister of Public Works on behalf of Her Majesty was directed to resume possession of the said branch on that day and to put the *Western Counties Railway Company* in possession thereof pursuant to said Act of May, 1874, all of which the suppliants had notice.

13. In pursuance of the said minute of council and of the said act of 1874 the officers of Her Majesty did, on or about the said first of August, upon the refusal of the suppliants to give up possession of the said branch, take possession thereof and afterwards gave possession of the same to the *Western Counties Railway Company*, which is the ejection and giving over of possession complained of in the fifth paragraph of the said petition.

14. I submit that in taking possession of the said branch, and in giving over such possession to the *Western Counties Railway Company*, no wrong was committed against the suppliants which entitles them to any relief against Her Majesty by petition of right.

Here the Attorney General does not say the possession was taken by force, or in any way tortiously, no tortious act is set up for which the Crown claim not

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to be liable, but the exact opposite, The Attorney General puts forward that upon the construction of the agreement and the statutes bearing thereon, the Crown claims it had a right to put an end to the contract, and they did so, and claim that the action of the Crown and its officers being lawful and not tortious, they were justified, and, therefore, the suppliants are not entitled to claim damages. The Crown does not and never has repudiated the act of its officer, but the very reverse. The Courts, however, having decided that the ground taken by the Crown was not tenable in law, that the Crown was misinformed as to its supposed rights, that the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence entirely fails. And therefore the Crown by its officers having thus acted on a misconception of, or mis-information as to, the rights of the Crown, wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach became possessed of the suppliants property, and for restitution of which and damages indemnity is now sought, and this is the only real substantial matter that I can discover in controversy in this petition.

To go outside of this agreement, of this litigation, and of this answer and defence of the Crown, and the legal decision on the rights of the parties, and declare this *bonâ fide* action of the Government, based on what the Government believed to be the true construction of the agreement and the just rights of the Crown to be nothing more nor less than a personal wrong, a simple act of trespass committed by *Mr. Brydges*, for which he and he only is legally responsible, conflicts, in my opinion, with every principle of law and justice. It must be admitted that the maxim that the Queen can

do no wrong does not apply to breaches of contract entered into by the Crown. To turn, then, the deliberate and advised action of the Crown on its construction of this agreement into a simple tort by an officer of the Crown would be to make the maxim applicable to breaches of contract as well as torts, and in my humble opinion to enable a salutory prerogative to be used for the perpetration of the greatest injustice. In a proper case no one will be more ready or willing to uphold and maintain this maxim than I, as I have on several occasions shown in this Court, but to apply the maxim to a case such as this would, in my opinion, be wholly unjustifiable, and supported by no authority that I am aware of, the suppliants seeking compensation and indemnity for a simple breach of a contract which the Crown wholly independent of tort deemed it had a right to put an end to.

What is then the true construction of this agreement, entered into between the *Windsor and Annapolis Railway Company, limited*, and the Government of *Canada* (approved and ratified by His Excellency the Governor General of *Canada*, in Council, on the 22nd day of September, A.D. 1871), and which provides *inter alia*, as follows:—

2. The Company (meaning the plaintiffs) shall expect, for the purpose of the authorities, (meaning the Government of *Canada*) in maintaining the railway and works have the exclusive use of the *Windsor Branch*, with all station accommodation, engine sheds and other conveniences (but not including rolling stock and tools for repairs) now in use thereon.

3. The Company shall also use, to the extent required for its traffic, the trunk line with the station accommodation thereon, including engine shed accommodation for fire engines, water supply, fuel stages, turntables, signals, telegraphs, wharves, sidings and other conveniences, but not including machine shops and other shops, buildings and appliances for repairs of rolling stock.

21. This agreement shall take effect on the 1st day of January,

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1872. and continue for 21 years, and be then renewed on the same conditions or such other conditions as may be mutually agreed on.

It must be construed so as to make it operate according to the intention of the parties.

I think the true construction of this agreement or grant is, and the clear intention of the parties as indicated thereby was, that the suppliants should have the full, beneficial and continuous enjoyment of the privileges thereby granted for a continuous period of 21 years, and that they should not be disturbed by the Crown in such enjoyment, and as a consequence, to enable the agreement to operate according to the intention of the parties, there is an implied undertaking on the part of the Crown not to do anything to derogate from its grant so to enjoy, the Crown, in my opinion, being no more entitled to act in derogation of its grant or to defeat its own act and not be liable for a breach of its agreement, expressed or implied, than a subject.

If parties agree that it shall be lawful for one to hold the other's property for a certain time, this is, on the one hand, an agreement that the owner shall not, during that time, interfere with such holding, and on the other, that the holder shall not detain it for a longer time, and in either case, if the one during the time interferes, or the other detains beyond the time specified, it is a breach of the covenant or agreement.

It cannot be denied that the Crown by this agreement contracted with the suppliants for, and granted to them, the continuous right. This, then, is a contract in which quiet enjoyment during the continuance of the agreement is necessarily implied as against the act of the Crown ; in other words, that the Crown will do nothing in derogation of its grant, nor disturb the suppliants in the enjoyment of that which the Crown agreed they should have, and, therefore, any interference with the possession of suppliants by the Crown is

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a breach of the contract, express and implied, and in no way resembles a mere tort committed by a stranger.

The suppliants complaining, therefore, of no act of tort committed by the Crown or its servants, but simply in effect alleging that the Crown, on the assumption that the contract was at an end, evicted the suppliants and resumed possession of the road, and so broke the agreement with the suppliants by preventing them from having what they were entitled to under the agreement, and the Crown having thus come into possession of property belonging to the suppliants, they, by this their petition of right, seek to be restored to such possession and indemnified for the damages sustained by such breach on the part of the Crown, or, in the words of the petition: "the Government of *Canada* by "the breach and failure to perform the said agreement "of 22nd September, 1871, and 22nd June, 1875, have "caused to your suppliants great injury, loss and "damage," for which they seek indemnity.

I think the action of the Crown under the minute of the Governor in Council, amounts to no more than an eviction by a landlord, whose tenant has a covenant express or implied for quiet enjoyment, in other words, simply equivalent to an eviction where the lessee is ousted by the lessor, in which case it is clear an action of covenant lies against the lessor on the implied covenant in law upon the word "demise." In this case we are not to look to the manner of the eviction, that is not the point in controversy, the right to evict is what we have to deal with, and therefore this case should be treated as if a copy of the minute of the Governor in Council, had been served on the suppliants and possession demanded thereon by the Crown, and the suppliants, knowing that they could not successfully or forcibly resist the action of the Crown, had, under protest, without requiring physical force to be used,

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permitted the Crown to resume possession, relying on their protest and contract; and as if now by legal means they sought restitution of the possession and redress and indemnity, for an alleged breach of their agreement, under which they were entitled as against the Crown to have the continuous possession and quiet enjoyment of the premises, for the period therein stipulated; and must not, as has been done, be treated as solely a question of tort committed by an officer of the Crown. This then appears to me to be peculiarly a case to which the petition of right is applicable. The Crown, acting in the assertion of its supposed rights, has broken its contract, by reason whereof property and the increase and proceeds of property belonging to the suppliants have found their way into the hands of the Crown to the detriment of the suppliants.

In the view taken adverse to suppliants' right to recover, in so dealing with the case there seems to me to be an entire ignoring of the privity of contract both express and implied between the suppliants and the Crown, and of the nature of claims on contract as distinguished from the class of claims founded on wrong, and also of the fact that the act done was under the authority of an order of the Governor in Council under a claim of right and in assertion of that right.

This act of the Government in endeavouring to put and end to the contract, or, in other words, to cease to continue it, was no act done with a tortious intent, it was an act which the Government deemed they had legal authority to perform, on the assumption that the contract was, by the legal act of the crown, at an end, and that the Government could, therefore, legally resume possession of the road. Neither the Government nor its officers entered, or professed to enter on or take possession of the road as trespassers, but under a claim of legal right; therefore neither the

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Crown nor its servants committed a tort in the legal sense of that term, or an act which can be set up as against the suppliants as a tort to defeat the claim of the suppliants on their contract; the crown, as Lord *Denman* expresses it, committed an unconscious and involuntary wrong, which, though not legal by reason of the contract being a continuous subsisting contract, was simply a breach of that contract. This taking possession under a claim of right, as opposed to a tortious taking by the officer has, as has been shown, never been repudiated by the crown, but, on the contrary, the Crown affirmed it in this suit and ask this court to affirm that, so far from the act of taking possession being tortious, it was lawful and right because the agreement was at an end. The crown treats it, and properly treats it, as a claim founded on contract and grant made on behalf of the Crown, which, *Erle*, C. J., says, are a class legally distinct from wrongs. The possession taken on the part of the Crown was therefore nothing more than a claim of title.

If this is mere matter of tort for which a petition of right could not be brought, but an action would lie only against Mr. *Brydges*, who, it is alleged, committed the tort, if Mr. *Brydges* died this action would die with him, *actio personalis moritur cum personâ*; and it that the Crown, having no right to put an end to the agreement, and it being valid and binding on the Crown, could direct its servant to take possession, accept the possession obtained by the act of its servant, and so most effectually, not only break but put an end to the agreement, and, contrary to its terms, keep in its own possession the property of the suppliants (for it need not have handed the possession over to the *Western Counties*,) and receive the profits and emoluments of the road, which belonged not to the Crown but to the suppliants, and the suppliants be remediless in the premises, as would be the practical result of the

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decision in the Court of Exchequer, is, I think, a doctrine principles of law and justice will not tolerate. If this is to be treated simply as a matter of tort as between the suppliants and the Crown the same principle, I presume, must have effect as between party and party. Suppose then, *A* owned this road and entered into a similar agreement with *B*, and *A*, assuming, as did the Crown in this case, that the contract was at an end, when in fact and in law it was in full force and effect, entered and evicted as of right the grantee or lessee, and continued in possession and received the rents and profits and died, in an action against *A*'s executors for breach of contract by the deceased in his lifetime would it be competent for them to reply, "no "action for indemnity or damages for breach of "contract by deceased can be brought against us, for "though true *A* did make this agreement and "though true, on the assumption that the agree-"ment was at an end, when in truth it was sub-"sisting, he did, contrary to the agreement, enter "and evict, and died, and though he has taken from you "all the privileges, profits and advantages, which by "his contract he agreed you should have, his doing "so is no breach of the agreement; his entry "eviction and resumption of possession was simply a "tort, not a breach of his contract, and therefore the "maxim *actio personalis moritur cum personâ* applies, "and so no action for such tortious act or its con-"sequences can be maintained against us; therefore, "as we have done nothing whatever since his death in "connection with the property, you are remediless." This, in my humble opinion, is an exact illustration of the present case.

I am pleased to think that in my view of the law I am not constrained to a conclusion, in my opinion, so unreasonable and unjust.

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These suppliants honestly contracted with the Government; there has been no breach of this agreement on their part that has not been satisfactorily arranged; it is not pretended that the suppliants have been guilty of any wrong whereby they have forfeited their rights under the agreement, or whereby they have debarred themselves from claiming the benefit of the contract. When the Crown therefore, disregarding the agreement, became possessed of that which, by virtue of the act of the Crown, had become the property of the suppliants, on no principle that I am aware of can relief be denied. Law, justice, common honesty, not to say the honor of the Crown alike demanded that there should be restitution of the property of the suppliants, and indemnity for the proceeds thereof which have come to the hands of the Crown, and of which the suppliants have been deprived by the wrongful, though unconsciously wrongful, act of the Crown.

This to my mind is peculiarly and emphatically a case in which one may, as *Lord Denman* did in *Baron de Bodes'* case declare an unconquerable repugnance to the suggestions that the door ought to be closed against all redress and remedy.

Had there been no contract in this case, and the seizure of this property had been wrongfully made by the Crown officers and came to the possession of the Crown, then it may be questionable how far the suppliants could, beyond a judgment of restitution, obtain redress for unliquidated damages for the wrongful seizure.

In such a case it well may be that having obtained restitution from the Crown of the property wrongfully seized, if damages are sought they should be obtained, if at all, from the officer who did the wrong.

Mr. Justice *Gwynne* says:

Now what is sought to be obtained by this Petition of Right, in

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addition to restitution of the property, is merely compensation in damages to be paid by Her Majesty for the trespass and eviction so committed by persons acting under the authority of the Government of *Canada* or professing so to do in taking possession of the *Windsor Branch Railway*, evicting the suppliants from the possession thereof and putting the *Western Counties Railway Co.* into possession thereof, and for the mesne profits received by the *Western Counties Railway* during their possession. For the damages sustained by the suppliants by this tresspass and eviction, the judgment recovered by the suppliants as plaintiffs against the *Western Counties Railway* Company renders that Company responsible, but the suppliants nevertheless claim the right to recover the same damages by a judgment to be rendered against Her Majesty upon the Petition of Right.

But this, I submit, is not so. How could the *Western Railway* be made responsible for the act of the Government in evicting and dispossessing the suppliants and for the resumption of possession by the crown, acts to which they were in no way parties? On the contrary, it appears from the case that the possession was taken on behalf of the Crown on the 1st August, and the road operated by the Crown from that period until the 24th September, and not till then was possession transferred to the *Western Counties Railway.* Who, but the Crown, can be liable for taking possession and keeping the suppliants out of possession, from the 1st August until 24th September? On what principle can the Crown be absolved from its liability, and the burthen of indemnifying suppliants cast on the *Western Counties Railway Company*, and so the suppliants bound to look to them instead of the crown for redress? Surely until the *Western Counties Railway Company* got the possession, in the absence of the slightest evidence to show that they had till then in any way interfered with the road, or the suppliants in connection with the possession thereof, they can in no way be made responsible.

Then, again, with reference to the trunk line. The result of the decision of the Privy Council is that when the Government resumed possession of the *Windsor*

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Branch, and consequently excluded the suppliants from the use of the trunk line of railway from *Halifax* to its junction with the *Windsor Branch* line, suppliants had the unquestionable right and title to the possession of the *Windsor Branch Railway*, and the use of the trunk line. Now, as to the trunk line from *Halifax* to *Windsor*, there can be no doubt that the suppliants were excluded from enjoying the uses of this road, and yet there is no pretence that there was any tortious act by the Crown or any of its servants—the suppliants, without any acts of force, were simply in defiance of their agreement excluded, and the reason assigned is thus put by Her Majesty's Attorney General in answer to suppliants' claim:

15. I deny that the suppliants were excluded by the Government from the trunk line between *Halifax* and *Windsor* or from any use thereof, but I submit that no relief can be decreed against Her Majesty upon the said petition with respect to the said trunk line inasmuch as the instrument of 22nd September, 1871, upon which the suppliants base their claim to relief if ever binding was based upon a single and indivisible consideration, viz.: one-third of the gross earnings from all traffic carried over the *Windsor* branch and the trunk line, and if the said instrument cannot, as I submit it cannot, under the circumstances above referred to, be enforced with respect to the said branch, neither can it be enforced with respect to the trunk line.

Inasmuch as it has been decided that the instrument of 22nd September, 1871, is valid and binding, this defence necessarily fails. What answer is there to suppliant's claim as to this? Nothing whatever, that I can discover; and how can it be denied that the Crown was guilty of a breach of this portion of the agreement for which suppliants are entitled to an indemnity; and what had the *Western Counties Railway* to do in reference to this?

But while I have little difficulty in arriving at the conclusion that this was a proper case for a Petition of

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Right. I have had much difficulty as to the amount of damages to which the appellants are entitled.

The concluding prayer of suppliants in the suit of the *Windsor and Annapolis Railway Co.* v. *The Western Counties Railway Co.*, is as follows:—

"The plaintiffs also pray that the defendant company may be ordered and decreed to deliver up possession of the said *Windsor Branch Railway* to the plaintiffs, and that they may be restrained by order or injunction from this honorable court from further keeping possession of the said railway and running trains thereon, and that an account may be taken of the full amount of the moneys received by the defendant company for freight or passengers on said road since the same came into their possession. And that until a final decree shall be made in this suit a receiver shall be appointed by this honorable court to take and receive all moneys earned or to be earned by the defendant company or any other company or persons whomsoever. And that such further or other relief in the premises may be granted to the plaintiffs as shall be in accordance with justice and equity, and as to this honorable court shall seem expedient."

On which the judgment of the Judge in Equity was in their favor upon the whole case. A judgment subsequently sustained by the Supreme Court of *Nova Scotia* and afterwards by the Privy Council on the appeal by the *Western Counties Railway*, and in this court on the appeal of the Attorney-General of *Canada*.

The suppliants having thus elected to sue the *Western Counties Railway Company*, not only for the recovery of the possession of the *Windsor* branch, but also by way of damages for the moneys received by the *Western Counties* Railway for the freight or passengers on said road since the same came into their possession, and having recovered judgment for the same, I, as at

present advised, do not think they can now recover another judgment for the same moneys against the Crown and thus have two judgments—one in contract against the Crown, and the other in tort against the *Western Counties Railway*, in two different courts for the same damages.

It is clear this action against the *Western Counties Railway* could only be against them as tort feasors, for it cannot be contended there was any contract or privity of contract between them and the suppliants for breach of which the suppliants could have an action. The suppliants then having elected to treat the dealings of the *Western Counties Railway* with the *Windsor* branch as a tort, and having recovered a judgment for such tort, suppose the officers of the Crown were (for the Crown could not be) joint tort feasors. the case of *Rex* v. *Hoar* (1) conclusively shows that after such judgment no action could be brought against such joint tort feasors.

If this is so it would seem necessarily to follow that the suppliants, having recovered judgment for all the damages sustained by reason of the tortious acts of the *Western Counties Railway Company* in reference to the property after it passed into their possession, the suppliants can only recover for the consequences of the breach of contract on the part of the Crown for the net freight and passage money which actually came to the hands of the Crown while the property was in the possession of and worked by the Crown, and that they cannot claim as damages for breach of contract what they claimed and had judgment for as damages for a tort committed by the *Western Counties Railway*, and which was proved on a hearing by the record in this court, which affirmed the judgment of the Supreme Court of *Nova Scotia*, and which, affecting

(1) 13 M. & W. 494.

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only the amount of damages in this case, did not require to be pleaded.

But wholly independent of and in addition to which it may be observed that had no action been brought against the *Western Counties Railway Co.*, after the Crown passed the property over to the *Western Counties Co.*, it is difficult to see how, for their occupation, a petition of right could be maintained. In such a case the cause of complaint against the Crown is removed or ceases, and the company, not the Crown, being in possession, they are in of wrong, and an action lies against them, and therefore no petition against the Crown, and this is very clearly put in *Staumford's* Exposition of the King's Prerogative, before referred to, at fol. 740, where it is said :—

> Also, whereas the king doth enter upon me, having no title by matter of record or otherwise, and put me out, and detains the possession from me, that I cannot have it again by entry without suit, I have then no remedy but only by petition. But if I be suffered to enter, my entry is lawful, and no intrusion. Or if the king grant over the lands to a stranger, then is my petition determined, and I may now enter or have my assise by order of the common law against the said stranger, being the king's patentee. When his Highness seizeth by his absolute power contrary to the order of his laws, although I have no remedy against him for it, but by petition, for the dignity's sake of his person, yet when the cause is removed and a common person hath the possession, then is my assise revived, for now the patentee entereth by his own wrong and intrusion, and not by any title that the king giveth him, for the king had never title nor possession to give in that case.

STRONG, J.:—

I am of opinion that we ought to dismiss this appeal for reasons which are substantially the same as those given by the learned judge before whom the Petition of Right was heard in the Exchequer Court.

Modern decisions have conclusively settled the law to be that the Crown cannot be made liable for wrong-

ful acts committed by its officers to the prejudice of a subject.

This question was discussed with great learning and very fully considered by the Courts in the cases of Lord *Canterbury* v. *The Attorney General* (1), *Tobin* v. *The Queen* (2), and *Feather* v. *The Queen* (3), with the result mentioned, it being held that the doctrine of *respondeat superior* which in the case of a subject is applied to make a principal or master liable for the wrongful or negligent act of his agent or servant, done within the scope of his authority, is not applicable to the Crown; and this principle has already been acted on in this Court in the cases of *McFarlane* v. *The Queen* (4) and *McLeod* v. *The Queen* (5). It follows, therefore, that if the acts complained of in this Petition of Right were mere torts the suppliant is not entitled to recover damages, and the conclusion of the Court below was perfectly correct and ought to be adhered to. The fact that the acts complained of were done under the special authority of the order in council of the 25th July, 1877, by which it was ordered in supposed conformity to the act 37 Vic., cap. 16, (though, as it has since been determined by the Privy Council, upon an erroneous construction of that Statute,) that possession of the *Windsor Branch Railway* should be given to the *Western Counties Railway Company* on the 1st of August, 1877, can make no difference; and that this is so even upon the assumption that the order in council is to be construed as a direct command by the Crown to its officers to take possession, as they did, of the *Windsor Branch Railway*, and to exclude the suppliant from the use of the Trunk line, is apparent from the authorities already quoted In *Tobin* v. *The Queen*, Lord Chief Justice *Erle* says:

(1) 1 Phill. 306.
(2) 16 C. B. N. S. 310.
(3) 6 B. & S. 257.
(4) 7 Can. S. C. R. 216.
(5) 8 Can. S. C. R. 1.

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That which the Sovereign does by command to his servants cannot be a wrong in the Sovereign because, if the command is unlawful, it is in law no command and the servant is responsible for the unlawful act the same as if there had been no command.

And the Chief Justice adds a quotation from *Hale's* Pleas of the Crown to the same effect. In *Feather* v. *The Queen* the Court of Queen's Bench say:—

> For the maxim that the King can do no wrong applies to personal as well as political wrongs and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by authority of the Sovereign. For from the maxim that the King can do no wrong it follows as a necessary consequence that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong, inasmuch as the wrongful act when done becomes in law the act of him who authorized or directed it to be done.

And both the cases just quoted from show that the only remedy for a wrong done in obedience to express orders emanating from the Crown is by an action against the officer who performs the act, and that to such an action the orders of the Sovereign constitute no defence. In *Feather* v. *The Queen* the case of *Buron* v. *Denman* (1) was relied on by the suppliant as an authority against this proposition; but that case, as explained by the court, was shown to have no application as the injury there complained of, and which by the ratification and adoption of the Lords of the Admiralty became an act of state, was done without the dominions of the Crown and to the prejudice of a foreigner, and being by reason of the adoption of the Admiralty to be considered as an act of state, was only remediable according to the rules and usages of international law, upon the reclamation of the government of which the party complaining was a subject to the government of the United Kingdom.

Another and distinct reason for holding that the Crown is not liable under the circumstances of the pre-

(1) 2 Exch. 167.

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sent case is that the Governor General and the Ministers of the Crown who advised him, in the making of the order in council of the 25th of July, 1877, did not assume to act under the authority of the Crown, but in pursuance of the Act of Parliament. This appears upon the face of the order in council itself, which adopts the report of the Minister of Public Works, who in his report: "Recommends that possession of the said *Windsor Branch Railway* be given to the *Western Counties Railway Company* on the 1st of August, 1877, under the terms of the Act of May, 1874, entitled An Act to authorize the transfer of the *Windsor* branch of the *Nova Scotia* railway to the *Western Counties Railway Company*." *Tobin* v. *The Queen* is a direct authority for the Crown upon this point also. It was there held that the officer, for whose act in destroying a vessel which he had seized, assuming to act under powers conferred by certain statutes for the suppression of the slave trade, although he erroneously supposed the statutes in question gave him authority so to deal with the property seized, when in truth they did not do so, was nevertheless for that reason not to be deemed an agent of the Crown. In the present case the possession of the railway was taken from the suppliants and transferred to the *Western Counties Railway Company* by the officers of the Crown, upon the supposition that they were acting in obedience to the paramount authority of parliament, an assumption for which it may be said, though it can make no difference in principle, they had much better grounds than had the officer for whose acts it was unsuccessfully sought to make the Crown liable in *Tobin* v. *The Queen*. If the interpretation of the statute acted on by the Governor General in council had been the correct construction, instead of an erroneous one, as the Judicial Committee of the Privy Council has held that it was, there could have been no doubt

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that the act of taking possession of the *Windsor Branch Railway* would have been attributable to the statute, and defensible as a proper mode of carrying its provisions into execution. The order in council then was not intended to be made in the exercise of the general executive powers of the Crown, but for the sole purpose of carrying into execution the supposed requirements of the Act, and for this reason the order in council is not to be considered as an act of the Crown, but rather as an act of the officers and ministers of the Crown, not intended to be done as being within the scope of the prerogative powers of the Crown, delegated generally to the Governor General, but with the object and intention of acting as the mandataries of parliament, in carrying out the provisions of the statute with which, according to the construction they assumed to be the correct one, they had been charged by parliament. The first point decided in *Tobin* v. *The Queen* is, therefore, a direct authority against the suppliants, and the order in council cannot be considered as a command of the Crown nor can anything done under it be imputed to the Crown. The suppliants are consequently not entitled to recover damages, if the injuries complained of are to be treated as mere wrongful acts on the part of the officers and servants of the Crown.

The suppliants, however, now say that the wrongs in respect of which they seek indemity were not merely tortious acts, but breaches of contract for relief in respect of which they insist they have a remedy by petition of right. And if they can show that there were contracts with the Crown of which the acts complained of constituted breaches they no doubt bring themselves within the authority of the *Banker's* case (1) and of that of *Thomas* v. *The Queen* (2). In the *Banker's* case, although there was great difference of opinion

(1) 14 St. Trials 39. (2) L. R. 10 Q. B. 34.

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whether the form of proceeding adopted in that case—a petition directly to the barons of the Exchequer—was the regular one, there seem to be a general consensus of opinion that whenever a sum of money was due by the Crown to a subject *ex contractu* a petition of right will lie. This was recognized to be the law in *Tobin* v. *The Queen*, and in *Feather* v. *The Queen*, *Cockburn*, C. J., says:

> We concur with that court (the Common Pleas) in thinking that the only cases in which a petition of right is open to the subject are: where the land or goods or money of a subject have found their way into the possession of the Crown and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or when the claim arises out of contract for goods supplied to the Crown or the public service.

In *Thomas* v. *Queen*, it was expressly held that a petition of right could be maintained for the recovery of damages for the breach of an executory contract entered into by a responsible minister of the Crown with the suppliant for the payment of money in an event which the petition alleged had happened. In the case of *McLean* v. *The Queen* (1), in this court, the same principle was adopted and the suppliant recovered damages for the breach by the Crown of a contract to employ them as printers at certain contract prices. In *Churchward* v. *The Queen* (2) also, although the case did not call for a decision on this point there are numerous dicta to the same effect, and, indeed, the Attorney General who argued that case on behalf of the Crown did not dispute the general principle that a petition of right will lie to recover damages for non-performance of a contract to pay money.

The petition itself seems rather to put the case of the suppliants as one entitling them to damages for tortious acts than as grounded on contract; its allegations, however, are not very clear in this respect. The ma-

(1) 8 Can. S. C. R. 210. (2) L. R. 1 Q. B. 201.

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terial paragraphs are the 5th and 11th. The fifth paragraph is as follows:

5. In pursuance of the aforesaid agreement of the 22nd September, 1871, and on the 1st January, 1872, the date named therein, the Government of *Canada* delivered to your suppliants, and they thereupon entered into the exclusive use and possession of the said ranch line with the stations, sheds and other conveniences in use thereon (subject, however, to the right of the said authorities to have access thereto for the purpose of maintaining the railway and works), and the Government likewise gave to your suppliants, and they thereupon took and exercised such use of the trunk line and the accommodation specified in connection therewith in article 3 of the said agreement of the 22nd Sept'r, 1871, as they were under such agreement entitled to have and exercise. And from the time when such use and possession of the said premises respectively were so given to them as aforesaid, your suppliants continued to hold and enjoy the same, and to work and operate their own railway line from *Windsor* to *Annapolis*, and the said branch and trunk lines from *Windsor* to *Halifax* until the 1st day of August, 1877. On that day one *Charles John Brydges*, then being and acting as the superintendent of government railways and acting on behalf of your Majesty's government of *Canada*, forcibly ejected your suppliants and their servants and railway stock from and afterwards forcibly prevented them from coming upon or using or passing over the said trunk and branch lines, and he continued in possession thereof, and to prevent your suppliants from coming upon or using or passing over either of such lines, until shortly afterwards the said government gave over the possession of the said branch line to another railway company known as the *Western Counties Railway Company*, incorporated under an Act of the Legislature of *Nova Scotia* for the purpose of making a railway from *Annapolis* to *Yarmouth* in *Nova Scotia*. Such company thereupon took and has ever since held possession of, and excluded your suppliants from, and from any use of, the said branch railway. The said government have continued to the present time in possession of the said trunk line and to exclude your suppliants therefrom and from any use thereof.

This seems clearly to rest the right to recover on the ground that the acts of the government superintendent of railways were tortious acts. But in the 11th paragraph the suppliants charge that they have suffered damages by reasons of breaches by the Crown of what is called the agreement of the 22nd September, 1871.

The prayer is for a specific performance of the agreement of the 22nd September, 1871, and *inter alia:*

That the sum of £150,000 sterling or such sum as may be reasonable may be paid to the suppliants in compensation, and by way of damages for the injuries and losses which have been occasioned to them by the breach and failure of your Majesty's government of *Canada* to perform the said agreement of the 22nd September, 1871.

The first question which arises on this branch of the case is, was there in the legal sense of the term a contract by the Crown to give the *Windsor* and *Annapolis Railway Company* the exclusive use of the *Windsor* branch, and the running powers over the branch line, or was not the agreement of the 22nd September, 1871, rather in the nature of a performance of an obligation which had been previously created by statute. By the agreement of November, 1866, by which Messrs. *Punchard, Barry & Clark* contracted with the government of *Nova Scotia* for the construction of the *Windsor* and *Annapolis Railway* it was provided that before the new line, which was to be the property of the contractors, was opened a traffic arrangement was to be made between them and the Provincial Government of *Nova Scotia* for the mutual use and enjoyment of the respective lines of railway between *Halifax* and *Windsor*, and *Windsor* and *Annapolis*, including running powers,or for the joint operation thereof, on equitable terms to be settled by two arbitrators to be chosen by the parties in case of difference.

By the *Nova Scotia* Act, 30 *Vic.* ch. 36, passed on the 7th May, 1867, *Punchard*, *Barry* and *Clark* were constituted a corporation under the name of the *Windsor and Annapolis Railway Company* and the stipulation contained in the contract of 1866 already stated was (among the provisions of the contract) declared "to be incorporated into and made parcel of the act." On the 1st of July, 1867, the Government Railways in

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Nova Scotia, including the *Windsor* Branch and Trunk line, became, by the operation of the 108th section of *British North America* Act, 1867, the property of the Dominion Government, and it has been determined by the judgment of the Privy Council in the case of the *Western Counties Railway Company* v. *The Western and Annapolis Railway Company* (1), that this transfer—

> Had not the effect of vesting in *Canada* any other or larger interest in these railways than that which belonged to the Province at the time of the statutory transfer, and that accordingly the Dominion took the property of the *Windsor Branch Railway* subject to the same obligation by which the right of the Provincial Government was affected, viz.: to enter into a traffic arrangement with the respondent company in terms of the agreement confirmed by the Provincial statute of the 7th May, 1867, and that it was in pursuance of that obligation that the Dominion Government entered into the agreement of the 22nd September, 1871.

It seems, therefore, that there is a good foundation for the argument that we ought to regard the agreement of 1871, not as an executory contract by the Crown, but rather as an ascertainment of the terms on which the suppliants were to enjoy the rights for which their promoters had stipulated by the original agreement of November, 1866, and which had been afterwards assured to them by the provincial statute. Again, can that be said to be a contract by the Crown which it had no option to refuse to enter into but with the alternative of being compelled to submit to such terms as the arbitrators might think fit to impose. A contract implies a voluntary act on the part of those who enter into it, and here the Crown was not free but was bound by the statute. It having been already determined by the highest authority that this agreement of September, 1871, was "in implement of the obligation to make a traffic arrangement," is it not rather to be regarded and treated as a performance of a statutory obligation by which the

(1) 7 App. Cases 187.

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Crown was bound, and which it could not afterwards, by declining to carry it out, be said to break, as it might be said to break a contract for the payment of money which had been freely entered into independently of any statutory requirement? To put it in another form, were not the rights of the suppliants to the exclusive use of the branch and to the running powers on the trunk line dependent upon the statute and not upon any contract with the Crown? On the other hand the agreement certainly took the form of a contract, and it may be said that it was none the less such because it was entered into by the Government under the compulsory powers of the statute.

In the entire absence of any authority showing how far the Crown can be made liable by this form of remedy in respect of obligations *ex contractu*, and considering the rather fine distinction upon which, as I suggest, the suppliants rights are to be imputed to the statute rather than to a contract, I should not like to rest my judgment on this ground.

If however the memorandum of September, 1871, is to be considered a contract by the Crown, it certainly is not one analogous to those for the non-performance of which a Petition of Right was held to lie in the *Banker's* case (1) and in *Thomas* v. *The Queen*, nor one of the class pointed out by *Cockburn*, C.J., in *Feather* v. *The Queen*, as entitling the party contracting with the Crown to a remedy by petition of right. Even if it be conceded that this arrangement of 1871 did constitute a contract binding on the Crown, it was not an executory contract of which it could be said that either the order in council or acts done under its authority by the superintendent of railways were breaches.

So soon as the suppliants were let into possession of

(1) 14 St. Trials 39.

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the branch line and permitted to enjoy the running powers on the trunk line they were in under the statute, and the agreement was executed and performed just as much as a covenant to pay money is satisfied by the payment of the money. There remained no longer any contract to be performed, the statute and agreement together gave them a complete title to the rights which the agreement had fixed and ascertained, and their continuous enjoyment of their rights was guaranteed, not by any contractor agreement, but by the statute. Had a statute empowered the Crown to make an absolute grant of the branch line and its franchises to the suppliants, and had a grant been accordingly made under the great seal, no one would pretend that if the Crown officers afterwards took possession of the railway their acts, although authorized by the Crown, would be in law anything other than mere tortious acts of the officers of the Crown; it could not in such a supposed case be pretended that there was any breach of an obligation springing from contract; any intermediate contract by the Crown between the statute and the grant would have been executed and performed by the grant. Then it appears to me that the statute imposing upon the government the obligation of conceding the rights which the agreement conferred upon the suppliants, vested those rights in them just as effectually as a formal grant would have done if a mere enabling power to make a grant had been given to the Crown. In the case of *Feather* v. *The Queen*, which was a petition of right to recover damages from infringement by the officers of the Crown of a patent for an invention, although the case was ultimately determined upon the ground that such a patent did not bind the Crown, it is still worthy of remark that the court pronounced an opinion upon what would have been the rights of the suppliant upon the assumption that the Crown was bound by the

patent, in which case it was considered that the infringement would have been a tort for which the Crown could not have been made liable. It was not even attempted in argument to put the case of the suppliant upon the ground of contract, though it would seem that if the Crown in the present case can be said to have broken a contract it might have equally been said to have done the same in the case presented by *Feather* v. *The Queen*. It results, therefore, from this case of *Feather* v. *The Queen* that a violation of a right in itself amounting to a tort is not to be considered a breach of contract for which the Crown is to be held liable, merely because the title to the right of property violated is to be ascribed to a contract with the Crown executed by grant.

For these reasons I am unable to consider the acts complained of here as breaches of an obligation springing from contract, as in the case of non-payment of money and other analogous cases; they are rather violations of a *jus in re*, of a statutory right of property, and therefore this is to be classed with such cases as *Tobin* v. *The Queen* and not with those in which, like *Thomas* v. *The Queen*, it has been held that an obligation to pay money arising from contract may be enforced by petition of right.

Further, the ground already adverted to in considering the liability of the crown for torts seems also to afford an answer to the suppliants, even granting that they are entitled to maintain that there was a contract binding on the Crown. As already stated, it was one of the grounds of the decision in *Tobin* v. *The Queen*, that when the officers of the Crown assume to act in pursuance of a statute they are not to be regarded as acting within the scope of their authority as agents of the Crown. And this principle applies as well to cases in which the authority which the officer assumes to exer-

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cise is not upon a proper construction of the statute conferred at all, as to those in which the acts are strictly within the terms of the statute and susceptible of being justified by it. Whatever may be said of mere non-performance or non-feasance there can be no reason for making any distinction in this respect, so far as positive acts are concerned, between acts which are in breach of contracts and those which are bare torts, acts violating rights of property. The acts relied on as being in breach of the contract which the Crown is said to have been bound by were the order in council and the taking possession of the branch line under its authority, and the exclusion of the suppliants from the use of the trunk line. Now, all these things were done, as already stated, expressly with the intention of acting in pursuance of the statute of 1874, and for the purpose of carrying out of the provisions of that statute, a duty which Parliament had imposed on the executive government. It is true that just as in *Tobin* v. *The Queen* it was erroneously supposed that the statute conferred powers which by a proper construction of its terms it did not give, but that is not material, the point is that the Governor General in Council was not acting as the officer or agent of the crown but as the mandatary of Parliament, and for this reason neither the order in council itself, nor the act of any officer in enforcing it, can be imputed to the Crown, and therefore, if we are to regard the Crown as being bound by a contract to continue the suppliants in the undisturbed enjoyment of their rights, there never has been any breach of that contract. It cannot be maintained in answer to this objection that the acts complained of are not to be attributed to the Crown, that the act of the Governor in Council was in itself an original and direct exercise of the power of the Crown, and in this respect equivalent to an order of the Queen in Council. The cases of

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Cameron v. *Kyte* (1), and *Musgrave* v. *Pulido* (2), have determined that the Governor of a colony is not, as incidental merely to his office, invested with the powers of exercising the Royal prerogative, that he is not, as it is expressed in those cases, to be considered a Viceroy, but that he only possesses such powers as have been delegated to him by his commission from the Crown. The British North America Act, 1867, makes no difference in this respect, for the 9th section is as follows :

> The Executive Government and authority in *Canada* is hereby declared to continue and be vested in the Queen.

Acts of state performed by the Governor General in Council are therefore ordinarily to be referred to the powers expressly or impliedly delegated to him by Her Majesty's commission, and consequently, if the Governor General assumes to act, not in exercise of the powers so delegated, but exclusively for the purpose of executing the provisions of an Act of Parliament, he can in that case no more be said to act as an agent or officer of the Queen than the naval officer in *Tobin* v. *The Queen* could have been said to have been acting within the scope of his authority as an officer of the Crown, and the high dignity of the office of Governor General of the Dominion and the magnitude and importance of the functions with which he is entrusted can make no difference in applying the principle of law that the Crown is not liable for the acts of any of its functionaries which are performed, not with the intention of exercising authority conferred by the Crown, but only for the purpose of complying with the mandates of Parliament.

This conclusion would not leave the suppliants without remedy, for they have not only a right of action against the officers of the Crown, if they acted upon an order unwarranted by law, but they have the further

(1) 3 Knapp, 332. (2) 5 App. Cases 102.

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right of petitioning Parliament for an indemnity which it is to be presumed will not be withheld from them.

The suppliants have already been restored to their rights as regards the possession of the railway, under the decision in the action against the *Western Counties Railway Company* and they therefore require no relief in that respect.

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

FOURNIER, J.:

Le 22 septembre 1871, le gouvernement du *Canada*, représenté par le Ministre des Travaux Publics, agissant avec la sanction de Son Excellence le Gouverneur Général, en vertu d'un ordre en conseil, fit avec la compagnie appelante un arrangement par écrit pour l'usage du chemin de fer connu sous le nom de *Windsor Branch Railroad*,—s'étendant depuis la jonction de *Windsor* sur le chemin de fer Intercolonial jusqu'au chemin de fer de la dite appelante qui conduit de *Windsor* à *Annapolis*. Les principales conditions de cet arrangement sont ainsi qu'il suit:

2. The Company shall, except for the purposes of the Authorities in maintaining the Railway and Works, have the exclusive use of the *Windsor* Branch, with all station accommodation, engine sheds and other conveniences (but not including rolling stock and tools) now in use thereon.

3. The Company shall also use, to the extent required for its traffic, the Trunk Line, with the station accommodation thereon, including engine shed accommodation for five engines, water supply, fuel stages, turn tables, signals, telegraphs, wharves, sidings and other conveniences, but not including machine shops and other shops, buildings and appliances for repairs of rolling stock."

* * * * * * * * *

10. The Company shall pay to the Authorities monthly, one-third of the gross earnings from all traffic carried by them over the *Windsor* Branch and Trunk Line.

* * * * * * * * *

19. In the event of the Company failing to operate the Railways

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between *Halifax* and *Annapolis*, then this Agreement shall terminate, and the Authorities may immediately proceed to operate the Railway between *Halifax* and *Windsor* as they may deem proper and expedient.

20. The termination of this Agreement, under the preceding clause, is not to prejudice any rights which the Company may now have.

21. This Agreement shall take effect on the 1st day of January, 1872, and continue for twenty-one years, and be then renewed on the same conditions, or such other conditions as may be mutually agreed on.

L'appelante prit en vertu de cet arrangement possession de l'embranchment de *Windsor* et l'exploita jusqu'au 1er août 1877, époque à laquelle l'appelante fut dépossédée par *C. J. Brydges*, surintendant des chemins de fer du gouvernement, agissant par ordre de ce dernier qui, peu de temps après, mit la compagnie intimée en possession du même chemin (*Windsor Branch*).

L'appelante se trouvant lésée par cette dépossession et le refus du gouvernement d'exécuter l'arrangement ci-dessus cité, demanda par pétition de droit à sa Majesté, une compensation pour les dommages lui résultant de la violation de l'arrangement en question. En vertu des dispositions de la 6me section, 39 *Vict.*, ch. 27, la compagnie *Western Counties Railway* à été mise en cause et a produit une défense. Après contestation liée et audition des preuves, cette cause fut plaidée devant l'honorable juge *Gwynne*, qui, par son jugement, rejeta la pétition de l'appelante pour deux raisons: 1o. Parce que Sa Majesté n'était pas responsable des conséquences des voies de faits (*trespasses*) commises par ses employés. 2o. Parce que l'appelante ayant poursuivi la compagnie *Western* pour avoir accepté du gouvernement la possession du *Windsor Branch*, et la faire condamner à rendre compte des recettes du dit chemin de fer, la condamnation qui a été prononcée avait eu l'effet d'éteindre le droit de demander les mêmes dommages contre Sa

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Majesté. C'est de ce jugement qu'il y a maintenant appel à cette cour.

La principale raison invoquée de la part de Sa Majesté contre le présent appel est exprimée dans le factum de son savant conseil, comme suit :

Because the Petition of Right Act does not give to a suppliant any additional remedy against the Crown which would not have existed in *England* prior to the Imperial Act 23 and 24 *Vic.*, c. 34, but merely relates to the form of procedure, and in *England* the relief prayed for against the Crown in this matter could not have been granted upon a Petition of Right.

The petition in this matter in effect seeks to recover from the Crown damages for trespasses unlawfully and forcibly committed by servants of the Crown, contrary to the well established doctrines laid down in the cases of *Tobin* v. *The Queen*, (1); *McFarlane* v. *The Queen*, Supreme Court of *Canada*; *MacLeod* v. *The Queen*, Supreme Court of *Canada*, and cases therein referred to.

Les autres moyens de défense de Sa Majesté, fondés sur les résolutions de la Chambre des Communes du Canada ; sur le défaut d'exécution de la part de l'appelante des conditions pécuniaires de l'arrangement du 22 septembre 1871 ; sur la 37me *Vict.*, ch. 16, ayant formé le sujet d'un procès décidé en dernier ressort par l'honorable Conseil Privé qui a donné gain de cause à l'appelante, doivent être laissés hors de considération comme ayant été finalement jugés D'après ces décisions l'arrangement du 22 septembre, 1871, doit être considéré comme légal et obligatoire.

On ne peut nier que cet arrangement forme entre les parties contractantes un contrat régulier obligeant chacune d'elles à en exécuter les conditions. La seule question à décider est donc de savoir s'il y a lieu de réclamer par pétition de droit des dommages (*unliquidated damages*) pour la violation d'un contrat (*breach of contract*). Cette question ne saurait souffrir de difficulté après la décision de cette cour dans la cause de *McLeod* vs. *La Reine.*

(1) 16 C. B. N. S. 310.

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Ayant eu plusieurs fois déjà l'occasion d'exprimer mon opinion sur cette question, je ne crois pas qu'il soit utile de le faire ici de nouveau. Je me contenterai de référer aux autorités citées dans la cause d'*Isbester* v. *La Reine*, décidée en cour d'échiquier, et à celles que j'ai citées dans la cause de *McLeod* v. *La Reine* (1), en ajoutant que s'il pouvait y avoir encore un doute à cet égard, les nombreuses autorités citées et les arguments si habilement développés dans les savantes dissertations de l'honorable juge en chef sur cette question auraient l'effet non-seulement de faire disparaître ce doute, mais aussi de démontrer que cette question est réglée par la jurisprudence établie.

L'hon. Juge *Gwynne* ayant considéré la dépossession opérée par M. *Brydges* comme une voie de fait commise par un employé, a déclaré, en se bâsant sur la cause de *Tobin* v. *La Reine*, qu'il n'y avait pas lieu à la pétition de droit.

L'appelante se plaint, il est vrai, dans sa pétition d'avoir été évincée par force (*forcibly*) du chemin de fer à l'usage duquel elle avait droit et d'avoir aussi été empêchée par force de s'en servir. Mais elle se plaint de plus qu'après s'en être emparé, le gouvernement en est demeuré en possession et qu'il en a ensuite remis la possession à la compagnie intimée. Quoique le fait de dépossession par force soit mentionné, il n'est toutefois reclamé aucun dommage pour cette considération, les dommages demandés ne sont que pour la privation de l'usage du chemin. D'ailleurs l'allégation que le gouvernement après la voie de fait de *Brydges* a continué en possession du chemin et l'a ensuite remis à la compagnie intimée, forme une allégation suffisante par elle-même du refus du gouvernement d'exécuter son contrat. En outre ce refus de la couronne a précédé la voie de fait commise par *C. J. Brydges*, car c'est en

(1) 6 Can. S. C. R. 1.

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vertu d'un ordre en conseil en date du 25 juillet, 1877, que le gouvernement a déclaré mettre fin à ses arrangements avec l'appelante, tandis que ce n'est que le 1er août suivant que l'appelante a été dépossédée.

L'allégation de la défense à cet égard mérite d'être citée.

12. I say that on or about the 25th July, 1877, the Government of *Canada* having completed arrangements with the Western Counties Railway Company for giving to them possession of the said branch, a minute of His Excellency the Governor General in Council was passed ordering and directing that the arrangements then existing with the Suppliants with respect to the said branch should be terminated on the first day of August, 1877, and the Minister of Public Works on behalf of Her Majesty was directed to resume possession of the said branch on that day and to put the Western Counties Railway Company in possession thereof pursuant to said Act of May, 1874, all of which the Suppliants had notice.

13. In pursuance of the said minute of Council and of the said Act of 1874, the officers of Her Majesty did on or about the said first of August, upon the refusal of the Suppliants to give up possession of the said branch, take possession thereof and afterwards gave possession of the same to the Western Counties Railway Company, which is the ejection and giving over of possession complained of in the fifth paragraph of the said petition.

On voit par cette citation que c'est le gouvernement lui-même qui, par une résolution solennelle, a décidé de mettre fin au contrat en question. La voie de fait de Mr. *Brydges* est donc tout à fait sans importance, et d'ailleurs l'appelante ne s'en plaint pas et n'a rien demandé pour ce motif.

Il est évident que les faits de la présente cause sont tout à fait différents de ceux de celle de *Tobin*. Le principe sur lequel est fondé le jugement dans cette dernière cause, quoique parfaitement correct, n'est pas applicable à la présente cause. Ce n'est pas pour les conséquences d'une voie de fait, mais pour l'exécution d'un contrat (*breach of contract*) que l'appelante réclame une compensation. La pétition de droit dans

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la cause de *Tobin* n'avait pas d'autre bâse que la voie de fait.

L'existence du droit de pétition dans le cas actuel étant admise, il ne devrait rester maintenant pour disposer de la cause telle qu'elle a été présentée par les plaidoiries des parties, qu'à déterminer le montant de la compensation à accorder ; mais l'Honorable Juge *Gwynne*, dans son jugement ayant décidé une importante question de droit que les plaidoiries des parties n'avaient point soulevé, une ré-audition de la cause a été ordonnée pour les entendre sur la question de savoir : jusqu'à quel point la poursuite intentée par l'appelante réclamant de la compagnie intimée un compte des recettes perçues par elle pendant son exploitation du *Windsor Branch* peut affecter son recours contre le Gouvernement.

Ni de la part de la Couronne, ni de celle de la compagnie intimée, le fait de l'existence de cette poursuite n'a été invoqué comme moyen de défense dans la présente cause. Ce n'est que lorsque le conseil de l'intimée a produit une copie du dossier d'appel (*Appeal Book*), au Conseil privé dans cette première cause, qu'il a déclaré que ce dossier faisait voir que l'appelante avait déjà obtenu jugement contre l'intimée pour une partie des dommages qu'elle réclamait en cette cause de la Couronne. L'appelante s'est opposée à cette production pour deux raisons : 1o. parce que le fait d'un premier jugement sur les mêmes causes d'action n'avait pas été plaidé ; 2o. que s'il eût été plaidé la preuve aurait dû être faite légalement, par la production d'une copie authentique du dossier, qu'il aurait fallu compléter par la preuve de l'identité des parties ainsi que de l'identité des causes d'action.

Ces objections sont bien fondées et suffisantes pour faire écarter la question soulevée par l'honorable juge *Gwynne* comme n'ayant été ni plaidée ni prouvée. De

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plus, il est clair que le principe de responsabilité n'est pas le même dans les deux causes,—dans celle-ci la responsabilité de la Couronne découle d'un contrat, mais dans l'autre, contre la Compagnie intimée, la responsabilité est basée sur une voie de fait pure et simple (*a common trespass*), qui, de plus, n'a été commise que plus d'un mois après la violation du contrat par le gouvernement. Les deux actions sont donc fondées sur des causes différentes, puisque la Couronne ne peut être tenue responsable d'une voie de faits. Cependant, si le premier jugement ordonnant à la compagnie intimée de rendre compte des recettes qu'elle avait perçues, eût été suivi d'un compte et d'une condamnation au paiement d'une somme déterminée et que cette somme eût été effectivement payée, je n'hésite pas à admettre que ce paiement aurait eu l'effet de diminuer d'autant le recours de l'appelante contre la Couronne. Cette doctrine paraît bien établie, mais l'ordre de rendre compte n'ayant été suivi d'aucune exécution,—aucun paiement n'ayant été fait, peut-on considérer que cet ordre a eu l'effet d'opérer pour autant l'extinction du droit d'action de l'appelante contre Sa Majestée? Ce principe ayant été admis par deux des hon. juges qui composent la majorité de la cour, un autre étant d'avis de renvoyer la petition *in toto*, la conséquence en a été que Sa Majesté a été exonérée de tous les dommages soufferts par l'appelante pendant le temps que la compagnie intimée a exploité le *Windsor Branch*.

Peut-on appliquer aux faits de cette cause le principe invoqué par l'hon juge *Gwynne* et soutenu par deux autres hons. juges de cette cour, viz: qu'un *former recovery*, avait éteint le droit d'action contre la Couronne? La référence aux dates principales des procédés de cette cause et à ceux de la cause de l'appelante contre le *Western Co.* fera voir le contraire.

L'action de l'appelante pour obtenir un compte de

la compagnie *Western Co.* a été intentée devant le juge d'Equité de la *Nouvelle-Ecosse, Halifax* le 10 août 1877, Son décret ordonnant une reddition est en date du 1er mars 1880, confirmé par la Cour Supêrme de la *Nouvelle-Ecosse*, 5 avril 1881, et par l'hon. Conseil Privé, le 22 février 1882.

Le 18 août 1878, un an seulement après l'institution de l'action devant le juge d'Equité, l'appelante prévoyant sans doute les longueurs de cette contestation qui a duré environ cinq ans, obtint un *fiat* lui permettant de produire sa pétition de droit contre Sa Majesté. Il n'y avait alors aucun jugement ou ordre dans sa poursuite contre la compagnie *Western Co.*, et ce n'est qu'environ 15 mois après le 1er mars 1880, que fut rendu le décret ordonnant un compte, confirmé deux ans plus tard par l'Honorable Conseil Privé. Lorsque la pétition de droit fut présentée, le droit d'action de l'appelante existait dans toute son intégrité ; il n'était pas possible de prétendre qu'il avait été éteint ou transformé par ce jugement qui n'existait pas alors. Tout au plus la compagnie intimée aurait-elle pu plaider une exception de litispendance en supposant que ce plaidoyer fût fondé dans les circonstances de la cause ; mais comme elle n'a pas jugé à propos de le faire, rien ne pouvait donc arrêter le cours de la procédure. Si le fait d'un jugement subséquent à l'institution de la pétition de droit pouvait affecter le droit d'action de l'appelante, n'aurait-il pas dû former le sujet d'un plaidoyer connu dans le droit anglais sous le nom de *puis darien continuance* ? Mais ni dans l'un ni dans l'autre de ces deux cas, on n'aurait pu empêcher l'appelante d'obtenir son jugement en cette cause, car l'existence de plusieurs jugements contre différentes personnes responsables des conséquences de voies de fait n'est pas illégale, comme le font voir les autorités citées ci-après.

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En outre est-il bien établi d'après la loi anglaise que la condamnation non suivie de paiement de l'une de deux parties également responsables des conséquences d'une voie de fait a l'effet d'éteindre la dette et d'opérer la décharge de la partie qui n'a pas été condamnée? Cette question est controversée et la jurisprudence ne semble pas encore être définitivent fixée. Il n'a jamais été prétendu avant la cause de *Brown* v. *Wootton*, que la simple existence d'un jugement fût une de fin non recevoir (*a bar*) contre l'action qui pourrait ensuite être dirigée contre une autre partie responsable au même degré.

Dans la cause de *Locke* v. *Jemner*, (1) bien qu'il semble été décidé qu'un jugement contre l'un des deux *trespassers* opérait la décharge de l'autre, et devait être considéré comme équivalant au paiement (*satisfaction*), le rapport de la cause nous laisse cependant sous l'impression que la cour était d'opinion que plusieurs jugements pouvaient être obtenus, mais que le paiement seul pouvait empêcher de procéder contre tous ceux qui étaient responsables. La cause de *Corbett* v. *Barnes*, tout en décidant qu'un seul paiement (*satisfaction*) peut être exigé, fait clairement voir par induction que plusieurs jugements peuvent être rendus contre ceux qui sont conjointement responsables d'une voie de fait. Ces causes font voir qu'avant comme après la décision de *Brown* v. *Wootton*, plusieurs des plus éminents juges d'*Angleterre* ont pensé que la loi était contraire au principe qui fait la base de cette décision. La cause de *Buckland* v. *Johnson*, en 1854, est la première dans laquelle cette décision a été considérée comme une autorité. Deux raisons sont invoquées au soutien de cette doctrine; la première, que la réclamation pour dommages, d'incertaine qu'elle est avant le jugement, devient, par l'effet du principe *transit in rem judicatam*,

(1) Rapportée par *Hobart*, 66 (*Trinity* Term, 12 James. 1.)

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(*is merged*), absorbée et confondue dans le jugement qui constitue une obligation d'un ordre supérieur. Si cette proposition est vraie quant à celui contre lequel un jugement a été prononcé, elle ne l'est certainement pas contre celui qui n'a pas été poursuivi ; le droit existant contre lui n'a été nullement transformé, et les intérêts du demandeur n'en sont pas plus avancés par ce jugement, et le recours devrait par conséquent exister encore contre lui. C'est la règle suivie dans le cas de personnes obligées conjointement et solidairement en matière de contrat—et comme en matière de voies de fait commises par plusieurs personnes, il y a également responsabilité solidaire, il est difficile de comprendre pourquoi dans ces cas-là l'on ne ferait pas aussi application du même principe. La remarque de Lord *Ellenborough*, dans la cause de *Drake* v. *Mitchell*, appuie fortement cette manière de voir :

A judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore till then, it cannot operate to change any other collateral concurrent remedy which the party may have.

Quoique les autorités du droit français aient peu de force dans un cas comme celui-ci, je ne puis m'empêcher de faire observer qu'elles sont conformes sur ce point à la doctrine énoncée par Lord *Ellenborough*.

Larombiere (1) :

Le jugement passé en force de chose jugée opère novation dans le droit ou l'obligation dont il déclare l'existence ; *novatur judicati actione prior contractus* (2). Un droit et un engagement nouveaux se substituent à ceux qui sont ainsi reconnus, plutôt ces derniers empruntent un nouveau caractère à leur reconnaissance en justice. Il en résulte une obligation qui a pour cause la chose jugée, *quæ ex causa judicati descendit* ; ou, mieux encore, une obligation qui n'est autre que le lien de droit produit par la chose jugée. Car, ainsi que le dit *Ulpien*, (3) ; on contracte en jugement de même qu'en convention, *nam sicut stipulatione contrahitur ita judicio contrahit.*

(1) Obligations, art. 1351, No. 144. (2) Loi 3 l., *De usur. rei. jud.*
(3) Loi 3, § 11 D. *ibidem.*

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Mais cette novation ne ressemble point à celles des articles 1271 et suivants. Elle ne produit point l'extinction de l'obligation, loin de là, elle la confirme. Car, dit *Paul*, (1), en exerçant une action en justice, nous ne faisons pas notre condition pire, mais nous la faisons meilleure ; *neque enim deteriorem causam nostram faciemus actionem exercentes, sed meliorem.* Cette novation a donc seulement pour résultat de faire que le jugement constitue désormais la cause de l'obligation, et que la chose jugée tient elle-même lieu de cause.

L'argument fondé sur le principe que ce qui était incertain auparavant est devenu certain par le jugement, et passé en force de chose jugée, est sans doute vrai, mais a-t-il d'autre effet que d'ajouter, comme le dit Lord *Ellenborough*, une sûreté de plus à la cause originaire d'action ? (*Is still but a security for the original cause of action, until it be made productive in satisfaction to the party*). Serait-il logique d'en conclure qu'il a aussi l'effet d'éteindre le droit d'action quant à ceux qui n'ont pas été poursuivis ? Est-ce la vaine recherche de la certitude de son droit que la partie lésée est venue demander à la justice, ou une indemnité réelle par un paiement effectif des dommages qu'elle a soufferts ?

Si la jurisprudence était bien établie, lors même que je la considérerais comme peu fondée en principe, je n'hésiterais pas à m'y conformer ; mais comme elle ne me paraît ni fixée, ni fondée sur des raisons satisfaisantes, je crois devoir en venir à la conclusion que l'ordre obligeant la Compagnie intimée à rendre compte à l'appelante, n'a nullement affecté le recours de cette dernière contre Sa Majesté. Je dois ajouter de plus, que je concours dans les arguments et les autorités citées par l'honorable juge *Henry* sur cette question. Comme lui, je suis d'avis que Sa Majesté est responsable de tous les dommages soufferts par la Compagnie appelante comme conséquence de l'inexécution de l'arrangement du 22 septembre 1871.

(1) Loi 29 D. *De novat.*

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The main subject of controversy in this case has, within the past five or six years, been adjudicated upon twice, by the Judge in Equity and the Supreme Court of *Nova Scotia;* and it was to some extent finally decided by Her Majesty's Privy Council in the suit of the appellant company against the *Western Counties Railway Company*. The right of the appellant company to the possession and use of what is known as the *Windsor Branch Railway*, under an agreement with the Dominion Government, was by all the judgments maintained. The company having been ejected from it by the Government of the Dominion in violation of its agreement and contract on the 1st of August, 1877, and kept so ejected for nearly three years, the question now before this Court is as to the right of the appellant company to damages for the losses sustained by it during the time it was so expelled and kept out of possession.

The appellants in this petition pray:

1. That the said agreement of the 22nd September, 1871, as confirmed by the said agreement of the 22nd June, 1875, may be specifically performed by Your Majesty, or by the Government of *Canada* on Your Majesty's behalf, and in particular, that in performance thereof, the Government may give and afford to your suppliants such a right to use the said trunk line from *Halifax* to *Windsor Junction*, with all station, engine, and other accommodation and conveniences thereto belonging, as provided by article 3 of the said agreement of the 22nd September, 1871, and also that in case Your Majesty's Government shall of any arrangement with the *Western Counties* Railway Company, or otherwise resume the possession and control of the said *Windsor* Branch Line, possession thereof with all station accommodation, engine sheds, and conveniences, may be given to your suppliants in conformity with the provisions of article 2 of the said agreement.

2. That an injunction may be awarded to restrain any of your Majesty's officers and servants from doing any act at any time hereafter during the continuance of the said agreement of the 22nd September, 1871, to interfere with or obstruct or disturb, or which may interfere with or obstruct or disturb your suppliants in taking

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and holding possession of, and in the exclusive use of the said branch railway and appurtenances, as provided by article 3 of the said agreement of the 22nd September, 1871.

3. That the sum of one hundred and fifty thousand pounds sterling (£150,000) or such sum as may be reasonable, may be paid to your suppliants in compensation and by way of damages, for the injuries and losses which have been occasioned to them by the breach and failure of your Majesty's Government of *Canada* to perform the said agreement of the 22nd September, 1871.

4. Such other relief in order to secure to your suppliants the full and undisturbed enjoyment by them of their rights under the said several agreements of the 22nd November, 1866, the 22nd September, 1871, and the 22nd June, 1875, and their said Act of Parliament, as the circumstances of the case may require and to your Most Excellent Majesty shall seem meet.

The petition, amongst other things, claims damages for the losses sustained; and it is for us now to consider if the claim is well founded, and to what extent?

The charge of ejection by the Government, as stated in the petition, is admitted by the answer, and was attempted to be justified under an Act of the Parliament of *Canada*, as is shown by the twelfth and thirteenth paragraphs of the answer of the Attorney General, on behalf of Her Majesty the Queen, as follows:—

12. I say that on or about the 25th July, 1877, the Government of *Canada* having completed arrangements with the Western Counties Railway Company for giving to them possession of the said branch, a minute of His Excellency the Governor General in Council was passed, ordering and directing that the arrangements then existing with the suppliants with respect to the said branch should be terminated on the first day of August, 1877, and the Minister of Public Works on behalf of Her Majesty was directed to resume possession of the said branch on that day and to put the Western Counties Railway Company in possession thereof pursuant to the said Act of May, 1874. all of which the suppliants had notice.

13. In pursuance of the said minute of Council and of the said Act of 1874, the officers of Her Majesty did on or about the said first of August, upon the refusal of the suppliants to give up possession of the said branch, take possession thereof and afterwards gave possession of the same to the Western Counties Railway Company, which is the ejection and giving over of possession complained of in the fifth paragraph of the said petition.

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The wrong was fully admitted, and, as I before stated, attempted to be justified. The legal result should, and must, therefore, follow. We are told, however, that what is complained of was but a trespass of the subordinate officers of the railway department, who ejected the appellant company, and that the Queen is not answerable for the trespass of such officers, and the case of *Tobin* v. *The Queen* has been cited to sustain the position. The two cases are in no respect alike. The one before us is not in the nature of an action for trespass as was the other. The act of the officers was no doubt a trespass; and they could have been held personally answerable in damages; and so we are also told was the case with respect to the *Western Counties* Railway Company. If no other redress can be obtained for a wrong, the consequences of which are comparatively enormous if not ruinous, than to seek it from the mere servants of a government or from a bankrupt company, to whom the property of the appellants was handed over by the Government, it might be at once said there is none. It would be monstrous if no redress could be had in such a case. The Government enter into a solemn agreement for certain substantial considerations to lease and permit a party to have the use of a Government railway for a term of years. The lessee fulfils his part of the contract, but the Government, without the slightest reason, sends parties to eject the lessee and take possesion of the railway. The contract is violated by the Government and damages were sustained by means of the ejection by the Government through its railway officers under its orders. Damages for the breach of the contract are sought, and it is claimed that no liability attaches to the Government, because the breach of the contract included an act of trespass. Does it render it any less a breach of contract because the officers who executed the orders of

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their Government under the minute of Council were guilty of a trespass? As well might one say who had had given a covenant for quiet enjoyment of real estate, to the party to whom he conveyed, and the covenant having been broken and an action brought for such breach: "I decided to eject you and employed "my servant to do it, but as he was guilty of a trespass "in ejecting you although by my orders I am not "answerable for trespass committed by him, and there- "fore I am relieved from my covenant, and you must "seek the only redress open to you which will be "in the shape of damages from him."

I am not unmindful of the distinction that exists as regards liability for torts between the Sovereign and a subject, and of the immunity of the Sovereign; but as the fact of a trespass having been committed could not be received as a defence to a charge of a breach of covenant the fact of the alleged trespass in this case cannot be received as a defence for the breach of an agreement. It would appear to me to be paralleled by a case of trover for a horse taken by defendant's orders by his servant from the owner who was pulled off the horse and beaten by the servant. The defendant denied liability on the ground that he only ordered his servant to take the horse; but as he had gone beyond orders and assaulted and beaten the plaintiff, for which latter act he the defendant was not liable, the fact of the servant having so exceeded his orders released him from the consequences of what was done within his orders. Such is in substance the defence to the claim of the appellants in the case. The government having ordered the officers to take possession of the railway, can they be permitted to say, that because their officers committed a trespass in doing so, the government is released from liability for the breach of contract involved. That posi-

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tion is fully sustained by the evidence; but why need we look to that when the answer fully admits it; and the respondent is estopped from now denying it. That issue being the only one I thus briefly dispose of, and adopt, to that extent, the views of the learned Chief Justice, whose exhaustive judgment I have had the priviledge of reading and whose arguments and authorities quoted fully sustain the position I have taken.

The remaining matter to be considered is in respect of the amount of damages.

Is the appellant company entitled to have awarded damages for the losses sustained for the whole period during which, by the act of the government, the company was deprived of the use of the railway; or only for the time it was held and operated by the government before handing it over to the *Western Counties Railway Company*?

It is urged, that as the appellant company commenced an action in the Equity Court in *Nova Scotia* against the other company in consequence of their alleged illegal acts in taking over the railway from the Government, and holding possession of it, and obtained a favourable decision from the learned judge in Equity before whom the case was tried—which decision was affirmed by the Supreme Court of *Nova Scotia* and also by Her Majesty's Privy Council—the respondent is not liable for damages for losses sustained after the road was handed over to that other company; and that to the latter the appellant must look for damages.

To appreciate properly the merits of that contention it becomes necessary to refer to dates.

The appellant company was ejected on the 1st day of August, 1877, and the other company put in possession of it on the 24th of September following.

The action against the other company was brought on the 10th of October following.

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The defendants demurred to the plaintiff's bill, which was argued; and on the 8th March, 1878, judgment was pronounced by the judge in Equity overruling the the demurrer with costs. An appeal was had from that judgment to the Supreme Court in *Nova Scotia*; and, in May, 1878, a judgment of that court was given, dismissing the appeal, and confirming the judgment of the judge in Equity.

An answer was on the 13th of May, 1878, put in by the defendants, and evidence taken; subsequently the case was heard by the judge in Equity and on the 1st of March, 1880, he delivered judgment; and concluded it by saying:—

> After having given the fullest consideration to the whole case, I am of opinion that the plaintiffs are entitled to the judgment of the court in their favor, with costs.

An appeal was taken from that judgment to, and heard by, the Supreme Court of *Nova Scotia* and in April, 1881, judgment was given simply dismissing the appeal, with costs.

From the latter judgment an appeal was taken to her Majesty's Privy Council, and, after argument, an order of the Queen in council dated the 27th of February, 1882, was passed, on the report of the Judicial Committee of the Council of the 22nd February, 1882, affirming the judgment of the Supreme Court of *Nova Scotia*, and dismissing the appeal with costs No further step or proceeding was taken in that cause; and no decree was made in it, either by the judge in Equity, or either of the appellate courts before whom it was heard.

The present action was commenced by the filing of the petition of right on the 19th of September, 1878. The answer was put in on the 18th of October, 1878, and the case was tried in the Exchequer Court of *Canada* during the summer or autumn of 1882, several months subsequent to the judgment of the Privy Coun-

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cil in the other case. What effect, if any, can the proceedings or judgment in that case have upon the amount of damages to be awarded in this? I have already quoted the several prayers in the petition of right herein, and by them the court is asked to decree the specific performance of articles 2 and 3 of the agreement of 1871, for an injunction to restrain any of the government officers or servants, from doing any act, to the prejudice of the company, in the use of the railway as provided by article 2 of the agreement; or in using the trunk line of railway from *Halifax* to its junction with the branch railway, as provided by article 3, and also for damages, for the injuries done to and losses occasioned by the company through the breach of, and failure of the government to perform, the agreement. The prayers of the appellant company in their bill against the other company is as follows:—

"The plaintiffs therefore pray that it may be decreed "and declared by this honorable court, that the said "agreement of the 22nd day of September, A.D. 1871, is "a valid and binding agreement, in no way cancelled or "vacated by an order in council or other act of the gov- "ernment of *Canada*, but that the same is still in full "force and effect. And that it may be further declared "that the said Act of the Dominion parliament, passed "on the 26th day of May, A.D. 1874, in no way affected "the rights of the plaintiffs in, to, and over the said "*Windsor Branch Railway*, but only affected the rights of "the Government of *Canada* in such road, subject to the "plaintiffs' rights, under the said agreement and under "the act of incorporation, passed by the legislature of "*Nova Scotia*; and that if the said act of the 26th of May, "A.D. 1874, purports to do more than to convey the rights "of the Government of *Canada*, subject to the plaintiff's "rights, and to affect the plaintiffs under the said agree- "ment and act of incorporation, then that the said Act

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"of the 26th day of May, A D. 1874, may be declared to "be *ultra vires* of the Parliament of *Canada*. Also, "that under any view of the said Act of the Parlia- "ment of *Canada*, and under the facts disclosed in "this bill, the running powers of the plaintiff over the "said *Windsor Branch Railway* are still in force and effect "The plaintiffs also pray that the defendant company "may be ordered and decreed to deliver up possession of "the said *Windsor Branch Railway* to the plaintiffs, and "that they may be restrained by order or injunction from "this honourable Court from further keeping possession "of the said railway and running trains thereon, and that "an account may be taken of the full amount of the "monies received by the defendant company for freight "or passengers on said road since the same came into "their possession. And that until a final decree shall be "made in this suit a receiver shall be appointed by this "Honourable Court to take and receive all monies earned "or to be earned by the defendant company or any other "company or persons whomsoever. And that such "further or other relief in the premises may be granted "to the plaintiffs as shall be in accordance with justice "and equity, and as to this honourable Court shall seem "expedient."

The first prayer merely asks for a declaration of the law as to the rights and interests of the appellant company.

The second, is for an order or decree for the possession of the railway, and an injunction against the further keeping of the possession of it, by the defendant company—for an account of the monies received by the latter for freight or passengers, since the road came into their possession; and for the appointment of a receiver, until a final decree should be made. It will then be seen, that the objects sought to be attained in the two actions are not identical—and a judgment for the

appellant company, in the action against the other company, could not afford the extent of relief prayed for in this suit. No claim for damages was made in the former—a decree for an account is asked for, but, if given, would not necessarily be a gauge by which to measure the damages of the appellant company. Who can, under the evidence we have, say the road was operated as successfully pecuniarly by the one company as it would have been by the other?

The branch line adjoining the line of the appellant company and being seventy or eighty miles from that of the other company, would, no doubt, be capable of yielding a much larger profit to the former. Besides the management and upholdence may have been larger in the one case than in the other. It is in evidence that in consequence of the change of possession and working of the branch railway, through traffic arrangements for passengers and freight were broken up and the revenue was thereby largely decreased. The profit of the other company was therefore much less than it otherwise would have been. Again, no decree was made in the action against the other company; and who can assume what, if made, it would have been. It is quite possible that if the account had been decreed and taken there would have been little or nothing to be awarded to the appellant company.

The parties in this suit have submitted it under issues raised by the pleadings; and by them we are to be governed and decide. In the answer, we find nothing pleaded as a defence on the ground of any recovery against the other company. There is no pleading necessary as to damages merely, but if there was a recovery of judgment for a part of the time damages are sought in this action, a plea thereof would not be one as to damages merely. We are asked to decide as to the breach of the agreement in question; and, in case

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of liability found for the injury done to the company, to say what damages the company are entitled to for the time which, by the act of the government, they were kept out of the use and possession of the railway.

The minutes of the trial of this suit show that a certain book, called the appeal book, on the appeal from the Supreme Court of *Nova Scotia* to this Court, in the suit of the appellant company against the other company, was tendered by the counsel of the respondent herein; and his lordship, before whom the trial was had, reports that the counsel who so tendered it said:

> It showed the present rights of the plaintiff company as against the Western Counties Railway Company; and that they were claiming against the latter company for the same damages as in the present action. The appeal book was offered as a substitute for the record of the proceedings, being instead of evidence by exemplification, and was, of course, subject to all just exception. (The appeal book received subject to all just exceptions and marked exhibit "A.")

The object of the counsel in tendering the book was, as reported, to show that the appellant company against the other company "the same damages as in the present action. The book, however, does not do so, as I have already shown. With all due deference, I cannot conceive how such could have been received under the issues being tried; and even had a plea of former recovery for the same cause of action been pleaded, evidence from the record was alone receivable; and even that would have required evidence of identity as to the parties and causes of action. Rules of evidence, long and well established, as necessary for the due and proper administration of justice, are not to be set lightly aside, or frittered away; and we are bound to observe them.

If legitimate evidence of a former recovery has been tendered, it would not have been receivable unless by an amendment of the pleading, which was not either asked for or ordered. We have then no issue before us

to which such evidence is applicable; and if we had, the evidence tendered cannot be received in respect of it. I consider it my duty therefore to decide as to the damages in this suit in the same manner as if that appeal book had not been tendered or received, as it was subject to all just exceptions.

The mere pending of another suit against other parties cannot be pleaded either in abatement or bar; but the recovery in a suit against another person for the same cause of action may, in some cases, be pleaded. By what I consider the ruling authorities, however, the mere recovery of judgment, without satisfaction, has been considered insufficient.

This suit was not tried until many months after the judgment of the Privy Council was given in the suit against the other company; and the respondent had ample time, and would have been no doubt permitted, to add to his answer, a defence as to the damages whilst the other company had possession of the railway; but such was not done; and the trial of the issues, raised by the petition and answer, took place. Had, however, such an addition to the answer been made, I cannot see any effect it could have had. There was no decree against the other company for anything; none for the payment of any money; and how can it be claimed there was any former recovery? We are told that the appellant can still proceed and get a decree; but, as I before said, they have not, and cannot, get any decree, to cover the damages claimed in this suit. They might obtain an account, and had that been done, and a decree founded on it, there might be a question if the amount, so decreed, should not be deducted from the amount of damages to be awarded in this case; although without satisfaction being shown it is very doubtful. The mere opinion of the judge, when deciding a case before him, is no part of the record, from which alone

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evidence can be derived, and we have, in this court, held that we would not hear an appeal from the opinions of judges but have always required the formal judgment of the court, evidenced by a certified copy of the rule or order or in some other necessary manner. In one case we declined to hear an appeal, although it was shown that there was no rule for judgment filed; and postponed the argument until a rule was filed and certified. How then can we with any consistency receive the opinion of a judge in evidence to affect the rights of parties when no formal judgment has ever been entered, or decree made. It may be said that a decree might have been obtained and that the appellant company should have moved for, and obtained one; but we are not trying that matter. The defence as to the damages rests on the fact of a former recovery; and how can we find that, in the case in question, there was any recovery at all, by which the damages in this suit would be affected?

In the case of the *Vestry of Bermondsey* v. *Ramsey* in the Common Pleas (1) in 1871, I find it held that:—

An unsatisfied judgment recovered by a vestry, for the expenses of paving a street, under the Metropolis Local Management Act, against a former owner of tenements, is no bar to an action for these expenses against a tenant under a succeeding owner of the tenements.

Montague Smith, J., with whom were *Miller* and *Brett*, JJ., in delivering the judgment of the court, said:

In the present case the judgment recovered against the owner has created a change of remedy *quoad* him; but we think it does not operate to affect the collateral concurrent remedy against the occupier. The priciple is illustrated by the familiar instance of actions against the several parties to a bill of exchange; and by the cases, which have a close analogy to the present, of principals and sureties, in which the recovery of judgment against one party is no bar to actions against the others.

(1) L. R. 6 C. P. 247.

He also says:—

No doubt in a case of joint liability, giving a joint cause of action against several, the recovery of judgment against one of the obligees is a bar to an action against the others, but this is not so where the liability is joint and several, or where several parties are independently and collaterally bound to the same obligation. The principle is well expressed by Lord *Ellenborough*, C.J., in *Drake* v. *Mitchell* (1). Lord *Ellenborough* said: "I have always understood the principle of transit *in rem judicatum* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party; and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party have."

It is said in *Woodfall* (2):

That if a lessee enter into a covenant which runs with the land, for himself and his assigns, and then assigns the term, and the assignee be guilty of a breach, an action on covenant lies, either against the lessee or against the assignee, but execution shall be taken against one of them only.

And again at page 209:

That the lessor may, at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate, but he can have execution against one only.

It is well settled that for a breach of contract or covenant an action can be maintained and damages recovered against the Sovereign by petition of right. It was so decided in *Thomas* v. *The Queen*. The appellant company is, in my opinion, entitled to damages in this suit for the time they were by the action of the government deprived of the possession, use and profits of the railway in question, from the 1st day of August, 1877, being the date of their expulsion, to the date of the filing of their petition of right on the 19th of September, 1878, and to our judgment for such damages to the amount of fifty-six thousand five hundred dollars with costs.

(1) 3 East 251. (2) Ed. 1867 p. 204.

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It was not and could not be denied by the appellant that no petition of right lies against the Crown to recover damages for a tort, and it was not and could not be denied by the Attorney-General that a petition of right does lie against the Crown to recover damages for a breach of contract. Is it for a tort, or for a breach of contract, that the appellants claim damages in this instance, is then the question to be first decided? That there is not a little difficulty in the solution of it is amply shown by the diversity of opinions amongst my brother judges. As the Court stood divided, after a first hearing, in which I had not sat, no judgment could be given and a re-hearing had to be ordered. I need hardly say that as the result of the case now depends upon the view I take, I have given to it more than ordinary consideration. I have come to the conclusion, for the reasons given by the Chief Justice in his elaborate judgment, that the damages claimed here are for a breach of contract, and not for a tort, and that consequently the appeal should be allowed, and the petition of right of the appellants maintained. The Privy Council has finally decided that under the contract of the 22nd September, 1871, the appellants became legally possessed of and were entitled to retain the possession of the railway in question. Now, it is admitted by the Attorney-General's statement of defence (No. 12) that it was by an order of, under, and in obedience to His Excellency the Governor General in Council that Mr. *Brydges* took possession of the said railway. The Attorney General further admits that the Minister of Public Works and his officers were ordered by the said order in council to take possession of the said railway in her Majesty's name, and it was in her Majesty's name, they evicted the suppliants. Now His Excellency the Governor General in Council's orders are surely the

orders of the Crown, the orders of the Sovereign. The executive authority is vested in the Sovereign. The Sovereign acts upon the advice of and through her responsible ministers, who, in turn, have her Majesty's orders put into execution by the officers of the state. To say that the appellants only recourse was against *Brydges*, as for a tort, is to say that a petition of right would never lie against the Crown for a breach of contract, as it is always by its officers that any order of the Crown authorizing and commanding a breach of contract must be executed.

In this case the Crown, under the advice of its constitutional advisers, was led to believe that it had the right to evict the suppliants.

The judgment of the Privy Council has determined that this was an error, and that the suppliants had a right to this railway. It does seem to me that the Crown must be held responsible to the suppliants for the consequences of this eviction.

This railway was actually used and the proceeds thereof received by the Crown for nearly two months.

I am of opinion that the Crown is responsible for the damages suffered by the suppliants during this period.

That there was an Act of Parliament on the matter, under which the Crown acted, or thought it could so act, does not alter the case. Parliament makes the laws, but does not execute them. This belongs to the executive power.

Parliament cannot convey its orders or directions to the meanest executive officer in relation to the performance of his duty (1).

Then the Privy Council have settled that this eviction was not authorized by any Act of Parliament.

GWYNNE, J.:—

By the Dominion statute, 39 Vic, ch. 27, sec. 19, it is

(1) May, Cor. Hist. Vol. 1, 430, 1st Ed.

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enacted that nothing in the act contained shall give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in *England* under similar circumstances by the law in force there, prior to the passing of the Imperial Statute 23rd and 24th *Vic.*, ch. 34.

The sole question raised and argued before me was as to the right of the suppliants to recover from Her Majesty damages by way of compensation for the wrongs in the petition of right complained of. And by force of the above clause of the Dominion Act that question is whether by the law of *England*, as it stood prior to the above Imperial Act, such damages were recoverable in *England* under like circumstances.

So long as the law of *England* is as it has been held to be in *Tobin* v. *The Queen* (1) and in *McFarlane* v. *The Queen* (2), decided in this Court, I am unable, notwithstanding the two arguments which this case has undergone upon this appeal, to see upon what principle the claim for damages asserted against Her Majesty upon this petition of right can be sustained.

The third ground enunciated in *Tobin* v. *The Queen*, upon which the judgment in that case proceeded, is that a petition of right cannot be maintained to recover unliquidated damages for a trespass. The main foundation upon which this principle rests is said to be the maxim that the Sovereign cannot be guilty of a wrong, and so cannot be made liable to pay damages for a wrong of which he cannot be guilty. *Erle*, C. J., in delivering the judgment of the Court there, says, (3):

> The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the Sovereign does personally the law presumes will not be wrong: that which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because, if the

(1) 16 C. B. N. S. 311. (2) P. 354.
(3) 7 Can. S. C. R. 216.

command is unlawful it is in law no command and the servant is responsible for the unlawful act the same as if there had been no command.

And citing Lord *Hale* in his pleas of the Crown (1) he continues:

Lord *Hale* says the law presumes the king will do no wrong, neither, indeed, can do any wrong, and therefore if the king command an unlawful act to be done the offence of the instrument is not thereby indemnified. But although the king is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.

He cites also Lord *Coke*, who says:

The king being a body politique cannot command but by matter of record for *Rex præcipit* and *Lex præcipit* are all one, for the king must command by matter of record according to the law, and *Bracton* says: *Nihil aliud potest, Rex; quam quod de jure potest.*

To the same effect he adds is *Blackstone* (2):

The king can do no wrong, which ancient and fundamental maxim is not to be understood as if every thing transacted by the government was, of course, just and lawful, but means only two things —first, whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king, nor is he answerable for it personally to his people, for this doctrine would destroy the constitutional independence of the Crown; and, secondly, that the prerogative of the Crown extends not to do any injury.

Having made these quotations, the learned Chief Justice concludes thus:

This maxim has been constantly recognized, and the notion of making the king responsible in damages for a supposed wrong tends to consequences that are clearly inconsistent with the duty of the Sovereign.

From this judgment and the reasoning in support of it, it is apparent that the principle upon which rests the doctrine that a petition of right cannot be maintained to recover unliquidated damages for a trespass is that

(1) P. 43. (2) 3 Bl. Com. 246.

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the act complained of being unlawful cannot in law be imputed to the Sovereign. In the eye of the law it is not the act of the Sovereign at all.

When the unlawful act is committed by an officer or servant of the Crown, it is, of course, not the personal act of the Sovereign, and the principle of *respondeat superior* cannot be applied to the Sovereign in such a case, for the Sovereign cannot command an unlawful act to be done. If the command is unlawful, it is in law no command, and moreover the Sovereign can, in the eye of the law, command only by matter of record.

Now the act upon which the suppliants in this case rest their claim for damages against Her Majesty is a plain act of trespass. The suppliants case is, that while in legal possession of the *Windsor Branch Railway* under the provisions of an Act of Parliament, and a valid contract, dated the 22nd of September, 1871, made in pursuance thereof with the Government of *Canada*, acting by and through the Minister of Railways, whereby it was agreed that the suppliants, performing the terms of the said contract in all things to be performed by them, should continue in such possession for the period of twenty-one years from the first day of January, 187?, one *Charles John Brydges* then being, and acting as, the superintendent of government railways, and acting on behalf of the Government of *Canada*, forcibly ejected the suppliants and their servants and railway stock from, and afterwards forcibly prevented them from coming upon, or using or passing over, the said trunk and branch lines, and he continued in possession thereof; and to prevent the suppliants from coming upon, or using, or passing over, either of such lines until shortly afterwards the said government gave over the possession of the said branch line to another railway company, known as the *Western Counties Railway Company*, incorporated under an Act

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of the Legislature of *Nova Scotia* for the purpose of making a railway from *Annapolis* to *Yarmouth*, in *Nova Scotia*, and that such company thereupon took and has ever since held possession of and excluded the suppliants from, and from any use of, the said branch railway; and the said Government of *Canada* have continued in possession of the said trunk line and to exclude the suppliants therefrom, and from any use thereof. And the petition further alleges, that notwithstanding that the suppliants had duly performed all acts and stipulations on their part to be performed under and by virtue of said agreement, nevertheless that the officers of Her Majesty's Government of the Dominion of *Canada* have, in violation and in breach of the provisions and agreements therein upon the part of Her Majesty contained, refused, and they continue to refuse to perform and abide by the terms and provisions of the said agreement on their part, and on behalf of Her Majesty with respect to the said trunk and branch lines, and to exclude the suppliants from possession thereof and from the use thereof; and further, that—

By the acts so committed by the Government of *Canada* in forcibly expelling and excluding the suppliants, and by their breach of and failure to perform the said agreements they have caused to the suppliants great injury, loss and damage, and the suppliants submit that they have no effectual remedy against her Majesty's government, except by petition of right; but that they have been advised that they are entitled to recover possession of the said branch line from the said *Western Counties Railway Company*, and they have accordingly commenced a suit against them for the purpose, in the Supreme Court of Equity in *Nova Scotia*, which suit is now pending.

At the time that the present petition of right was brought to a hearing the above suit against the *Western Counties Railway Company* had been conclusively determined by the Judicial Committee of the Privy Council in favor of the suppliants, and it was admitted that the suppliants had been restored to their possession of the

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Windsor Branch line, and that all that the suppliants now sought was to recover from her Majesty compensation in damages for the injury sustained by the suppliants by the wrongful conduct set forth in the petition of right, which damages were therein prayed for as follows:

> That the sum of one hundred and fifty thousand pounds sterling, or such sum as may be reasonable, may be paid to the suppliants in compensation by way of damages for the injuries and losses which have been occasioned to them by the breach and failure of Her Majesty's Government of *Canada* to perform the said agreement of the 22nd September, 1871.

It is apparent that what is relied upon in the petition of right as a breach by the Government of *Canada* of the agreement contained in the instrument of the 22nd September, 1871, and as establishing a failure upon the part of that government to abide by the terms of that instrument, wholly consisted in the illegal act of trespass and eviction committed by Mr. *Brydges*, acting as chief superintendent of government railways, and in the alleged wrongful continuance of that act of trespass done to the line when the possession was restored to the suppliants. Now the judgment of the Judicial Committee of the Privy Council in the case of *The Windsor & Annapolis Railway Co.* v. *The Western Counties Railway Co.* establishes that the instrument of the 22nd September, 1871, operated in implement of, and as specific performance of the agreement entered into with the *Windsor & Annapolis Railway Co.* by the Government of *Nova Scotia*, under and in the terms of an act of the legislature of that province prior to Confederation, subject to the provisions of which act the *Windsor Branch Railway* became by the *British North America* Act, vested in the Government of the Dominion of *Canada* Upon the execution therefore of the instrument of the 22nd September, 1871, the *Windsor and Annapolis Railway Company* became and were

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possessed of the *Windsor Branch Railway* by a good, sure, perfect and indefeasible statutory title, subject only to the conditions stated in that instrument, nothing further was required to be done to complete their title, which then became and thenceforth was sufficient in law to have enabled the suppliants to have maintained their possession against all trespassers and disseisers whomsoever and to obtain satisfaction in damages from all persons whomsoever and all corporations guilty of and parties to any trespasses committed upon such their possession. They had full power to have resisted the trespass alleged in the petition to have been committed by Mr. *Brydges*, and to have prevented the wrongful eviction which is therein complained of, and to have obtained complete satisfaction in damages from him and all persons by whose direction and authority he acted, for such his illegal entry upon the property whereof the suppliants were so legally possessed.

It is now contended, that although it is admitted that no petition of right can be maintained for the purpose of recovering damages against Her Majesty by way of compensation for the trespass and eviction, which was in fact a disseisin committed by Mr. *Brydges*, and the continuance thereof by the *Western Counties Railway Company* after they were, as stated in the petition, put into wrongful possession of the *Windsor Branch Railway*, still that the damages consequential upon those trespasses may be recovered from Her Majesty, by treating the wrongful and illegal acts of Mr. *Brydges* and other officers of the Dominion Government as constituting a breach of contract by Her Majesty. This contention, I confess, appears to me to be utterly fallacious and unsound, for, if a petition of right cannot be maintained for the purpose of recovering from Her Majesty, damages by way of compensa-

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tion for the trespasses, because the acts complained of were trespasses and illegal, and for that reason cannot be imputed to, (or in law be regarded as the acts of,) her Majesty, to whom the doctrine of *respondeat superior* does not apply, I am quite unable to see how those same illegal acts of trespass can be imputed to, and be regarded as the acts of, her Majesty for the purpose of making her responsible in damages as for a breach of contract. In *The Queen* v. *McFarlane* (1) I have expressed my opinion of the fallacy involved in this species of argument, which cannot, in my opinion, be supported upon any principle or by any authority.

Mr. *McCarthy* in his able argument for the suppliants admitted that if there is not in the instrument of the 22nd September, 1871, an implied contract that the suppliants shall have quiet enjoyment of the *Windsor Branch Railway* free from any interruption by or on behalf of her Majesty, that is to say, that if the instrument does not operate as a demise by her Majesty of the *Windsor Branch Railway* for the term of 21 years, the suppliants have no *locus standi in curiâ*. But that instrument neither is nor professes to be a lease by her Majesty of the *Windsor Branch Railway*. Neither in its frame nor its manner of execution is it a lease, and the assumption that the present case is analogous to an action of covenant against a lessor for breach of an implied covenant for quiet enjoyment against the acts of the lessor and of those claiming under him, even if well founded, would not place the right of the suppliants to recover in any clearer light; for there can not be an implied covenant for quiet enjoyment contained in the instrument of the 22nd September, 1871, any more than there is a like covenant by Her Majesty in letters patent of land granted in fee simple. Yet it

(1) 7 Can. S. C. R. 244.

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has never been heard that a petition of right lies to recover damages from the sovereign, as for a breach by the sovereign of a covenant for quiet enjoyment founded upon a wrongful entry and disseisin committed by a grantee claiming under a subsequent grant of the same land, or by an officer of the government in putting such second grantee in possession of the land previously granted to another. In the present case all idea of her Majesty having given any directions personally to Mr. *Brydges* to commit the acts complained of, is out of the question. In committing those acts he was not acting or professing to act in any sense by the command or authority of Her Majesty, nor otherwise than under the command and authority of the members of the Dominion Privy Council, or of some of them, who neither acted nor professed to act under the command or authority of Her Majesty but under an order in council professed to be passed under the provisions of and upon the authority of an Act of the Parliament of the Dominion of *Canada*. It appears now by the judgment of the Privy Council in the case of the *Windsor* and *Annapolis Railway Company* v. *The Western Counties Railway Company* that the construction put upon that act of Parliament by the Privy Council of *Canada* was erroneous, but such erroneous construction of the act while it may make the members of the Privy Council themselves individually responsible for any act, by them done or commanded to be done upon the assumed authority of the act of Parliament, and of the order in council professed to be passed also upon its authority, cannot make their acts, or the acts of Mr. *Brydges* under their direction, to have been acts committed under the authority of and by the command of Her Majesty, nor can Her Majesty be made responsible in damages for such acts as being in breach of a covenant entered into by her. To a Petition of Right,

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seeking to recover damages from Her Majesty for the act complained of as constituting a breach of a covenant entered into by Her, the answer is precisely the same as it would be to a petition seeking to recover damages from Her Majesty by way of compensation for the trespass and disseisin, treating it as a trespass: namely, that the acts constituting the alleged breach of covenant being illegal cannot be regarded as being the acts of the Sovereign at all for any purpose, whether it be for the purpose of establishing a trespass or a breach of covenant committed by the Sovereign; as the acts were the unlawful acts of the person or persons actually engaged in committing them or who commanded them to be so committed, but cannot in law be regarded as the acts of Her Majesty.

If this, which appears to me to be the undoubted law of *England*, appears to be too technical a construction of the law and does not coincide with public opinion in the present day as to what should be the law in cases of trespasses committed by officers of the Dominion Government upon the property of individuals or corporations, application must be made to the Dominion Parliament to provide other means for redressing such wrong than the law of *England* by which we must be governed in this matter, at present affords. The appeal in my opinion should be dismissed with costs.

Appeal allowed with costs.

Solicitor for appellants: *H. Mc D. Henry.*

Solicitors for respondents: *O'Connor and Hogg and J. J. Gormully.*

HENRY YARWOOD ATTRILL (DEFENDANT) ..... } APPELLANT;

AND

SAMUEL PLATT (PLAINTIFF).....RESPONDENT.

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*March 16.
1884
*Jan. 5.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Easements—Grant of servient tenement—Implied reservation—Implied grant—Plan—Evidence—Boundaries—Description—Riparian proprietor—Diversion of water.

One piece of land cannot be said to be burdenedby an easement in favor of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do,—and if the title to different parcels comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact—*quasi* easements.

If the *quasi* servient tenement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent.

If the dominant tenement is first granted, all *quasi* easements which have been enjoyed as appendant to it over a *quasi* servient tenement retained by the grantor, pass by implication.

Besides the lands the title to which was derived from their common grantor, the appellant was proprietor of another piece of land, called Block A, situated on the opposite side of the River *Maitland*, the boundary of said Block on the river side being high water-mark.

Held,—That the lateral or riparian contact of the land with the

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

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water would suffice to entitle the appellant to object to any unauthorized interference with the flow of the river in its natural state.

In 1859 the then owners of part of the lands in question had a plan prepared and registered, and in 1871 they conveyed a parcel which they described as Block F.

Held,—That it must be presumed they intended to convey the same parcel of land shown on said plan as Block F with the same natural boundaries as those thereon indicated.

The evidence of professional draughtsmen was properly admitted to show what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plan were intended to indicate.

When a close or parcel of land is granted by a specific name, and it can be shown what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is known.

APPEAL by the above named appellant (defendant) from a judgment of the Court of Appeal for *Ontario*, dated the 29th June, A D. 1882, affirming a decree pronounced in the Court of Chancery for *Ontario*, in favour of the respondent (plaintiff), on the 8th day of April, A.D. 1880, at the examination of witnesses and hearing at *Goderich*, before His Lordship Vice-Chancellor *Proudfoot*.

The substance of the plaintiff's bill of complaint is, that upon the 4th day of July, 1859, the *Buffalo & Lake Huron Railway Company*, being the owners of certain lands upon both sides of the river *Maitland*, demised a part thereof to the plaintiff by an indenture of lease of that date, whereby it was witnessed that for the several considerations therein expressed, the said company did demise to the plaintiff, and did agree to sell to him the lands and premises following, situate in the town of *Goderich*:

A mill site on the river *Maitland*, also the easement and privilege

of constructing and maintaining a dam upon and across the said river so high as to take up eight feet of the fall of the said river, but no more, also the easement and privilege of constructing and maintaining a sufficient head race from the said intended dam to the said mill site, also the easement and privilege of a roadway leading through the lands of the said company from the said mill site to the boundary of the lands of the said company in the direction of *North* street, also the easement and privilege of constructing a switch from the said mill site to the main line of the said railway of the company near *Goderich Harbour*, in so far as the same shall run on, over, or through the lands of the said company, which said lands, &c., are more particularly described and pointed out on a plan thereof to be annexed, and in the following description, that is to say—Description of mill-race: Commencing at a point on the southerly edge of the channel, known as the Blind Channel, and forming part of the river *Maitland*, the aforesaid point being due West 295 feet from a point in the centre line of *North* street, produced at the distance of 2,314 feet from the flagstaff on the centre of the court house; thence due north 9° 50', 199 feet to an angle; thence due north 50° 7' east, 279 feet 5 inches to an angle; thence due north 32' minutes east, 291 feet 2 inches to an angle; thence due north 34° 46' east, 259 feet 6 inches to an angle; thence due north 13° 31' east, 495 feet 4 inches to an angle; thence due north 49° 25' east, 103 feet 7 inches to an angle; thence due north 60° 2' east 110 feet 8 inches to an angle; thence due north 79° 18' 30" east 319 feet 3 inches, more or less, to the head gates of the race; thence easterly across the head gates 107 feet, more or less, to the high water-mark caused by a dam giving a head of 8 feet of water at the mill; thence westerly and southerly along that high water-mark on the easterly side of the mill-race following the various windings of the high-water mark aforesaid on the natural bank adjoining the said race to the northerly limit of the railway embankment; thence south westerly along that limit to its intersection with the blind channel of the river *Maitland;* thence north easterly along the southerly edge of the blind channel aforesaid, following its several windings to the place of beginning.

Then follows a description of the mill site as follows:—

Commencing at a point on the easterly edge of the mill race, which point is 320 feet on a course due north 50° 7' east from a point in the production of the centre line of *North* street northerly 2,559 feet from the flag staff on the centre of the court house in the town of *Goderich;* thence due north 50° 7' east 260 feet to an angle; thence due north 39° 53' west 333 feet to an angle on the edge of the

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mill race in a southerly direction, following the various windings thereof to the place of beginning, the whole containing an area of one acre: To have and to hold the said demised lands, &c, and premises unto the plaintiff, his executors, administrators and assigns for and during and unto the full end and term of seven years to commence and be computed from the day the flouring mill intended to be erected on the said mill site shall have commenced working, but in any event from the 1st day of May next ensuing the date of the said indenture of lease. Yielding and paying therefor yearly and every year of the said term of seven years, the clear yearly rent or sum of $100 by equal half yearly payments of $50 each, to fall due and be payable at the beginning and middle of each year.

And it was by the said indenture declared and agreed that the plaintiff, his heirs, executors or assigns should, between the day of the date of the said indenture and the 1st day of May next ensuing, at his or their own proper cost, charge and expense, put up, erect, build and construct a flouring mill on the said mill site with all necessary works, easements, and appurtenances, and during the said term thereby granted at his or their own proper costs and charges, construct, build and maintain the said dam, mill and all and singular other the works, easements and appurtenances without any charge whatever to the said company; and that notwithstanding anything in the said indenture contained, the said company should retain and possess absolute and unconditional power and control over the said river and the waters thereof above the backwater caused by the said dam so to be erected by the plaintiff as aforesaid, and also below the said mill site, and should also have the right of using the said river and the waters thereof for machinery or water purposes, or otherwise, as the said company should think fit, however not wasting the water of the said river below the said head race, but having the right of operating such water in the dam or head race of the said plaintiff as to the said company should seem fit: Provided further that the said plaintiff, his heirs, &c.,

should have the right to purchase the said demised premises at and for the sum of $5,000, at any time during the continuance of the said term, upon giving to the said company six months' notice thereof in writing to end before or at the time of the expiration of the term thereby granted; and that if he or they should not elect so to purchase, he or they should, at the expiration of the said term, have the privilege of re-renting the same demised premises for a further term of three years by giving six months notice thereof to end before or along with the said term of seven years at and for the annual rent which would be equivalent to the interest at six per cent. per annum on the said $5,000 to be paid half-yearly at the times thereinbefore provided for payment of rent during the said term of seven years, with liberty to him or them to purchase the said redemised premises during the said second term on the same terms and conditions as above provided, with respect to purchasing during the said first term, but that in case the said plaintiff, his heirs, etc., should not at the expiration of the term or terms aforesaid, purchase the said demised premises, all the erections, improvements and fixtures thereon erected, put and placed during the continuance of the said terms, should belong to, and form part of the said lands and freehold, and at the expiration of the said term or terms, as the case might be, or sooner determination of the term by the said indenture granted, revert to and become the absolute property of the said company.

The bill then avers that the plaintiff was let into possession of the said premises by the said company, and that he and his assigns have ever since been in uninterrupted possession and enjoyment of the said lands and of the said easements and privileges, including the easement and privilege of erecting and maintaining a dam across the said river so high as to take up

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8 feet of the fall of the said river, but no more, also of the easement and privilege of constructing and maintaining a sufficient head-race from the said intended dam to the mill site, and that soon after the plaintiff had acquired the said property, he commenced in the year 1859 making extensive improvements thereon, and built a large flour and grist mill and salt manufactory thereon, and that he and the successive owners thereof spent large sums of money in order to render them available for the purposes for which they were purchased, and in constructing and maintaining the head of eight feet of water for the said mills and works, and that at the time the plaintiff procured the said lease of the said lands and easements with the right of purchase from the *Buffalo & Lake Huron Railway Company*, and for a long time prior thereto, and ever since the waters of the said river reached the plaintiff's mill-race and dam by a channel which branched off from the main channel of the river within a short distance of the bridge across the said river; and that in the year 1861 the plaintiff cleared out the said channel at considerable expense and built a dam near the said bridge and thereby caused the water to flow through the said channel in a sufficient volume to produce the head of eight feet to which he was entitled. And the bill charged that the plaintiff was entitled to maintain that dam, and to have the said channel kept in its accustomed condition, and to have the water to flow therein to the plaintiff's mill And the bill alleged further, that the plaintiff expended the sum of $12,000, or thereabouts, in improving, constructing and perfecting a race-way from the said channel to his mill; and that the plaintiff and the successive owners have been in uninterrupted possession and enjoyment of the said channel and raceway for the purposes of the said mills and other works since the year 1861, and until destroyed on the

11th day of February, 1880, when the defendant, with a number of men and horses employed by him, commenced, without any right or authority, and in violation of the plaintiff's rights, to fill up with timber, planks, earth, and stones, the mouth of the said channel, through which the waters of the said river flowed to the plaintiff's said mill, and on the 12th day of February, 1880, the said laborers of the defendant, acting under his instructions, unlawfully and in violation of the plaintiff's rights, pulled down the dam so erected by the plaintiff for the purpose aforesaid, and used the stone and gravel from the said dam in blocking up the said channel, therewith forming a permanent impediment to the flow of the water through the said channel.

The bill further alleged that while the plaintiff was in possession as aforesaid, he, with the concurrence of the *Buffalo & Lake Huron Railway Co.*, by an indenture dated the 9th of November, 1866, assigned the said lands and premises to one *Alex. T. Paterson*, and that afterwards, by an indenture of bargain and sale, bearing date the 3rd day of February, 1873, the said lands in pursuance of the said contract were conveyed to the said *Paterson* in fee simple by the *G. T. Ry. Co.* of *Canada*, who had acquired all the property and rights of the *Buffalo & Lake Huron Railway Co.*, and that *Paterson*, by an indenture dated the 22nd of August, 1873, conveyed to one *Tew*, who, by an indenture of the 4th of December, 1875, conveyed the same to the plaintiff together with said easements and privileges; and that the successive owners, under the said respective deeds, respectively entered into the actual possession of the said lands, easements and privileges, and actually enjoyed the same; and that the said several deeds are all registered in the registry office of the county of *Huron*, in which

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said lands are situate. And the bill prayed that the defendant might be perpetually restrained by the order and injunction of the Court of Chancery from keeping the said channel blocked up and from in any way interfering with the flow of water therein, and for an account of the damage sustained by the plaintiff by reason of the said conduct of the defendant.

To this bill the defendant filed a long answer, in which he sets up his right to do the acts complained of at the places stated in the bill; and therein he denies the plaintiff's right to the easement as claimed by him. The short material substance of his answer is, that the defendant, is seised in fee of a piece of land situate on one side of the river *Maitland*, and abutting thereon, and known as part of block F, in the northerly part of the town of *Goderich*, and of a piece of land opposite thereto, on the other side of the river *Maitland*, called the Great Meadow, situate in the township of *Colborne*, and that in virtue of such seisin he is seised of the bed of the river at the place where the said dam was situate; and that in virtue of such seisin he did the acts complained of, as he insists he lawfully might, for the reason that, as he alleges, the said dam was wrongfully erected on lands whereof he was seised in fee, and wrongfully obstructed the flow of the waters of the river in their natural course past the defendant's said land and another piece of land lower down the said river, called block A, whereof the defendant is also seised in fee; and the defendant alleges and insists that the acts and conduct of the plaintiff in erecting the said dam and in excavating the channel, which is situate on land whereof the defendant alleges that he is seised in fee, being part of the piece of land called block F, and in drawing off the waters of the river through the said channel from above the said dam, were unauthorized acts of trespass committed by the plaintiff without the

authority of the then owners of the soil where the same were committed, and that in fact the plaintiff had no right whatever to the easement and privilege as claimed by him of maintaining the said dam and the channel leading therefrom as excavated by him, either by grant or prescription, although title by the latter mode is not asserted in the bill, but title by grant only is. The defendant closes his answer by praying by way of cross relief against the plaintiff that he may be ordered to remove the said dam near the said bridge as an unlawful obstruction in the said river, and that he may be restrained from continuing the use of the said artificial channel through the portion of block F, whereof the defendant is seised in fee, and from otherwise diverting or interfering with the natural flow of the river in its proper and natural channel past and along the lands on the north and south banks of the said river, whereof the defendant is seised in fee.

The following description of the *locus* will be better understood with the aid of the sketch on the next page.

The river *Maitland* flows westward into *Lake Huron*, into which it empties about half a mile to the west of respondent's mill. *Maitland* bridge is situated about half a mile to the eastward of the mill. The river is not navigable. Its north bank, from the bridge to the lake, is composed of the parcel of land called "The Great Meadow," which begins at the bridge and runs westerly along the river until it meets block "A," which forms the remainder of the bank to the lake. Beginning again at the bridge, and running westerly along the south bank, it is comprised of blocks "F" and "E," which carries us below or to the westward of the lands and easements in dispute.

The river forms the boundary between the township of *Colborne*, on the north, and the town of *Goderich* on the south.

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The respondent's mill and the so-called channel in dispute are upon the south bank in the town of *Goderich*. The dam is across the main channel of the river, near the bridge. In the river, but nearest the *Colborne* shore, is an island called "C." The appellant, at the time the alleged wrongful acts complained of were committed, was the owner, in fee simple, of said block "A," "The Great Meadow" and island "C," in the township of *Colborne*, and of blocks "E" and "F" in the town of *Goderich*, except such portions thereof as the respondent was entitled to.

The town of *Goderich* is built upon a plateau, about 100 feet above the river. Descending towards the river, a second plateau, some 30 or 40 feet above the river, is reached. This is block "F." To the westward, and on a lower level by several feet, is block "E." Between blocks "E" and "F" there was originally a dry or blind channel of the river, forming a natural boundary. This has been enlarged and deepened, and in the accompanying sketch is called "Mill Pond." In the description by metes and bounds, in respondent's title, it is called "Mill Race." The banks of block "F" are precipitous towards the river. Towards its easterly end and down stream for about 100 yards after descending to nearly the level of the river, there is a small shoal or flat before the actual waters of the river, in the main channel, are reached. This shoal or flat is of varying width, but not exceeding at any point 100 feet. To the westward, after passing this shoal or flat, the waters of the river formerly washed the high and almost precipitous banks of the upper table-land composing block "F" down to the limits of block "E."

In 1859, when the respondent's title began, the south bank of the river was a forest. No mill had ever been built, nor dam nor race-way constructed, but the whole was in a state of nature. The respondent's lessors, the

railway company, then owned blocks "E" and "F," and island "C," and "The Great Meadow," and the bed of the river, but they never owned block "A," nor did they ever own the land forming the north bank of the river above the bridge, although they owned block "D," upon the south bank.

The material portions of the titles of the plaintiff and defendant to the various properties may be briefly set out.

The plaintiff's title is as follows:—

1. The lease of the 4th July, 1859, from the *Buffalo & Lake Huron Railway Company* hereinbefore fully set out.

2. Deed, dated the 11th July, 1864, executed by plaintiff *Platt*, authorizing *Alexander Thomas Patterson* to receive a deed from the *Buffalo & Lake Huron Railway Company*.

3. Assignment of lease, dated 1st October, 1864, by *Platt* to *Patterson*, assigning lease of 4th July, 1859.

4. Lease dated 9th November, 1866, between the *Buffalo & Lake Huron Railway Company*, of the first part, *Platt*, of the second part, and *Patterson* of the third part. After reciting that the original lease had been assigned by *Platt* to *Patterson* in trust by way of collateral security, the railway company demised the premises described in the original lease to *Patterson* for a new term of three years from the 1st day of May, 1867, and it was thereby agreed that "the demise thereby granted and the rights and liabilities of the party of the third part thereunder, should in all respects be subject and according to all the provisions, promises, covenants, stipulations, conditions, limitations and agreements contained in the original lease, including the right to purchase the demised premises within the term of three years (as in the lease mentioned) excepting the right of renewal."

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5. Deed dated the 3rd February, 1873, *The Grand Trunk Railway Company* of *Canada* to *Alexander T. Patterson*. This recites that "whereas the *Buffalo & Lake Huron Railway Company* did sell to one *Samuel Platt*, etc., certain lands hereinafter described, and whereas the said *Platt* did transfer all his rights in and to said lands to the party of the second part, who is now at the execution hereof to pay the purchase money and interest now unpaid, and who desires the conveyance for the said lands to be made to him, and whereas by the statute 33 *Vic.* ch. 49, of the Parliament of *Canada*, and the agreement therein referred to, the title to the said lands is now vested in the *Grand Trunk Railway Company of Canada*," and then proceeds to grant to the party of the second part, his heirs and assigns, in consideration of the sum of $5,700, the same lands as in the original lease, by the same description, as far as the description of the mill site. Thereafter the description proceeds as follows:—

"Also commencing at a point on the easterly edge of the mill race, where the westerly limit of *North* street produced intersects the same, thence north fifty-four degrees fifteen minutes east six hundred and sixty-eight feet to an angle, thence north thirty-five degrees forty-five minutes west three hundred and ninety-six feet, more or less, to the edge of the mill race, thence along the high water mark of the mill race in a southerly direction, following the various windings thereof to the place of beginning; this last piece containing one acre and twenty-five one hundredth parts of an acre, be the same more or less, and all of which property covered by this indenture is shown on the plan annexed hereto, reserving, however, to *A. M. Ross*, of the said town of *Goderich*, Esq., his heirs and assigns, and all persons owning or occupying the part of block F, or any part thereof heretofore conveyed by the *Grand Trunk Rail-*

way Company of Canada and the *Buffalo & Lake Huron Railway Company*, to the said *Ross*, and which is shown in pink on the map attached to said conveyance, a right of way on foot and for carriages and animals, and all other purposes, from off and along the eastern boundary of the lands hereby conveyed, so as to give access to the road now passing under the railway embankment on the south side of the property hereby conveyed, such right of way to be of a width taking in the whole outlet of the said bridge or culvert which carries the railway over the existing road, of forty feet, and keeping that width from said outlet to and along the said easterly boundary of the lands hereby conveyed, to the water's edge of the pond, and no further, to have and to hold the said lands, hereditaments, and other the premises above mentioned and described, unto the said party of the second part, his heirs and assigns, to the use of the said party of the second part, his heirs and assigns forever; subject, nevertheless, to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown, and also subject to easement above reserved."

The deed contains the following provisoes which were also in the original lease of the 4th July, 1859:—

"Provided always, and in accordance with the provisions of the agreement for the sale of said lands, the said party of the first part, their successors and assigns, shall, notwithstanding any matter or thing in these presents contained, retain and possess absolute and unconditional power and control over the said river *Maitland*, and the waters thereof above the backwater caused by the said dam so to be erected, and also below the said mill site, and shall also have the privilege and right of using the said river and the waters thereof for machinery and water power purposes or otherwise, as they, the said party of the first part, shall see fit; how-

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ever, not wasting the water of the said river below the head-race of the said party of the second part, but having the right and privilege of wasting such water in the dam or head-race of the said party of the second part as to the said party of the first part shall see fit.

"Provided further, that the said party of the second part, his heirs and assigns, shall have the right and privilege of deepening, and in common with other persons of using the blind channel below the said mill site, for the purpose of navigation, and also the easement and right of using, for the purposes of erecting buildings for manufacturing purposes, the space between the said intended tail-race and switch."

6. Deed, *Alexander T. Patterson* and wife, to *Arthur Tew*, dated 27th August, 1873, consideration $4,000. Conveys the same property as described in preceding deed, and contains the same reservations.

7. Deed, *Tew* to *Platt*, dated 4th December, 1875. Conveys the same property as described in the deed last mentioned, in consideration of $4,000.

The defendant *Attrill's* title to Block F is as follows:

1. Conveyance, dated 17th February, 1865, by the *Canada Company* to the *Buffalo and Lake Huron Rwy. Company* of the whole block.

In this conveyance reference is made to a plan prepared in 1859, and registered at the instance of the railway company, who, at that time, had agreed with the *Canada Company* for the purchase of this and other lands. This plan is hereafter mentioned in the judgments.

2. Deed, dated 3rd June, 1871, by the *Grand Trunk Railway Company* and *Buffalo & Lake Huron Rwy. Co.* to *Alexander M. Ross*, conveying, in consideration of $1,520, part of Block F, described as follows:—

"All that part of said block F shown on the plan annexed hereto, and colored pink, that is, to say: This

conveyance covers all of said block F, excepting the part thereof shown on the said plan annexed hereto in green color, and which part colored green is described thus: Commencing at a point on the easterly edge of the mill race where the west limit of *North* street produced intersects the same there, north fifty-four degrees fifteen minutes east (N. 54° 15' E.) six hundred and sixty-eight feet (668) to an angle; thence north thirty-five degrees and forty-five minutes west (N. 35° 45 W.), three hundred and ninety-six feet, more or less, to the edge of the mill race; thence along the high water mark of the mill race in a southerly direction, following the various windings thereof to the place of beginning; also excepting and reserving from said block F the mill race described thus:—

"Commencing at a point on the easterly edge of the channel known as the Blind Channel and forming part of the River *Maitland*, the aforesaid point being due west two hundred and ninety-five (295) feet from a point on the centre line of *North* street produced northerly at a distance of two thousand three hundred and fourteen feet from the flagstaff on the centre of the Court House; thence due north nine degrees and fifty minutes (9° 50'), east one hundred and ninety-nine feet, to an angle; thence due north fifty degrees and seven minutes (50° 7'), east two hundred and seventy-nine feet and five inches (279 ft. 5 in.) to an angle; thence due north thirty-four degrees and forty-six minutes (34° 46'), east two hundred and fifty-nine feet and six inches (259 ft. 6 in.) to an angle; thence due north thirteen degrees and thirty-one minutes (13° 31'), east four hundred and ninety-five feet and four inches (495 ft. 4 in) to an angle; thence due north forty-nine degrees and twenty-five minutes (49° 25'), east one hundred and three feet and seven inches (103 ft. 7 in.) to an angle; thence due north sixty degrees and two minutes (60° 2'), east one

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hundred and ten feet and eight inches (110 ft. 8 in.) to an angle ; thence due north seventy-nine degrees eighteen minutes and thirty seconds (79° 18' 30"), east three hundred and nineteen feet and three inches (319 ft. 3 in.) more or less, to the head-gates of the race ; thence easterly across the head-gates one hundred and seven feet (107 ft.) more or less, to the high water mark caused by a dam giving a head of eight (8) feet of water at the mills ; thence westerly and southerly along that high water mark, on the easterly side of the mill race, following the various windings of the high water mark aforesaid on the natural bank adjoining the said race to the westerly limit of the railway embankment ; thence southerly along that limit to its intersection with the blind channel of the river *Maitland* ; thence northeasterly along the southerly edge of the blind channel aforesaid, following its several windings to the place of beginning, and which said two excepted parcels above described form no part of the part of block F, colored pink, or of the lands conveyed by this indenture or intended thereby to be conveyed."

3. The land described in the last mentioned conveyance was afterwards by deed dated the 7th December, 1876, conveyed to the defendant.

The defendant acquired title to block E, as follows :

1. By conveyance dated 3rd June, 1871, by which the *Grand Trunk Railway Company* and *Buffalo & Lake Huron Railway Company*, in consideration of $400 conveyed to one *Ince*. The description is as follows :—

"All and singular that certain parcel or tract of land and premises situate, lying and being in the town of *Goderich*, in the county of *Huron*, and province of *Ontario*, and known as block E, that is to say, all that parcel and tract of land shown on the plan annexed hereto, and marked "Plan of block E, town of *Goderich*," and colored pink ; the intention being that no

part of the mills, mill-dam, mill-pond, mill-race, or works connected with said mills, mill dam, mill pond, and mill race, situate east and south of the easterly line of said lands colored pink, as said line is marked and shown on said plan, shall be covered by this conveyance, it being clearly intended and understood that all, and each, and every part of said mills, mill-dam, mill-pond and mill-race and works connected therewith, and all land whatsoever situate east and south of said easterly line of said lands shown on said plan in pink, as marked on said plan annexed hereto, is and are excepted and reserved in this indenture, and no land except that colored pink, on said plan annexed hereto and which is situate west and north of said mill, mill-dam, mill-pond, and mill-race and works shown on said plan, shall pass under this conveyance."

2. Deed from *Ince* and wife to *Alexander McLagan Ross*, dated 27th April, 1875.

4. Deed *Alexander McLagan Ross* and wife to *Francis Jordan*, dated 26th May, 1875.

4. Deed, *Francis Jordan* to defendant, dated 26th October, 1875.

The appellant's title to Island C and the Great Meadow is derived under conveyances from *The Buffalo & Lake Huron Co.* and *The Grand Trunk Railway Co.*, dated the 3rd June, 1871, Island C being sold and conveyed in fee to one *Abraham Smith* and the Great Meadow to one *John Macdonald*. The appellant purchased from *Smith*, and from the devisee under the will of *Macdonald*, the Great Meadow, in August, 1876, and Island C on the 15th December, 1879.

Block A appellant holds under a different title from that which he makes to the other lands. Part of the block was sold and conveyed by Sir *Alexander Tilloch Galt* and wife to appellant on the 27th September, 1873, another part on the same day by *Lucy Bennet Widder*

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and *John Davidson*, trustees of the late *John Widder*. The railway company were never seized of any part of this land.

The description of the Great Meadow in the deed to *John Macdonald* is as follows:—

"All and singular that certain parcel or tract of land and premises situate, lying and being in the township of *Colborne*, in the county of *Huron* and Province of *Ontario*, on the north side of the river *Maitland*, known as 'The Big Meadow,' estimated as containing sixty-one acres of land, be the same more or less."

In the deed to the appellant made in August, 1876, the description is as follows:—

"All that tract or parcel of land known as the 'Big' or 'Great Meadow,' situate between blocks A, B and the original road allowance on the westerly side of block C, in the said township and the river *Maitland*, containing sixty-one acres of land, more or less. * * *

"Also the original road allowance along the southerly side of said block C, as particularly described by metes and bounds in a deed from the municipal council of the township of *Colborne* to *John Macdonald*, dated 26th December, 1860, and registered, &c., containing 4 acres and 22 perches, more or less.

"Also so much of said block C as is situated westerly of the northern gravel road running through the said township.

"Excepting portions of the said road allowance and block C (otherwise included in this description), which have been heretofore disposed of by the late *John Macdonald*, as appears from the records of the registry office of the county of *Huron*, namely:—Lots numbers 1, 2, 25, 26 and 27, as shewn on the registered plan of bridge plan, and lots called 91, 92, 97 and 98, but not shown on such registered plan, and an acre conveyed to *Deltor* and *Kirkptrick* for the *Maitlandville Salt Com-*

pany, and three acres and 12 perches conveyed to one *Thomas Hussey*, also one quarter of an acre conveyed to the school trustees, lying immediately to the rear of said lot 25, of the same width and depth as said lot number 25."

The description in the deed to *Smith*, of Block C, is as follows :

" All and singular that certain parcel or tract of land and premises situate, lying and being in the township of *Colborne*, in the county of *Huron* and Province of *Ontario*, known as block C, and described on the plan annexed hereto, colored red."

And in the deed from *Smith* to appellant, the description is :—

All, &c., known as block C, and described on the plan annexed to a certain deed from the *G. T. Ry. Co.* of *Canada* and the *Buff. & L. H. Ry. Co* to the party of the first part, dated 3rd June, 1871.

The description of the part of block A conveyed by Sir *Alexander Tillock Galt* and wife, is as follows :—

"All and singular that certain parcel or tract of land and premises situate, lying and being in the township of *Colborne*, in the county of *Huron* and Province of *Ontario*, containing by admeasurement 31 acres and seven-tenths of an acre, be the same more or less, being composed of part of the southerly part of lot or block A, in the western division of the said township of *Colborne*, and may be more particularly known and described as follows ; that is to say :—Commencing at a point on the southerly side of road allowance between blocks A and B, said point being a distance of 56 chains and 70 links, measured south-westerly, along the southerly side of the aforesaid road allowance, from the angle formed in the road (said angle being at the limit between blocks A and B, as shown on the registered plan of *Colborne*) ; thence due S. 39½ degrees W., along

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the S. limit of road, 13 chains and 11 links; thence S. 20 degrees E., 2 chains and 58 links; thence S. 14¼ degrees W., 77 links; thence S. 44 degrees W., 1 chain and 70 links; thence S. 55¾ degrees W., 1 chain and 33 links; thence S. 49 degrees W., 4 chains and 7 links; thence N. 67 degrees, 50 minutes E., 22 chains and 92 links; thence S. 22 degrees and 10 minutes E., 5 chains and 60 links, more or less, to high water mark of river *Maitland;* thence N. 62¾ degrees E., 4 chains and 25 links, measured up stream along said high water mark; thence due N. 15 chains and 70 links; thence due W. 13 chains and 40 links, more or less, to the place of beginning."

And in the deed from the trustees of the late *John Widder*, the description of the part of block A conveyed is as follows:—

"All and singular those certain parcels or tracts of land and premises situate, lying and being in the township of *Colborne*, in the county of *Huron* and Province of *Ontario*, containing by admeasurement nine acres three roods and one perch, be the same more or less, being composed of lots numbers 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39, according to a plan or survey of the southerly part of lot 2, block A, in the said township of *Colborne*, made by *Charles L. Davis*, Esquire, provincial land surveyor, for *William Warren Street* and others, as an addition to the said town of *Goderich*, and as shown on the map or plan hereunto annexed, and which said parcels or tracts of land and premises may be more particularly known and described as follows; that is to say:—Commencing at a point on the easterly limit of "Saw Mill Road," said point being due S. 19 degrees W., 1 chain and 85 links from the south-westerly angle of the property known as the late *John Galt's;* thence due N. 67 degrees and 50 minutes

E., 23 chains and 75 links, more or less, to the easterly limit of said lot number 39, and up to the property known as the said late *John Galt's;* thence due south 22 degrees and 10 minutes E., 4 chains and 60 links, more or less, to the high water mark of the river *Maitland,* thence southwesterly, following the high water mark of the river *Maitland,* a distance of 27 chains, more or less, to its intersection with the easterly limit of "Saw Mill Road;" thence northeasterly along said limit of road, 5 chains, more or less, to the place of beginning. The whole containing an area of 9 acres, 3 roods, 1 perch, be the same more or less, as before stated."

On the 8th day of April, A.D. 1880, the case was heard before *Proudfoot,* V. C.

At the trial, the title of appellant to the lands comprising the north bank of the river was proved, and in fact not disputed. His title to blocks E and F, subject to the exceptions and reservations before mentioned, was also proved.

As the appellant, in his answer, admitted the commission of the alleged trespasses, he was called upon to begin; he did so, and after putting in his title deeds and the several maps in evidence, and calling two Provincial Land Surveyors to identify and locate upon the grounds the several parcels, the learned Vice-Chancellor held that he had established a *primâ facie* title, and the respondent was then called upon to prove his title.

This he proceeded to do, by putting in the original lease to him, the renewal lease, the conveyance to *Patterson,* and the several mesne conveyances to him.

Under these he claimed title by express grant, or failing that, then by implication.

He also set up a title to the use of the easements in question by prescription, upon which evidence was given by a number of witnesses, and a further title by

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license from and acquiescence by the railway company, the common grantor.

He further contended that block F did not extend to the river, or that if it did the appellant's title was limited to that part colored pink, attached to the conveyance to *Ross*, appellant's predecessor in title, and that such part colored pink did not include the land covered by the raceway or channel in question.

He further claimed that with repect to the appellant's ownership of the parcels called The Great Meadow and Island C on the north bank, that the easements in question having been open, apparent and continuous, when the conveyance by the common grantor was made in 1871, were impliedly reserved, and that the Registry Act had no application.

As against block A he claimed title by prescription.

The learned Vice-Chancellor delivered his judgment, finding that block F extended to the river; that appellant was the owner of it to the river; that the channel in question was therefore upon appellant's lands; that such channel was artificial; that there was no title by prescription made out, but that respondent had acquired a right under the several leases and conveyances to him, "and under the subsequent dealings between him and the railway company," to the easements in question as against the appellant. He made no mention in his judgment of the appellant's rights as owner of the lands on the north bank.

From the learned Vice-Chancellor's decision the appellant appealed to the Court of Appeal, and that court, after two arguments, unanimously dismissed his appeal with costs.

The judgment of the court was delivered by their Lordships Mr. Justice *Burton* and Mr. Justice *Patterson*.

From the judgment of the Court of Appeal the defendant appealed to the Supreme Court of *Canada*.

Mr. *Garrow* for appellant :—

The appellant claims to be the owner of the *locus in quo*, the soil of the raceway in question, by virtue of his ownership of block F.

The respondent makes no claim to the land. He only claims an easement. It, of course, is not decisive of his right to the easement of this raceway for the appellant to establish his ownership of the soil.

The title to the easement may remain untouched. Their lordships in appeal apparently overlooked this in their consideration of the boundaries on the river side of block F. The original lease only demised easements; the grant to *Patterson* is of easements (so far as the *locus in quo* is concerned), and respondent, in his bill of complaint, only claims easements.

But the appellant's right to put the respondent to proof of his title to these easements, in so far as his ownership of block F is concerned, depends upon his establishing that that block extends to the river, and thus embraces the soil of the raceway.

The appellant's rights as owner of the north bank stand upon a different footing. The easements claimed are a dam and race, by means of which the waters are diverted from the north bank as well as from the south bank.

As against the north bank, therefore, the respondent would in any event be bound to prove his title to these easements.

If, however, block F extends to the river, and the appellant is entitled to it to the river, and the respondent has not made out his title, there is an end of the case, and a consideration of the questions arising from the ownership by appellant of the north bank becomes unnecessary.

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The first question, therefore, is: What, as a matter of fact, is the northerly limit of block F?

The learned counsel went very fully into the evidence and submitted that block F was, at the time of the conveyance to *Ross*, a perfectly defined parcel, having for its northerly limit, from block E to the *Maitland* bridge, the main channel of the river *Maitland*, and that the finding of the Court of Appeal to the contrary is erroneous.

Assuming that the previous proposition is established, the next question is: Did the conveyance to *Ross* grant to him block F to its northerly limit, the river? Again, without reference to the title to the easements claimed by respondent, it is submitted that this must be answered in the affirmative.

The learned counsel went fully into the evidence on this point.

The river, as a natural boundary of block F, should be preferred if any doubt:—*Angell* on Watercourses (1); *Juson* v. *Reynolds* (2).

The intention of the parties expressed in the conveyance must govern. *White* v. *Bass* (3); *Dodd* v. *Burchell* (4); *Taylor* v. *Corporation of St. Helens* (5); *Gillen* v. *Hayes* (6).

The right of the respondent to purchase was to have been exercised during the term, and time was of the essence, and until the right was exercised, the relationship of vendor and vendee did not exist. *Ball* v. *Canada Co.* (7).

If conveyance executed in pursuance and fulfilment of original contract, it must be construed as giving only the same rights as the original contract. *Wood* v *Saunders* (8).

(1) 7 Ed. ss. 22 & 36,
(2) 34 U. C. Q. R. 199.
(3) 7 H. & N. 722.
(4) 1 H. & C. 113.
(5) 6 Ch. D. 270, 271.
(6) 33 U. C. Q. R. 516.
(7) 24 Gr. 281.
(8) L. R. 10 Ch. 582.

There having been no express reservation, the only ground upon which a reservation can rest is by implication. *Goddard* on Easements (1).

Here the conveyance to *Ross*, was of the *quasi* servient tenement, the grantors retaining the *quasi* dominant tenement, and there was no reservation of the easements now claimed. *Edinburgh Life Ass. Co.* v. *Barnhart* (2); *Suffield* v. *Brown* (3); *Wheeldon* v. *Burrows* (4); *Allen* v. *Taylor* (5)

The cases of *Young* v. *Wilson* (6), and *Watts* v. *Kelson* (7) are relied upon by respondent, as being at variance with the law as laid down in *Suffield* v. *Brown*, above cited.

In the former case Vice-Chancellor *Proudfoot* declined to follow the judgment of Lord *Westbury* in *Suffield* v. *Brown*, because the easement in question in that case was not apparent and continuous, as in *Young* v. *Wilson* (8). On rehearing the Chancellor dissented from the the judgment of the court Vice-Chancellor *Blake* evidently felt himself constrained by, as he says, the weight of authority, to refuse to follow *Suffield* v. *Brown*, but he upheld the original judgment upon other grounds as well, in which also Vice-Chancellor *Proudfoot* concurred. *Wheeldon* v. *Burrows* had not then been decided, affirming, as it does, the judgment of Lord *Westbury*, not only so far as applicable to the class of easements in question in *Suffield* v. *Brown*, but as applicable to apparent and continuous easements, as in the present case, and as in the case itself of *Wheeldon* v. *Burrows*.

It is true that in *Watts* v. *Kelson* the Lords Justices, in the course of the argument, express themselves as

(1) 2 Ed. 41.
(2) 17 C. P. 76.
(3) 10 Jur. N. S. 111.
(4) 12 Ch. D. 31.
(5) 16 Ch. D. 358.
(6) 21 Gr. 144, 611.
(7) L. R. 6 Ch. 166.
(8) 21 Gr. 611.

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satisfied with the case of *Pyer* v. *Carter* (1), but, as pointed out by the judges of the same court when considering these remarks in the latter case of *Wheeldon* v. *Burrows*, there is nothing in the considered judgment in *Watts* v. *Kelson* affecting or weakening Lord *Westbury's* judgment in *Suffield* v. *Brown*.

Moreover, *Watts* v. *Kelson* was a case of implied grant, not, as here and in *Wheeldon* v. *Burrows*, implied reservation, and quite different principles were therefore involved.

It is submitted, therefore, that the law must be taken to be as laid down in *Wheeldon* v. *Burrows*, and that, if so, it is conclusive against the implied reservation by the *Grand Trunk Railway Co.* of the easements in question on the sale and conveyance to *Ross* in June, 1871, of block F.

Again, assuming that the easements in question were reserved in the conveyance to *Ross* it is clear that they did not pass to *Patterson* by the subsequent conveyance in 1873, and in law they were thereby extinguished. After the conveyance to *Ross* they existed, if at all, not as *quasi* but as real legal easements, with the usual legal incidents, one of which was, that it was essential to their maintenance that they should be appurtenant to a dominant tenement. *Goddard* on Easements (2).

After June, 1871, the only land owned by the railway company in the vicinity of the easements in question was the respondent's mill site. When that was finally granted to *Patterson*, without these easements being included, the servient tenement was relieved of their burden and they ceased to exist.

The appellant further contends that even if the court should be of opinion that there was a reservation of the easements in question, as against block "F," that there

(1) 1 H. & N. 916. (2) 2nd Ed. 10.

is clearly no room for such a conclusion in considering the several conveyances of the parcels on the north bank, viz., Island C, and The Great Meadow. Such conveyances are absolute in form and contain no reservation or exception whatever, and the foregoing argument against implied reservation applies with additional force in considering the title to these parcels.

By means of the dam and race claimed by respondent there was a diversion of the water of the rivers from the main channel which affected Island C, The Great Meadow and Block A upon the north bank.

The appellant submits that there is no room upon the facts for the application of the principle of "reasonable user," as suggested by Mr. Justice *Burton* in his judgment, and for which he cited *Embry* v. *Owen* (1).

That was a case of the extent of the right of a person having an undoubted title in respect of which the right was exercised, a right to abstract running water for the purposes of irrigation.

Here we say the respondent has no title whatever, upon which to base his alleged right to use the water as he does, and where he does.

Even if he has the right as against the south bank that is insufficient. He must possess a title as against both banks, otherwise he has no right to maintain the dam to divert the water, or even to maintain the artificial race, constructed in the bed of the river, without the dam, such a construction, even if it did not, as it does, divert the waters out of their ordinary channel is an unlawful encroachment upon the *alveus* and actionable, without showing special damages.

Bickett v. *Morris* (2); *Lord Norbury* v. *Kitchen* (3); *Kirchoffer* v. *Stanbury* (4); *McArthur* v. *Gilles* (5); *Penn-*

(1) 6 Exch. 353.
(2) L. R. 1 Scotch App. 47.
(3) 15 L. T. N. S. 501.
(4) 25 Gr. 413.
(5) 29 Gr. 223.

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ington v. *Brinsop Hall Coal Co.*(1); *Holker* v. *Porritt* (2); *Clowes* v. *Staffordshire Potteries Co.* (3); *Angell* on Watercourses (4); *Goddard* on Easements (5).

The question is, has the respondent a right to divert at all. If he has such right we do not claim that he has used it excessively. Our contention is, that he has no right or title to the easements he claims, and therefore no right to divert at all.

This confines the question to whether he has proved his alleged title as he was bound to do, a question evidently not considered, but assumed in the Court of Appeal.

There is equally little support for the supposed dilemma into which Mr. Justice *Patterson* suggests the appellant may be forced, *i. e.*, that of contesting the respondent's title, under his title deeds, at the peril, if it should be found that they do not cover the *locus in quo*, of its being held that respondent's trespass, in constructing the race and dam in question, amounted to a taking possession of the land itself, and that he had therefore acquired a title by prescription, the limit being ten years in that case, while in the case of easements it is twenty.

It ought to be sufficient answer to this to say that the respondent in his bill only claims easements.

But further, until the conveyance to *Patterson* in 1873, he was only a tenant to the R. R. Co., and therefore by his encroachments for the benefit of the demised premises was acquiring no title as against them. *Earl of Lisburn* v. *Davies* (6); *Whitmore* v. *Humphries* (7).

Until June, 1871, the R. R. Co owned the whole.

The bill of complaint was filed on the 26th February,

(1) 5 Ch. D. 769.
(2) L. R. 10 Exch. 59.
(3) L. R. 8 Ch. 125.
(4) Sec. 100 (7th Ed.)
(5) P. 335.
(6) L. R. 1 C. P. 259.
(7) L. R. 7 C. P. 1.

1880. So that in no possible view of the matter could any title by prescription to the *locus in quo* be sustained, even if the date of its origin would be taken to be when the several tenements were severed

Then, has respondent acquired a prescriptive right to divert the water, as against block A, owned by appellant?

The title to this block was not derived from the railway company, and the respondent's only title therefore must be by prescription.

In the judgments of their lordships in the Court of Appeal it is apparently taken for granted that respondent has such title, or, at least it is stated briefly that the evidence clearly shows that he has such a title.

The first answer to this alleged right is that it is no part of the case made by the respondent in his bill of complaint. The appellant, in his answer, sets up his rights as owner of block A. The respondent did not amend his bill claiming a prescriptive right as against that block. He simply joined issue. The appellant was therefore only bound to prove his title, which he did.

The second answer is, that the evidence does not show that the respondent has such prescriptive right, but shows the contrary.

If, on the pleadings, the point was open to respondent, the burden of proof was, of course, clearly upon him.

He was bound to prove and has failed to prove that he had, for a period of twenty years prior to the interruption by appellant, enjoyed, as of right, easements the same in extent and character as those with which appellant interfered. *Bealey* v. *Shaw* (1); *Rutlan* v. *Winans* (2); *Hunt* v. *Hespeler* (3); *McKechnie* v. *McKeyes* (4).

(1) 6 East 209.
(2) 5 C. P. 379.
(3) 6 C. P. 269.
(4) 9 U. C. Q. B. 563; 10 U. C. Q. B. 37.

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The learned counsel went fully into the facts bearing on this point.

Mr. *Maclennan*, Q.C., and Mr. *M. G. Cameron*, for respondent:

In answer to the first contention, viz., that the channel in dispute is upon appellant's land, the respondent contends that such is not the case.

Counsel for respondent went fully into the maps, descriptions and evidence on this point.

In answer to the second contention of the appellant, viz., that as owner of the lands on the north side of the river, called the Big Meadow, Island C and block A, his riparian rights are injuriously affected by the diversion of the water into the raceway of the respondent near the *Maitland* bridge, the respondent contends: That there is no evidence of diversion, and that the evidence is the other way. As to the Big Meadow and Island C, the appellant's title comes through persons who purchased from the railway company on the 3rd of June, 1871, and block F and the respondent's lands and easements were also purchased from the same company; the Big Meadow and Island C, having been purchased at a date subsequent to the grant by the railway company to respondent, of the right to the easement to use the water, as he is now using it, the appellant cannot stand in any better position than the railway company, who owning, as they did, the lands on both sides of the river, and the bed of the stream, had a right to divert the water from the Big Meadow and Island C.

As to block A the appellant's deed carries his land only to high water mark, so that it is only when the river is at its highest point that he has any riparian rights whatever, and the evidence shows that when the water is high there is no diversion at all by the plaintiff, and no occasion for it; the plaintiff's dam and

raceway are then overflowing, and there is no evidence of diversion affecting block A at any time.

If there is any diversion, which we deny, it is quite clear from the evidence that respondent has established a prescriptive right so to divert it.

The evidence is undisputed, that whatever diversion there was began in 1859 and continued for more than 20 years, up to the time of the obstruction by the appellant.

It is also clear from the evidence that about Christmas, 1859, the respondent made the dam of loose stones across the river, near the bridge thrown down by the appellant, and that he had maintained that dam there ever since, and from that time the water has flowed through the channel in dispute to his mills, and they were driven thereby, and have been driven thereby, without interruption, up to the date of the obstruction by the appellant.

The respondent admits that the embankment as it exists at present, and within which the raceway is confined, was not completed throughout its whole extent until within 20 years, but we say that that cannot and does not impair respondent's title by prescription, because early in 1859 the respondent had dammed the river to its full breadth, including the present raceway, and by letting the old dam go, and, instead thereof using the raceway within the embankment, and at the same time keeping the river dammed to its full breadth, as the respondent did, he merely narrowed the limit over which he exercised his easement, and the respondent would not lose his prescriptive right because the dam was carried away, and rebuilt in the same or another place, if it was not altered or increased to the detriment of the owner of the servient tenement, the right claimed by respondent being to raise a dam so high as to take up eight feet of the fall of the river

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There is no evidence to show that a greater burthen was thrown on the servient tenement by the alteration within 20 years. It was diminished, and the right by prescription is still good, though only to the extent to which it was reduced by the alteration. *Harvey* v. *Walters* (1); *Thomas* v. *Thomas* (2); *Rex.* v. *Tippett* (3).

The right to a water course is not destroyed by an owner's altering the course of the stream. *Hall* v. *Swift* (4).

The alteration here was made long before the appellant or his grantor acquired any right whatever.

Alteration in the condition or character of a dominant tenement, to extinguish an easement, must be of a nature and of a character which will inflict serious injury on the servient tenement, by increasing the burthen of the easement; and if the burthen is enlarged, and the user of the right totally changed from that originally contemplated by the grantor of the privilege, the easement will be extinguished. *Goddard* on Easements (5).

The respondent is in possession of the raceway in dispute in one of two ways: either by express grant from the railway company, or as a trespasser. If the has shown a clear title by prescription; if the latter, the appellant must also fail, because the respondent has been in possession, even according to appellant, who says he finished building the channel in 1865, over ten years, and has thus acquired a title as owner of the soil by the Statute of Limitations.

The respondent also claims the easement of constructing a dam in the river *Maitland*, so that he may obtain a head of 8 feet of water at his mills, by express grant, and the appellant, who claims under the railway company, is precluded from asserting a right inconsis-

(1) L. R. 8 C. P. 162.
(2) 2 C. M. & R. 34.
(3) 3 B & A. 193 and 5 E.C.L.R. 258.
(4) 4 Bing. N. C. 381.
(5) P. 360.

tent with the existence and maintenance of the said dam and raceway. *Hendry* v. *English* (1); *The Rochdale Canal Co.* v. *King* (2); *Goddard* on Easements (3); *Edinburgh Life Assurance* v. *Barnhart* (4); *Brewster* v. *The Canada Co.* (5).

The license, although verbal, is sufficient, and is irrevocable, if coupled with a grant; or if the licensee, acting upon the permission granted, has executed a work of a permanent character, and has incurred expense in its execution. *Nichol* v. *Tackabery* (6); *Winter* v. *Brockwell* (7); *Woods* v. *Leadbetter* (8).

The evidence also clearly shows that at and long before the appellant, or those under whom he claims, purchased, the respondent openly and continuously used the dam and raceway in dispute, and, therefore, that he purchased subject to the easement of respondent.

The authorities show that when there is a continuous and apparent user, it is immaterial whether the dominant or servient tenement be first sold, and that a grant of the easement must be implied in favor of the dominant tenement. *Young* v. *Wilson* (9); *Richards* v. *Rose* (10); *Pennington* v. *Galland* (11); *Ewart* v. *Cochrane* (12); *Watts* v. *Kelson* (13); *Shory* v. *Piggott* (14); *Pyer* v. *Carter* (15); *Dodd* v. *Burchell* (16); *Wadsworth* v. *McDougall* (17); *Diamond* v. *Reddick* (18); *Hickman* v. *Lawson* (19); *Watson* v. *Traughton* (20).

(1) 18 Gr. 119.
(2) 2 Sim. N. R. 78.
(3) P. 85 *et seq.*
(4) 17 U. C. C. P. 63.
(5) 4 Gr. 443.
(6) 10 Gr. 109.
(7) 4 Gr. 443.
(8) 13 M. & W. 844.
(9) 21 Gr. 607 & 144.
(10) 9 Exch. 218.
(11) 9 Exch. 1.
(12) 7 Jur. N.S. 925, 4 McQueen, 117
(13) L. R. 6 Chy. 166.
(14) Palmer 444, cited Gale, 102.
(15) 1 H. & N. 916.
(16) 1 H. & C. 123; 31 L. J. Exch. 364.
(17) 30 U. C. Q. B. 369.
(18) 36 U. C. Q. B. 391.
(19) 7 Gr. 494.
(20) App. Cases, 1st Dec., 82.

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The easement to which the respondent claims to be entitled is, in its nature, continuous. There is this clear distinction between easements, such as rights of way, or easements used from time to time, and easements of necessity, or continuous easements. The former do not pass unless the owner, by appropriate language, shows an intention that they should pass, but the latter will pass by implication of law without any words of grant. *Polden* v. *Bastard* (1).

But whatever might have been the result between the appellant and the railway company, if the matter had been between them, it is clear that the railway company could not sell, or the appellant acquire, the servient lands otherwise than subject to respondent's easements.

It is no answer to the respondent's claim to say that if the supply of water running through the race-way in question to the respondent's mill was cut off, possibly some other supply might be obtained. It is clear here that no supply of water equally convenient could have been obtained, and it is sufficient to show that. *Watts* v. *Kelson* (2); *Morris* v. *Edgington* (3).

The case of *Wheeldon* v. *Burrows* is not an authority against respondent's contention, nor does it alter the law as laid down in *Young* v. *Wilson*. In the former case, the easement was not necessary to the reasonable enjoyment of the property granted, but one respecting lights, where no easement by implication would arise on the severance of the tenements.

It makes no difference whether the easement had a legal existence before the severance of the tenements. *Gale* on Easements (4); *Dart* on Vendors and Purchasers (5); *Davies* v. *Sear* (6).

(1) L. R. 1 Q. B. 156, 161.
(2) L. R. 6 Chy. 175.
(3) 3 Taunt. 31.
(4) 5th Ed. pp. 95 et seq.
(5) P. 537.
(6) L. R. 7 Eq. 427.

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Suffield v. *Brown* and *Crossley & Sons* v. *Lightowler* do not affect this case, as the easement there was neither apparent nor continuous, and not one of which the purchaser would necessarily have notice.

The rule under which a man is prevented from derogating from his own grant has no application to this case, except in favor of the respondent

RITCHIE, C. J.: delivered judgment, stating in substance that he had come to the conclusion the plaintiff had failed to show title to the strip of land on which the head-race was made or to the easements in question; that in his opinion block F came to the river; and that, even if block F did not come to the river, the plaintiff had no right to maintain the obstruction at the stone dam, and so divert the water of the *Maitland* river from the Great Meadow, Island C, and block A.

STRONG, J.:—

In considering this case it will be convenient in the first place to ascertain what (if any), on the 3rd June, 1871, the date of the several conveyances to *Ross, McDonald & Smith*, was the title of the respondent to the mill, lands and easements, now claimed by him, for it is manifest that the respondent can have no more extensive rights against the appellant deriving title from the railway company, through *Ross* and the other grantees mentioned, than he had against the railway company at the date referred to, except in so far as such rights were either expressly or by implication of law reserved to the railway company in the deeds mentioned, and were subsequently vested in *Patterson* under the deed of the 3rd February, 1873. By following this order it will be possible to disembarrass the case of several questions, relating to equitable acquiescence, prescription, and the Statute of Limitations, which have given rise to much

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controversy in the court below, but which are, as will be shown (with the exception of the single point of prescription, so far as it relates to one parcel of the appellants' land on the north bank of the river—block A,) irrelevant to the decision of the present appeal.

By the original lease of the 4th of July, 1859, the mill site, lands and easements appendant to them were demised by the *Buffalo and Lake Huron Railway Company* to the respondent for the term of seven years from the 1st of May, 1860.

The lease contained a provision giving the lessee an option to purchase the fee in the demised premises, at any time during the currency of the lease, upon giving the lessors six months notice in writing to end before or at the expiration of the term, and also a covenant for renewal for the further term of three years, with liberty to the lessee, or his assigns, to purchase the re-demised premises during the second term, on the same terms and conditions as had been provided with respect to the purchase during the first term of seven years; and it also contained a clause in these words :—

> In case the said party of the secnd part shall not, at the expiration of the term or terms aforesaid, or sooner determination of these presents, purchase the said demised premises, all the erections, buildings, improvements and fixtures thereon erected, built, put and placed during the currency of the said term or terms, shall belong to and form part of the said lands and freehold, and at the expiration of the said term or terms, as the case may be, or sooner determination of these presents, revert to and become the absolute property of the said party of the first part.

By an indenture dated the 9th day of November, 1866, made between the *Buffalo and Lake Huron Railway Company*, of the first part, the respondent, of the second part, and *A. T. Patterson*, of the third part, after reciting that the original lease had been assigned by the respondent to *Patterson*, in trust by way of collateral security, the Railway Company demised the

premises to *Patterson* for a new term of three years from the 1st day of May, 1867, and it was thereby agreed that "the demise thereby granted, and the rights and lia- "bilities of the party of the third part thereunder should "in all respects be subject and according to all the provi- "sions, promises, covenants, stipulations, conditions, "limitations and agreements contained in the original "lease, including the right to purchase the demised "premises within the term of three years (as in the lease "mentioned) excepting the right of renewal." The renewed term expired on the 1st of May, 1870. There is no evidence to show that the option of purchasing was exercised before the expiration of the term, or that the time for exercising it had been in any way extended. The respondent, it is true, remained in possession, but the mere fact of possession cannot be sufficient to shew that he ever elected to purchase, so as to create a contract between himself and the railway company. The right of purchase expired with the term, for it is clear, both upon principle and authority, that, in the case of all such unilateral stipulations, time is strictly regarded (1); moreover, by the terms of the provision for purchase contained in the lease, time was made essential, for the right was conditional upon giving notice six months at least before the end of the term, so that, if the general law were not as it undoubtedly is, the parties must be held to have made time of the essence by the terms in which their agreement is expressed. It cannot, therefore, be open to doubt or question, that from the 1st May, 1870, when the term expired, until the 3rd June, 1871, when the several parcels, blocks E and F, Island C, and the Great Meadow, were respectively sold and conveyed by the *Grand Trunk Railway Company* (who had purchased from and acquired all the rights of the *Buffalo and Lake Huron Railway Co.*)

(1) Fry on Specific Performance, Ed. 2, pp. 471 & 475.

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to the parties under whom the appellant claims, the respondent was in possession as a mere tenant at sufferance, having no other right or title either at law or in equity. Upon the evidence this conclusion is inevitable, unless indeed we are, without proof, to make conjectures in favor of the respondent's case. It is out of the question to say that any presumption of an exercise of the option of purchase, or of its extension in point of time, or of the making of a new agreement for the purchase of the property, can, in the absence of all other proof, be inferred from the mere fact of the holding over after the time had expired; such possession can, I repeat, be attributed only to a mere tenancy at sufferance. No doubt if it had been sufficiently proved that the railway company were bound by a contract of purchase, either under the terms of the lease, or by an agreement made independently of the lease, the fact of possession would have been sufficient constructive notice of the equitable rights of the respondent, to all persons who subsequently purchased from the railway company, but this is the utmost effect which could be attributed to that fact. Therefore on the 3rd June, 1871, the date of the conveyance of the several parcels of which the appellant is now the owner in fee (with the exception of block A on the north bank of the river, which was not derived from the railway company, but was acquired by the respondent under a different title) the respondent had no title whatever, either as a lessee or as a purchaser, to this mill property, he was merely a person in possession, who had been a tenant, but whose title had expired, and who held over by the sufferance of his landlords. It is impossible, therefore, to ascribe the respondent's present title to any earlier date than that of the conveyance to his trustee, *Patterson*, on the 3rd February, 1873, and, as the appellant's title is derived under conveyances executed in June, 1871, the case

must be considered as if the questions now in litigation had arisen between the appellant, or his immediate predecessors in title, and the railway company immediately after the latter date and before the conveyance to *Patterson*. In thus viewing the case it will at once become apparent that the questions of prescription, the statute of limitations, and the supposed equitable title arising from the acquiescence of the *Buffalo and Lake Huron Railway Company* in the enlargement of the easement as originally granted, to which some importance was attached in the court below, are immaterial to the decision of the present appeal. On the 1st of May, 1870, when the renewal term expired, the railway company became the absolute owners in fee in possession, or with the right of immediate possession, of all the lands now in question, as well of the mill property and its appurtenant easements, as of the lands on both sides of the river, now the property of the appellant, excepting only block A on the north bank. There was therefore, with the exception mentioned, from this date, until the ownership was again separated, on the execution of the conveyances under which the appellant's title is derived, entire unity of ownership by the railway company of all the tenements, as well of those which are now alleged to be servient, as of those which are said to be dominant, and there could have been, during this period, no easements in the strict sense of the term. It is manifest that one piece of land cannot be said to be burdened by a servitude in favor of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do. There was therefore, when the title to all these lands came to be vested in the same owner, an

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extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, ceased to be so, and became mere easements in fact—*quasi*-easements, as they are sometimes called. Then what possible difference can it make in the rights of parties claiming under the railway company, that there had been, during the term which had expired, a possession in the tenant beyond the rights which his lease conferred—a possession which was an encroachment upon other lands of his landlord not comprised in the lease, of such a character that if it had been a possession of the lands of a stranger it would have ripened into a title under the statute of limitations; or that the tenant had, during the term, enjoyed an easement over lands of his landlord other than those demised to him, and which would, in like manner, have given him an easement by prescription, if the burden of it had been imposed upon the lands of a third person; or that such easement had even been enjoyed with the direct and express acquiescence and license of the landlord, who had encouraged the tenant in an expenditure for the purposes of making the easement available? It is impossible to see how any such acts could have had the slightest legal effect upon the rights of the parties claiming under the railway company the owner of the whole, dominant and servient tenements alike. They would, it is true, have some effect as evidence to show that the easements claimed existed as easements in fact, quasi-easements, whilst the several tenements were in the hands of the same owner, but no other and no legal consequence whatever could be attached to such acts in the event which has happened of the ownership of all the lands having become consolidated in the hands of the railway company. Supposing the railway

company had not originally owned the mill property at all, and that the easements claimed had actually been acquired in favor of that property and against the other properties now owned by the appellant by a user for the full statutory period of twenty years, and that then the dominant tenements had been acquired by the railway company by purchase, there must in that case have been an extinguishment of the easements. The same principle would also apply in the case of easements to which an equitable title had been acquired by the license and acquiescence of the railway company followed by an expenditure, on the faith of such a sanction, by the owner of the mill property. Again, if in the case supposed of the title to the two properties being absolutely vested in fee in different owners, a title to the land itself on which the race-way is constructed had been actually acquired by a possession for the required period under the statute of limitations, this would, of course, have been immaterial if the railway company had subsequently acquired a title to the mill property by purchase. Then, when the term came to an end and the mill property reverted to the lessors, it was at least as strong a case as that supposed. It is well settled law that all additions to the demised premises, acquired by a lessee by encroachments on the land of a stranger and possession for the statutory period, enure on the determination of the tenancy to the benefit of the reversioner, as also do easements acquired under the Prescription Act, and an easement acquired by a tenant by acquiescence and license of his landlord over other lands of the latter must be presumed to be so acquired as incidental to the enjoyment of the demised premises, and not as an easement in gross, if indeed such a right as an easement in gross is recognised at all by the law, and therefore to be limited to the continuance of the term and to be determined upon the expiration

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of the lease. The result is that all these questions of the statutes of limitations, prescription, and license can have nothing to do with the decision of the case, if we determine, as I think we must, on the evidence contained in the record, that the respondent up to the date of the conveyance of 3rd June, 1871, never had any interest, legal or equitable, in the mill property and its appurtenant easements, except as a lessee for the original and renewed terms, the latter of which came to an end on the 1st of May, 1870, and that there is no foundation in fact for the assumption that the respondent has now any title which he can carry back to the option of purchase, or in any way ascribe to the stipulations contained in the lease or to any other origin legal or equitable earlier in date than the conveyance to *Patterson* on the 3rd February, 1873.

We have, therefore, in order to determine what are now the rights of the appellant in respect of block F, to ascertain what were the rights of the railway company immediately after the execution of the conveyances to *Ross*, *Smith* and *McDonald* of the 3rd June, 1871, for it is plain that the respondent, claiming under a subsequent conveyance to *Patterson* executed on the 3rd February, 1873, can claim no more extensive rights than his grantors had.

The appellant seeks in the first place to justify the acts which the bill was filed to restrain, the partial removal of the dam and the embankment of the raceway, upon the ground that as the riparian proprietor of block F, he was also the owner of the bed of the river to its middle thread, and that he, therefore, shows the embankment on the stream and a part of the dam to be erected on land which belongs to himself, and in which he had the absolute and unrestricted right of property. The respondent, on the other hand, insists that the descriptions in the conveyance to *Ross* of the 3rd June,

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1871, does not carry the northerly limit of block F to the water's edge, and that consequently the appellant is neither the owner of the land in the bed of the river on which the dam and race-way are placed, nor even a riparian proprietor. I am of opinion that the conclusion arrived at by Mr. Justice *Proudfoot*, before whom the cause was originally heard, that block F did extend to the waters of the river *Maitland*, was a correct inference from the plan of 1859 as explained by the witnesses who gave evidence as experts, and from the descriptions contained in the conveyance to *Ross*.

The learned judges of the Court of Appeal were of opinion that the plan of 1859 was not entitled to any weight for the purpose of identifying block F as a piece of land extending to the water's edge, inasmuch as it did not appear that "the plan was made by a person having authority to bind the owner". But it is proved that the fact was otherwise; that the plan was made for the owners of the land, the railway company, and was actually registered by them, as appears by the memorandum to that effect on its face.

It was, therefore, in June, 1871, when the railway company conveyed to *Ross*, a plan binding on them, to this extent at least, that when they conveyed a parcel of land, which they described as block F, it must be presumed that they intended to convey the same parcel of land as is shown by that denomination in this plan of 1859 and with the same natural boundaries on the north and north east as are there indicated.

It is contended however by the respondent that these limits of block F are shown by the irregular line of shading on the plan of 1859. This the appellant answers by producing as witnesses experienced draughtsmen and surveyors, who state their opinions to be that this shading is not intended as a boundary line, but is meant to represent the configuration of the land

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in question and to mark where the table land comes to an end, and to show the declivity and slope towards the river, which are found upon the ground. That it is, what Mr. *Miles*, one of the witnesses, says is technically called by draughtsmen, a "contour line," showing the brow of the hill.

This evidence is objected to by the learned judges of the Court of Appeal for the alleged reason that the question is not a proper one to be decided by the evidence of experts, but one for the court itself. From this conclusion I am compelled to differ. The question submitted to these experts is not the general one, what is the actual boundary of this block F, but what is intended to be shown by this shading on a plan prepared by a professional draughtsman a provincial land surveyor, and adopted by the railway company. Upon such a point it appears to me beyond doubt that the evidence of other professional draughtsmen may be admitted, not, it is true, to give their opinion upon the question of fact submitted to the court, but to show what, according to the general practice and usage of draughtsmen in preparing plans, similar marks and shadings are intended to indicate. And this is what Mr. *Passmore* does in the following passages of his deposition. He is asked, "What is the meaning of the "shading all round? A. It is the shading of the hill "side. Q. Would this shading, according to the proper "drawing, belong to block F or not? A. Certainly; "that is just the shading of the hill side. Q. Then it is "intended to designate a flat? A. Just the slope of the "shore from the top of the head line." This testimony is entirely confirmed by that of Mr. *Miles*, the other professional draughtsman called by the appellant. I am of opinion that this evidence is free from the objections which have been made to it; that it was properly admissible, and that it and the plan together entirely

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warrant the conclusion come to by Mr. Justice *Proudfoot* at the trial. If this shaded line is not meant to show the boundary of block F, it is not to be presumed that there was any boundary on the north and north-east sides but the river. The descent to the river as described by one of the witnesses, was so abrupt as almost to be perpendicular, and the river originally, and before the construction of the race-way washed the foot of the declivity. There is always a strong presumption in favor of natural boundaries when there are not well defined surveyed lines laid down either upon the ground or upon maps or plans, and if it is once established that the shading upon the map of 1859 is not meant to show a boundary line that presumption applies here, and we must determine, as the primary judge did, that block F is a piece of land extending to the water's edge. There is, however, in addition to the plan and the evidence of the surveyors who show that the shading cannot be relied on as a limit, a piece of evidence which establishes that fact conclusively. The deed of the 3rd June, 1871, by which the railway company conveyed block F to *Ross*, of which more will have to be said when I come to consider another part of the case, has a plan annexed to it to which reference is made in the description contained in the deed. This plan, on which is depicted, coloured in pink, certain parts of block F, which, whatever disputes there may be as to other land which the appellant contends and the respondent denies was intended to pass by this deed, were indisputably intended to be conveyed, shows, at the eastern extremity of the block, a piece of land covered by the pink coloring which, upon a comparison of this plan annexed to the deed with the plan of 1859, is seen at a glance to be beyond the shaded line, to the eastward or north eastward of it. This in a deed executed by the railway company, the common

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grantor, under whom both the appellant and respondent claim, is therefore a positive admission made at a date anterior to the conveyance under which the respondent claims that block F is not a piece of land contained within limits described by the shading on the plan of 1859. No answer has been given to this either in the factum filed by the respondent or in the argument at the bar, and I am at a loss to conceive how it could be answered. But this plan annexed to the deed, not only entirely destroys the theory of the respondent that the boundary is shown by the shaded line, thus confirming the argument of the appellant that there being no other boundary which can be suggested the natural boundary of the river must be presumed to be the limit, but it does more, for it shows block F at the particular point already referred to, the eastern extremity of the block, as actually touching the river and for some distance at this point the railway company, by the plan accompanying their deed, give the river as a boundary. Then, if the river is the boundary of the block at this point, it surely creates an almost irresistible inference that the river was intended to be the boundary throughout. But indeed it is difficult to say how it can be urged, when we suppose the shaded line on the plan of 1859 to be obliterated, as we must consider it to be, for all purposes of a boundary, that the plan annexed to the deed of 1871 does not actually give the river as the boundary throughout.

I have, therefore, no hesitation in accepting the judgment of the learned judge at the trial on this part of the case, and in determining that the portions of block F conveyed to *Ross* by the deed of June, 1871, did extend to the river.

It follows that the appellant, as the proprietor of the bank to the water's edge, is presumably the owner also

of the bed of the river to the middle thread of the stream, and the race-way which the bill seeks to have the appellant restrained from interfering with and so much of the dam, also, as is to the south of the middle line of the river were therefore erections upon the appellants land.

Then it is further contended for the respondent that according to the deed of June, 1871, the appellant is only entitled to such parts of block F as appear to be coloured in pink on the plan annexed to that instrument. Having once ascertained of what block F consists there can be little difficulty on this head. The only piece of block F actually excepted is that coloured green upon the plan. By the very terms of the description the whole of block F beyond this excepted parcel must be held to have passed by the deed, even assuming that the parts coloured pink on the plan do not show the whole of this residue. The words of the description are :—

> All that part of said block F shown on the plan annexed hereto and coloured pink, that is to say this conveyance covers all of said block F excepting the part thereof shown in the said plan annexed hereto in green colour, and which part coloured green is described thus.

And then follows a particular description of the excepted parcel. Now, assuming that "block F" was a description of a definite piece of land extending to the river, a conclusion already arrived at, and also assuming that the respondent is right in saying that the pink colouring does not show the whole of the residue of the block beyond the excepted parcel, I should still be of the opinion that the whole of the remainder of the block passed. Mr. Justice *Patterson* in his judgment refers to the case of *Iler* v. *Nolan et al* (1), as applicable to this point, and I am willing to abide by that case

(1) 2 U. C. Q. B. 319.

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as containing a correct exposition of the law and as being a governing authority to be applied here. Then what does *Iler* v. *Nolan*, which is only one among a great number of cases both here and in *England*, decide? It determines that where a close or parcel of land is granted by a specific name, and it can be shown what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is generally known. Applying this principle here, it is beyond controversy that the whole of block F passed under the deed. But no such question really arises here, for the parts colored pink in the plan in the deed of 1871 do extend to the river, and therefore include the whole of the block except the reserved portion. The reasons for this conclusion already given are greatly strengthened by an argument which, as applicable to another part of the case, the respondent himself has strongly insisted on. The respondent has himself contended, and the surveyors called called by him support his contention, that the black lines on this plan are designed to show the present race-way as it actually existed at the date of the deed, and has existed since 1865. Taking this to be as the respondent insists, it also shows that block F is bounded by the river, for we are told by the witnesses that the inner bank of the raceway, which is represented in the plan by the inner black line, to which the pink colouring extends, is the natural bank of the river. The consequence is that the description in the deed, as I have construed it, is entirely consistent both in itself and as applied to the plan, and that the parts colored pink do show all of block F save the excepted part

colored green, and *that* as a parcel of land having the river for one of its boundaries. In other words when the description in the deed says, "All that part of block "F shown in the plan annexed hereto and colored pink; "that is to say, this conveyance covers all of said block "F except the reserved parts," it correctly and emphatically says that the parts colored pink do show the whole of block F ascertained as a piece of land having the river for its boundary, excepting such parts as are expressly reserved.

It is said, however, that even if the appellant is the owner of the land itself that the respondent is entitled, in respect of the mill and lands conveyed by the deed of the 3rd February, 1873, by which the railway company conveyed to *Patterson* the premises which have since become vested in the respondent, to an easement giving him the right to maintain the dam and raceway, and this is rested upon two distinct grounds. First, it is claimed under the express reservation in the deed to *Ross* of the 3rd June, 1871, under which the appellant derives his title, and secondly, it is asserted that by operation of law there was an implied reservation of these easements. On both these points it appears to me that the decision must be adverse to the respondent. Any easements to which the respondent is entitled against the appellant as the proprietor of block F must, so far as his title depends on express grant, be necessarily found in the deed to *Ross* of 3rd June, 1871. It has already been shown that the renewed lease came to an end and the stipulation giving a right to purchase the mill property thereby became inoperative on the 1st May, 1870, from which date the railway company were seized in fee in possession, or with a right to the immediate possession, of the mill property and were also seized in fee of so much of block F as had not been included in the lease,

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and that consequently from that date all easements were extinguished by unity of ownership. This is incontrovertible, unless we are to ascribe the deed to *Patterson* of the 3rd February, 1873, to some equitable title earlier in point of time than the date of the 3rd June, 1871, either under the right of purchase conceded by the lease, or under some other agreement binding in equity, but this, as already demonstrated, is impossible, unless we can proceed, to the entire disregard of evidence, upon pure hypothesis and conjecture. Then as on the one hand a title to the easements claimed by the respondent by express grant cannot have relation back to any title earlier than the reservations contained in the deed of 1871, so on the other hand it is clear that nothing done by the railway company subsequently to the execution of that deed, can in any way burden the lands, so as to affect them in the hands of the appellant as claiming under *Ross*. Therefore the recital in the deed of 1873 that it was granted in pursuance of the contract of purchase, and the description of the easements contained in that deed, and the reference therein to the lease, can have no effect against the appellant with regard to whom they were *res inter alios acta*. It follows that the respondent, in seeking to make out a title by express grant, must be restricted to the deed of 1871, and can have no other or larger easements than such as are expressly reserved by it in favour of the grantors, the railway company, or, as it may be put, are re-granted to them by *Ross*, their grantee of the land. Then turning to the deed of 1871, we find that it makes no reference to the expired leases, or to any right of the respondent, or of those claiming under him, or in his right, that there is no reference to these prior instruments in extension or aid of the description; but that it purports to reserve just what is specifically described within the four corners of the deed itself, and nothing

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more. After the description of the land intended to be conveyed to the grantee, *Ross*, already extracted, and being, as I construe it, all of block F, except the reserved portions, the deed proceeds to describe very fully, giving courses and distances, two parcels of land, the first being described as a piece coloured green on the map, and the second as what is called the mill-race. The latter, it is to be observed, is not the mill-race now in dispute, but a piece of land so fully and accurately described that there can be no question as to its size or locality, and which is entirely distinct from the mill-race for the whole length of the river, from the dam near the bridge downwards, as now claimed by the respondent. This mill-race is not reserved by way of easement, but the land itself is excepted from the conveyance to the grantee in the deed. The deed does not in terms purport to convey any easement over the lands conveyed to *Ross*, or to except from the operation of the conveyance anything but the two pieces of land which are described as before stated. It is, therefore, out of the question to say that the right to maintain a race-way such as the respondent now claims, was acquired under the reservation. A piece of land to be used as a race-way and designated as a race-way, was, it is true, reserved, but this was not in any way, identical with the race-way formed by the embankment erected int he bed of the river, and extending in the river for three-quarters of a mile as far east as the dam near the bridge, as now used and claimed, for the purposes of the mill by the respondent. The easements which the respondent, by his bill, seeks to have established and protected, are in respect of this race-way and also of the dam which he has placed obliquely across the river, near the head of the race-way. As regards the first—the race-way—he has entirely failed to shew any title by express grant under the reservation in the deed. He, also, in my opinion,

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fails to show any grant or reservation which entitles him to maintain such a dam as he has erected, and the appellant's partial removal of which led to the institution of this litigation. Part of the description of the race-way contained in the deed of June, 1871, is as follows:—

> Thence due North 79 degrees, 18 minutes and 30 seconds, East 319 feet 3 inches, more or less to the head gates of the race, thence easterly across the head gates 107 feet, more or less, to the high water mark, caused by a dam giving a head of 8 feet of water at the mill.

Save this there is no mention of a dam any where in the deed. The question is, therefore, narrowed to this, did this incidental reference to the high water mark caused by a dam giving eight feet of water at the mill authorize the respondent to continue to maintain the dam or obstruction in the bed of the river near the bridge which he had placed there whilst he held under the lease? The respondent insists that this reference to a dam was an informal reservation by the grantees, the railway company, of a right to construct or maintain a dam anywhere they might choose to place it for the purpose of getting a fall of eight feet of water at the mill without restriction to any particular locality, and that, therefore, it authorises the maintenance of the present dam. I am not able to assent to this proposition. In the first place, it seems to be very clear that this mention of a dam in the description was not intended to operate as the reservation of an easement to maintain a dam, but was a mere matter of local description. But, be this as it may, it seems clear that the appellant is right when he contends that the dam referred to was, or was intended to be, below the head gates mentioned in the description. The head gates were intended to let the water confined or ponded back by the dam, into the mill race, and it therefore

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follows that the dam, to cause this elevation of the water, must have been westerly of or below the head gates, the locality of which is precisely fixed by the deed. Again such a dam as the present never could have been intended, for the reason that it would not have been effective for the purpose of giving the required head of water at the mill without the adjunct of the longitudinal embankment in the bed of the stream forming the race way, and there is no pretence for saying that any right to maintain this embankment was conferred by the deed of 1871. The respondent endeavours to meet this argument by calling the race-way itself a dam, but the answer to this is easy, "race-way" is certainly the more accurate description of the channel through which the water is conveyed from the dam, across the river, in the direction of the mill, and we have the race-way intended particularly described in the reservations of the deed. I have already said that I think that we ought not to look out of the deed itself in order to ascertain the locality of the dam, but if we are to look at the lease, the only other instrument which can be referred to for the purpose, so far from helping the respondent's case, the description of the dam there referred to makes the case stronger against him, for the dam authorised by the lease is "a dam across the river *Maitland* so high as to take up eight feet of the fall of the said river, and no more." Again, the *Buffalo & Lake Huron Railway Company* by the lease reserved the right to the use of the water of the river above the back water to be caused by the dam. These references to a dam in the lease, therefore, plainly show that what was contemplated was a dam across the river (not one placed longitudinally in it) obstructing the natural flow of the water and so low down that the lands of the railway company to the east of it (which land did not extend eastward beyond the eastern extremity of block

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F) would be above the back water, a description which would be entirely inapplicable to the existing dam. Then the evidence of one of the surveyors, *Miles*, the appellant's witness and *Wetherall*, called for the respondent, both of whom know the premises, puts this question of the locality of the dam beyond dispute. *Miles* gives the following evidence:—

Q. If the dam were to be maintained where it is, or in other words if the dam is not to be brought down to where it originally was, would the words in the description be sensible or have any meaning at all, that is, the course which carries you to the head gates, and thence across the head gates to the high water mark of the dam, giving so many feet of water, could these words have any sense unless the dam was erected there? A. According to that the dam would be immediately below the head gates.

Q. To give effect to that part of the description of the plaintiff's land there must be a dam at these head gates? A. Yes.

Q. Could you, by any possibility, reach the high water of the present dam in this description? A. No.

Q. Looking at this old map of *Wetherall's* to which Mr. *Passmore* referred, and to which you referred also, would the dam, as laid down in that map, give effect to the language of this description: a dam located as that dam was? A. The dam must be at the old head gates.

Q. If the dam was at the old head gates, would there be any sense in having this long channel running up along the front of lot F? A. If the dam is high enough; I think not.

Q. Is there anything to prevent its being made high enough? A. A mere matter of expense.

Being cross-examined, the witness says:

Q. What do you say about the position of the dam? A. If the dam is below the head gates, where it is shown on the *Wetherall* old map the description of the mill privilege can be understood, and then the dams dam back the water to the head gates, and the description shows 107 feet going east along the head gates to the high water mark, caused by a dam; well, if the dam were in its present position, this 107 feet would not touch it, it says 107 feet, more or less, but does not mean 1000 feet, more or loss.

Q. I understood you to state to Mr. *Garrow* where the dam ought to be? A. Below the head gates.

Q. That is lower down the river, you mean? A. Below the head gates.

Q. Well, the head gates are the head gates of the pond? A. Exactly, you go to that by description, by metes and bounds.

Q. Whereabouts should the dam be? A. According to the old head-gates it was attached to the head gates; that is, according to the old plan.

Then Mr. *Wetherall*, who is called by respondent, and who prepared the description contained in the original lease after a survey of the ground made for the purpose, agrees with the appellant's witness; his statement is as follows:

Q. Now the head gates must have been there when you made the survey for the description? A. Yes.

Q. And have you gone over the matter? A. Yes.

Q. And that same description is continued down to the very latest title deeds that he has? A. Yes.

Q. The same description throughout? A. Yes.

Q. And the description of his property is simply the exceptions from F? A. Yes.

Q. Then you say the head gates must have been there? A. Yes.

Q. Now, was the dam not there at the time? A. I can't remember.

Q. Did you know where the dam was to be at the time? A. By the head gates being there, I should say that the dam was to be as shown on my map.

Q. This is your own map, the map of 1864, and was prepared by yourself? A. Yes.

This map of 1864 is produced and is one of the exhibits in the cause, and it distinctly shows the dam situated below the head gates. We have, therefore, the locality of the dam referred to in the deed of 1871 ascertained not precisely, it is true, but sufficiently for the appellant's purpose of showing that it meant a dam placed in the river below the head gates, and did not mean a dam and embankment, such as the respondent now claims.

This concludes the question of any easements by express grant, against the respondent, unless there is any force in an argument derived from the black lines drawn on the plan annexed to the deed of the 3rd June, 1871, which have been already referred to. It was a

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matter of controversy at the trial whether or not these black lines were intended as a delineation of the race-way now claimed. The respondent's witnesses, who were called to give evidence as experts, thought they were meant to show the race-way, and I think they were right. But granting this to be so, I am at a loss to see how that fact shows that this raceway, or an easement in respect of it, was reserved by the railway company. No reference is made in the deed itself to the raceway, or to these lines as representing it, and consequently their only effect can be to show that at the date of the execution of the deed the raceway existed in fact, and was as a fact brought to the notice of *Ross* at the time he took his conveyance. If we were now considering the effect of these lines in connection with other evidence showing an agreement to reserve this race-way or the right to maintain it in an action to rectify the deed, I can understand how these lines might have an important bearing, but in an action like the present, when we are only called upon to construe the deeds and to give them their strict legal effect, the appearance of these lines in the plan must be considered immaterial and can have no other or greater significance than the fact of the actual existence of the race-way itself at the date of the deed can have. The respondent has therefore wholly failed to make out a title to any easement by express reservation.

Then we have to consider whether, as a matter of law there was any implied reservation of rights by way of easements to maintain the dam and raceway arising upon the conveyance of the railway company to *Ross*. Both the dam and race-way had been enjoyed by the respondent, not only as quasi-easements which were continuous and apparent in the interval between the expiration of the leasehold term and the deed of the 3rd of June, 1871, but they had also existed by the suffer-

ance of the railway company as easements *de facto* during the continuance of the lease, when the several tenements were in different hands. Were they then reserved as legal easements when the ownership in fee of the two properties was again severed by this conveyance to *Ross*? In a strict technical sense there is no such thing as a reservation or exception of an easement upon a conveyance of land, for a reservation or exception means something reserved or excepted out of the land itself, and an easement in favor of other lands is not within this definition (1); a reservation or exception of an easement is therefore construed and held to operate as an inartificially expressed grant by the grantee in favor of the grantor. Can it therefore be said that there was any such grant by *Ross*, the grantee, in favor of his grantors the railway company, not as has been shown, contained in the deed, but arising from implication of law from the state of facts existing at the time of the execution of the conveyances? It appears to me that upon the later authorities this question must be answered adversely to the respondent.

Three modern cases of the highest authority have settled the law upon this much controverted point. The decisions to which I refer are those of *Suffield* v. *Brown*, *Crossley* v. *Lightowler* and *Wheeldon* v. *Burrowes*, the two first mentioned decided respectively by Lords *Westbury* and *Chelmsford* and the last by the English Court of Appeal. In *Suffield* v. *Brown* (2), Lord *Westbury* determined that when the *quasi servient* tenement was first conveyed without expressly providing for the continuance of the easement there was no implied reservation for the benefit of the land retained by the grantor. In this case of *Suffield* v. *Brown* the easement

(1) Goddard on Easements, p. 100 (Ed. 2).

(2) 4 DeG. J. & S. 155.

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was one of a class which has been called non-apparent and discontinuous, that is the enjoyment of it was of an occasional or intermittent character, and this was at first supposed to have afforded ground for a distinction between the principle of *Suffield* v. *Brown*, and that involved in the case of *Pyer* v. *Carter* (1). Later, however, Lord *Chelmsford* in deciding *Crossley* v. *Lightowler* (2), applied the same rule to the case of an easement apparent and continuous, and finally in the case of *Wheeldon* v. *Burrows* (3) the Court of Appeal expressly over ruled *Pyer* v. *Carter*, so far as it is to be regarded as an authority for a contrary doctrine, holding that no distinction was to be made for this purpose between easements which are apparent and those which are non-apparent. In all these cases it was recognised as a well settled rule of the law of property, that if the dominant tenement is first granted, all *quasi* easements which had been enjoyed as appendant to it over a *quasi servient* tenement retained by the grantor, pass by implication. The *ratio decidendi* of these decisions against the doctrine of implied reservation in the case of the servient tenement being first sold, is that where land is granted uncharged with any easement, it would be to authorize the grantor to derogate from his own grant, and so to set up a presumption against a rule of law, if he were to be permitted to subject the granted land to a user for the benefit of the land retained, to which it had been in fact subservient, whilst he was the owner of both tenements. This being the reason of the rule, it is plain that any distinction between easements apparent and those non-apparent, would be entirely arbitrary.

No argument against the application of these authorities to the facts of the present case can therefore be found-

(1) 1 H. & N. 922.

(2) L. R. 2 Ch. App. 478.

(3) 12 Ch. D. 31.

ed on the circumstance that the existence of the dam and raceway must have been known to the grantee under the deed of June, 1871. It may be said, however, that here the easements claimed did not consist merely in special modes of user and enjoyment, to which the first granted tenement had been subjected for the first time during the unity of ownership, but that the dam and race-way had both been previously enjoyed during the temporary severance of title which had been occasioned by the lease. But although it is true that this circumstance is not to be found in any of the decided cases, it appears very clear that it can make no difference when it is considered that the principle upon which they were decided is, that a grantor cannot claim rights in derogation of his grant, since a vendor, claiming an easement which had had a legal existence previous to the unity of ownership and which had been extinguished by it would be manifestly acting quite as much in derogation of his grant of the servient tenement as would a vendor who had himself been the original author of the *quasi*-easement, whilst the titles were united. The only notice I find of this point in any of the text books is contained in the following passage, extracted from the work of Mr. *Goddard* on the law of easements (1) :

If the quasi-easements had legal existence as easements before the unity of ownership, and the quasi-dominant tenement is sold, the purchaser, as in the other case, will become entitled to the easements, but what would be the result if the quasi-servient tenement is sold, is apparently an open question. Now, the authority of *Pyer* v. *Carter* is so much shaken, for Lord *Westbury* did not extend his judgment in *Suffield* v. *Brown* to this point, but in all probability it would be said that the grantor could not derogate from his own grant, that as he sold the quasi-servient tenement without making any stipulation for the reservation of the extinguished easement—it would be in derogation of his grant if he could claim them; it might also be said that as the vendor made no mention of the easements

(1) Goddard on Easements, Ed. 2, p. 112.

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in his deed he must be presumed to have intended not to reserve them. Should this be so decided it would make no difference whether the quasi-easements were first used during the unity of ownership or legally existed as easements before the ownership was united.

It is to be remarked that this was written before *Wheeldon* v. *Burrows* was decided, and as this case has now settled the law as proceeding upon the principle that a grantor cannot derogate from his grant, it can make no difference that the easements had once had a strictly legal existence which had been terminated by merger.

Then it is urged that these were easements of necessity, and so within the exception pointed out by Lord Justice *Thesiger* in his judgment in *Wheeldon* v. *Burrows* with reference to ways of necessity. There is not the slightest foundation for such a proposition. It is shown by the evidence that the dam and race-way in question are not indispensably necessary to the use of the mill, but that the same head of water might be obtained by erecting a dam below the old head gates, and that the preference of using the water in one mode rather than the other, is only on the ground of expense. It is not sufficient, to bring a case within the exception recognized by Lord Justice *Thesiger*, to show merely that, as the premises were constructed and used at the time of the grant of the servient tenement, the tenement retained by the grantor was dependent for a continuance of the user by means of the same contrivances and arrangements, upon an easement over the granted property. It must be shown, in order to make out an implied reservation upon this ground, that the easement was absolutely necessary to any user at all by the grantor of the land retained by him. If the argument could prevail in the present case it would have been sufficient also to have brought the case of *Crossley* v. *Lightowler* within the principle of the same exception,

and also to have exempted the case of *Pyer* v. *Carter* from the criticism and disapproval to which it has been subjected. For these reasons I am of opinion that there was no implied reservation of these easements arising from the fact of their apparent and continuous existence and use, to the knowledge of the grantee, entitling the railway company to them as easements appendant to the mill and other tenements which were retained by the company at the date of the deed of June, 1871, and of which property the respondent is now seized.

Had it been found impossible to reach the conclusions already indicated, either for the reason that the appellant was not a riparian proprietor in respect of block F, or because, though seized of that parcel of land with a boundary on the river, it was subject in his hands to the easements claimed, I should still have been compelled to dissent from the courts below, and to hold that the appellant was entitled to have the decree reversed as having shown a sufficient justification of the acts complained of in respect of his ownership of the three parcels of land on the north side of the river, Island C, the Great Meadow, and Block A. The rights of the appellant in respect of the first two parcels appear to me to depend on propositions so plain and simple that very little is required to be said to show that he ought not to have been enjoined as he has been by the decree now complained of. The appellant's title to these lands is derived under conveyances from the railway company. Island C was sold and conveyed by the railway company in fee to *Smith*, on the 3rd June, 1871, and by a deed of the same date, the Great Meadow was sold and conveyed by the same grantors in fee to *McDonald*. The appellant acquired his title to these lands by purchase from *Smith* and from the devisee under the will of *McDonald*, by whom the lands were respectively conveyed to him in December, 1879. As

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regards Island C, the very description of the land itself, as an island, imports *primâ facie* that it extends to the edge of the waters by which it is surrounded, and, moreover, the registered plan of 1859, or rather the certified copy of it from the *Canada Company's* office, which was put in to supply the piece torn off in the registered plan, shows the island as having the water for a boundary. Again the same plan shows the great meadow as extending on the south to the waters of the river. There is not the slightest ground for questioning the correctness of either of these descriptions. The fact that, by means of the dam and raceway, the water is unduly diverted from the appellant's lands on the north bank of the river, would seem a necessary result of the dam and embanked channel forming the raceway, from the mere descriptions which we have of them in the evidence, and I should have thought no further proof would have been requisite to establish the appellant's case in this respect. The Court of Appeal, however, was of a different opinion, though the learned judge before whom the case was tried seems to have had no difficulty in finding for the appellant on this point. A reference, however, to the depositions of the witnesses examined at the trial, conclusively establishes that there is a diversion not only to an appreciable extent, but to an extent sufficient to be injurious to the appellant's rights as a riparian owner.

Wetherall, a surveyor and a witness called by the respondent, says:

By reason of this dam and race-way the waters of the river are diverted for about three-fourths of a mile; namely, from the head of the head race at the bridge to the foot of the tail race below the mill. In low water the race takes the greater part of the river, takes it all except what percolates through the dam. The water which is diverted by the race would, if left to itself, go down the main channel past island C, the great meadow and block A, and as it is diverted it does not go past these properties.

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Miles, a witness called by the appellant, also a surveyor, says:

> The water is diverted from the main channel by means of the plaintiff's dam and the raceway that he is claiming, it is made to flow out of the main channel of the river until it reaches the lower end of block E, and it diverts it from both A & C, and the Great Meadow.

This testimony is not in the least degree contradicted, and in face of it I find it impossible to agree with the learned judges of the Court of Appeal in holding that the fact of the diversion of the waters from these lands on the north side of the river is not proved. The appellant's riparian ownership of these last mentioned lands and the fact of injury to the appellant's right as such owner being thus established, he has made out a *primâ facie* case justifying the acts which the respondent complains of as having been done for the purpose of abating the nuisance caused by the dam. The onus is thus thrown upon the respondent to show some title to the right claimed to maintain the dam and race-way, and thus to divert the waters of the river from the appellant's property on the north side. Then what shadow of title to such a privilege has the respondent shown? I have not seen the two deeds of the 3rd June, 1871, by which these north side lands were conveyed to *Smith* and *McDonald* respectively, as they are not printed in the case, but it has not been suggested that they contained any reservations or exceptions which would operate as a grant of an easement in favour of the railway company giving the right to divert the natural flow of the water or in any way to interfere with the ordinary common law rights of the grantees in these deeds as riparian proprietors of the lands conveyed. There is not then in the case of these lands on the north bank any such difficulty as was founded on the reference to the dam in the exception contained in

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the conveyance of block F, and there is nothing therefore on which to rest any claim of title by express grant or reservation. Then, as has already been stated, when considering the appellant's rights in respect of block F, the law as finally settled by the decision in *Wheeldon* v. *Burrows* precludes the possibility of implying any reservation of easements in favour of the lands retained by the railway company over those conveyed by them to *Smith* and *McDonald*.

There only remains to be considered the appellant's rights as the proprietor of block A, which he holds under a different title from that which he makes to the other lands on the north bank of the river. The railway company were never seised of this land, and consequently the appellant's title to it is not, as in the case of the other parties, acquired from a grantor who was also originally the owner of the respondent's mill and other property. There can, therefore, in respect of this piece of land, be no question of easements by reservation, and the only points which have been or could be made against the appellant's justification of his acts in removing the dam and race-way, as owner of this property, are, first, that his title did not give him the right of a riparian proprietor in respect of it; and secondly, that an easement has been acquired against this block A by prescription. The deed by which this land was conveyed to the appellant has not been printed in the record, but it is said in the judgment of Mr. Justice *Burton*, and the fact has not been disputed by the appellant, either in his factum or in the argument at the bar, that the boundary of this land on the river side is high water mark, and thence along high water mark to a point on the bank. Assuming this to be so, I fail to see that there can be any doubt that the appellant is a riparian

proprietor entitled to object to any unauthorized interference with the flow of the river in its natural state.

A title to the bed of the river is clearly not requisite to entitle a proprietor of the bank to the use of the water; the case of *Lyon* v. *The Fishmongers' Company* (1) expressly decides that the lateral or riparian contact of the land with the water is sufficient to entitle the landowner to his right though he may own no part of the bed of the stream. That there was a diversion of the water from block A sufficiently injurious, in fact, to have entitled the appellant to maintain an action is clear from the evidence of the witnesses from whose depositions extracts have been already given. It thus appears that the effect of the dam and race-way is to divert the water from the north side as well when the river is at the height of ordinary high water as at other times when it is at a lower stage; and that this must be the result is apparent from the very nature of these obstructions which the respondent has placed in the river.

The acquisition of an easement by prescription against block A is not raised by the pleadings, but I should be very unwilling now to conclude the respondent on that ground. The twenty years user requisite to make out a title of prescription is however not proved. The dam and race-way, which are to be considered as parts of the same structure, were not completed until 1865 and the date of the acts of disturbance which the respondent complains of were in February, 1880. The respondent himself, in the evidence which he gave at the trial, admits distinctly that the works constructed by him for the purpose of turning the water to the south side of the river were not completed until 1865. He says:—

I built another embankment there in 1865, on the dam from the

(1) L. R. 1 H. L. C. 662.

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middle gates up to the upper gates, and I completed that in 1865. Q. Is that the present dam? A. The long dam? Yes.

In the face of this admission by the respondent it is impossible to contend that there was for twenty years prior to February, 1880, a user of the water in the manner in which the respondent now uses and claims the right to use it by means of the present dam and race-way.

In my judgment, therefore, the respondent has failed to show that he is entitled to the relief which the court below has given him, and the appeal must, therefore, be allowed, the decree reversed, and the bill dismissed, with costs to the appellant in this court, and in both the courts below.

FOURNIER, J.:

In this case I agree with the views expressed by His Lordship the Chief Justice, and the appeal should be allowed.

HENRY, J.:

Understanding some time ago that other members of the court were preparing exhaustive judgments embracing all the points in this case, I considered it unnecessary that I should prepare a written judgment. It is sufficient, therefore, for me to say that I concur in the views expressed by my learned brothers who have read their judgments, and also in the judgment which I have had the pleasure of reading, prepared by brother *Gwynne*. I have considered the case fully and I have arrived at the same conclusion that they have. The fact is, in the first place, that the cases and title did not go beyond the head gate, and that the dam referred to in these conveyances meant a dam of sufficient height to give eight feet of a head at the mill, and that dam placed and erected at the head gate. The descrip-

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tion in the leases and in the deed that subsequently followed, clearly point that out as the true construction of the document, and that when *Ross* got the deed the other parties and the respondent had no title whatever to the property. They had made no application either for a renewal of the lease or to purchase under the clause of the lease which gave them the right to do so. The property belonged, therefore, unrestrictedly to the parties who gave the deed to *Ross*. *Ross* took that as a conveyance of the property, being block "F," without being encumbered by any reservation of an easement in the respondent other than that which is described in the lease. A question was raised as to the extent of block "F," and I have no hesitation in saying from all the evidence that that block extended to the water, and as a necessary consequence took in the rights of the proprietors to half the stream, and that the excavations for the mill below the dam, that was subsequently erected by the respondent, were made on the soil of block "F." But we have here evidence also that the appellant owned land on the other side of the river, to which no reservation is applicable. He also owned block "A," deriving his title from a totally different source. Under any one or other of those titles, then, I think he was entitled to abate the nuisance by which his property was injured. I can see no right whatever in the respondent to erect the upper dam. It would have been of no service there without the excavation that followed it, to direct the water towards the head gates, and if he had the right to make a dam, he had not the right, certainly, to make the excavations that were necessary in order that that dam would be of any service. Looking at the whole case, with the evidence, and considering the law applicable to it, I have no difficulty in arriving at the conclusion that the appeal in this case ought to be

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allowed, and the original decree of the Vice Chancellor reversed, with costs.

GWYNNE, J.:

[After reading a statement of the case proceeded as follows:]

The solution of the questions arising in this case depends wholly, as it appears to me, upon the construction of the instruments under which the plaintiff and defendant respectively claim. What the plaintiff claims by his bill is not any estate in the land covered with the waters of the river *Maitland* at the place where the dam spoken of in the bill and therein alleged to have been erected in 1861, is situate, or in the channel leading therefrom, to the plaintiff's mill, but only the easement, right and privilege of maintaining the dam so alleged to have been erected, and of using the channel constructed and dug, as in the bill alleged, for conveying the waters of the river *Maitland* from above the said dam, which easements, rights and privileges the plaintiff asserts no title unto by prescription, but wholly as granted to and vested in him, under and by virtue of the terms and express provisions of the several indentures mentioned in the bill. The plaintiff's whole claim is founded upon the grant of the easements as described in the original lease, which lease as he contends granted the easement, right and privilege of erecting the dam therein referred to, at the sites of the dam alleged in the bill to have been constructed in 1861, near the bridge across the river. The plaintiff's whole claim rests upon the right to the easement as granted by that lease. He asserts no other title.

Now, the plaintiff not claiming any estate in the bed of the river where the dam was erected, nor in the land covered with the water flowing through the channel, alleged to have been dug by the plaintiff on the south

side of the river leading from the said dam, but only the easement, right and privilege of maintaining such dam for the purpose of conducting the waters of the river therefrom, through the said channel to the plaintiff's mill, whether the contention of the defendant that he is seised in fee of the land where the acts complained of were done be or be not well founded, the plaintiff cannot succeed upon this bill unless he establishes his right to the easement as alleged in his bill, to whomsoever the fee in the land over which such easement is claimed may belong; so likewise the defendant, having by his answer set up a case in respect of which he claims cross relief, unless he establishes, not only that the plaintiff is not entitled to the easement, right and privilege of maintaining the dam at the place where it was erected, and of conducting therefrom the waters of the river through the said channel to the plaintiff's mill, but also that the defendant is seised in fee of the soil and bed of the river where the dam was erected, or of some other land abutting on the river in virtue of which he had a right to remove the dam as a wrongful obstruction in the bed of the river to the flow of the waters of the river in their natural course to and past such his land. If the defendant fail to establish *his* title as set up in his answer, and the plaintiff fail to establish *his* title to the easement as claimed in his title, the plaintiff's bill must be simply dismissed.

It is, I think, very plain that the indenture of lease, dated the 4th July, 1859, executed by the *Buffalo & Lake Huron Railway Co.*, did not grant to the plaintiff the easement, right and privilege of constructing a dam across the river from the great meadow on the north side of the river at the place where the stone dam mentioned in the plaintiff's bill was erected, nor any right to dig the channel in the bill mentioned to have

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been dug by the plaintiff for the purpose of conducting thereby the waters of the river from the said dam to his mill. True it is that this indenture does not define any precise limits for the site of the dam thereby authorized to be constructed, but its approximate site as contemplated by the parties to that indenture can be ascertained from the evidence of *William Robinson*, who superintended the work done by the plaintiff from October, 1859, to 1865, the latter year inclusive. He says that the plaintiff came to the place in June, 1859, and the witness himself, in October of that year, at which latter date "all the surveying, to lay down the site of the mill and the race, had been completed and part of the dam was built." The dam here spoken of was situate about half a mile lower down the river than the stone structure near the bridge, which is alleged in the bill to have been constructed in 1861, but which the evidence I think shows, and Mr. *Proudfoot*, V.C, has found as a fact, to have been constructed at a much later period; and that this dam, constructed in 1859 and not the stone structure near the bridge, comes within the limits and the terms and contemplation of the grant of July, 1859, sufficiently appears from the terms of the indenture of the 4th of that month, which clearly establish that the dam authorized thereby must be so situate as to have in it the head gates of the race, the precise situs of which is specifically defined by metes and bounds, and so must be, as the dam of 1859 in fact was, about half a mile lower down the river than the stone structure, the removal of which by the defendant is complained of in this suit The construction, therefore, of this stone dam near the bridge, whenever constructed, whether in 1861, as alleged in the bill, or later, as the learned Vice-Chancellor has found the fact to be, and the digging by the plaintiff of the channel leading therefrom to his mill cannot be justified

as acts done in pursuance of any power or grant of easement contained in the indenture of 4th day of July, 1859.

It appears that the indenture of the 9th November, 1866, which in the bill is alleged to have been an assignment by the plaintiff, with the concurrence of the *Buffalo & Lake Huron Railway Company* of the lands, premises and easements granted by the indenture of the 4th of July, 1859, was, in fact, an indenture of demise, executed by the *Buffalo & Lake Huron Railway Company*, the plaintiff being made a party thereto, and concurring therein to *Patterson*, who is therein recited to have been made assignee of all the plaintiff's rights and interests under the indenture of the 4th of July, 1864; and the indenture of the 9th of November, 1866, is, in fact, a grant and demise executed in pursuance of the provisions o the indenture of the 4th July, 1859, for granting a further term of three years to *Patterson* of the identical premises and easements granted and demised by the indenture of the 4th July, 1859, by the same precise description as the same are described in that indenture, for the term of three years, to commence and be computed from the 1st day of May, 1867, and containing a clause as to the purchase of the same premises within the said term of three years under the conditions and subject to the provisions in that behalf contained in the indenture of the 4th July, 1859. The indenture of the 9th November, 1866, being in express terms limited and confined to the identical lands, premises and easements granted by the indenture of the 4th July, 1859, cannot operate as a grant of any easement different from or more extensive than that which had been granted by the last named indenture.

Up to this period, then, the plaintiff had acquired no right whatever derived from the *Buffalo & Lake Huron* Railway Co., authorizing the construction across the

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river *Maitland* of the stone structure mentioned in the bill as being near the bridge across the river, the removal of which by the defendant constitutes the gist of the plaintiff's bill of complaint.

In this state of facts and in this condition of things, the *Buffalo & Lake Huron Railway Co.*, and the *Grand Trunk Railway Co.* upon the 2nd of February, 1870, entered into an agreement under their respective common seals whereby, subject to the approval of parliament, it was among other things agreed that the railway and works, stores, rolling stock and surplus lands, and all other the property and rights of the *Buffalo* company should vest absolutely in the *Grand Trunk* company as from the 1st July, 1869, and be deemed part of their undertaking subject to all existing mortgages and encumbrances thereon, and that subject thereto and to other matters not important to the consideration of the question before us, the railway, works, surplus lands, property and rights of the *Buffalo* company should be held by the *Grand Trunk Co.*, free from all debts, liabilities and obligations of the *Buffalo* company; and that the *Buffalo* company should forthwith, or when and as the same from time to time should become due, pay and discharge all sums due from them as purchase money for land sold to them and for rights of way; and that the *Grand Trunk Co.* should, within twelve months' from that confirmation of the said agreement by the Canadian Parliament, sell or retain, at a valuation to be ascertained by a valuer to be named by each company (the valuers to name an umpire to decide between them in case of difference), the said surplus lands, and should forthwith apply the proceeds of such sales or the amount of such valuation in extinction, as far as the same would go, of the sums due for right of way; and all other debts and obligations whatever except those by the agreement expressly assumed by the

Grand Trunk Co., and except mortgage and debenture debts and certain arrears which, under the agreement, might be capitalised, but including the interest not so capitalised; and that whether such obligations were or were not a charge upon the line and property of the *Buffalo Co.*, or upon any part thereof, and that the said *Buffalo & Lake Huron Co.* should for ever indemnify the said *Grand Trunk Co.* against all the debts, liabilities and obligations of the *Buffalo Co.*, except those thereby expressly adopted by the *Grand Trunk Co.*, and against any interference with the railway, the works, the surplus lands or other the property of the *Buffalo Co.*, vested by the agreement in the *Grand Trunk Co.*, and any demand by or on behalf of any creditor or claimant against the *Buffalo Co.*, except as aforesaid.

By an Act of Parliament which received the royal assent upon the 12th May, 1870, in 35 *Vic.* ch 49, this agreement was ratified and confirmed and all its provisions, stipulations and agreements were declared to be valid and binding, and should have in all respects the same force and effect as if the same and every of them were expressly embodied in the Act. Now, the term created by the indenture of the 9th November, 1866, terminated on the 1st May, 1870, and there is no allegation or pretence that during the currency of that term the lessee *Patterson* had elected to become purchaser of the premises demised, under the provisions in that behalf contained in the lease. If he had not, the effect of the 33rd *Vic.* ch. 49 was to make the *Grand Trunk Railway Company*, the absolute proprietors of the premises demised by the indenture of the 9th November, 1866, freed and released from the said indenture and from every thing contained therein as part of the surplus lands of the *Buffalo & Lake Huron Railway Company* under and subject to the provisions

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of the Act relating to surplus lands; and if *Patterson* had given notice to the *Buffalo* company declaring his election to become purchaser of the demised premises under the provision in that behalf in the indenture of lease contained, then upon the passing of the statute 33rd *Vic.* ch. 49, the *Grand Trunk* company became seized of the premises, subject only to the obligation created by the express terms of the indenture of the 9th November, 1866, as to the extent of the property and the rights to be conveyed to *Patterson*, and subject to no other claim or demand whatsoever to be made by or on his behalf.

We next find that the *Grand Trunk Railway Company*, being obliged by the terms of the Act 33rd *Vic.*, ch. 49, to sell or to retain at a valuation the surplus lands so acquired by them, by an indenture bearing date the 3rd day of June, 1871, and made between the *Grand Trunk Railway Company* and the *Buffalo and Lake Huron Railway Company*, of the first part, and one *John Macdonald*, of the second part, in consideration of the sum of $950, by him paid to the parties of the first part, they, the said parties of the first part, did grant unto the said *Macdonald*, his heirs and assigns, forever "the lot on the north side of the river *Maitland* known as *The Big Meadow*," to have and to hold to him, his heirs and assigns forever, and the said parties of the first part thereby covenanted with the said party of the second part that they had the right to convey the said lands to the said party of the second part notwithstanding any act of theirs, and that the said party of the second part should have quiet possession of the said lands free from all incumbrances, and that the parties of the first part had done no act to incumber the said lands. Now *The Big Meadow*, so granted, abutting as it plainly appears to abut upon the river *Maitland* on its north side, the bed of that river contiguous to and along

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the extent of the piece of land, called *The Big Meadow* so granted, *ad medium filum aquæ* passed by the above deed to the grantee *Macdonald*, his heirs and assigns in fee simple, unaffected by anything contained in the indentures of the 4th July, 1859, or of the 9th of November, 1866, to alter, defeat or prejudice such grant. This deed was duly registered on the 18th of July, 1871, in the registry office of the county of *Huron*, in which county the land called *The Big Meadow* is situate. Now, the stone structure across the river, which the plaintiff claims the right to maintain, and the defendant the right to remove, and which he has removed, is partly—that is to say, to the middle thread of the river—situate upon land which became vested in fee in the said *Macdonald* by the indenture which conveyed to him the big meadow; and the property so vested in *Macdonald* became, and was, by mesne conveyances from him, vested in the defendant at the time that he did the acts which are complained of. In so far, therefore, as regards one half of the dam across the river, which the plaintiff insists that he has a right to maintain as it was before it was removed by the defendant, namely, that half situate on the bed of the river on the side abutting on the big meadow, it appears to have been situate upon land whereof the defendant was seised in fee, and over which the plaintiff has not shown any grant of any easement affecting such land, his right, therefore, if any he has, to the easement, right and privilege of maintaining a dam upon that part of the river, can be sustained only by his showing title by prescription to the enjoyment of such easement, and that as already pointed out he does not by his bill profess to do.

It appears also by the evidence that upon the same 3rd day of June, 1871, by an indenture of that date executed by and between the *Grand Trunk Railway Co.*

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and the *Buffalo & Lake Huron Railway Co.* of the first part, and one *Alexander M. Ross* of the second part, the said parties of the first part in consideration of the sum of $1,520, paid to them by the said party of the second part, did grant unto the said party of the second part, his heirs and assigns for ever—

All that parcel or tract of land and premises situate, lying and being in the town of *Goderich* and known as part of block F in the said town, and which parcel or tract of land may be more particularly described thus: All that part of the said block F shown on the plan annexed hereto and colored pink; that is to say, this conveyance covers all of said block F, excepting the part thereof shown on the said plan annexed hereto in green color, and which part colored green is described thus: Commencing at a point on the easterly edge of the mill race where the west limit of *North* street (produced) intersects the same there; thence north fifty-four degrees fifteen minutes east six hundred and sixty-eight feet to an angle; thence north thirty-five degrees and forty-five minutes west 396 feet, more or less, to the edge of the mill race; thence along the high water mark of the mill race in a southerly direction, following the various windings thereof to the place of beginning; also excepting and reserving from said block F the mill-race described thus: (here follows a description identical with the description of the mill-race, as contained in the above indentures of lease of the 4th July, 1859, and of the 9th November, 1866.)

The deed then proceeds as follows:

Which said two excepted parcels above described form no part of block F, colored in pink, or of the lands conveyed by this indenture, or intended thereby to be conveyed. To have and to hold unto the said party of the second part, his heirs and assigns to and for his and their sole and only use forever, subject, nevertheless to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown.

By this indenture, the parties of the first part covenanted that they had the right to convey the said lands to the party of the second part, notwithstanding any act of the said party of the first part, and that the said party of the second part should have quiet possession of the said lands free from all incumbrances; and that the

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said parties of the first part had done no act to incumber the said lands.

Upon this deed two contentions upon the part of the plaintiff have been based : 1st. That the land covered with the waters of the river running to the head gates mentioned in the lease of the 4th July, 1859, from above the stone dam near the bridge across the river along the foot of the high bank, on the south side of the river, and between that bank and a gravel bed which the plaintiff constructed on the bed of the river, formed no part of the land by this deed conveyed to the defendant; and 2nd, that even if the land covered with such water did pass to the defendant, it only passed subject to the right and easement reserved by the grantors to have the waters of the river run uninterruptedly along the channel so created. The most favorable light for the plaintiff in which the evidence, as to this mode of conducting the water of the river from the bridge can be viewed, as it appears to me, is, that in the year 1865 the plaintiff completed and almost wholly in that year constructed a gravel bank in the bed of the river, from what the plaintiff calls an island therein, near the bridge, down the river to the head gates mentioned in the lease of July, 1859, which was situate in the remains of a dam which he had in that year constructed within the limits authorized by that lease, and which had subsequently been washed away. By the construction of this gravel bank and of the stone structure or dam in the river near the bridge, which was also completed in the same year, 1865, the channel was first formed in the river for conducting its waters to the plaintiff's head gates, the situs of which is defined in his lease. The view taken by some of the learned judges in the court of appeal for *Ontario* differing in this point from the view taken by the learned V. C. *Proudfoot*, viz., that there was a strip of land not being part of block

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F, but lying between it and the river, makes it necessary to trace the condition of the piece of land called block F and the adjacent lands known as block E from a period antecedent to their acquiring such designations.

These blocks constituted part of the lands in what was called the *Huron* tract originally granted to the *Canada Company*. What other designation was ever given to them by the *Canada Company*, if any ever was, does not appear unless it be that they formed part of the town plot of the town of *Goderich*. As early as 1844 on a map filed by the *Canada Company* and registered in the registry office of the county of *Huron*, showing part of the town plot of the town of *Goderich* and its harbor, these blocks E and F are shown upon what appears to be a part of the unsurveyed portion of the town of *Goderich*, E being situate lower down the river and F adjacent thereto higher up. Now, although this map does not define with accuracy the line separating those blocks, yet there is nothing upon it which supports or countenances the idea that block E extended up the river between block F and the river, so as to separate that block from the river or *vice versâ*, that block F extended down the river and between the river and the parcel on which the designation E appears, or that a parcel not designated by any letter or number lay between the high bluff or bank above which the designation block F appears and the edge of the river. On the contrary, although the designated block F appears on the plan above the high bank which is very distinctly laid down on the plan, I should, without hesitation, conclude from the plan itself taken alone that it plainly enough exhibits the intention that the piece called block F should be regarded as extending down the steep bank to the water's edge of the river, which runs along its entire length. But in 1859 that

intention appears to me to be put beyond all doubt. In the month of June of that year the *Buffalo & Lake Huron Railway Company* appear to have made an arrangement with the *Canada Company* for the acquisition by the former Company of the title to certain lands of the *Canada Company*, in virtue of which arrangement they executed the lease of May, 1859, before their title was perfected by deed, which was executed upon and bears date the 17th of February, 1865. As part of such arrangement a plan was prepared under the direction of the *Canada Company*, of "*Goderich* harbour and part of the river *Maitland* with certain lands and premises sold by the *Canada Company* to the *Buffalo & Lake Huron Railway Company*," which was signed by *Frederick Widder*, Commissioner of the *Canada Company*, upon behalf of that company and by *R. J. Carter*, Director and General Manager of the *Buffalo & Lake Huron Railway Company*, on the 3rd of June, 1859, and registered in the registry office of the county of *Huron* on the 6th of that month. Upon this map are laid down blocks "E and F" and a dotted line, which plainly, as I think, is intended to define the boundary line between these blocks extending down to the water's edge of the river. Block F is also thereon shewn, plainly, as I think, to extend to the river along its entire length, from the *Maitland* bridge to the dotted line, between blocks E and F, which is situated a long way down the river below the bridge. That such was the plain intention is confirmed by reference to the terms of the deed of the 17th February, 1865, although the designations blocks E and F do not appear in that deed. The description in that deed, which comprises those pieces of land, is as follows:

The northern unsubdivided portion of the *Goderich* town plot in the said town of *Goderich*, butted and bounded as follows:—Commencing at the water's edge of the river *Maitland*, at the last limit

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of *Wellington* street produced; thence following the several courses of the river *Maitland* against the stream to within forty-nine and one-half feet of the centre of the approach to the bridge over the river *Maitland* produced; thence up and parallel with the centre line of that approach, and always distant forty-nine and one-half feet therefrom to the northern limit of *Gloucester Terrace* and the intersection of the west limit of *Cambria* street produced; thence due west along *Gloucester Terrace*, and divers other courses to the place of beginning.

After describing other lands, the deed then proceeds:

Also the Big Meadow on the north side of the river *Maitland*, in the township of *Colborne*, in the county of *Huron*, estimated as containing sixty-one acres of land, be the same more or less.

Then, after describing other lands, the deed proceeds:

Also, all the right, title and interest which the *Canada Company* may now have in and to those certain parcels or tracts of land covered by water, lying between the townships of *Goderich* and *Colborne*, that is to say, by the river *Maitland* from its confluence with *Lake Huron*, for a distance up stream of one mile and seven-eighths of a mile.

Then, after describing other lands situate between the town plot and *Lake Huron*, the deed proceeds:

All the lands and tenements hereinbefore mentioned, and also all the lands and waters and all the rights, titles, privileges and interests in the same, such as the *Canada Company* may have, are described and laid down on the copy of a map made by *Thomas Nepean Molesworth*, Deputy Provincial Surveyor, dated third day of June, in the year of our Lord, one thousand eight hundred and fifty-nine, and signed by *Frederick Widder* and *Robert Stuart Carter*, on behalf of the respective parties to these presents.

Now, there cannot, I think, be a doubt that at this time and thence continually until and at the time of the execution by the *Buffalo & Lake Huron Railway Co.* and the *Grand Trunk Railway Co.* of the deed of the 3rd of June, 1871, to *Ross*, the block F extended to the water's edge of the river *Maitland*. It is said, however, that the contents of that deed indicate an intention of the proprietors to alter the boundary of the block on the river side and show that what was thereby con-

veyed did not extend to the river. The contrary, I think, appears both by the express terms of the deed and by reference to the plan annexed thereto.

The deed in terms professes to grant to *Ross*, his heirs, and assigns for ever, the whole of a piece of land said to be known as block F, excepting certain specially described excepted parts thereof. Now, when we bear in mind that the *Canada Co.* gave to the block its designation and its bounds, and conveyed it to the *Buffalo & Lake Huron Railway Co.*, from whom the *Grand Trunk Co.* acquired it as surplus lands, which they were under an obligation to sell and to apply the proceeds to a particular purpose if they should not pay the *Buffalo & Lake Huron Railway Co.* for them at a valuation, there can, I think, be no doubt that when the piece of land is spoken of in this deed as "known as block F," what is meant must be that block as shown on the plan registered on the occasion of the contract of purchase made between the *Buffalo & Lake Huron Railway Co.* and the *Canada Co.* The deed, however, goes on to define more particularly the land intended to be sold and conveyed to *Ross*, as follows:

> All that parcel of block F shown on the plan annexed hereto colored pink; that is to say, this conveyance covers all of the said block F, excepting the part shown on the plan annexed hereto in green color (which is particularly described) and also excepting and reserving from the said block F the mill race described thus.

Then follows a minute verbatim description by metes and bounds of the mill race as granted by the lease of July, 1859. This plainly, as it appears to me, expresses the intention of the grantors, the *Buffalo & Lake Huron Railway Co.*, and the *Grand Trunk Railway Co.*, to convey to *Ross* the whole of block F except the piece colored green and except also so much of the mill race as granted and described in the lease of the 4th July, 1859, as was situate upon block F.

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Referring, then, to the plan, the part colored pink very plainly, as it appears to me, is shown to reach to the water's edge of the river, for by far the greater part of the extent of the piece of land It shows, as part of the river, what the plaintiff in his evidence describes as the channel completed by him in 1865 by the construction of a gravel bank in the bed of the river.

The plan seems to indicate this channel composing the space between the line shewing such gravel bank, and the piece shaded pink as part of the river *Maitland*. It may be that, and no doubt is, the fact, that the conformation of the south bank of the river along block F was different from what it was in 1859, when the plan by which the *Canada Company* sold to the *Buffalo & Lake Huron Railway Company* was registered.

Now, it is very plain that no part of this channel above the old head gates in the dam as authorized by the lease of July, 1859, and constructed in that year, comes within the description of the piece colored green, or of the mill-race, as described in that part of the deed to *Ross*, of the 3rd June, 1871, defining the mill-race which is excepted from the operation of that deed. If then this space between the gravel bank constructed by the plaintiff in the bed of the river and the piece of land shaded pink on the plan, is situate upon and forms part of block F, it passed to *Ross* by the express terms of the deed, and if it is not part of block F, it is part of the river *Maitland*, and if it constituted (as there is no doubt upon the evidence it always did for the greater part of the extent immediately above the plaintiff's old head gates) part of the river *Maitland*, then the piece shaded pink extending down to this water, the bed of the river *ad medium filum aquæ* would pass to *Ross*. So that, unless specially reserved the land covered with water flowing down between the gravel bank in the bed of the river and the piece shaded pink, and to the middle

thread of the river, would and did pass by the deed to *Ross*. Close up to the bridge for some little distance the river is plainly shewn to wash along the piece of land shaded pink, without any line whatever, similar to that lower down, indicating the gravel bank, and there is no indication whatever on the plan of there being any obstruction whatever across the river, where the stone structure or dam which the plaintiff claims the right of maintaining, was situtate, from which any argument in support of the contention that the right of maintaining such structure was intended to be reserved can be drawn. The plan rather shows the waters of the river as if they flowed in their natural course, save as they are confined by the gravel bank constructed in the bed of the river to the plaintiff's old head gates as described in the lease of the 4th July, 1859, and as constructed originally in the dam by that deed authorized.

Independently of the case of *Wheeldon* v. *Burrows* (1), relied upon by the learned counsel for the appellant as establishing that there can be no implied reservation from the deed to *Ross* of June, 1871, of the easements claimed by the plaintiff, it appears to me to be impossible to contend that that there can be any implied reservation of an easement of a water course as a race-way to a mill over a particular piece of land, when the deed in virtue of which the implied reservation is claimed contains, in very explicit and express terms, a reservation from the grant contained in the deed of a race-way to the same mill site in a wholly different place from that over which the race-way by implication is claimed to be reserved. The principle that *expressum facit cessare tacitum* seems to me to put that point beyond all question.

The effect then of the deed to *Ross* of June, 1871, was, as it appears to me, to convey to him the land down to the

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waters of the river *Maitland*, as of a piece of land abutting on the river free from any reservation of a right of maintaining the stone structure or dam across the river at the place where the stone structure or dam, which the plaintiff claims the right of maintaining, was situate, and free also from any right of easement in the race-way as claimed by the plaintiff; and from any right to affect the waters of the river above a dam constructed within the limits as prescribed or authorized by the leases of July, 1859, and November, 1866, other than in such manner as a dam constructed as thereby authorized would affect the river above it. But it was contended for the respondent that the race-way which the plaintiff now claims the right to enjoy for the purpose of conducting the waters of the river to this mill site, for the mill itself appears to have been burned down in 1872 and not since rebuilt, is the identical one which is described in the indentures of lease of July, 1859, and of November, 1866; that contention must be determined upon the true construction of those instruments, and, in my opinion, cannot be sustained. In support of this contention, the plaintiff was permitted to give evidence of conversations which he alleged that he had had with Mr. *Carter*, Managing Director of the *Buffalo & Lake Huron Railway Company*. This evidence was objected to on the part of the defendant, and, in my opinion, should not have been received as the effect, if effect should be given to such conversations, would be, upon oral statements of what had been said by a servant of the company, to put a construction upon indentures executed under the corporate seal of the company, which, in my opinion, would not be authorized by, but would be at variance with, what the deliberately prepared terms of those indentures express. But, even if admissible, the evidence of the plaintiff as to those conversations with Mr. *Carter*, if they ever did take place,

which appears to me to be more than doubtful, is not of such a nature that it would be at all safe to rely upon it or to attach any weight whatever to it.

They took place as alleged by the plaintiff in his examination in chief after the completion by him of the works executed in 1865, and after, as the plaintiff alleges, Mr. *Carter* was aware that the plaintiff had completed such work, but upon cross-examination he is obliged to admit that Mr. *Carter* left this country and went to *England* in 1864, when he ceased to be manager of the *Buffalo & Lake Huron Railway Company*. He then says that it was after Mr. *Carter* ceased to be manager of the company, that the plaintiff had the conversations spoken of with him; but he was in *England* in 1865, and, in so far as appears, he does not appear to have had any connection with the company since he left this country for *England* in 1864 when the lease of November, 1866, was executed to *Patterson*. The seal of the company was set thereto by the company's secretary, and that Mr. *Carter* was ever in this country after 1864 does not appear. If any part of the conversations alluded to did ever take place it can safely be said that they did not take place in or subsequent to 1864, and plaintiff can claim nothing which cannot be claimed under the indenture of lease of November, 1866, to *Patterson*. It is not necessary to criticise closely the plaintiff's evidence in relation to this matter, for upon no principle could the company or their assigns, the *Grand Trunk Railway Company*, be affected by any verbal statements of Mr. *Carter* to the plaintiff, even when he was the railway company's manager, in respect of a matter provided for in the indenture of lease to an extent not authorized by the terms of that indenture, but it appears to me that if Mr. *Carter* ever made any statement of the nature alleged by the plaintiff, it must have been prior to the erection of the dam, which was erected

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in 1859, at which time it would naturally relate to a dam to be constructed within the limits prescribed and authorized by the lease of July, 1859. It only remains to be observed that in February, 1873, nearly two years after the *Grand Trunk Railway Company* conjointly with the *Buffalo & Lake Huron Railway Company* had by the indentures of June, 1871, conveyed *The Big Meadow* to *Macdonald*, and that part of block F described in the deed to *Ross*, under both of whom the defendant now claims, it was not competent for the *Grand Trunk Railway Company*, even if so minded, to convey to *Patterson*, through whom the plaintiff claims, any easement, right or privilege, prejudicially affecting the lands so conveyed, not specially reserved in the deeds whereby such lands were respectively granted. Moreover the very precise manner in which the *Grand Trunk Railway Company* in the deed of February, 1873, describe the race-way thereby intended to be granted according to the identical metes and bounds stated in the indentures of lease of July, 1859, and November, 1866, plainly shows that they entertained no idea of granting any other or different race-way or easement than that mentioned in those indentures, and excepted from the grant to *Ross* contained in the indenture of 3rd June, 1871. This is also apparent from the plan annexed to the deed to *Patterson* of February, 1873, and which is therein referred to in the following terms: "all of which property covered by this indenture is shown on the plan annexed hereto." This plan shows no part of the race-way from near the bridge as claimed by the plaintiff, but does exhibit the race-way as described in the lease of July, 1859. The deed to *Patterson* of February, 1873, after the words "this indenture made the third day of February, in the year of our Lord, one thousand eight hundred and seventy ," has a blank left in which it is plain that by mistake the word "three" was

omitted to be inserted, for the plaintiff alleges in his bill, and it is admitted, that it was in fact executed in 1873 ; that it was executed after the deed to *Ross* of the 3rd June, 1871, appears from the deed itself, wherein the deed to *Ross*, granting to him that portion of block F conveyed to him by the deed of 3rd June, 1871, is referred to as having been previously executed.

Upon the whole, then, it appears to me that the plaintiff fails to show any title by grant of the easement as now claimed by him, and that the defendant has shown title, as well to the bed of the river abutting on one side thereof on the big meadow, and on the other on the part of block F, whereof the defendant is seised in fee, which title authorized him to remove the stone structure or dam across the river near the bridge, across the *Maitland*, the right of the plaintiff to maintain which constitutes the gist and substance of this suit. The plaintiff does not claim any title by prescription to maintain this obstruction in the river as a burthen upon the lands of which the defendant is so seised in fee, and if such a claim had been made, the evidence, in my opinion, wholly fails to support it; and of this opinion also was the learned Vice Chancellor. However, no such claim is made by the plaintiff.

For the reasons already given, I am of opinion that this appeal should be allowed, with costs, and that the plaintiff's bill should be ordered to be dismissed out of the Court of Chancery for *Ontario* with costs. It is unnecessary to grant to the defendant any thing as prayed by him by way of cross relief, beyond the relief which he obtains by dismissal of plaintiff's bill.

Appeal allowed with costs.

Solicitors for appellant: *Garrow & Proudfoot.*

Solicitors for respondent: *Cameron, Holt & Cameron.*

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*March 14.

*June 23.

WILLIAM PUNTON MUNN *et al*.....APPELLANTS;

AND

LEWIS BERGER & SONS (LIMITED)...RESPONDENTS.

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

Sale of Goods—Acceptance, evidence of—Parol admissible—Art. 1235 C. C. (P. Q.)

Held (reversing the judgment of the court below)—That in an action upon an unwritten commercial contract for the sale of goods exceeding the sum of $50, oral evidence of acceptance *or* receipt of the whole or any part of the goods, is admissible, under Art. 1235 C. C.

APPEAL from a judgment of the Court of Queen's Bench (appeal side) rendered on the 31st day of October last, confirming a judgment of the Superior Court at *Montreal*, rendered on the 9th of February, 1882, by the Honorable Mr. Justice *Papineau*, dismissing appellants' action for want of proof.

The action was brought by *William Punton Munn* and *Robert Stewart Munn*, doing business in *Newfoundland* under the name and style of *John Munn & Co.* The declaration sets forth the transaction as being carried out by *Lord & Munn*, as agents of *John Munn & Co.*, with the defendants acting by their agent *William Johnson*; that *Johnson* knew that *Lord, Munn & Co.*, were acting as agents of *John Munn & Co*, and that *Johnson* purchased the goods in question, barrels of steamed oil. The declaration sets forth further that *Johnson* wrote to *Lord, Munn & Co.* withdrawing his offer, as though it

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

had not been accepted; that *Lord, Munn & Co.* demurred to this, and that then *Johnson* authorized *Lord, Munn & Co.* to sell the oil for account of defendants. The defendants denied that they ever purchased the oil, or had any negotiation with the plaintiffs concerning the oil, or that they had contracted with plaintiffs as alleged in plaintiffs' declaration By a second plea defendants specially denied that *Johnson* was ever authorized by them, or that he had any authority to enter into the alleged contract on their behalf.

On the issues so raised the parties went to proof, and plaintiffs produced *James Lord*, a partner of *Lord, Munn & Co.*, as a witness. Without objection, *Lord* proved that *Johnson* was the agent of the defendants. He was then asked to state "What occurred on the occasion of "the visit of Mr. *Johnson* to your office (*i e.*, office of "witness), the 26th of May, 1878." Witness then related the propositions of *Johnson*, that *Lord, Munn Co.* telegraphed to plaintiffs their answer accepting, and that *Lord, Munn & Co.* then offered the oil as stated. Here defendants' counsel interposed an objection "to the witness proceeding to detail the conversation, if any, which occurred between him and Mr *Johnson* on this occasion, inasmuch as it is an attempt to prove by mere verbal conversation a contract for the sale of goods exceeding in value the sum of $50, without having first produced any memorandum in writing, or made any proof within the requirements of Article 1235, C. C." This objection was maintained and the ruling was excepted to.

On behalf of plaintiffs, witness was then asked: "Had you in store, on account of *Lewis Berger & Sons*, "a quantity of seal oil during the course of the summer "of 1880?" Objection was taken to this on similar grounds; the objection was maintained.

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Witness was then asked: "Did you or did the plaintiffs in this case deliver any oil that you had in your "possession for themselves; did they employ you to act "as agent for them to sell it?" The defendants also objected to this question. They contended it was irrelevant unless it was intended to get witness to say that his firm held the oil for defendants. Other questions, all seeking to elicit from witness answers to show that he had received verbal instructions to deal with the oil as if it were the property of defendants, stored with *Lord, Munn & Co.*, were put; but they were all objected to, and the objections maintained by the court unless some writing could be produced. The witness said there was no such writing. The plaintiffs then asked the following question: "Did "the defendants, by their agent, Mr. *Johnson*, exercise "any acts of ownership over the said oil so in store "during the months of July and August and September "of the year 1880, and if so, state what the said acts of "ownership were?" Objection was taken to this question, and the court instructed the witness that "if there is any writing to establish the said acts of ownership, he may answer." The witness says "there is no exercise of acts of ownership in writing." The court thereupon maintained the objection.

Thereupon the appellants asked that the case might be suspended in order to allow them to appeal from the rulings so made by the learned judge, declaring that it was impossible for them to proceed with the further examination of the witnesses, the evidence being virtually stopped.

The appellants applied to the Court of Queen's Bench on its appeal side, for leave to appeal from the said orders, but was refused such leave.

Thereupon the appellants had again to proceed, and being shut out from all evidence either of the contract,

or acceptance, or delivery, judgment was pronounced dismissing their action.

An appeal was taken from the final judgment of the Superior Court to the Court of Queen's Bench, appeal side, and by judgment rendered on 31st October, 1883, the said appeal was dismissed with costs.

Mr. *Kerr*, Q. C., for appellants :

The only question to be decided in this case is the following :

Can a plaintiff who seeks to recover damages, to the amount of $3,094.71 for breach of contract for the sale of goods exceeding in value $50, from the defendant (there being no writing signed by the defendant) establish by parol evidence that the defendant accepted or received part of the goods, or gave something in earnest to bind the bargain ?

The provisions of the Civil Code of *Lower Canada* governing this question are to be found in Arts. 1233 and 1235.

Previous to the Civil Code, the same proof that was admissible in *England* under the 17th section of the Statute of Frauds in all suits founded upon sales of goods was admissible in like suits in *Lower Canada.*

It remains, then, for the elucidation of the present question to enquire whether under the English Statute of Frauds parol testimony (there being no memorandum in writing) could have been admitted in any such suit to establish acceptance and receipt, part payment or earnest.

Under that section there can be no doubt that partial delivery and acceptance, payment, either in part or in whole, and earnest could and can be proved in *England* by parol testimony on a sale of goods, where no memorandum in writing had been signed by the party

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charged. And that such proof was and is sufficient to cause the contract to be held good (1).

In *England* and elsewhere a different meaning was and is attached to the words "accept" and "receive." In the 17th section of the Statute of Frauds they evidently did not mean the same thing, for as laid down by Lord *Blackburn* in his work on Sales (2): "As there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt—an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract and as so far satisfying the contract; the receipt of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them." *Campbell* on Sales and Com. Agents (3).

In Art. 1235 C. C., L. C., the words being "accepted or received," evidently mean that "accept" differs from "receive," and that the same act or process is not intended to be required by the use of the words in the alternative.

It is quite settled that the acceptance of the goods, or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one "of fact for the jury, not matter of law for the court." *Benjamin* on Sales (4).

The constructive acceptance by the buyer may properly be inferred by the jury when he deals with the goods as owner, when he does an act which he would have authority to do as owner, but not otherwise.

(1) Browne, Statute of Frauds, 315, 322 and 337, and cases there cited.

(2) Pp. 22 & 23.

(3) P. 169.

(4) 3rd ed., 130, 148, 149, and cases there cited.

It is also now finally determined that the goods may remain in the possession of the vendor, if he assume a changed character, and yet be actually received by the vendee. *Chaplin* v. *Rogers* (1); *Elmore* v. *Stone* (2).

By Art. 1235, C.C., L. C., it is provided that to maintain an action or exception founded on a sale of goods exceeding $50, a memorandum in writing is not required if the buyer "has accepted or received part of the goods."

Whilst thus under the Statute of Frauds acceptance and actual receipt of part of the goods sold by the buyer causes the agreement to be a binding contract, under Art. 1235 C.C., L. C., either acceptance or receipt produces the same effect.

It certainly is very extraordinary that the codifiers should have changed the wording of the 17th section of the Statute of Frauds when they incorporated it into Art. 1235, and yet that they should not, if any change in the law was intended to be effected, have distinguished the new provision in the usual manner.

Moreover, certain specific meanings had, by a long series of judgments, been attached to the words "accept" and "receive," and it would seem to be rash in the extreme to run the risk of unsettling the jurisprudence established for many years by changing the phraseology used in any portion of the provisions of the Statute of Frauds intended to be incorporated into Art. 1235.

The use of the word "or," however, between the words "accepted" and "received," in Art. 1235, in lieu of the conjunction "and" in s. 17 of the Statute of Frauds, cannot have changed the meaning of those words as settled by the courts. Nor can such use of the alteration be held to have prohibited the old mode of proof of either acceptance or receipt by parol testimony, and to have required proof in writing to establish such facts.

(1) 1 East 195. (2) 1 Taunt. 458.

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In conclusion I contend that the article in question, therefore, is productive of this effect, that the action or exception in such case cannot be maintained unless a writing, signed by the party, is proved, or part acceptance, part receipt, or earnest, given by the vendee is established by testimony; but any one of the requirements being fulfilled satisfies the article.

Such being the case, it is clear that, under the circumstances, where in the declaration there is an allegation of acceptance or receipt of the whole or any part of the goods, or earnest, the vendor cannot be prohibited from proving by testimony the agreement, the acceptance or receipt of the goods, or earnest, according to the allegations of his declaration. If he fails in establishing by such testimony one of such requisites, his action must be dismissed on the ground that the agreement was non-productive of an obligation; if, on the contrary, he establishes by such testimony either acceptance, receipt or earnest the agreement thereby was transformed into a contract productive of all the obligations arising from a contract of sale.

As, in old Roman law, the verbal, literal and real contracts required certain formalities over and above the mere agreement of the contracting parties; in the verbal, a form of words in the shape of a question and answer between the contracting parties; in the literal, an entry in a ledger or table-book; and, in the real, the delivery of the thing, ere the agreement was clothed with the obligation, so under the 17th section of the Statute of Frauds are partial acceptance and receipt, part payment, earnest, or a memorandum in writing, required to make the agreement good. And under Art. 1235 in like manner a memorandum in writing, partial acceptance, or delivery, or earnest, ripens the agreement into a contract.

Mr. *Tait*, Q.C., for respondents:

The appellants made no attempt to prove any tender of the goods to the respondents, or any sale of them, or that they sustained any loss or damage by the non-reception of the goods by the respondents.

The decisions of the courts below as to reception of the evidence should not be disturbed, because the appellants have not made out a case in which it is permitted to prove a contract of sale by verbal testimony under Art. 1235 C. C., P. Q.

The learned counsel also referred to *Campbell* on Sales (1).

RITCHIE, C. J.:

The appellants in this case offered to prove by verbal evidence the fact of the acceptance or partial acceptance by, and of delivery to, and the exercise of acts of ownership by the respondents over the oil sold, also to prove verbally the contract by witnesses, but the learned judge was of opinion that such acts could only be proved by writing, and the appellant being prevented from making such verbal proof, judgment was pronounced dismissing the action.

This being a commercial transaction, I think the judge should have allowed the questions proposed to the witnesses to be put and answered. I think the learned judge was in error in thinking that acceptance, or partial acceptance, or delivery, or the exercise of acts of ownership over the oil sold, could only be proved by writing. In *England* to make the sale good, the requisites of the statute of frauds not having been complied with, the buyer should "accept part of the goods so sold and actually receive the same." By article 1235 C. C. L. C. in sale of goods over $50 a memo. in writing is not required if the buyer "has accepted or received part of the goods, or given some-

(1) P. 169.

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thing in earnest to bind the bargain." It is quite clear to me that proof of acceptance, or receipt, or earnest given, may be by parol testimony, and proof in writing to establish such facts is not necessary. The witness should have been allowed to answer the questions proposed—we cannot anticipate what the answers would have been, or whether they would have sustained plaintiff's contention.

STRONG, J., concurred.

FOURNIER, J.:

Les faits de cette cause ont donné lieu à la question suivante : Dans un contrat de vente commerciale excédant $50, le démandeur, poursuivant en dommages pour refus d exécuter le contrat, peut-il faire la preuve testimoniale que le défendeur a accepté ou reçu une partie des effets vendus, ou qu'il a donné des arrhes pour rendre le marché obligatoire, lorsqu'il n'y a pas eu d'écrit signé par le défendeur ?

En matière de commerce, le principe général est, article 1233, que la preuve testimoniale est admise "de tout fait relatif à des matières commerciales," mais à ce principe il y a des exceptions, et entre autres celles de l'article 1235 : "Dans toutes les matières commerciales où la somme des deniers ou la valeur dont il s'agit excède cinquante piastres, aucune action ou exception ne peut être maintenue contre une personne ou ses représentants, sans un écrit signé par elle," dans les cas suivants entre autres : De tout contrat pour la vente d'effets, à moins que l'acheteur n'ait accepté ou reçu une partie ou n'ait donné des arrhes.

La règle qui précède a lieu lors même que les effets ne doivent être livrés qu'à une époque future, ou ne sont pas, au temps du contrat, prêts à être livrés.

Cet article est en substance la clause 17 du *Statute of*

Frauds, en force dans la province de *Québec* longtemps avant l'adoption du Code Civil. Dans l'application de ce statut on se conformait à la jurisprudence créée en *Angleterre* par de nombreuses décisions rendues sur son interprétation.

Cette clause 17, d'où est tiré notre article 1235, en diffère dans un point important; le statut impérial dit:

No contract for the sale of any goods, wares and merchandises for the price (value) of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall *accept* part of the *goods so sold, and actually receive the same*, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereto, lawfully authorized.

On voit par le texte de cette clause que l'acceptation et la réception de fait (*actual receipt*) sont toutes deux nécessaires pour faire admettre la preuve testimoniale, lorsqu'il n'y a point de memorandum signé par la partie que l'on veut rendre responsable. Telle a été la jurisprudence constante en *Angleterre*. En vertu de l'art. 1235 il n'en est pas de même, l'acceptation *ou* la réception d'une partie des effets suffit pour dispenser de la nécessité de produire un écrit. Cet article s'exprime dans l'alternative, en se servant de la disjonctive *ou*, au lieu d'employer la conjonction *et* comme dans le statut impérial. Il y a certainement là une grande différence, et ce langage est si clair qu'il est impossible de prétendre que le texte de l'article 1235 doit être lu comme le statut impérial qui emploie la conjonction entre les mots acceptation et réception.

Les mots acceptation (*acceptance*) et réception n'ont pas dans le *Statute of Frauds* la même signification; ils signifiaient évidemment dans l'intention du législateur deux choses différentes dont il exigeait le concours pour dispenser de la production d'un écrit. C'est l'opinion de Lord *Blackburn* dans son traité "*On Sales*" où il

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s'exprime comme suit sur la signification de ces deux mots (1):

As there may be an actual receipt without any acceptance, so there may be an acceptance without any receipt. An acceptance of part of the goods is an *assent* by the buyer meant to be fixed, that this part of the goods is to be taken by him as his property under the contract and as so far satisfying the contract—the receipt of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them.

Les codificateurs ont sans doute trouvé dans cette différence entre l'acceptation et la réception un motif suffisant pour admettre que l'existence de l'une ou de l'autre aurait le même effet que la réunion des deux en vertu de la clause 17 du *Statute of Frauds*. On ne peut en conséquence refuser de donner effet au changement introduit par l'article 1235. Toutefois le code en n'exigeant que l'acceptation ou la réception, et en donnant un même effet légal à l'un ou à l'autre, n'en a pas changé la signification établie par la jurisprudence, ni modifié le mode d'en faire la preuve, suivi par cette jurisprudence, qui admettait la preuve testimoniale de l'*acceptance and actual receipt*. Le code sous ce rapport n'a point modifié cette jurisprudence, il n'y est dit nulle part dans l'article 1235 que la preuve de l'acceptation ou de la réception de partie des effets devra être faite par écrit—au contraire, lorsque l'une ou l'autre de ces deux conditions existe, il dispense de l'obligation de produire un écrit, comme dans le cas où des arrhes ont été donnée. Si, comme je le crois, cette interprétation est correcte, la preuve testimoniale de l'acceptation ou réception de partie des effets vendus, tel que allégué dans la déclaration, peut être reçue.

HENRY, J.:

This is an action to recover the price of a quantity of

(1) Pp. 22-23.

oil alleged to have been sold and delivered by the appellants to the respondents. The contract set out in the declaration was not in writing, and the respondents refused to complete the purchase. The declaration alleges an acceptance of a portion of the oil, the storing of it by the agents of the appellants at the request of the agent of the respondents, and the sale of a part of it by the same direction. At the trial the appellants, having proved the contract for the sale, were proceeding to adduce oral evidence, when the learned judge before whom the cause was tried, on objection raised on the part of the respondents, decided that, under the terms of the Civil Code, the evidence of acceptance or delivery must be proved by a writing signed by the party to be affected by it; and, rejecting the oral evidence tendered, dismissed the action with costs. On appeal to the Court of Queen's Bench, the judgment of the court of first instance was affirmed, with costs, and from the latter judgment the case came by another appeal to this court; and having been argued it awaits our judgment. The only question before us is as to the ruling of the learned judge in rejecting the evidence in question.

By the article of the Civil Code applicable to this case (1235), it is provided as follows:

> In commercial matters in which the sum of money or value in question exceeds fifty dollars no action or exception can be maintained against any party or his representatives, unless there is a writing signed by the former in the following cases. 4. Upon any contract for the sale of goods, unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain;—the foregoing rule applies, although the goods be intended to be delivered at some future time, or be not at the time of the contract ready for delivery.

What then, is the meaning of the second proviso? The first part of the article provides that no action or exception can be maintained on a contract, the amount of which exceeds fifty dollars, unless it is in writing

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and signed by the proper party, and the effect of the second proviso is to except from the operation of the first provision of the article cases where the buyer has accepted or received part of the goods, or given something to bind the bargain. The articles were adopted from sec. 17 of the English statute of frauds; but in one important respect they differ. Under the latter there must be a delivery out of the possession and control of the vendor, so as to destroy his (vendor's) lien; for the continuance of such lien necessarily implies that he retains the possession. By a proper and legitimate construction of the provision in the code the "acceptance" or "delivery" of part of the goods is sufficient. The words admit, I think, of no other construction.

It is not necessary to constitute an acceptance and delivery under the statute of frauds that the position or location of the goods should be changed. In *Kershaw* v. *Ogden* (1), it was decided that, though the goods remain in the personal possession of the vendor, yet, if it is agreed between the vendor and vendee, that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute. Numerous cases have been decided in *England* on the same principle.

Roscoe, in his work on Nisi Prius Evidence (2), says:

> There need not be an actual delivery, but there may be something tantamount. Such as the delivery to the buyer of a key of the warehouse in which the goods are lodged or the delivery of other *indicia* of property.

Lord *Kenyon*, C. J., in *Chaplin* v. *Rogers*, says (3):

> And this is evidence of acceptance as well as delivery.

A written order given by the seller of goods to the buyer, directing the person in whose care the goods are

(1) 3 H. & C. 717, and 34 L. J. Ex. 159.
(2) P. 478.
(3) 1 East 192, 195.

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to deliver them, is a sufficient receipt within the statute, provided the person to whom it is directed accept the order for delivery and assent to hold the goods as the agent of the buyer. See *Searle* v. *Keeves* (1); *Bentall* v. *Burn* (2); and *Salter* v. *Woollams* (3).

The declaration contains allegations that the oil in question on arrival at *Montreal* was taken out of the ship and stored by the directions of the agent of the respondent, who told the latter that he would be satisfied to receive the same on the then present gauge and inspection, and would not require it to be re-gauged on delivery. Shortly after the storage of the oil, the agent of the appellants at *Montreal* was requested by the agent of the respondent to sell it at a certain named price, and he, acting on such instructions, sold a portion of it at the price so fixed by the agent of the respondents. The appellants should have been permitted to give oral evidence of these facts as showing an acceptance of the oil and a delivery also. I think that such evidence was admissible under the article of the code to which I have referred, and, that as such evidence was improperly rejected on the trial, I think the judgment of the Superior Court dismissing the appellants action and that of the Court of Queen's Bench affirming it should be set aside and a new trial granted with all costs.

GWYNNE, J.:—

I also am of opinion that this appeal must be allowed. In an action upon a contract for the sale of goods exceeding the sum of $50, where there is no written contract, oral evidence of the acceptance of the goods by the defendants, is as admissible under article 1235 of the C. C. of the Province of *Quebec* as it is under the provisions of the Statute of Frauds in *England*. The

(1) 2 Esp. 598.
(2) 3 B. & C. 426.
(3) 2 M. & Gr. 650.

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evidence, therefore, which was tendered by the plaintiffs for the purpose of proving acceptance by the defendants in this case should have been received. Whether the evidence, when received, shall prove to be sufficient to entitle the plaintiffs to recover in this action, is a question with which we cannot be in a position to deal until we shall see what the extent of the evidence is.

Appeal allowed with costs.

Solicitors for appellants: *Kerr & Carter.*

Solicitors for respondents: *Abbott, Tait & Abbott.*

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*May 3.

*June 18.

J D. E. LIONAIS *et al*.....APPELLANTS;

AND

THE MOLSON'S BANK ....RESPONDENT.

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

Will, construction of—Executor, powers of—Prohibition to alienate —Art. 972 C. C., P. Q.—Document not proved or produced at trial—Inadmissible on appeal.

By the 3rd clause of her will, *H. M.*, the testatrix, disposed of all her property, movables, and immovables, in favor of her children as universal legatees. The legacy was subject to the extended powers of administration conferred by the 5th clause of the will (referred to in the statement of the case) and also to the power to alter the disposition in favor of the testatrix's children given by the same clause to her husband *H. L.*, the executor, and also by the will the executor was exonerated from the obligation of making an inventory and rendering an account. *H. L.*, in his quality of testamentary executor and administrator to the estate of the said *H. M.*, endorsed accommodation promissory notes signed by *C. L.*, one of his children, and "The

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

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M. Bk." (respondent), as holder thereof for value, obtained judgment against both the maker and indorser. An execution was subsequently issued against *H. L., esqualité*, and certain real estate of the late *H. M.*, which he detained in his said capacity was seized and advertized for sale. *J. D. L. et al* (the appellants), who are the only children of the defendant *H. L.*, and his wife, opposed the sale of the property seized on the ground that the said property was *insaisissable.*

Held (reversing the judgment of the court below, *Taschereau* and *Gwynne*, JJ., dissenting)—that the endorsements were not authorized by the will, and that the clause in the will, exempting the property of the testatrix from execution, is valid, and must be given effect to. Art. 972, C. C.

Held also : That a document which has not been proved nor produced at the trial cannot be relied on or made part of the case in appeal.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) (1), confirming the judgment of the Superior Court, dismissing the appellants' opposition.

The respondents, the *Molson's Bank*, obtained judgment against the maker and the endorser of certain promissory notes drawn by *E. H. Charles Lionais*, and endorsed by *Hardoin Lionais*, in his quality of executor to the last will and testament of his deceased wife, *Henriette Moreau*, mother of said *E. H. Charles Lionais*, the amount being for $8,963.83, besides interest and costs.

On the 25th February, 1879, the bank sued out a writ of execution, and under it seized certain properties pertaining to the estate of *Henriette Moreau.*

The appellants, *J. D. E. Lionais* and others, the only children of the marriage of *Hardoin Lionais* and *Henriette Moreau*, made an opposition to this seizure, claiming the properties as theirs under their mother's will, which, besides constituting them universal legatees, provided that the properties should be *insaisissable*,

(1) 26 L. C. Jur. 271.

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and not liable for any debts created by the said *Hardoin Lionais*, nor for any debts whatsoever, save those which had been created by the testatrix herself under her own signature, and concluded for the nullity of the seizure.

The respondents contested the opposition, alleging : That the will of *Dame Henriette Moreau*, besides investing *Hardoin Lionais* with the powers of an administrator, confers on him certain other powers of division of the property which are described in the will. And the respondents further alleged : That for thirty years past, *Hardoin Lionais* has, by unlawful and fraudulent means, put out of the reach of his creditors all what he owned, and that acting in concert with his wife he has transferred to the latter all the profits on the speculations which he has made, and which constitute the forty-nine fiftieths of the property left by Mrs. *Henriette Moreau.* That the latter's intention in making her will was to practically leave to her husband the control of her property, but in such a manner as to prevent her husband's creditors from seizing it *de pleno jure* and without discussion. That the clause of *non saisissabilité* is therefore without importance, and that the property may be seized on *Hardoin Lionias* himself as if he was the lawful owner and the universal legatee of said estate.

The appellants answered : That the property left by *Dame Henriette Moreau* belonged to herself in full ownership, and is *insaisissable* under the terms of her will. That the allegation of fraud and complicity of fraud between the testatrix and her husband, is false, ill-founded and expressly denied, and made through malice, and the opposants reserve their right to have it struck out from the proceedings.

Issue being joined, the parties went to proof, and the respondents made the following admissions :—

1st. That the appellants were the only children of the late Mrs. *Henriette Moreau.*

2nd. That the said Mrs. *H. Moreau* is deceased.

3rd. That her last will fyled has been duly registered with a declaration of her death.

4th. That the debt for which the judgment in this case has been rendered was contracted by *Charles Lionais,* after the death of the said dame *Henriette Moreau.*

5th. That the real estate or immovable property seized in this cause formed part of the estate belonging to the said Mrs. *Henriette Moreau.*

The appellants' opposition was dismissed by judgment of the Superior Court on the 13th September, 1880, and that judgment was affirmed by the Court of Queen's Bench for *Lower Canada* (appeal side).

The material provisions of *Henriette Moreau's* will are in the terms following:—

"Article 3me.—Je donne et je lègue tous mes biens, meubles et immeubles, propres et acquêts, meubles meublant, argenterie, dettes actives, créances, actions ou parts de banques, deniers comptants, valeurs, cédules et obligations et toutes autres choses généralement quelconques que je delaisserai à mon décès, sans en rien excepter ni réserver, de quelque nature qu'ils soient, et en quelque lieu et endroits qu'ils se trouvent dus et situés, aux enfants issus de mon mariage avec le dit *Hardoin Lionais,* mon époux, et en cas de prédécès d'aucun d'eux, aux enfants nés du ou des predécédès en légitime mariage, par réprésentation.

"A l'effet de quoi, je les institue mes légataires universels en propriété et jouissance, sujet, toutefois, aux restrictions et conditions exprimées en l'article 5me ci-après.

"Article 4me.—Et pour exécuter mon présent testament je nomme et choisis le dit *Hardoin Lionais,* mon

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époux, mon exécuteur testamentaire, ès-mains duquel je me desaissis de tous mes biens, lui en donnant la saisine durant et audelà de l'an et jour, et pendant tout le temps que durera l'administration de mes dits biens, sans être tenu de donner un cautionnement, ni de faire inventaire, ni même de rendre compte.

"Article 5me.—Je nomme mon dit époux, *Hardoin Lionais*, administrateur de tous mes dits biens, tant en propriété qu'en usufruit, avec pouvoir de les vendre, céder, échanger, hypothéquer, aliéner ou autrement en disposer, soit en propriété, soit en usufruit, fruits et revenus, l'autorisant à faire, signer, et exécuter tous billets, chèques, obligations, reçus, quittances et tous autres actes et documents requis et généralement à faire tous actes de la plus entière administration, sans qu'il soit besoin, en aucun cas, d'autorisation préalable des cours de justice, ni du consentement ni de l'intervention de mes héritiers ou aucune d'eux.

"Et pour les fins de cette administration, je veux et entends que mon dit époux, ès-dites qualités, soit revêtu et je le revêts et l'investis des mêmes droits, pouvoirs et autorisation qui lui sont conférés dans et par la procuration générale que je lui ai accordée le sept de juillet mil huit cent cinquante-quatre, par acte reçu devant Mtre *L. A. Moreau* et son confrère, notaires, et ce, d'une manière aussi parfaite que si toutes et chacune des clauses insérées dans ma dite procuration formaient partie intégrale de mon présent testament; mon désir étant que, sous le titre d'administrateur et exécuteur testamentaire, il continue à exercer et exerce à l'avenir et après ma mort, les mêmes droit et pouvoirs qu'il a en vertu de ma dite procuration, laquelle je ratifie et confirme dans tout son contenu, ainsi que tous les actes, transactions, procédures, et généralement tout ce qu'il a déjà fait et exécuté et tout ce qu'il fera à l'avenir, avant et après mon décès, en vertu de cette même pro-

curation et en vertu des présentes ; voulant que toutes choses faites et accomplies par mon dit époux, ès-dites qualités, aient leur plein et entier effet, et qu'elles soient suivies et exécutées selon leur forme et teneur, sans division ni discussion.

"Et subsidiairement, je désire que mon dit époux, ès-dites qualités, après mon décès, fasse la disposition et le partage de la totalité ou de partie de mes biens, tant en propriété qu'en usufruit, fruits et revenus comme il le jugera convenable, et dans le temps qu'il lui paraîtra opportun, lui donnant toute la latitude possible dans et pour l'administration de mes dits biens et leur aliénation et disposition, et laissant entièrement à sa discrétion la manière de retirer et percevoir, placer et employer les fruits et revenus et intérêts provenant de mes dits biens, ainsi que les capitaux d'iceux, et le soin de pourvoir, comme il entendra, au soutien, à la subsistance, à l'éducation et à l'établissement de tous ou chacun de mes enfants, et lui donnant l'autorité et le pouvoir de léguer et partager mes dits biens ou portion d'iceux, selon ce qu'il jugera à propos, à et entre tous mes dits héritiers ou aucun d'eux soit par testament, donation, entrevifs ou autre disposition testamentaire ou autrement, à sa discrétion ; ma volonté étant que mon dit époux, ès-qualités, ne soit aucunement lié dans ses opérations par les termes dans lesquels est conçu l'article troisième ci-dessus écrit, lequel article ne peut et ne pourra, en aucun cas, être interprêté comme conférant un droit absolu d'hérédité en faveur d'aucun de mes dits héritiers, mais uniquement un droit éventuel sujet aux dispositions libres de mon dit époux, ès-qualité.

"En sorte que mes dits héritiers ne pourront, en tout état de choses, prétendre qu'à ce que mon dit époux, ès-qualités, décidera de leur accorder respectivement ou à aucun d'eux, si, toutefois, il juge à propos de le faire, dans la proportion qu'il jugera convenable, et à l'époque

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qu'il croira la meilleure, et à sa discrétion, sans que mes dits héritiers ou aucun d'eux ne puissent jamais réclamer et revenir contre les actes, opérations et dispositions de mon dit époux, ès-qualité, que je laisse entièrement libre sous tous rapports.

" Et ma volonté est que mes dits bien, tant en propriété qu'en usufruit, capitaux, fruits et revenus, tant meubles qu'immeubles, soient et restent insaisissables, et ne puissent être saisis, vendus et décrétés ou l'un ou l'autre, que pour les dettes propres de ma succession, c'est-à-dire ; celles auxquelles j'ai ou aurai souscrit ou serai partie, et pour nulles autres dettes.

" Cette administration et exécution, mon dit époux les conservera sa vie durante, sans être tenu de donner caution ni de rendre aucun compte de sa gestion et de ses operations, ce dont je le dispense entièrement tant envers mes héritiers ou aucun d'eux qu'envers toutes autres personnes que ce soit, lesquelles ne pourront aucunement le troubler ou l'iniquiéter à cet égard."

The questions to be determined on the appeal were:

1. Whether the property seized belonged to the defendant *Hardoin Lionais* himself, or to the opposants, *J. D. E. Lionais et al.*, children of *Hardoin Lionais* and *Henriette Moreau*, deceased, and

2. Whether, if not the property of *Hardoin Lionais*, it could be affected by endorsement of his, in his quality of executor upon promissory notes, drawn by *E. H. Charles Lionais* ?

Mr. *Barnard*, Q.C., on behalf of the respondents, applied for leave to produce, as forming part of the case, a copy of the power of attorney mentioned in the will for the purpose of showing that the power of endorsing notes was one of the powers specially contained in it. The court held that as it did not form part of the proceedings in the court below, it could not be made a part of the case on the present appeal.

Mr. *Doutre*, Q.C., for appellants; and Mr. *Barnard*, Q.C., and Mr. *Creighton*, for respondents.

The arguments of counsel sufficiently appear in the judgments hereinafter given. In addition to the cases referred to in the judgments the learned counsel for the appellants cited and commented on the following cases and authorities:—*Troplong* on Donations (1); *Sirey* (2); *Furgole* (3); *Demolombe* (4); *Aubry & Rau* (5); *Esdaile* v. *Lanouze* (6). And the learned counsel for the respondents cited and relied on the following cases and authorities:—*The Ontario Bank* v. *Lionais* and *Lionais* opposant (7); *The Union Bank* v. *Lionais* and *Leman et al T. S.* (8); *Ricard* on Donations (9); *Delvincourt* (10); *Demolombe* (11); *Aubry & Rau* (12); *Demolombe* (13); *Hutchinson* v. *Tenant* (14); *Rolland de Villargues* Substitutions Prohibées (15); and in *Thomson's Estate, Herring* v. *Barrow* (16).

RITCHIE, C. J.:—

The judgments of the dissentient judges in the Court of Queen's Bench, particularly that of Mr. Justice *Cross*, commend themselves to my mind. My brother *Fournier* has kindly permitted me to peruse the judgment he is about to deliver and with which I entirely concur. I feel that I can add nothing with advantage to the points discussed by him.

If we look at the plaintiff's pleadings we find that the first contention is, that the property was really the property of the father colorably and fraudulently in the

(1) Nos. 541 & 548.
(2) 11 vol. p. 132.
(3) 4 vol., ch. 10, s. 4, No. 13.
(4) Vol. 22, Nos. 5 & 55.
(5) 7 vol. p. 450.
(6) 1 Younge Exch. 394.
(7) 1 Legal News 279.
(8) Not reported.
(9) 2 Part., 2 Glose 7, p. 411, No. 86 & Seq.
(10) 2 vol. p. 358.
(11) 16 vol. No. 358 & Seq.
(12) 7 vol. pp. 451 & 457.
(13) 22 vol. No. 118.
(14) 8 Ch. D. 540.
(15) Ed. 1835, p. 328.
(16) 13 Ch. D. 144.

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hands of the wife to keep it from the hands of the husband's creditors—this was abandoned. Then, that by the will the husband was the absolute proprietor, his wife having made him *son legataire universel purement et simplement.* This Mr. Justice *Fournier* has conclusively disposed of. Then, that this was an administration authorized by the will in accordance with the provisions of the will; this has likewise been conclusively disposed of by Mr. Justice *Fournier.* These then are all the objections set up in the pleadings. It is now said that the opposants should have produced the power of attorney, as it may have authorized the father to endorse and bind the succession. In addition to the fact that plaintiff does not in his pleadings take this ground, nor rely on anything in the power of attorney to justify the endorsement, nor even refer to it, the objection is to my mind conclusively met by referring to the terms of the will which provide with reference to the power of attorney that it is given only for the purposes of the administration, the words are :—

Et pour les fins de cette administration je veux et entends que mon dit epoux ès-dites qualités soit revêtu, et je le revets et l' investis des mêmes droits, pouvoirs et autorisation qui lui sont conferés dans et par la procuration générale, que je lui ai accordée le sept de juillet mil huit cent cinquante-quatre par acte reçu devant Mtre. *L. A. Moreau* et son confrère notaires.

As Mr. Justice *Fournier* says, these endorsements were not authorized by the will and were clearly not made with a view or in course of administration of the estate, and the power of attorney could give no such power as to enable the executor to bind the estate for matters *dehors* the estate and its administration, as to do so would be directly contrary to the provisions of the will and misappropriation of the funds of the estate.

STRONG, J. :—

It seems very clear that the appellants were not

bound to proceed by way of "*tièrce opposition*" attacking the judgment. They were neither parties to the action in which the judgment was recovered nor were they represented in that action. The judgment is therefore as regards them *res inter alios acta* and, as it has been said, no more affects their rights than a piece of blank paper would have done (1).

They are to all intents and purposes "*tiers*" as regards this judgment, which has not the effect of *chose jugée*, as regards them, and they are therefore like every third party, whose property is seized under an execution founded on a judgment to which he is not either personally or by representation a party, entitled to maintain an opposition to the seizure in order to have it annulled. No doubt Art. 910 C. C. P. of *Quebec* would have authorized an opposition to the judgment, but the very terms of that article show that it is facultative and not restrictive. This point was not taken in the factum of the respondent and it was not insisted on by the learned judges in the court below, but as it is considered fatal by some of my learned brothers in this court, it was incumbent on me to consider it, which I have done, with the result just indicated.

Upon the merits I have come to the same conclusion as that arrived at by the dissenting judges in the Court of Queen's Bench. The question to be decided is entirely one of interpretation. By the 3rd clause of her will the testatrix disposes of all her property, moveables and immoveables in favor of her children as her universal legatees. This legacy is, however, subject to the extended powers of administration conferred by the 5th clause of her will, and also to the power to alter the disposition in favor of the testatrix's children given by the same clause to her husband, *Hardoin Lionais*, the executor. It is clear, however, that if the executor

(1) Doutre 2 Proc. Civ. No. 653.

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should not exercise the power of making a different division of the property from that made by the testatrix herself in the third clause, but should die without having either by act *inter vivos* or by testament altered that disposition, the children will take the property in equal shares by force of the direct gift thus made to them by the testatrix herself.

I cannot agree that the executor has anything more than powers of administration, greatly extended, no doubt, beyond those which the law would have given him, but still powers of disposition and administration merely, as distinguished from either property or *usufruct* in himself. It is impossible, therefore, consistently with this view to concur in the opinion of those who hold that *Hardoin Lionais* had the right to dispose of the property of the testatrix beyond the express power of disposition in favor of his children given him by the will. It is true that the will exonerates him from the obligation of making an inventory and rendering an account. But these dispensations are insufficient to constitute a gift of the property in his favour, they do not make him a legatee. Although relieved from the obligation of furnishing an account, he would still be liable to the heirs or universal legatees, if he made any fraudulent disposition of the property, and would be bound at the close of his administration to hand over the residue of the estate to those beneficially entitled (1).

Then the question arises, whence is the power derived to bind the estate to the prejudice of the heirs by the endorsements which *Hardoin Lionais* made for the accommodation of his son *Charles?* Not from the law, for it is clear that no such authority is incidental to the powers conferred by the articles of the code, which define the authority of testamentary

(1) Pothier Don. Test. 229; 14 Laurent 386, 387, 388.

executors. If any such power exists, it must, therefore, be found in the express provisions of the will. Then to which of these provisions is it to be referred? It is out of the question to say that it is comprised in the duty which the testatrix has devolved upon the executor of providing for the subsistence, education and establishment of the children. Endorsing accommodation bills is surely not within any of these provisions. The establishment of a child means setting him forth in the world, and *Charles Lionais* was a man already extensively engaged in business on his own account, when his father endorsed the notes in question. Further, the pledging the credit of the estate contingently and conditionally, by a cautionary obligation, such as that undertaken by an accommodation endorser, cannot possibly be considered as a proper mode of establishing or advancing a child, and cannot therefore be presumed to have been contemplated by the will.

There only remains the power to make a division of the property which is contained in these words:

Et subsidiairement, je désire que mon dit époux ès-qualités, après mon décès, fassè la disposition et le partage de la totalité ou de partie de mes biens, tant en propriété qu'en usufruit, fruits et revenus, comme il le jugera convenable et dans le temps qui lui paraîtra opportun, lui donnant toute la latitude possible dans et pour l'administration de mes dits biens, et leur aliénation et disposition, et laissant entièrement à sa discrétion la manière de retirer et percevoir, placer et employer les fruits et revenus et intérêts provenant de mes dits biens ainsi que les capitaux d'iceux, et le soin de pourvoir comme il l'entendra au soutien, à la subsistance, à l'éducation et à l'établissement de tous ou aucun de mes enfants, et lui donnant l'autorité et le pouvoir de léguer et partager mes dits biens ou portion d'iceux, selon ce qu'il jugera à propos, à et entre tous mes dits héritiers eu aucun d'eux soit par testament, donation entre-vifs ou autre disposition testamentaire ou autrement à sa discrétion; ma volonté étant que mon dit époux ès-qualité, ne soit aucunement lié dans ses opérations et dispositions par les termes dans lesquels est conçu l'article troisième ci-dessus écrit, lequel article ne peut et ne pourra en aucun cas, être interprêté comme conférant un droit

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absolu d'hérédité en faveur d'aucun de mes dits héritiers, mais uniquement un droit éventuel, sujet aux dispositions libres de mon dit époux, ès-qualité.

En sorte que mes dits héritiers ne pourront, en tout état de choses, prétendre qu'à ce que mon dit époux, ès-qualité, décidera de leur accorder respectivement on à aucun d'eux si toutefois il juge à propos de le faire, dans la proportion qu'il jugera convenable, et à l'époque qu'il croira la meilleure, à sa discrétion, sans que mes dits héritiers ou aucun d'eux ne puissent jamais réclamer et revenir contre les actes, opérations et dispositions de mon dit époux ès-qualité, que je laisse entièrement libre sous tous rapports.

Et ma volonté est que mes dits biens, tant en propriéte qu'en usufruit, capitaux, fruits et revenus tant meubles qu'immeubles soient et restent insaisissables et ne puissent être saisis, vendus et décrétés, ou l'un ou l'autre, que pour les dettes propres de ma succession, c'est-à-dire, celles auxquelles j'ai ou aurai souscrit ou suis ou serai partie, et pour nulles autres dettes.

The fair meaning and interpretation of the provision of the will appears to me to authorize only a direct disposition in favour of the children of the testatrix, either by testament, donation *inter vivos*, or in some analogous manner, and if it stood alone, and the construction which I put upon it was not, as I think it is, greatly strengthened by other parts of the will, I should be prepared to hold that the executor was not empowered to carry out the dispositions which the testatrix left him free to make by undertaking cautionary obligations for the benefit of one of the children.

When I find, however, that the testatrix has explicitly declared that her property, moveable as well as immoveable, shall not be liable to execution for any debts except the proper debts of her succession, which she further explains to be those which she shall have herself subscribed, or to which she was or should become a party, it seems to me that she has by express words prohibited her executor from conferring benefits on the children or any of them in the indirect manner insisted on by the respondent here, viz.: by the endorsement of accommodation bills to be paid out of the funds of the

estate, in case the party principally liable should make default in paying them; for it is impossible to give effect to this provision of the will without accepting it as equivalent to a declaration that such endorsements as those in respect of which this judgment was recovered should not bind the estate. But even granting that the pretentions of the respondents were so far well founded as to require us to hold that an indirect benefit of this kind was *intra vires* of the executor, I should still be unable to acquiesce in the result at which the courts below have arrived.

It would even in that case still be necessary to show that the executor intended to exercise the power to give conferred upon him. But how could it be said that any such intention is apparent in the present case? There is no pretence for saying that the executor ever made any express declaration of an intention to execute the bounty of the testatrix in this irregular manner. Nor is anything shown to warrant the presumption of fact that the executor in endorsing the notes in question intended conditionally or contingently, in case he was called upon to pay them, to appropriate a portion of the estate corresponding in amount to *Charles Lionais*. In point of fact no such intention could be presumed, for the plain reason that the notes were endorsed in reliance on the credit and solvency of *Charles Lionais*, and in the expectation that he would pay them; and it was not contemplated that the estate would be called upon to make good the undertaking of the executor. As to any legal presumption of such an intention, none can be suggested sufficiently supported by either principle or authority to call for any argument in refutation. Then a fair test by which to ascertain whether the endorsements were, in fact, made with the intention of exercising in favour of *Charles Lionais* the liberality with which the testatrix had entrusted her executor, is to

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ask this question; could *Charles Lionais*, if his father had thought fit to pay and to retire the notes, and had so done, and had then sued him upon them, have opposed any defence founded on the will to such an action by the executor? It is manifest from the facts in evidence that he could not, but on the contrary that *Charles Lionais* would, if the notes were to be now taken up by the executor, be liable to have judgment recovered against him by the executor for their amount—at least so far as such an action has not been prescribed. This consideration, seems to me, to show conclusively that the endorsement can not be considered as a donation to *Charles Lionais* out of the testatrix's estate to the amount of the notes, and if it cannot be said to be a donation or exercise of liberality authorized by the will, the executor had no more power to bind the estate for debts of *Charles Lionais* than for those of any stranger.

Therefore the direct proof being all against the existence of any such intention, there is nothing to show that the executor, even if he had had power to give in such an indirect manner, ever intended so to exercise the powers conferred on him by the will.

Lastly, I am of opinion with Mr. Justice *Cross* that Art. 972, by itself and independently of the preceding considerations as to the powers of the executor, is a sufficient ground for maintaining this opposition, and that, by force of the express terms of the article referred to, the clause in the will exempting the property of the testatrix from execution is valid and must be given effect to.

As regards the power of attorney. That is not proved nor produced, and it is out of the question to say that it can make any part of the case against the present appellants upon the opposition which they have formed to the seizure. The judgment itself is *res inter alios acta* as regards them, and if they are not bound by the judg-

ment, they certainly cannot be bound upon the mere presumption as to the terms of a document not to be found in the record of which the judgment forms part. Had the opposants been put in cause in the original action, and had this power of attorney been traced to their possession, then on their refusal to produce it, a presumption as to its contents might perhaps have been made against them, but it does not appear ever to have been in their possession, and if it was they have never declined to produce it. Had it been proved on the contestation of the opposition, it might, if its terms had been sufficiently extensive, have warranted the Court in maintaining the seizure, but no reference appears to have been made to it, so I regard it as entirely out of the case.

I am for reversing the judgments appealed against with costs in both the Courts below, and for maintaining the opposition with costs.

FOURNIER, J. :—

Bien que dans cette cause il ne s'agisse que d'une question d'interprétation de quelques clauses d'un testament, il est cependant nécessaire à cause d'une objection faite à la procédure adoptée par les appelants, de donner un exposé des plaidoiries au moyen desquelles les parties ont lié contestation, afin de s'assurer si les questions a décider ont été régulièrement soumises.

La Banque *Molson*, intimée, a obtenu contre le défendeur en cette cause, *Hardoin Lionais*, un jugement pour la somme de $8,963.83, montant de certains billets promissoires qu'il avait endossés en qualité d'exécuteur testamentaire et administrateur de la succession de dame *Henriette Moreau*, son épouse décédée,—ainsi que contre *E. M. Charles Lionais*, le faiseur de ces billets.

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En exécution de ce jugement, l'intimé a fait saisir sur le défendeur *Hardoin Lionais* des immeubles dont il est en possession en sa qualité susdite.

Les appelants, seuls enfants du défendeur *Hardoin Lionais* et de son épouse, dame *Henriette Moreau*, ont par opposition demandé la nullité de cette saisie en se fondant sur le testament de leur mère contenant les clauses suivantes qui ont donné lieu à la contestation en cette cause (1).

Les appelants allèguent que dame *Henriette Moreau* est décédée à *Montréal*, le 21 décembre 1874, sans avoir révoqué son testament, lequel a été enregistré avec un certificat de son décès, le 30 décembre, même année.

Qu'en sa qualité d'exécuteur testamentaire et d'administrateur, le dit *Hardoin Lionais* a pris possession de toutes les propriétés délaissées par sa dite épouse et les a administrées,—que dans le cours de son administration, il a outre passé ses pouvoirs, et qu'il a sans autorité endossé les billets promissoires sur lesquels a été rendu jugement en cette cause contre lui;

Que la dite *Henriette Moreau* n'a jamais endossé les dits billets,—ni contracté les dettes pour laquelles les dits billets ont été donnés,—que les dites dettes, non plus que les dits billlets, n'ont été faits pour l'avantage de sa succession, mais bien au contraire à son détriment.

Qu'ils sont les seuls enfants issus du mariage de dame *Henriette Moreau* avec *Hardoin Lionais*, et, par conséquent, les seuls légataires universels en pleine propriété et en usufruit de sa succession, intéressés à la conservation des dits biens et à faire déclarer que la saisie d'iceux est nulle et illégale, attendu que les biens de la dite succession sont, par les termes de son testament déclarés *insaisissables*, et qu'ils ne peuvent être saisis et vendus que pour les dettes contractées par la

(1) Ubi supra pp. 529 & seq.

dite *Henriette Moreau* elle-même, ou pour l'avantage de sa succession, tandis que la dette pour laquelle a été rendu le jugement sur lequel est fondée la saisie n'est pas une de ces dettes.

L'intimée a plaidé à cette opposition que le testament de dame *Henriette Moreau*, en outre des pouvoirs d'exécuteur testamentaire et administrateur, confère à *Hardoin Lionais* le pouvoir de disposer de sa succession en la manière indiquée dans les clauses ci-dessus citées. Elle allègue de plus que pendant au moins trente ans *Hardoin Lionais* a, par des moyens frauduleux, mis ses biens à l'abri des recherches de ses créditeurs, en plaçant au nom de sa femme tous les profits des spéculations qu'il faisait et qui composent aujourd'hui en grande partie la succession de sa femme. Que cette dernière en faisant son testament avait l'intention de laisser à son mari le contrôle de ses biens de manière à empêcher les créanciers de son mari de les saisir. Qu'en conséquence, la clause d'insaisissabilité est sans effet, et que les propriétés peuvent être saisies comme appartenant à *Lionais* lui-même, et comme s'il était le légataire universel de la succession.

Les appelants ont répondu spécialement que les propriétés saisies appartenaient en pleine propriété à leur mère qui les avait, en vertu de son testament, déclarées *insaisissables*. Ils niaient aussi spécialement l'allégation de fraude en se réservant le droit de la faire disparaître du dossier.

La preuve sur la contestation ainsi liée consiste dans les productions faites par les parties et dans l'admission de faits qui suit :

Que les dits opposants sont les seuls enfants tous majeurs, issus du légitime mariage du défendeur et de son épouse, feue dame *Henriette Moreau*.

Que la dite dame *Henriette Moreau* est décédée à *Montréal* le 21 décembre 1874.

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Que le testament de la dite dame *Henriette Moreau*, a été reçu par *C. A. Terroux* et collègue, notaires, le 18 juillet 1868, qu'il a été dûment enregistré avec une déclaration du décès de la dite testatrice.

Que la dette pour laquelle le jugement en cette cause a été rendu, a été contractée par *Charles Lionais*, après le décès de la dite dame *Henriette Moreau*.

Que les immeubles saisis en cette cause, font partie et dépendent de la succession de la dite dame *Henriette Moreau*.

L'admission de fait consentie par l'intimée que les propriétés saisies en cette cause formaient partie des biens de la succession de dame *Henriette Moreau*, met à néant cette partie de son ploidoyer alléguant fraude de la part de *Hardoin Lionais* pour mettre ses propriétés à l'abri des poursuites de ses créanciers. Cette question écartée, il ne reste évidemment que la question d'interprétation du testament. C'est maintenant la seul contestation entre les parties. Elle a été décidée contre eux par la Cour Supérieure dont le jugement a été confirmé par une majorité de la Cour du Banc de la Reine. C'est de ce dernier jugement dont ils appellent. Avant d'entrer dans la considération du mérite de cet appel, je dirai quelques mots de l'objection soulevée contre la procédure. L'intimée prétend que les appelants auraient dû attaquer par le moyen de la *tierce opposition* le jugement rendu contre *Hardoin Lionais*, au lieu de s'opposer à son exécution en le considérant quant à eux comme *res inter alias judicata*. Il n'est pas douteux qu'ils auraient pu adopter cette voie; et l'intimée pour éviter de voir plus tard son jugement attaqué, aurait sans doute mieux fait de faire juger la question de l'étendue des pouvoirs de *Hardoin Lionais* contradictoirement avec ses enfants en les mettant en cause avec lui.

Ces derniers n'ayant pas été mis en cause étaient-ils

obligés, pour attaquer le jugement d'employer la voie de la tierce opposition ? Non. Ce mode d'attaque étant facultatif, ils ont pu légalement renouveler la contestation sur une question qui n'avait pas été jugée avec eux. Les autorités suivantes font voir que la voie adoptée par les opposants leur était ouverte.

L'article de notre Code de procédure au sujet de la tierce opposition est au même effet que celui du Code *Napoléon* (1).

Toutes personnes dont les intérêts sont affectés par un jugement rendu dans une cause où ni elle ni ceux qui la représentaient n'ont été appelés, peut y former opposition.

Code *Napoléon* (2) :

Une partie peut former tierce-opposition à un jugement qui préjudicie à ses droits, et lors duquel, ni elle ni ceux qu'elle représente n'ont été appelés.

" L'art. 474 (3) dit bien qu'une partie peut former tierce-opposition, etc., mais il ne dit pas qu'elle est tenue de prendre cette voie ; il ne lui ôte pas la faculté de se borner à dire que le jugement qu'on lui oppose, n'a pas été rendu avec elle ; qu'il lui est étranger ; que ce jugement est à son égard comme s'il n'existait point ; que c'est, en un mot, *res inter alios acta.*

" Ainsi la tierce-opposition est purement facultative, et si nous avons dit sur la quest. 1682, que l'on peut forcer d'intervenir celui qui aurait droit de se rendre tiers opposant à un jugement à rendre, on ne peut en conclure qu'il ait besoin d'user de ce droit pour empêcher que le jugement ne produise ses effets contre lui ; le droit de le contraindre à cette intervention n'est établi qu'en faveur de la partie intéressée à ce que le jugement qu'elle poursuit soit rendu contradictoirement avec lui (4)."

(1) De la Tierce-Opppsition, art. 510, C. P. C. de *Québec.*

(2) De la Tierce-Opposition, art. 474.

(3) Art. 510, C. P. Civ. de *Québec.*

(4) Carré et Chauveau. De la Tierce-Opposition, art. 474, Q. 1722.

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On peut donc l'attaquer pour cause de fraude, de collusion, etc, ou faire juger qu'il est *res inter alios acta.*

"Ainsi celui qui n'a pas été partie à un jugement qui préjudicie à ses droits, peut en prévenir l'exécution à son égard, en l'attaquant par tierce-opposition, soit principale, soit incidente.

"Mais il n'est pas tenu de prendre cette voie ; l'art. 474, C. Pr., ne lui ôte pas la faculté de se borner à invoquer la maxime *res inter alios judicata aliis non nocet.*

"Ainsi jugé que la tierce-opposition n'est point nécessaire contre un jugement dans lequel on n'a point été partie ; conséquemment, une demande en partage contre laquelle on oppose un jugement rendu avec une autre partie, doit être appréciée, nonobstant le rejet de la tierce-opposition." *Bioche* (1).

Indépendamment de la faculté qu'avaient les appelants d'adopter l'un ou l'autre des moyens, qui leur étaient ouverts, il faut remarquer que l'intimée ni dans ses plaidoyers ni dans son factum devant la Cour du Banc de la Reine, ni devant cette cour, n'a fait objection à la procédure adoptée par les appelants. Elle les a suivis sur le terrain qu'ils avaient choisi et elle a lié contestation avec eux. Cette contestation est légalement liée comme on le voit par les autorités ci-dessus citées.

Il ne doit en conséquence rester pour l'examen de cette cour que les questions décidées par les deux autres cours, savoir :—1° Si *Hardoin Lionais*, en vertu des pouvoirs qui lui sont conférés par le testament, peut être considéré comme ayant autorité pour lier la succession de Dame *Henriette Moreau* par des endossements consentis en sa qualité d'exécuteur testamentaire et d'administrateur de cette succession en faveur de *Charles Lionais*, un de ses fils, sans avoir reçu aucune valeur ou

(1) Vo. Tierce-Opposition, p. 509, No. 8.

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considération pour les endossements 2° Si les biens que *Lionais* est chargé d'administrer comme exécuteur testamentaire ont été légalement déclarés insaisissables.

La solution de ces questions dépend uniquement de l'interprétation à donner aux clauses ci-dessus citées de ce testament.

L'hon. juge *Sicotte* qui a rendu en première instance le jugement en cette cause, a interprété, ce testament comme donnant à *Hardoin Lionais* un droit absolu de propriété. Dans une autre cause où la même question a été soulevée, l'hon. juge *Jetté* a décidé que *Lionais* ayant le droit de disposer des propriétés pour l'éducation, le soutien et l'établissement des enfants, cela devait comprendre le droit d'endosser des billets pour aider *Charles Lionais* dans son commerce; de plus, qu'ayant par le testament le pouvoir de disposer des biens en faveur des enfants ou de l'un d'eux, à son gré soit par testament, donation entrevifs ou autrement, ces pouvoirs devaient aussi comprendre celui de donner les endossements qu'il avait consentis en faveur de *Charles Lionais*.

Dans une autre cause, l'hon. juge *Papineau* a décidé la même chose. Il y a encore une cause citée dans le factum de l'intimée où la question d'insaisissabilité des mêmes biens a été soulevée; l'hon. juge *Johnson* a décidé dans cette même cause que comme il s'agissait d'une dette de la succession même, la question ne pouvait pas alors être soulevée. Cette décision n'affecte pas les questions soumises sur le présent appel. Dans la Cour du Banc de la Reine les opinions ont aussi été partagées. Les autres décisions portent sur le mérite de cette cause.

Est-il vrai, comme l'a décidé l'hon. juge *Sicotte*, que *Hardoin Lionais* est propriétaire absolu, malgré le legs universel de la propriété fait en faveur de celui ou de

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ceux des enfants de la testatrice qu'il lui plaira d'indiquer.

Le testament donne, à la vérité, des pouvoirs très étendus à l'exécuteur testamentaire. Usant de la faculté que donne au testateur l'art. 921 du Code Civil, la testatrice a, par l'art. 4 de son testament, autorisé son exécuteur testamentaire et administrateur à vendre et hypothéquer les biens de la succession, les céder, échanger, hypothéquer, aliéner ou autrement en disposer, soit en propriété soit en usufruit, etc., l'autorisant à faire, signer et exécuter tous billets, chèques, etc., et tous autres documents requis ; et généralement à faire tous actes de la plus *entière administration.* Tous ces pouvoirs ne sont donnés que pour des fins d'administration. La déclaration en est plusieurs fois répétée par la testatrice. Dans la 5me clause, elle déclare lui donner *toute* la latitude *possible dans et pour l'administration* des dits biens. Encore dans cette même clause en parlant de la durée des pouvoirs conférés, la testatrice dit "cette administration et exécution, mon dit époux les conservera sa vie durant." Si étendus qu'ils soient ces pouvoirs ne sont évidemment que des pouvoirs d'exécuteur testamentaire et d'administrateur ; ils ne sont nullement ceux d'un propriétaire. Il n'y a pas une seule expression dans ce testament qui confère à *Hardoin Lionais*, la propriété ou même l'usufruit des biens en question. C'est en s'appuyant sur l'étendue des pouvoirs même que l'on essaie d'en tirer l'induction qu'en réalité il en est non seulement l'administrateur, mais le propriétaire Cette induction serait juste si l'on pouvait considérer les pouvoirs donnés en faisant abstraction de la qualité d'exécuteur. *Lionais* a droit de vendre, c'est vrai, mais comme administrateur et exécuteur son pouvoir de vendre est limité par sa qualité d'exécuteur testamentaire. Il ne peut pas

vendre personnellement, pour son profit et avantage. Il ne pourrait donner un titre valable.

Chaque fois qu'il exerce un des nombreux pouvoirs conférés, ce doit être en sa qualité d'exécuteur. La testatrice se sert plusieurs fois de cette expression pour désigner l'exercice par son mari de ses fonctions d'exécuteur testamemtaire. Il ne peut pas agir en autre qualité, et dans l'appréciation des actes qu'il fait on ne doit jamais perdre de vue qu'il n'a le pouvoir de les faire que ès-qualité. Alors il ne peut plus être considéré comme propriétaire absolu ; les termes du testament s'y opposent.

Par l'art. 4me, *Lionais* est aussi dispensé de faire inventaire, et même de rendre compte. Le 5me, le dispense aussi de rendre aucun compte de sa gestion ou de ses opérations, tant envers les héritiers de la testatrice qu'envers toutes autres personnees que ce soit. On s'est encore appuyé sur ces exemptions pour en conclure que *Hardoin Lionais* doit être considéré comme propriétaire des biens. Ces exemptions sont autorisées par l'art. C. C. 916. Le testateur peut limiter l'obligation qu'a l'exécuteur testamentaire de faire inventaire et de rendre compte de l'exécution de sa charge, ou même l'en dispenser entièrement. Quant à l'effet de cette dispense, j'adopte à ce sujet l'opinion que l'honorable juge *Cross* a exprimé dans ses notes sur cette cause en l'appuyant des autorités qu'il a citées. Il peut sans doute résulter de cette dispense un avantage pour l'exécuteur, mais cela ne peut le constituer légataire de ce qui reste. La suite de cet article (911) en contient une déclaration expresse en ces termes : " Cette décharge n'emporte pas celle de payer ce qui lui reste entre les mains, à moins que le testateur n'ait voulu lui remettre la disposition des biens sans responsabilité, *le constituant légataire*, ou que les termes du testament ne comportent autrement la décharge de payer."

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Dans le cas actuel on ne peut pas dire que la testatrice ait voulu remettre ses biens à son exécuteur, ni en faire son légataire, puisqu'elle l'a chargé d'en faire lui-même la distribution, et qu'elle a institué des légataires universels par la disposition suivante :

Article 3me.—Je donne et lègue tous mes biens, meubles et immeubles, propres et acquets, meubles meublants, argenterie, dettes actives, créances, actions ou parts de banque, deniers comptants, valeurs, cédules et obligations, et toutes autres généralement quelconques, que je délaisserai à mon décès, sans en rien excepter ni réserver, de quelque nature qu'ils soient, et en quelques lieux et endroits qu'ils se trouvent sis et situés, aux enfants issus de mon mariage avec le dit *Hardoin Lionais*, mon époux, et en cas du prédécès d'aucun d'eux, aux enfants nés du ou des prédécédés, en légitime mariage par représentation.

A l'effet de quoi je les institue mes légataires universels en propriété et jouissance, sujet toutefois, aux restrictions et conditions exprimées en l'article 5 ci-après.

La testatrice a apporté il est vrai des restrictions à cette institution, en chargeant son exécuteur par l'art. 5 de faire lui-même le partage et la disposition de la totalité ou de partie de ses biens, comme il le jugerait convenable, s'en rapportant seulement à lui pour la subsistance, l'éducation et l'établissement de leurs enfants; lui donnant le pouvoir de partager et léguer ses biens ou portion d'iceux, etc., lorsqu'il le jugerait à propos, ou entre tous ses héritiers ou à aucun d'eux, ajoutant que sa volonté était que son dit époux es-qualité, ne fût aucunement lié dans ses opérations et dispositions par les termes de l'article troisième, lequel ne pouvait en aucun cas être interprété comme conférant un droit absolu d'hérédité en faveur d'aucun de ses enfants, mais uniquement un droit éventuel, sujet aux dispositions libres de son dit époux ès-qualité.

Si la disposition donnant à l'exécuteur le droit de faire le partage des biens est légale, elle doit avoir son effet, rien dans le testament ne s'y oppose; il n'y a pas d'autre disposition de la pleine propriété des biens que

celle faite par l'art. 3, sous les restrictions ci-dessus mentionnées—les autres ne concernant que l'administration. Il n'y a aucune contradiction entre ces clauses, elles ne sont pas incompatibles et doivent par conséquent recevoir leur exécution.

Quant au pouvoir de la testatrice de charger son exécuteur testamentaire de faire la distribution de ses biens, il n'est aucunement contraire à la faculté illimitée de tester, et sa légalité en est parfaitement démontrée par l'honorable juge *Cross*, aux notes duquel je réfère, ainsi qu'aux autorités qu'il a citées, ainsi qu'à celles citées dans le factum des appelants. Cette question ne peut faire difficulté.

De ce qui précède, je conclus que *Hardoin Lionais* n'est ni légataire ni propriétaire absolu, qu'il n'est qu'exécuteur testamentaire et administrateur avec des pouvoirs très étendus, c'est vrai, mais pour gérer et administrer seulement.

D'après le code, les pouvoirs de l'exécuteur testamentaire sont assimilés à ceux du mandataire—ce sont par conséquent les principes du mandat qui doivent régir la conduite de l'exécuteur.—Sur ce point la cause n'offre pas de difficulté.

La divergence d'opinion s'élève sur l'étendue des pouvoirs conférés. Si considérables qu'ils soient, comportent-ils l'autorité en faveur de *Hardoin Lionais* de consentir des endossements de billets comme il l'a fait, sans considération, pour *Charles Lionais*? Le testament lui donne bien le pouvoir de faire, signer et exécuter des billets, mais il est tout-à-fait silencieux à l'égard des endossements. La différence entre ces deux sortes d'actes est essentielle Dans le premier, le faiseur du billet agit pour son intérêt personnel, et il est censé avoir reçu valeur ou considération pour l'engagement qu'il signe. Dans le second, il donne simplement un cautionnement pour la dette d'un autre sans en retirer

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aucun avantage. L'autorisation de signer un billet comme faiseur ne peut pour cette raison comporter celle d'endosser. La responsabilité étant beaucoup plus considérable dans le second cas, que dans le premier; un exécuteur testamentaire ou autre mandataire ne pourrait lier la succession ou son mandant sans une autorisation spéciale, car le mandataire doit se renfermer exactement dans les bornes de son mandat. *Pothier* (1). Il en sortirait évidemment en donnant un cautionnement ou endossement sans considération, quand il n'est autorisé qu'à signer un billet pour valeur reçue et pour des fins d'administration seulement.

On trouve au 5me vol. L. C. Rep. (2), une cause qui a beaucoup d'analogie avec celle-ci, c'est celle de *Castle* v. *Baby*. Dans cette cause il a été décidé qu'un agent revêtu du pouvoir de vendre, échanger, concéder les propriétés mobilières et immobilières, de composer, referer à arbitres, etc., enfin d'agir aussi amplement et effectivement que la mandante elle-même aurait pu le faire en personne, n'avait cependant pas le pouvoir de faire et escompter des billets promissoires comme agents.

La Cour du Banc de la Reine a maintenu cette même doctrine dans deux causes rapportées dans le 21 vol. L. C. J. (3), *Serre dit St. Jean* v. *La Banque Metropolitaine*, et dans celle de *Symes* contre la même banque (4).

Dans *Parsons* (5), on trouve citées plusieurs causes dans lesquelles il a été décidé que l'autorité de faire des billets ne comporte pas celle d'en endosser.

L'intention de la testatrice de ne conférer que des pouvoirs d'administration, et non des droits de paiements à *Hardoin Lionais*, est encore démontrée par la précaution qu'elle a prise de déclarer tous ses biens insaisissables, par la clause suivante : " Et ma volonté est

(1) Mandat No. 90.
(2) P. 411.
(3) P. 207.
(4) P. 201.
(5) On notes and bills, p. 107.

que mes dits biens, tant en propriété qu'en usufruit, capitaux, fruits et revenus, tant meubles qu'immeubles, soient et restent insaisissables, et ne puissent être saisis, vendus et décrétés ou l'un ou l'autre, que pour les dettes propres de ma succession, c'est-à-dire : celles auxquelles j'ai ou aurai souscrit, ou suis ou serai partie, et pour nulles autres dettes." La testatrice pouvait légalement attacher cette condition d'insaisissabilité à sa libéralité (1). En déclarant que ses biens ne pouvaient être saisis que pour ses propres dettes et pour *nulles autres dettes*, n'était-ce pas clairement limiter les pouvoirs de l'exécuteur testamentaire à ceux d'administrateur seulement? Si elle avait eu l'intention de lui donner le pouvoir de lier sa succession d'une manière générale, elle n'aurait certainemeut pas pu imposer cette condition d'insaisissabilité ; car on ne peut s'affranchir du paiement des dettes que l'on a contractées ou que l'on autorise à contracter. L'imposition de cette condition fait voir la limite imposée à l'étendue des pouvoirs. Elle ne peut être dans le cas actuel considérée comme un simple conseil donné à l'exécuteur, puisqu'il n'est pas légataire. En vue du legs universel, elle doit être considérée comme imposée en faveur des légataires universels auxquels elle voudrait faire parvenir ses biens.

Mais on répond à cette observation en disant que ceux-ci n'ont qu'un *droit éventuel.* L'honorable juge *Tessier* a fait justice de cet argument par un raisonnement si fort et si juste que je crois devoir le citer en entier:—

Il est vrai qu'il est dit que le droit des enfants n'est qu'*éventuel,* mais ceci s'applique au droit réservé au père de partager et donner ces biens à ceux des enfants qu'il choisira ; c'est là la seule *éventualité,* il n'a pas le droit d'en disposer en faveur d'étrangers. Le legs est absolu en faveur d'un, ou de deux, ou de trois, ou des quatre

(1) Voir C. P. C., art. 558 et art. 632.

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enfants, mais le père peut disposer du tout en faveur de l'un, c'est à cause de cela que le droit devient éventuel pour les autres, dépendant de cet événement, mais s'il n'en dispose pas en faveur des uns au préjudice des autres enfants, ils restent en parts égales légataires absolus en propriété et en usufruit.

Pour justifier les endossements en faveur de *Charles Lionais*, l'intimée invoque aussi la disposition du testament donnant pouvoir à l'exécuteur testamentaire de pourvoir à la subsistance, à l'éducation et à l'établissement de tous ou chacun des enfants de la testatrice. Si la preuve établissait que l'exécuteur testamentaire a exercé ces pouvoirs en endossant pour son fils *Charles*, toute difficulté cesserait; mais c'est tout le contraire qui est prouvé. *Charles Lionais* était déjà établi lorsque son père a commencé à endosser pour lui. Il ne l'a fait, comme il le dit dans son témoignage, que dans le but d'aider son fils à passer quelques époques difficiles dans ses affaires; mais toujours avec la certitude que celui-ci paierait ses billets. Il ajoute que s'il avait cru que *Charles Lionais* n'aurait pas été capable de payer ses billets, il ne les aurait pas endossés. Il déclare aussi qu'il n'a jamais eu en cela l'intention de lui faire aucune libéralité en vertu du testament, les endossements ne peuvent être considérés comme une donation. L'exécuteur ne pouvait donner qu'une chose qui existait dans la succession et en observant les formalités voulues en pareils cas C.C. art. 776, et en se départissant de son droit de propriété dans la chose donnée, art. 777 C.C. Quel droit de propriété pouvait-il avoir dans les fonds empruntés par son fils de la Banque *Molson*? Aucun. Il n'avait fait qu'encourir avec lui l'obligation de rendre ces fonds à la Banque. Il est en conséquence impossible de considérer ces endossements comme libéralités faites en avancement d'hoirie. La nature de la transaction et la preuve s'y opposent.

En résumé je suis d'opinion que la contestation a été bien soulevée par les plaidoiries et qu'il y a lieu de décider les questions jugées en première instance.

Que *Hardoin Lionais* n'est pas propriétaire absolu des biens mentionnés dans le testament de dame *Henriette Moreau*, son épouse, qu'il n'avait pas le pouvoir de consentir les endossements des billets sur lesquels a été rendu le jugement en cette cause, le condamnant à payer $8,963.83.

Que la clause d'insaisissabilité est légale et que les propriétés appartenant à la succession de *Henriette Moreau*, saisies en cette cause, sont exemptes de saisie et ne peuvent être vendues pour le paiement des endossements en question.

L'appel doit être alloué.

HENRY, J.:—

I am of opinion that, under the will, *Lionais* had no power to bind the estate by becoming endorser for one of his sons. It was not carrying out the objects of the will. Although power is given to him to manage the estate in any way he likes, still he has to do it with a view to dividing it amongst the children of the party who made the will. He was not required to account to them, but it was clearly the intention of the testatrix that the children should have the benefit of the property. He was restricted by the terms of the will in such a way that he could pay nothing and become answerable for nothing, except what was really a debt due by the succession. He then undertakes to bind the estate as surety for his son, and it is stated that that is giving to the son an advance in pursuance of the will. But he swears that he never expected to pay the notes, and the evidence shows that he only pledged the security of the succession as security, and he expected that the son would pay the debt at maturity. Surely

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then, that cannot be taken as an act of an executor in pursuance of the terms of the will, or looked upon as an advance in favor of one of the legatees.

Then, as to the question whether the parties could make opposition in the way in which they have done? I can see no difficulty at all in their doing so. They had no notice of the suit in which the judgment was taken, and I can find nothing in the code of procedure to prevent them from doing so. They are coming in and showing that the judgment is wrong and should never have been given against the estate so as to bind the property of the succession. I think they can do so at any time, when that property is subject to seizure or about to be seized. I fully concur in the views that I have heard expressed by my learned brother *Fournier* on all the points of the case. It is unnecessary for me to repeat them. After a full consideration of the case, I think the appeal should be allowed, and the judgment of the court below reversed with costs.

TASCHEREAU, J. :—

The respondents (The *Molson's* Bank) have obtained a judgment for the sum of $8,963.83 against the defendant, *Hardoin Lionais*, in his quality of testamentary executor and administrator to the estate of his wife, the late Mrs. *Henriette Moreau*, for the amount of certain promissory notes made and signed by *Charles Lionais*, one of his children, and endorsed by the said defendant, *Hardoin Lionais*, in his said quality.

An execution was issued against the said defendant *es-qualité*, and certain real estate of the late Mrs. *Henriette Moreau*, which he detained in his said capacity, was seized and advertised for sale by the sheriff of the district of *Montreal*.

The appellants, who are the only children of the defendant *Hardoin Lionais* and his said wife Dame

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Henriette Moreau, opposed the sale of the property seized by an opposition in which they allege:

"That by her testament and last will dated 18th July, 1878, received before Mtre *C. A. Terroux* and colleagues, notaries, in the city of *Montreal*, Dame *Henriette Moreau*, the wife of the defendant *Hardoin Lionais*, bequeathed all her property, moveable and immoveable, in ownership and in usufruct to the children born of her marriage with the said *Hardoin Lionais*, appointing them her universal legatees, and in the event of the decease of any one of them, his share to revert to the survivors.

"That by the said will, the said *Hardoin Lionais* was appointed testamentary executor and administrator of the said estate.

"That by a clause (5) of her will, the said Dame *Henriette Moreau* decreed and ordered that all her property, whether moveable or immoveable, the principal, the usufruct and the rents and revenues thereof shall be and remain *insaisissable* and could not be seized nor sold, save and except only for the personal debts of the said testatrix, viz.: for those debts only which she should have herself subscribed during her life time, and for no other debts.

"That the said Dame *Henriette Moreau* departed this life at *Montreal*, on the 21st December, 1874, without having revoked her said will, which has been duly enregistered according to law, with a certificate of her death, on the 30th December, 1874.

"That in his capacity of testamentary executor of the said Dame *Henriette Moreau*, and as administrator to her estate, the said *Hardoin Lionais* has taken possession of all the property and has administered it, but that he, the said *Hardoin Lionais*, although acting in good faith, has nevertheless outgone the powers conferred upon him, and without any authority has endorsed without

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receiving any value or consideration therefor, certain promissory notes, to wit: those for which the judgment in this cause has been rendered.

"That the said Dame *Henriette Moreau* has never subscribed to, nor been a party to the debt for which the said promissory notes have been given; that the said debt was not contracted nor said notes given for the advantage or benefit of her estate, but on the very contrary, said debt is onerous and detrimental to its interests.

"That the said opposants are the only children, issue of the lawful marriage of the said late Dame *Henriette Moreau* with the said *Hardoin Lionais*, and they are consequently the only universal legatees as well in ownership as in *usufruct* of the property of the said estate, and that they are all interested in the safe-keeping and conservation of said property, and in having it declared that the seizure made in this cause of part of the real estate left by the said Dame *Henriette Moreau*, is null and illegal and must be set aside, in as much as said real estate is exempt from seizure by the terms of the will, *insaisisable*, and can only be seized and sold for debts subscribed to by the said Dame *Henriette Moreau* herself, or for the benefit of her estate, whereas the debt for which judgment has been rendered and said seizure made, is not one of those.

"Wherefore the said opposants pray that the said seizure of the said immovable property be set aside and annulled, and that it be declared that the said immovable property cannot be seized in execution of the judgment rendered in the present cause against *Hardoin Lionais* in his said quality of executor and administrator to the estate of the late Dame *Henriette Moreau*."

Issue having been joined by the bank with the opposants on the said opposition, the Superior Court dismissed the opposition and held that the said im-

movables could be seized in execution of the judgment rendered against *Hardoin Lionais* in his said quality, that is to say, against the estate. On appeal, the Court of Queen's Bench confirmed the judgment of the Superior Court. The opposants now appeal to this court.

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I am decidedly of opinion to dismiss their appeal. The features of this case are such that I do not hesitate to say I would have been very sorry indeed to find myself obliged to come to a different conclusion. One of the opposants is the same *Charles Lionais* for whom these notes were endorsed and who, upon the security of these endorsements, got the bank to advance him the amount it endeavors to recover in the present case. Here is a man who went to the bank with certain endorsements, obtained money on the security of these endorsements, and who, now, that the bank exercises its action against the endorser, claims the right to intervene, and, on the ground that his endorser had not the right so to endorse for him, tries, with the assistance of his brothers, the other opposants, and with the connivance of his father the defendant and the said endorser, to hinder and stop the execution of the judgment obtained by the bank on such endorsements. Can such a contention, on his part, be entertained? Is he not estopped from taking such a position?

As I have already remarked, the judgment is not against *Hardoin Lionais*, personally, but against him as administrator and executor of the said estate. It follows, of course, that it is not executory against any property of *Lionais* himself other than the property coming from his wife. If executory at all, it must be so against the estate only. This seems to be undeniable. Then so long as the judgment stands against the estate, it must be executory against the estate. It follows that it is the judgment that the opposants should have im-

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pugned, either by *requête civile or tièrce opposition*—if, as they contend, their father had no authority to bind the estate by endorsing notes in the name of the estate. Their allegation, in the opposition, that their father had no authority to endorse notes in the name of the estate would be perhaps a sufficient ground of opposition to the judgment, but it is not a valid ground of opposition to the seizure. As long as the judgment stands and is allowed to stand against the estate, it is *chose jugée* that their father had a right to endorse notes in the name of the estate as he did.

I cannot, however, leave the appellants under the impression that they might with any chance of success attack the judgment. I am of opinion with the two courts below that *Hardoin Lionais* had full power and authority to endorse notes for one of his sons as he has done, and to bind the estate thereby. The appellants, it seems to me, fall into the error of treating this case, as if *Hardoin Lionais* had so endorsed not for one of his sons, but for a third party, a stranger. That would be a different case, and would raise different questions which we have not to determine here. The endorsements made by *Hardoin Lionais* in his quality of executor and administrator of his wife's estate have been made to assist one of his and the testatrix's sons in his trade and business. He certainly had the power to do so under the will. He had the power to give even all the estate to this son, *Charles*, and this, either by "dona-"tion *entre-vifs ou autrement à sa discrétion:*" he had the power to borrow from the Bank any amount, one, two, three hundred thousand dollars to mortgage all the estate for it, and place the sum, in *Charles's* busines, either as a loan or a gift to him. Could the appellants then have contended, that though their father had clearly the right to give such a mortgage, yet the Bank

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could not have recovered upon the mortgage because the will says that all the estate is to be *insaisissable*. That is what he did virtually here: he did not grant a special mortgage to the Bank—a mortgage is only a cause of preference between creditors—but he borrowed from the Bank in the name of the estate to assist his son: all the estate then has become *le gage de la créance*, because the debt itself is the debt of the succession. *Hardoin Lionais* could even have sold any part of the estate, or even the whole of it, and have put the proceeds into *Charles's* business. The clause of *insaisissabilité* clearly cannot apply to a debt contracted for the estate or in the name of estate, and authorized by the will. Mr. Justice *Tessier* admits this, though the learned judge differed as to the right of *Hardoin Lionais* to endorse for his son.

I am of opinion with the two Courts below, and the six judges out of eight who have had this will under consideration, that *Hardoin Lionais* had full power to so endorse for one of his sons, and that by doing so he bound the estate. The judgment dismissing the appeal should therefore be confirmed.

GWYNNE, J.:

In the judgment of my brother *Taschereau* I fully concur, but I am of opinion that the appeal should be dismissed, and the contestation of the opposants fail upon this single ground, that upon them is cast the burthen of establishing beyond all doubt, and by the most conclusive evidence, that the estate of a testator is not liable to be seized and sold upon an execution issued to enforce a judgment obtained against his executor in the character of executor. In this case the estate of the testatrix is *primâ facie* liable to satisfy the judgment recovered against the administrator of her will in

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his character of administrator; the opposants can only displace this *primâ facie* liability by clear proof of the contrary, and such proof must be complete *in omnibus*. They profess to do so by producing the will of the testatrix, by which, however, it appears that she declared her will and desire to be, that her husband, whom she made administrator of her will, besides the special powers conferred upon him as named in the will, should be clothed for the purpose of administration of the testatrix's estate, and she, by her will, clothed and invested him, with all the powers, rights and authority which she had conferred upon him by a power of attorney, which she had granted to him the 7th July, 1854, executed before Mr. *Moreau et son confrère*, notaries, and that in as perfect a manner as if all and each one of the clauses inserted in the said power of attorney formed an integral part of her last will and testament, her desire being that under the title of testamentary administrator and executor he should continue to exercise after her death the same rights and powers which he had in virtue of her said power of attorney, which she, by her will, ratified and confirmed in every particular, as well all the acts, transactions and matters, and generally everything which he had already done, and everything which he shall do in the future, both before and after her decease, in virtue of that same power of attorney and of her said will.

Now, until the opposants produce, and they have not produced, this power of attorney so confirmed with the powers therein contained made part of her will, it cannot be said that the testatrix's administrator had not full power and authority to do the very act for the doing which the judgment recovered against him in his character of administrator was recovered. The opposants therefore have failed to prove the issue, the whole

burthen of proving which, is cast upon them, and which they have assumed to prove.

Appeal allowed with costs.

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Solicitors for appellants: *Doutre & Joseph.*

Solicitors for respondents: *Barnard & Beauchamp.*

THE CORPORATION OF THE CITY OF QUEBEC..... } APPELLANTS; 1884

AND

THE QUEBEC CENTRAL RAILWAY COMPANY..... } RESPONDENTS.

*March 14.
*June 23.

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

Railway Bonds—39 *Vic., ch.* 57 (*P. Q.*), *construction of*—*Condition Precedent*—*Certificate of Engineer, contents of*—*Parol evidence inadmissible*—*Onus probandi.*

The *L. and K. Ry. Co.* was incorporated in 1869 (32 *Vic.*, ch. 54), to construct a railway from *Levis* to the frontier of the state of *Maine*, a distance of 90 miles. The company was authorized by that act to issue bonds or debentures to provide funds for the construction of the railway.

In 1872, by 36 *Vic.*, ch. 45, power was given to issue bonds to the amount of three million dollars, without limitation of time, and without restriction as to the length of the railway constructed. In 1874, a statute of the Legislature of *Quebec* (37 *Vic.*, ch. 23), declared that debentures to the amount of $280,000 had already been issued, and limited for the future the issuing of bonds to the amount of £300,000 stg., to be issued as follows:—The first issue of £100,000 at once; the second issue of £100,000 when 45 miles of the road should have been completed and in running order, as certified by the Government Inspecting Engineer; and the third issue of £100,000 as soon as

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

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30 additional miles—making in all 75 miles—should have been completed, with the same privilege for the three issues.

In 1875, by the Act 39 *Vic.*, ch. 57, the Legislature amended the former acts so as to modify the condition to be fulfilled by the *L and K. Ry. Co.* before the third issue of £100,000 could be by them made. This condition was as enacted by the said Act (39 *Vic*, ch. 57) "so soon as the rails and fastenings required "for the completion of the remaining forty-five miles or there- "abouts of the company's line shall have been provided, then "the remaining one thousand bonds, of one hundred pounds "each, to be termed the third issue, may be issued by the "company."

In that Act lastly cited, the preamble declared: "Whereas it "appears that a total length of forty-five miles of the company's "line having been completed, a first and second issue each of "one hundred thousand pounds of the company's debentures "have been made."

In March, 1881, the *L. and K. Ry.* was sold by the sheriff at the suit of the plaintiffs the *W. M. Co.*, and bought by the *Q. C. R. Co.* respondents for $195,000.

In April, 1881, the corporation of the city of *Quebec* (appellants), filed an opposition *afin de conserver* for $218,099, being the amount of 300 debentures of £100 sterling and interest of the second issue issued on the 25th January, 1875, numbered 1020 and upwards, payable on the 1st January, 1894, and for the payment oi which the opposants alleged that the said railroad was hypothecated.

The *Q. C. Ry. Co.*, also opposants in the case, contested the opposition of the corporation of the city of *Quebec*, and claimed the issue of the bonds of the second issue and held by the appellants was illegal. At the trial no certificate was produced, but the government engineer stated that he had reported to the Minister of Railways that there were only 43½ miles of the road completed, and the secretary of the company testified that the total length of railway certified by the government engineer as being complete and in running order had never exceeded 43½ miles. The learned judge at the trial found as a fact that there were only 43½ miles completed, and held the bonds of the second issue invalid. This judgment was affirmed by the Court of Queen's Bench (appeal side).

On appeal to the Supreme Court, it was

Held (reversing the judgment of the court below)—That the effect of the statute 39 *Vic.*, ch. 57 is to make the bonds

therein mentioned good, valid and binding upon the company, although the conditions precedent specified in 37 *Vic.*, ch. 23, might not have been fulfilled when they were issued.. (Ritchie, C. J., and Strong, J., dissenting.)

Per *Fournier* and *Henry*, JJ., that as there was evidence that a certificate or report had been given, oral evidence of the contents of the certificate or report was inadmissible and therefore respondents had failed to prove the illegality of the second issue.

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

The facts and pleadings sufficiently appear in the head note, and judgments hereinafter given.

Mr. *P. A. Pelletier*, Q.C., for appellants:

The ground upon which the respondents contend that the appellants are not entitled to rank *pari passu* with them on the proceeds of the judicial sale of *Levis & Kennebec Railway* is that forty-five miles of the road had not been completed, a condition precedent, they alleged, necessary to legalize the issue of the bonds of which they are the holders. First, I submit that if the bonds mentioned in their opposition have been issued previous to the completion of the 45 miles of the road, and without the production of the certificate of the Government engineer, these bonds have nevertheless been declared valid and legally issued, by the Act 39 *Vic.*, ch. 57.

The legislative power which has imposed certain conditions on the *Levis & Kennebec Railway Company* on the issue of the bonds, had the right to alter, change, and even remove those conditions. The Legislature which, in 1874, had authorized the issuing of the bonds only after 45 miles would have been completed, had the right to declare, in 1875, that those bonds were valid, though issued before the completion of the 45 miles of the road.

Admitting that, conformably to the Act 39 *Vic.*, ch.

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57, the *Levis* and *Kennebec Railway Company* had purchased the rails and ties or fastenings for the remainder of the road to the frontier, and that the bonds of the third issue be legal would not the bonds of the second issue be legal? Certainly they would. And there is no proof of record that the rails and ties have not been purchased, and that the bonds of the third issue have not been issued. But if the bonds of the third issue have or had been issued regularly after the purchase of the rails and ties, how can it be pretended that the bonds of the second issue would nevertheless be null? Such a pretension would lead to a very illogic, abnormal consequence, to a consequence manifestly in contradiction with the intention of the Legislature.

If the appellants fail on this branch of the case, then I submit that the proof adduced by the respondents is not only insufficient, but it is also illegal. The certificate of the engineer not having been produced, it was not competent to prove the contents thereof by oral testimony.

Geo. Irvine, Q.C., for respondents:

No consideration of the equities of the case can affect the legal rights of the parties.

The learned judge who heard this case, came to the conclusion, as a matter of fact, that the length of the road at the time of the issue of these bonds mentioned in the statute was not completed.

The evidence of the secretary and of the engineer proves that fact beyond all doubt, and the condition precedent not having been fulfilled, the second issue of bonds is illegal.

Then, if it is admitted that the road was not completed, as it must be, I submit the insertion of the statement in the preamble of the Act 39 *Vic.*, ch. 57 (which

is a private Act) can have no effect. Any misrepresentations of fact or law in the preamble or body of a private Act can be shown. *Ballard* v. *Way* (1); *Shrewsbury* Peerage Case (2); *Hardcastle* on Statutes (3).

RITCHIE, C.J.:—

The *Levis and Kennebec Railway* was brought to sale by the Sheriff of the District of *Quebec*, at the suit of *The Wason Manufacturing Company*, the original plaintiffs in this case, and was adjudged to the *Quebec Central Railway Company* on the 22nd March, 1881, for the sum of $192,000. Upon this sale the *Quebec Central Railway Company*, the present respondents, fyled an opposition claiming $272.537.34, being the amount of several sterling bonds of the *Levis and Kennebec Railway Company* mentioned in the opposition. The corporation of *Quebec*, the present appellants, also fyled an opposition based upon a number of bonds alleged to be held by them, and for the amount of which they also claimed to be collocated upon the proceeds of the sale. The opposition of the corporation of *Quebec* was contested by the *Quebec Central Railway Company* on the ground that the bonds held by them were illegally issued, and consequently null and void, and this contestation was maintained by the judgment of the Superior Court, rendered on the 19th December, 1882.

The circumstances which have given rise to the present contestation may be shortly stated as follows:

The *Levis and Kennebec Railway Company* was incorporated by an Act of the Legislature of the Province of *Quebec* passed 32 *Vic.*, (1869) chap. 54, which Act was subsequently amended by the 36 *Vic.*, (1872) chap. 45, and again amended by the 37 *Vic.*, (1874) chap. 23, assented to 28th January, 1874, which is the only Act

(1) 1 M. & W. 529. (2) 7 H. L. C. 13.
(3) P. 242.

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necessary to be referred to for the purposes of the present case. The first section of this Act enacts as follows:

The following words in the twelfth, thirteenth, fourteenth and fifteenth lines, in the fourth section of 36 *Victoria*, chapter 45, to wit: "The said company shall have power to issue bonds to the amount of three million dollars, the capital of the said company, and such bonds shall not be for less than five hundred dollars each," are struck out, and the following are substituted therefor; "The said Company shall have power to issue debentures to the amount of three hundred thousand pounds sterling, and such debentures shall not be for less than one hundred pounds sterling each; provided, however, that until forty-five miles of the said company's railway shall be completed and in running order, as certified by the government inspecting engineer, no more than one thousand of the said debentures of hundred pounds sterling each, to be termed the first issue, shall be issued by the company; and as soon as such forty-five miles shall have been certified as complete and in running order as aforesaid, then a further issue of one thousand bonds of one hundred pounds sterling each, to be termed the second issue, may be made by the company, and no more of such bonds shall be issued by the company until seventy-five miles of the said road (inclusive of the aforesaid forty-five miles) shall be complete and in running order, as certified by the government inspecting engineer; and so soon as such seventy-five miles shall have been certified as completed and in running order as aforesaid, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company, it being understood, however, and hereby declared, that such terms 'first issue,' 'second issue' and 'third issue' shall be for convenience only of this bill, and shall not be deemed to give any of the said issues priority one over another."

This act was again amended by the 39 *Vic.*, (1875) chap. 57, assented to the 24th December, 1875, the preamble of which recites as follows:

Whereas the *Levis and Kennebec Railway Company* have prayed, that the act to amend their act of incorporation be amended in the particulars hereinafter set forth, and it is expedient to grant their prayer; and whereas it appears that a total length of forty-five miles of the company's line having been completed, a first and second issue, each of one hundred thousand pounds of the company's debentures, have been made, each of such issues consisting of one thousand debentures of one hundred pounds sterling each; and

whereas, since the passing of the said amended act, the subsidy by the Provincial Legislature has been increased to four thousand dollars per mile, and that further subsidies are about to be granted by various municipalities through which the line passes, thus providing a considerable portion of the amount required for the completion of the earth works and bridges on the forty-five miles of lines remaining to be completed; and whereas, to insure the speedy completion of the said forty-five miles now incomplete, it is expedient that the rails and fastenings required should be provided without delay.

Immediately on the passing of the act of 1874, the company issued £100,000 of bonds, as they had a right to do under the provisions of the said act. The bonds claimed by the respondents form part of this issue, which consist of one thousand bonds of one hundred pounds sterling each. The claim of the corporation of the city of *Quebec*, is founded upon bonds of the second issue.

These debentures of the second issue are headed, "*The Levis and Kennebec Railway*," province of *Quebec*, Dominion of *Canada*, incorporated by a special act of the Legislature of the province of *Quebec*, assented to on the fifth day of April, 1869, amended by an act assented to the 24th day of December, 1872, and further amended by an act assented to the 28th day of January, 1874," and on their face purport to be issued under the authority of the above-mentioned acts and of the *Quebec* Railway Act, 1869, and were issued the 25th January, 1875, 11 months before the passing of the 39 *Vic.*, cap. 57.

The contestation by the *Quebec Central Railway Company* alleges that inasmuch as the *Levis* and *Kennebec Railway Company* was only authorized to make the second issue of bonds when forty-five (45) miles of their road was completed and in running order as certified by the government inspecting engineer, and that as no such length of railway had ever been built by them,

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or ever certified by the engineer, this second issue was illegal, null and void. The evidence clearly shows that only forty-three and a-half (43½) miles of road had been completed up to the date of the sale by the Sheriff in 1881, and the government engineer states that he never gave any certificate for that length of line. The appellants, the corporation of the city of *Quebec*, contend on the other hand, that although it may be true as a matter of fact that the proper length of road had not been completed, the preamble of the Act of 1875 justifies them in claiming the legality of the bonds held by them.

I think we have nothing whatever to do in this case with the sale by the sheriff, but only with the proceeds of that sale. Both parties admit the sale to have been right, and no question is raised as to whether the sheriff sold too much or too little, nor as to what the purchasers were entitled to, or what their rights are under such sale. As to these questions all parties appear to be perfectly satisfied and to agree that if both these issues of debentures are legal the proceeds should be divided among the holders of such debentures in rateable proportion, but if the second issue are illegal, then the whole should be paid to the holders of the first issue. This is not a controversy between the holders of the second issue and the company that issued them, but between the holders of the first and second issues, and it is quite clear that the company and the holders of the second issue could not by any combination of theirs cut down the security of the holders of the first issue unless what they did had legislative sanction.

It is not, therefore, necessary to discuss or decide whether, if the money raised on these debentures has been *bonâ fide* applied for the purposes of the company, the *bonâ fide* lender is or is not entitled to payment as against the company; nor is it a question between the holders

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of these debentures and the directors who issued them, nor between the shareholders and the directors or company. The sole controversy is whether the second issue of debentures are valid as debentures and entitled as such to rank *pari passu* on the money in court with those of the unquestionably legal first issue; in short, between the holders of the bonds legally issued and the holders of the bonds alleged to have been illegally issued, and the determination of this question will, in my opinion, depend entirely and solely on the question: whether since the issue of the second debentures they have been legalized directly, or there has been such a legislative recognition of their legality as to place them on an equal footing with the first issue.

As to the illegality of the second issue at the time the issue was made, I do not think there is room for any doubt.

It is hardly possible to conceive that the legislature could have used more clear and explicit language, not only limiting the right to issue debentures, but actually prohibiting the issue of debentures except as provided. Power is given to issue debentures to the amount of £300,000 stg., and such debentures shall not be for less than £100 stg. Provided, however, that until 45 miles of the said company's railway shall be complete and in running order, as certified by the government inspecting engineer, no more than one thousand of the said debentures of £100 stg. each, to be termed "the first issue," shall be issued by the said company. Could stronger prohibitory words have been used? They are negative and prohibitory, yet as if to remove the possibility of a doubt as to the intention of the legislature, that the company should have no right to issue debentures beyond such first issue till the 45 miles shall not only have been complete, but shall have been certified as complete and in running order, the legislation con-

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tains the enactment: "And as soon as such 45 miles have been certified as complete and in running order as aforesaid, then a further issue of one thousand bonds of £100 stg. each, to be termed 'the second issue" may be made by the company."

Is there anything ambiguous here—is there any room for doubt or argument? Could a condition precedent to the right to issue more bonds be more clearly or explicitly stated? And this it must be remembered is an act passed to amend a previous act which contained these words: "The said company shall have power to "issue bonds to the amount of $3,000,000, the capital "of the said company, and such bonds shall not be for "less than $500 each," by directing these words to be struck out and substituting those I have referred to, limiting and prohibiting the issuing of debentures, except as provided for in the manner I have pointed out.

After the passing of this act the company issued, as they had a right to do, 1,000 debentures of £100 stg. each, which became for the time being a first charge on the road. But in the face of these statutory provisions referred to, not only without authority of law, but in direct defiance of the legislature, when 45 miles of the road were not complete and in running order and were not so certified by the government inspecting engineer, —for it is not questioned, and under the evidence cannot be questioned, that 45 miles were not complete and in running order, and such 45 miles were not certified as being complete and in running order by the government engineer—the second bonds were issued; that is to say, the company on the 25th January, 1875, issued 300 debentures of £100 stg., those now held by the city of *Quebec*. If the conditions of a statutable power are not complied with, how can it be said to be lawfully exercised? Can any person, lawyer or layman, who

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can read and understand the English language, say otherwise than that the debentures so issued were issued not, only without authority of law, but in direct opposition to a clear and express enactment of the legislature, and therefore illegally issued and consequently void, and no more in fact and in law than waste paper.

I have therefore no difficulty in coming to the conclusion, forty-five miles of the road not having been completed, that the company in issuing the second bonds pledged their funds, not only in an unauthorized but in a forbidden manner, in a manner beyond their powers at the time the issue was made, and for which they had not obtained parliamentary authority; even if the issue was made in the expectation of such authority being obtained, the bonds were improvidently and illegally issued without reference to the necessity of 45 miles of the road being first completed.

It seems almost a waste of time to refer to authorities on a matter which seems so clear as that the second bonds were illegal when issued.

Re Pooley Hall Colliery Company (1):

By the articles of association of a company, extended by a special resolution, the directors were empowered to incur debts and to borrow on mortgage and other securities to an amount not exceeding £8,000. They issued a number of debentures at a time when the liabilities of the company exceeded £8,000; and it was held, that the debentures were not voidable, but absolutely void, and that the holders of them could only come in *pari passu* with the simple contract creditors for the amounts secured by their debentures.

Lord *Romilly* in that case said:

With respect to the debenture holders, I think the validity of the debentures depends upon the fact of whether the liabilities did or did not exceed £8,000, at the date of the issue. That was the amount which was fixed as the limit.

* * * * * *

(1) 21 L. T. N. S. 690.

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Therefore I am of opinion that if the liabilities of the company exceeded £8,000, they had no power to issue these debentures; that they are not voidable, but that they were absolutely void, the directors having had no authority to issue them.

In *Wales* v. *Ropert* (1), in which case the debentures were declared void as being for a sum in excess of the borrowing powers of the company, *Keating*, J., says:

So far as binding the company is concerned that document was mere waste paper. The directors had no power to issue it, and it was afterwards held by the Court of Chancery to be absolutely and *ab initio* void.

In reference to a railway company whose borrowing powers were not to arise until a certain portion of their line was open for traffic, in speaking of debentures issued in contravention of such statutory powers as being invalid, *In re Bagnalstown and Wexford Railway Co.* (2), the Lord Justice of appeal says:—

The former is limited by the number and values of the shares; the latter (their loan capital) undergoes a two-fold limitation, viz: first, a restriction of the total that may be borrowed; second, the imposition of conditions precedent, such as, in some companies, that the whole share capital be subscribed for and one-half of it actually paid up; in others, that the undertaking shall have begun to be productive, by the opening of the line or of described portions of it. Any attempt to add to the loan capital in violation of either of those restrictions—*i.e.*, either after the full amount permitted has been already borrowed, or before the prescribed conditions precedent have been fulfilled—would be illegal, and the debentures so issued would be invalid.

In re The Cork and Youghal Railway Co., exparte, Overend, Gurney & Co. (limited) (3):

The railway company had exhausted their capital and borrowing powers; but their undertaking was yet incomplete. At a general meeting of the company, a balance sheet, showing the then amount of excess, was laid before the company, and a resolution was adopted authorizing the board to issue to *L.*, their financial agent, bonds to

(1) L. R. 8 C. P. 477. (2) Ir. L. R. 4 Eq. 526.
(3) 21 L. T. N.S. 738.

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be settled by counsel. *Lloyd's* bonds to a large amount were accordingly given to *L.*, upon which he raised money, some part of which, it was not disputed, was applied in payment of the company's debts and completing their works, and the bonds passed from *L.* into the hands of the present respondents, who carried in claims against the proceeds of sale of the railway under a special Act of parliament for its dissolution, and claimed to be entitled to a surplus of such proceeds in priority to the shareholders. On appeal by the shareholders, it was held that, although it was not law that no creditor who trusted the company after its capital and borrowing powers were exhausted could recover what was due to him, yet any debenture, loan notes, or the like, for the mere borrowing of money in excess of the company's powers, were void; but as the moneys raised in this case had been applied in paying debts of the company, and otherwise for the purposes of its undertaking, with the sanction and acquiescence of its shareholders, these latter could not be entitled to the surplus of the company's property without repaying all moneys so raised and expended.

The Lord Chancellor said:

On the other hand it was equally clear, or it has been made clear, if it was not clear before by the case of *Chambers* v. *The Manchester & Milford Railway Co.*, and the very able and lucid judgment there given, especially that of Mr. Justice *Blackburn*, that any scheme by which a company is authorized only to raise a given amount of capital by shares, and then a certain other quantity, usually one-third, of the share capital is prescribed by the Act of parliament under which it acts, in the shape of debentures or mortgages, they cannot issue any debenture, or loan note, or any security of that description, for the mere purpose of borrowing money; and I apprehend any such instrument so issued would be just as void in equity as at law, being contrary altogether to statute, and being absolutely forbidden by statute; for I entirely adopt the view which was taken by the learned judges, that that thing, in respect of which a penalty is inflicted by statute, must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever.

That being so, this distinction is drawn by Mr. Justice *Blackburn*, which appears to me to be very plain and clear. He says (1):

They (that means these instruments) are on their face the acknowledgment of a debt to some particular person, with a covenant to pay it. Such instruments may be useful in this way: when a company are indebted it may be convenient to make a bond

(1) 5 B. & S. p. 611.

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pointing to a particular portion of the debt actually due; it would facilitate the assignment in equity of the debt thus acknowledged to be due, and possibly throw upon the company the onus of showing the non-existence of the debt. But if there be no debt existing, such an instrument cannot create one, nor put any assignee in a better position than the original obligee or covenantee; and the person holding it could not recover upon it, if it was shown that it was given gratuitously, or was not authorized by statute."

Lord Justice *Giffard* said:—

I think it of importance to state clearly in this case that it is not intended by the court to throw the slightest doubt on the decision come to in the case of *Chambers* v. *The Manchester amd Milford Railway Co.*, and, from the course which the matter took in the court below, I think it also important to say that there is no ground whatever for the argument that a contract or instrument which fails in a court of law by reason of its illegality can, nevertheless, be enforced in equity, bacause money has been paid and received in respect of it. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks, but as to any claim sought to be actively enforced, the defence of illegality is as available in a court of equity as it is in a court of law; and it is for that reason, among others, that the declaration made by the court below has been varied. That, of course, is no answer to the present case.

But it is now contended that a new Act was passed by which the validity of these bonds is established, the practical effect of which would be that from the date of their issue, 25th January, 1875, up to the passage of this Act on the 24th December, 1875, the rights of the holders of the first issue, continued as a first and only charge, in no way affected by this illegal issue, but were by the passing of this Act swept away and the holders of the illegal issue placed on the same footing as the holders of the first issue legally made, and entitled to rate concurrently, as no doubt they would have been entitled to do, if such second issue had been legally made.

If the legislature contemplated legislation of this exceptional and retrospective character, we shall require

to find such an intention clearly and unequivocally expressed. The Act relied on is the 39 *Vic.* ch. 57, which was passed, as appears by the preamble above cited, at the instance and on the prayer of the *Levis & Kennebec Railway Co.*, and which enacts as follows,

The following words in the 22, 23, 24, 25, 26, 27, 28, 29 and 30th lines of the first section of 37 *Vic.*, ch. 23, to wit:

And no more of such bonds shall be issued by the company until seventy-five miles of the said road (inclusive of the aforesaid forty-five miles) shall be complete and in running order as certified by the government inspecting engineer, and so soon as such said seventy-five miles shall have been certified as completed and in running order as aforesaid, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company are struck out and the following are substituted therefor:

And as soon as the rails and fastenings required for the completion of the remaining forty-five miles or thereabouts of the company's line shall have been provided, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company.

The act 39 *Vic.*, ch. 57 will bear no such construction as contended for. The recital cannot be relied on either as establishing the truth of the statements contained in the recital, or as repealing the provisions of the original act, or as legalizing these debentures. There is nothing in this act repealing the first act either by express words or by necessary implication. To give this act such a retrospective operation, as is now sought to be done, is opposed in my opinion to all principle and authority.

There is not a word in this act in express terms, that I can discover, affirming the legality of this issue, still less recognising such illegality and legalizing it, nor is there any language altering the law, or indicating any intention to alter the law by repealing the 37 *Vic.*, ch. 23, which prohibited the second issue until forty-five miles were completed and certified to. The legislature had no such object in view, nor were they, as appears

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by the recital, asked to do so; the legislation sought was not to aid the holders of the second issue, still less to take away, or to lessen, impair, or affect in any way, the rights of the bondholders under the first issue, (and it was not in reference to either of these issues of stock) but to enable the company to provide rails and fastenings for the speedy completion of the length of road represented by the company to be incomplete, and surely this legislation must be construed consistently with and not in derogation of the rights of other parties as they stood at the time.

There is not the slightest indication from the language of the act of an intention to cut down the express provisions of the previous enactment, or to modify, alter, or excuse, the fulfilment of the conditions to be fulfilled by the *Levis and Kennebec Railway Company* before issuing the second debentures. On the contrary, the provisions of the act assume the fulfilment of the conditions and the legality of the issue. Any recognition of the validity of the debentures by the legislature is based only on the representation placed before the legislature by the *Levis and Kennebec Railway Company*, that the conditions had been complied with; and this we are now asked to construe into a recognition that the bonds had been legally issued, whereas the whole representation was to the effect that the conditions having been complied with no legislative recognition was needed to give them legal force and effect.

Clearly what the legislature intended to do was, at the instance of the company, to base certain legislation, as to the issue of further debentures, on the representation that certain bonds already issued had been legally issued, not to deal with or to recognize and give vitality to an issue illegally made. Had the company represented to the legislature that the condition imposed by the 37 *Vic.*, ch. 23, had been

disregarded and the 45 miles never completed or certified as provided, and an issue had been made in defiance of the law and was consequently illegal, can it be supposed the legislature would have legalized such an issue to the detriment of the holders of the first legal issue? If the legislature determined to do so, is it possible to suppose an intention would not be apparent on the face of the act and manifested in terms express, clear and unmistakable? And here the language of *Jessel*, M.R., in *Harrison* v. *Cornwall Minerals Railway Co.*, (1) is strictly applicable, viz:—

> On the other hand the argument appears to me to be without answer, that the vested rights of persons acquired before the passing of the Act, who either bought debenture stock or lent money on mortgage, are not interfered with by the legislature without compensation, and it requires the strongest and clearest words in an Act of parliament before you are entitled so to interpret it as to deprive people of their property without compensation.
> * * * * * *

It being shown, as it has most unquestionably been in this case, the representation of facts essential to the legality and validity of the issue was incorrect, though the legislature may have acted on such a misrepresentation and the legislation based on such misrepresentation be fruitless, the illegality of this issue remains as if the legislature had not been mislead.

But even if the insertion of a statement in an Act such as this would amount to a legislative recognition, so soon as the allegation is shown to be incorrect the recognition necessarily ceases to have any effect. It being made to appear that the representation was unfounded, and the fact not being as the legislature on such representation assumed it to be, the recognition relied on necessarily falls with the representation and the assumption based thereon. This was a private act prayed for by the company, and any misrepresentation

(1) 18 Ch. D. 341.

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of fact or law in the preamble or body of the act can be shown. As regards the character and the true construction of this act and the effect of the recital, the following authorities are applicable:

Quilter v. *Mapleson* (1):

It is a well settled rule that you are not to construe an act to be retrospective so as to alter existing rights, unless you find from the act itself that such was the intention of the legislature.

As a general principle acts of parliament, especially when they alter the rights of parties, are not to be construed retrospectively unless otherwise provided.

Hickson v. *Darlow* (2). Mr. Justice *Fry* in that case says:

Now, it is a well-known principle of law on the construction of acts of parliament, and especially when the rights and liabilities of persons are altered thereby, that they are not to have a retrospective operation unless it is expressly so stated.

And *Jessel*, M. R., in *Quilter* v. *Mapleson* (3):

The question whether an Act of parliament is retrospective in its operation must be determined by the provision of the Act itself, bearing in mind that a statute is not to be construed retrospectively unless it is clear that such was the intention of the legislature.

There can be no question, in my opinion, that this is a private act to which the holders of the first issue were no parties, and I think it a clear principle that rights acquired under the 37 *Vic.*, ch. 23, cannot be taken from them by a private act to which they are not parties, unless by clear express words the intention is manifest.

In *Ballard* v. *Way* (4), Lord *Abinger*, C.B., says:

I consider that these Acts of parliament (private acts) do not affect all mankind with a knowledge of what is contained in them.

And in *Earl of Shrewsbury* v. *Scott* (5), *Cockburn*, C.J., says:—

(1) 9 Q. B. D. 672.
(2) 23 Ch. D. 692.
(3) 9 Q. B. D. 674.
(4) 1 M. & W. 529.
(5) 6 C. B. N. S. 157.

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We have been reminded, indeed, that a private act of parliament has been said upon very high authority to be little more, if anything, than a private conveyance between those who are parties to it, and to a certain extent I agree to that proposition. Recitals in a private act of parliament could never be held to bind persons who were not parties to the act. Provisions, however general in their terms, could not be held to affect the rights of parties who were not before parliament and whose rights were never intended to be affected.

In *Mahony* v. *Wright* (1), *Lefroy*, C. J., says:—

But it is settled by authority that the recital of an intention merely in a subsequent statute to repeal a former specific statute will not operate by implication to repeal the former statute, and that in order to affect such a repeal there must be a clause of repeal in the repealing statute.

Per L. J. *Turner* in Trustees of *Birkenhead Docks* v. *Laird, &c.* (2):

It is thus laid down in *Jenkins*, 3rd century, case 11:

"A special statute does not derogate from a special statute without express words of abrogation."

Per Kay, J. in *Gard* v. *Commissioners of Sewers* (3):

General enactment cannot repeal specific enactment in an earlier act merely by implication.

In *Edinburgh & G. Ry. Co.* v. *Magistrates of Linlithgow* (4), the Lord Chancellor says:

A recital in an Act will not bind those who are not within its enacting part.

In *Purnell* v. *Wolverhampton N. W. Co.* (5), *Erle*, C. J., says:

There is much in the argument of Mr. *Powell*, that these are all in the nature of private acts, and that a provision in a private act is not to be held repealed by a subsequent private act, unless there are words which operate expressly to repeal it, and I think the principle thus enunciated by him should guide our judgment upon this occasion.

Byles, J.:

(1) 10 Ir. C. L. 426.
(2) 4 DeG. McN. & G. 742.
(3) 49 L. T. N. S. 328.
(4) 3 Mac. H. L. C. 708.
(5) 10 C. B. N. S. 576.

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I am of the same opinion, and I must confess I have been much influenced by the case of the *Trustees of the Birkenhead Docks* v. *Laird* (1), where Lord Justice *Turner*, a very high authority, lays down the rule to be this: "It is a rule of law that one private act of parliament cannot repeal another, except by express enactment." If the Waterworks Clauses Act, 1847, were so incorporated with the *Wolverhampton* Waterworks Transfer Act, 1856, as to override the 18 and 19 *Vic.* ch. cli., it could only at the utmost impliedly repeal the 40th section of the last mentioned Act; and the case referred to is a distinct authority to show that there can be no repeal except by express enactment.

As to what are private acts. The marginal note in *Brett* v. *Beales* (2) is as follows:

An act of parliament, private in its nature, is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed and taken to be a public act and shall be judicially taken notice of without being specially pleaded." A canal act is not rendered a public act by containing provisions empowering the company to regulate and take towage rates and tolls from persons using the canal.

Per Atty.-Gen. *arguendo:*

These private acts have always been treated as mere contracts between individuals and their recitals are of no more value than the recitals of any private deeds.

Lord *Tenterden*, after consulting his brother judges on two grounds laid for admission of evidence—1st, that the concluding clause renders it admissible as a public act; 2nd, that independent of that clause it is so from its nature, says (3):—

The answer given to the first was that the clause only applied to the forms of pleading and did not vary the general nature and operation of the act. I was inclined to that opinion at the time and my learned brothers agree with me in that impression. We also think that the second ground fails. It is said that the bill gives a power of levying a toll on all the king's subjects, and therefore the act is public. The power given is not so extensive, it is only to levy toll on such as shall think fit to use the navigation. The ground, therefore, on which it is said the act is public and the evidence admissible fails and I cannot receive it.

(1) 23 L. J. Ch. 457. (2) 1 Moody & M. 421.
(3) 1 Moody & M. 425.

In *Beaumont* v. *Mountain* (1), on *Brett* v. *Beales* (2) being cited and commented on, *Alderson*, J., says:—

The question in that case was not so much as to the mode of proving the act as to whether the act could be taken as proof of certain facts recited in it.

The court held when the act is declared to be a public act and is required to be judicially taken notice of without being specially pleaded, it was unnecessary to prove it by certified copy of the original.

And in *Wordward* v. *Cotton*, (3) *Alderson* B.:—

I think Lord *Tenterden* only meant to say in *Brett* v. *Beales*, that the clause was one respecting the mode of proving the act, and that for other purposes, as for instance the recital of matters in it, it did not give it the effect of a public act.

And Lord *Lyndhurst*, C.B., says:—

The case of *Brett* v. *Beales* has been much misconceived. It is certainly not well reported, but I think that upon the whole scope of it Lord *Tenterden* meant to rule the same law that is decided in *Beaumont* v. *Mountain*.

As to the effect of recitals with reference to questions of fact or of law.

In *The Queen* v. *The Inhabitants of Haughton*, (4).

By a local and personal act (since repealed) it was recited that the highway in question was in the township of D. *Held*, recital not conclusive.

Lord *Campbell*, C.J., says:—

Had there been anything amounting to an enactment that the road should be considered in *Denton*, this would have prevailed over the estoppel, but a mere recital in an act of parliament, either of fact or law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital.

In the *Shrewsbury* Peerage case (5) it is said:—

The act 1 *Geo. IV.*, c. 40, was put in for the purpose of reading a part of the recital.

(1) 10 Bing. 405.
(2) 1 Moody & M. 421.
(3) 1 C. M. & R. 47.
(4) 1 El. & B. 501.
(5) 7 H. L. C. 13.

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An act 6 and 7 *Vic.*, c. 28, and other private acts, were then proposed to be put in for a similar purpose.

Mr. Serjeant *Byles* objected to receiving these recitals as evidence of the facts.

Sir *F. Kelly* contended that they were complete evidence of such facts; the *Wharton* Peerage, where the Lord Chancellor, on such evidence being tendered, said "It is very strong proof, for it is the well known practice of this House not to allow the insertion of such a statement in the recitals of a private act of parliament, unless the truth of that statement has been previously proved to the satisfaction of the judges to whom the bill has been referred."

Lord *St. Leonard's:*

That used to be the practice, but it is not so now, the evidence in support of private bills is not now submitted to and reported on by the judges, and future recitals will not therefore be evidence.

With the hardship of this case we have nothing to do; if the second issue is legal, the holders are entitled to their share of the money in court, if they are not legal they have no claim and no court can relieve them. But I cannot help remarking that I should think no prudent person would take debentures without looking at the authority of the company to issue them. On this point *Jessel*, M.R., says in *Harrison* v. *Cornwall* (1):

No companies borrow under their statutory powers, or ought to borrow, without expressing all the acts under which they borrow, and I believe they do. It is the practice to state under what acts they borrow the money, so that the lenders may look at the acts for themselves, and see what the powers are. Any lender would, no doubt, be very foolish who did not inquire of the company as to what their borrowing powers were, and I have known such questions addressed to secretaries of companies over and over again.

The most casual glance at the statute would show the absolute conditions under which alone the power of issuing debentures in this case could be exercised, and the prohibition from issuing except on those conditions, and if seeing this a purchaser did not choose to inquire whether the conditions had been complied with or not, I cannot see that he has anybody but himself to blame.

(1) 18 Ch. Div. 341.

It is impossible that at the time the company issued and parted with these debentures, any person could have been misled by the recital in the act, for it is clear beyond all doubt that they were issued before the passing of the act; the act says so, and the appellants in their opposition admit it as follows :

OPPOSITION AFIN DE CONSERVER PRODUITE PAR L'APPELANTE LE 5 AVRIL 1881.

Que le vingt-cinq de janvier mil huit cent soixante-quinze, la dite défenderesse, en conformité à la loi, a émis et mis en circulation trois cent bons ou débentures, de la somme de cent louis sterling chaque, par lesquelles débentures elle s'est obligée de payer au porteur de chacune des dites débentures, le premier de janvier mil huit cent quatre-vingt-quatorze, la dite somme de cent louis sterling, pour valeur reçue, avec intérêt à raison de sept louis sterling par chaque somme de cent louis sterling, le dit intérêt payable les premiers jours de janvier et de juillet de chaque année, depuis la date de l'émission des dites débentures jusqu'au dit premier de janvier mil huit cent quatre-vingt-quatorze, au porteur des coupons ou bons annexés aux dites débentures et en faisant partie;

Que les dites trois cents débentures ainsi émises par la dite Défendresse, &c., &c.

But if any person could have been misled, the hardship would be infinitely greater on the holders of the legal first issue if their security was to be cut down behind their backs by debentures issued on a date when there was no law to justify their issue, and for which issue no subsequent legislative authority has been given, simply because the company introduced a misrepresentation into the private act, on the assumption of the correctness of which the legislature made provision, not for legalizing any unlawful issue, but simply assuming to have been correctly done what was so alleged, with reference to other operations for finishing the road, with which neither the holders of the first issue nor of the second issue had anything to do.

STRONG, J., concurred.

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FOURNIER, J :—

Les deux parties en cette cause, l'appelante et l'intimé, sont porteurs de bons émis par la compagnie du chemin du fer de *Lévis* et *Kennebec*, en vertu de l'acte 37 *Vic.*, ch. 23 des statuts de *Québec*, amendant la charte du dit chemin de fer de *Lévis* et *Kennebec*. Ce statut constate que lors de sa passation, des bons avaient déjà été émis au montant de $280,000, et limite pour l'avenir l'émission de bons à la somme de £300,000 sterling,—qui seraient émis comme suit : une première émission de £100,000 devant avoir lieu immédiatement ; la seconde (100,000) £100,000 lorsque 45 milles du chemin en question auraient été complétés, et la troisième aussi de £100,000, lorsque trente autres milles du dit chemin de fer auraient été construits. Ces différentes émissions quoique appelées 1ere, 2me et 3me, n'ont aucune priorité les unes sur les autres,—au contraire, elles doivent affecter le dit chemin de fer au même degré, ainsi que le statut le déclare :

It being understood, however, and hereby declared, that such terms "first issue," "second issue" and "third issue" shall be for convenience only of this bill, and shall not be deemed to give any of the said issues priority one over another.

Cet acte fut plus tard amendé et la condition de construire trente milles de chemin de fer avant de pouvoir faire la 3me émission fut abolie par la 39me *Vic.*, ch. 57, et remplacée par la suivante :

So soon as the rails and fastenings required for the completion of the remaining 45 miles or thereabouts of the company's line shall have been provided, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company.

Le chemin de fer de *Lévis et Kennebec*, hypothéqué à la garantie de ces bons a été vendu par le shérif du district de *Québec*, le 22 mars 1884, pour la somme de $192,000. C'est l'intimé qui en est devenu l'acquéreur.

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Comme porteur de bons de la 1re émission, il a formé opposition sur le produit de la vente pour la somme de $284,537.34.

L'appelante aussi produit une opposition réclamant, sur les mêmes deniers, le paiement de $218,099 pour bons de la 2me émission, avec rang de première hypothèque sur le dit chemin

L'intimé à contesté l'opposition de l'appelante sur le principe que les bons dont elle était porteur faisaient partie de la seconde émission qui avait été faite illégalement. L'intimé base cette prétention sur cette partie de la 37me *Vict.*, ch. 23, en déclarant que la 2me émission n'aura lieu qu'après que 45 milles du dit chemin de *Lévis* et *Kennebec* auront été complétés, et il allègue que de fait la dite émission a eu lieu lorsqu'il n'y avait encore que 43½ milles du chemin fait et terminés, et qu'en conséquence la compagnie du chemin de *Lévis* et *Kennebec* n'a jamais eu le droit de faire que la première émission et que tous les autres bons émis par elle sont nuls.

L'appelante a attaqué en droit cette défense, en alléguant que le fait avancé par l'intimé que les 45 milles de chemin de fer n'avaient jamais été complétés, était contraire à la loi 39 *Vict.*, ch. 57, laquelle déclare dans son préambule que les dits 45 milles du chemin de fer ont été complétés, et reconnaît dans ses dispositions la validité de la seconde émission et modifie les conditions pour la troisième émission. Avant de faire droit sur cette défense il a été ordonné de procéder à la preuve sur les faits avancés par l'intimé. Celui-ci après avoir exposé les faits dans son *factum*, dit que cette cause ne présente qu'une seule question, celle de savoir quel doit être, à l'égard de personnes non parties à un acte privé, l'effet de la constatation dans le préambule de l'acte d'un fait qui est en réalité erronné. Il pose ainsi la question :—

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From this statement it will appear that the whole point in this case is whether the recital contained in the preamble of a private act of a fact itself untrue and erroneously stated, is evidence of the truth of such fact against persons who are in no way parties to the passing of such private bill, and who were in all probability ignorant of what was taking place.

C'est aussi à cette seule question que l'hon. juge qui a décidé en première instance a réduit les divers points de fait et de droit soulevés par l'appelante. Cette manière de voir ne représente pas correctement ses prétentions. Elle n'a pas prétendu s'appuyer seulement sur l'énonciation contenue dans le préambule de la 39 *Vic.*, ch. 57. Mais elle invoque pour justifier sa prétention l'effet de cet acte sur l'ensemble de la législation concernant ce chemin de fer. Elle prétend de plus que l'intimé ne pouvait pas par une preuve testimoniale contredire les déclarations contenues dans la 37me *Vic.*, ch. 57.

L'hon. juge après avoir cité une partie du préambule, se demande s'il fait partie de l'acte et s'il a aucune force législative. Il cite l'autorité de *Dwarris* sur l'effet du préambule dans un statut. Il cite aussi l'autorité de *Taylor* (1), pour montrer qu'une énonciation même dans un acte public ne forme pas une preuve concluante, et il en tire la conclusion suivante :

The preamble of the act in question being without force in a legislative sense, and creating or conferring no powers, the pretention of the corporation, &c., &c..... is unfounded in law.....

Comme on le voit par les expressions de l'hon. juge lui-même, il a limité son examen de la qnestion à l'effet du préambule.

Aucune observation de sa part ne fait voir s'il a cherché dans le corps de l'acte la confirmation de l'énonciation du préambule, ou s'il ne se trouve pas dans le corps de l'acte quelque déclaration équivalente à une disposition législative formelle reconnaissant la validité des bons de la 2me émission.

(1) On Evid., p. 1423.

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Il faut d'abord remarquer que ce préambule est d'un caractère tout spécial; la mention de l'achèvement des 45 milles du chemin de fer, est le moindre fait qu'il contient. On y trouve de plus des déclarations qui font voir que cet acte a été le résultat d'une transaction entre le gouvernement et les intéressés, en considération de l'augmentation du subside accordé par la législature et en vue de nouveaux subsides sur le point d'être accordé. On ne pourrait donc pas retrancher une seule des conditions de ce compromis sans détruire complètement l'effet de cette loi. Il est nécessaire, je crois, de citer les principales parties de ce préambule :—

Attendu qu'il appert que lorsqu'une longueur totale de quarante-cinq milles de la compagnie a été complétée, une première et une seconde émission des débentures de la compagnie ont eu lieu chacune pour un montant de cent mille livres, chacune des dites émissions consistant en mille débentures de cent livres sterling chacune; et attendu que depuis la passation du dit acte amendé, le subside accordé par la législature provinciale a été élevé jusq'à concurrence de quatre mille piastres par mille, et que de nouveaux subsides sont sur le point d'être accordés par les diverses municipalités traversées par la dite ligne, contribuant ainsi dans une proportion considérable au montant requis pour l'achèvement des terrassements et des ponts sur les quarante-cinq milles qui restent à compléter; et attendu que pour obtenir le prompt achèvement des dits 45 milles actuellement inachevés, il est à propos que les rails et les attaches requis soient achetés sans délai.....

Ce préambule qui contient tant de faits précis et importants doit sans doute avoir un effet considérable sur l'interprétation de l'acte, et suivant l'article 12 du C. C. de *Québec*, il doit être considéré comme faisant partie de l'acte.

Lorsqu'une loi, (dit cet article,) présente du doute ou de l'ambiguité, elle doit être interprétée de manière à leur faire remplir l'intention du législateur et atteindre l'objet pour lequel elle a été passée.

Le préambule qui fait partie de l'acte sert à l'expliquer.

Il faut remarquer que ce statut est un de plusieurs actes amendant la charte du chemin de fer de *Lévis* et *Kennebec*,

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que l'intervention de la législature qui subventionnait ce chemin, était encore devenue nécessaire pour en faciliter la construction en modifiant les conditions précédemment exposées concernant l'émission de bons. Ce préambule fait voir que ce n'est qu'après un complet examen de la position des affaires de la compagnie que la législature a acquiescé aux demandes qui lui étaient faites. Le préambule ne contient pas seulement l'énoncé du fait que 45 milles de chemin ont été complétés ; il va beaucoup plus loin ; il dit que la preuve en a été faite en s'exprimant ainsi, " et attendu qu'il appert que lorsqu'une longueur totale de quarante-cinq milles de la ligne de la compagnie a été complétée, une première et une seconde émission des débentures de la compagnie ont eu lieu chacune pour un montant de cent mille livres, chacune des dites émissions consistant en mille débentures de cent livres chacune." Ces expressions ne constituent pas seulement une énonciation d'un fait, elle comporte de plus la déclaration que le fait a été constaté—qu'une première et une seconde émission avait eu lieu. Mais dit l'intimé ce fait n'étant pas exact et ne se trouvant que dans le préambule, il peut être contredit et il offre une preuve testimoniale à cet effet. Mais cet avancé est-il correct, ne trouve-t-on que dans le préambule la mention de la seconde émission ? N'y a-t-il pas dans le corps de l'acte des expressions qui font voir que cette loi constate le fait d'une seconde émission ? La dernière partie de l'unique section de ce statut ne peut laisser aucun doute à cet égard ; elle dit positivement qu'il ne restait alors que les bons de la 3me émission. C'était donc positivement déclarer dans le corps de l'acte que les deux autres émissions avaient été faites. C'était répéter la déclaration du préambule.

Le but principal de cet acte était sans doute de changer les conditions de la 3me émission qui, d'après la 37me *Vic.*, ch. 23, ne pouvait avoir lieu qu'après l'achè-

vement des 75 milles, en permettant de faire cette émission aussitôt après l'achat des rails, et c'est en accordant cette faculté que la loi reconnaît la validité des deux autres émissions dans les termes suivants, " et aussitôt que les rails et les attaches requis pour l'achèvement des quarante-cinq milles restant ou à peu près de la ligne de la Compagnie auront été achetés, alors les mille bons restant de cent livres sterling chacun, qui seront désignés comme étant la troisième émission, pourront être émis par la compagnie." Après la mention faite dans le préambule des deux premières émissions, la déclaration dans cette section que la troisième peut-être faite suivant les nouvelles conditions n'est-elle pas une reconnaissance formelle et positive de la légalité des deux autres ? Ceci me semble démontrer clairement que la question ne pouvait pas être résolue pas le seul examen du préambule,—qu'il fallait de plus examiner l'acte dans son ensemble.

Il y a encore à considérer le fait important de la date des bons de la 2me émission, et celle de la sanction de l'acte 39 *Vic.*, ch. 57. Ces bons avaient été préparés le 25 janvier 1875, longtemps avant la passation de la 39 *Vic.*, ch. 57. Dans quel but en a-t-on fait mention dans ce dernier acte ? Doit-on supposer que cette mention est tout à fait oiseuse et faite sans aucune intention quelconque d'utilité de la part des intéressés ? On a sans doute pensé qu'après l'émission faite il y avait avantage à constater comme un fait légal ces deux émissions. S'il y avait la condition de construire 45 milles avant de pouvoir faire la 2me émission, il y avait aussi à l'émission des premiers bons une condition fort importante, celle de racheter, avec le produit de ces bons, tous ceux émis en vertu de la 4me section de la 36me *Vict.*, ch. 45. En présence de cette condition on comprend qu'il était du plus haut intérêt, pour la compagnie et pour les porteurs de bons, d'avoir une décla-

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ration statutaire reconnaissant la validité de ces émissions.

Voici ce que dit *Taylor On Evidence*, (1) :—

The solemnity of an act done, though not done in court, will also, sometimes, raise a conclusive presumption in its favour.

Et s'il est vrai de dire :—

But in general a local and private statute, though it requires a clause requiring it to be judicially noticed, is not, as against a stranger, any evidence of the facts recited (2).

Il est aussi juste de dire que lorsque la personne qui attaque la vérité du fait attesté, n'est pas étrangère à l'acte, la présomption légale de la vérité du fait est complète comme le dit *Parke, B.*, dans la cause de *Ballard* v. *Way* (3) :—

This is an incumbrance created by a private act to which the defendant may be considered a party, and, therefore, it is the same as if there had been an agreement with him.

Si la demande à la législature est faite dans l'intérêt des porteurs de bons de la 1ère et 2me, aussi bien que ceux de la 3me émission, et suivant l'autorité ci-dessus ils doivent être considérés comme parties à l'acte, et ne doivent pas être admis à prouver que l'émission a été irrégulière dans le cas même où cette preuve eût été possible. En conséquence je suis d'avis que la preuve faite par l'intimé en cette cause au sujet des irrégularités qui peuvent avoir eu lieu lors de l'émission est inadmissible.

Une considération qui n'est pas sans importance, c'est que l'appelante n'était devenue acquéreur des bons de la 2me émission que longtemps après la passation de la 39me *Vict.*, qui en reconnaît la validité, il n'était pas nécessaire pour elle de porter ses perquisitions au-delà du statut pour savoir si leur émission était légale, les ayant acquis de bonne foi sur l'autorité des déclarations

(1) P. 95.
(2) P. 1377.
(3) 1 M. & W., 530.

solennelles du statut, cela devait lui suffire pour se convaincre de leur légalité.

C'est sans doute dans ce but qu'elles ont été mentionnées non seulement dans le préambule, mais aussi à la fin de la section première; autrement il faudrait en conclure que cette mention a été insérée sans réflection et par pure ineptie de la part du rédacteur du bill. Mais comme on en voit fort bien l'utilité, on doit être convaincu que l'acte n'a été ainsi fait qu'à la demande de tous les intéressés, parmi lesquels étaient sans doute les porteurs des bons de la première émission.

Quant aux arguments de l'intimé au sujet du défaut d'avis aux porteurs de bons, et aussi à ce qu'il a dit de la manière dont se fait la preuve des préambules des actes, je ne crois pas qu'il soit utile d'y répondre autrement qu'en disant qu'on doit présumer que toutes les procédures nécessaires ont été régulièrement faites.

L'avis donné devait mettre tous les intéressés sur leur garde, et ils n'ont aucun droit de se plaindre qu'on a décidé sur leurs intérêts sans les avoir entendus.

Si, comme je le crois, la position prise par l'hon. juge de la Cour inférieure est erronée; si j'ai établi que la loi a voulu parler des deux émissions en question comme étant légalement faites, il ne resterait donc plus qu'à savoir si la législature de *Québec* avait le pouvoir de faire ce qu'elle a décrété.

Il me semble que cela ne peut faire le sujet d'un doute raisonnable. Il s'agissait, dans tous les statuts ci-dessus cités, de législation au sujet d'un chemin de fer local commençant à *Lévis* et se terminant à la frontière du *Maine*. Le pouvoir de la législature de *Québec* à cet égard ne peut être mis en contestation. Toutes les dispositions de ces divers actes étaient dans les limites de ses attributions, et doivent recevoir leur effet.

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Mais en supposant que la 39me *Vict.*, ch. 57, n'aurait pas tranché la question et qu'il n'y aurait en faveur de l'appelante qu'une énonciation qui pourrait être contredite, l'intimé en a-t-il détruit la vérité par une preuve légale ? Les bons de la 2me émission qui sont les titres de la créance de l'appelante, sont en forme authentique et faits conformément aux divers actes concernant l'incorporation du chemin de *Lévis* et *Kennebec*, et conformément aussi à l'acte des chemins de fer de *Quebec*. Ils sont revêtus des signatures des président et secrétaire, et portent le sceau officiel de la dite compagnie. A leur face ces titres sont parfaits et l'on doit, d'après la maxime, *Omnia praesumuntur ritè et solenniter esse acta*," les considérer prouvant un titre parfait, jusqu'à preuve du contraire. Comme actes officiels, la présomption légale qu'ils ont été dûment exécutés est en leur faveur *Brown.* (1) :

Again, where acts are of an official nature, or requiring the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rnle is, *Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium.*

On peut encore invoquer en faveur de leur légalité, la présomption que les conditions dont la violation ferait de leur émission un acte frauduleux, ont été duement exécutés.

It is a well established rule that the law will presume in favour of honesty and against fraud (2).

Dans le cas où les bons en question seraient considérés comme des actes de particuliers, les mêmes présomptions devraient s'appliquer à leur validité, car ils sont revêtus des formes les plus solennelles que la loi exige pour la perfection d'un titre.

As regards the acts of private individuals, the presumption, *ommia rite esse acta*, forcibly applies where they are of a formal character

(1) Legal maxims, p. 848. (2) Id. P. 849.

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as writings under seal. Likewise upon proof of title, everything which is collateral to the title will be intended, without proof; for, although the law requires exactness in the derivation of a title, yet, where that has been proved, all collateral circumstances will be presumed in favour of right.

On the same principle, it is a general rule, that when a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shown,—*stabit præsumptio donec probetur in contrarium*; negative evidence rebuts this presumption, that all has been duly performed (1).

L'appelante se présente donc ici avec un titre qui doit être considéré comme parfait *donec probetur in contrarium.* Mais comment doit être faite cette preuve pour opérer la destruction de ce titre? La loi anglaise pas plus que celle de la province de *Québec* n'admet la preuve testimoniale en pareil cas. C'est la seule que l'intimé a offerte.

Il a fait entendre deux témoins MM. *Lesage* et *Demers* pour leur faire déclarer qu'il n'avait été fait et complété que 43½ milles. Leurs déclarations verbales peuvent-elles être opposées aux déclarations positives de la loi qui fait voir le contraire. Aux termes de la 37me *Vic.*, ch. 23, la seconde émission ne devait avoir lieu que sur un certificat de l'ingénieur-en-chef que 45 milles avaient été complétés et mis en opération. Cette preuve verbale est donc absolument inutile et d'aucun effet.

L'ingénieur-en-chef *Light* a aussi été entendu comme témoin. Il dit qu'il n'est pas bien sûr de la longueur du chemin qui avait été exécuté, mais qu'il a déduit 1½ mille qui n'était pas complété. Que restait-il à faire pour le terminer? Il n'en dit rien, y avait-il encore de l'ouvrage à faire pour un dollar ou pour des milliers? On n'en sait rien, mais il ajoute qu'il a fait à ce sujet un rapport qui a été remis à l'hon. M. *DeBoucherville*, alors ministre des chemins de fer. Ce témoignage est tout-à-fait illégal d'abord parce qu'il tend à contredire par témoins une déclaration de la loi, et ensuite parce

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(1) Brown's Legal maxims p. 852.

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que l'existence d'un rapport étant prouvée, la preuve testimoniale de son contenu ne pouvait être reçu.

The contents of a written instrument, which is capable of being produced, must be proved by the instrument itself, and not by parol evidence * * * The fact that in cases of this kind the writing is in the possession of the adverse party does not change its character, its absence must be accounted for by notice to the other party ot produce it, or in some other legal form, before secondary evidence of its contents can be received (1).

La preuve est claire et précise qu'un certificat a été donné et rien n'en explique l'absence de production.

L'admission de ce témoignage est une violation des règles de la preuve. Le rapport ou certificat seul aurait pu faire preuve du fait qu'il n'y avait eu que 43½ milles de complétés. Le défaut de production de ce rapport par l'intimé doit faire présumer que le rapport en question n'aurait pas prouvé ce que dit *Light*. De plus n'aurait on pas dû faire la preuve que l'ouvrage incomplet pour lequel *Light* avait fait une diminution de 1½ mille, n'avait pas été complété depuis son rapport ?

En conséquence il me paraît impossible d'en venir, comme le jugement de 1re instance l'a fait, à la conclusion que les bons de la 2me émission sont nuls et que les porteurs de la 1ère doivent au mépris des termes positifs du statut déclarant qu'il n'y aura aucune priorité entre ces bons, absorber tout le produit de la vente du chemin de *Lévis* et *Kennebec*, qui était affecté à la garantie des bons de la première comme de ceux des deuxième et troisième émission.

Pour ces motifs et pour ceux exprimés par l'honorable juge *Tessier*, je suis d'opinion que l'appel devrait être alloué, que la contestation de l'opposition de l'appelante, faite par l'intimé, devrait être renvoyée et que l'appelante devrait être colloquée concurremment avec l'intimé pour le montant de son opposition sur le produit de la vente du chemin de *Lévis* et *Kennebec*. Le tout avec dépens.

(1) Taylor on Evidence Pp. 358 & 366.

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A company called the *Levis and Kennebec Railway Company* was incorporated by an act of the legislature of the province of *Quebec*, in 1869 (32 *Vic.*, chap. 54.) That act was subsequently amended by 36 *Vic.*, chap. 45; again amended by the 37 *Vic.*, chap. 23, and again by the 39 *Vic.*, chap. 57.

Over forty miles of the railroad was built and in running order, and, on the 22nd of March, 1881, the right and title of the company in the railway was sold at auction by the sheriff of the district of *Quebec*, under an execution at the suit of "*The Wason Manufacturing Co.*, to the respondents, for $192,000.

Upon this sale the *Quebec Central Railway Co.*, the present respondents, fyled an opposition claiming the sum of $272,537.34, being the amount of several sterling bonds of the *Levis and Kennebec Railway Co.* mentioned in the opposition. The corporation of *Quebec*, the present appellants, also fyled an opposition based upon a number of bonds alleged to be held by them, and for the amount of which they also claimed to be collocated upon the proceeds of the sale. The opposition of the latter was contested by the former on the ground that the bonds held by them were illegally issued, and consequently null and void, and this contestation was maintained by the judgment of the Superior Court, rendered on the 19th December, 1882, and subsequently affirmed by a majority of the Court of Appeal in *Quebec*, Mr. Justice *Tessier* dissenting.

The first section of the act 37 *Vic.*, ch. 23, is as follows (1):—

The following is the preamble and a part of section one of 39 *Vic.*, ch. 57 (2):

By section one the restriction contained in the Act 37 *Vic.*, ch. 23, was repealed, so far as related to the third

(1) See p. 568. (2) See p. 568.

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issue of the company's bonds, until the full completion of the ninety miles; and the following provision was substituted:

So soon as the rails and fastenings required for the completion of the remaining forty-five miles or thereabouts of the company's line shall be provided, then the remaining one thousand bonds of one hundred pounds sterling each, to be termed the third issue, may be issued by the company.

Here then, is, in my opinion, a legislative declaration of the validity of the first and second issues of the bonds. The fact of the completion of the first forty-five miles of the railroad, is particularly referred to in the preamble; and that fact having been ascertained, the condition upon which the third issue was provided to have been made, was ameliorated; and the enacting words have virtually incorporated the statement in the preamble, as to the first forty-five miles having been completed. If that position is tenable, then the evidence on the trial cannot affect the legal rights of the holders of the second issue of the bonds. The Legislature of *Quebec* had jurisdiction over the subject matter; and legal tribunals cannot resist its declaration, no matter upon what evidence that might be produced.

The words in section 1 of 37 *Vic.*, ch. 23, are:

And as soon as forty-five miles shall have been certified as complete and in running order as aforesaid, then a further issue of one thousand bonds of one hundred pounds sterling each, to be termed the second issue, may be made by the company.

If the necessary certificate was issued, then the rights of the bondholders of the second issue, acting on the certificate, could not be affected, in my opinion, by evidence subsequently, that when it was issued, the forty-five miles, although certified as provided by section one, were not fully completed. It was to the certificate alone that purchasers of the bonds had to look. That was the security and the only one provided for them by the legislature, and when that certificate

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was executed and issued by the proper officer, the liability under the bonds when issued attached. A certificate was duly issued before the sale of the bonds, but it was not given in evidence; and it may be questionable whether any evidence as to the condition of the first forty-five miles at the time was regular. If the bonds were purchased and held on the security of the certificate, it should have been produced by the respondents; or, if none such were given, that fact should have been shown. It is shown, however, that a certificate was given by the inspecting engineer of the government, and lodged with the Minister of Railways of the province of *Quebec*. That document was, then, the best evidence, and should have been produced. The contents of it were not attempted to be given; and could not have been, unless the original could not be produced. The holders of the bonds are *primâ facie* entitled to share in the proceeds of the sale left after paying the execution creditor; and the onus of the illegality of the issue raised was on the respondent company. They, in my opinion, were bound to shew the illegality of the issue of the bonds held by the appellants. The respondents rely on two allegations in one of their pleas, "that forty-five miles of the said company's railway "have never yet been built and in running order, nor "certified as such by the government inspecting "engineer." I have already stated my opinion, that it would not invalidate bonds purchased on the security of the certificate, provided for by the Act, even should it be shown, that through mistake or otherwise the road was certified to be completed when it was not; and that consequently such an issue would be immaterial. I have also stated my opinion that when it was once shown or admitted, as it was, that a certificate was issued, and available, it should have been produced by the respondent company before being

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permitted to go into evidence of the state of the forty-five miles. It is quite possible that the engineer may have given a certificate for the whole distance of forty-five miles, and subsequently found it was somewhat short of that distance, but that, in my opinion, would not affect the certificate. The appellants are, in my opinion, justly entitled to a participation in the funds in question as bond-holders; and to deprive them of it, the best available evidence should be required to show the illegality of the issue. Such evidence has not I think been given. Even had it been, I think the issue of the bonds was legislatively sanctioned, as before pointed out.

For these reasons I think that the appellants are entitled to the judgment of this Court with costs.

GWYNNE, J.:—

The point which is raised upon this appeal is one of the gravest nature, the importance of which, as it appears to me, cannot be over estimated, affecting as it does the value and character of debentures of a railway company, issued and placed upon the money markets of the world, and there sold to innocent persons who purchased them for value in the confidence and assurance solemnly published on the face of the debentures, that they have for their validity the sanction and guarantee of the Legislature of the Province of *Quebec*, but which, as now appears, are (by the judgment of the courts of the province upon the authority of whose Legislature the debentures upon their face profess to have been issued) pronounced to have been illegally issued—and without the sanction or authority of any law—and to be of no value or effect whatever, and to be, in fact, no better than waste paper,

A difficulty has *in limine* suggested itself to my mind, namely—whether upon the proceeding which is

now before us, and in view of the transaction out of which (as appears by the appeal case submitted to us,) it originates, the record is so framed that a judgment to the effect that the debentures in question are absolutely invalid, as they have been pronounced to be by the judgment of the courts of the Province of *Quebec*, can have any judicial force and effect?

By the appeal case it appears that the proceeding before us originates in a judgment recovered in the Superior Court of the Province of *Quebec*, on the 20th day of January, 1877, by the *Mason Manufacturing Co.* against the *Levis & Kennebec Railway Co.*, a company incorporated and having certain powers and privileges conferred upon it by 32 *Vic.* ch. 54 and certain other acts in amendment thereof, passed by the Legislature of the Province of *Quebec*. To enforce execution of this judgment a writ of execution against the goods and chattels, lands, and tenements of the railway company was issued, addressed to the Sheriff of the district of *Quebec* whereby he was ordered to levy the sum of $4,688.33, (the amount of the judgment, with the interest thereon from the said 20th January, 1877,);—a return having been made by the Sheriff to this writ to the effect that he had seized the goods, lands and tenements of the company, but had not sold the same by reason of certain oppositions *à fin de distraire*, a writ of *venditioni exponas* was issued out of the Superior Court on the 3rd day of March, 1881, whereby, after reciting the previous writ, the sheriff's return thereto, and the proceedings had thereon, the sheriff was commanded that he should proceed according to law to the sale of the road called the *Levis and Kennebec Railway*, comprising the road made and built by the defendants, from and including the terminus thereof in the parish of *Notre Dame de la Victoire*, county of *Levis*, district of *Quebec*, up to and including the ter-

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minus in the parish of *St. Joseph*, district of *Beauce*, with the way and right of passage over the said extent as now established, the depots, stations, buildings connected with the said road and now occupied for the use of the said road, and ground occupied by the defendants for the said road, and the said depots, stations and buildings, also the rolling stock of the said road and which is found thereon, namely: Two engines and tenders, one first-class and four second-class passenger cars, twelve wood cars, two cattle cars, twenty-two large platform cars and six small ones, ten hand cars, nine laury cars, and one baggage and post office car, with all the rights of the defendants in and upon the road now in operation, and its right to continue and extend the same to the boundary line of the State of *Maine*.

Now, by what law can a sheriff by a sale such as that here directed, transfer to a purchaser from him, not only all the rolling stock, goods and chattels of the company, but also the railway itself, the depots, stations and buildings, and the lands on which they are erected, together with the rights of the defendants in and upon the road as in operation, and the right of the company to extend the same to the boundary line of the State of *Maine*—in short, all the corporate estate and all the corporate powers, rights and privileges of the company?

The sheriff, however, has returned that to satisfy the judgment of $4,688.33, with interest from the 20th day of January, 1877, not that he had sold a portion of the chattel property of the company, which he had under seizure, of a value apparently five or six times the amount of the judgment, and that he had thereby realised sufficient to pay and satisfy the judgment, but that he had on the 22nd of March, 1881, proceeded to the sale and adjudication of the said lands and tenements and sold the same to the *Quebec Central Railway Co.*

for the sum of $192,000; the right to participate in which sum is the question now brought before us.

Now, it is to be observed, not only that there does not appear to have been any occasion for the sale of any lands and tenements belonging to the company, inasmuch as it does not appear that the goods and chattels which the Sheriff had returned that he had under seizure, were first sold and found to be insufficient to satisfy the judgment, but further the *Quebec Central Railway Co.* which was incorporated for building and working a totally different railway had no power or authority whatever to acquire the *Levis* and *Kennebec* railway, nor had any person or company such power or authority. A railway consisting of its road way, stations, buildings, and other real estate necessary for the working of and for the use and enjoyment of the railway as a going concern, is a species of property which is capable of being held, worked, used and enjoyed only by the body corporate created by the Legislature for that special purpose, no other person or body corporate could acquire the property, powers, and privileges held by the *Levis & Kennebec Railway Co.* for the working of their railway, unless specially authorized by the Legislature for that purpose, and the Sheriff, therefore, could not, under the ordinary process of execution divest the company of such property, and vest it in a person or company not capable of taking and holding it for the purpose for which alone it was authorized to be constructed, and the property in question here, namely, the *Levis* and *Kennebec* railway, so far as constructed, being capable of being, and being, hypothecated to persons who advanced their money upon the security of having a lien upon the whole of the work as a going concern, to permit such property to be sold as bare lands and tenements divested of the corporate privileges annexed to them in the possession

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of the company, thus stripping the property of the whole of its value as security as a going concern for the money advanced upon it as such by the hypothecary creditors; and to compel them to accept, in lieu of their hypotheques upon the property as a going concern, the money realized by a sale of the naked lands and tenements divested of the corporate powers and privileges annexed to it as a going concern, would be such a fraud upon the hypothecary creditors that I cannot well see how it could receive the sanction of law apart from all authority upon the subject. It has, however, been decided in the Province of *Quebec* where the railway in question here is situate, that a railway of an incorporated company cannot be seized in execution of a judgment or sold at sheriff's sale. *The County of Drummond* v. *S. E. Ry. Co.* (1) This is the established law also of the province of *Ontario*, as well as in *England*. If, then, the sale of the *Levis and Kennebec Railway* professed to have been made by the sheriff, and by which the money was realised the appropriation of which is under consideration here, was illegal and void, with what propriety can a court of justice interfere by adjudicating upon the legal rights of parties to moneys which upon the record before the court are shewn to be the proceeds of an illegal and void sale?

Would not an adjudication as to the distribution of the moneys which are the proceeds of the sale, if it should have any judicial effect, be *ipso facto* an affirmance of the illegal sale?

Should a court pronounce a judgment in any matter, however brought before it, which, if it has any judicial effect, deprives absent hypothecary creditors of the *Levis and Kennebec Railway Co.* of the benefit of their securities?

The corporation of the city of *Quebec* appear by the

(1) 22 L. C. J. 25.

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record to be holders of but a portion of the debentures of that class or issue, the whole of which the court has pronounced to be void and of no force or effect whatever. Can, then, a court with any propriety pronounce debentures of a railway company, sold as good and valid securities to purchasers for value, to be null, void and of no effect, in the absence of a representation of all persons holding such securities ; or otherwise than in a suit properly framed, so that judgment therein shall be effectual to bind all persons holding like securities ? To have them pronounced to be null and void may be, and no doubt is, a matter of some importance to the *Quebec Central Railway Co.*, who, after the illegal sale to them of the property of the *Levis and Kennebec Railway Co.* stripped of all its value as a going concern for a sum about one-fifth of the amount of the debentures hypothecated upon it, have, by an act of the legislature, acquired all the corporate rights and privileges of the former company, in which rights and privileges consisted the chief value of the hypothecary securities, which rights and privileges and corporate property they now hold under an act which contains, however, this proviso, that nothing in the act contained shall in any wise affect the rights of the creditors of the *Levis and Kennebec Railway Co.* I confess, however, that I cannot bring my mind to think that it was competent or proper for the Court upon this proceeding, or otherwise than in a suit properly framed, to which all persons interested shall be parties, including the *Levis & Kennebec Railway Co.*, and all persons claiming to be their hypothecary creditors, to pronounce a judgment to the effect that the *Levis & Kennebec Railway Co.* never became or were indebted to the purchasers of any of the debentures belonging to the class or issue to which those of which the city of *Quebec* are now the holders belong, in respect of the moneys received by the rail-

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way company upon the sale of and upon the security of those debentures, but that all debentures of that class or issue, notwithstanding that they were sold by the company to purchasers for full value, always have been and are null and void, having no validity, force or effect whatever in law and equity against the company that issued them and received value for them. That they were so null and void is, in my opinion, the sole substance and effect of the judgment pronounced by the courts of the Province of *Quebec* in this case, all the rest of the judgment is merely consequential upon such adjudication of nullity, and it is from this adjudication of nullity that this appeal is taken.

Assuming it to be competent for the Court, notwithstanding the points of difficulty above referred to which have suggested themselves to my mind, to pronounce such a judgment in a proceeding framed as the present is, it remains to be considered whether the judgment can be sustained upon the merits.

By the 32 *Vic.* ch. 54, as amended by 36 *Vic.* ch. 45 and 37 *Vic.* ch. 23 of the statutes of the Province of *Quebec*, the *Levis & Kennebec Railway Co.* were authorized, by a resolution of the directors of the company to that effect, to issue their bonds or debentures for the purpose of raising money to prosecute their undertaking. The statutes enacted that such bonds should be signed by the President and countersigned by the Secretary-Treasurer with the seal of the company thereto affixed. That they should constitute a privileged claim upon the personal property of the said company, and shall bear hypotheque from the date of the resolution authorizing the same on the immoveable property belonging to the company, and this without any registration. That the company should have power to issue the bonds to the amount of £300,000 sterling, in bonds for not less than £100 sterling each, pro-

vided always that until 45 miles of the railway should be completed and in running order, of which the certificate of the inspecting engineer of the government should afford proof, no more than one thousand of said bonds of £100 sterling each, to be termed the "first issue," should be issued by the company, and that so soon as a certificate as aforesaid should be given, certifying that the said 45 miles are complete and in running order, a further issue of one thousand bonds of £100 sterling each, to be termed the "second issue," might be made by the company; and that no further bonds should be issued by the company until 75 miles of the said road (including the 45 miles above mentioned) should be completed and in running order, according to the certificate of the inspecting engineer of the government; and that so soon as it should be certified that the said 75 miles are completed and in working order as aforesaid, the last thousand bonds of £100 sterling each, termed the "third issue," may be issued by the company, it being understood and declared by the statute that the expressions "first issue," "second issue" and "third issue" were used merely for convenience, and that they should not be construed as giving to any of those issues priority over the others.

The company adopted the following form of bond for the purposes of the three several issues above mentioned, showing upon the face of every bond (no matter to which issue it should belong), that each bond issued was one of the whole 3,000 authorized to be issued and which constituted an hypothecary charge upon the property of the company, a precaution which, I apprehend, was adopted as being deemed of some importance in the English market, upon which, as appears as well from the directions in the statute, that the bonds should be issued for sterling money, as from the terms of the

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bonds themselves, it was contemplated to offer them for sale :—

LEVIS AND KENNEBEC RAILWAY COMPANY.

PROVINCE OF QUEBEC, DOMINION OF CANADA.

Incorporated by a special act of the legislature of the province of Quebec, assented to the 5th day of April, 1869, amended by an act assented to the 24th day of December, 1872, and further amended by an act assented to the 28th day of January, 1874.

STERLING DEBENTURE.

Bearing interest at the rate of 7 per centum per annum, payable on the first days of January and July in each year, in the city of *London, England.*

Know all men by these presents that the *Levis and Kennebec Railway Co.* under the authority of the above mentioned acts, and of the *Quebec* Railway Act, 1869, promises to pay to the bearer of this bond, in the city of *London, England,* on the 1st day of January, 1894, the sum of £100 sterling, value received, with interest thereon, at the rate of seven per centum per annum, payable semi-annually, according to the tenor of the coupons annexed. And for the payment of the said principal sum and interest the *Levis and Kennebec Railway Co.*, under the authority of the above mentioned acts, has hypothecated and does hypothecate the whole of the said *Levis and Kennebec Railway Co.'s* road, stations, permanent way, and all branches thereof constructed or to be constructed, rolling stock, machinery, fixtures, equipments, and all other the real and personal property of the company, and the tolls, income, rents and profits thereof or any part thereof, inclusive of a capitalized subsidy granted by the Legislature of the Province of *Quebec*, in Government 5 per cent. debentures, to the amount of $1,748 per mile, payable on completion of the first 25 miles of railway, and after upon each and every mile completed, together with all rights, easements and appurtenances thereto belonging or in any wise appertaining.

This debenture is one of an issue amounting to three hundred thousand pounds and consisting of three thousand bonds of one hundred pounds sterling each, and numbered consecutively from 1 to 3,000 inclusive, all of like tenor herewith.

SEAL. In witness whereof, the *Levis and Kennebec Railway Co.* has caused its corporate seal to be hereto affixed and the same to be attested by the signature of its President and Secretary, this day of

The company, as appears from a recital *in the pre-*

amble of the statute 39 *Vic.*, ch. 57, hereafter referred to, and the correctness of this recital is not questioned, executed bonds to the amount of and to represent the first and second issues authorized by the above acts, that is to say, for £200,000 of the £300,000 authorized by the acts. These bonds would seem to have been afterwards, but at what date does not appear, sent to a Mr. *Albert Grant* in *London*, to be disposed for the company upon the *London* market. From the opposition *à fin de conserver* filed by the appellants, it appears that the bonds, of which the appellants are the holders, being bonds to the amount of £30,000 sterling, all of which, from the numbers being above number 1,000 and under number 2,000, appear to belong to the second issue, were among those which were transmitted to Mr. *Grant*, and bear date the 25th day of January, 1875. There is nothing to show when these bonds were first sold. All that appears is that Mr. *Grant* at some time, but when is not stated, transmitted to the railway company their full face value of £30,000 sterling. The city of *Quebec* do not appear to have become holders of them until the month of January, 1877, long after the passing of the act 39 *Vic.*, ch. 57.

It is consistent with all that appears before us, and not at all improbable, I think, in view of the natural enquiries likely to be made by and on behalf of purchasers of these bonds for evidence of the fulfilment of the conditions precedent necessary to be fulfilled before the bonds could legally be issued, that none of those numbering over 1,000, that is that none of those constituting what is termed the "second issue" in the statute, were or could have been disposed of by Mr. *Grant* until after the passing of the Act 39 *Vic.*, ch. 57; and if the time of the sale of the bonds, as distinguished from the time of their being executed and issued by the company to be sold, is material, it certainly is not suffi-

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ciently shown to justify us in pronouncing bonds, which are good upon the face of them and in the hands of purchasers for value to be null and void, if being sold after, though issued before, the passing of the Act they would not be so. Now at the session of the Provincial Legislature held in December, 1875, the company, having thus already issued bonds to the full amount of the first and second issues, and there remaining to be issued only the "third" issue of £100,000 sterling to complete the whole amount which they were authorized to issue, petitioned the Legislature for a further amendment of their Acts, and thereupon the 39 *Vic.*, ch. 57 was passed, the preamble of which is as follows:

> Whereas the *Levis & Kennebec Railway Co.* have, by petition, prayed that the Act to amend their Act of incorporation may be amended; and whereas it is expedient to grant the prayer of their petition; and, whereas it appears, &c. (1).

It is to be observed here, 1st., that this Act is obtained upon the petition of the company, and, being passed at their instance and for their benefit, must be construed strongly as against them, and to give effect to their acts and contracts, and so validity to the bonds, which are therein recited to have been issued by them as and for the second issue of bonds, forming part of the £300,000 sterling, which they were authorized to issue, and, having so obtained the act, they must be estopped from questioning the validity of the bonds in the hands of purchasers for value (2). 2nd.—The act does not profess to be passed upon the supposition that, or upon any suggestion or representation that, before the issue of the bonds for £200,000 sterling in the act recited, the conditions precedent to their issue imposed by 37 *Vic.*, ch. 23, had been fulfilled. What is recited is very different and falls short of any such representation. What is recited, in substance and

(1) See p. 568

(2) *Priestly* v. *Foulds* 2 M & G 193.

effect, is that it appears to the satisfaction of the Legislature that after the company had performed work which, in the opinion of the Legislature, constituted a completion of the 45 miles, they issued the first and second issues of bonds amounting to £200,000 sterling in the whole. The recital does not say that the company had put the 45 miles in running order, or that the inspecting engineer of the Government had given his certificate to that effect. On the contrary, from what is recited, we must presume that the Legislature were well aware that no such certificate had been given, but that they were satisfied, from independent evidence taken by themselves, that the 45 miles had been substantially completed, and that with the other subsidies referred to in the preamble, legislative and municipal, enough appeared to justify the Legislature in authorising the remaining £100,000 sterling of the £300,000, which the company were authorized to borrow, to be raised by bonds of the last or third issue, under the altered conditions stated in the act. Accordingly the act, in lieu of the provisions in 37 *Vic.*, ch. 23, as to the conditions upon which the third issue might be made, enacts that:—

> So soon as the rails and ties requisite for the completion of the remaining 45 miles or thereabouts of the company's line shall be purchased, then the one thousand bonds remaining of £100 sterling each, which shall be designated as being the third issue, may be issued by the company.

Now, what is this but to say that bonds to the amount of £200,000 sterling, constituting the bonds which belong to what is termed the "first" and "second" issues, have been already issued, and that for the remaining £100,000 sterling of the total sum of £300,000 may, upon certain conditions, be issued by the company, which shall be regarded as being the third issue.

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Whether the recital in the preamble as to the time when the first and second issues are said to have taken place was true or not, is, as it appears to me, immaterial, for the Act is, in my opinion, quite insensible, unless, when authorizing the issue of the remaining one thousand bonds of the three thousand authorized to be issued, which are to be regarded as the third issue, it is construed as recognising as good, valid, and binding upon the company, the bonds to the amount of £200,000 constituting the first and second issues recited as having been already issued.

The only way in which bonds for the remaining £100,000 sterling could be, or could be treated as being the third issue of the £300,000 sterling bonds, is by regarding the bonds for £200,000 sterling recited as already issued, as effectually representing the "first" and "second" issues, and this wholly irrespective of, and so excluding, all enquiry as to whether or not the conditions precedent to their issue as required by 37 *Vic.*, ch. 23 had been fulfilled; and so, as it appears to me, the effect of the statute 37 *Vic.*, ch. 57, is to constitute the bonds, therein recited as having been already issued to the amount of £200,000 sterling, to be good and valid bonds binding upon the company, although the conditions precedent specified in 37 *Vic.* ch. 23 had not been fulfilled when they were issued.

It is quite unnecessary, in my opinion, to insist upon the recital of the bonds having been issued after the completion of the 45 miles, as affording evidence conclusive or otherwise, of the fact that the 45 miles had been completed in the sense of authorizing the bonds to have been issued under the provisions of 37 *Vic.* ch. 23; mere completion, of the 45 miles would not, as I have already said, have had that effect. The Act 39 *Vic.*, ch. 57 would be open, in my opinion, to the construction I put upon it, if nothing had been said in its

preamble about the 45 miles; if, for example, the recital had been as follows:

Whereas the *Levis & Kennebec Railway Co.* have by their petition prayed that the Act to amend their Act of incorporation may be amended; and whereas they have already issued a "first" and "second" issue of bonds, each of such issues consisting of one thousand bonds for £100 sterling each, making in the whole £200,000 sterling; and, whereas since the passing of the said amended Act the subsidies of the Provincial Legislature have been increased, &c., * * * (without saying anything about 45 miles); therefore, it is enacted, &c. * * *

But, in truth, the recital which is in the preamble of the Act is not contradicted or disproved by the evidence offered in this case. All that the evidence establishes is that the government inspecting engineer has never certified 45 miles, nor more than 43½ miles, as being complete and in running order, and that the government engineer upon some occasion, but when in particular does not clearly appear, it may have been after the passing of 39 *Vic.*, ch. 57, took off 1½ miles from the length of road which the company insisted upon as being completed, but which the government engineer did not consider completed; how far it was short of completion to satisfy him does not appear. Whether it would have required an outlay of ten dollars or more, and what sum, to complete the 1½ miles so "taken off," does not appear. Now, what the preamble recites is in effect, that the Legislature were satisfied that the 45 miles had been completed (a fact which might co-exist with the government engineer not being so satisfied,) in such manner as to warrant the Legislature in regarding them as complete and in recognizing the second issue equally as the first, and so justifying them in granting the prayer of the company's petition, as to the remaining £100,000 sterling to constitute the "third" issue.

After the passing of 39 *Vic.* the certificate of the

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government engineer was no longer a matter essential to be established, and by that Act, so obtained by the company, they were, in my opinion, for ever estopped from setting up in answer to any claim made for recovery of the amounts purported to be secured by bonds coming within the designation of the "second" issue, that those bonds had been issued *ultra vires*; and this, as appears to me, is all that is necessary to be, established; for if the company cannot dispute the validity of the bonds, they cannot always have been, and be null, void, and of no effect, as they have been pronounced to be by the judgment appealed against; and if they are good, valid, and binding upon the company in an action against them, they must be so, also, as against all creditors of the company holding bonds for other parts of the £300,000 sterling; for all bonds issued to that amount, to whatever class belonging, whether to the first, the second, or the third issue, are put upon the same footing, none having a preference over another. It is contended upon behalf of the *Quebec Central Railway Co.*, that, so to hold, would be inequitable and unjust towards them upon the ground that they, as holders of the bonds of the first issue, lose the benefit which the completion of the 1½ miles, which, in the opinion of the government engineer, the work done by the company falls short of 45 miles, would give to their securities, and they think it therefore equitable that they should have, as additional security for their bonds, the benefit which the outlay of the proceeds of the second issue to the amount of £100,000 sterling has contributed to the completion of the 43½ miles admitted to have been completed; but, in truth, the security of the holders of all the bonds is increased beyond what it originally was by the subsidies recited in 39 *Vic.*, ch. 57, and this claim of the *Quebec Central Railway Co.* is made in the face of the further fact, that they have

acquired the whole of the corporate estate, rights and privileges of every description of the *Levis & Kennebec Railway Co.* vested in them under a statute which enacts that nothing in that statute shall, in any wise, affect the rights of the creditors of the *Levis & Kennebec Railway Co.* If the *Quebec Central Railway Co.* cannot maintain their contention upon strict, rigid principles of law, as distinguished from equity, they cannot, in my opinion, upon principles of equity.

Assuming, therefore, the record of the case before us to be properly framed, so as to make an adjudication as to the validity of the bonds of the *Levis & Kennebec Railway Co.* of which the corporation of the city of *Quebec* are the holders effectual and conclusive, I am of opinion that they are good, valid and effectual against the *Levis & Kennebec Railway Co.*, and the property by the bonds purported to be hypothecated, and that they rank equally with the bonds of the same company held by the *Quebec Central Railway Co.*, and equally with those latter bonds affect all the property of the *Levis & Kennebec Railway Co.* by the bonds purported to be hypothecated.

This appeal, therefore, should, in my opinion, be allowed with costs.

Appeal allowed with costs

Solicitors for appellants: *Pelletier & Chouinard.*

Solicitors for respondents: *Irvine & Pemberton.*

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*Nov. 5.
1880
*Feb'y. 9.

JOHN JESSE REEVES, (PLAINTIFF'S REPRESENTATIVE) ..... APPELLANT;

AND

CHARLES OVIDE PERRAULT, ASSIGNEE TO THE INSOLVENT ESTATE OF F. GERIKEN ..... RESPONDENT.

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

Hypothecary action—Delegation of payment in hypothec—Sale of property en bloc prior to acceptance of delegation—Personal liability under delegation—Ventilation.

On the 14th October, 1874, Mrs. *R.* sold to one *Q.* the south half of the cadastral lot No. 4679, in the city of *Montreal*, and on the same day Mrs. *C.* sold him the north half of the same lot. On the 17th October, 1874, *Q.* sold to *G.*, and to *L.* & *R.* three undivided fourths of the two properties *en bloc* for a sum, of $49,612.50, in deduction of which purchasers paid cash $22,246.87½, and covenanted to pay the balance for *Q.* to Mrs. *R.* Mrs. *R.* was not a party to this last deed, and did not then accept the delegated debtors. In June, 1876, Mrs. *R.* sued *G. et al.* hypothecarily for sums due to her on the deed of sale by herself to *Q.*, and thereupon *G.* abandoned (*delaissé en justice*) his undivided fourth of the said south half of lot No. 4679. On the 4th December, 1877, Mrs. *R.* accepted the delegation of payment made in her favor by *Q.*, in the deed of the 17th October, 1874, and afterwards brought the present action against *G.* for one-third part of the debt of $27,356.63, with interest due her in virtue of said delegation of payment. *G.* contended that the acceptance of the delegation of payment being subsequent to the hypothecary action and his *delaissement* was null and of no effect, and therefore he could not be sued for any portion of the money.

Held,—That, under these circumstances, *G.* was relieved from personal liability under the delegation of payment, but only to the extent of his interest in the south half of said lot No. 4679,

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

and remained liable for his interest in the remainder of the property, the amount to be estimated by a valuation (*ventilation*) of the south half of the lot proportionately to the price of the whole property.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), confirming the judgment of the Superior Court (*Montreal*), and dismissing the appellant's action (1).

This was an action brought by *Dame Marguerite E. V. Reeves* against *Frederick Geriken*, to recover $8,937, to wit: $6,841.40, as being the amount of three instalments of $2,280.46⅔ each, on the sum of $9,121.87½, balance due on a sale made by one *Joseph Quesnel* to *Frederick Geriken*, which balance the latter agreed to pay to *Mrs. Reeves* on account of a larger amount due her by *Quesnel*, and $1,915.59 for interest on the $9,121.87½, up to the 14th of October, 1877.

During the pendency of this suit *Dame M. E. V. Reeves* (plaintiff) died, and *F. Geriken* (defendant) became insolvent; and the present appellant, as *Dame M. E. V. Reeves'* universal legatee, was substituted as plaintiff, and the present respondent, as assignee of the insolvent estate of *Geriken*, was substituted as defendant.

The facts are fully stated in the judgment of the Court hereinafter given.

Mr. *Doutre*, Q.C., for appellant, contended:—

That the respondent could not, by surrendering his interest in the property in a former action (hypothecary) relieve himself of his personal obligation

The respondent became bound to the plaintiff (now appellant), by the acceptance of the delegation of payment from *Quesnel*, for the whole amount he agreed to pay, on the principle (1) that, in the absence of delegation, *Quesnel* could claim the whole from him; and the plaintiff, exercising the action of *Quesnel*, claims on the

(1) 2 Legal News 67.

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same ground; if *Quesnel* were plaintiff, the respondent would have no answer in law or equity to oppose, and the appellant, representing *Quesnel*, cannot be answered otherwise than *Quesnel* could.

In matter of hypothecs, every particle of land is hypothecated to the whole amount of the claim secured by such hypothec; the surrender of a portion left the remainder, to-wit: the portion sold by Mrs *Cadieux*, hypothecated for the whole purchase money due to plaintiff, and the personal liability still subsisting, combined with the hypothec, prevented respondent from obtaining a release by surrendering a portion.

Admitting, by hypothesis, the principle invoked in the plea and in the judgment, the respondent was not impleaded in this action in respect to the land he surrendered. Art. 2013 C. C. and Art. 736 C. C. P. See also *Merlin* (1)

At the time the plaintiff brought her hypothecary action, she was not vested with the rights of *Quesnel*, either personal or hypothecary, unless she was vested by the mere registration of, *Quesnel's* sale to respondent, according to the doctrine held in *Pattenaude & Leriger* (2), which, after all, is immaterial. See also *Ryan* v. *Halpin* (3).

The only relief the respondent could claim from his surrender was that, through it, he had paid portion of his purchase money, such portion being determinable by means of a *ventilation;* but the respondent, not having pleaded any payment, there is no occasion for that enquiry.

Mr. *Pagnuelo*, Q.C., for the respondents, contended:

1st. That the amount claimed is the instalment and interest which the defendant had promised to pay *Quesnel*, represented by plaintiff, for the purchase of $\frac{1}{4}$ of the south portion of lot 4679.

(1) Vo. Ventilation. (2) 1 L. C. J. 106,
(3) 6 L. C. R. 61.

2nd. He has been evicted from this ¼ by a hypothecary creditor of *Quesnel*, with the knowledge and sanction of *Quesnel*, the vendor.

3rd. *Quesnel* was bound to repel this hypothecary action, or to indemnify the defendant; therefore, he is bound to return defendant the portion of the price which he has received cash from him at the time of the sale, and for the same reason he cannot claim the balance of the price; it would be absurd to make a man pay for a property from which he has been evicted for a cause whereof the vendor is responsible.

4th. The plaintiff, who claims to exercise the actions of *Quesnel*, is repelled by the same plea or exception of warranty.

5th. Moreover, there never was a delegation, even imperfect, in favor of plaintiff against defendant. She refused to accept defendant as her debtor, preferring to exercise her own hypothecary rights; this repudiation of the proffered delegation concludes her and liberates the debtor for ever.

6th. The plaintiff, even if she had any right under this delegation of payment without a formal acceptance thereof, has entered with defendant into a judicial contract, duly executed, which had the effect of depriving defendant of the land he bought, and this finally settles the question.

The learned counsel relied on the following authorities and cases in support of his proposition: *Duvergier*, De la Vente (1); *Seaver* v. *Nye* (2); *Dubuc* v. *Charron* (3); *Banque du Peuple* v. *Gingras* (4); Art. 554 C. C. P.; Arts. 2016, 2017, 2058, 2061, 2062, C. C.; *Troplong*, De la Vente (5); *Troplong*, Hypot heques (6); *Lauriere*, Cout. de Paris (7).

The judgment of the court was delivered by—

(1) 2 Vol. No. 24.
(2) 8 L. C. R. 221.
(3) 9 L. C. Jur. 79 & 106.
(4) 2 L. C. R. 243.
(5) 1 Vol. Nos. 487 et Seq.
(6) No. 827 et Seq.
(7) 1 Vol. pp. 779 & 780.

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TASCHEREAU, J.:—

The late dame *M. E. V. Reeves*, plaintiff in the court of first instance, alleged in her declaration that by deed of sale of 14th Oct., 1874, registered on the 20th of the same month, she sold to *J. A. Quesnel*, Sheriff of *Arthabaska*, a lot of land described at length, and designated as part of No. 4679, on the plan and book of reference made for the parish of *Montreal*, and composed of two pieces of land, the first of which containing 41 arpents and 13 perches, the second containing 28 arpents and 37 perches, the whole adjoining a lot of land, sold the same day, to the said *Quesnel*, by one dame *Cadieux*, also part of said cadastral lot No. 4679; that it was agreed in the said deed, that the said sale was made for the sum of $700 per superficial arpent, which, from the calculations made by the surveyor and accepted by the parties to the deed, amounted to a total sum of $48,650, in deduction of which the purchaser paid cash $12,162.50; and as to the balance, to wit $36,487.50, the said purchaser promised to pay it to the said plaintiff, in four annual and consecutive payments of $9,121.87½ each, the first of which would be due and payable on the 14th October, 1875, and every other, at the same date, at each consecutive year, with interest at 7 per cent, reckoning from the date of the said deed, said interest payable semi-annually; and for surety of the payment of the said balance, and of the interest to accrue, the said lands were declared hypothecated by privilege of *bailleur de fonds*, vendor; that the said purchaser had taken possession of the said lands from the date of the said deed; and that there was due and owing to the said plaintiff, on the principal of the said purchase money, $27,365 62½, and $7,662.36 for interest accrued on the said sum of $36,487.50, since the date of the said deed; that the two sums added together formed $35,027.48½, on which she had received only $732.89, to be

imputed on the interest; that by another deed of sale passed on the same day, dame *Domitilde Meunier*, wife separated as to property of *Manassès Cadieux* and by him duly authorized, sold to the said *J. A. Quesnel*, present and accepting, a lot of land contiguous to the lots above mentioned, composed of two pieces, being all the north-east part of said lot 4679 of the cadastral plan and book of reference of the parish of *Montreal*, containing altogether 41 arpents and 49 perches; that the deed last mentioned had been registered on the 20th October, 1874; that by a deed passed on the 17th October, 1874, the said *J. A Quesnel* sold to the defendant (respondent), to the Hon. *T. Robitaille* and to the Hon. M. *Laframboise*, the three undivided fourths of the two immoveables above described, acquired by him, one from the said *Domitilde Cadieux* and the other from the plaintiff, forming, the said two immoveables, the total extent of the cadastral lot No. 4679; that the said sale, from *J. A. Quesnel* to the defendants, *Robitaille* and *Laframboise*, had been made for the sum of $49,612.50, in deduction whereof *Quesnel* acknowledged having received from the purchasers the sum of $22,246.87½; that it had been covenanted, in the said last mentioned deed, that, as to the balance of the purchase money, to wit, $27,365.62½ the said defendant and his co-purchasers, *Laframboise* and *Robitaille*, would pay it or would cause it to be paid, each for a third part to the acquittal and discharge of the said *Quesnel*, to the said plaintiff or representatives, as follows, to wit: in four annual and consecutive payments of $6,841 each, the first of which would become due and payable on the 14th October, 1875, and so on, at each of the three consecutive years then following; that these payments put together were the same as those mentioned in the deed of the 14th October, 1874, by the plaintiff to the said *Quesnel*; that it had moreover been covenanted in the

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said deed, from *Quesnel* to the defendants, *Robitaille* and *Laframboise*, that the said balance of $7,365.62½ would produce interest at 7 per cent. per annum, to be reckoned from the 14th October, 1874, which interest the said purchasers bound themselves each for a third to pay or cause to be paid to the plaintiff, every six months, to the acquittal of said *Quesnel*; that on the 14th October, 1877, there were due and payable three of the said payments and that the defendant was indebted in one-third of the said three payments, to wit: $6,841.40; that no interest had been paid on the said sum, since the 14th October, 1874, and that the said interest amounted, on the 14th October, 1877, to $1,915.59, the two sums forming together that of $8,757; that, at *Montreal*, the 4th day of December, 1877, by deed before *l'Archevêque*, notary public, the plaintiff had accepted the delegation of payment made in her favor, by the said *Quesnel*, in the deed of the 17th October, 1874, and had declared to be willing to constitute the said defendants, *Laframboise* and *Robitaille* her personal debtors, according to the terms of the said delegation; that on the 15th December, 1877, that acceptation had been served upon the said *Quesnel*, and on the 19th December, 1877, upon the defendant, by notarial deeds; that under these circumstances, the plaintiff was entitled to claim from the defendant the said sum of $8,957 which the defendant refused to pay, wherefore she prayed for judgment, for principal, interest and costs.

To that action the respondent pleaded that on 1st June, 1876, the plaintiff impleaded the said *Laframboise*, *Robitaille* and *Geriken*, by action under No. 2298, declaring on the deed of sale by herself to *Quesnel* of the 14th October, 1874, alleging that the latter owed her $9,121.86½ for the payment falling due on the 14th October, 1875, with $3,831.18 for interest, at 7 per cent, on the sum of $36,487.50, from the date of the said deed, until the 14th

April, 1876, with interest at 6 per cent. on the sum of $2,554.12½ from the 2nd December, 1875, date of the institution of an action against *Quesnel*, and with interest, from the date of said action, on $1,377.06, balance of the said interest until final payment; that these sums added together formed $12,953.05; that the said plaintiff further alleged in the said action that the three defendants were in possession, as proprietors, of three undivided fourths of the immoveable described in the said deed of sale, and she prayed hypothecarily against the said three defendants that the three undivided fourths of the said immoveable be declared hypothecated for the said sums, principal, interest and costs and that they be condemned to abandon the said three undivided fourths or to pay; that in conformity with the option offered by the plaintiff to the said defendants, the said *Geriken* had, on the 10th November, 1876, abandoned (*délaissé en justice*) his undivided fourth of the property described in the declaration in this cause and in the deed of the 14th October, 1874, according to law, and that he had moreover, the same day, signified his abandonment to the plaintiff; that subsequently, the 28th December, 1877, judgment was rendered, by which the immoveable described in this cause and in the said deed of the 14th October, 1874, was declared hypothecated in favor of the plaintiff, for the said sum of $12,953.05, composed as above, with hypothecary condemnation against the said *Laframboise*, *Robitaille* and *Geriken*; that it follows from the foregoing that the pretended acceptation of delegation by the plaintiff was null and of no effect, and that the defendant *Geriken* could not be held in any manner to pay, either to the plaintiff or to *Quesnel*, any part of the purchase money which he had promised to pay for the property so abandoned by him, and of which he had suffered eviction by the act of the plaintiff and he prayed

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for the dismissal of the action. This was followed by a general issue.

The plaintiff answered generally, denying all the facts alleged in the plea and reiterating the affirmations of her declaration.

The evidence consists of the documents alleged in the declaration and the plea. Upon this evidence the Superior Court, sitting at *Montreal*, dismissed the plaintiff's action. On appeal, the Court of Queen's Bench confirmed the said judgment, and the plaintiff has thereupon brought the case to this court.

I may here immediately remark that the case of *Lacombe* v. *Fletcher* (1), though it has not been cited by the parties, has not escaped my attention. It was there held by the Court of Appeal that the purchaser of an immoveable property, who has accepted an assignment of the price of sale, cannot set up, in answer to the claim of the assignee, a *délaissement* (not a demand *en délaissement* as the heading of the report states) made by him, so long as he has not been judicially dispossessed. In the present case, as in that one, the defendant merely alleges a *délaissement*, without showing that any proceedings have been taken upon it. By art. 1521 C. C. this would seem sufficient See also *Dorwin* v. *Hutchins* (2). But without entering into the consideration of this question of law, as the parties have not raised it themselves, I may say that I think there is a distinction to be made of the present case from *Lacombe* v. *Fletcher*. There the plaintiff in the hypothecary action, on whose demand the defendant had abandoned the property, and the plaintiff in the personal action against the same defendant, were two different persons. Whilst here, the plaintiff in the hypothecary action and the plaintiff in the personal action are one and the same person. Now here, when the defendant pleaded his abandonment of

(1) 11 L. C. R. 38. (2) 12 L. C. R. 68.

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the property, if the plaintiff, on whose demand this abandonment has been made in the hypothecary action, intended to renounce this abandonment, or not to proceed on it, she should have pleaded it by a special answer to the defendants' plea. She did not do so, but merely filed a general answer to the plea. Now, she cannot be presumed to have renounced her rights on the hypothecary action, and the judgment she obtained thereon. I then take it that the abandonment made by the defendant is complete and must be taken as such, in the consideration of the present case, and so it seems to have been treated in the two courts below.

Another point which has not been noticed by the parties, has presented itself to my mind.

By art. 1180 C. C. the debtor consenting to be delegated cannot oppose to his new creditor the exceptions which he might have set up against the party delegating him, although at the time of the delegation he were ignorant of such exceptions.

It may be that this only applies to a perfect delegation, and when novation has taken place and the first debtor discharged, though *Demolombe* (1) is of opinion that this rule applies even when the first debtor has not been discharged, as is the case here. See on the question *Duranton* (2), *Laurent* (3), and authorities there cited. It is possible also that as Mrs. *Reeves* did not accept the delegation, but accepted it only later by a separate deed, this may render this rule inapplicable to this case. I presume that she must have thought so, since she did not avail herself of it in answer to the defendant's plea. However, as the question has not been raised, nor argued, either before us or in the court below, I do not give any opinion on it.

I then take it that the defendant can oppose to the

(1) 5 Des contrats Nos. 324 to 328.

(2) 12 Vol. No. 333, 334.

(3) 18 Vol. No. 319

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plaintiff's demand all the exceptions he could have opposed to *Quesnel*, in whose rights she stands in this case.

Now if *Quesnel* himself was suing the defendant for his share of the price of the sale made by him *Quesnel* to this defendant and *Laframboise* and *Robitaille*, the defendant could plead in answer to *Quesnel's* demand that he has been evicted of the property sold to him. For the abandonment (*délaissement*) of the property made by the defendant is, in law, an eviction:

> C'est pourquoi les demandes en revendication, les demandes en action hypothecaire qui sont données contre quelqu'un, sont appellées, dans le language du Palais, des évictions (1).

The defendant, when sued in an hypothecary action by *Reeves*, could have, in the same suit, sued *Quesnel en garantie*, but his failure to do so does not free *Quesnel* from his obligations as warrantor, as it is not pretended that he had any ground of defence to the hypothecary action, (2). It is clear also that *Quesnel*, as the defendant's warrantor, could now be sued by the defendant in a direct action (3).

Now, *celui qui a l'action a l'exception*, and the defendant has the right to invoke against *Quesnel's* demand (and against *Reeves*, his *locum tenens*), those obligations of *Quesnel*, as such warrantor (4), resulting from the eviction from this property which he, the defendant, has had to submit to (5). Just as he would under article 1535 C. C., (if, instead of having actually been evicted, he had only cause to fear being disturbed by *Reeves'* hypothecary action,) be entitled to delay the payment of the price of sale to *Quesnel*, until he,

(1) Pothier, Vente No. 82, see also, Idem loc. cit. Nos. 83, 86.
(2) Article 1520 C.C.
(3) Article 1508 C. C.; Pothier vente, No. 108.; Bourgon, 1 Vol. p. 433.
(4) Pothier vente, No. 165;
(5) *O'Sullivan* v. *Murphy* 7 L. C. R. 424.

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Quesnel, caused such disturbance to cease, or gave security.

I may here remark that the opinion seems to have been expressed in the courts below, and it has been repeated at the argument here, that *Geriken* has a ground of exception against the plaintiff's demand, on the fact that he was sued hypothecarily, and had to abandon the property for *Laframboise* and *Robitaille's* share of the price of sale, as well as for his own share.

This is an error resulting, I am sure, from the fact that it has been overlooked that in *Quesnel's* sale to *Geriken*, *Laframboise* and *Robitaille*, though each of the purchasers is personally charged with one-third of the balance of the price of sale, yet, all they bought, that is to say, the three-fourths of the property, was mortgaged for the whole of the balance due—that is to say, *Geriken* does not only mortgage his fourth of the property for his share of the price, *Robitaille* his share of the property for his share of the price, and *Laframboise* his share of the property for his share of the price, but the whole of their shares together are mortgaged for the whole of the balance due. So that each share of the property is mortgaged, not only for what is due by the holder of that share, but also for what is due by the holders of the other two shares. The deed is clear on this:

> And as security for the payment of the said sum or balance of the price of sale, the undivided three-fourths of the above described land and dependence, now sold, remain specially affected and hypothecated by privilege of vendor expressly reserved.

So that though, personally, *Geriken*, *Laframboise* and *Robitaille* owe each only one-third of the balance of the price of sale, yet each of them mortgaged his share of the property for the two-thirds due by the two others as well as for his own. Of course, not being personally responsible for *Laframboise* and *Robitaille's* two shares,

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Geriken, when sued hypothecarily for these two shares, could abandon the property, as he did, and free himself from any further liability *quoad* these two shares (1). But he cannot oppose this abandonment *quoad* these two shares to *Quesnel*. It is obvious, that if he mortgaged his property in favour of *Quesnel* as security for *Robitaille's* and *Laframboise's* shares, he cannot invoke against him, *Quesnel*, as a ground of exception to the demand of the price of sale, that he has been sued on that mortgage. I do not lose sight of the fact that the hypothecary action against *Geriken* was based on *Reeves'* sale to *Quesnel*, and that it is only in *Quesnel's* sale to *Geriken* and others that this joint mortgage for the whole sum on each share of the property is created. But, as an answer to *Quesnel*, this, it seems to me, is of no importance. But it is not only for *Robitaille* and *Laframboise's* shares, as well as for his own, that *Geriken* has been sued hypothecarily, and has abandoned this property, but he was so sued, and made such abandonment, for *Quesnel's* share as well. Now for this share of *Quesnel* he was guaranteed by *Quesnel* against all trouble and eviction. As I have remarked previously, even if he had not been sued hypothecarily, and had not thereupon abandoned the property, if *Quesnel* sued him for the price of sale, *Geriken* could plead fear of trouble under art. 1535 C. C. and delay his payment till *Quesnel* paid his share of the price, or got in some manner a discharge of the mortgage for his share, or gave security to the amount thereof.

It seems clear, also, that if *Reeves* had accepted the delegation in her favour by the deed itself which has created it, and then had sued *Geriken* for his share of

(1) Troplong, prescription, No. 816; Loyseau, Du Déguer. liv. 4, ch. 3, No. 16, p. 121; Persil, 2 Vol. Priv. Hyp. 218; Pont, 2 Vol. Priv. & Hyp. No. 1179; Laurent, 31 Vol. No. 286.

the price of sale, as she does in the present case, then *Geriken* would also, against her demand, have been entitled to plead, under the provisions of art. 1535, his fears of being troubled for *Quesnel's* mortgage, for his own share of the price. Why could he not now plead against her demand the eviction he has had to submit to, as he could plead it against *Quesnel* himself?

But the direct question raised here is whether *Reeves*, having sued *Geriken* hypothecarily, can now sue him personally for his share of the price of the sale made by *Quesnel* to him and to others, on the acceptance of the delegation therein, which acceptance she has made since her hypothecary action and the abandonment thereon by *Geriken*.

In *France*, an abandonment may be made without a demand of it being made by a mortgagee, and the authors treat extensively the question whether an abandonment can be made voluntarily and be forced upon the mortagees when the price of sale is still due by the holder of the property. But that is not the question here. *Reeves* herself has demanded from *Geriken* the abandonment of this property and he has abandoned it only upon her own summons to him to do so. Of course, if it was only for his share of the price of sale that he had been sued, there would be no question that *Geriken* could never rid himself of his obligations under the contract of sale, but he has been sued hypothecarily and has abandoned for *Quesnel's* share of the price as well as for his own. Now, the authorities seems to me clear against *Reeves'* right, under such circumstances, of now asking against *Geriken* a personal condemnation for his share of the price of sale. *Troplong* (1), has no doubt on this. *Pont* (2) agrees with *Troplong*,

(1) Prescription, Nos. 797, 813, 823.

(2) Priv. v. Hypo., suite de Marcadé, Nos. 1135 & 1180 and authorities there cited.

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and says that the jurisprudence has settled the point according to *Troplong's* views. After speaking of the personal action of the party to whom the delegation has been made against the party delegated, he adds :

> Seulement, les créanciers devront soigneusement éviter, dans ces divers cas de mettre en avant l'action hypothécaire, s'ils tiennent à conserver l'action personnelle qu'ils ont contre le tiers détenteur ; s'ils concluaient tout d'abord au délaissement, on s'ils procédaient aux poursuites par la sommation de payer ou de délaisser ils seraient censés renoncer par cela même à l'action personnelle, et desormais, ils seraient non recevables à l'exercer. C'est la remarque de M. *Troplong* ; elle a été confirmée par la jurisprudence (1).

In a case of *Hulot* v. *Arjambault*, decided by the Court of Appeal, *Orleans*, on the 28th May, 1851, it was specially held that if in such a case a personal creditor sues hypothecarily, he loses his personal action.

I would refer also to the cases of *Duplessis* v. *Poulet* and *Vernor* v. *Roy*, decided in the same court in 1847 and 1849. These three decisions are to be found in *Devilleneuve* and *Carette* (2).

The case of *Geoffroy* v. *Duplessis*, decided by the Cour de Cassation on July 1st, 1850, (3) may be also cited as being on questions relating to this one. There the surrender of the property was annulled, because the price of sale was more than sufficient to pay the mortgagees. There can be no such question raised on the present case. The sum due by *Geriken* was not sufficient to pay *Quesnel's* debt. If he had paid his share, he would have had to pay *Quesnel's* share besides, pay two shares, the half of the price, instead of one share, the fourth of the price. He could not, by paying his share of the price of sale, free the property from the mortgage lying upon it for *Quesnel's* share of this price. He could then

(1) See also 7 Taulier, 383, 385, and 7 Bolleux, 363, 580, 581, and note 2 ; 3 Aubry et Rau, 446 & 447 ; 31 Laurent, Nos. 280 à 284, 291 and 292.

(2) Vol. 30, (1851) pp. 521 et seq., part 2.

(3) Dalloz, Dic. de jurisp. 1850, p. 117, and the notes to it.

surrender the property and thereby free himself from his own personal obligations at the same time as from the mortgage upon the property for *Quesnel's* share. *Reeves* cannot complain of it, since she herself gave him the option to surrender the property, and *Quesnel* (or *Reeves* in his name) cannot complain of it either, since he has lost his right of action against the defendant for the price of sale, by not fulfilling his share of the contract of sale, that is to say, his obligation of warranty towards the defendant against all trouble and hypothecs. *Laurent* says (1):

Il reste une hypothèse sur laquelle il ne reste aucun doute. Le prix ne suffit pas pour désintéresser les créanciers; ceux-ci agissent hypothècairement; c'est leur droit et leur intérêt. L'acquéreur délaisse, comme il en a le droit. Dans ce cas le vendeur ne peut pas intervenir pour s'opposer au délaissement et pour en demander la nullité. En effet, le vendeur n'a d'autre action contre l'acquéreur que l'action personnelle pour le contraindre à payer son prix; mais il exercerait vainement cette action; dans l'espèce, la poursuite ne désintéresserait pas les créanciers, puisque le paiement du prix ne dégagerait pas l'immeuble de toutes les charges hypothécaires qui le grèvent; de sorte que l'acquéreur, tout en payant, resterait exposé à l'action hypothécaire des créanciers qui ne seraient pas désintéressés: Or, dès qu'il est tenu hypothécairement et poursuivi comme tiers détenteur, il a le droit de délaisser. Ce sont les termes de l'arrêt que nous venons d'analyser (No. 282). La doctrine est d'accord avec la jurisprudence.

The case of *Dubuc* v. *Charron* (2), decided by Mr. Justice *Badgley*, at *Montreal*, in 1865, is precisely in point, and maintains the same doctrine. The case of *La Société Permanente de Construction* v. *Larose* (3), in the Court of Review, *Montreal*, 1871, though not exactly on facts similar to those in the present case, virtually decides the point in the same sense as *Dubuc* v. *Charron*. There the purchaser had specially stipulated that he would have the right to surrender the

(1) 31 Vol. No. 283.
(2) 9 L. C. Jur. 79.
(3) 17 L. C. Jur. 87.

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property, but the court in its *considérants* says that this was a right which he had by the operation of the law. Then there is the case of *La Société de Construction de Montreal* v. *Désaultels* (1), decided in April last by the Court of Review, at *Montreal*, where it was held that hypothecary creditors, whom a purchaser had obliged himself to pay by his deed of purchase, forfeit their rights to a personal action against him, by suing him hypothecarily. I refer also specially to 20 *Duranton* Nos. 252 to 257.

It appears to me there can be no doubt upon this question of law.

Another possible point of view in this case is this: *Reeves* accepted the delegation only after *Geriken* had surrendered the property on the hypothecary action. Till then, *Quesnel* was alone *Geriken's* creditor (2). He could till then have revoked that delegation (3), and even without doing so, and notwithstanding the delegation, he could sue *Geriken* for the price of sale if any was due (4).

Reeves could never, against her will, be bound to accept this delegation. The question whether the registration of the deed constituting the delegation was a sufficient acceptance of the delegation cannot be raised here, because she never intended to avail herself of the delegation till she accepted it by the deed of December 4th, 1877. On the contrary, she virtually refused the offer of this delegation by proceeding hypothecarily. It may be that, under certain circumstances, registration of a deed containing a delegation may be invoked by the party to whom the delegation is made, as an acceptance or equivalent to an acceptance of it, but it cannot be contended that such registration oper-

(1) 2 Legal News 147.
(2) 7 Toullier No. 286.
(3) Art. 1029 C. C.
(4) *Mallette* v. *Hudon*, 21 L. C. Jur. 199.

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ates a forced acceptance of the delegation, and imposes it against his will on the creditor. Here it is only by the deed of December 4th, 1877, that *Reeves* accepted this delegation. But at this date *Geriken* owed nothing. The contract between him and *Quesnel* had been resiliated. Upon being evicted from the property for a mortgage against which his vendor was obliged to guarantee him, he ceased to be bound by his obligations under this contract. Had he paid his purchase price before being evicted he could have recovered it back from his vendor (2); not having yet paid it, he can, on the same grounds, resist his vendor's demand for it He was entirely relieved from this price of sale. So that, when *Reeves* accepted the delegation, she was too late; *Geriken* had been freed from his obligations.

But now, as to a question of fact, I have so far supposed that *Geriken* has been evicted from the whole of the property he bought from *Quesnel*. But is that so? Certainly not. He bought from *Quesnel* the whole of lot 4679, but he has been evicted from the south part of that lot only, from the part sold to *Quesnel* by *Reeves*. This appears by his own plea. He alleges that he has been evicted from the part of the property described in *Reeve's* deed to *Quesnel*, of the 14th of October, 1874. Indeed, *Reeves* had no hypothec by her own deed of sale on the other part of the lot, which *Geriken* bought on the same day from Mrs. *Cadieux*, and then, of course, had no hypothecary action against *Geriken*, as holder of the *Cadieux* lot, in virtue of his own deed to *Quesnel*. *Geriken* has, then, been evicted from a part only of the property sold to him by *Quesnel*. He thus can claim to be relieved from the payment of the value of that part only, as he holds the other part, and Mrs. *Reeves'* acceptance of the delegation is valid for the part for which the sale stands good. The value of this part,

(1) Art. 1511 & 1513 C. C.

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for which he has not to pay, is, according to Art. 1518 C. C., to be estimated proportionately upon the price he had agreed to pay for the whole property. So that a relative valuation of this south part of the lot has to be made before the amount to be deducted from the price of sale, and from the three instalments thereof claimed in the present case, can be ascertained (1).

The defendant has contended before us that he has paid *Quesnel* in cash for the *Cadieux* lot; that is to say, for one-fourth his share of it. He wants us to find in the sale from *Quesnel* to him and his co-purchasers, that the balance due thereon is due for the *Reeves* lot only. But this is hardly covered by his plea, and then that may have been the intention of the parties to that deed, but that is not what they did. The sale is purely and simply of the three-fourths of the whole of the lot 4679 for one sum *en bloc*, and for that sum the purchasers have mortgaged, not only this *Reeves'* lot, but also the *Cadieux* lot, so that *Reeves* now, as *cessionaire* of *Quesnel*, has a mortgage on the *Cadieux* lot. The deed expressly says that the balance due is due for the sale of the three-fourths of the two lots. The mortgage is stipulated for the said price of sale, that is, for the price agreed upon for the said three-fourths of the two lots, not for the price of the *Reeves* lot only.

For these reasons I am of opinion that the appeal should be allowed with costs, and that the plaintiff should have judgment for part of the three instalments due to her; the amount to be established by the valuation to be made of the part of the property abandoned by the defendant proportionately to the price agreed to as the price of the whole of it. Perhaps the parties may agree as to that valuation, and as to the amount for which judgment should be entered.

(1) Pothier Vente No. 142.

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GWYNNE, J. :—

I concur in the judgment of my brother Taschereau. I think the plaintiff is entitled to recover the difference, if any there be, between the value of the one-fourth part from which *Geriken* was evicted and the amount claimed.

Appeal allowed with costs.

Solicitors for appellant: *Doutre, Branchaud & McCord.*

Solicitors for respondent: *Duhamel, Pagnuelo & Rainville.*

HENDERSON *et al*.....APPELLANTS; 1885

AND *Feb'y. 19.
*Mar. 16.

GEORGE GUILLET.....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF CAMERON, C.J., SITTING FOR THE TRIAL OF THE WEST NORTHUMBERLAND CONTROVERTED ELECTION CASE.

Wager by agent with voter—Bribery—Corrupt practice—Treating on polling day—Agency.

One *Pringle*, an acknowledged agent of the respondent, and the President of the Conservative Association whose candidate the respondent was, made a bet of $5 with one *Parker*, a Liberal, that he would vote against the Conservative party, and deposited with a stakeholder the $5, which, after the election, was paid over to *Parker*. At the trial, *Pringle* denied that he was actuated by any intention to influence the conduct of the voter, and alleged that the bet was made as a sporting bet, on the spur of the moment, and with the expectation that, as he said, *Parker* would warm up and vote; but he also admitted in evidence that it passed through his mind that some one on the voter's side would make the money good if he voted. *Parker* said he had formed the resolution not to vote before he made his bet,

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

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but the evidence showed that he did not think lightly of the sum which he was to receive for his not voting, his answer to one question put to him being: "Oh! I don't know that $5 would be an insult to any one not to vote."

Held (reversing the judgment of the Court below), That the bet in question was colorable bribery within the enactments of sub-sec. 1 of sec. 92 of the Dominion Elections Act, 1874, and a corrupt practice which avoided the election.

The acts complained of in the *Heenan-Beauvais* charge were also relied on as sufficient to have the election set aside. The facts of this charge were that *H.*, a Conservative, prior to the election, canvassed, in company with the respondent, one *B.* On election day *H.* was selected by the assistant secretary of the association (an acknowledged agent of the respondent) to represent the respondent at the *Burnley* poll, and obtained from him a certificate under s. 42 of the Dominion Elections Act, entitling him to vote at the *Burnley* poll. *H.* there met *B.* and treated him by giving him a glass of whiskey, and after *B.* had voted he gave him $2 and subsequently sent him $50. The treating, according to *B's.* evidence, was nothing more than an act of good fellowship; and according to *H's.* account, that *B.* was not feeling well, and the whiskey was given in consequence. *B.* negatived that the $2 were paid him for his vote, and *H.* said that he supposed it was a dollar bill and told *B.* to go and treat the boys with it, and that it was not given on account of any previous promise or for his having voted.

The Court *a quo* held that none of these acts constituted corrupt acts so as to avoid the election.

On appeal to the Supreme Court of *Canada*,

Held, per *Ritchie*, C.J. and *Henry* and *Taschereau*, JJ.—There was sufficient evidence of *H s.* agency, but it was not necessary to decide this point.

Per *Strong*, J.—There was no proof of *H's.* agency. Agency is not to be presumed from the fact that the respondent permitted *H.* to canvass *B.* in his presence, and there is an entire absence of proof of any sufficient authority to *H.* to bind the respondent by his acts at the polling place in the matters of the treating and the payment of the $2.

Per *Fournier*, J.—That the treating of *B.* on polling day, both before and after he had voted, by *H.*, an agent, and the giving of the sum of $2 immediately after he had voted, were corrupt acts sufficient to avoid the election.

APPEAL from the decision of the Hon. Chief Justice *Cameron* (1), dismissing with costs the petition against the election of respondent.

The petition contained the usual allegations, but at the close of the case petitioner's counsel relied upon two charges, which are contained in items 1, 2, 8 and 9 of the Bill of Particulars, viz. :—

"1. *Raphael Beauvais* was, on the 20th day of June, 1882, at the township of *Haldimand*, by *Thomas Heenan*, an agent of the respondent, treated, contrary to section 94 of the Dominion Elections Act of 1874, and promised the sum of $50, or other valuable consideration, to induce the said *Raphael Beauvais* to vote for the said respondent at the said election.

"2. The said *Raphael Beauvais*, at the time and place aforesaid, was, by the said *Thomas Heenan*, treated, contrary to section 94 of the Dominion Elections Act, 1874, and paid the sum of $2, on account of the said *Raphael Beauvais* having voted for the respondent at the said election.

"8. *John Parker* was, on or about the 17th day of June, 1882, paid the sum of $5, and treated, contrary to section 94 of the Dominion Elections Act of 1874, by *Robert Roderick Pringle*, an agent of the respondent, to induce the said *John Parker* to refrain from voting at the said election.

"9. *John Parker* was, on or about the 30th day of June, 1882, paid the sum of $5, or some other valuable consideration, by *Robert Roderick Pringle*, an agent of the respondent, on account of the said *John Parker* having refrained from voting at the said election."

The evidence relied on in support of the charges contained in paragraphs 8 and 9, known as the *Pringle-Parker* case, is reviewed in the judgments hereinafter given.

(1) 2 Rep. Elec. Cases, Ont., 32.

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As to the charges contained in paragraphs 1 and 2, known as the *Heenan Beauvais* case, it was proved that on polling day, before voting, one *Beauvais* was treated twice by one *Heenan*, and immediately after voting he was taken behind the school house, where the poll was held, and treated again and given $2, and a few weeks later *Heenan* gave him $50, but under the following circumstances:—*Heenan* was a strong conservative, and the respondent and *Heenan* together, had seen and canvassed *Beauvais* a few days previous to the polling, at *Donohoe's* hotel, on the morning after a meeting held there by respondent. On this occasion, one *Polkinghorne*, who acted as assistant-secretary of the association to which respondent entrusted the management of his election, obtained from the returning officer a certificate under section 42 of the Act, entitling *Heenan*, as an agent of respondent, to vote at the *Burnley* poll. *Heenan* went to *Burnley* the evening before the polling, and passed the night at *Donohoe's* hotel. He left early in the morning, and, when passing *Beauvais'* house, stopped to speak to him, and gave *Beauvais* a drink of whiskey from a flask or bottle. *Beauvais* in his evidence stated that *Heenan* asked him if he was going to the poll; he answered, he was. *Heenan* replied: "All right, I will see you there." They met at the poll, and *Heenan* "coaxed, and coaxed" him to vote on his side. *Beauvais* said it was not his side. *Heenan* then went into the polling booth and coming out again told *Beauvais* once in a while: "Vote with us, you won't be sorry for it; you won't be sorry for it." During this time he treated *Beauvais* again from his bottle. *Beauvais* at last said he would vote for respondent on two conditions: first, that he should get money for his vote, and second, that *Heenan* should keep the fact of how he voted a secret. *Heenan* agreed to the latter condition, and, as

to the first, he said, as *Beauvais* relates: "he could not do it, and he darsen't do it; because, he said, if he gave me something before I would go into the poll when the people was looking at me with him, he says, when you come to vote they might swear you, and it would not work." *Beauvais* then went in and voted. As he was coming out *Heenan* asked him how he had voted; he said, for respondent. *Heenan* replied that he was glad, and asked him to go around behind the school house, where he gave *Beauvais* another drink, and gave him a $2 bill, saying, "that will buy you whiskey coming home." *Beauvais* said the money was not given for his vote, and asked when he would see *Heenan* again. The latter answered that he would meet him in *Cobourg* in four or five weeks. He went to *Cobourg*, but was told there that *Heenan* had gone to his place. On going home he found that his wife had received a message from *Heenan* to meet him at *Warkworth* the next morning. He went there and met *Heenan*, who suggested his going to see his friends below *Montreal*, in order to get him out of the way. He said he could not afford it, and *Heenan* said, "we will lend you the money if you go away." They were at *McGraw's* tavern, and as *Beauvais* was leaving the table after dinner, the waitress, *Mary Ann Donohoe*, handed him an envelope with his name on the outside, and $50 inside. This, she stated, was handed to her by *Heenan* while *Beauvais* was at his dinner.

Beauvais was examined on the 7th of January, and, on account of *Heenan's* absence the trial was adjourned to the 2nd of May, when *Heenan* was examined. He stated that *Beauvais*, in the morning, complained that he "had a bad stomach," and that he gave him the first drink on that account, and told *Beauvais* that any farmer who would vote for the National Policy would not be sorry for it, and swore that he did not put forward

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any such excuse for the second drink he gave *Beauvais*, just before he got him to vote; but says, that as *Beauvais* was coming out of the poll after voting, he asked him if he felt better now, and *Beauvais* said his stomach was bad yet. He added that he neither directly or indirectly had any intention of influencing *Beauvais*.

The learned judge at the trial found that *Heenan* was an agent, but that the treating was not done with the object of corruptly influencing *Beauvais*, and that the money was not corruptly given, and also held that the bet in the *Pringle-Parker* case was not made with a corrupt intent.

Mr. *J. J. MacLaren*, Q.C., for appellants:

In addition to the authorities and cases reviewed in the judgments, the learned counsel referred to the following:—

Cooper v. *Slade* (1); the *Bradford* case (2); the *Carrickfergus* case (3); the *Jacques Cartier* case (4); *Montreal West* case (5); *Bellechasse* case (6); *North Ontario* case (charge 13) (7). Also to the *Bonaventure* case (8); under section 257 of the *Quebec* Election Act, which is identical with the second paragraph of sec. 94 of the Dominion Act.

As to the meaning of the word "wilful" in sec. 98 of the Dominion Elections Act, 1874. *Queen* v. *Prince* (9).

As to agency:—The *Harwick* case (10), and the *Westbury* case (11). As to the agency and extensive powers of the active and prominent members of such associations, and the responsibility of candidates for their acts, reference was made to the following cases: *Bewdley* case

(1) 25 L. J. Q. B. 329.
(2) 19 L. T. N. S. 724.
(3) 1 O'M. & H. 265.
(4) 2 Can. S. C. R. 262.
(5) 20 L. C. Jur. 23.
(6) 6 Q. L. Rep. 107.
(7) Hodgins, 792.
(8) 3 Q. L. Rep. 75.
(9) L. R. 2 C. C. 164.
(10) 3 O'M. & H. 70.
(11) 3 O'M. & H. 78.

(1); *Chester* case (2); *Gravesend* case (3); *Tewkesbury* case (4); *Wigan* case (5), where the substitution of the name of *Polkinghorne* for that of *Scott* would make almost every word said in that case equally applicable to the present one; the *Stroud* case (6); the *Durham* case (7); the 2nd *Taunton* case (8); the 1st *Taunton* case (9); the *Bewdley* case (10); the *Niagara* case (11); the *Cornwall* case (12); the *Charlevoix* case (13).

Mr. *Dalton McCarthy*, Q.C., for respondent:

On the betting charge, referred to the following cases and authorities:—*Cunningham* on Elections (14); *Mattinson* and *Macaskie* on Corrupt Practices at Elections (15); *Allen* v. *Hearn* (16); *Leigh and Le Marchant* (17); *Bushby's* Election Law (18); *Clerk's* Election Committees (19); the *Monmouth* case (20).

The *Youghall* case (21); the *Cashel* case (22).

See also the following cases:—*Salisbury* case (23); *South Norfolk* case (24); *Lincoln* case (25).

Agency—*Mattinson* (26); *Harwich* case (27).

Agency by working:—*Mattinson* (28); *Staleybridge* case (29).

But agent can only bind candidate within the scope of his authority:—*Mattinson* (30); *Westbury* case (31);

(1) 44 L. T. N. S. 283.
(2) 3 O'M. & H. 148.
(3) 44 L. T. N.S. 64.
(4) 44 L. T. N.S. 192.
(5) 4 O'M. & H. 7.
(6) 3 O'M. & H. 11.
(7) 2 O'M. & H. 136.
(8) 2 O'M. & H. 73-4.
(9) 1 O'M. & H. 184-85.
(10) 1 O'M. & H. 17-19.
(11) Hodgins, 574.
(12) Hodgins, 548.
(13) 5 Can. S. C. R. 146.
(14) 2nd ed. (1880) pp. 150-151.
(15) 1883, p. 34.
(16) 1. T. R. 56.
(17) 2nd ed. (1874), p. 19.
(18) 5th ed. p. 129.
(19) Pp. 81-82.
(20) Kn. & Omb. 416 (1835).
(21) Falc. & Fitz. 404, (1838.
(22) 1 O'M. & H. 289.
(23) 4 O'M. & H. 21.
(24) Hodgins, 666 & 667.
(25) Hodgins, 495.
(26) P. 108 L. J. Lush
(27) 3 O'M. & H. 69.
(28) P. 110.
(29) 20 L. T. N. S. 75.
(30) Pp. 106 & 107.
(31) 1 O'M. & H. 47; 20 L. T. N S. 17.

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Blackburn case (1); *North Norfolk* case (2); *Harwich* case (3); *Durham* case (4).

The mere fact of being in candidate's company does not make agency:—*Mattinson* (5); 1st *Salisbury* case (6); 2nd *Salisbury* case (7); *Harwich* case (8); *Shrewsbury* case (9).

Otherwise, if he is carrying it on:—1. In concert with the candidate's organization; or 2. If the candidate has full knowledge of his efforts, and approves and sanctions them.

Mere non-interference may or may not be sufficient:—1st *Taunton* case (10); 2nd *Taunton* case (11).

Agency ceases after election:—*Mattinson* (12); *Salford* case (13); *Southampton* case (14); *North Norfolk* case (15).

Then as to agency when there are other agents, or when candidate takes upon himself the canvass:—See *Harwich* case (16); *Mattinson* (17).

RITCHIE, C. J.:

This is an appeal from the decision of the Hon. Chief Justice *Cameron*, dismissing with costs the petition against the election of respondent.

The petition contained the usual allegations, but at the close of the case petitioner's counsel relied upon two charges, which are contained in items, 1, 2, 8 and 9 of the bill of particulars.

(1) 1 O'M. & H. 199; 20 L. T. N. S. 823.
(2) 1 O'M. & H. 236; 21 L. T. 264.
(3) 3 O'M. & H. 69; 44 L. T. N. S. 189.
(4) 2 O'M. & H. 134.
(5) Pp. 110 & 111.
(6) 3 O'M. & H. 130.
(7) 4 O'M. & H. 21.
(8) 3 O'M. & H. 69.
(9) 2 O'M. & H. 36.
(10) 1 O'M. & H. 181.
(11) 2 O'M. & H. 74.
(12) P. 123.
(13) 1 O'M. & H. 133; 19 L. T. N. S. 120.
(14) 1 O'M. & H. 222.
(15) 21 L. T. N. S. 270; 1 O'M. & H. 243.
(16) 3 O'M. & H. 69; 44 L. T. N. S. 189.
(17) P. 115.

Items 1 and 2 in effect charge that *Thomas Heenan*, an agent of respondent, on polling day, treated *Raphael Beauvais*, a voter, in order to induce him to vote, and on account of his being about to vote, and treated him, and gave him $2 on account of his having voted and promised him $50 or other valuable consideration.

The second charge under items 8 and 9 of the bill of particulars, relates to the bet of $5 made with *John Parker*, an elector, by *R. R. Pringle*, the President of the Conservative Association whose candidate respondent was. There is no question about *Pringle's* agency, and, as he himself says, for a month he did nothing else but look after the election, driving night and day throughout the riding, organizing committees, visiting them, getting reports, directing respondent where to hold meetings, where and whom to canvass, &c.

As to the charge against *Heenan*, in the view I take of the case, I do not think it necessary to refer to it, but were it important for the determination of the appeal, and it became necessary to decide the question of agency, I should hesitate before I differed from the learned judge, who, at the conclusion of his judgment, says :—

> If it were necessary in this case to decide whether *Heenan* was agent or not of the respondent, I should be inclined to hold that he was. I am quite sure from what appeared at the trial, the respondent would have been anxious to secure the influence and assistance of *Heenan*, and, I think, he was disposed to regard his presence with him in the neighborhood of *Burnley* as beneficial to his cause, and no direct request on his part to *Heenan* to canvass for him would have indicated to me that he accepted his services more distinctly than what did take place.

I think, however, that the second charge under items 8 and 9 of the bill of particulars, known as the *Pringle-Parker* case, must be fatal to this election. I think that whenever a wager is made in such a way as to influence a voter in determining for whom he will or will not vote, or in influencing him in refraining from voting, it

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is a corrupt practice, the necessary effect of the bet being to restrain the voter and influence him in determining whether he would vote or refrain from voting. The law requires the voter to be free till the last moment of giving or withholding his vote, which he cannot be, if he has laid such a wager as the present. The bet deprives the voter of free action, he becomes, as *Martin*, B., said in the *Bradford* case (1), a man incompetent to give a vote because he has not that freedom of will and of mind which the law contemplates a man ought to have for the purpose of voting.

In this very case the person who wagered with the voter puts forward as evidence that he made the bet under the idea that he would win it, because, though the voter had expressed an intention not to vote, knowing him to be a partizan of the opposite party, and who, if he did vote, would vote against the party for whom *Pringle* was acting as agent, though then at variance with his party, he would warm up and vote; but this shows, it seems to me, very strongly the impropriety of the bet, because the moment he warmed up and wished to vote he would find himself confronted with the loss of ten dollars before he could do so, and the voter very candidly admits that that amount might have an influence on his voting or refraining from voting, and I am by no means prepared to say it had not a direct influence on the voter in this case, and it is clear the wagerer, *Pringle*, thought it would influence him, for, though he says he thought he would vote and lose the wager, he thought he could be induced to do so by his party making up the money to him, so that there would be bribery on one side or the other.

The evidence of *Parker* is as follows:

Q. Now, did you make that bet with him so as to get this

(1) 19 L. T. N. S. 725.

money for not voting; had that anything to do with it? A. I did not intend to vote anyway.

Q. Had this bet anything at all to do with your not voting? A. I do not think it.

Q. And as far as you know, do you think Mr. *Pringle* had any notion that making this bet would prevent your voting? A. I don't know anything about that; you must judge that yourself.

Q. Did you think about it at the time? A. I did not think any thing about it at the time.

Q. You have just told us all that took place about it? A. I think so.

Q. You have kept your resolution and did not vote? A. Yes.

Q. And that is the story? A. Yes, sir.

Q. Would you have taken $5 to vote? A. No.

Q. Would you have taken $5 if you intended to vote to keep from voting? A. No.

Q. Would you have taken twice that? A. Oh? I don't know.

Q. What is your price? A. I have not got any price.

Q. At all events $5 is not your price? A. No.

Q. You would not have allowed a man to insult you by offering $5 not to vote? A. Oh; I don't know as $5 would be any insult to any person not to vote.

Q. You are not high strung? A. No; I am not.

I think in view of this evidence it is quite clear that this voter was not so high strung that a wager of money would not influence him, and it is also clear that Mr. *Pringle*, who made this bet, thought it would influence the voter, for though he says he thought the voter would vote and lose his money, he goes on to say this:

Q. You still thought he would vote notwithstanding what *Beatty* had said? A. Yes, and I thought it very likely he would not lose the $5.

Q. Why? A. I thought somebody else would make it good to him on his party side.

Q. You thought somebody on his side would very likely make good the $5? A. Yes.

Q. That passed through your mind? A. I don't know at that time it did; it was afterwards.

Q. When did it pass through your mind? A. I could not tell.

Q. But you remember that did pass through your mind some time, that somebody on his side would probably make it good if he voted? A. Yes.

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So that we find this man was placed in the position to either to lose his money, or the only terms upon which he could vote would be by his own side remunerating him for the loss he would be put to, and I think in view of the evident desire of the Legislature to secure the free and independent exercise of the elective franchise, to allow the candidates or their agents to engage in transactions such as these with voters with impunity would be to allow them to frustrate the spirit and letter of the law.

Even the decision of the learned judge who tried this case can hardly be said to be entirely opposed to the conclusion at which I have arrived for, he says:

> While I do not think I can properly hold the bet was made with the intention of inducing *Parker* to refrain from voting, it comes dangerously near leading to that conclusion. On the whole case, it seems to me that a decision for or against the validity of the election could not be said to be absolutely wrong.

I am of opinion to allow this appeal with costs.

STRONG, J.:

Two cases of alleged bribery by agents have been relied on by the appellant as affording grounds for avoiding the election. The facts disclosed by the evidence in relation to one of them, the *Pringle-Parker* case, already stated by the Chief Justice, are, in my opinion, such as to require us to allow the appeal and to set aside the election.

The learned judge who tried the petition came to the conclusion that any *primâ facie* presumption of a corrupt intent by *Pringle* in making the bet with *Parker* that he would vote at the election was sufficiently rebutted by the denial of the former that he was actuated by any intention to influence the conduct of the voter, and by the statement of *Parker* that he formed the resolution not to vote, and that he adhered

to and carried out this resolution unaffected by the wager proposed by *Pringle*, and the learned judge thought that this direct evidence of the parties concerned was confirmed by the surrounding circumstances. With every disposition to acquiesce in the finding of a judge for whose ability and experience I have so high a respect as the present Chief Justice of the Common Pleas, I am unable to agree in this conclusion.

When an acknowledged agent, as *Pringle* was, makes a bet of this kind against the interest of his own party in the election, one or the other of two inferences must be made; it must be assumed, either that he was so indifferent to the success of his own side that he was willing to make money by wagering against it, or that the bet was not made for the purpose of winning but with the view of losing it, and so in order to confirm the voter in his declared resolve not to vote, and thus under the guise of a wager to bribe him. It appears to me impossible to say in the face of the evidence that the first was the object which Mr. *Pringle* had in view. He was the respondent's chief agent, and, as he himself states, most indefatigable in the prosecution of the canvass, spending a considerable sum of money in legitimate expenses to carry the election, and devoting much time and labour to it, and I cannot suppose in the face of his own testimony that he really wished that *Parker* should vote, as he must have done, if he in truth made the bet to win.

If the bet was not made with the hope and desire of winning it, it must have been made with the intent that its decision, depending as it did upon the mere volition of *Parker*, should have the effect of making him adhere to his first determination not to vote. Such, I say, would be the *primâ facie* presumption from the mere fact that such a bet was made. Then is it suf-

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ficient to do away with such a presumption, that the parties to the wager, when examined as witnesses, state that they were mentally unconscious of any intention to treat the bet as an inducement not to vote, and by *Parker* stating that it had not such an effect? I am of opinion that such a denial of criminal intent cannot for a moment be permitted to outweigh the natural and obvious conclusion to be drawn from the act itself; all the principles which courts proceed on in acting on circumstantial evidence forbid it. The policy of the law in cases of bribery at elections is against such a mode of escaping from the effect of evidence like that before us; were we once to countenance the notion that an agent could safely make a bet of this kind with a voter, relying on his own statement on oath being afterward sufficient to enable him and his candidate to escape from the consequences of it, as an act of bribery, we should, in my opinion, be suggesting a form of corruption which would be almost universally resorted to.

I must also differ with the learned Chief Justice, when he says that the surrounding circumstances go to show that the bet was not made in order to induce *Parker* to refrain from voting.

It appears to me not to be sufficient to warrant this conclusion that *Parker* swears that he had resolved not to vote and that he was not conscious of any influence being exerted on him by the circumstances of the bet inducing him to adhere to his original determination. As *Buller*, J., says in *Allen* v. *Hearn* (1):

> The law leaves it to the voter to exercise his franchise or not, but it also requires him to be free till the last moment of giving or withholding his vote, which he cannot be if he has laid such a wager as the present.

(1) 1 T. R. 60.

As to the argument that the amount of the bet—$5—was so small that it cannot be supposed that it exercised any influence on the conduct of the voter, there is one answer at least, amongst several which may be suggested, which must be conclusive. It is found in the evidence of *Parker* himself, for being asked by counsel for the respondent: "You would not have allowed a man to insult you by offering $5 not to vote?" he answers: "Oh I don't know as $5 would be any insult to any person not to vote"—thus showing that he did not think so lightly of the sum which he was to receive in the event of his not voting, and of that which he was to lose in the event of his exercising his franchise as to consider it a mere nominal sum.

There is an absence of authority so far as decisions go on the effect of wagers of this kind. The case of *Allen* v. *Hearn* and several cases before election committees were cases in which the bets were not by a candidate or an agent but by a voter or non-voter with a voter, and were wagers on the event of the election and not on the voting or non-voting of a particular voter, and the question invariably arose on a scrutiny and did not affect the election but was confined to the single vote. Some of the text writers on election law do however allude to this question, and all who have treated of it unhesitatingly pronounce such a wager to be nothing else than colorable bribery. Thus *Cunningham* (1) says:—

> Hitherto we have only adverted to the effect of betting on individual votes. There may be cases where the whole election may be rendered void in consequence of a bet or bets, as when a candidate or agent bets with voters that he will not be returned. He by this evidently makes it their interest that he should be returned, and such a bet would doubtless be held by a judge to avoid the election, for it would be a mere cloak to render the real nature of the transaction less repulsive or probably to hide it from detection.

(1) 2 Ed. p. 152.

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Bushby, in his manual (1), is even more to the point; he says, in discussing the question of indirect bribery:

> Again, the offence may be committed under various colorable pretexts, as for instance, when a man offers to bet against his own side with a voter. The intention of the person making the offer would in such a case be presumed to be corrupt, and the bet, if taken, would, as regards him, be a bribe. Moreover, if the vote were given in accordance with the corrupter's intention, the voter also would be guilty of bribery, provided that he was aware of that intention.

Again, *Rogers* (2), in his treatise, is to the same effect, for he says:

> Cases might arise where a briber might effect his corrupt purpose by means of a wager with a voter by betting against his own party.

These quotations, though not of course of the same weight or value as judicial decisions, are yet amply sufficient to confirm me in the opinion which without their concurrence I should have arrived at and which I have already stated, that this election ought to be avoided in consequence of the bet in question and the subsequent payment of the amount of the stakes, as being colorable bribery within the enactments of subsec. 1 of sec. 92 of the Dominion Elections Act of 1874.

As regards the *Heenan-Beauvais* case, I am of opinion that there is no proof of *Heenan's* agency. The authorities referred to by Mr. *McCarthy* show conclusively that agency is not to be presumed from the fact that the respondent permitted *Heenan* to canvass *Beauvais* in his presence, and there is an entire absence of proof of any sufficient authority to *Heenan* to bind the respondent by his acts at the polling place in the matters of the treating and the payment of the $2.00.

The appellant should, I think, have the general costs of the election and of this appeal, and also all costs incidental to the *Pringle-Parker* case in which he suc-

(1) 5 Ed. p. 129. (2) 13 Ed. p. 372.

ceeds, but I consider the respondent entitled to the costs as well of the *Heenan-Beauvais* case, as of the other cases which were dismissed by the judge at the trial.

FOURNIER, J.:—

I am also in favor of allowing this appeal, not only on the ground that I consider the wager made and paid by *Pringle* to a voter to be an indirect bribe, but also on the ground that I consider the treating of *Beauvais* on polling day, both before and after he had voted, by *Heenan*, an agent, and the giving of the sum of $2 immediately after he voted, to be corrupt acts sufficient to avoid the election.

HENRY, J.:—

I consider the bet made by *Pringle*, under the circumstances in this case, no matter what his own views were, sufficient to avoid the election. It is a direct inducement not to vote—it is true in the shape of a bet—but it amounted to the same thing as if he handed him five dollars; in fact it was more, for if he voted he would lose $5. When a party does that, he, in my opinion, takes away from the voter that freedom which the law requires he should have up to the last moment. The policy of our election law being that every man should go to the poll free and uncontrolled by any influence whatever, and that the vote should be secret, anything that may interfere with his franchise in the shape of a gift, office, or emolument is an interference with the freedom of the party; and if that is done by the candidate or his acknowledged agent, I think it is under the law sufficient for avoiding the return.

In respect to the other case I express no opinion. I cannot say the evidence is insufficient to prove *Heenan's* agency. However, I have not given attention to that point, because I did not consider it necessary in the

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view I take of the other questions I have already spoken of. I think the appeal should be allowed with costs and the election avoided.

TASCHEREAU, J., concurred with RITCHIE, C.J.

Appeal allowed with costs.

Solicitor for appellants: *J. W. Kerr.*

Solicitor for respondent: *Henry F. Holland.*

1884 FLAVIEN CHOLETTE ....APPELLANT;

*Oct. 28. 29 & 30.

AND

1885 JAMES W. BAIN.....RESPONDENT.

*Jan'y 12.

ON APPEAL FROM JOHNSON, J., SITTING FOR THE TRIAL OF THE SOULANGES CONTROVERTED ELECTION CASE.

Dominion Elections Act, 1874, *Sec.* 95—*Intimidation—Undue influence—Conspiracy between Deputy Returning Officer and respondent's agent to interfere with franchise by marking ballots—Effect of—Election void.*

In an election petition it was charged that the respondent personally, as well as acting by *C. A. C., D. P.* and others, his agents, did undertake and conspire to impede, prevent, and otherwise interfere with the free exercise of the franchise of certain voters, and that, in furtherance of a premeditated scheme which the respondent and his agents well knew to be illegal, they did, in fact, so impede, prevent, and interfere with the exercise of the franchise of certain voters, by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of these voters was unjustifiably interfered with.

At a previous election the respondent had been defeated by a majority of three votes, and the election having been contested was set aside, and certain voters were reported by the judge as having been guilty of corrupt practices, but had not been found

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

guilty of such corrupt practices under section 104 of the Dominion Elections Act, 1874.

At a public meeting before the election *C. A. C.*, the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him, threatened them with punishment if they voted; and subsequently printed notices to the same effect were sent to these voters.

On the polling day *D. P.*, who had been appointed deputy returning officer, on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with *C. A. C.*, and on his advice and in collusion with him marked the ballots of certain of these voters.

Held,—That the election was void by reason of the attempted intimidation practiced by *C. A. C.*, the respondent's agent; and by reason also of the conspiracy, between the said agent and the deputy returning officer, to interfere with the free exercise of the franchise of voters, violations of sec. 95 of the Dominion Elections Act, 1874, and corrupt practices under section 98 of the said Act.

APPEAL from the judgment of *Johnson*, J., rendered on the 2nd of July, 1884, maintaining the respondent as the duly elected member of the House of Commons for the electoral district of *Soulanges*, and dismissing the petition of the appellant, with costs.

The respondent, *James W. Bain*, was returned for the electoral district of *Soulanges*, at an election for the Dominion House of Commons, held on the 20th and 27th December, 1883.

His election was contested by the appellant on the 8th February last by a petition in the usual form, as to corrupt practices, without claiming the seat. The respondent met the petition, 1st, by a denial of the petitioner's right to petition; 2nd, by a denial that any corrupt practices had been committed by himself, his agents and partizans.

On the 20th March, 1884, respondent's plea of want of quality on the part of the petitioner was rejected, and on the 2nd July, 1884, *Johnson*, J., after the hear-

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ing of witnesses, rendered judgment, maintaining the election and dismissing the petition with costs.

On appeal to the Supreme Court of *Canada*, the question decided by the court was whether the facts upon which charge No. 96 of the petition was rested, constituted violations of section 95 of the Dominion Election Act, 1874.

The charge is as follows:

"On or about the 26th December, 1883, before polling "day and during said election, defendant personally and "by his agents, specially by *Charles A. Cornellier*, advo- "cate, of *Montreal*, and *Damien Prieur*, clerk, of *St.* "*Zotique*, did contrive, frame and conclude a design to "intimidate, stop and hinder in the free exercise of their "electoral franchise the following persons, to wit: "*Jean Baptiste Elie, Théodore Duval, Gabriel Leroux,* "*Charles Châles, Isaie Fournier, Damase Fournier, Joseph* "*A. Legris, Elie Baptiste Prieur, Joseph Pilon, Méné-* "*zippe Cusson, Séraphin Bissonette, Théophile Sureau,* "*dit Blondin*, and, by executing said design through the "agency of defendant's agent at the poll of *St. Zotique*, "held by said *Damien Prieur*, did intimidate, stop and "hinder in the free exercise of their electoral franchise "the said above mentioned persons voting at said poll, "to wit: *J. B. Elie, Gabriel Leroux, Théodore Duval,* "*Charles Châles, Isaie Fournier*, and *Damase Fournier*, "all of them electors of *St. Zotique*, against the instruc- "tions and notifications of the returning officer, *A. M.* "*Pharand*."

The documentary and oral evidence relied on as proving the said charge, are reviewed at length in the judgments hereinafter given.

Mr. *Geoffrion*, Q. C., and Mr. *DeB. Monk*, for appellant.

The following authorities were cited and relied on as applicable to the facts of the case.

The *Kamouraska* case (1); the *Laval* case (2); the *Jacques Cartier* case (3); *Rouville* Election case (4); *Cunningham* on Elections (5); *Rogers* on Elections (6); *Gloucester* case (7); *Bothwell* Election case (8); Journals House of Commons (9).

Mr. *Alderic Ouimet*, Q. C., and Mr. *Cornellier*, for respondent, relied on the following authorities:

North Durham (10); *Windsor* case (11); *Bradford* case (12); *Stafford* case (13); *Bolton* case (14); *Hackney* case (15); *Drogheda* case (16).

The remarks of Justice *Blackburn* in the *North Norfolk* case (17): "But, in order to bring a case within this "section, it must be shown that the loss or damage "inflicted or threatened is of a substantial nature. What "may be called a mere precarious loss would not neces- "sarily be sufficient." The *Verchères* Election case decided by Judge *Jetté* (18).

RITCHIE, C. J.:—

It was charged by particular 96 that the respondent personally as well as acting by Mr. *Cornellier*, by *Damein Prieur* and other persons unknown to the petitioner, did undertake and conspire to impede, prevent and otherwise interfere with the free exercise of the franchise of the following voters, to wit: *Joseph A. Legris*, *Joseph Pilon*, and *Elie B. Prieur*, of *Coteau Landing*, *Charles Châles*, *John Elie*, *Gabriel Leroux*, *Théodore Duval*, *Damase Fournier*, *Baptiste Fournier*, *Zotique Lalonde*, and others of *St. Zotique*, *Ménésippe*

(1) 3 Q. L. R. 308.
(2) 7 Leg. News 186.
(3) 2 Can. S. C. R. 216.
(4) 2 Leg. News, 193, 194.
(5) Ed. 1880, p. 199, 494, 496, 603
(6) Ed. 1880, p. 404.
(7) 2 O'M. & H. 60.
(8) 8 Can. S. C. R. 676.
(9) (1884) Vol. 18, pp. 8, 12, 210.
(10) 2 O'M. & H. 156.
(11) 1 O'M. & H. 6.
(12) 1 O'M. & H. 40.
(13) 1 O'M. & H. 229, p. 234.
(14) 2 O'M. & H. 150.
(15) 2 O'M. & H. 85.
(16) 2 O'M. & H. 204.
(17) 1 O'M. & H. 241.
(18) Not reported.

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Cusson of *St. Clet*, and that, in furtherance of a premeditated scheme which they, respondent and his agents, well knew to be illegal, they did, in fact, so impede, prevent and interfere with the exercise of the franchise of certain electors, *Charles Châles*, *John Elie*, *Gabriel Leroux*, *Théodore Duval*, *Damase Fournier*, *Baptiste Fournier*, *Zotique Lalonde*, all electors of the Parish of *St. Zotique*, by getting their ballots marked, rendered identifiable and consequently void, whereby the franchise of these voters was unjustifiably interfered with.

This is the only charge I think it necessary to discuss.

There is no controversy as to the facts upon which this charge was rested; the question submitted to this court is therefore not one of the interpretation to be given the evidence, as to which there is no conflict. It is a question of law, as to whether the facts constitute a violation of section 95 of our Dominion Elections Act.

There can be no doubt that *Cornellier* was not only the agent of the respondent, but the organizer of respondent's whole election. He gives this account of himself:

Q. Dès l'émanation du bref dont il est question en cette cause, vous vous êtes mis en rapport avec le défendeur, n'est-ce pas? R. Oui, monsieur.

Q. Ici ou à *Montréal*? R. Ici, à *Montréal*, partout où je l'ai rencontré, je me suis chargé de l'organisation et je l'ai faite.

Q. C'est vous qui vous êtes chargé de l'organisation, et c'est vous qui l'avez faite? R. Oui.

Q. Par conséquent, il s'est reposé sur vous par rapport à cette organisation-là? R. Je crois que oui.

Q. Vous avez agi en conséquence? R. Oui, monsieur.

Q. Etes-vous allé chez lui pendant l'élection? R. Très-souvent.

Q. Qu'entendez-vous par très-souvent? R. Plusieurs fois par semaine.

Q. Avez-vous séjourné chez lui? R. J'ai séjourné chez lui, j'ai couché chez lui, j'ai mangé, je me suis retiré chez lui en différents temps, lorsque j'étais dans la paroisse de *St. Polycarpe*, je me suis retiré chez monsieur *Bain*.

Q. Et il était entendu que vous deviez conduire l'élection? R. Il était entendu que je devais prendre une part active à l'élection.

It is equally clear that up to the time of his appointment as deputy returning officer, *Damien Prieur* had taken an active part in the election.

In his evidence he answers as follows:

Q. Avez-vous pris une part active à la dernière élection? R. Oui, monsieur, j'ai pris une part active à l'élection, jusqu'à ma nomination comme sous-officier rapporteur.

Q. En faveur du défendeur? R. Oui, monsieur.

Q. Vous avez toujours travaillé pour monsieur *Bain*, n'est-ce pas? R. Dans ses deux élections.

Q. Monsieur *Bain* le savait? R. Oui, il devait le savoir.

And he knew that at the previous election between the same parties in which he had worked for Mr. *Bain* which had been set aside, that the majority was only three votes:

Q. Etes-vous allé chez lui pendant l'élection? R. Non, monsieur.

Q. Est-il venu chez vous? R. Il est venu chez moi, c'est-à-dire, pas chez moi, mais chez mon père.

Q. Vous saviez que sa minorité à l'élection précédente avait été de trois voix? R. Oui, monsieur, il a eu d'abord deux voix et ensuite, après le décompte, il a eu trois voix.

His appointment, he being so unquestionably a partizan, was most imprudent on the part of the returning officer, if he was aware of it, (which I am happy to say does not appear to have been the case, but on the contrary he seems to have acted with great discretion and propriety,) and *Prieur's* acceptance most reprehensible, for judged by his previous partizanship, and communications with *Cornellier* in reference to these votes, and his subsequent conduct, it could only have been to enable him to use his office in conjunction with Mr. *Cornellier* in violating the law in the interest of the respondent.

Here is what he says:

Q. Avez-vous vu monsieur *Cornellier* pendant la dernière élection? R. Oui, monsieur, très souvent.

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Q. Très souvent? R. Bien, c'est-à-dire très souvent, plusieurs fois.

Q. Chez vous? R. Une couple de fois chez nous, deux ou trois fois, je n'ai pas remarqué toutes les fois que je l'ai vu; chaque fois que je l'ai vu; chaque fois qu'il est venu à *St. Zotique*, il est venu chez nous.

Q. Vous l'avez vu ailleurs, aussi? R. Je l'ai vu chez mon beau-père.

Q. Qui cela? R. Monsieur *Filiatrault.*

Q. Monsieur *Stanislas?* R. Oui, monsieur.

Q. Vous a-t-il parlé avant l'élection de certains voteurs de *St. Zotique* qui ne devaient pas voter? R. Personnellement, il ne m'en a pas parlé, mais il a dit chez monsieur *Filiatrault*, et partout où il a été, que certains voteurs n'avaient pas droit de vote, il a dit cela devant moi.

Q. Seul vous en a-t-il parlé à vous? R. A moi personnellement, tout seul, non.

Q. Vous en a-t-il parlé à vous, soit seul ou avec d'autres? R. Avec d'autres il m'a dit que ces gens-là n'avaient pas droit de vote, qu'ils étaient déqualifiés.

Q. Vous a-t-il parlé de la manière dont vous deviez prendre les objections aux votes de ces gens-là? R. Il m'a dit qu'une objection serait filée.

Q. Bien, voulez-vous dire si monsieur *Cornellier* vous a parlé de certaines objections qu'il devait faire aux votes des électeurs qu'il prétendait être déqualifiés? R. Je crois qu'il m'a parlé à propos de cela; il m'a dit qu'il avait certaines objections à faire sur certains votes qui étaient connus comme déqualifiés dans le comté.

Q. Qu'est-ce qu'il vous a dit? R. Il m'a dit que ces gens-là n'avaient pas droit de vote, qu'il prétendait que ces gens-la n'avaient pas droit de vote, qu'ils étaient disqualifiés par la loi.

Q. Est-ce tout? R. Je crois que c'est tout.....Bien, le matin, il est venu chez nous.....

Q. Quel matin? R. Le matin de la votation.

Q. Qu'est-ce qu'il vous a dit? Qu'est-ce qu'il est allé faire chez vous? R. Il m'a dit que j'avais parfaitement le droit de marquer les bulletins des gens qui étaient disqualifiés par la loi.

Q. Etiez-vous sous-officier-rapporteur? R. Oui, monsieur.

Q. Au poll numéro huit? R. Oui, monsieur.

Q. Et monsieur *Cornellier* est venu chez vous le matin même de la votation? R. Monsieur *Cornellier* est venu chez nous le matin de la votation et il m'a dit que j'avais parfaitement le droit de marquer le bulletin des gens qui étaient déqualifiés par la loi, qu'il prétendait qui étaient déqualifiés par la loi.

Q. Monsieur *Prieur*, que lui avez-vous dit alors ? R. Je lui ai dit : "C'est correct, si j'ai droit de le faire, je le ferai."

Q. Vous a-t-il montré ses objections ? R. Je les ai vues avant.

Q. Vous les avez vues avant la votation ? R. J'ai lu la nature des objections.

Q. Il vous les a montrées ? R. Oui.

We find the returning officer distinctly and formally instructing his deputy as to his duty in respect to not marking the ballots, and intimating to him his unwillingness to appoint him if he was not satisfied to act as instructed. Here is what the returning officer says :

Q. Y avait-il de ces électeurs qui se trouvaient dans cette situation particulière à *St. Zotique* ? R. Oui, monsieur.

Q. Pouvez-vous dire qui ils étaient ? R. *Charles Châles, Gabriel Leroux, John Elie*, je crois, et peut-être quelques autres ; je me rappelle que de ces trois-là.

Q. *Isaie* et *Damase Fournier* ? R. Je ne pourrais pas jurer.

Q. Qui a agi comme votre député-officier-rapporteur au poll de *St. Zotique* ? R. *Olivier Damien Prieur.*

Q. Il était nommé par vous, n'est-ce pas ? R. Oui, monsieur, sa commission est du vingt-deux décembre dernier.

Q. Vous reconnaissez ici la commission en vertu de laquelle *Damien Prieur* agissait à ce poll-là ? R. Oui, monsieur.

Q. Cette commission est signée par vous ? R. Oui.

Q. Lui avez-vous donné des instructions requises par la loi ? R. Je lui ai donné des instructions imprimées et des instructions verbales.

Q. Il avait déjà agi comme sous-officier-rapporteur ? R. Deux fois.

Q. A-t-il eu la loi entre ses mains ? R. Oui, monsieur.

Q. Il est revenu vous trouver pendant l'élection, M. Pharand ? R. Il est venu chercher sa boîte le vingt-quatre décembre.

Q. Qui était présent ? R. Monsieur *Juaire.*

Q. C'est ce M. *Juaire* qui a agi comme votre sous-officier-rapporteur à la rivière *Beaudette*, n'est-ce pas ? R. Oui, monsieur.

Q. Voulez-vous dire ce qui s'est passé dans cette circonstance-là, quand il est venu chercher la boîte ? R. Quand il est venu chercher sa boîte, il est arrivé avec son livre ouvert, me disant qu'il avait des objections.

Q. Quel livre ouvert ? R. L'acte de la loi fédérale de mil huit cent soixante-quatorze, me disant qu'il y avait des objections filées contre les voteurs déqualifiés, et qu'il était décidé d'agir en vertu de l'article cinquante-six. Là, je lui ai fait comprendre que ceci ne se rapportait

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que lors du des bulletins du scrutin à la fin de la votation et je lui ai défendu formellement d'employer ce moyen-là, lui disant que les objections qui seraient faites, de les entrer au cahier de votation avec un numéro correspondant à celui de l'objection, et que par ce moyen, on verrait si ces électeurs-là avaient voté ou non, et que ce serait aux tribunaux à décider plus tard sur la légalité de leurs votes.

Q. Lui avez-vous dit qu'il fallait assermenter les voteurs et entrer les objections au cahier de votation? R. Je lui ai dit que le cahier de votation contenait la profession, la résidence, la qualité de propriétaire ou locataire enfin la qualification, et que s'il y avait des objections, d'entrer le mot "objecté" avec le numéro correspondant à celui des objections, et que si on demandait d'assermenter les voteurs, de les assermenter, et que s'ils refusaient de voter ou de jurer, qu'il devait entrer la question et la réponse, et que s'ils voulaient, qu'il devait tout consigner au cahier de votation.

Q. Lui avez-vous dit qu'il ne devait pas assermenter les bulletins de cette nature-là? R. Oui, monsieur.

Q. Le lui avez-vous dit formellement? R. Oui, monsieur.

Q. N'est-il pas vrai M. *Pharand*, que vous avez déclaré, là, que si *Damien Prieur* ne suivait pas vos instructions, que vous ne le nommeriez pas votre député? R. J'ai fait remarquer à M. *Prieur* que s'il ne voulait pas se conformer aux instructions que j'avais reçues, et que s'il ne voulait pas me dire qu'il était réellement convaincu que les instructions que je lui donnais étaient légales, que je prèfererais ne pas lui donner la boîte, ne pas lui donner sa commission, et il est parti en disant qu'il était parfaitement convaincu que j'àvais droit.

Q. Que vous aviez raison? R. Oui, monsieur.

Then we have the obtaining the appointment on the assurance to the returning officer that he was perfectly satisfied that the returning officer was right.

Notwithstanding all of which we find him immediately after, consulting with Mr. *Cornellier*, acting on his advice or instructions, and in direct opposition to and defiance of those of the returning officer, and marking and destroying the ballots, and complaint is made to the returning officer who writes a letter, (though strange to say under the circumstances he was prevented from giving the contents,) which evidently was forbidding his continuing the practice.

Prieur, in his examination, says what the letter contained; viz.:

Elle disait à peu près ceci: qu'il m'avait défendu de marquer les bulletins, de faire ces choses-là, et que si je les faisais, c'était à mes risques et périls, si je les faisais, ou si je l'avais fait.

The deputy returning officer exhibits his partizan character and his complicity with *Cornellier* in this, which I can only designate as a conspiracy to destroy ballots, by showing this letter to the agents of the respondent, but refusing to allow the agent of the opposite candidate to see it. His evidence on this point leaves no doubt in my mind as to the improper motives which prompted him throughout:

Q. A quatre heures et demie vous avez reçu une lettre de l'officier rapporteur, monsieur *Pharand*? R. Oui, monsieur,

Q. L'avez-vous cette lettre-là? R. Je ne l'ai pas sur moi, mais je dois l'avoir chez nous; l'autre jour en regardant des papiers, il me semble l'avoir vue.

Q. Que disait cette lettre? R. Elle disait à peu près ceci: qu'il m'avait défendu de marquer les bulletins, de faire ces choses-là et que, si je les faisais, c'était à mes risques et périls, si je le faisais ou si je l'avais fait.

Q. Qui vous a remis cette lettre? Q. C'est monsieur *Bissonnette*, je crois.

Q. Monsieur *François Bissonnette*? R. Oui.

Q. Le secrétaire d'élection de monsieur *Pharand*, l'officier-rapporteur? R. Je ne le sais pas.

Q. Vous a-t-il dit de mettre cette lettre-là dans les archives de votre bureau de votation? R. Après qu'il m'eut remis la lettre, il est resté dans le poll une escousse, et quand il est parti, il m'a dit de mettre la lettre dans les archives du poll.

Q. Il vous a dit de mettre la lettre dans les archives du poll? R. Oui, monsieur *Bissonnette* m'a dit de la mettre dans les archives, mais la lettre ne le dit pas.

Q. Avez-vous mis la lettre dans les archives du poll? R. Non, parce que je considérais que c'était une lettre privée.

Q. Avez-vous montré cette lettre au représentant de monsieur *Bain*, dans ce poll-là? R. Oui, monsieur, parce qu'il me l'a demandé.

Q Le représentant de monsieur *Bain* vous a demandé la lettre?

R. Il m'a demandé si je voulais lui montrer la lettre et je la lui ai montrée.

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Q. Avez-vous recu la même demande de la part du représentant de M. *deBeaujeu* ? R. Peut-être.....c'est possible.....je crois que oui.

Q. Lui avez-vous montré la lettre? R. Non, je ne la lui ai pas montrée, monsieur *Cornellier* l'avait dans les mains quand il me l'a demandée et il me l'a donnée ensuite.

Q. Vous ne la lui avez pas montrée? R. Non.

Q. Pourquoi n'avez-vous pas communiqué cette lettre-là aux deux représentants des deux candidats? R. Parce que c'était une lettre privée et je suis bien le maître de montrer mes lettres à qui je voudrai.

Q. Vous ne l'avez pas mise dans les archives du poll, parce que vous considériez que c'était une lettre privée? R. Oui.

I cannot conceive that an agent of a candidate, or a deputy returning officer, could act in a more flagrant manner in violation of the law, to defeat the right of voters and prevent a fair and honest election according to law than was done in this case by the respondent's agent and this unworthy deputy returning officer. Here is what another party says :

Q. Monsieur *Parèyre*, avez-vous durant la dornière élection rencontré monsieur *Charles Auguste Cornellier*, écuyer, avocat, quelque part? R. Oui, monsieur, je l'ai rencontré chez *Stanislas Filiatrault*, la veille de la nomination.

Q. Etiez-vous allé spécialement pour le voir? R. J'avais été demandé, c'est-à-dire, monsieur *Filiatrault* avait envoyé son petit garçon pour me chercher disant que M. *Cornellier* désirait me donner des instructions.

Q. A quel titre devait-il vous donner ces instructions? R. Il me donnait ces instructions comme devant être nommé sous-officier-rapporteur.

Q. Aviez-vous raison de vous attendre à être nommé sous-officier-rapporteur. R. Je n'en savais rien, je n'avais pas eu de commission, seulement on m'avait dit que je devais l'être ; mais l'officier-rapporteur ne m'en avait jamais parlé.

Q. Veuillez donc raconter à la cour ce qui s'est passé entre M. *Cornellier* et vous ? R. Je suis arrivé le jour de la nomination, au soir, et M. *Cornellier* m'a dit qu'il désirait me parler. M. *Filiatrault* m'a introduit à M. *Cornellier*. M. *Cornellier* a dit : " Asseyez-vous ; je vous ai fait demander pour vous donner des instructions concernant l'élection ; on m'a dit que vous deviez être nommé officier-rapporteur, et j'ai des instructions à vous donner " : Et M. *Cornellier* a

commencé ses instructions, il a commencé à me dire qu'il y aurait des votes d'objectés, et que ces objections seraient présentées par l'agent de M. *Bain*.

Q. Vous a-t-il mentionné le fait que ces objections devaient être imprimées ou quelque chose? R. Ces objections étaient imprimées dans le temps. Ensuite il m'a dit: "Lors que quel qu'un se présentera pour voter, vous mettrez la première objection qui vous sera présentée, objection No. 1, ainsi de suite pour les autres.

Q. Vous a-t il mentionné quelques noms de personnes, à propos de ces objections dans le temps? R. Il m'a mentionné *Séraphin Deschamps*, père. Il m'a dit: "Si *Seraphim Deschamps*, père, se présentait," et ainsi de suite.

Q. Si je comprends bien votre réponse, M. *Cornellier* vous aurait dit de marquer cela sur le dos des bulletins? R. Sur le dos des bulletins, et ensuite au dépouillement, mettre les bulletins marqués avec les objections, les mettre sous enveloppe; en ayant soin de mettre sous enveloppe les bulletins écartés. Et ensuite j'ai demandé pour quelle raison. "La raison, c'est celle-ci, a-t-il dit, c'est que les bulletins iront devant le juge, et le juge décidera si ces bulletins devront servir à M. *de Beaujeu* ou non," et alors il m'a lu quelque chose; il m'a lu quelque chose comme quoi il avait raison de faire cela.

The conduct of both these parties deserves, in my opinion, the severest condemnation. The agent of the respondent, in the first place, trying privately to induce a person whom he supposed would be appointed deputy returning officer, in case he was so appointed, to violate the law in the interest of the party for whom he was acting; and afterwards privately interfering with a public officer and inducing him to violate the law and his duty under it, and so to act in opposition to what I cannot doubt from his connection in this transaction with the deputy returning officer he must have known, (in fact *Prieur* swears he told him,) were the instructions of his superior, the returning officer; and the deputy returning officer, in holding private conversations behind the back of his superior officer and advising with an agent of one of the candidates, and acting on such advice by marking ballots of voters with a view to their identification, and so to destroy them and

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prevent their being counted in the interest of such candidate, (and this, too, on an unfounded pretence that such voters had been judicially disqualified, when, in fact, there had been no such disqualification,) not only in defiance of the law, but in defiance of the officer appointing him, responsible for the appointment of proper persons under him, and in breach of the instructions of his superior and of his promise and undertaking to that officer, that he would act in conformity with the law and his instructions, and without the giving of which promise it is obvious he would never have been appointed.

I can hardly conceive a more fraudulent device or contrivance in the language of the 95th section of the Dominion Elections Act, "to impede, prevent, or inter-"fere with the free exercise of the franchise of the "voters." This being so, there clearly has been a violation of that section by the terms of which the party guilty of such violation is to be deemed to have committed the offence of undue influence, and which by sec. 98 is declared to be a corrupt practice, and by sec. 101 any corrupt practice committed by a candidate at an election, or by agent, whether with or without the actual knowledge and consent of such candidate, the election of such candidate, if he has been elected, shall be void. I cannot conceive a case which calls more imperatively for the marked condemnation of this court than this, for if tampering with returning officers by candidates or their agents is tolerated, or such combinations and conspiracies to act in direct opposition to the law can be entered into with impunity between candidates or their agents and returning officers, both the letter and spirit of the law is set at nought and an honest, free election becomes an impossibility, if unscrupulous parties choose so to combine, and returning officers can be found to lend themselves to such like

schemes and be permitted in their official capacity to carry them out with impunity.

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STRONG, J.:—

I am likewise of opinion that this election must be set aside, and that upon two distinct grounds: First, on the ground of threats to voters and attempts at intimidation; and, secondly, upon the ground that the arrangement come to between Mr. *Cornellier* and the deputy returning officer to mark the ballots of certain voters, and what was done in pursuance that of arrangement, were acts of improper interference with the exercise of their franchises by those voters within the meaning of sec. 95 of the Dominion Elections Act, 1874.

The original attempt at intimidation was made at a meeting held at *St. Zotique* previous to the election, and is referred to in a passage of the judgment of the learned judge who tried the petition—Mr. Justice *Johnson*—who thus states his conclusion from the evidence:—

If there were any doubt as to the meaning of Mr. *Cornellier's* speech at *St. Zotique* (and making due allowance for party feeling, I really think that the witnesses on both sides agree pretty much as to what was said), there could be none as to what was really meant; for, unless we assume they meant one thing on one day and another on another day, we have in writing in the notice just what was the position taken by the respondent and his agents in this matter; and it is not pretended that the tenor of the speeches was different from that of the notices.

This is a rather more favorable construction than I should have been inclined, had I been dealing with this case in a court of first instance, to have placed on the evidence, but I am willing and, probably, I am bound, according to the principles of dealing with evidence in an appellate court, to accept this finding as conclusive.

In addition to this however it was proved that Mr. *Cornellier* told these electors that if they voted in violation of the law they should be prosecuted.

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Then, assuming that Mr *Cornellier*, in his speech at *St. Zotique*, stated neither more nor less, but just what was contained in the notices subsequently served on the voters in question at the poll, let us see what that statement was in point of fact, and then enquire what we must consider to be its legal effect.

The notice served is as follows :—

Je soussigné, agent dûment autorisé de *James William Bain*, écuyer, l'un des candidats à la présente élection, objecte au vote de *Charles Châles*, fils, de *St. Zotique*, électeur apparaissant à la liste électorale de l'arrondissement No. 8, et qui s'est présenté pour voter sous le numéro huit du cahier de votation du Poll No. 8.

Et pour raisons au soutien de cette objection, je déclare en ma qualité susdite, que je m'objecte à ce que le présent électeur ne donne son vote, attendu que par jugement prononcé le six octobre dernier (1883), à *Coteau Landing*, dans la cause de contestation d'election, dans laquelle *Stanislas Filiatreault*, commerçant du *Coteau Landing*, était pétitionnaire, et *G. R. L. G. H. S.* de *Beaujeu*, était défendeur et inscrite sous le numéro trois des dossiers de la Cour Supérieure siégant sous l'acte des élections fédérales contestées de 1874 et amendments, le dit jugement prononcé par son Honneur le juge *Loranger*—le dit *Charles Châles*, fils, après avis, dûment signifié sur lui et trouvé suffisant par le dit jugement, après contestation, a été trouvé coupable de manœuvres frauduleuses et menées corruptrices au sens du dit acte, et rapportées en conséquence à l'orateur de la Chambre des Communes du *Canada*, et que, partant, il est devenue électeur déqualifié (scheduled briber) au sens de la sec. 104 du dit acte des élections fédérales contestées de 1874 et amendements, et ce pour huit annés à venir à dater du six octobre dernier 1883, et qu'il ne peut voter à la présente élection.

Je requiers également l'assermentation du dit *Charles Châles*, fils et demande que la présente objection soit notée au dos du bulletin qui sera délivré (si aucun ne l'est), en par le sous-officier rapporteur mettant au dos du dit bulletin, s'il en délivre un, le même numéro que celui de l'objection, pour que sa décision puiss être révisée par la cour, au cas de scrutiny.

A. CORNELLIER,

St. Zotique, 27 décembre 1883. Agent autorisé de *J. W. Bain*.

Therefore, adopting the conclusion of the learned judge, that the statement of Mr. *Cornellier* at the *St. Zotique* meeting was the equivalent of what was contained in

these notices subsequently served, we must take it to be proved that Mr. *Cornellier* then publicly stated to and of those electors whose names were mentioned in the report made to the Speaker by Mr. Justice *Loranger*, who tried a former controverted election for the county, that they had been found guilty of corrupt practices under sec. 104 of the Dominion Elections Act of 1874. That section is as follows :—

> Any person, other than a candidate, found guilty of any corrupt practice, in which, after notice of the charge, he has had an opportunity of being heard, shall, during the eight years next after the time at which he is so found guilty, be incapable of being elected to and of sitting in the House of Commons, and of voting at any election of a member of the House of Commons, or of holding any office in the nomination of the Governor General of Canada.

Then it is the law that any voter who, having been legally disqualified by the judge trying an election petition, afterwards, in contravention of such sentence of disqualification, votes at a subsequent election, is in addition to a liability to an indictment at common law, subject to such penalties as might be imposed by an election judge pursuant to the provisions of sec 117 of the Dominion Elections Act of 1874.

So that it is proved by the clearest evidence, and according to the finding of the judge, that Mr. *Cornellier*, in his speech at *St. Zotique*, openly and publicly declared to the voters named in Mr. Judge *Loranger's* report that they were disqualified from voting, and that if they voted they would be liable to such penalties and punishments as might be imposed by law, which, he further declared, should be enforced by all processes of law which could be taken advantage of against them for those purposes. The assertion of disqualification and threat of punishment in the case of voting thus made, I hold to have been, under the real facts of the case, a practising of intimidation upon the voters named, with a view to induce them to

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refrain from voting, under the express words of the 95th sec. of the Dominion Elections Act, 1874. It matters not that this attempted intimidation did not succeed, but that all these voters afterwards, and after being advised by others, had the courage, in the face of the intimidation which had been practised and the threats which had been made, to present themselves at the poll and insist upon their votes being received. Nothing is better established in point of law than the proposition that the threat, if made by an agent of the candidate, though unsuccessful in deterring the voter, is sufficient to avoid the election. In the *Northallerton* case (1) Mr. Justice *Willes* says:

> A mere attempt on the part of an agent to intimidate a voter, though it was unsuccessful, would avoid an election.

Then, when the voters came to the poll there was a repetition of the attempt at intimidation which had been practised at the *St. Zotique* meeting, in a more formal and deliberate way, by serving upon the deputy returning officer, openly and in the presence of the voters, the notice already referred to, calling upon the officer to reject the votes because the voters had been found guilty of corrupt practices and fraudulent devices by the judge who had tried the former petition. Now, it is no answer as a justification of these charges of intimidation to say that the statement of Mr. *Cornellier* at the meeting, and the assertion to the same effect in the notice, that these persons had been found guilty, as alleged, is literally true, and, that Mr. Justice *Loranger* had, as the fact was, stated in his report to the Speaker, that they were guilty of corrupt practices. The charge advanced by Mr. *Cornellier* was, that they had been found guilty of corrupt practices in such a way as to disqualify them from voting, and to make them liable to punishment and penalties if they

(1) 1 O.M. & H. 173.

did vote. The report to the Speaker does not establish anything of the kind. In order to disqualify an elector and make him liable to penalties if he should vote after disqualification, it is made by the 104th section, which I have already stated, an indispensable condition that "after notice of the charge he shall have had an opportunity of being heard." Now, in the present case, it is manifest that this most just, fair and reasonable provision of the law had not been observed. It is true that the electors in question had been served with a notice to appear before Mr. Justice *Loranger*, and to show cause why they should not be reported as guilty, and that they attempted to set aside this notice, but they never were confronted with the witnesses whose testimony was relied on to prove them guilty, and they never had an opportunity of making their defence, for they never had an opportunity of cross-examining the witnesses against them, which, as will be universally acknowledged, is the most valuable incident of the right of defence which an accused person possesses. The witnesses relied on to prove corrupt practices against these persons may, it is true, have been cross-examined in the principal trial on the main issue—the validity of the election ; but it was one thing to cross-examine them on behalf and in the interest of the respondent to the petition, and another and a totally different thing to cross-examine them on behalf of these electors accused of corrupt practices. It is beyond all question that no opportunity was ever afforded for a cross examination of this latter kind, and in the absence of it, it is impossible to say that these persons were ever heard in their defence, or afforded an opportunity of being so heard, sufficient to bring them within the provision of the 104th section. They were, therefore, never legally disqualified, and had an unimpeachable right to vote.

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I am not prepared to say that Mr. *Cornellier* did not believe the law was as he stated it to be, or that he knew that the facts did not warrant his statement of the law. So far from imputing to Mr. *Cornellier* that he knowingly and wilfully misstated either facts or law, I now repeat what I said at the argument, that I believe he acted in perfect good faith, and considered himself justified in making the assertions he did to these persons. But what I hold is, that an agent of a candidate, whether advocate or layman, who undertakes to tell an elector he has no right to exercise his franchise, and will be subject to punishment or penalties if he does so, or who makes representations and assertions to an elector respecting his right to vote calculated to intimidate him and to induce him to refrain from voting, does so at his peril; and that it is incumbent on an agent so acting to be sure that his facts are correct and his law is sound, for in the event of his being in error in either respect his candidate must suffer the consequences. In the present case the right of these electors to vote was impugned on grounds which, on investigation, turn out to be without foundation in point of law and also in point of fact, and consequently the statement that they would be liable to prosecution, and would be prosecuted, if they exercised their franchises, must be regarded as the fulmination of an illegal threat, constituting a practising of intimidation within the meaning of the 95th section, which, by the same section, amounts to undue influence, and, being practised by an admitted agent, must make the election void.

I also agree with the Chief Justice that the election must be set aside upon the distinct ground mentioned by him, and for reasons in the main identical with those which his lordship has stated.

The returning officer only appointed Mr. *Prieur* to be

a deputy returning officer after taking proper and prudent precautions to assure himself that Mr. *Prieur*, though an open partizan of the respondent's, would act properly at the election. In the interview which the returning officer had with Mr. *Prieur*, preceding the appointment of the latter, reference was made to these voters mentioned in the report of the judge at the previous trial, and the returning officer exacted from Mr. *Prieur* a promise that he would not put any marks on the ballots, or do anything in any way to interfere with the votes of these men. Mr. *Prieur* accepted the office on that promise and understanding, and otherwise it would not have been conferred upon him. Then what does Mr. *Prieur* do? If nothin further had taken place than his reception of the notices when they were handed to him at the poll, his conduct would have been unobjectionable. Even if he had marked the ballots, there being no preconcerted arrangement that he should do so, his so marking them might, perhaps, have indulgently been attributed to ignorance or to misconception of the somewhat complicated law which regulates elections. But we are precluded by the evidence from making these suppositions, for it is proved beyond doubt or question that in face of the caution he had received from the returning officer, and the promise he gave to act upon it, Mr. *Prieur* had, before the polling, a private interview and conference with Mr. *Cornellier*, the agent of the respondent, in which, notwithstanding his promise to his superior officer who had appointed him, not to mark the ballots, he agreed and conspired with Mr. *Cornellier* to do so. This conduct of the deputy returning officers, pursued in privity with the agent of the respondent, and induced by the irregular and clandestine solicitation of that agent, constitutes a ground for setting aside this election, distinct altogether from

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that of intimidation and threatening, before disposed of, as being "a fraudulent device or contrivance impeding, "preventing, or otherwise interfering with, the exer- "cise of the franchise" of the voters in question within the meaning of the provision of sec. 95, expressed in the words just quoted. In my opinion, a stronger exemplification of the evil which sec. 95 was intended to prevent than that of an agent of a candidate agreeing and conspiring with a returning officer to put a mark on the ballot of a particular voter, by which that ballot might be afterwards identified, could not be suggested. My conclusion therefore is, that on both the grounds indicated the appeal must be allowed, and with costs.

FOURNIER, J.:—

I am also of opinion that the election should be set aside for the two reasons given by the learned Chief Justice, for the intimidation which is proved, and also for a fraudulent contrivance to interfere with the freedom of the election.

TASCHEREAU, J.:

At an election held for this county in 1882, to fill the vacancy caused by the death of the previous member, two candidates, *deBeaujeu* and *Bain* the present respondent, had contested the seat. The result was a majority of three for *deBeaujeu*. This election, however, was subsequently voided for corrupt practices by *de Beaujeu's* agents. A writ was then issued for a new election, which took place on December 27th, 1883, between the same candidates, *Bain* and *de Beaujeu*. *Bain*, the respondent, having been returned by a majority of three, the appellant contested his election by a petition in the usual form, without claiming the seat for *deBeaujeu*. After a long trial, the presiding judge

dismissed the petition, and maintained the election. The petitioner now appeals to this court from the said judgment, limiting his appeal to certain cases only.

Particular No. 96 is one of these cases. It is in the following terms. [The learned judge read the charge] (1).

It appears, by the evidence on this charge, that shortly before polling day, Mr. *Cornellier*, who is admitted to have been the respondent's conducting agent, had a document printed in the following form:

I, the undersigned, duly authorized agent of *James William Bain*, Esq., one of the candidates at the present election, object to the vote of of elector appearing on the electoral list of district No. and who has come to vote under No. of the voters' list of the electoral district No. and for reasons in support of this objection, I declare, in my above quality, that I object to the present elector giving his vote, because, by judgment pronounced at *Coteau Landing* on the 6th October last, in the contested election case in which *Stanislas Filiatrault*, merchant, of *Coteau Landing* was petitioner, and *G. R. L. G. H. S. de Beaujeu* was defendant, and inscribed under No. 3 of the records of the Superior Court sitting under the federal contested Elections Act of 1874 and Acts amending the same, said judgment pronounced by his honor justice *Loranger*, the said after notice duly served upon him and found sufficient by the said judgment after issue joined was found guilty of corrupt practices according to said act, and reported in consequence to the Speaker of the House of Commons of *Canada*, and consequently he has become a disqualified elector (scheduled briber) in the sense of the said federal contested Elections Act of 1874 and amendments, and for eight years, from the 6th October last, that he cannot vote at the present election. I demand also the administering of the oath to the said elector, and also that the present objection should be endorsed on the ballot, which will be given (if any should be given) by the deputy returning officer placing on the back of the ballot (should he deliver one to said voter) a number corresponding to that of the objection, in order that the court may be enabled to revise his decision on a scrutiny.

It must be remarked here that this document contains a false statement, and that it was not true that

(1) *Ubi supra.*

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the electors, against whom it was prepared, had been disqualified or deprived of their franchise.

This document was made known throughout the county, and a copy of it left by *Cornellier* with each of the respondent's agents at the different polls. Those of the electors of *St. Zotique*, mentioned in the charge, who have been examined, had all heard of it, or been told that they had no right to vote, and their ballots would be marked, as demanded by *Cornellier*.

Before the nomination, *Cornellier* sent for a man named *Prieur*, who, it was supposed, would be the deputy returning officer at the *Coteau Landing* poll. *Prieur's* evidence as to what then passed between him and *Cornellier*, is as follows:

Q. Veuillez donc raconter à la cour ce qui s'est passé entre M. *Cornellier* et vous? R. Je suis arrivé le jour de la nomination, au soir, et M. *Cornellier* m'a dit qu'il désirait me parler. M. *Filiatrault* m'a introduit à M. *Cornellier*. M. *Cornellier* a dit: "Asseyez-vous; je vous ai fait demander pour vous donner des instructions concernant l'élection; on m'a dit que vous deviez être nommé officier-rapporteur, et j'ai des instructions à vous donner": Et M. *Cornellier* a commencé ses instructions, il a commencé à me dire qu'il y aurait des votes d'objectés, et que ces objections seraient présentées par l'agent de M. *Bain*.

Q. Vous a-t-il mentionné le fait que ces objections devaient être imprimées ou quelque chose? R. Ces objections étaient imprimées dans le temps. Ensuite il m'a dit: "Lorsque quelqu'un se présentera pour voter, vous mettrez la première objection qui vous sera présentée, objection No. 1, ainsi de suite pour les autres."

Q. Vous a-t-il mentionné quelques noms de personnes, à propos de ces objections dans le temps? R. Il m'a mentionné *Séraphim Deschamps*, père. Il m'a dit: "Si *Séraphim Deschamps*, père, se présentait," et ainsi de suite.

Q. Si je comprends bien votre réponse, M. *Cornellier* vous aurait dit de marquer cela sur le dos des bulletins? R. Sur le dos des bulletins, et ensuite au dépouillement, mettre les bulletins marqués avec les objections, les mettre sous enveloppe; en ayant soin de mettre sous enveloppe les bulletins écartés. Et ensuite j'ai demandé pour quelle raison. "La raison, c'est celle-ci, a t-il dit, c'est que les bulletins iront devant le juge, et le juge décidera si ces bulletins

devront servir à M. *deBeaujeu* ou non," et alors il m'a lu quelque chose ; il m'a lu quelque chose comme quoi il avait raison de faire cela.

Q. Après que M. *Cornellier* vous eut donné ces instructions, avez-vous, vous-même, regardé l'Acte Electoral, pour voir si les instructions étaient correctes ? R. Je l'ai regardé.

Q. Vous saviez que M. *Cornellier* était avocat ? Q. Je le savais.

Q. Et avez-vous réellement cru que M. *Cornellier* vous donnait des instructions véritables et légales dans le temps ? R. Je n'avais pas de doute que M. *Cornellier* me donnait des instructions véritables.

Q. Est-ce que le numéro que vous deviez mettre sur le bulletin devait correspondre avec quelque autre numéro ? R. Devait correspondre avec l'objection.

Q. De sorte que, suivant vous, vous pouviez parfaitement identifier celui qui votait ? R. Parfaitement.

And this evidence is uncontradicted. Can one imagine conduct more reprehensible than this of a member of the bar, the respondent's chief election agent, so approaching a man whom he expects to be a deputy returning officer, in order to give him his instructions as to this officer's duties, and to tell him how he will have to perform his functions.

However, as to this *Coteau Landing* No. 1 poll, *Cornellier's* gratuitous instructions to *Prieur* were of no effect, as another man Mr. *Gladu* one who knew his duty, was appointed deputy returning officer.

In the *St. Zotique* poll, however, *Cornellier* was more successful. Here, *Damien Prieur*, an active partizan of the respondent, was named deputy returning officer. The returning officer, a man of integrity and against whose conduct nothing can be said, had made it a condition of this nomination that he, *Prieur*, would not mark any of the ballots as *Cornellier* desired them to be marked, telling him that such marking would be contrary to law. It was only on the promise by *Prieur* to follow those instructions of the returning officer, that he was appointed deputy returning officer. On the very morning of the polling day, however, he promised

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Cornellier that, as he, *Cornellier*, insisted that the ballots of those who were disqualified could be legally marked, he *Prieur* would mark them. And he did mark them. He did not hesitate to ignore the instructions of his superior officer, and the promise he had made to get his appointment in order to put himself into the hands of the respondent's agent and obey his desires and dictations. His oath of office had evidently not deprived the respondent of a partizan.

What actually took place at the poll is as follows:—*Prieur*, before delivering ballots, to any of the objected voters marked on the back of the ballot the words, "objected to by objection No. " placing upon the ballot a number which corresponded with the number of the objection. In this way, the eight ballots of the above named voters were marked with identifying numbers, and *Prieur* says he put them in his pocket.

This was done in spite of a written protest from the opposing candidate's agents.

Hearing of this proceeding, the returning officer, in the afternoon, wrote a letter to *Prieur*, severely reprimanding him and telling him he would have to answer for his conduct.

On receipt of this letter, which was coupled with an order by the election clerk, who delivered it, to place it of record among the documents of the poll, *Prieur* handed it to Mr. *Cornellier*, who perused it; the other representative asked permission to see it, but this *Prieur* refused, and put the letter in his pocket where it remained.

After the close of the poll *Prieur* getting nervous, probably, and afraid of the consequences of his illegal acts, took out the eight objections produced before him and endorsed them "objection dismissed." He then counted as good the marked ballots which he

had in his pocket and put them in this box. Mr. *Champagne* says they all identified the votes.

"*Put the ballots in his pocket.*" That is what this deputy returning officer has to confess he did under the guidance of the respondent's conducting agent. And this in face of an enactment in which no one has ever dreamt of an ambiguity, that the deputy returning officer "shall then immediately, and in the presence of the elector, place the ballot paper in the ballot box" (1).

As to the marking of these ballots, I need not say anything to prove its utter illegality. It had to be admitted before the court by the respondent's counsel.

Now, it seems to me, that it can hardly be possible to bring clearer evidence of fraudulent contrivances to prevent voters from exercising their franchise. That this agent's object was to prevent these voters from voting at all, if possible, is made abundantly clear by a number of witnesses examined in the case, who all testify that he did not cease repeating publicly and privately during the election the false statement that these men had no right to vote; that if they voted, legal measures would be taken against them; and that if they came to the polls, their votes would be objected to, and if received at all by the deputy returning officer, would be distinctly marked so as to be identified. These witnesses, however, on this only proved what the printed notice says in unequivocal terms.

This marking of the ballots at the instigation of the principal agent of the respondents, taken in connection with the notice issued by the said agent with the intention to prevent these voters from voting at all, or, if voting, from voting as their fellow citizens did, under the protection of secrecy guaranteed to them by the Ballot Act, was a fraudulent device or contrivance

(1) 41 Vic., ch. 6, s. 45.

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to impede, prevent and interfere with the free exercise of the franchise of these voters, and a corrupt practice under section 95 of the Act. Whether or not this contrivance was successful, is immaterial.

A mere attempt on the part of an agent to intimidate a voter, even though it were unsuccessful, would avoid an election (1).

If there was a fraudulent device of any sort to prevent a voter voting a certain way, even though unsuccessful, it would amount to a fraudulent device to interfere with the free exercise of the franchise (2).

And whether these acts of the respondent's agent affected the result of the election or not, is also immaterial. A single act of corrupt practice by an agent avoids the election.

The contention that this election-agent acted in good faith and under the impression that these voters had really no right to vote, that he could legally ask from the deputy-returning officer the marking of their ballots, and the putting of these ballots in the deputy returning officer's pockets, and that consequently his acts should not avoid the election, cannot be admitted. When any one accepts for a candidate the responsibility of the complete organization and carrying out of an election, as this agent did in this county, he must be presumed to undertake that, as far as he himself and all those over whom he has any control are concerned, everything shall be conducted according to law. He undertakes to perform the duties, and all the duties, of an election agent, according to law, and he cannot later on be excused for any infraction of these duties, by saying that he ignored them; he is estopped from doing so. If he did ignore them, it is culpable negligence in him, of which he cannot take advantage; and to him with more force

(1) Per Willes, J., *North Allerton* case, 1 O'M. & H. 173.

(2) Per Blackburn, J., in the *Gloucester* case, cited in *Leigh* v. *Le Marchant*, P. 124, (2nd ed.) See also the *Devon* case, 3 O'M. & H. 122.

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than to any one else in that election applies the maxim, *ignorantia juris non excusat.* (1). The election laws might as well be repealed, if such a defence could prevail.

I am of opinion the appeal should be allowed with costs, and this election avoided with costs of the petition and trial thereof in the election court against the respondent.

Had this charge of fraudulent contrivance under sec. 95 not been established, the election would still have had to be set aside on the charge of intimidation, as shown by Mr. Justice *Strong's* judgment, in which I entirely concur.

Appeal allowed with costs.

Solicitors for appellant: *Monk & Ryan.*

Solicitors for respondent: *Ouimet, Cornellier & Lajoie.*

THE TRUST AND LOAN COMPANY OF CANADA..... } APPELLANTS;

AND

MILLER LAWRASON, *et al.*, EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE WILSON DARNLEY..... } RESPONDENTS.

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*Dec. 7, 8.
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*May. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Rev. Stats. Ont., ch. 104—Wrongful Distress for Mortgage money—Attornment clause.

A mortgage made in pursuance of the Act respecting Short Forms of Mortgages, R. S. O., ch. 104, in addition to all the clauses mentioned in the statute, contained the following provision and variation: "And the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the company, subject to the said proviso." Among the statutory clauses in the mortgage were those

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

(1) *Young* v. *Smith*. 4 Can. S. C. R. 494.

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providing that the mortgagees on default of payment for two months, might on one month's notice, enter on and lease or sell the lands; that they might distrain for arrears of interest, and that until default of payment, the mortgagors should have quiet possession.

Held, per *Strong*, *Fournier* and *Henry*, JJ., (affirming the judgment of the Court of Appeal for *Ontario*,)—That upon the proper construction of the deed there was no reservation of rent entitling the mortgagees to claim a landlord's right, as against an execution creditor, of a year's arrears of interest on their mortgage before removal of goods on mortgaged premises by the sheriff.

Sir *W. J. Ritchie*, C. J., and *Taschereau* and *Gwynne*, JJ., *contra*.

The Court being equally divided the appeal was dismissed without costs.

APPEAL from the Court of Appeal for *Ontario* (1).

The following special case without pleadings was submitted by consent of the parties:

"This is an interpleader issue directed by two several orders bearing dates respectively on the 22nd day of January, A.D. 1880, and the 18th day of February, A.D. 1880, and made by *Robert G. Dalton*, Esq., clerk of the Crown and Pleas, Queen's Bench, for the purpose of determining the right of the plaintiffs as against the defendants to the sum of $1,596.79 which has been paid into court in the cause of *Lawrason* v. *Christie*, and by the consent of the parties and by the order of the said *Robert G. Dutton*, bearing date on the 11th day of May, A.D. 1880, the following case has been stated for the opinion of the court.

"1. Under and by virtue of an indenture of mortgage, bearing date the 23rd day of March, A.D. 1877, and made between The Hon *David Christie* of the first part, the plaintiffs of the second part, and *Margaret R. Christie*, wife of the said Hon. *David Christie*, for the purpose of barring her dower only, of the third part, of which mortgage a true copy is hereto annexed, the plaintiffs became and have ever since the date of the

(1) 6 Ont. App. R. 286.

said mortgage remained, mortgagees of the lands and premises in said mortgage described, for securing payment to them of the moneys which the said mortgage purports to secure at the times, and in the manner in the said mortgage provided for payment and the said mortgage was not executed by the said mortgagees.

"2. The said The Hon. *David Christie* remained in actual possession of the said lands under and pursuant to the provisions of the said mortgage from the date thereof until after the directing of the interpleader issue herein.

"3. Under and by virtue of a writ of *fieri facias* against, goods tested the 7th day of February, A.D. 1879, and issued out of the Court of Queen's Bench for *Ontario*, directed to the sheriff of the county of *Brant* for the having of execution of a judgment of that court recovered by the defendant *Miller Lawrason* in an action at his suit against the said The Hon. *David Christie*, and under another writ of *fieri facias* against goods, tested the 18th day of February, A.D 1879, and issued out of the county court of the county of *Brant*, directed to the said sheriff for the having of execution of a judgment of that court recovered by the defendants, *William Burrill*, *John Heaton* and *Henry Wilson Darnley* as executors of the last will and testament of *George Wilson Darnley*, deceased, in an action at their suit against the said The Hon. *David Christie*, and under two other several writs of *fieri facias* against goods tested respectively on the 18th day of February, A.D. 1879, and the 24th day of April, A.D. 1879, and issued each out of the county court of the county of *Brant*, and directed to the said sheriff for the having of execution of two several judgments of that court recovered by the defendant *Cockshutt* in two several actions at his suit against the said The Hon. *David Christie*, the said sheriff did in the month of December, A.D. 1879, seize and

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take in execution all the goods and chattels of the said The Hon. *David Christie*, then lying and being upon the said lands, and he has since under and by virtue of the said writs sold and removed the said goods and chattels from the said lands.

"4. The plaintiffs, before the date either of such sale or of such removal, but some days subsequently to such seizure as aforesaid, and while the sheriff was in possession under such seizure, gave notice to the said sheriff that they claimed to be landlords of the said lands, and that the said the Hon. *David Christie* was their tenant, and that there was then due to them from and payable by the said the Hon *David Christie* for rent of the said lands for several years preceding the date of the giving of the said notice, a sum greatly exceeding $2,720, and that they required the said sheriff, before removing any of the said goods and chattels, to pay to them the sum of $2,720, as and for one year's rent of the said lands for the year next preceding the giving of the said notice.

"5. The said sheriff, after the giving of the said notice, applied to this court for relief under the Interpleader Act, when an order was made by the said *Robert G. Dalton*, bearing date 22nd day of January, A. D. 1880, and ordering the said sheriff to pay into court in the said cause of *Lawrason* v. *Christie*, and out of the proceeds of the sale of the said goods and chattels, a sufficient sum to cover the amount of the said execution of the defendant *Lawrason*, together with interest and costs up to the time of such payment, and the taxed costs of the application for the said order, to abide the result of an issue between the plaintiffs and the defendant *Lawrason*, and that he should pay over to the plaintiffs the balance of the proceeds of the sale of the said goods after deducting thereout his own fees, poundages and incidental expenses, together with the moneys so directed to be paid into court as aforesaid; provided that such

balance should in all not exceed the said sum of $2,720.

"6. Afterwards, upon the application of the defendants *Cockshutt, Burrill, Heaton* and *Darnley*, an order was made by the said *Robert G. Dalton*, bearing date the 18th day of February, A. D. 1880, whereby it was ordered that the lastly mentioned order be amended, and that the sheriff should pay into court a further sum sufficient to cover the amount of the said several executions of the defendants *Cockshutt, Burrill, Heaton* and *Darnley*, together with interest thereon and costs up to the time of such payment, and that the said defendants should be added as parties defendants to said issue.

"7. The said sheriff has, in pursuance of the said orders, paid into court as thereby directed the sum of $1,596.79, and has paid to the plaintiffs the sum of $1,180.91, besides which sum the plaintiffs have not since the making of the said mortgage been paid anything on account of the moneys thereby secured, either for principal or interest, or by way of rent. The question for the opinion of the court is, whether the plaintiffs by virtue of the said mortgage or anything therein contained and of the facts hereinbefore set forth, are entitled as against the defendants to any portion of the money so paid into court as aforesaid in the cause of *Lawrason* v. *Christie.*

"If the court shall be of opinion in the affirmative, their judgment shall be entered up for the plaintiffs for the amount of the said money so paid into court as aforesaid, together with the interest which shall then have accumulated thereon, and their costs of the said interpleader proceedings and of and incidental to their issue, to be paid by the defendants. If the court shall be of opinion in the negative, then judgment for the said moneys and accumulated interest, together with costs of defence to be paid by the plaintiffs, shall be entered up for the defendants."

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The Court of Queen's Bench held that a tenancy at will was created by the mortgage at a fixed rent, equivalent to interest, for which the mortgagees had all the remedies of a landlord. The Court of Appeal reversed the judgment of Queen's Bench and held there was no rent fixed for which there was power to distrain.

Mr. *Marsh* for appellant:

The main question that arises in the present case is one of construction of the mortgage. Is there a tenancy at a fixed rent? The statutory distress clause contained in the mortgage in question, coupled with the possession had by the mortgagees pursuant to the provisions of the mortgage, created the relationship of landlord and tenant between the mortgagor and the respondents: *Royal Canadian Bank* v. *Kelly* (1).

By the wording of the distress clause in question, rent and interest are equivalent and interchangeable terms. The effect of this is to reduce the arrears of interest to the extent of whatever amount of interest may be collected by way of rent. This avoids the difficulty raised in some of the cases decided under other distress clauses, where it was objected that there was no provision for the application of the rent in payment of the interest. This equivalence of the rent to the interest also establishes the fact that the rent is fixed and certain, for there is no question but that the interest reserved by the mortgage is fixed and certain, and so must that be which is its equivalent. The distress clause provides that as soon as the interest falls into arrear it may be recovered "by way of rent reserved." Upon reference to *Webster's* Dictionary, under the word "way," it will be found that the phrase "by way of" is equal to the phrases "as being," 'in the character of," which latter is the meaning given to it by Mr. Justice *Gwynne* in *Royal*

(1) 19 U. C. C. P. 196 and 430, as explained in 14 C. L. J. 8.

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Canadian Bank v. *Kelly* (1), where he considers that the rent is fixed by the use of this phrase. Upon substituting either of these two phrases, "as being," "in the character of," for its equivalent as used in the statutory distress clause, it will appear that the distress clause indicates not only the mode in which the overdue interest may be recovered ; but also, the character in which it is to be recovered, viz., as a rent (2).

That part of the clause which provides that the time for payment of the principal money may be extended upon payment of arrears at any time before judgment shows that the clause in question was intended merely as a license to the mortgagees to commence action upon default, but that the mortgagees' right to treat the mortgagor as a trespasser is not complete until judgment is obtained, and in this case no action or suit was commenced after default and before the directing of the interpleader issue herein,

Clause 2 of the special case states that the mortgagor "remained in actual possession of the said lands under and pursuant to the provisions of the said mortgage from the date thereof until after the directing of the interpleader issue herein," *i. e.*, as tenant at will.

A tenancy at will at a fixed rent having been created upon the execution of the mortgage, and the will never having been determined as is shown by clause 2 of the special case the same tenancy at the same rental still subsisted after the default (3).

The attornment clause in the mortgage expressly creates a tenancy at will, subject to the proviso for payment of interest, and the statutory distress clause provides that the mortgagees may distrain for interest "by

(1) 19 U. C. C. P. 211.

(2) See Osler, J., 6 Ont. App. Rep. 304, and Gwynne, J., in *Royal Canadian Bank* v. *Kelly*, 19 U. C. C. P. 211.

(3) See 1st point of argument mentioned by Mr. Leith, 14 C. L. J. N. S. 11.

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way of rent reserved," which should be constructed as and for rent reserved These three clauses, when read together, create a tenancy at will at a fixed rent.

An attornment clause in a mortgage creates the relation of landlord and tenant, with all its incident remedies

Jolly v. *Arbuthnot* (1); *Morton* v. *Woods* (2); *Re Stockton Iron Works Furnace Co.* (3); *Exparte Bank of Whitehaven. Re Bowes* (4); see note to *Keech* v. *Hall* (5).

Another point taken is that we do not come within the provisions of 8 *Anne*, ch. 14, sec. 1, and as we claim under that statute we must show that we come within the meaning of that statute. There is an express case which proves conclusively that the statute of *Anne* extends to the case of a tenancy under an attornment clause in a mortgage. *Yates* v. *Ratledge* (6). The same principle was acted in the case of *Monroe* v. *Build* (7).

Another objection taken was that appellants claim was prejudiced by the Chattel Mortgage Act. In order that an instrument may be avoided by the Chattel Mortgage Act, it must be strictly within the terms of that act. The instrument in question here is not a "mortgage or conveyance intended to operate as a mortgage of goods and chattels." In *England* it has been held that such an attornment does not infringe upon the Bill of Sales Act. See *re Stockton Iron Works Furance Co.*(8); *re Bowes* (9); see also *Patterson* v. *Kingsley* (10); and *McMaster* v. *Garland* (11). The proper construction of this instrument may be best arrived at by applying the ordinary rules which judges have framed for the interpretation of written contracts. See *Morton* v. *Woods* (12).

(1) 4 DeG. & J. 224.
(2) L. R. 3 Q. B. 658; affirmed on appeal L. R. 4 Q. B. 293.
(3) 10 Chy. D. 335.
(4) 42 L. T. N.S. 409.
(5) Smith's L. C. (8th ed.) 583.
(6) 5 H. & N. 249.
(7) 36 U. C. Q. B. 469.
(8) 10 Ch. D. 335.
(9) 25 Grant 425.
(10) 14 Ch. D. 725.
(11) 31 U. C. C. P. 320.
(12) L. R. 4 Q. B. 305.

The attornment clause here, if not construed together with the distress clause, so as to create a tenancy at a rent certain, will either be of no effect or will be a *clausula damnosa* so far as the mortgagees are concerned, rendering them liable, in the character of mortgagees in possession, to account to subsequent incumbrancers for rents and profits which by the terms of the contract they have debarred both themselves and the subsequent incumbrancers from collecting. The instrument being intended solely as a security for money, it could never have been intended by the parties to it, that it should have any such prejudicial effect upon the mortgagees, and the above authorities show that it should not be treated as inoperative. It would therefore appear that the attornment clause and the distress clause must be so read and construed together as to create a tenancy at a fixed rent.

Phillips on Insurance (1); See *Am. Express Co.* v. *Pinckney* (2); *Harper* v. *Albany Mutual, &c., Co.* (3); *Gumm* v. *Tyrie* (4).

The mortgage in the present case conforms to the Statutory Short Form of Mortgages throughout, with the addition, however, of some further clauses, one of which is the attornment clause. If this latter clause should be thought to conflict with any of the clauses contained in the statutory short form, then upon the authority of the above citations, it should be treated as the governing clause. Moreover, it is stated in the special case, that the mortgagor "remained in actual possession of the said lands and premises under and pursuant to the provisions of the said mortgage from the date thereof until after the directing of the Interpleader issue herein," and it also appears therefrom

(1) Sec. 125.
(2) 29 Ill. 392.
(3) 17 N. Y. 198.
(4) 33 L. J. N. S. Q. B. 111.; per Blackburn, J.

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that default was made in payment of the mortgage moneys within a few months after the date of the mortgage, while an examination of the mortgage itself will show that the attornment clause contains the only provision under and pursuant to which the mortgagee could remain in possession after default.

A point is made in the judgment of *Patterson*, J., also in the judgment of *Burton*, J., of the fact that in the long form of the statutory distress clause, from which the lastly quoted words are taken, the said words are followed by the clause "as in the case of a demise," and it is argued from this that it is indicated by the lastly mentioned clause that the statutory short form of mortgage does not create the relationship of landlord and tenant between the mortgagor and mortgagee. Whether this be a proper deduction or not it has no bearing on the present case, for here there is a demise, or what is equivalent to it, an attornment by the tenant. All that is here required is to show that there is a fixed rent.

It was also objected in the court below that the various statutory clauses relating to possession contained in the mortgage in question are inconsistent one with another, and inconsistent with the attornment clause. I submit, in case of any such inconsistency, the attornment clause should prevail. It is not necessary for the appellants to show the the exact nature of the tenancy under which the mortgagor held; it is sufficient if they show that there was a tenancy of any kind and that it was at a fixed rent. That there was a tenancy of some kind is sufficiently shown by the special case when it is admitted that the mortgagor "remained in actual possession of the said lands under and pursuant to the provisions of the said mortgage from the date thereof until after the directing of the interpleader issue herein."

Mr. *Kerr*, Q.C., and Mr. *Wilkes* for respondents:

The appellants in the case make their claim under the provisions of the statute of 8 *Anne*, ch. 14, sec. 1, and in order to succeed they must show: 1st. That the relation of landlord and tenant was created; 2nd. That there was a fixed rent; and 3rd, that the rent was fair and reasonable.

The mortgage is made in pursuance of the Act respecting short forms of mortgages (1), and the clause upon which appellants rely is what they allege to be the attornment clause. That clause does not refer to any rent, and if the intention of the parties had been that the interest should be the rent, it would be likely that the words "at the rent fixed by this provision" would have been added. That clause gives only the right to take possession of the land, and the distress clause in the mortgage in question is a mere license to the mortgagees to distrain the goods of the mortgagor for arrears of interest. The ground which the Court of Appeal took was, that if effect was given to this clause as creating the relation of landlord and tenant at a fixed rent, then it would be holding that the intention of the parties was to confer and secure a remedy against the goods of a stranger that might happen to be on the premises. If such had been the intention of the parties, would the mortgagees have allowed three years of interest to accrue; for the mortgage was given in 1877, and it was not until after the seizure by a judgment creditor, that the present appellants moved in the matter.

The mortgage in this case was given and accepted as a security for moneys lent on the security of the lands mortgaged, and the courts have always required any extraordinary right that may be reserved to the mort-

(1) R. S. O. ch. 104.

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gagee to be such as is a fair and reasonable one, having regard to the nature of the security.

It has been considered right that a mortgagee should have the same security for his debt when the mortgagor is in possession as he would have if the mortgagor's tenant or a stranger was in possession, the mortgagee being entitled, on default of payment of interest, to demand and recover from the tenant or stranger the rent which would otherwise be paid to the mortgagor, who was entitled to the possession of the premises until default should be made in payment of the mortgage. The clause of attornment of the mortgagor to the mortgagees was then devised, and has been very extensively used, and this was done because it was conceded that the proviso allowing the mortgagees to distrain for arrears of interest amounted to nothing more than a license to seize, and it has been well decided, it is submitted, that the term in the intended form of the covenant that the mortgagees may distrain, and by distress warrant recover, by way of rent reserved, as in case of a demise of lands, the interest due, together with the costs attending such distress as in like case of distress for rent, means no more than that the like proceedings may be taken to recover the interest as may be taken when a distress is made for rent. This proviso, as appears from the language used in the short form, is only intended to give the right to distrain for arrears of interest and not rent; and it is submitted that if any other construction is put upon this proviso, it will become repugnant to the other terms of the ordinary mortgage (apart from the attornment clause), all of which show that the essential matters provided for are payment of the principal money secured thereby, with interest thereon.

There is no demise of the premises by the mortgagees contained in this proviso, nor is there any agreement

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that on default a tenancy shall be created, and that the interest shall then become rent, nor is it alleged that there is any interest in arrear.

The case of *Clowes* v. *Hughes* (1), shows that there was no subsisting tenancy here. See also *Walker* v. *Giles* (2).

Moreover, there is an inconsistency and repugnancy in the clauses of the said mortgage; for how can the tenancy at will be reconciled with the provision that in default of payment for two calendar months the mortgagees may, on one calendar month's notice, enter on and lease or sell the said land?

Under the attornment clause, the mortgagee is entitled, if at all, to the rental of the lands mentioned in the mortgage from its date, while under the other clause just referred to, the mortgagor, being entitled to quiet possession until default, the mortgagee cannot enter on and lease the said lands, in order that he may receive the rents and profits of the said lands, until there is default of payment for two months, and then only on giving one month's notice. The mortgagee, therefore, could not enter at will, as he would have the right to do if a tenancy at will was created.

If the mortgagor abandoned possession of the lands and default was made, the mortgagee could not obtain possession thereof and make a lease until after two months' default and one month's notice had been given. But if the attornment clause in the mortgage in question is held to be a valid one, the mortgagee would be entitled at any time to give notice of the termination of the tenancy at will and take possession. The attornment clause cannot be construed to confer two such distinct rights inconsistent with each other.

My learned friends have relied on the case of the *Royal Canadian Bank* v. *Kelly* (3), but the judgment

(1) L. R. 5 Ex. 163. (2) 6 C. B. 700.
(3) 19 U. C. C. P. 430.

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of the Court of Error and Appeal, in that case, reversed the decision of the Court of Common Pleas that the statutory distress clause in a mortgage, under the Short Forms Act, creates the relationship of landlord and tenant between the mortgagor and the mortgagee.

Then it is contended that the proviso as to distraining for interest applies and aids the attornment clause as before mentioned. This distressing clause cannot be held to be "the said proviso" mentioned in the attornment clause. This attornment clause, however, contains no allusion to rent, and by itself it could give no power to distrain. It is an excrescence upon, not an integral portion of the mortgage, and there is no portion of the distress clause, either in its short or extended form, that gives the right to distrain for any rent.

Another reason why appellants cannot succeed is, that by the terms of the mortgage, upon default of payment of interest the principal became due, and default was made on the twenty-third day of March, 1877, as the interest was payable in advance and the mortgage money became wholly due and payable prior to the said seizure, and the mortgagor still remaining in possession could not be a tenant, but was a trespasser, and the interest was assessable as damages only.

Finally, we submit that it is against public policy that any such power as is claimed in this case should be given to mortgagees. Such a power is in direct contravention of the Chattel Mortgage Act, and if allowed would seriously impair the usefulness of that Act.

Mr. *Marsh*, in reply, relied on *Morton* v. *Woods* (1); *Re Threlfell* (2); *Pinhorn* v. *Souster* (3); *Brown* v. *Metropolitan Counties, &c., Society* (4); *Turner* v. *Barnes* (5).

(1) L. R. 3 Q. B. 658, and 4 Q. B. 293.
(2) 16 Chy. D. 274.
(3) 8 Ex. 763.
(4) 1 El. & El. 832.
(5) 2 B. & S. 435.

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RITCHIE, C. J.:—

Whatever may be the effect of the distress clause standing alone, upon which there appears to have been a difference of judicial opinion, I think there can be no doubt as to the construction and effect of the attornment clause and the distress clause in the same instrument. In construing these two clauses, we must take into consideration the whole scope and object of the instrument, and not regard the position of the clauses; because, as *James*, L.J., says in *ex parte National Guardian Assurance Co.* in *re Francis* (1):

There is no magic in the position of the clauses in the deed, every clause is part and parcel of the bargain between the parties.

It is said in *Mill* v. *Hill* (2):

The general rule of construction is that the courts, in construing the deeds of parties, look much more to the intent to be collected from the whole deed than from the language of any particular portion of it. The intent must be collected from the deed itself, and not from evidence *aliunde;* and the courts consider themselves authorized and bound, where they can collect the intent from the language of the deed, if all the parts of the deed will admit of it, to construe that deed rather according to the general intent than according to any particular phraseology contained in it.

And with reference to attornment clauses, *Jessel*, M. R. says *In re Stockton Iron Furnace Co.* (3):

According to the course of practice of conveyancers, when the mortgagor is occupying, so that there is no rent receivable to meet the interest on the mortgage debt, it is usual that he should agree to become tenant. There is nothing novel or remarkable in the mortgage. It is in the ordinary form.

Bacon, C. J., in *ex parte Jackson*, in *re Bowes* (4), says:

The case of *In re Stockton Iron Furnace Co.* (5) is valuable for the observations which it contains, which traverse the whole ground of these attornment provisions, and no disapprobation is expressed by the judges, either in that case, or even in *ex parte Williams* (6), of

(1) 10 Ch. D. 413.
(2) 3 H. L. Cas. 847.
(3) 10 Ch. D. 353.
(4) 14 Ch. D. 730.
(5) 10 Ch. Div. 335.
(6) 7 Ch. Div. 138.

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the use of an extensive attornment clause. Attornment clauses are in themselves valid. They can only be impeached, that is to say, the contract between the parties can only be set aside, if you can infer from the facts that there is an attempt to defraud the other creditors of the mortgagor in the event of bankruptcy happening. There is not a particle of evidence in this case which leads me to think that such an intention was present here.

Cotton, L. J. (1):

Undoubtedly, a mortgagor and a mortgagee have a right to insert in their mortgage deed a clause making the mortgagor attorn as tenant to the mortgagee, and thus by contract constituting the relation of landlord and tenant between the two. Under such circumstances, where it is a real and not a fictitious or sham arrangement, the ordinary consequences of a tenancy follow, and there can be a distress for the rent agreed upon, which will be valid and effectual in the case of bankruptcy. As has been pointed out by Lord Justice *Baggallay*, this is quite reasonable, for the mortgagee has a right to take possession, and to turn out the mortgagor, whether he is in possession by himself or by his tenant. If the mortgagor is in possession by a tenant, then the rent which that tenant pays comes into the hands of the mortgagee. If the property is in the possession of the mortgagor himself, the mortgagee may turn him out and let the property, either to a stranger or to the mortgagor; and, therefore, there is nothing unreasonable, or that can be called a fraud on the law of bankruptcy, in allowing the parties to make a contract in the mortgage deed which they might validly and effectually make afterwards. If the mortgagee lets to a third party, no question can arise as to the amount of rent; and if the attornment clause is one which really constitutes the relation of landlord and tenant between the mortgagor and mortgagee, the court will not be nice in considering whether the rent is too great for the mortgaged property.

Thesiger, L. J. (2):

There can be no doubt that such clauses contained in the mortgage deeds are valid and operative in themselves, and that they may, and ordinarily do, create the relationship of tenant and landlord between the mortgagor and mortgagee, and with it the ordinary right of distress which the law attaches to that relationship. And, more than that, it appears to me abundantly clear, both upon principle and authority, that attornment clauses will be valid and operative, although the rent reserved by them may be considerably in excess of what may be required to keep down the interest on the mortgage debt. I can even imagine a case in which the rent reserved

(1) P. 739. (2) P. 743.

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may be sufficient to pay both principal and interest. But, while that is so, it must also be admitted that the object of attornment clauses is, while giving an additional security to the mortgagee, to place him, as regards the mortgagor who is left in possession of the property, and, in the matter of rent, in the same position in which he would have been if the mortgaged premises had been under lease to a third party.

Now what was the intent of the parties in reference to this deed? Clearly their sole object was to secure to the mortgagor the repayment of the mortgage money and interest. The clauses in the deed, more especially those we are now considering, were unquestionably inserted with a view to that end in the interest of, and for the benefit and protection of the mortgagee. If it was intended that the right to distrain was merely a collateral license, assuming the distress clause gave no more than a license, to which the right to distrain the goods of a stranger on the premises would not be incident, nor would the right to claim a year's rent, under the statute of *Anne*, when the goods are seized by the sheriff, what possible object could there have been in the interest of either party in inserting the attornment clause. If the attornment does not establish the relation of landlord and tenant, it is meaningless. If it establishes the relation of landlord and tenant, but without the reservation of a fixed rent, and is to be read as separate and distinct from the distress clause, then instead of operating in the interest of the mortgagee, and in furtherance of his security, it would impose on him a most onerous burthen, and cast on him a duty of a character having the exact contrary effect, viz.: by making him a landlord it would constitute him a mortgagee in possession with all the corresponding liabilities attaching to that position, and more particularly in regard to any subsequent incumbrances, without conferring on him any other or greater rights or privileges than he would have without the

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insertion of such a clause, a state of things not benefiting but detracting from the security, a state of things not indicated by the deed, and which, I think, neither party could have contemplated or intended, and which will be avoided by giving legitimate effect to all the clauses of the instrument.

By reading these two clauses together as creating a tenancy at a fixed rent, distrainable as between landlord and tenant, the clauses are consistent the one with the other, and in accordance with the scope and object of the mortgage security. To read them separately and as having no connection with or bearing on each other is to render them wholly irreconcilable. To say that the mortgagor when he agreed to the insertion in the mortgage of a clause in these words: "And the said "mortgagor doth release to the company all his claims "upon the said lands and doth attorn to and become "tenant at will to the company subject to the said pro-"viso," viz, the proviso for repayment of principal and interest, and, at the same time, inserted the statutory clause that the company might distrain for interest, which, extended by the terms of the statute, reads thus:

And it is further covenanted, declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators shall make default in payment of any part of the said interest at any of the days and times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises or any part thereof, and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands, tenements, hereditaments and premises so much of such interest as shall from time to time be or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like cases of distress for rent;

To say that he did not intend to make himself a tenant under the first clause, and did not intend under

the second clause, read in connection with the first, to fix the amount of rent and times of payment as between landlord and tenant, and make the rent so fixed, rent distrainable by way of rent under the tenancy so created as a right of distress incident to a tenancy, is to say, it appears to me, that the instrument is incapable of a reasonable and consistent construction. I think the only possible object the parties could have had in inserting the attornment clause was to make the interest, when in arrears, rent, and give the landlord the same right, as if in so many words, the attornment clause had specified that the mortgagor became tenant at a fixed rent, viz: the amount of the interest in arrears reserved by the mortgage. Any allusion to rent in the attornment clause was rendered unnecessary, because the rent is fixed by the distress clause, which authorizes the interest to be distrained by way of rent reserved. Those clauses, as I said before, being read together, establish the relation of landlord and tenant, and in my opinion fix the amount of interest as rent for the purposes of the tenancy; or in other words, that the reason why the attornment clause was inserted was to prevent any doubt arising as to the right to distrain being treated under the distress clause as a mere leave and license, and not as a rent charge.

In delivering judgment on the appeal in *Morton* v. *Woods*, (1) Lord Chief Baron *Kelly*, after noticing the appellant's contention that there were certain defects in the form of the mortgage instrument there under consideration which rendered it invalid as a lease, says:

> It might be so in the ordinary case of a lease; but in order to ascertain whether such a rule of construction has any application to the present instrument, we must take into consideration the whole scope and object of it. And when we find the main, and indeed only object of the deed is a mortgage, and that the creation of a tenancy and the relation of landlord and tenant with a reservation

(1) L. R. 4 Q. B. 305.

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of rent are intended as a mere security for the repayment of the mortgage money and interest, the authority cited is no longer applicable; and we must look at the whole instrument taken together in order to ascertain the intention of the parties.

and I agree that if the mortgage in question herein be construed according to the rule enunciated in *Morton* v. *Woods*, there can be no reasonable doubt that the relationship of landlord and tenant at a fixed rent was thereby created.

Therefore, in my opinion, the occupation by the mortgagor, connected with the attornment clause and the provision that the mortgagee should have the power of distress for the interest in arrears by way of rent reserved, constituted the relation of landlord and tenant between the mortgagor and mortgagee, whereby the mortgagor became tenant at will to the mortgagee, at a fixed rent, viz: the amount of the interest payable at fixed times, and that under such demise, on default in payment of the interest, it became payable *qua* rent and liable to be distrained for as rent, the right to distrain not being a mere collateral license but a right of distress incident to a tenancy.

As the addition of the attornment clauses distinguishes this case from the *Royal Canadian Bank* v. *Kelly* (1), and makes whatever may be doubtful in that case clear in this, I refrain from discussing or expressing any opinion on the point there decided that without the attornment clause, the statutory distress clause has the same effect, as I think the two have in this case.

STRONG, J.:—

I am of opinion that we ought to dismiss this appeal. I entirely agree with the majority of the Court of Appeal that, upon the proper construction of the mortgage

(1) 19 U. C. C. P. 43.

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deed, there is no reservation of rent. Nothing is said about rent in what is called the "attornment" clause, and, assuming, as I do for the present purpose, that either by the effect of this attornment clause, or by the operation of the covenant, that the mortgagor should retain possession until default, or by the combined effect of these two provisions, a tenancy of some kind was created there is no pretence for saying that there was, either by expression or implication, any reservation of rent as incident to that tenancy, unless it was contained in the distress clause. What we have to do, then, is to construe the extended statutory equivalent of the short form of proviso actually used by the parties in the mortgage deed itself. And here, I would observe, that the present case affords a very good example of the imprudence of using these short forms, which, in *England*, as I find it stated in writers of authority, are never adopted. The short form in the mortgage is:

Provided that the Company may distrain for arrears of interest.

There is no indication n these words of any intent to reserve a rent. If, therefore, we read the proviso, of which this short form is the symbol, as containing a reservation of rent, we are giving an effect to it which makes the use of this statutory form a snare. If the statute had enacted in so many words that interest should mean rent, of course there would be an end of the matter; but, whilst it stops short of that, and so long as there is any ambiguity in the words of the enlarged covenant (though I am far from admitting that there is any ambiguity in the extended form here), I think we ought so to construe the extended form as to ascribe to it a meaning of which the short form may be said to be a fair general expression, and this we certainly should not be doing if we were, by the aid of the statute, to translate the word "interest" as meaning or including rent. I do not,

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however, consider this as a conclusive reason, though, in my estimation, it certainly greatly strengthens the construction placed upon the extended form by the majority of the court below. Again, the very existence of an express clause of distress which would be totally unnecessary to entitle the mortgagee to distrain for rent, though not conclusive, is also a circumstance weighing against the construction contended for by the appellants. But I rest my judgment upon what appears to me, speaking with all respect for those who entertain different opinions, to be the plain meaning and intendment of the words of the proviso, taken in its extended form as given in the schedule to the statute, and which is as follows:—

> If the said mortgagor, his heirs, executors or administrators, shall make default in payment of any of the said interest, at any of the days and times heretofore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and by distress warrant to recover by way of rent reserved (as in case of a demise) of the said lands, tenements, hereditaments, and premises, so much of such interest as shall from time to time be, or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like case of distress for rent.

Reading this form, it is apparent at once that all depends upon what is to be considered as meant by the words "to recover by way of rent reserved as in case of a demise of the said lands * * * * so much of said interest," &c.

Now, in the first place, it is to be observed that what is to be recovered by the distress, is not rent but interest *eo nomine*; what warrant is there then for saying that this arrear of interest is to be considered as rent reserved? The only answer which can be suggested is, that the words "by way of rent reserved" show that the interest is, so soon as it gets into arrear, to be considered as a reserved rent; but this is to beg the whole

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question for the words by way of rent reserved are not used in connection with the interest, but with the mode of recovering it; it is not said that interest in arrear is to be considered as rent reserved, but that when interest in arrear is to be recovered, it is to be so recovered in the same way that rent reserved on a demise is to be recovered, namely, by distress. And the latter words of the clause, providing that the costs of the distress shall be recovered "as in like case of distress for rent," reflect light on the preceding expressions, and show, as clearly as language can express it, that the distress is not to be for rent, but for interest to be recovered in the same way as rent.

The case of *Doe Wilkinson* v. *Goodier* (1) is an authority amply sufficient to warrant this construction. In that case, the power of distress authorized the mortgagee to distrain for interest in arrear for twenty-one days "in like manner as for rent reserved on a lease;" and the court held that this did not amount to a reservation of rent, but was a mere personal clause of distress. I am unable to see any difference sufficient to make a reasonable distinction between the concluding words of the clause in question here, and which, as I have said, are a key to the construction of the expressions used in the earlier part of the proviso, "as in like case of distress for rent;" and the words in *Doe Wilkinson* v. *Goodier*, "in like manner as for rent reserved on a lease." I am, therefore, of opinion, that for the reasons given by the majority of the Court of Appeal—reasons to which I profess to add nothing, but merely to reiterate them in my own language—this appeal should be dismissed.

I have arrived at this conclusion, as already indicated, merely by a process of verbal construction, and without being influenced by any considerations of the impolicy

(1) 10 Q. B. 957. See also *Doe dem Garrod* v. *Olley*, 12 Ad. & El. 481.

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or hardship of giving effect to the provision in question as amounting to a reservation of rent.

As I was a party to the decision in the case of the *Royal Canadian Bank* v. *Kelly*, in the Court of Appeal, I think it proper to say that I have given no weight to that decision as an authority in the present question; for this the want of any authentic report of the case would alone be a sufficient reason, but besides this, my recollection of that case is such that I could not properly act upon it. In *Kelly* v. *Royal Canadian Bank* there was not, as there is here, an express provision in the mortgage deed that the mortgagor should become tenant at will to the mortgagee—in other words, there was no attornment clause—the only clause contained in the deed from which a tenancy could be implied was the provision that the mortgagor should have quiet possession until default, and I am able to say that the grounds of my own judgment, which concurred with those stated by the Chief Justice, was that there was no tenancy to which a rent (as a rent service) could be incident, since the covenant that the mortgagor should have possession until default in payment —in a case where the principal and interest were payable not at one fixed date but by instalments—wanted that certainty which is requisite for the creation of a term. The judgment of the court in that case was the judgment of a large majority, but a majority which did not agree in the reasons assigned for their judgments, for whilst the judgments of some of the learned judges proceeded upon the grounds I have just mentioned those of others proceeded upon the ground upon which the Court of Appeal have rested their decision in this case, the proper construction of the clause of distress in the extended form given in the statute. This want of unanimity was probably the reason why the judgment was witheld from the reporter. I only mention it now

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as explaining why I attributed no weight to it in arriving at a decision of the present appeal.

Although I rest my judgment in the present case entirely on the same grounds as those relied on by Mr. Justice *Burton* and Mr. Justice *Patterson*, in the Court of Appeal, I think it right to point out some further grounds for the conclusion that, notwithstanding the existence of the attornment clause in this mortgage deed, no tenancy to which a rent service could have been incident, was created. This attornment clause appears to be so utterly inconsistent with the proviso, that the mortgagor should have quiet possession until default, that the one or the other of these clauses must be void for repugnancy. The mortgage deed, operating as a conveyance to the mortgagee of the whole fee, these provisions are in the nature of redemises to the mortgagor, and, therefore, must be construed beneficially to the mortgagor, and strictly against the mortgagee, who is in the position of a grantor as regards them. Then it being impossible to reconcile a tenancy at will, that is, a tenancy determinable at the will of the mortgagee, under which the latter can, at any time, take possession, with a provision, though in form but a mere personal covenant, that the mortgagor shall remain in quiet possession until default in payment; one or the other of these two clauses must necessarily give way, and upon the principle of construction just stated, it is clear that this must be the attornment clause being less beneficial to the mortgagor. It is no answer to this argument to say that the tenancy at will can subsist with the collateral personal covenant of the mortgagee not to take possession until default, for such a covenant would be enforced specifically by a court of equity, which would restrain the mortgagee from taking possession in violation of its terms, and thus there would arise a direct

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repugnancy between such a provision and a tenancy at will. Then, in determining whether a tenancy is created or not, and what is the nature of the tenancy we must have regard at law as well as in equity to the terms of the whole deed, for to this extent at least the case of *Walker* v. *Giles* (1), though impugned in other respects, is still law, and is so recognized in the later cases of *Pinhorn* v. *Souster* (2), and *Brown* v. *The Metropolitan Counties, &c., Society* (3). That this is the effect of the authorities is also recognized in *Davidson's* Conveyancing (4), and in the 3rd edition of *Fisher* on Mortgages (5) the true principle to be extracted from the authorities is thus stated:—

> Although a tenancy may be created by insufficient words in the deed it will not be allowed where the effect would be inconsistent with the general object of the deed.

Then, the tenancy at will created by express words in the attornment clause being thus rejected we have only to deal with the provision that the mortgagor shall hold until default in payment of principal or interest at the times stipulated in the deed; if any tenancy is created it must be by that clause. Now, when I say that this clause is in the nature of a redemise, I do not mean to say that it creates a strict legal tenancy, that it confers upon the mortgagor a chattel interest amounting to a legal term, for it has been determined—and upon long established principles of the law relating to leases and terms for years, it could not be otherwise held—that the uncertainty in the duration of the term is fatal to such a construction, though, as I have before said, the covenant is one which a court of equity would undoubtedly enforce by restraining the mortgagee from ejecting the mortgagor before default.

(1) 6 C. B. 662
(2) 8 Exch. 763.
(3) 1 El. & El. 832.
(4) 2 Vol., p. 645. (3rd Ed.)
(5) P. 446.

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In the view which I thus take of the proper construction of the mortgage deed, after eliminating, for the reasons already stated, the clause purporting to create the tenancy at will, there is neither a tenancy created by the remaining provisions of the deed nor anything amounting to a reservation of rent.

The uncertain duration of the holding until default in any one of the half-yearly payments of interest during a period of five years, and then until default in the payment of the principal at the end of that time, makes the implication of a tenancy, in view of the requisites for the creation of a legal term, in my opinion, impossible.

Tere are, it is true, some decisions which may seem contradictory on this point, and *Wilkinson* v. *Hall* (1) is supposed to have determined otherwise. I think, however, that case is sufficiently distinguished from the present in the full and able discussion of the authorities contained in the note to *Keech* v. *Hall* in *Smith's* Leading Cases (2). This distinction is that in *Wilkinson* v. *Hall* the mortgagor was to remain in possession until default made in the payment of the mortgage money at one certain time fixed by the deed —not as here, until default should be made in any one of a number of half-yearly payments spread over a series of years. In a case—such as that of *Wilkinson* v. *Hall*—all the money, principal and interest together, being payable at a day certain, the duration of the term was fixed and ascertained as soon as the deed was executed to be until the one certain day named for payment. In a deed framed like the present, it is, however, impossible to say what the duration of a right of possession will be, which is dependent altogether on *ex post facto* events—in the present case ten different contingencies.

(1) 3 Bing. N. C. 508.

(2) 1 Smith's Lead. C. (Ed. 8), p. 577.

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Therefore, for the reason that it wants that prefixed certainty which is essential to the creation of a term, I should be inclined to hold—if the point had to be decided—that the quiet possession clause in the present case does not create a legal tenancy. The editors of *Smith*'s Leading cases state the following as a general conclusion from the authorities (1):

> It may, perhaps, be concluded in this review of the authorities that in order to make a re-demise there must be an affirmative covenant that the mortgagor shall hold for a determinate time and that where either of these elements is wanting there is no re-demise.

The mortgage deed in the present case does contain the affirmative covenant that the mortgagor shall hold, but not that he shall hold for a determinate time

It is no answer to this to say "*id certum est quod certum reddi potest*," for no principle of the law of property is better established than that which makes it indispensable to the creation of a term that its duration should be prefixed and certain from the beginning, and not fluctuating or uncertain according as certain contingencies may or may not happen.

We find it laid down that a lease for so many years as *A* shall live is void for uncertainty, though nothing can be more certain than that there is a limit to human life, but a lease for twenty-one years if *A* shall so long live is good, being a lease for a term certain, determinable on a contingent event which may happen before the expiration of the term limited (2).

So in the case of a mortgage where the principal is payable in one sum, at one fixed date, and the interest is made payable in a number of half yearly payments, as in the present case, if the covenant should be that the mortgagor should have quiet possession until the time fixed for payment of the principal, with a proviso that such right of possession should be determinable upon default

(1) Smith's L. C. 8th Ed., p. 583. (2) See Co. Litt., 45 v.

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in payment of the interest at any of the stipulated times, that, no doubt, would create a perfectly good legal interest in the nature of a term of years. This distinction may be thought very thin and meaningless, but it is well-settled law, and that is sufficient for the present purpose. I have made these observations, not as intending to rest my judgment upon them, but because it occurred to me that it might be useful to draw attention to the difficulty I should have felt, in holding that the quiet possession clause created a tenancy, as a suggestion that this clause, in mortgage deeds, should be so framed as to avoid the objection, as may easily be done.

As to the point that the quiet possession clause could, in no case, operate, because the mortgage was not executed by the mortgagees, I am clearly of opinion that, even as a strict legal objection, it is of no force, since the principle is, that a mortgagee or grantee is bound, even at law, to sustain the burden of covenants and provisions contained in a deed under which he claims to take a benefit, even though he has not executed the instrument (1), and, at all events, a court of equity would, on the ground of equitable fraud, restrain a party to a deed in such a position from repudiating any obligation or onerous provisions which the instrument imposed upon him.

It was suggested, that, although no tenancy was created to which a rent, as a rent service, could be incident, the distress clause might be construed as creating a rent charge. This point is sufficiently answered by the view which—following the Court of Appeal—I have taken of the proper construction and meaning of the clause in question a further and conclusive reason being that the mortgagor had no legal estate out of which such a rent charge could issue.

(1) See Co. Litt 230b.

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My conclusion is, that the appeal should be dismissed, with costs.

FOURNIER, J., concurred with STRONG, J.

HENRY, J.:

I agree with my brother *Strong*, and entirely adopt the views of Mr. Justice *Patterson* and Mr. Justice *Burton*. I have come to the conclusion that the attornment was not to attorn further than to give a license to distrain which would enable the mortgagees to collect arrears of interest and did not create the relation of landlord and tenant so as to enable them to distrain strangers' property found on the premises.

TASCHEREAU, J.—Was of opinion that the appeal should be allowed.

GWYNNE, J.:—

At the time of the passing of the 27th and 28th *Vic.*, ch. 31, it was the universal practice, I may say, in the Province of *Upper Canada* for mortgagees to insist, as a condition of all loans on mortgage, upon a clause being inserted in the mortgage whereby in express terms the mortgagor become tenant to the mortgagee at a rent which was the interest agreed upon for the principal sum secured by the mortgage, and the object of the act was simply, in my opinion, as its title indicates, to establish a short form, which could conveniently and at a trifling expense be registered in full. That the relation of landlord and tenant can subsist between a mortgagee and his mortgagor simultaneously with, and by virtue of the same instrument as creates the relationship of mortgagee and mortgagor, is not disputed. If then, the language of the short form given by the statute is sufficient to create the relationship of landlord and tenant at a rent, I cannot see upon what principle

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we should construe that language as conferring a mere license to distrain the goods of the mortgagor himself alone, and so deprive the mortgagee of the security which (upon the faith of the language of the statute being sufficient for the purpose), may have been an essential condition without which he would not have consented to lend his money; and I cannot see how a mortgagee's insisting upon his having the security, which a mortgagor becoming tenant of the mortgagee for the mortgaged premises gives to the latter, can be regarded as in fraud of the Chattel Mortgage Act. Now, the language of the statute when expanded as it is in column two of the Act is:

> And it is further covenanted, declared, and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors, or administrators shall make default in payment of any part of the said interest at any of the days and times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns to distrain therefor upon the said lands, tenements, hereditaments and premises or any part thereof, and by distress warrant to recover by way of rent reserved as in the case of a demise of the said lands, tenements, hereditaments and premises so much of such interest as shall from time to time be and remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress as in like cases of distress for rent.

Now this language is, to my mind, essentially different from the language used in *Chapman* v. *Beecham* (1); *Doe Wilkinson* v. *Goodier* (2); and *Pollitt* v. *Forrest* (3). The covenant is not that the mortgagee may distrain for the interest "in like "manner as landlords are authorized to do in res- "pect of distress for arrears of rent upon leases for "years;" nor "in like manner as for rent reserved by "lease;" nor does the covenant impose a penalty for which the mortgagee may distrain "as for rent in

(1) 3 Q. B. 723.
(2) 10 Q. B. 957.
(3) 11 Q. B. 962.

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arrear " as in *Pollitt* v. *Forrest*, but it is that the mortgagee may distrain upon the lands and for the interest, and recover it by way of rent reserved as in the case of a demise, thus, as it appears to me, plainly declaring that the interest shall be deemed to be rent reserved and recoverable as such. But it is said that the introduction into the clause of the words " as in the case of a demise of the said lands, &c.," is quite inconsistent with the relationship of landlord and tenant being created; but on the contrary, the language appears to me to be sufficiently appropriate to the object in view, which was not to create an indenture of demise merely, which the legislature knew to be an instrument which in its terms is different from an indenture of mortgage, but in an indenture of mortgage to attach the relationship of landlord and tenant to that of mortgagee and mortgagor, with all the incidents of the former relationship as in the case of a demise—just as if the parties should have said that although this is an indenture of mortgage, and the parties to it are called mortgagee and mortgagor, the relationship of landlord and tenant shall also exist between the parties, and the interest payable by the mortgagor shall be paid to and recoverable by the mortgagee by way of rent reserved upon the indenture of mortgage, just as in the case of a pure indenture of demise. The language of the statute appears, to my mind, to be abundantly sufficient to superadd the relationship of landlord and tenant to that of mortgagee and mortgagor, upon the authority of *West* v. *Fritche* (1); *Doe Dixie* v. *Davies* (2); *Pinhorn* v. *Souster* (3); *Doe Bastow* v. *Cox* (4); *Brown* v. *Metropolitan Counties, &c., Society* (5); *Morton* v. *Woods* (6); and being sufficient for that purpose I do not think that we should be

(1) 3 Ex. 216.
(2) 7 Ex. 89.
(3) 8 Ex. 763.
(4) 11 Q. B. 122.
(5) 1 El. & El. 832.
(6) L. R. 3 Q. B. 658.

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justified in diminishing its force. However to a clause which, to my mind, is in itself sufficient, the parties to the mortgage before us, to make assurance doubly sure, have introduced a further clause whereby the mortgagor in express terms attorns to, and becomes tenant at will to the mortgagee, subject to the proviso for redemption contained in the mortgage. I am unable to see how we can declare that the relationship of landlord and tenant, with all its incidents, does not exist without declaring that the plainly expressed intention of the parties shall not prevail. The appeal therefore must, in my opinion, be allowed and the judgment of the Court of Queen's Bench be restored.

Appeal dismissed without costs.

Solicitors for appellants: *Macdonald, Macdonald and Marsh.*

Solicitors for respondents: *Hardy, Wilkes, Jones and D. Brooke.*

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BOUNDARY LINE—*Equitable estoppel—Description of land by reference to plan—Construction of deed—Extrinsic evidence of boundaries*— *T* was the owner of lot 9, and *C.* was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. *T.* being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked *C.* where he claimed his northern boundary was. *C.* pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, *C.* not objecting. A few days afterwards *T.*, with his architect and builder, went on the ground, and, in the presence of *C.*, the builder again marked out the boundary by means of a line connecting the surveyor's marks, *C.* not objecting. Excavating was commenced according to that line immediately, and *T.'s* house was built according to the line on the extreme verge of *T.'s* land. The first time that *C* raised any objection to the boundary so marked was when the walls of *T.'s* house were up and ready for the roof and considerable money had been expended in building. *Held:* That *C.* was estopped from disputing that the line run by the surveyor, was the true line. Per *Strong*, J.: When lands are described by reference to a plan, the plan is considered as incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description.

In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents which do not agree with those in the deed.

In 1861, *W. D. P.*, who owned a piece of land bounded on the south by *Queen* street, on the east by *William* street, on the west by *Dummer* street, and running north some distance, laid out the southerly portion into lots depicted upon a plan, which plan showed the boundary line between the plaintiff's and defendant's lots to be exactly 600 feet from *Queen* street. There were no stakes or other marks on the ground to indicate