REPORTS

OF THE

SUPREME COURT

OF

CANADA

REPORTER

C. H. MASTERS, Q.C.

ASSISTANT REPORTER

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

PUBLISHED PURSUANT TO THE STA TE BY

E. R. CAMERON, M. A., REGISTRAR OF THE COURT.

VOL. 29.

OTTAWA:
PRINTED BY S. E. DAWSON, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY.
1899

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

The Hon. HENRI ELZÉAR TASCHEREAU J.

" JOHN WELLINGTON GWYNNE J.

" ROBERT SEDGEWICK J.

" GEORGE EDWIN KING J.

" DÉSIRÉ GIROUARD J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Hon. DAVID MILLS, Q.C.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA:

THE HON. CHARLES FITZPATRICK, Q.C.

ERRATA.

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

Page 57, line 22, for "Cabana" read "Cavanagh."

Page 113, line 6, for "execution" read "extension."

Page 142, line 24, for "(15)" read "(14)," and, at line 28, for "(8)" read "(15)."

Page 407, line 19, for "Supreme" read "Superior."

Page 443, line 16, for "has" read "had."

Page 450, line 18, for "reserving" read "reversing."

Page 541, in third foot-note for "Bab." read "Barb."

Page 585, line 5, for "(*Ont.*)" read "(Can.)", and at line 6, for "Ontario" read "Upper Canada."

Page 640, line 20, for "Supreme" read "Superior."

Page 641, line 14, for "*mises*" read "*mis.*"

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

B.

C.

D.

G.

H.

I.

J.

K.

R.

U.

V.

W.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

THE CITIZENS' LIGHT AND POWER COMPANY (DEFENDANT) ..... APPELLANT; 1898

AND Oct. 5, 6.

NORBERT LEPITRE *et ux* (PLAINTIFFS) ..... RESPONDENTS.

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

Negligence—Master and servant—Employers' liability—Use of dangerous material—Insulation of electric wires—Cause of death—Findings of fact—Arts. 1053, 1054 *C. C.*

Persons dealing with dangerous material are obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end and where there is evidence that there was a precaution which might have been taken by a company making use of electrical currents to prevent live wires causing accidents, and that this precaution was not adopted the company must be held responsible for damages.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), affirming the

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

1898

THE CITIZENS' LIGHT AND POWER CO. v. LEPITRE.

judgment of the Superior Court, District of Montreal, which maintained the plaintiffs' action with costs.

The plaintiffs brought the action for damages for the death of their minor son alleged to have been caused through the negligence of the defendant.

The deceased was employed as a lineman by the company and at the time of the accident was at his work passing a dead wire along the ceiling of the cellar of the power house, in close proximity with a large number of wires which were charged with a strong electric current. There was some evidence to shew a possibility of imperfect insulation of these live wires, as the ends of the tie-wires, by which they were attached to porcelain insulating knobs, were left bare instead of being covered, as they might have been, with insulating tapes. Expert witnesses declared that it was not usual to cover the ends of tie-wires in this manner, but that if such precautions had been taken the possibility of accidents occurring through contact with live wires would have been decreased. The deceased was not seen to come in contact with the live wires, but was found dead on the floor, where he had been working, with a wound upon his arm as from a burn and one of his shoes burnt and broken in the sole. The trial judge found that the injury might reasonably be attributed to an electric shock caused by imperfect insulation of the tie-wires and gave a verdict for the plaintiffs on the ground that there was a presumption of fault against the company which had not been rebutted by evidence and it had not been shewn that the accident was due to any imprudence or fault on the part of the deceased.

The company now appeals from the judgment of the Court of Queen's Bench, on appeal, affirming the judgment in the trial court.

J. B. Allan for the appellant. The application of art. 1054 C. C. made in this case at the trial is not correct. It is not shewn affirmatively that deceased came to his death through any definite cause imputable to the want of skill, care or precaution of the company or of those for whom they are responsible. Art. 1054 C. C. is not intended to extend the theory of damages in case of negligence but only to restrict it.

This case is subject to the application of the principles laid down by *The Montreal Rolling Mills Co.* v. *Corcoran* (1); *The Canada Paint Co.* v. *Trainor* (2); *The Dominion Cartridge Co.* v. *Cairns* (3).

The mere presumption that deceased died by an electric shock occasioned in a mysterious manner whilst in the company's employment, is not sufficient to condemn them without positive evidence of fault on their part. The circumstances here are just as consistent with negligence on the part of the deceased as on the part of the company. There is evidence to shew deceased had been warned as to possible danger and had considerable experience and knew what precautions to take while working in proximity to live wires. There is no proof that any tie-wires had cut through the insulation and become charged, nor that the deceased came in contact with their bare ends. On the contrary it is shewn that if he had retained his proper position at his work deceased should not have been at any time touching the tie-wires.

Belcourt (*Desmarais* with him), for the respondents. There were evidently at least four acts of omission proved against the company, any of which would involve responsibility for negligence;—

(1) 26 Can. S. C. R. 595. (2) 28 Can. S. C. R. 352.
(3) 28 Can. S. C. R. 361.

1898

THE CITIZENS' LIGHT AND POWER CO. v. LEPITRE.

1st. It was imprudent to allow electric currents to pass through the wires in close proximity to where deceased was obliged to work and especially when the work could have been done at another time when the currents were off;

2ndly. The cellar floor was of earth which had been allowed to become saturated with water and dangerous when electric dynamos and currents were in close proximity;

3rdly. Metal pipes were allowed to remain uncovered and scattered about the cellar floor; and

4thly. The tie-wires while covered with insulation were left bare at the ends although it was possible to have covered these ends with insulating tapes and thus prevented the possibility of accidents through contact with them.

If not a case of *res ipsa loquitur*, this is at least an instance where there has been neglect to take obvious precautions to insure the safety of persons employed by the company to work among their dangerous currents and materials. The cases cited by the appellant are easily distinguishable from the present which involves more the principles laid down in *The George Matthews Co.* v. *Bouchard* (1) in the judgment of His Lordship Mr. Justice Girouard at page 589. There is also in this case the inevitable conclusion that the deceased suffered death on account of the negligent omission of the company to take reasonable and obvious precautions for insuring the safety of their servants while engaged in a dangerous employment.

THE CHIEF JUSTICE (*Oral*).—I am of opinion that this appeal should be dismissed with costs. There was evidence before the trial judge which he was called upon to appreciate and on which he appears to have

(1) 28 Can. S. C. R. 580.

based his findings. It would be contrary to principle and authority to interfere in such a case.

It has been shewn by the evidence of the company's superintendent that there was a precaution which might have been taken by the company to prevent live wires causing accidents but that this precaution was not adopted. This is therefore a case for the application of the principle now well established that persons dealing with dangerous things should be obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end. This the appellant has omitted to do.

GWYNNE J.—I am of opinion that the appeal should be dismissed as the findings in the trial court were supported by evidence and should not be disturbed.

SEDGEWICK and KING JJ. concurred.

GIROUARD J.—I follow the decision in the case of *The George Matthews Co.* v. *Bouchard* (1), and there was some evidence that the tie-wires might have been protected upon which the trial court judge based his verdict. I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Campbell, Meredith, Allan & Hague.*

Solicitors for the respondents: *Desmarais & Cordeau.*

(1) 28 Can. S. C. R. 580.

1898
*Oct. 10.

WILLIAM JOHN SIMPSON AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH PALLISER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW AT MONTREAL.

Appeal—Jurisdiction—Judgment in Court of Review—Judgment in first instance varied—Art. 43 *C. P. Q.—54 & 55 V. c.* 25, *s.* 3, *s.s.* 3—*Statute, construction of.*

Where the Superior Court, sitting in Review, has varied a judgment, on appeal from the Superior Court, by increasing the amount of damages, the judgment rendered in the court of first instance is not thereby confirmed so as to give an appeal direct from the judgment of the Court of Review to the Supreme Court of Canada under the provisions of the third sub-section of section three, ch. 25 of the statute 54 & 55 Vict. (D) amending the Supreme and Exchequer Courts Act.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review, at Montreal, by which the decision of the Superior Court was revised and reformed and the amount of damages awarded was increased.

The action was brought for assault and slander and the plaintiff recovered a judgment for three hundred dollars damages in the Superior Court whereupon both parties inscribed in review, the defendants appealing on the ground that they were not liable for any damages whatever and the plaintiff contending by his cross-appeal that the damages should be increased.

The Court of Review dismissed the inscription by the defendants, declaring that there was error in the

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

judgment of the Superior Court, and condemned the defendants to pay an increased amount of damages assessed at five hundred dollars.

The defendants then appealed to the Supreme Court of Canada against the judgment rendered in the Court of Review asking the dismissal of the action, and the plaintiff also filed a cross-appeal to the Supreme Court asking for additional damages.

Atwater Q.C. and *R. A. E. Greenshields* for the defendants, appellants.

C. H. Stephens Q.C. for the respondent, and cross-appellant.

While the arguments of counsel on behalf of the defendants, appellants, were proceeding the court raised the question of the jurisdiction of the Supreme Court of Canada to hear this appeal direct from the Court of Review and reference was made to article 43 of the Code of Civil Procedure of the Province of Quebec and to the Dominion statute, 54 & 55 Vict. ch. 25, sec. 3, sub-sec. 3. Counsel were heard on this question.

Atwater Q.C. for the defendants, appellants. There could be no appeal to the Court of Queen's Bench on the part of the defendants because the decision of the Superior Court, so far as it dismissed their pleas and declared their liability for damages, had been affirmed by the Court of Review, and although there might have been a right of appeal on their behalf respecting the increase in the assessment of damages, they could not appeal against the $300 judgment which had been confirmed nor could they obtain relief upon the whole case in the Court of Queen's Bench.

C. H. Stephens Q.C. for the plaintiff, respondent and cross-appellant. The plaintiff could not, on an appeal to the Court of Queen's Bench, take exception to any of the points that had been confirmed in the Court of

1898
SIMPSON
v.
PALLISER.

Review any more than the defendants could have raised the questions set up by their pleas which had been dismissed in both courts.

At the conclusion of this argument judgment was pronounced on the question of jurisdiction.

THE COURT was of opinion that as the judgment of the Court of Review declared that there was error in the judgment of the Superior Court and thereupon proceeded to revise and reform the judgment of the Superior Court by increasing the damages awarded to the plaintiff and also rendering the judgment which it declared ought to have been rendered, there was no appeal direct to the Supreme Court of Canada from that judgment of the Court of Review because there was a right of appeal therefrom to the Court of Queen's Bench, where, upon a cross-appeal, the whole case would have been before that court.

The appeal was accordingly quashed, but as the objection to the jurisdiction had been taken by the court no costs were allowed.

Appeal and cross-appeal quashed without costs.

Solicitors for the defendants, appellants: *Greenshields, Greenshields, Laflamme & Glass.*

Solicitors for the respondent, cross-appellant: *Stephens & Hutchins.*

LOUIS JOSEPH NAPOLÉON CHEF *dit* VADEBONCŒUR (PLANTIFF)... } APPELLANT;

AND

THE CITY OF MONTREAL (INTERVENANT) ..... } RESPONDENT.

1898

*Feb. 20.

*Oct. 13.

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

Title to land—Entail—Life-estate—Substitution—Privileges and hypothecs—Statute, construction of—16 *V. c.* 25 *&* 77—*Mortgage by institute—Preferred claim—Prior incumbrancer—Registry laws—Practice—Sheriff's sale—Chose jugée—Parties—Vis Major—Estoppel—Arts.* 945, 947, 950, 951, 953, 956, 958, 959, 2060, 2172 *C. C.—Arts.* 707-711 *C. C. P.—Art.* 781 *C. P. Q.—Sheriff's deed—Deed-poll—Improvements on substituted property—Grosses réparations.*

Upon being judicially authorized, the institute in possession of a parcel of land in the City of Montreal, *grevé de substitution*, and a curator appointed to the substitution, mortgaged the land, under the provisions of the Act for the relief of sufferers by the Montreal fire of 1852, 16 Vict. ch. 25, to obtain a loan which was expended in reconstructing buildings on the property. Default was made in payment of the mortgage moneys and the mortgagor obtained judgment against the institute and caused the land to be sold in execution by the sheriff in a suit to which the curator had not been made a party.

Held, that as the mortgage had been judicially authorized and was given special preference by the statute superior to any rights or interests that might arise under the substitution, the sale by the sheriff, in execution of the judgment so recovered, discharged the land from the substitution not yet open and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the lands.

An institute, *greve de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been

PRESENT: - Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

destroyed by *vis major* in order to make necessary and extensive repairs, (*grosses réparations*), upon obtaining judicial authorization, and in such a case the substitution is charged with the cost of the *grosses réparations*, the judicial authorization operates as *res judicata* and the substitute called to the substitution is estopped from contestation of the necessity and extent of the repairs.

The sheriff seized and sold lands under execution against a defendant described in the writ of execution, process of seizure and in the deed to the purchaser as "*grevé de substitution.*"

Held, that the term used was merely descriptive of the defendant and did not limit the estate seized, sold or conveyed under the execution.

Judgment of the Court of Queen's Bench for Lower Canada affirmed, Taschereau and King JJ. dissenting.

Held, further per Taschereau J. that article 2172 of the Civil Code of Lower Canada, as interpreted by the statute 29 Vict. ch. 26, applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court, sitting in review at Montreal, and affirming the judgment of the Superior Court, District of Montreal, which maintained the defence and intervention of the respondent and dismissed the plaintiff's action with costs.

The plaintiff brought his action (*pétitoire*), against the universal legatees of one Michel Laurent, deceased, to recover the property in question with rents, issues and profits. The land formerly belonged to the plaintiff's grandfather who died in 1843, having previously made his last will and testament whereby he bequeathed it to his son, the plaintiff's father, for his lifetime subject to the condition or charge of preserving the *fonds* and that, at his death, it should be returned and delivered over to his children born in lawful wedlock as their property absolutely. The plaintiff, the only surviving child of the institute, renounced his father's succession and claims title to the property

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

as being called to the substitution created under his grandfather's will upon the death of his father, the institute, which happened in 1883.

The deceased Michel Laurent had acquired the land from the City of Montreal, intervenant in the action, which had become the purchaser of the property at sheriff's sale, and sold it to him at public auction under the following circumstances:—In 1852, while the institute was in possession of the property, an extensive conflagration occurred in the City of Montreal, and amongst the buildings destroyed were those upon the land in question An Act was passed by the Legislature (16 Vict. ch. 25), for the relief of sufferers, and to facilitate the negotiation of loans to enable them to rebuild the property destroyed by the fire, and the City of Montreal was thereby authorized to guarantee loans made for the re-construction of buildings in the place of those so destroyed. The institute took advantage of the privilege, and he, together with the curator to the substitution, obtained judicial authorization to borrow $9,600 from a loan company which was expended in re-constructing buildings on the land in question. As the institute had no personal revenues, and the revenue from the lot in question had been bequeathed by way of maintenance, the loan was indispensable. The third section of the "Relief Act" provided that sums so lent should be secured for the principal, interest and costs, by privilege, "upon the houses or other buildings erected and built upon the lot of ground," and that such privilege should be "superior to and have preference over any other claim, debt, mortgage or privilege whatever, on such houses or buildings," and that to secure such privilege it should not be necessary to observe any of the formalities then "re-" quired by law, or any other formality whatsoever; "provided always, that such privileges shall, as re-

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

" gards the ground itself upon which such houses or " buildings may be erected, rank next after the privi- " leges, debts, mortgages or claims already existing or " which may exist upon such ground (*fonds*) at the " time of making such loan; but nothing herein con- " tained shall prevent the parties making such loan or " loans from taking a hypothec as provided by law, " upon the said ground (*fonds*), which hypothec, if " duly registered, shall rank as aforesaid."

The institute made default in payment of the loan, and the company recovered judgment against him and caused the land with the buildings thereon to be seized and sold under execution by the sheriff. The curator to the substitution had not been made a party to this suit and, in the writ of execution and process of seizure and sale as well as in the sheriff's deed, the defendant was described as "*grevé de substitution.*" At the sheriff's sale, the City of Montreal, in order to protect its warranty, became purchaser of the property for $7,000, and afterwards sold it by public auction when Laurent became the purchaser as above mentioned, at the price of $6,800. The sheriff advertised the land itself, (*fonds*,) for sale with the buildings thereon and sold and granted his deed, in the usual form and for as much as might be in him, for the land and buildings as advertised.

For the defence it was contended that these sales were a final and unimpeachable alienation, that any rights which may have belonged to the plaintiff were thereby divested, especially as the loan was authorized by the court, and was in fact effected in the interest of the substitute himself. The defence also urged that the plaintiff's real rights, if any, had not been preserved by registration within the time limited after the proclamation of the official cadastre subsequently made of the division in which the land is situated as re-

quired by article 2172 C. C., and that, in any event, the plaintiff could only recover upon condition that he should reimburse all costs of improvements made in good faith with interest.

On the part of the plaintiff it was contended that the curator to the substitution had not been properly made a party to the action by the loan company, but that the institute had been therein sued and condemned alone; that his rights as *grevé de substitution* only had been seized and alienated by the sheriff's sale, leaving the rights of the substitute still subsisting and sufficiently protected by the registration of the will.

The Superior Court dismissed the plaintiff's action with costs maintaining the defence and intervention by the City of Montreal (defendant in warranty), and condemned the plaintiff to pay the costs of the demand in warranty. In the Court of Review the judgment of the Superior Court was reversed, the plaintiff's action maintained with costs and the judgment as to the demand in warranty modified. On appeal to the Court of Queen's Bench, the judgment of the Court of Review was reversed and set aside and the judgment of the Superior Court restored with costs.

Belcourt for the appellant. Under the execution the sheriff only sold the rights of the institute and not those of the substitute; and the will having been once registered it was not necessary to renew the registration at the time of the establishment of the cadastre, since the question at issue is one of proprietorship. Renewal of registration is only necessary for the conservation of hypothecs. See *Banque du Peuple* v. *Laporte* (1); *Wells* v. *Gilmour* (2); *Wheeler et al.* v. *Black et al* (3); *Surprenant* v. *Surprenant* (4); and *Page* v. *McLennan* (5).

(1) 19 L. C. Jur. 66.
(2) Q. R. 3 Q. B. 250.
(3) M. L. R. 2 Q. B. 139.
(4) M. L. R. 1 S. C. 242.
(5) Q. R. 7 S. C. 363.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

The principal question in this case is whether or not the sale by the sheriff caused the rights of the substitute to disappear. The title of the institute is as an owner it is true, but on the opening of the substitution the estate must revert and be delivered up in conformity with the will creating the substitution; [Arts. 944, 950, 955, 961 C. C.]; and sheriff's sales do not purge lands from substitutions not yet open, [Art. 710 C. C. P.,] unless the curator has been called into the suit; [Art. 959 C. C.] See also Art. 2060 C. C. and the judgment on the appellant's opposition to the seizure in 1859, reported as *The Trust and Loan Company of Upper Canada* v. *Vadeboncœur* (1), maintaining the contestation on the ground that his rights could not be effaced by a sheriff's sale.

In the sheriff's deed issued to the respondent the estate conveyed was limited by mentioning that the lots were seized as belonging to the institute through the will and the conveyance was expressed by him to be only "in so far as it on me depends and as I can legally do so." There is full reservation made of the rights of the substitute by the use of these terms in the sheriff's deed.

In reply to the claim for reimbursement of money expended on *grosses réparations*, the appellant claims that the value of the repairs are compensated by rents, issues and profits received and enjoyed by the defendants during their possession of the property.

We refer also to 2 Pigeau, Proc. Civ. (ed. 1779) pp. 506, 616; Denisart, "Acte de Notoriéte" (3 ed.) pp. 407-408; 2 Mourlon, n. 936; 22 Demolombe, 500; Thev. d'Essaules, n. 689, 690; 9 Rolland de Villargues, nn. 254, 255, and the case of *Bérubé* v. *Morneau* (2), and arts. 2130, 2172 and 2172*a* of the Civil Code.

(1) 4 L. C. Jur. 358.

(2) 14 Q. L. R. 90.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Ethier Q.C. for the respondent. We call attention to the absence of any proof of record to show that the testator is dead; and the appellant can have no rights, as consequently it does not appear that the substitution is yet open; all further argument is under reserve of this plea.

The clause in the "Fire Relief Act" which declares those loans to constitute a privilege on the immoveable, in preference to any claim, debt or hypothec whatsoever, without it being necessary to comply with any of the formalities required by law, *or any formality whatever*, dispensed with the necessity of securing authorization from the court to borrow the sums necessary to reconstruct the buildings, and that formality was thus evidently adopted only *ex majore cautelâ*.

Even by Art. 951 C. C. permission is given to alienate the substitution in cases of necessity; see also Art. 953 C. C.. and *Caty* v. *Perrault* (1). Under any circumstances the registration of the will has not been renewed since the filing of the cadastral plans and proclamation thereof as required by Art. 2172 C. C., which is fatal to any rights claimed thereunder; *Poitras* v. *Lalonde* (2), per Mathieu J. *La Banque du Peuple* v. *Laporte* (3), per Baudry J., and *Despins* v. *Daneau* (4), per Ouimet J. Art. 2131 C. C. requires such renewals in case of all real rights whatsoever which are subject to registration. Art. 711 C. C. P. uses the term "real rights" in the same wide sense.

As to the estate sold at the sheriff's sale we simply refer to the terms of the deed to show that the sheriff really conveyed to the city, in the most formal manner, the whole estate in the immoveable in question, without mentioning the usufruct, or any reservations whatever. The descriptive term applied to the defend-

(1) 16 R. L. 148.
(2) 11 R. L. 356.
(3) 19 L. C. Jur. 66.
(4) M. L. R. 4 S. C. 450.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

ant in the process has no effect towards limiting the estate seized and sold.

Lastly the buildings reconstructed on the land with the money specially borrowed for that purpose were necessary and urgent repairs of an extensive character, *grosses réparations*, absolutely required to make the property, bequeathed *à titre alimentaire*, revenue bearing, and they enure to the benefit of the substitution and consequently are a charge upon it. The maxim "*nemo locupletari debet damno alterius*" applies here.

TASCHEREAU J. (dissenting.)—There is no controversy upon this appeal as to the facts of the case.

In 1840, one François Vadeboncœur, appellant's grandfather, made his will in favour of his son, Louis, with substitution in favour of his grandson, the appellant. The testator died in 1843. Louis, the institute, died in 1883, when appellant, Louis Joseph, became entitled to the legacy made in his favour by his grandfather. By his action he claims from the respondents the ownership of a lot of land in Montreal included in that legacy of which they or their *ayants-cause* are in possession The respondents met that action by a plea alleging that they had bought the lot in question at a sheriff's sale, under execution of a judgment recovered by the Trust and Loan Company against both the institute and the curator to the substitution. Appellant replied that it was only against his father, the institute, as institute, that this judgment had been recovered, and not against the curator to the substitution. As a matter of fact, that is so, and it is now conceded by the respondents that this part of their plea is unfounded; the curator was not even a party to the action of the Trust & Loan Company. Notwithstanding this, however, the respondents contend that the appellant's rights were

extinguished by the sheriff's sale under that judgment against the institute alone. *Primâ facie*, such a contention seems untenable. And the three courts below are unanimous in holding that, under ordinary circumstances, a substitute cannot be so deprived of his rights upon proceedings to which neither he, nor the curator, were parties.

But the Superior Court and the Court of Queen's Bench have found, in the following additional facts of the case, a bar to appellant's right of action.

In 1852, while the institute was in possession, a fire having destroyed a large portion of the city, including the buildings on the lot in question, the legislature, by 16 Vict. ch. 25, deemed it expedient to come to the relief of the victims of this disaster by enabling them to borrow the funds necessary to rebuild upon the security of the City Corporation, present respondents. The institute took advantage of that legislation, and jointly with the curator to the substitution borrowed $9,600 from the Trust & Loan Company, upon, among other securities, the guarantee of the City Corporation as authorized by the aforesaid statute. Upon default to pay the overdue instalments, the Trust and Loan Company took a judgment in 1857 against the institute, but not against the curator, and had the lot in question seized and sold in 1860 by the sheriff to the present respondents. The provision in this statute, upon which the respondents mainly rely, is contained in section 3, which reads as follows:

> And be it enacted that any person or persons, company or firm or persons, body politic or corporate so making any loan or advance under any instrument to which the Corporation shall be a party as aforesaid, shall have a privilege for such loan in principal, interest and costs, *upon the houses or other buildings* erected and built upon the lot of ground described in such instrument, which privilege shall be superior to, and have preference over, any other claim, debt, mortgage

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Taschereau J.

or privilege whatsoever, *on such houses or buildings*, and that to secure *such* privilege it shall not be necessary to observe any of the formalities now required by law, or any other formality whatsoever; Provided always that such privilege shall, as regards the ground itself upon which such houses or buildings may be erected, rank *next after* the privileges, debts, mortgages or claims already existing or which may exist upon such ground (*fonds*) at the time of making such loan; but nothing herein contained shall prevent the parties making such loan or loans from taking a hypothec as provided by law, upon the said ground (*fonds*) which hypothec, if duly registered, shall rank as aforesaid.

The last part of the section relating to conventional hypothecs upon the ground (*fonds*) itself has no bearing on the case, as it is not alleged, nor evidenced on the record that the deeds in favour of the Trust and Loan Company have ever been registered. So that the company's privilege was clearly restricted to the buildings. But even if these deeds had been registered, appellant's rights or claim to the lot itself which had been previously registered, are clearly protected by that legislation. The company, however, had undoubtedly the right to take a judgment against the institute on his personal obligation, and execute it on the lot itself. The institute was owner of it. Appellant could not, and does not attack that judgment. He simply argues that as the curator was not a party to it, it does not concern him. It is the effect of the judgment that he puts in issue, not its legality or validity.

The same as to the sheriff's sale to respondents. Appellant does not, and could not, ask to have it set aside. It was a perfectly valid one as far as it went. The controversy is merely as to what passed under it, or as to what it is that the city bought. Did they or did they not buy it subject to appellant's rights under the substitution? It seems to me evident that nothing but a substituted property was seized, and nothing but a substituted property was sold. Of

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Taschereau J.

course, it was the land that was sold, and that sale might have become free from all claims if the appellant had died before the opening of the substitution. But upon a judgment against the institute alone for his debt, the substitute's right to the ownership cannot be wiped out if he survive the institute. It is from the grantor that he takes the property. He is not the *ayant-cause* of the institute. The appellant has renounced his father's succession. Then the city knowingly purchased a substituted property; it was sold as such; and they had notice of the substitution by its registration and publication *en justice*. That is why an *opposition afin de charge* was not necessary to preserve appellant's rights. The sheriff's deed, moreover, expressly says that the sale is only of what he legally can sell; Pothier, substit. 551. And the purchaser under it cannot have another or a better title than the judgment debtor had. Appellant could not have intervened to stop the sale. He, in fact, attempted it, but his opposition was dismissed on the ground that he could not be prejudiced by proceedings against the institute alone. That judgment is reported as *Trust & Loan Co. of Upper Canada* v. *Vadeboncœur*. (1).

The Trust and Loan Company had the personal obligation of both the institute and the curator, and had they taken their judgment against both could have executed it against both. But having chosen to take judgment against one of them only all that they could seize and sell on that judgment was the property of that one, and not the property of the other. And if their judgment debtor had only a life-estate in the lot in question, it is only a life-estate that can have been seized and sold. And it is only a life-estate that respondents purchased under the sale in execution of that judgment. It is not his liability for the re im-

(1) 4 L. C. Jur. 358.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Taschereau J.

bursement of this loan that the substitute now questions; he simply contends that, as he has not been sued for it and condemned, no execution against his co-debtor can have extended to his own property.

The judgments against the appellant in the Superior Court and in the Court of Queen's Bench seem to be based on the consideration that this loan was made in appellant's interest and for his benefit. But this is a disputed fact and not at all clear upon the evidence. Appellant contends that it was made exclusively in the institute's interest. However, assuming that he did benefit thereby, it does not follow that his property was, or could be, sold under a judgment against a third party.

It was said in the Court of Queen's Bench that under art. 710 C. C. P. the appellant's rights were extinguished by the sheriff's sale because the Trust and Loan Company's claim was preferable to the substitution. But this article of the Code of Procedure is not given as new law and cannot be construed as an addition to or an alteration of section 953 of the Civil Code.

Extensive repairs (*grosses réparations*) and necessary disbursements of an extraordinary nature do not, it is true, fall exclusively upon the institute, but that is as between the institute and the substitute. Art. 947 C. C. And it does not follow therefrom that the party who has made these repairs at the request of the institute has a right of action against the substitute, still less that, under a judgment against the institute alone, he can sell the substitute's rights. And when the substitute invokes the protection of the sacred rule that no one can be condemned before being heard or summoned, it is no lawful answer that if he had been heard he would have been condemned.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Taschereau J.

Moreover, by the statute, the Trust and Loan Company had no lien on the lot itself, as I have already remarked. And even if they had, that could not have had the effect of rendering a judgment against the institute executory on any but the institute's rights and property. The substituted property was his property no doubt, but *pro tem.*, and subject to the substitution, if the substitute were to survive the institute. Such was the judgment of the Court of Review, and such would be my determination of the controversy.

Then, assuming that the appellant were liable for the amount of this loan, that would not be, in my opinion, a reason for dismissing his action. All that could be contended for would be that before he could get back his property, he should repay what the respondents have disbursed upon the loan. If the substitution had opened immediately after this loan to the *grevé*, the company's action upon it would have been against the appellant. He would then have had the option of retaining his property upon re-payment of the loan. Why should he be deprived of this option now? I do not see any reason for it, and I think that, in any case, the judgment dismissing his action is wrong. The judgment of the Court of Review should be restored with reserve of any recourse the respondents may have to recover from the appellant the amount disbursed by them to pay the Trust and Loan Company, in so far, at least, as he has benefited thereby. They may have that personal recourse, but, in my opinion, the appellant has a right to his property.

The respondent raised a point as to the necessity under art. 2172 C. C. of renewing the registration of the will creating the substitution in question. The three courts below are against them on this point, which is settled in that sense by the jurisprudence of

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Taschereau J.

the Court of Appeal in the province since 1874. *La Banque du Peuple* v. *Laporte* (1); *Wells* v. *Gilmour* (2); *Wheeler* v. *Black* (3), in this court, but point abandoned.

I agree that such a renewal was not necessary. The subsequent Act of 1875, 29 Vict. c. 26, interprets the article as applying only to hypothecs. It would be with great reluctance that we could be induced to upset a well established jurisprudence of the Provincial Court of Appeal upon a point of this nature affecting vested rights and titles to realty.

Another objection raised by the respondents is that it has not been proved that François Vadeboncœur, the grantor, is dead. This is a futility. Their very deed from the sheriff upon which they base their defence would not exist if the institute had not been in possession as institute, and he could not have been in possession as institute if the grantor had not been dead. Moreover, this objection was taken in the Court of Appeal for the first time, and that could not be done on such a point. *Lyall* v. *Jardine* (4); *Bank of Bengal* v. *Macleod* (5); *Bank of Bengal* v. *Fagan* (6); *Owners of the "Tasmania"* v. *Owners of the "City of Corinth"* (7); *Connecticut Fire Insarance Co.* v. *Kavanagh* (8).

The appeal, in my opinion, should be allowed with costs, and the judgment of the Court of Review restored, with reserve of respondent's rights, as I have mentioned.

GWYNNE J.—While concurring in the judgment of my brother Girouard who has dealt with the case very

(1) 19 L. C. Jur. 66.
(2) Q. R. 3 Q. B. 250.
(3) M. L. R. 2. Q. B. 139; 14 Can. S. C. R. 242.
(4) L. R. 3 P. C. 318.
(5) 7 Moo. P. C. 35.
(6) 7 Moo. P. C. 61.
(7) 15 App. Cas. 223.
(8) [1892] A. C. 473.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Gwynne J.

fully the case appears to me to be concluded by the statute 16 Vict. ch. 25 That statute, after reciting that a then recent disastrous conflagration in the city of Montreal had destroyed upwards of one thousand houses, and that the greater number of the persons who had suffered by that conflagration had lost all they had and were unable to rebuild the property so destroyed without assistance, and that the Corporation of the City of Montreal had expressed a willingness to become surety to the extent of one hundred thousand pounds for such of the said persons as might borrow for the purpose of enabling them to rebuild on the property so destroyed, enacted that it should be lawful for the said corporation to become surety for monies borrowed by any such sufferers for the purpose of rebuilding upon their land made vacant by the fire, such suretyship being by the statute declared to constitute an obligation for the repayment of the moneys borrowed and of the interest thereon in the event of the lenders being unable to enforce payment thereof from the parties borrowing the same after due diligence, and the discussion of the personal and real estate of the said parties for that purpose; and by the Act it was enacted that no such loan should exceed the sum of £500 on each lot of ground to be built upon, and further, that any person or persons, etc., making any loan under an instrument to which the corporation should be a party as surety

should have a privilege for such loan in principal, interest and costs upon the houses or other buildings erected and built upon the lot of ground described in such instrument, which privilege should be superior to and have preference over any other claim, debt, mortgage or privilege whatsoever on such houses or buildings, and that to secure such privilege it shall not be necessary to observe any of the formalities now required by law, or any other formality whatsoever; Provided always that such privilege shall, as regards the ground itself upon which such houses or buildings may be erected, rank next after

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Gwynne J.

the privileges, debts, mortgages or claims already existing or which may exist upon such ground at the time of making such loan.

Among the sufferers by the said fire were Louis Vadeboncœur and his infant son, the now plaintiff, the former of whom at the time of the said fire was by the last will of his father, François Vadeboncœur then deceased, seized as *grevé de substitution* of a piece of land having a frontage of eighty feet on St. Mary Street in the City of Montreal, and a depth of eighty feet, with houses thereon which were destroyed by the said fire, and the ownership of the said piece of land in reversion was by the said will of the said François devised to the children of the said Louis begotten in lawful marriage as *substitués*.

For the purpose of availing themselves of the benefit of the said Act, (16 Vict. c. 25) the said *grevé* and one Trefflé Goyette, as and being the duly appointed curator to the substitution established by the said will of the said François, jointly petitioned the judge of the Circuit Court at Montreal that they should be judicially authorised to borrow under the conditions in the said Act contained, the sum of two thousand pounds (currency) for the purpose of building four houses upon the said piece of ground; and such proceedings were thereupon had that the said petitioners were in due form of law by the judgment of the said court judicially authorised to borrow the said sum and for the purpose of securing payment of the said principal sum and the interest thereon to hypothecate the said piece of land.

In pursuance of the authority so judicially obtained the said *grevé* and the curator of the said substitution borrowed from the Trust and Loan Company the said sum of two thousand pounds in four several sums of five hundred pounds each which were expended in erecting four houses as authorised by the judgment of

the Circuit Court and for the purpose of securing repayment of the moneys so borrowed they, upon the 22nd day of June, 1853, executed four several mortgages each securing $2,000 and interest thereon upon several portions of the said piece of land each having a frontage of twenty feet on said St. Mary Street, and a depth of eighty feet. And the said Corporation of the City of Montreal became parties to the said several mortgages and thereby respectively became *cautions* of the said borrowers for the repayment of the said sums by the said mortgages respectively secured under and in pursuance of terms of the said Act of Parliament.

Afterwards, the said sum of eight thousand dollars having been found to be insufficient for the completion of the said four houses, the said *grevé* and the curator to the said substitution upon the 8th day of September, 1853, in due form of law petitioned the said court for leave to borrow a further sum of £500 for completion of the said four houses under the provisions of the said Act (16 Vict. c. 25), and a certain other Act (16 Vict. c. 77), passed for the purpose of amending the said Act (16 Vict. c. 25), and such proceedings were thereupon had that the said petitioners were by the judgment of the said court judicially authorized to borrow, and did accordingly borrow, the further sum of £400 upon the security of the said piece of land from the said Trust and Loan Company, and for the purpose of securing repayment thereof with interest they executed another mortgage bearing date the 10th of September, 1853, upon the whole of the said piece of land having a frontage of eighty feet by a depth of eighty feet to which mortgage also the corporation of the city of Montreal became parties as surety of the said borrowers under the conditions and in accordance with the provisions of the said Acts of Parliament.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Gwynne J.

At the times of the said respective loans having been effected and of the execution of the said respective mortgages in security therefor there were not any other debts, mortgages or claims existing and affecting the lands upon which the said four houses were erected with the money so borrowed, having privilege or precedence over the said mortgages, and consequently the said Trust and Loan Company, in virtue of the said respective mortgages and of the provisions of the said Acts of Parliament, had for the said loans in principal, interest and costs, privilege as well over the land upon which the said houses were so as aforesaid erected as over the houses themselves superior to and having preference over every other claim, debt or privilege whatsoever. The mortgages covered the whole estate in the land and the houses thereon erected, not only of the *grevé*, but also of those in substitution. Default having been made in payment of the moneys secured by the said several mortgages, the Trust and Loan Company recovered judgment in consideration of such default against the *grevé*, and issued execution thereon in due form of law and by process of a writ of *venditiori exponas* issued upon the said judgment caused to be sold at sheriff's sale upon the 6th of February, 1860, the whole estate in the said land which had been so mortgaged to them under the provisions of the said statutes, and at such sale the corporation of the city of Montreal being the highest bidders therefor became the purchasers of the said land and premises at and for the sum of $7,000, paid to the sheriff by whom the said sale was made. The mortgaged estate thus realized less than the amount secured by the said mortgages, and thereby the corporation of the said city in their character of surety for the said borrowers became liable under the said

statutes to the said Trust and Loan Company for the balance.

The said *grevé* died upon the 25th of October, 1883, and the sole question now is as to the estate acquired by the said corporation by their purchase at the said sheriff's sale.

It is not questioned that the said estate in substitution was subject to the mortgages so as aforesaid executed equally as was the estate of the *grevé*, and was liable to be sold for satisfaction of the claim of the Trust and Loan Company, but it is contended that the proper form of procedure to enable the mortgagees to sell the land in which the plaintiff had the estate in substitution, was not pursued inasmuch as the curator to the substitution had not been made party to the action in which the judgment upon which the sale took place was rendered.

It is not suggested that if the curator to the substitution had been made a party to that action it would have derived any benefit or could have prevented the land and premises mortgaged from being sold for the purpose of satisfying the judgment recovered for default in payment of the moneys secured by the mortgages. It appears obvious upon the evidence that the joint and several covenants of the *grevé* and the curator to the substitution were, in view of the impecunious condition of the institute and the substitute, of value only as providing a mode of reaching by judicial process the land and premises mortgaged, all remedies against which the statute, 16 Vict. c. 25, sec. 1, seems to have required to be exhausted before the guarantee of the Corporation of the City of Montreal should become exigible.

Under the circumstances above appearing there cannot, I think, be entertained a doubt that the claim of the Trust and Loan Company under the mortgages

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Gwynne J.

so as aforesaid judicially authorised, constituted by force of the special statute (16 Vict. c. 25), a privileged claim superior to and in preference over the substitution, and consequently that by force of articles 950-951 and 953 C. C. and art. 710 C. C. P., the sheriff's sale on the execution issued upon the judgment recovered in the action instituted by the mortgagees, the Trust and Loan Company, effectually passed the whole estate, that of the substitute as well as that of the *grevé*, all which was made subject to the mortgages for realising payment of the moneys secured by which the judicial sale took place, and that therefore, upon the death of the *grevé* such judicial sale was not dissolved in favour of the substitute, the present appellant.

The appeal must, in my opinion, be dismissed with costs.

SEDGEWICK J. concurred in the opinion that the appeal should be dismissed with costs.

KING J. dissented being of opinion that the appeal should be allowed.

GIROUARD J.—Lors de la plaidoirie orale devant nous, j'étais sous l'impression que le défaut d'avoir mis en cause le tuteur à la substitution était un juste motif de nullité du décret, à l'encontre de l'appelé à la substitution; mais après une plus sérieuse étude de la question, je suis arrivé à une toute autre conclusion. D'après les dispositions de nos Codes—qui ont simplement reproduit le droit ancien—il faut le supposer jusqu'à preuve du contraire; *Herse* et *Dufaux* (1); la seule conséquence de ce défaut est que le jugement qui a donné lieu à la saisie n'est pas chose jugée contre

(1) 9 Moo. P. C. 281.

l'appelé, tandis qu'il le serait, si le curateur à la substitution eût été mis en cause. (C. C. art. 945, 959.)

La loi dit formellement que le décret par le shérif n'affecte, en aucune façon, les droits des appelés, sauf dans quelques cas spécialement mentionnés, et ce sans distinguer si le curateur à la substitution est en cause ou non. (C. C. art. 950, 953; C. P. C. art. 710.) Les ventes forcées de biens-fonds substitués sont assujetties à des règles particulières, qui, au moins avant le Code, ne reconnaissaient à l'appelé aucun droit à faire valoir avant l'ouverture. *Trust and Loan Co. of Upper Canada* v. *Vadeboncœur* (1); *Wilson* v. *Leblanc* (2); voir sous le Code l'art. 956.

L'article 710 du Code de Procédure Civile (art. 781 du nouveau Code), postérieur au Code Civil, et beaucoup plus large que l'art. 953 de ce dernier, ajoute :—

Le décret ne purge pas les substitutions non ouvertes sauf le cas où il existe une créance antérieure ou préférable, apparente dans la cause.

Les auteurs et la jurisprudence sont unanimes à regarder comme une charge de la substitution les grosses réparations, et à plus forte raison, la reconstruction des édifices incendiés, particulièrement de ceux dont le revenu était, aux yeux du substituant, et en fait, nécessaire au soutien de tous les bénéficiaires de la substitution, ce qui existe dans l'espèce, puisqu'il le déclare alimentaire et insaisissable, et que ces immeubles formaient tout leur avoir. C. C. art. 947, 951, 958; *In re Desrivières* (3); *Caty* v. *Perrault* (4); Thevenot d'Essaule (Ed. Mathieu) nn. 685, 689, 691, 692 et page 463.

Au numéro 685, Thevenot dit :

Quant aux grosses réparations, le grevé n'est point obligé de les faire; par exemple, s'il s'agit de relever et reconstruire des choses tombées par vétusté, ou par force majeure, sans qu'il y ait faute de sa part.

(1) 4 L. C. Jur. 358.
(2) 13 L. C. Jur. 201.
(3) 12 R. L. 649.
(4) 16 R. L. 148.

1898

VADEBONCŒUR v. THE CITY OF MONTREAL.

Girouard J.

Au No. 686, il ajoute:

Que si le grevé les a faites, il est fondé à en répéter le montant, lors de la restitution des biens. Il y a une loi qui le dit expressément, pour l'héritier grevé qui a reconstruit les maisons incendiées.

Thevenot n'exige pas même l'autorisation du conseil de famille: Dénizart, *vo.* "Subs." no. 109, et Lacombe, *vo.* "Subs." p. 183, no. 10, sont du même avis. A plus forte raison, la substitution est-elle responsable du coût de ces reconstructions, lorsque, comme dans l'espèce, elles ont été autorisées en justice? Dans le premier cas, l'appelé pourra contester l'urgence ou la valeur des réparations ou constructions; dans le second, l'autorisation en justice est chose jugée contre lui (C. C. Art. 959) à moins qu'il ne prouve la fraude ou la collusion entre le grevé, le tuteur à la substitution et le créancier. Ici rien de semblable n'est allégué. L'ordre du juge a été régulièrement obtenu suivant la pratique immémoriale suivie dans la province de Québec, et l'appelant admet lui-même que les bâtiments érigés avec les fonds empruntés, valent aujourd'hui même la somme de $9,600, le montant total des emprunts. Je considère donc que les hypothèques en question en cette cause sont valides aux yeux du droit commun et constituent une réclamation préférable aux termes de l'art. 710 du Code de Procédure. A plus forte raison doit il en être ainsi en face du Statut, 16 Vict. ch. 25, qui a autorisé le cautionnement de la cité de Montréal, et à mon avis, c'était plutôt pour l'obtenir que pour valider les emprunts, qu'il fut passé. Même si le doute était permis sur ce point, les termes du statut sont si clairs, si larges, qu'il est impossible de ne pas considérer la réclamation comme préférable, ainsi que M. le juge Gwynne le démontre. Ce point ne me paraît pas sérieusement contesté par l'appelant.

L'intimée a été forcée d'acheter les biens substitués pour protéger son cautionnement, et elle le fit, non pas à vil prix, mais en payant la pleine valeur de l'immeuble, savoir $7,000, puisque cinq ans plus tard elle le vendait, à l'encan public, à Michel Laurent, pour $6,800, sans qu'il n'apparaisse aucune détérioration ou dépréciation extraordinaire. Tous ces faits apparaissent au dossier; l'incendie des lieux au grand feu de 1852, dont le grevé n'était certainement pas responsable; l'autorisation de l'intimée par la Législature de se porter caution des victimes du feu, pour reconstruire les édifices incendiés; l'autorisation du conseil de famille et du juge au grevé et au tuteur de la substitution de faire les emprunts; les hypothèques consenties par les deux tant sur les bâtisses que le fonds; le jugement basé sur toutes ces hypothèques; le décret par le shérif en exécution du dit jugement et paiement des dits emprunts et enfin la valeur actuelle des bâtisses. Tous ces faits, notamment la bonne foi de toutes les parties, sont apparents dans la cause; et d'après la jurisprudence bien établie de la province de Québec, tant avant le Code que depuis, ils constituent une créance préférable apparente dans la cause, aux termes de l'article 710 du Code de Procédure Civile, c'est-à-dire, une créance qui prime la substitution elle-même et pour laquelle l'appelé est responsable, absolument comme il l'est pour une dette du substituant, ou une hypothèque antérieure à la substitution, et pour le paiement de laquelle le créancier n'est pas obligé d'attendre l'ouverture de la substitution ou de provoquer la nomination d'un curateur à la substitution, mais peut procéder à l'échéance contre le grevé absolument comme s'il n'y avait pas de substitution, C. C. 2060; Voir aussi, Laurent, Vol. 14, n. 565; Actes de Notoriété, p. 407; Héricourt, Des Im., p. 150; Dénizart, *vo.* "Subs." nn. 99,102,103; Lacombe, *vo.* "Subs." p.

1898

VADEBONCŒUR v. THE CITY OF MONTRÉAL.

Girouard J.

180, n. 2. C'est ce que fit le créancier dans l'espèce; il fit vendre l'immeuble par le shérif, sur le grevé, qui alors était le seul propriétaire connu *animo domini*, (C. P. C. art. 632), et à mon avis, cela suffisait aux termes de l'art. 710, qui est exorbitant du droit ordinaire en matière de décret. Cet article n'exige pas que le tuteur à la substitution soit en cause, et je ne crois pas que les tribunaux doivent imposer cette formalité.

Il en serait autrement si le shérif n'eût vendu que les droits du grevé, ainsi que la Cour de Revision l'a supposé; alors il n'y aurait pas lieu de se méprendre sur la portée du décret; mais, ici le shérif ne fait mention du grevé que pour indiquer qu'il vend sur le grevé, non pas ses droits simplement, mais tout l'immeuble, sans en rien réserver. Il eut été, sans doute, plus prudent de mettre en cause le curateur à la substitution et peut-être plus conforme à la pratique ordinairement suivie, mais il me semble que les tribunaux ne doivent pas exiger l'accomplissement de cette formalité, à peine de nullité du décret, lorsqu'il n'y a aucune loi qui la prononce ou fasse même mention de cette formalité; et qu'au contraire l'article 710 semble prévoir le cas où il n'est pas en cause et qu'enfin il y a absence totale de griefs de la part de l'appelant.

La majorité de cette cour est donc d'avis de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Lamothe, Trudel & Trudel.*

Solicitors for the respondent: *Roy & Ethier.*

THE NORTH-WEST ELECTRIC COMPANY, LIMITED (DEFENDANT).. } APPELLANT;

1898
*Mar. 3, 4.
*Oct. 13.

AND

MARY C. WALSH (PLAINTIFF).....RESPONDENT.

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

Company—Directors—By-law—Ultra vires—Discount shares—Calls for unpaid balances — Contributories — Trustees — Powers — Contract — Fraud—Breach of trust—Statute, construction of—C. S. M. c. 9 Div. 7—R. S. M. c. 25, ss. 30, 33.

The directors of a joint stock company incorporated in Manitoba have no powers under the provisions of "The Manitoba Joint Stock Companies Incorporation Act" to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment without the sanction of a general meeting of the shareholders of the company is invalid.

A by-law or resolution of the directors of a joint stock company which operates unequally towards the interests of any class of the shareholders is invalid and *ultra vires* of the company's powers.

Where shares in the capital stock of a joint stock company have been illegally issued below par the holder of the shares is not thereby relieved from liability for calls for the unpaid balances of their par value.

Judgment of the Court of Queen's Bench for Manitoba (11 Man. L. R. 629) reversed, Taschereau J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Manitoba (1) reversing the judgment of the trial court by which the plaintiff's action was dismissed with costs.

The plaintiff brought suit claiming that she was the owner of a number of shares in the capital stock

PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 11 Man. L. R. 629.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

of the company which had been issued to her as fully paid up and non-assessable on payment of a sum less than the face value thereof under an agreement between her and the directors that the shares should be so issued to her at a discount, and asked for a declaration that certain calls made upon her said shares and the forfeiture thereof for non-payment of the calls were illegal and void, and alternatively that she should be reinbursed the actual sum paid by her for the shares in question. The case was tried before Sir Thomas W. Taylor, Chief Justice of Manitoba, who dismissed the action with costs, but on appeal to the full court, his judgment was unanimously reversed, and it was ordered that a judgment should be entered in favour of the plaintiff under certain terms and conditions and saving certain rights of persons therein mentioned.

A statement of the facts and questions of law at issue in the case appears in the judgment of the court as delivered by His Lordship, Mr. Justice Sedgewick.

Ewart Q.C. for the appellant. All the judges in the courts below found that the directors as promoters of the company acted fraudulently in allotting these shares at a discount and thereby giving an advantage over other shareholders. There was no express contract that the shares should be issued at the discount allowed, and the respondent who received them knew that the action of the directors was a fraud upon the company and that the company was not bound by their agreement. The transaction was managed by the plaintiff's husband, who was her agent and at the same time a promoter, a director and the trustee of the company. This case is similar to *Dr. Daniell's Case* (1) which was followed in the case of *McCraken* v. *McIntyre* (2), and reference made to it at pages 494,

(1) 22 Beav. 43; 1 DeG. & J. 372. (2) 1 Can. S.C.R. 479.

and 527. See also *Welton* v. *Saffery* (1), per Macnaughten L. J. at page 321; *Re Western of Canada Oil Co.*; *Carling Hespeler & Walsh's Cases* (2), per Mellish L. J. and James L. J.; *Leeke's Case* (3); *Re Disderi & Co.* (4); *Re Canadian Oil Works Corporation*; *Hay's Case* (5); *Re Railway Time Tables Publishing Co.* (6), per Lindley L. J. at page 115, and Bowen L. J. at page 117; *Re Cachar Co.*; *Lawrence's Case* (7); *Re Madrid Bank*; *Wilkinson's Case* (8); *Re Addlestone Linoleum Co.* (9), and *Oakes* v. *Turquand* (10) at pages 351 and 352. The plaintiff, through her agent, had full knowledge of the circumstances, and chose to place herself in a position to take advantage of any benefits that might be obtained, and as holder of the stock she should be compelled to bear the burthens of it. See remarks of Richards C. J. in *McCraken* v. *McIntyre* (11) at pages 495 and 510. See also *In re Reese River Silver Co.*; *Smith's Case* (12) and *The Central Railway Co. of Venezuela* v. *Kisch* (13) at page 125; *Preston* v. *Grand Collier Dock Co.* (14.) It was a surreptitious and fraudulent dealing; *Panama & S. Pac. Tel. Co.* v. *India Rubber, etc. Co.* (15), per James L.J. at page 527. See Lindley on Companies (5 ed.) at page 781 and the cases cited in support of the statement there made as to contributories.

The issue of shares at a discount is illegal under English law; *Welton* v. *Saffery* (1); it is also illegal under Canadian law, *McCraken* v. *McIntyre* (11) at page 509, and the Manitoba Statute, R.S.M. c. 25, ss. 30 and

(1) (1897) A.C. 299.
(2) 1 Ch. D. 115.
(3) L.R. 11, Eq. 100; 6 Ch. App. 469.
(4) L. R. 11 Eq. 212.
(5) 10 Ch. App. 593.
(6) 42 Ch. D. 98.
(7) 2 Ch. App. 412.
(8) 2 Ch. App. 536.
(9) 37 Ch. D. 191.
(10) L.R. 2 H.L. 325.
(11) 1 Can. S.C.R. 479.
(12) 2 Ch. App. 604.
(13) L.R. 2 H.L. 99.
(14) 11 Sim. 327.
(15) 10 Ch. App 515.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

33, gives no power to make by-laws *contrary to law*, even by implied construction. See *Mollwo, March & Co.* v. *Court of Wards* (1), followed in *Pooley* v. *Driver* (2). A misapprehension of the law by the Legislature does not make that the law which it has erroneously assumed the law to be: *Earl of Shrewsbury* v. *Scott* (3) at page 53.

In this case it is not pretended that any general meeting of the company ever dealt with this issue of the stock at a discount. The discount resolution was in February, 1890, but in October, 1889, the company had covenanted with the Edison Electric Light Company that all shares (save their 200) "shall be of the par value of $100 each * * * and shall be issued for full payment in cash only." A general meeting of the company was held between these dates, and it is fair to assume that the agreement was then either expressly, or impliedly, approved by the company; *Re British, Provident Life & Fire Assur. Co.; Coleman's Case* (4) at page 503; and if so the company had (within the precise wording of section 30) "at a general meeting of the company" absolutely declared that the shares should not be issued at a discount. It was, therefore (upon any construction of the statute), impossible for the directors to issue the shares below par. Even if this cannot be assumed the company had under its seal made the requisite declaration, and the directors had no power to disregard what the company had thus done.

The director's resolution was *ultra vires*, because it was unreasonable—this, apart from any statute. Shareholders are entitled to be treated equally and fairly by the directors. Even majorities of shareholders have no power to infringe that equality.

(1) L.R. 4 P.C. 419.
(2) 5 Ch. D. 458.
(3) 29 L.J.C.P. 34.
(4) 1 DeG. J. & S. 495.

Lindley on Companies (5 ed.) 396; Brice on Ultra Vires (3 ed.) 195-196; *Menier* v. *Hooper's Telegraph Works* (1), at page 353; *Ex parte Cowen* (2); *Beatty* v. *Northwest Transportation Co.* (3); *Hutton* v. *Scarborough Cliff Hotel Co.* (4). Issuing shares at a discount, even to all the shareholders, is a breach of the equality—for some shareholders may possibly not be able to take them. *Guinness* v. *Land Corporation of Ireland* (5); *Ashbury* v. *Watson* (6).

The plaintiff cannot complain of any misrepresentations by the company as to the character of the shares, or its power to allow the discount because the scheme was a fraud perpetrated by Walsh himself, and in any case, the company, as distinguished from individual directors, is not chargeable with such misrepresentations. *Houldsworth* v. *City of Glasgow Bank* (7); *Re Addlestone Linoleum Co.* (8); *Lynde* v. *Anglo-Italian Hemp Spinning Co.* (9).

As to the alternative claim the plaintiff never has repudiated the shares, and does not now claim to do so; upon the contrary she has obtained a judgment declaring that she is the owner of fifty-three of them. She is therefore not in a position to claim rescission. Lapse of time alone would be a sufficient bar to any such claim. *Clarke* v. *Dickson* (10); *Sharpley* v. *Louth & East Coast Ry. Co.* (11).

J. Stewart Tupper Q.C. for the respondent. This case cannot be governed by English cases decided under the English statute, which contains a clause respecting breaches of trust upon which those cases rely. The

(1) 9 Ch. App. 350.
(2) 2 Ch. App. 563.
(3) 6 O. R. 300; 11 Ont. App. R. 205; 12 Can. S. C. R. 598; 12 App. Cas. 589.
(4) 2 Dr. & Sm. 514.
(5) 22 Ch. D. 349.
(6) 30 Ch. D. 376.
(7) 5 App. Cas. 317.
(8) 37 Ch. D. 191.
(9) [1896] 1 Ch. 178.
(10) E. B. & E. 148.
(11) 2 Ch. D. 663.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

statute which determines the powers and rights questioned here has no such clause. There was no fraudulent intention in respect to the issue of the stock in question in this case; it was honestly made in the belief that the power to do so existed, however, incidentally, the trustees may have erred in their duties.

The company allowed the respondent to exercise her full privileges as owner of the shares, and to attend the next annual meeting of the company and to vote thereat by her attorney, and also to transfer two of the shares to her husband, which transfer was duly registered by the company, and the shares transferred in the books. See *In re British Provident Fire & Life Assurance Co.; Lane's case* (1); *Re British Provident Fire & Life Assurance Co., Grady's Case* (2); *Phosphate of Lime Co.* v. *Green* (3); clear evidence of the adoption of the contract is also found in the action of the appellant in making calls upon the shares and in taking proceedings to forfeit the shares for non-payment of calls. The husband was managing director until March, 1890, but he had no connection with the company as shareholder or director for eight months previous to the issue of the share certificate to the respondent on the 24th of February, 1891.

The Manitoba Act provides for the creation of corporations, and the liability of shareholders to creditors is expressly declared by section 44. Their liability to the company and to each other is by section 49 "for all sums of money by them subscribed." Not only is there no prohibition against issuing shares at a discount, but sub-section (*b*) of section 30 and sub-clause (*d*) of section 72 are clear recognitions of such a power. See the language of Maclennan J. A. in *Re Ontario Express and*

(1) 33 L.J. Ch. 84; 1 DeG. J. & S. 504.
(2) 32 L.J. Ch. 326.
(3) L.R. 7 C.P. 43.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Transportation Company (1) at page 661. There are no such provisions in the English Act under the provisions of which (secs. 7, 8 and 11) the Court of Appeal in England reversed the decision of Mr. Justice Chitty, who, so recently as 1888, held that a company could issue its shares at a discount: *In re Almada and Tirito Co.* (2). See also *In re Addlestone Linoleum Co.* (3); *Ooregum Gold Mining Co.* v. *Roper* (4); *In re Railway Time Tables Publishing Co.* (5).

In the Manitoba Act, by section 30, the directors are empowered "to administer the affairs of the company," and to make any description of contract which the company might, by law, enter into, also to make by-laws, not contrary to law or to the Letters Patent of the Company to regulate the allotment of stock; and by section 33 it is declared that, if the Letters Patent make no other definite provision, the stock of the company shall be "allotted" when and as the directors by by-law or otherwise may ordain." It seems quite clear that the appellants had power to sell the respondent the shares in question at a discount, and that the proviso (*b*) to this section is intended to limit the powers of the directors only when a price, either at a premium or discount has been fixed by the shareholders for the shares. As a matter of fact, however, the shareholders had authorized the transaction in question by by-law No. 2, in which authority was conferred on the trustees to dispose of the stock on such terms as they saw fit. In any event the respondent was entitled to assume that the sanction of the shareholders had been obtained so as to make the issue legal; *Royal British Bank* v. *Turquand* (6); Lindley on Companies 166; *County of Gloucester Bank* v. *Rudry Merthyr*

(1) 21 Ont. App. R. 646.
(2) 38 Ch. D. 415.
(3) 37 Ch. D. 191.
(4) (1892) A.C. 125.
(5) (1895) 1 Ch. 255.
(6) 6 E. & B. 327.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Steam etc. Co. (1). The onus was on the appellants to show that the action of the directors was unauthorized by the shareholders, and no such evidence was given. This subsequent ratification is equivalent to prior authorization; *Irvine* v. *Union Bank of Australia* (2).

The use of the word "bonus" does not prevent the sale of the shares in question being a sale at a "discount," as it is the substance of the transaction which governs, not the language with which it may be clothed: *In re Licensed Victuallers Mutual Trading Association* (3); *In re Faure Electric Co.* (4); *In re London Celluloid Co.* (5); *In Re New Chile Gold Mining Co.* (6).

The agreement with the Edison Company could not confer authority on the appellants to make the calls. At most that transaction would merely give a right of action to the Edison Company against the appellants. Nor need there be any serious discussion respecting the appellants' novel contention that they can "approbate and reprobate." It has been decided again and again that this cannot be done. The contention that the sale of the stock at a discount was proof of fraud is idle in view of the fact fact that there was no evidence to show that the stock was worth more than the respondent gave for it. But even if there had been fraud, the appellant company had to repudiate or affirm the contract. It was bound to accept or reject it as a whole. The contract was to pay $3,200, and it cannot be turned into an agreement to pay $16,000. *Currie's Case* (7); *DeRuvigne's Case* (8); *Anderson's Case* (9); *Waterhouse* v. *Jamieson* (10).

If the company had no power to issue shares at a discount we should recover the money paid on the

(1) [1895] 1 Ch. 629.
(2) 2 App. Cas. 366.
(3) 42 Ch. D. 1.
(4) 40 Ch. D. 141.
(5) 39 Ch. D. 190.
(6) 38 Ch. D. 475.
(7) 3 DeG. J. & S. 367.
(8) 5 Ch. D. 306.
(9) 7 Ch. D. 75.
(10) L. R. 2 H. L. Sc. 29.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

ground that there was an entire failure of consideration. *In re Ince Hall Rolling Mills Company* (1); *In re Railway Time Table Publishing Company*; *Ex parte Sandy's* (2). Lindley on Companies, (5 ed.) pp. 189, 235. Mere laches do not disentitle the holder of shares to relief against an invalid forfeiture. *Garden Gully United Quartz Mining Co.* v. *McLister* (3). Besides such a defence is not open to the appellants, as it is not raised in the pleadings: *Clarke* v. *Hart* (4).

TASCHEREAU J. (dissenting).—I would dismiss this appeal. The reasoning of Mr. Justice Killam seems to me unanswerable.

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

SEDGEWICK J.—The respondent's husband was a promoter and corporator and the original managing-director of the appellant company. The company was incorporated on the fifteenth of June, 1889, by letters patent, issued under the provisions of the Manitoba Joint Stock Companies Incorporation Act, (Consolidated Statutes of Manitoba), ch. 9, div 7, with a capital of one hundred thousand dollars divided into one thousand shares of one hundred dollars each, the object of the company being the carrying on of an electric lighting and power business in the province.

The applicants were George H. Strevel, Frank J. Walsh, Jefferson Davis, James W. Johnston and Henry J. Dexter, each of whom had subscribed twenty shares of the capital stock of which they at first had paid ten per cent and eventually the remaining eighty per cent.

(2) 23 Ch. D. 545, note.
(1) 42 Ch. D. 98.
(3) 1 App. Cas. 39.
(4) 6 H. L. Cas. 633.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

The applicants were the provisional directors of the company.

On the fifteenth of July, 1889, the provisional directors passed the following resolution :

That whereas an agreement was entered into by this provisional board with the negotiators and the persons by whom money is advanced on mortgage bond security for the establishment of the business of the company, which agreement requires the handing over to trustees the amount of all unsubscribed stock fully paid up and non-assessable, to be disposed of as such trustees see fit, on the production of the necessary cash surrender value of mortgage bond or bonds, be it resolved therefore that this Board hereby nominate F. G. Walsh and H. J. Dexter, trustees, and direct the issue to them of nine hundred (900) shares of this company, fully paid up and non-assessable for the above purposes.

It may be here noted that as a matter of fact there was no agreement ever come to or even contemplated such as was that referred to in this resolution. Nor was any money advanced by any person whatever for the purpose mentioned and no one has ever yet been able to give an intelligent or reasonable account of its meaning or object. However at a meeting of the shareholders of the company subsequently held this resolution was confirmed and incorporated in the by-laws of the company as follows :

BY-LAW No. 2.—Be it enacted that the remainder of the capital stock, to wit, nine hundred (900) shares be issued to enable this company to carry out the spirit of resolution passed on the fifteenth day of July, 1889, which reads as follows : "That whereas an agreement was entered into by this provisional board with the negotiators and the persons by whom the money is advanced on mortgage bond security for the establishment of the business of the company, which agreement requires the handing over to trustees the amount of all unsubscribed stock fully paid up and non-assessable to be disposed of as such trustees see fit on the production of the necessary cash surrender value of mortgage bond or bonds, be it resolved therefore that this board hereby nominate F. G. Walsh and H. J. Dexter, trustees, and direct the issue to them of nine hundred (900) shares of this company, fully paid up and non-assessable for the above purposes."

This by-law likewise is as inexplicable as the resolution upon which it was based, but the directors acting upon it issued to F. G. Walsh and Henry J. Dexter, as trustees, the remaining nine hundred outstanding shares of the company in the following form:

THIS CERTIFICATE entitles F. G. Walsh and Henry J. Dexter, trustees, to nine hundred (900) shares in the capital stock of the Northwest Electric Company (Limited), fully paid up and non-assessable, and transferable in the books of the company in person or by attorney on surrender of this certificate.

Another extraordinary thing had occurred before the issue of this certificate. On the seventeenth of October, 1889, the company entered into a contract with the Edison Electric Light Company, by which the latter company was to transfer the use of certain patents relating to electric light in consideration of which and of the sum of four thousand dollars in cash the company agreed to deliver to the Edison company two hundred fully paid up shares of its capital stock, agreeing at the same time that the remaining six hundred shares should be issued only after full payment in cash.

At a meeting of the directors of the company held on the 3rd February, 1890, the following resolution was passed:

That whereas by-law No. 2 appointed Frank G. Walsh and Henry J. Dexter trustees of nine hundred shares of the capital stock of this company for the purposes set forth in the by-law; and whereas the said trustees have reported the allotment of certain portions of trust stock in the following manner, to wit: James McNaught, St. Paul, one hundred and sixty shares; Joseph M. Graham, Winnipeg, Man., one hundred and sixty shares; Edison Light Company, New York, two hundred shares on the conditions that a bonus be received from each of the allottees, as follows: From James McNaught, the sum of $3,200 cash; from Joseph M. Graham, the sum of $3,200 cash; Edison Electric Light Company, the sum of four thousand dollars cash; and have further allotted of such stock to Mary E. Dexter and Mary

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

C. Walsh of Winnipeg, in consideration of and in the following manner, viz.: Mary E. Dexter, one hundred and sixty shares, and Mary C. Walsh, one hundred and sixty shares of fully paid up and non-assessable stock, for which each of them is to pay a bonus, within twelve months from the date hereof, the respective sums of $3,200. Be it resolved that the board hereby ratifies and confirms the same and directs the secretary and president or vice-president to issue certificates subject to such conditions and allow the necessary transfer to be made in the transfer books.

Certificates were accordingly issued to McNaught, Graham and Mary E. Dexter, for one hundred and sixty shares each and to the Edison Electric Light Company for two hundred shares, and on the 3rd of February following, Walsh, the husband of the respondent, paid to the company $3,200, and on its receipt she was entered upon the lists of the company's shareholders and received a certificate that she was the owner of one hundred and sixty shares, fully paid up and non-assessable in the capital stock of the company. The respondent subsequently transferred two of these shares to her husband.

It is not contended that Mrs. Walsh was a purchaser for value without notice, or that she has any greater rights than her husband would have had had he issued the shares to himself, so that for the purposes of this opinion I propose to treat him as the real plaintiff and not his wife.

So far it would seem that all the stock of the company had been disposed of, and that seven hundred of these shares had realised not $70,000 as they would have, had they been sold at par, but only $14,000, the holders of the other shares having paid for them $30,000.

It might here be observed that whether this transfer to the directors and their wives at eighty per cent below par was legal or not, it was especially flagitious because of the existence of the agreement to

which I have referred between the appellant company and the Edison Electric Light Company. Doubtless the consideration which influenced the Edison Electric Light Company in making their venture was the fact that the whole of the capital stock would be subscribed and paid for in full, it being evident that nothing would be more likely to impair the success of the concern than any serious curtailment of the statutory capital.

And so it happened sometime previous to the 10th of September, 1891, that the company became seriously involved in financial difficulties. The debts amounted to about $98,000, a judgment had been recovered for $1,100, and other creditors were pressing for payment of their claims. The then shareholders of the company made an investigation into its affairs when the manipulations above stated in regard to the stock became known and the company was advised that the directors and shareholders who had received the seven hundred shares at less than par were liable to pay the balance. On the 10th of September, 1891, a resolution was passed authorizing the company to make two calls of twenty per cent each upon the stock. These calls were duly made, and all of the shareholders except Mrs. Walsh and her husband, who held the two shares, paid the eighty per cent, they alone refusing to do so. Their stock was thereupon declared forfeited, and certain portions of such forfeited stock were subsequently sold by the directors at eighty cents, fifty-three shares still remaining in the treasury undisposed of, although this was not known to the plaintiff at the commencement of the action.

The plaintiff thereupon brought this suit claiming that she was the owner of one hundred and fifty-eight shares of $100 each of fully paid up and non-assessable stock of the company, and that the defendant's actio "

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

in making said calls and forfeiting said stock was illegal, and that the company's register be amended so as to show the plaintiff the holder of said stock; asking in the alternative, for a declaration that the defendants were indebted to the plaintiff in the sum of $3,200, and that they may be ordered to pay the same, etc.

The case was tried before Sir Thomas Taylor, Chief Justice of Manitoba, who dismissed the plaintiff's claim. But his judgment was unanimously reversed upon appeal before Dubuc, Killam and Bain JJ.

The first question to be determined is as to the legality of the issue below par of these one hundred and sixty shares, above referred to, to Mrs. Walsh.

I am of opinion, as in fact all the judges below in dealing with the case seem to have held, that they were illegally issued and that the by-law and resolution upon which such issue purported to be based were absolutely void in so far as they authorized the issue of stock for a sum of money below par.

Three considerations lead me to this conclusion.

In the first place it is elementary law that no joint stock company can issue stock below par unless authorized to do so by the legislature under whose authority it was created. A joint stock company is as a rule a trading association, and except for the limitations of its charter or of the creating statute each of its members would be liable to the uttermost farthing for every obligation of the association. The legislature however gives immunity to the shareholders either in whole or in part in consideration of each member paying in to the company's treasury a fund which in the judgment of the legislature will be sufficient protection to the public against its probable liabilities. In other words the company on behalf of its members contracts for their immunity from obligation in consideration of their providing a fund which the legis-

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

lature on behalf of and for the protection of the public considered sufficient for that purpose, the dominant and cardinal principle being that the investor purchases immunity from liability beyond a certain limit on the terms that there shall be and remain a liability up to that limit. The principle that no joint stock company unless expressly authorized can issue its stock below par is taken for granted by this court in the case of *McCraken* v. *McIntyre* (1), and has been reiterated over and over again in the House of Lords and Privy Council, notably in the recent cases of *Ooregum Gold Mining Company of India* v. *Roper* (2), and in *Welton* v. *Saffery* (3), so that so far as the general principle is concerned there can be no question of controversy. But it is contended that under the special provision of the Manitoba Joint Stock Companies Incorporation Act, now chapter 25 of the revision of 1891, such special authority has been given or may be inferred as being possessed by companies incorporated under it. Section 30 is mainly relied upon in support of this contention. After providing that the directors may make any description of contract which the company might by law enter into and make by-laws not contrary to law or to the letters patent of the company to regulate the allotment of stock, the making of calls thereon, the payment thereof, the forfeiture of stock for non-payment and the disposal of the forfeited stock, etc., etc., it contains the following proviso.

> Provided also that no by-law for the allotment or sale of stock at any greater discount or any less premium than that which had been previously authorized at a general meeting or for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at an annual meeting or a special general meeting.

(1) 1 Can. S. C. R. 479. (2) [1892] A. C. 125.
(3) [1897] A. C. 299.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

This proviso doubtless gives rise to some difficulty and at first sight would seem to lead to the conclusion that the legislature did suppose that the company might sell its stock at a discount without special authorization and enacted this particular clause under the impression that such was the law. There is no other provision in the statute indicating this intention except as may be inferred from the power of allotment. But the word "allotment" has no connection whatever with the amount to be paid for stock, but only with the number of shares which may be issued to this or that individual altogether irrespective of the consideration to be paid for it. So that there being no conveyance of direct power to the directors, the proviso must refer either to cases where possibly the letters patent themselves give authority to issue stock below par (on the legality of which I do not express an opinion), or to cases where the company incorporated under the general Act may have had special power conferred upon it by special Act, or it may possibly refer to cases where before issue of stock a general meeting has determined upon the amount beyond par at which the stock should be sold, and the proviso limits the power of the directors to issue below that amount except under the specified conditions. But whatever the draftsman of this clause or the legislature which passed it had in view, I am perfectly satisfied that it cannot be held to authorize the directors of the company to destroy its capital stock, as they have here to some extent attempted to do, and thereby nullify the checks and guards which the legislature has wisely provided in order to the protection of the public interest.

But in addition to this it may be observed that any enactments of the legislature as to what the law is, is not of itself equivalent to the making of the law. The

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

enactment is no doubt of great weight as evidence of the law, but it is by no means conclusive, and when the existing law is shewn to be different from that which the legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence. *Mollwo March & Co.* v. *Court of Wards* (1).

A misapprehension of the law by the legislature would not have the effect of making that the law which the legislature had erroneously assumed it to be. *The Earl of Shrewsbury* v. *Scott* (2).

In the second place the by-laws and resolutions are bad because, assuming the proviso to authorize the issue of stock below par, the issue in the present case was not confirmed at any annual or special meeting of the company.

And in the third place the by-laws and resolutions were bad upon the general common law principle that a by-law must not be unreasonable or work unequally towards members of any one class affected by it. In the case of the present by-law there are many flagrant inequalities. McNaught and Graham were to get their stock upon payment of twenty per cent cash down. The Edison Electric Light Company were to get their stock upon payment of twenty per cent cash down, but in addition they were to hand over valuable patents in connection with the work of the company, while Mrs. Walsh and Mrs. Dexter, the wives of the two trustees specially charged to protect the interests of the company, were not required to pay cash down but were allowed a whole year to pay the twenty per cent.

This clear, manifest and gross favouritism stamps the by-law upon its face as invalid.

(1) L. R. 4 P. C. 437.

(2) 29 L. J. C. P. 34.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

I take it then to be clear for these reasons that the issue of the stock was illegal and *ultra vires* of the company.

I am further of opinion that the company, so soon as they were aware of the fact that the directors had illegally issued the stock in question, not only had a perfect right but it was their duty not to repudiate the bargain but to enforce it by making the necessary calls.

The fact that the respondent held a paper which upon its face stated that she held so much stock paid in full, while evidence of the statement, was not conclusive evidence of it. As a matter of fact, the stock was not fully paid up and the existence of the certificate could not by any possibility be equivalent to full payment. The statute gives power to the directors to call in and demand from the shareholders all sums of money due for payment of stock and to enforce all calls for interest thereon by action in a competent court.

Apart from the operation of the doctrine of estoppel I know of no reason why any holder of stock which has not been paid for in full should not be liable for the balance due in respect of it. The latest case dealing with this particular phase of the question is *Bloomenthal* v. *Ford* (1). That was a case where the appellant lent money to a limited company upon the terms that he should have as collateral security fully paid up shares in the company and the company handed to him certificates as of fully paid up shares. No money had in fact been paid upon the shares, but the appellant did not know this and believed the representation that they were fully paid up shares. It was held by the House of Lords that he was not liable to contribute in respect of these shares, but solely

(1) [1897] A.C. 156.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

upon the ground of estoppel. Had he taken the shares as security for the loan knowing the fact that they had never been issued at all and had come direct from the company's treasury to him, it is clear that the House of Lords would have held him liable as a contributory.

Then in the *Ooregum Case* (1), it was decided that the liquidator of the company should call upon the shareholders of the shares such as these in the present case for the balance due upon them for the purpose of paying the creditors of the company; while in *Welton* v. *Saffery* (2), carrying the doctrine to its fullest extent, it was held that shareholders might be called upon to contribute not only enough to liquidate the company's debts and the costs of winding up, but also a sufficient amount to adjust the rights of all the company's contributories *inter se*.

It is argued that inasmuch as there was a contract between the respondent and the company in respect to these shares, the company must confirm the contract *in toto* or not confirm it at all. I do not think that doctrine applies to a case such as this. This is not so much the case of a contract, the case of one party making a proposition and another accepting it in good faith. It is the case of a director having in his possession or under his control the treasury of the company and of his fraudulently, or to say the least, for his own personal advantage, helping himself to its contents at the expense of those whose interest he was bound to conserve and whose property he was obliged to protect.

In the present case the transaction would have been no different had these directors placed in the treasury an amount sufficient to pay for the stock they issued to themselves and then immediately taken out of it the eighty per cent. of their deposit. That is practically the present case. And to me it is impossible to con-

(1) [1892] A. C. 125. (2) [1897] A. C. 299.

1898

THE NORTH-WEST ELECTRIC CO. v. WALSH.

Sedgewick J.

ceive that when they are called upon to refund the eighty per cent dishonestly or illegally abstracted they can raise the defence which is made in the present case.

What Lord Justice Turner said in the *Daniell Case* (1) is extremely applicable here.

But it was argued on Mr. Daniell's behalf that the shareholders could not claim against him except on the footing of the resolution, and that if they claimed against him on that footing they must take the resolution as it stands, and treat him as a holder of shares in respect of which five pounds had been paid; that the contract into which he had entered could not be severed. This argument, however, rests as it seems to me upon this basis, that in determining this case we are to look to *contract and to contract only*, and I think that that basis is unsound. *There was, in truth, no contract in this case.* These shares were placed in the name of Dr. Daniell under no contract with the shareholders, but by the mere unauthorized act of the directors, of whom Dr. Daniell was one, and we are bound, I think, to consider this in determining the question before us. Taking then this consideration into account, how does this case stand? These two thousand four hundred shares were assets of the company. Dr. Daniell appropriated two hundred of them to himself. By that appropriation they were prevented from being disposed of for the benefit of the company. Can trustees (and directors of companies are trustees, or quasi-trustees) appropriate the trust property to themselves, and then say to their *cestuis que trustent:* "We took this property on the terms that we should not be liable for any loss which might arise upon it?" I think a court of equity would not permit this, but would view the matter in this light; there is a double breach of trust, a breach of trust in taking the property at all, and a further breach of trust in introducing this stipulation into the contract, and the *cestuis que trustent* must have the option of affirming the one breach of trust and disaffirming the other.

And so Lord Macnaghten in *Welton* v. *Saffery* (2), already referred to, says:

There, as it seems to me, lies the fallacy. How was the supposed contract made? Who gave the requisite authority for making it? Not the company, nor yet the shareholders. It is beyond the power of a limited company to limit the liability of the shareholders in a manner inconsistent with the memorandum of association. The directors therefore had no authority from the company to issue shares at a discount, or on any terms relieving the shareholders from liability to pay in full.

(1) 22 Beav. 43. (2) [1897] A. C. 299.

If the directors acted without authority, how can their action bind those who are supposed to have given them authority, but who, in fact, gave them none? The truth is, as it seems to me, that *there never was a contract between the company or the shareholders on the one hand and the persons to whom these discount shares were offered on the other.* There was an offer by the directors, purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the discount shareholders on the register; they allowed their names to remain until their remedy against the company was gone, and now they cannot be heard to say that they were not shareholders.

I could have understood that argument if I could have found a contract. It may be well that one party to a contract cannot escape from his obligations by pleading incapacity to perform them in full if the other party is willing to take something less than that which is bargained for. *But if there is no contract I cannot see what equity there is to compel a principal to submit to one set of conditions because his agent had attempted ineffectually to bind him to another and a different set.*

I take it that the maxim "*approbo non reprobo*" does not apply to or enure to the benefit of a trustee in transactions between him and his beneficiary when he has illegally attempted to secure a benefit for himself.

The beneficiary undoubtedly can approve and take advantage of all benefits accruing from his transactions and at the same time hold him responsible for all losses suffered therefrom.

I am of opinion that the ground taken by the respondent, and upon which the learned judges in the court of appeal reversed the original judgment, are untenable.

I think therefore that the appeal should be allowed and the judgment of the learned Chief Justice of Manitoba restored.

Appeal allowed with costs.

Solicitors for the appellant: *Ewart, Fisher & Wilson.*

Solicitors for the respondent: *Macdonald, Tupper, Phippen & Tupper.*

1898

*Mar. 8, 9.
*Oct. 13.

ALFRED BOULTBEE (PLAINTIFF).....APPELLANT;

AND

CASIMIR S. GZOWSKI, JR. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Principal and agent—Broker—Stock exchange custom—Sale of shares—Marginal transfer—Undisclosed principal—Acceptance—"Settlement"—Obligation of purchaser—Construction of contract—"The Bank Act," R. S. C. c. 120, ss. 70-77—Liability of shareholders—"Stock jobbing."

The defendant, a broker doing business on the Toronto Stock Exchange, bought from C, another broker, certain bank shares that had been sold and transferred to C by the plaintiff. At the time of the sale C was not aware that the defendant was acting for an undisclosed principal and the name of a principal was not disclosed within the time limited for "settlement" of transactions by the custom of the exchange. The transferee's name was left blank in the transfer book in the bank, but it was noted in the margin that the shares were subject to the order of the defendant who, three days after settlement was due according to the custom of the exchange, made a further marginal memorandum that the shares were subject to the order of H. The affairs of the bank were placed in liquidation within a month after these transactions and the plaintiff's name being put upon the list of contributories, he was obliged to pay double liability upon the shares so transferred under the provisions of "The Bank Act," for which he afterwards recovered judgment against C and then, taking an assignment of C's right of indemnity against the defendant, instituted the present action.

Held, that as the defendant had not disclosed the name of any principal within the time limited for settlement by the custom of the Exchange and the shares had been placed at his order and disposition by the seller, he became legal owner thereof, without the necessity of any formal acceptance upon the transfer books and that he was obliged to indemnify the seller against all

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

consequences in respect of the ownership of the shares, and the double liability imposed under the provisions of The Bank Act."

1898

BOULTBEE v. GZOWSKI.

APPEAL from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court of the High Court of Justice (2) which had reversed the decision of the trial court and ordered a judgment to be entered in favour of the plaintiff.

The plaintiff sued under an assignment from one Robert Cochran of a claim against the defendant which arose in respect of the sale of twenty shares of the Central Bank of Canada. The plaintiff, prior to the sale, was the owner of the shares and sold and transferred them to Cochran, who shortly afterwards sold them to the defendant. Within thirty days of this transfer the bank went into liquidation, and the plaintiff was placed on the list of contributories and compelled to pay double liability on the shares. The plaintiff claimed that Cochran was bound to indemnify him against such payment, and Cochran, while admitting such liability contended that Gzowski was in turn bound to indemnify him, and having assigned his claim to the plaintiff an action was brought by him against them both. In an action judgment was recovered against Cochran, but the action as against Gzowski was dismissed without prejudice to the rights of the plaintiff upon the ground that at the time of the assignment by Cochran he had no judgment against Gzowski, and that the right was not assignable at that time. The plaintiff obtained a new assignment from Cochran subsequent to the judgment against him, and then brought this action, which was dismissed with costs at the trial by Mr. Justice Meredith. On appeal to the Divisional Court, composed of Armour C.J. and Falconbridge and Street JJ., the trial

(1) 24 Ont. App. R. 502. (2) 28 O. R. 285.

1898

BOULTBEE v. GZOWSKI.

court judgment was set aside and a judgment ordered to be entered against the defendant, Gzowski, for the amount of the judgment recovered against Cochran with interest and costs. The plaintiff now appeals from the judgment of the Court of Appeal which reversed the decision of the Divisional Court and restored the trial court judgment dismissing the plaintiff's action with costs.

The facts of the case and questions at issue on the present appeal are stated in the judgments now reported.

H. J. Scott Q.C. for the appellant. The contract in this case may be summarized as being an offer by one party of a price for the stock and an acceptance by the other. This constituted a complete contract between the parties, and is the contract upon which this action is brought. It is a contract of the simplest kind, the purchase and sale of stock unaccompanied by any special terms and conditions. There was no necessity for any written contract nor was any entered into. The legal results of such a contract are: First, the duty on the part of the vendor to deliver the stock; Secondly, the duty on the part of the purchaser to take the stock when delivered, to pay for it and to accept it *cum onere*, that is to indemnify the vendor against all the consequences of ownership. It is upon this latter part of the contract that the appellant relies. Both Cochran and Gzowski are brokers and members of the Toronto Stock Exchange, which, unlike the London Stock Exchange, has no rules governing sales, and the rights of the parties depend upon the general principles of law apart from any special regulations, *Maxted* v. *Paine* (1). All the judges agree upon this. See judgments of Meredith and Street JJ. (2); and of Burton C. J. O., and Osler

(1) L. R. 6 Ex. 132.

(2) 28 O. R. at pp. 290, 302.

J. A. (1). See also the cases cited in the various judgments, and particularly *Kellock* v *Enthoven* (2).

Cochran was therefore entitled, and appellant, as his assignee, is entitled to be indemnified by the respondent, for the amount for which judgment has been recovered against Cochran. The fact of acting for an undisclosed principal does not relieve the respondent from personal liability. The transfer to Henderson was really made by the respondent and he cannot by his own act be relieved from liability. As to transfers in blank see Lindley on Companies (5 ed.) pp. 471 and 472. The equitable ownership of shares, agreed to be sold, depends on the contract of sale and not on the form of transfer; consequently where there is a binding agreement for the sale and transfer of shares it is comparatively immaterial, as between the buyer and seller, whether a transfer in blank has been executed or not. Cases like *Loring* v. *Davis* (3) involving the doctrine of trustees and *cestuis qui trust* do not depend upon privity of contract and cannot affect the rights of parties under contracts.

I refer also to Cabana, Money Securities, (2 ed.) p. 516; and the case of *Hughes-Hallett* v *The Indian Mammoth Gold Mines Co.* (4).

Aylesworth Q.C. for the respondent. The plaintiff's liability as a contributory arose while he himself held the shares, and in consequence of his having held them within one month before the bank's suspension; but his recourse was preserved under the Act as against Henderson, to whom the shares had been transferred, and who, as the registered holder of the shares at the date of the bank's suspension was also made a contributory; R. S. C. c. 120, ss. 70 and 77. The

(1) 24 Ont. App. R. at pp. 503 and 506.
(2) L. R. 9 Q. B. 241.
(3) 32 Ch. D. 625.
(4) 22 Ch. D. 561.

1898

BOULTBEE v. GZOWSKI.

master's decision upon the effect of these marginal transfers was considered and upheld *In re Central Bank of Canada*; *Baines's Case* (1), and the judgment of the master forms a complete bar to the plaintiff's claim and, under the present circumstances, there cannot be any liability on the part of the respondent towards the appellant. The obligation to indemnify is to be implied from the circumstances of the case in the sense of being the tacit agreement between the parties and not as being imposed by law whether the parties agreed to it tacitly or not; not to be forced upon them by law or in equity *nolens volens*.

The learned trial judge found that it was not contemplated that the defendant should in any case become the transferee, and that the real contract between the two brokers was, that defendant's firm should be personally answerable for the payment of the price of the shares on the day following the purchase, and that upon such payment Cochran would transfer them to any one defendant's firm might name, or by way of "marginal transfer" put it in that firm's power to transfer the shares to any competent transferee, and that it was never contemplated by either that defendant should be in any case bound to take a transfer of the shares, or otherwise come under any personal liability in respect to them, beyond payment of the purchase money, and procurement of a valid transfer of them. The implied obligation was not that the transferee of the shares was to indemnify plaintiff against the double liability which arose whilst he was the holder of them but, more consistently with the principles of indemnification, it was that the purchaser had the right to call upon the plaintiff or upon Cochran, if he were really the vendor, for indemnity in respect of this liability. *Humble* v. *Langston* (2). The principle

(1) 16 Ont. App. R. 237. (2) 7 M & W. 517.

of the case of *Burnett* v. *Lynch* (1) does not apply, and although *Grissell* v. *Bristowe* (2) deals particularly with the usages of the London Stock Exchange, note the remarks by Cockburn C.J. at page 50 of the report.

The evidence in no way warrants the conclusion that there was at any time a completed transaction of sale and purchase of these shares as between Cochran and the defendant. The effect of the adoption of the form of transfer used in the transaction was to prevent personal liability in respect to the shares from attaching to defendant, and the purpose and intent of the parties was that the shares might be transferred directly to and accepted by the real purchaser, Henderson. The transfer executed by Cochran became, as was intended, a transfer from him directly to Henderson, the real purchaser, establishing direct privity of contract between them. The marginal transfer executed by Cochran was a power of attorney from him to defendant's firm to put forward the person to whom the shares might be sold as the final purchaser, instead of the firm, and this is what was done, he was accepted as the transferee, and he became the shareholder, subject to the double liability, and liable, if any one was, to indemnify Cochran. A novation took place which precluded Cochran from asserting any demand against defendant in respect of their agreement. In *Walker* v. *Bartlett* (3) the defendant was the real purchaser, and yet was not bound to take a transfer of the shares in his own name, but could cause the shares to be registered in that of some other person to be named by him as the owner thereof, the seller having signed an order for a transfer of the shares, leaving a blank space for the name of the transferee.

(1) 5 B. & C. 589.

(2) L. R. 4 C. P. 36.

(3) 18 C. B. 845.

1898

BOULTBEE v. GZOWSKI.

See also *Hawkins* v. *Maltby* (1) and *Re Central Bank of Canada, Baines's* and *Nasmith's Cases* (2).

The new Bank Act (3), in more clear and precise language makes plain the intention, that the "recourse" of shareholders who had transferred their shares within the prescribed time before the bank's suspension is and was intended to be against those only by whom such transferred shares were actually held at the time of the bank's suspension.

The cases relied upon by the appellant turn upon the view that under the rules of the English Stock Exchange the purchasing broker was held liable, not because he was deemed a purchaser, but because having under the Stock Exchange rules entered into an engagement to produce a purchaser within a certain time and have his name entered as the transferee, he had failed to perform some of the terms of the engagement and was to be held liable as if he had been the purchaser. The rules and usages of the London Stock Exchange are set out in Lindley's Law of Companies, (5 ed.) pp. 548 to 557. See also Fry on Specific Performance, (3 ed.) pp. 655 to 671, and the rules are given in full in a foot note to *Grissell* v. *Bristowe* (4) beginning at page 53. The inquiry in these cases was, who was the purchaser, and if the court is not able to find any other purchaser at all competent to deal with the vendor, then the person who assumed to make the contract with the vendor is deemed to be the purchaser. I refer to remarks on the case of *Kellock* v. *Enthoven* (5) in the judgment of the learned trial judge and the cases there cited by him in that connection. The cases referred to by Mr. Justice Street are inapplicable to the circumstances of this case, because the

(1) L. R. 4 Eq. 572.
(2) 16 O. R. 293.
(3) 53 Vict. ch. 31, sec. 96.
(4) L. R. 4 C. P. 36.
(5) L. R. 9 Q. B. 241.

liability (if any) of a purchaser to indemnify his vendor lasts only as long as the purchaser is the registered owner or holder; *Shaw* v. *Fisher* (1). The respondent never held the shares at all; or, if he ever held them, he had parted with them before the liability in respect of which he is now sued, arose; the liability (if any) which arose during the time defendant held the shares, (if he ever held them,) was a liability on the shares in respect of which Cochran might or could be held liable, and not a liability on the shares in respect of which defendant could be rendered liable which arose while he held them, if he ever did so. Lastly it is found and determined as against the appellant in such a manner as to be *res judicata* against him and to estop him from now contending the contrary, that Cochran was not damnified until after the commencement of the action in which judgment was recovered against him; therefore, the liability in respect of which the appellant is sued did not arise while he held the shares, if he ever held them. Henderson, as the real purchaser and transferee, became directly responsible and liable to the vendor Cochran in respect of any liability or obligation against which the purchaser of shares is liable to indemnify his vendor, and Cochran's remedy was and is against Henderson. *Brown* v. *Black* (2); *Evans* v. *Wood* (3); *Maxted* v. *Paine* (4); *Coles* v. *Bristowe* (5); *Grissell* v. *Bristowe* (6); *Paine* v. *Hutchinson* (7); *Bowring* v. *Shepherd* (8); *Loring* v. *Davis* (9).

The effect was that Cochran as vendor accepted Henderson either as the original purchaser or as a

(1) 5 DeG. M. & G. 596.
(2) L. R. 15 Eq. 363; 8 Ch. App. 939.
(3) L. R. 5 Eq. 9.
(4) L. R. 4 Ex. 203; L. R. 6 Ex. 132.
(5) 4 Ch. App. 3.
(6) L. R. 4 C. P. 36.
(7) 3 Ch. App. 388.
(8) L. R. 6 Q. B. 309.
(9) L. R. 32 Ch. D. 625.

1898

BOULTBEE v. GZOWSKI.

sub-purchaser from the appellant, entitled to a transfer of the shares, and transferred the shares to Henderson at the respondent's request; and this dealing put an end to any liability on the part of the respondent to indemnify Cochran, if any ever existed. All liability of the respondent (if any ever existed) ended with the payment of the purchase money and the transfer to Henderson accepted by him, and this remedy being against Henderson, he is not entitled also against the respondent Gzowski, who only acted as intermediary between the real parties to the transaction, and the appellant has no higher or better right than Cochran, who by his own act, made the transfer directly from him to Henderson. See *Castellan* v. *Hobson* (1) also *Coles* v. *Bristowe* (2). Moreover the right (if any) of the appellant was and is barred by the proceedings and judgment in the former action referred to in the judgments in this action.

The rules of the Toronto Stock Exchange provide for the settlement of disputes arising between members in reference to any transaction entered into between them in the exercise of their profession as stockbrokers by arbitrators, members of the board, and the matter of defendant's liability (if any) was and is a matter to be determined between him and Cochran according to the rules of the Exchange, and no assignment by Cochran could put an end to this right to have the matter determined and disposed of in the domestic forum. At all events there is no recourse to the courts until after the domestic forum has been invoked. *Field* v. *Court Hope of A. O. F.* (3); *Essery* v. *Court Pride of the Dominion* (4). In fact this question was before the assignment by Cochran duly dealt with and determined by the Toronto Stock Exchange in favour

(1) L. R. 10 Eq. 47.
(2) 4 Ch. App. 3.
(3) 26 Gr. 467.
(4) 2 O. R. 596.

of the respondent, and both Cochran and the appellant are bound by that decision or determination.

1898

BOULTBEE v. GZOWSKI.

TASCHEREAU J. (dissenting).—I would dismiss this appeal. I concur in my brother Gwynne's reasoning.

GWYNNE J. (dissenting).—In the conclusion arrived at by the learned judge who tried this case, and by the Court of Appeal for Ontario, unanimously, that this action must be dismissed, I entirely concur.

The plaintiff Boultbee, who was examined as a witness on his own behalf says that upon the 21st or 22nd of October, 1887, being desirous of selling some shares, paid up in full of the capital stock of the Central Bank which stood in his name on the stock registry book of the bank, he employed a Mr. Cochran, a practising broker on the Toronto Stock Exchange, to sell twenty of such shares for him, and he then signed a printed paper which Cochran presented to him for his signature. He does not think that he read the paper, and he cannot say what it was save that he supposes it was a power of attorney or some authority enabling Cochran to sell the shares for him. He says that on the following day he went to Cochran to see if the shares had been sold, and that Cochran then informed him that he had not succeeded in selling them; that he again went the next day for the like purpose, and was again informed that the shares had not yet been sold, and that a short time after he called again, and in fact that he called every day until the affair was completed by Cochran giving him his cheque for $1,940, being at the rate of $97 per share for the twenty shares. He never signed any paper whatever save that above spoken of when he employed Cochran as his broker to sell the shares for him; after the receipt of the said sum of $1,940 as the proceeds of the

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

sale of his shares, he never heard anything more of the matter until the failure of the bank, when there arose a discussion as to who was liable to the liquidators of the bank for the statutory double liability on the shares.

Now upon Saturday, the 22nd day of October, 1887, a Mr. Henderson employed Messrs. Gzowski and Buchan, who were also brokers practising on the Toronto Stock Exchange, to purchase for him thirty shares in the capital stock of the said bank. Upon the next business day, namely, Monday the 24th of October, 1887, the secretary of the Stock Exchange in the ordinary manner according to the usage and practice of the Toronto Stock Exchange, called up Central Bank stocks for transactions on change when Gzowski and Buchan acting as brokers for Mr. Henderson, bid $97 per share for ten shares, which Cochran, acting as vendor's broker, agreed to accept, and the transaction on change was thereupon closed at that price. The usage and practice of the Toronto Stock Exchange for brokers purchasing stock for their principals is to pay upon the next business day after the transaction on change, the amount fixed by such transaction to the vendor's broker, and subsequently, within a reasonable time, for no time is limited for that purpose by any rule of the Toronto Stock Exchange, the transaction is closed by a formal transfer of the shares by the vendor in the stock transfer book of the bank, and upon the purchaser signing underneath the transfer an acceptance thereof, the transfer is effected. There were no certificates of shares in the Central Bank transferred by the vendor's broker to the purchaser's broker leaving it to the purchaser to have his name entered as owner upon the stock registry book; the only transfer of shares in the Central Bank stock was effected by the above formal transfer and the acceptance thereof in

the share transfer book of the bank. Upon the 25th day of the said month of October, Messrs. Gzowski and Buchan, in accordance with the usage and practice of the Toronto Stock Exchange, gave their cheque to Mr. Cochran for $970, the price of the ten shares bid for by them on the preceding day, and upon the same 25th day of October, they in like manner as upon the 24th, bid $95 per share for twenty-five other shares in the Central Bank stock, which bid Cochran, also acting as vendor's broker, accepted, and this transaction was closed at that price in the ordinary course of the stock exchange as on the preceding day. For these twenty-five shares Gzowski and Buchan gave their cheque to Mr. Cochran upon the 26th of October for $2,375, according to the usage and practice of brokers purchasing shares for their clients upon the Toronto Stock Exchange. There is in these transactions so closed on change no mention made of any particular shares, nor of any particular owner or owners of the shares contracted for. These are matters which, as is well understood by the contracting brokers, are never disclosed until shares in fulfilment of the vendor's broker's contract come to be transferred in the share transfer book of the bank. But although it never is disclosed on change who a broker is selling or purchasing shares for, still there can be no doubt now upon the evidence in the case that in point of fact as to thirty of the thirty-five shares so bid for and paid for by Gzowski and Buchan, they were purchased and paid for on behalf of Mr. Henderson, the actual purchaser through his brokers Gzowski and Buchan; and it is equally clear, I think, upon the evidence, that as to twenty of those thirty-five shares, Mr. Cochran was acting merely as broker for Mr. Boultbee, the actual owner and vendor of those shares. Mr. Cochran's evidence was not given with that precision which one would expect

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

from a broker who could, or at least should, have no doubt whether in his transactions on the Stock Exchange he was acting as a vendor of his own property or as broker for a client. Still however, notwithstanding his want of precision, the fact I think does abundantly appear that he was acting as broker for Mr. Boultbee who was the real owner and vendor of twenty of the thirty-five shares. It is proved by the evidence of Mr. Boultbee himself that he never signed any paper relating to the shares unless it was a power of attorney to Cochran to sell the shares for him, and that upon several days after conferring such power upon Cochran he was informed by Cochran that the shares had not yet been sold, and upon a subsequent occasion he received a sum of money from Cochran as the proceeds of the sale of the shares; it is established therefore that Boultbee had never executed any instrument purporting to transfer himself the shares to any one. Mr. Cochran on his examination as a witness for the plaintiff admitted that in his dealings with Gzowski and Buchan on the said 24th and 25th of October, he was pursuing his ordinary calling of a broker buying and selling on the stock exchange, and that he then sold twenty shares of Central Bank stock for Mr. Boultbee; in another place he says that he believes he sold them for him; that he did so, is abundantly apparent from other passages in his evidence. He produced a book containing entries as to these transactions. It contained an entry of a charge "to Central Bank stock, 20 shares at $97, from Boultbee." That entry he said might be read either that he sold for Boultbee or possibly that he bought for himself; but he added that he did not think the latter was likely and he repeated that it was not likely —that it was not what he was in for. This book also shewed two payments on the 24th October, and he

said that he gave Mr. Boultbee a cheque for $1940 representing as he said 20 shares at $97 per share; as shewn above he had contracted with Gzowski & Co. for the sale of 10 shares at $97 per share, and he himself had also stated that he had sold 10 shares on the 24th and twenty-five on the 25th October to Gzowski & Co. He was asked then to explain how he came to pay Boultbee on the 24th, to which he answered that he did not know how he paid him more than he had sold for, and added that "it was very foolish." This was all the explanation that Mr. Cochran could give, or at least did give, that it was very foolish for him to give Mr. Boultbee more for his shares than he had sold them for. An explanation might possibly be found in the fact that the sale of the ten shares to Gzowski & Co. on the 24th having fixed the price on change on that day, and as Mr. Boultbee was, as appears by his own evidence, very urgent upon Mr. Cochran to effect a sale, the latter may have given his cheque for the 20 shares at the rate at which the ten had been sold to Gzowski & Co. not doubting that he would be able to sell the other ten shares for the like amount; in this however, he was disappointed, for the 25 shares sold on the 25th realized only $95 per share, or possibly he might have sold ten shares to some one else of which we have heard nothing. Then being asked to fix the day on which he sold Boultbee's shares he could not say for the reason that as he said he could not tell which were Boultbee's shares "because all that stock" (namely the thirty-five shares sold to Gzowski & Co.) "was probably in my own name," an expression the significance of which will appear later. The evidence as already shewn, clearly establishes that Cochran and Gzowski and Buchan were respectively acting as brokers for undisclosed principals in accordance with the usage and practice of the Toronto Stock Exchange, which

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

usage and practice is, like the usage and practice of the London Stock Exchange "not dissimilar," as is said in *Torrington* v. *Lowe* (1) "to the usage and practice of other branches of commerce," and the question which remains simply is: What was the nature and effect of the contract entered into between Cochran as vendor's broker, and Gzowski and Buchan as purchaser's brokers, in respect of the said thirty-five shares at the time of the respective transactions which took place on change being there closed in relation to such thirty-five shares? And the plain construction of such transactions, as was well understood and intended by the contracting brokers, in my opinion is, that Cochran as a vendor's broker thereby undertook upon receipt from Gzowski and Buchan, acting as purchaser's brokers, in accordance with the usage and practice of the Toronto Stock Exchange, of the monies agreed by them to be paid for the shares to cause thirty-five shares to be transferred in the transfer share book of the bank unto the nominees or a nominee of Gzowski & Co., so that such nominees or nominee could become legal owners or owner thereof on the shareholders' list in the bank; and Gzowski and Buchan upon their part contracted to pay the price agreed upon for the shares on change in accordance with the usage and practice of the Toronto Stock Exchange, and further to provide a person or persons to accept such shares in the share transfer book of the bank. When Gzowski and Buchan paid, as they did pay, the price agreed upon for the shares nothing remained for the completion of their contract by Gzowski and Buchan but to produce a person or persons who should accept a transfer or transfers of the shares in the transfer book of the bank as provided in section 24 of ch. 120 R. S. C., and who should

(1) L. R. 4 C. P. 26, 32.

thereby assume all responsibility attached to being owners or owner of shares so transferred, which liability, as the shares were all paid up in full, consisted wholly, in so far as the vendors or a vendor of the shares or any of them were or was concerned, in an obligation to idemnify the vendors of the shares so transferred against any loss which might be occasioned (in the event of the bank becoming insolvent) by force of the provisions of section 77 of the said ch. 120 which enacts that,

persons who, having been shareholders in the bank, have only transferred their shares or any of them to others, or registered the transfer thereof within one month before the commencement of the suspension of payment by the bank, shall be liable to all calls on such shares as if they had not transferred them, saving their recourse against those to whom they were transferred.

Now the proceeding adopted by Mr. Cochran for the purpose of fulfilling his part of the above contract appears to have been, as to twenty shares, for we have no information as to the other fifteen, balance of the thirty-five shares, that he went to the bank and signed in the share transfer book of the bank a blank transfer of twenty shares fully paid up in the capital stock of the bank, at the foot of which entry in the bank transfer book is subjoined the acceptance following by Mr. Henderson for whom Gzowski and Buchan had acted as purchasers brokers.

I do hereby accept the foregoing assignment of twenty shares in the stock of the Central Bank of Canada assigned to me as above mentioned at the bank this 29th day of October, one thousand eight hundred and eighty-seven.

(Signed) J. D. HENDERSON.

From the time of the signing by Mr. Henderson of this acceptance he has been accepted and entered on the books of the bank as the owner of twenty fully paid up shares as so transferred, or intended so to be, and as such owner he has been entered on the list of

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

contributories upon the winding up of the bank, and as such transferee he has assumed the burthen imposed by ch. 120 R. S. C. upon transferees of shares in the bank. The circumstances under which Mr. Henderson thus became the acceptor, transferee and owner of these twenty shares were that, in the margin of the blank transfer which Cochran had signed in the share transfer book of the bank, he inserted the words "subject to the order of Gzowski and Buchan. R. C."

Mr. Cochran in his evidence says that this was the ordinary mode adopted by the bank for enabling transfers to be perfected; the ordinary way, he said, was to give the above order the object being, as he explained, that Gzowski and Buchan might either accept the shares themselves in the share transfer book of the bank, or nominate somebody else who should so accept them without Gzowski and Buchan themselves becoming transferees of the shares. This was the mode adopted by the bank of complying with sec. 29 of the ch. 120 R. S. C. which enacted that no assignment or transfer should be valid unless it is made and registered and accepted by the person to whom the transfer is made in a book or books kept by the directors for that purpose.

Now this marginal order so made by Mr. Cochran had no further operation than to direct the bank to accept as Mr. Cochran's transferee of the twenty shares whomsoever Messrs. Gzowski and Buchan should nominate, and accordingly Gzowski and Buchan with this intent inserted on the margin of the blank transfer signed by Cochran in the share transfer book of the bank below the marginal order signed by Mr. Cochran with his initials "R. C." the words following· "subject to the order of J. D. Henderson, G. & B." In accordance with this order Mr. Henderson signed the acceptance of the shares and thereby became Cochran's

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

transferee and the owner of the shares covered by the blank transfer in direct succession to Cochran on the bank books, and thereby also Gzowski and Buchan fulfilled in every particular their contract made with Cochran in so far as 20 shares of the thirty-five contracted for were concerned.

This case is to be governed by the usage and practice of the Toronto Stock Exchange just as much as transactions on the London Stock Exchange are governed by the usage and practice of that exchange, and there is no necessity that such usage and practice should be evidenced by written rules. By Mr. Cochran's own evidence it is sufficiently established that he inserted the marginal order in the blank transfer in accordance with the ordinary usage and practice of brokers on the Toronto Stock Exchange, and for the express purpose of enabling Gzowski and Buchan to nominate the person to accept the transfer and who upon acceptance thereof in the share transfer book of the bank should become transferee and owner of the twenty shares. Upon the London Stock Exchange there is a certain class of persons called "jobbers" who purchase shares on change for speculation, and who are allowed to pass their contract through various hands before ever any person is found to accept and become the actual purchaser of such shares; a day is fixed which is called the name day, by which the jobber must name a person who shall accept and hold the shares so dealt with. Whether there is any usage or practice upon the Toronto Stock Exchange in relation to such "jobbers" does not appear, nor is it material that it should appear in the present case which was plainly one of a purchase by Gzowski and Buchan as brokers for their client a purchaser for investment, and not at all a purchase by themselves for "jobbing"

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

and speculative purposes. The name day in the case of "jobbers" in England, is fixed for the purpose of closing the further "jobbing" with the shares so purchased. By this day the "jobber" must find a person to take the shares as the actual purchaser and owner, or be himself held to his purchase. When a person is so produced to accept the shares as the purchaser, the transaction with the purchasing jobber on change is brought to the same point as in the case of a *bonâ fide* purchase on change by a broker for his client, who is the real purchaser and as such accepts and takes a transfer of the shares contracted for by his broker. *Merry* v. *Nickalls* (1) must govern the present case. It lays down the law as now finally established after much contrariety of opinion. The case was one where shares were purchased on change by a "jobber," but an actual purchaser had been found for the shares by the name-day.

Now that judgment and the rule of law thereby established is in its principle precisely applicable to the case of a broker who purchases for a client who pays for and accepts a transfer of the shares and therefore can be equally applied to the circumstances of a transaction like the present. It is there said in the House of Lords that

> it is to be considered as now settled that if the jobber in performance of his contract gives to the broker of the seller the name of a person who is able to contract and is willing to be named as purchaser of the shares and the name is accepted on the part of the seller, the jobber is discharged.

Now applying the principle of that rule, so said to be established as settled law after much difference of opinion, to the case of a contract like the present, as made between Cochran as vendor's broker, and

(1) 7 Ch. App. 733; and on appeal in the House of Lords, L. R. 7 H. L. 530.

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

Gzowski and Buchan as brokers of an actual *bonâ fide* purchaser for investment, it seems beyond controversy that when Cochran entered in the margin of the transfer in blank signed by him in the share transfer book of the bank the order and direction that Gzowski and Buchan's nominee should be accepted and entered as transferee, and when Henderson who was such nominee signed the acceptance of the transfer in the share transfer book and was entered in the bank books as transferee and owner of the shares mentioned in the blank transfer, Gzowski and Buchan became thereupon absolutely discharged from their contract with Cochran or his principal and from all responsibility whatever in respect thereof. This, as it appears to me, is the true and rational construction of this transaction construed as it must be by the usage and practice of the Toronto Stock Exchange where the transaction took place by the intention and understanding of the parties to the contract, and by the mode of transfer in the share transfer book of the bank adopted by the bank; and it is the construction which is in conformity with the principle of the rule applicable to the case as now finally established by the House of Lords in *Nickalls* v. *Merry* (1).

This mode of effecting transfers of shares from a vendor to a purchaser upon a purchase contracted through brokers on change by means of these orders inserted in the margin of transfers in blank signed by the vendor appeared in the winding up proceedings of the Central Bank to have been much abused for the purpose of purely jobbing transactions upon a most extensive scale, being thereby carried on by the bank itself and its officers and other persons, passing from hand to hand through divers persons, the original contract made on change for jobbing and speculation solely before

(1) L. R. 7 H. L. 530.

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

ever any person should become transferee of the shares, and these jobbing transactions were carried to such an extent as to cause the failure of the bank, and its affairs to be wound up in liquidation; but such abuses so practised cannot effect a case like the present in which the purchasing broker's client, and for whom alone in point of fact the brokers acted in contracting with Cochran as a vendor's broker for the shares in question, accepts in due form of law in the bank books the transfer in blank therein made and signed by Cochran, who thereby assumed for the first time in the transaction the position of vendor. It is perfectly clear upon the evidence that Gzowski and Buchan did not nor did either of them, ever intend to become or contract to become, or in point of fact become transferees or transferee of the shares in question, or of any of them. They never in point of fact acted in the transactions relating to these shares or any of them in any other capacity than as brokers for Henderson, who has accepted the transfer of the shares as made by Cochran, and all the obligations attached by law to such transfer.

If Gzowski and Buchan had failed to nominate a person who should accept a transfer thereof in the bank transfer book as they had by their transaction on change contracted with Cochran to do, they would doubtless have been liable in an action at suit of the vendor for all damages accruing to him by such their breach of contract, but that is a very different thing from the liability which is attempted to be imposed on them in the present action, which is simply in effect that a broker acting on change for a purchaser is bound to indemnify a vendor against all damage, in the event of his client after acceptance of a transfer of the shares on the books of the bank fail-

ing to discharge the obligations imposed upon him by his so becoming transferee of the shares.

The Divisional Court of Queen's Bench in their judgment which reverses the judgment of the learned trial judge whose judgment the Court of Appeal for Ontario have restored, proceeded, first, upon the misconstruction of the contract made on change between Cochran and Gzowski and Buchan, holding it to be similar to that in *Walker* v. *Bartlett* (1), which was a contract not made on change at all or even between brokers, but between the actual owner and vendor of the shares and the actual real purchaser thereof for his own use and benefit, and holding further that the transfer in blank executed by Cochran is to be regarded as having been so executed for the mere convenience of Gzowski and Buchan in the sense that the blank transfer in *Walker* v. *Bartlett*, which was shown in evidence to have been so executed by the direction of, and solely for the convenience of the defendant, who was himself and for himself alone the actual purchaser of the shares. The court thus assumed that Gzowski and Buchan were the actual real purchasers and intended transferees of the shares on the bank books, thus ignoring altogether the evidence in the case, and the usage and practice of brokers on the stock exchange, subject to which the brokers were contracting, as was well understood by them and as is explained and admitted by Mr. Cochran himself in his evidence. The court seems to have assumed that brokers practising on the Toronto Stock Exchange could not be governed in their transactions on change by any usage or practice not evidenced by written rules, but there is nothing to prevent persons contracting, wherever the contract may be entered into, namely, whether on change or elsewhere, from

(1) 18 C. B. 845.

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

contracting in accordance with the usage of a particular trade, or with any well understood usage in relation to a particular matter. All transactions must be construed in accordance with the plain intention of the parties to the contract with relation to contracts on change. *Merry* v. *Nickales* (1) is a conclusive authority that they must be construed in accordance with the usage and practice of brokers, and that such usage may be evidenced partly by oral evidence, partly by written rules. As to the practice and usage of the Toronto Stock Exchange, as affecting the transactions in question here, there is no conflict of evidence. The contract entered into on change by Gzowski and Buchan as already shown was not in relation to any particular shares, nor as to the shares of any particular vendors, but that they would pay for (which they did) thirty shares in the Central Bank to be transferred by Cochran to some persons or person to be nominated by Gzowski and Buchan, who should accept such transfer in the bank transfer book, and relieve the owner from, and indemnify him against all the obligatians imposed upon him as vendor and transferor of the shares. Now that *Walker* v. *Bartlett* (2) has no application to the present case is apparent from this, that there the defendant was the actual purchaser of the shares who had himself contracted for the purchase for his own sole use and benefit, but as it was necessary that as purchaser he should be entered as such upon the stock registry of the company whose shares he was purchasing, he requested that the vendor should deliver to him a transfer in blank so that he might substitute the name of some other person as the transferee, and accordingly the vendor (at the purchaser's request and for his sole convenience, not for the purpose of doing anything which was part of the vendor's contract to do) delivered to

(1) L. R. 7 H. L. 530. (2) 18 C. B. 845.

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

the defendant a transfer in blank, and the defendant having failed to have the name of any other person inserted as transferee, and having thus suffered the vendor's name to remain on the stock registry list of the company, was held bound to indemnify the vendor from obligations to which he was subjected so long as his name appeared on that list. But in the present case, Gzowski and Buchan never put themselves forward as the actual purchasers of the shares or any of them, nor was the transfer in blank executed by Cochran at their request, or in point of fact for their mere convenience, but in accordance with the well known usage and practice of the bank in relation to the transfer of shares bought and sold on change from a vendor to the purchasing broker's client, and to enable such purchasing brokers to nominate their client the actual purchaser of the shares and the person to be inserted transferee thereof in the bank book, which they did, and he in the usual form accepted the transfer and the obligations incident thereto.

The Divisional Court also relied upon the case of *Kellock* v. *Enthoven* in the Exchequer Chamber (1). That case also, as pointed out by the learned trial judge, has no application in the present case, for there, the person made liable to indemnify the plaintiff, the vendor, was a person to whom the shares had actually been transferred upon the stock registry and who although he had sold and in like manner transferred the shares to another, was made liable to the vendors who had so transferred the shares to the defendant under sec. 38 of 25 & 26 Vict. ch. 89. In precise accordance with this judgment is sec. 77 of ch. 120 R. S. C., which alone imposes upon the persons therein mentioned who have ceased to be shareholders in a bank, the same liability as is imposed by sec. 70 upon the share-

(1) L. R. 9 Q. B. 241.

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

holders at the time of a bank becoming insolvent, as if the persons affected by the sec. 77 "had not transferred their shares saving their recourse against those to whom they were transferred," but as Gzowski and Buchan never were, nor was either of them, such transferees or a transferee of any of the shares in question, this case of *Kellock* v. *Enthoven* (1) is inapplicable in the present case.

Secondly, the Divisional Court proceeded upon the ground that in their opinion the double liability under sec. 77 of the ch. 120 is a liability inseparably attached to the shares themselves which are transfered precisely in the same manner as the liability to pay a mortgage upon real estate is attached to the assignment of the equity of redemption in the estate mortgaged and becomes imposed upon every assignee of such equity of redemption, but if this *ratio decidendi* should prevail, then first, the liability to indemnify a vendor of shares against the double liability which is imposed by sec. 77 of ch. 120, would pass to and upon the ultimate transferee of the shares "within the month preceding the commencement of the suspension of payments by the bank," which would be contrary to the express provision for recourse which, by the section, is reserved to the transferor against his transferee, which transferee must be the person to whom the transfer of shares is made under sec. 29 of the Act. And secondly, if the liability by sec. 77 is attached to the shares transferred in the same manner as the liability to discharge a mortgage upon an estate is attached to the assignment of the equity of redemption in the estate mortgaged then of necessity the identity of the shares to which such liability is attached must needs be unequivocally apparent on the instrument transferring them, but in the instrument executed by Cochran as a transfer which Henderson accepted there

(1) L. R. 9 Q. B. 24.

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

are no shares mentioned so as to be capable of identification by numbers or otherwise, as having been shares which Boultbee ever owned. How the bank determined what shares should be appropriated by them to Henderson as representing the shares which he had bought through Gzowski and Buchan as his brokers, we have no means of knowing, nor are we now concerned to inquire, but what we do know from Cochran's own evidence, is that *he* could not distinguish which of the thirty-five shares which he contracted with Gzowski and Buchan to sell belonged to Mr. Boultbee, for the reason that as he said, all those shares—not were his own property—but "probably were in his name." What he meant by this expression is not apparent, for there is proved to be in the share transfer book of the bank a paper purporting to be a transfer not of any particular shares capable of being identified by numbers or otherwise, but of "twenty shares," in the stock of the bank as from Boultbee to Cochran executed by Cochran himself as attorney for Boultbee to Cochran himself, and accepted by him and dated the 22nd October, 1887, the day on or about which Boultbee had given to Cochran a power of attorney to sell twenty shares for him. Of this instrument by way of transfer it is plain upon Boultbee's evidence that he was not aware when several days after having giving the power of attorney to Cochran he received from Cochran the proceeds of the shares as sold for him by Cochran on change—a sum in excess, to Cochran's surprise, of the amount for which as he says he has sold the shares and had gotten for them. In fact Boultbee could have had no knowledge of this instrument purporting to be a transfer to Cochran until after the failure of the bank, for he says in his evidence that from the day of his receiving the proceeds of the sale of his shares on change for him by

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

Cochran, he never heard anything in relation to the matter until after the failure of the bank, when as he says, discussions arose as to who were liable for the double liability. Then for the first time it would seem that he heard how the transaction had been carried out by Cochran, and then he took proceedings in the liquidation of the bank against Gzowski and Buchan claiming that they, as purchasers of his shares, should indemnify him against his statutory liability. In that proceeding he failed, but now for the purpose of effecting what he then failed in, through the intervention of Cochran he adopts the document so executed by Cochran bearing date the 22nd October, 1887, as evidencing a sale made by him to Cochran, while his own evidence and also Cochran's, plainly proves that no such sale ever took place; Cochran says in his evidence that in dealing with Gzowski and Buchan in respect of the thirty-five shares he was dealing as vendor's broker, and that he could not tell which of the thirty-five shares were Boultbee's for that all were probably in his own name, and he could not understand how he did such a foolish thing as pay to Boultbee as the proceeds of the sale of his shares on change, more than he had sold them for. His practice appears to have been that upon receiving from his client a power of attorney to sell shares for him he put them into his own name by permission of the bank authorities. By this mode of dealing with his client's property without his authority it is not strange that he should be unable to distinguish what shares were intended by a sale when the shares were not identified by numbers or otherwise. When he executed the blank transfer which Henderson accepted he may have have had fifty or one hundred shares standing in his name, but all really belonging to different clients, or partly to clients and partly to himself as the real

owner; when then he transferred or executed an instrument purporting to transfer shares not identified by numbers or otherwise, it is natural that neither he, or any one else could say to what particular shares any such transfer related; what loss to his clients and what complications would be created by this mode of conducting the business by a broker, in respect of shares which he was authorised to sell for his clients and by this absence of identification of the shares sold by him and professed to be transferred by him, we are not concerned in the present case; all that is necessary for the present purpose is to show that adopting the *ratio decidendi* upon which the Divisional Court proceeded, it is impossible for the plaintiff to succeed in the present action, for the *onus probandi* wholly lies upon him, and upon the evidence in the present case it is impossible upon this record judicially to say that any shares of which Boultbee had been the owner were ever transferred to any one by Cochran.

Then again, Cochran was not in the liquidation proceedings charged with any liability to the liquidators of the bank under sec. 77 of the Act, as a person who had been a shareholder within the month preceeding the commencement of suspension but who had transferred his shares before the suspension, so that his transferee does not seem to have been liable to any action for indemnity at his suit in virtue of the provisions of sec. 77. If his transferee could be liable in any action at his suit it must be independently of that section; and the liability is assumed to be of this nature—that Cochran's transferee by force of the transfer from him is under an implied obligation to indemnify him against an implied obligation which it is contended he lies under to Boultbee to indemnify him under sec. 77 as being the transferee from Boultbee of his shares. But as it appears in evidence

1898

BOULTBEE v. GZOWSKI.

Gwynne J.

that Boultbee never did in point of fact transfer any shares to Cochran a grave question would arise whether or not Cochran's irregular and unauthorized dealing with Boultbee's shares, which he was authorised to sell and professed to have sold for him on change, created any liability to indemnify Boultbee under the provisions of sec. 77 against the obligation imposed upon him by that section or whether Cochran's liability to Boultbee would not in such case arise rather out of and by reason of his irregular dealing with Boultbee's shares; and in the latter case, whether or not his transferee, who had no knowledge that he was acquiring by a transfer from Cochran any shares in which Boultbee had any interest, would be under any obligation to indemnify Cochran in the interest of Boultbee against such his obligation to Boultbee. But it is unnecessary to consider these points further now, or to do more than suggest that these questions would seem to require more consideration than they have received if the case must needs be decided upon the *ratio decidendi* upon which the Divisional Court proceeded. But for the reasons first above given, I am clearly of opinion that the judgment of the learned trial judge and of the Court of Appeal for Ontario should be affirmed, and this appeal dismissed with costs.

SEDGEWICK J.—There is little or no dispute as to the facts of the case, and they are very simple. The appellant Boultbee, prior to the 26th of October, 1887, was owner of twenty shares of the stock of the Central Bank of Canada, and he sold them to Robert Cochran, a stock broker, doing business in the Toronto Stock Exchange. On the 24th of October they were put up for sale by Cochran on the stock exchange and were purchased by a firm of stock brokers, Messrs. Gzowski

1898

BOULTBEE v. GZOWSKI.

Sedgewick J.

and Buchan, according to the usual course of business on the exchange. Cochran sold as principal, and Gzowski and Buchan purchased for an undisclosed principal, one J. B. Henderson, who it would appear was neither then, nor has he been since, a person of any means. On the 26th of October the buyers paid Cochran for the shares so purchased whereupon the latter went to the office of the bank and signed a transfer, leaving out of the body of the transfer the name of the transferee, but writing in the margin opposite the blank where the transferee's name under ordinary circumstances would be: "subject to the order of Gzowski & Buchan." Subsequently Gzowski went to the bank and wrote under the marginal note initialled by Cochran the words "subject to the order of J. B. Henderson, G. & B." and subsequently, on the 29th of October Henderson signed an acceptance of those shares, all of the documents so far as the present question is concerned, being as follows:

Subject to the order of Gzowski & Buchan. (Sgd.) R.C.

Subject to the order of J. D. Henderson. (Sgd.) G. & B.

For value received from.....I, R. Cochran, of Toronto, do hereby assign and tranfer unto.....of.....twenty shares (on each of which has been paid.....dollars), amounting to the sum of two thousand dollars in the capital stock of the Central Bank of Canada, subject to the rules and regulations of the said bank.

Witness my hand at the said bank, this 26th day of October, one thousand eight hundred and eighty-seven.

(Sgd.) ROBERT COCHRAN.

Witness: (Sgd.) A. B. ORDE.

Within thirty days from the time that Boultbee made his transfer to Cochran and Cochran made the transfer just set out, the Central Bank of Canada went into liquidation, and Boultbee was placed on the list of contributories and compelled to pay the liquidators of the bank $2,125 as double liability on his shares pursuant to the provisions of the Bank Act. He

1898

BOULTBEE v. GZOWSKI.

Sedgewick J.

thereupon sued Cochran and obtained a judgment against him for the amount so paid to the liquidators. Cochran thereupon transferred his claim of indemnity against Gzowski & Buchan to Boultbee, and Boultbee brought this action as such assignee for the purpose of obtaining indemnity from the latter.

There is, as I have said, practically no dispute about the facts. The transaction on the boards of the Stock Exchange of the 24th of October was an ordinary transaction of the simplest kind, Cochran offering for sale the shares in question, Gzowski purchasing them at the price named and a memorandum being made of the transaction by an officer of the exchange. There was nothing more, nothing less than this; no special terms or conditions of any kind. There is not much doubt in ordinary cases as to the legal results of such a contract. They are (1) the duty on the part of the seller to deliver the stock; (2) the duty on the part of the buyer to take the stock when delivered, to pay for it and to accept it *cum onere*, that is to indemnify the seller against all the consequences of ownership. It is so laid down by Blackburn J. in *Maxted* v. *Paine* (1).

> On the other hand the buyer would be bound not only to pay the price and to accept the benefits of ownership, but also to relieve the seller from all the burthens of ownership.

And in Lindley on Companies, 5 ed. p. 492:

> The obligation of the purchaser is to pay the price agreed upon and to accept a transfer of the shares and to indemnify the vendor from all liability in respect of them accruing after the purchaser has become their equitable owner.

And at p. 493:

> The obligation of the purchaser to pay the price, accept the shares and indemnify the vendor against liability in respect of them, was recognised at law even before the Judicature Acts, and for a breach of such an obligation an action will lie.

There was not any denial at the argument of these

(1) L. R. 6 Ex. 132, 151.

elementary and fundamental propositions, but it was contended that under all the special circumstances connected with the transfer there must have been within the contemplation of the parties an intention to absolve the brokers, Gzowski and Buchan, not from responsibility to pay the purchase money, but to give them an immunity from double liability in respect of the shares under the provisions of the Bank Act.

The Toronto Stock Exchange is an ordinary incorporated association having certain rules and customs which all members of the association as between themselves are presumed to know, and upon the faith and understanding of which they are presumed to contract, but there is no express rule dealing with the subject of indemnity or with the respective rights of the buyer and the seller of shares upon the exchange, nor as far as I can see is there any evidence whatever of any custom or of any understanding as between the members of the exchange upon this question of indemnity. Special provision has been made for it in the rules of the London Stock Exchange, and every contract there made is of course made subject to those rules, but in Toronto a contract such as this was must be governed by the general provisions of the common law apart from any custom or convention varying that law.

The learned trial judge in dismissing the plaintiff's action, and the learned judges of the Court of Appeal in reversing the judgment of Divisional Court which had maintained his action, found in the transfer from Cochran above set out evidence that there must have been, within the contemplation of the parties at the time of the sale upon the Exchange, an intention in the minds of both parties that the buyer was not to be held responsible for any liability that might ever arise in respect of the shares purchased under the Bank Act.

1898

BOULTBEE v. GZOWSKI.

Sedgewick J.

The only substantial oral testimony, as far as I can see, affecting the question is the evidence of Cochran, and it is as follows :—

Q. Do you recollect when it was that you gave this marginal transfer ?—A. It must have been the same day that I got paid by Gzowski and Buchan.

Q. Why didn't you give him an assignment, an actual transfer on the books ?—A. The ordinary way is simply to give the order.

Q. Why ?—A. So that they can give it to any one, or accept it themselves.

Q. It puts them in the position of enabling somebody else to accept it ?—A. Yes.

Q. And puts them in the position of not being acceptors of the stock ?—A. Yes, in the books.

Q. They do not become transferees of the stock on the books ?—A. No.

Q. It is to enable them to deal with it without becoming transferees ?—A. Yes.

HIS LORDSHIP.—Can the witness help us in that? There is the document.

It seems to me this is evidence, not of any custom of the stock exchange, but of an irregular practice which the Central Bank of Toronto had permitted to grow up by allowing transfers to be made in this, what I would suppose to be an unusual and extraordinary fashion. But it does not suggest the idea that there was any intention that the common law rights of the parties arising from the simple contract when the shares were up for sale should in any way be altered. But looking at the transfer itself, it is not I take it in any sense a transfer in blank, as that phrase is generally understood. The name of the buyer was not set out in the space where ordinarily it is set out, but the buyer's name was indicated in the margin, and it was impossible for any other name to be filled up in the transfer than such as the seller might approve. No disposition could specially be made of the shares without the signature

and transfer of the buyers Messrs. Gzowski and Buchan, and the document is to be construed as an ordinary mercantile instrument like a delivery order or a dock warrant for goods. The seller by placing the shares subject to the order and disposition of the buyer, enabling the buyer to do as he liked with them, ceased himself to have any possession or control in respect of them, and as between him and the buyer the latter cannot dispute that he is a legal owner and liable as such owner to all the consequences which his contract of purchase entails. It made no difference to Cochran whether Gzowski and Buchan were acting for themselves or for an unknown principal. The moment the contract of sale was made on the 24th, in my view Cochran possessed of all his rights as a seller, and Gzowski likewise become subject to all the obligations of a buyer, Cochran fulfilling his obligations by the transfer of the stock to the order of Gzowski, and that altogether independently of whether Gzowski ever formally indicated his acceptance of the stock upon the transfer books of the bank. There is no indication in the evidence that there was any intention that the common law obligations of the buyer should be split up, one of these remaining the personal obligation of the buyer himself, and the other the personal obligation of somebody of whom the seller knew nothing and never did know anything until long after the whole transaction had been completed. I venture to say with great submission, that the judgment of the court appealed from has made a contract for these parties which they themselves never dreamed of. Special terms and unusual conditions not within the contemplation of the parties, and not made by them, have been forced into it by giving a fallacious efficacy to the terms of the transfer which was not any part of the contract but simply giving effect to the

1898

BOULTBEE v. GZOWSKI.

Sedgewick J.

contract so far as the seller was concerned. As stated in Lindley on Companies, pages 472-473:

> The equitable ownership of shares, agreed to be sold, depends on the contract of sale and not on the form of transfer * * * Consequently where there is a binding agreement for the sale and transfer of shares, it is comparatively immaterial, as between the buyer and seller, whether a transfer in blank has been executed or not.

I am clearly of opinion that Messrs. Gzowski & Buchan (the name of Mr. Buchan has been eliminated from the case by consent of parties) are as purchasers of these shares liable to indemnify the plaintiff in respect of them.

I do not deem it necessary to refer to the further points raised by the respondent as they were substantially disposed of at the argument. In my opinion the judgment appealed from should be reversed and the judgment of the Divisional Court restored, the whole with costs.

KING J. concurred.

GIROUARD J.—The whole question seems to be: Was Gzowski a transferee of the Boultbee or Cochran shares or was he acting as a mere broker? It is admitted that brokers on the Toronto Stock Exchange, standing in this respect very differently from brokers in the London and European Exchanges, buy and sell on their own account. According to the custom of the Toronto Stock Exchange, all transactions must be "settled" not later than the following day, and on the Monday following if the sale be made on Friday, the exchange being closed on Saturday, a custom which seems to be reasonable. It is not proved what this settlement fully means; it certainly means the payment of the purchase money and the transfer of the shares by the vendor; but does it also comprise its

acceptance by the client of the broker or the real purchaser? It is alleged that it is sufficient to accept and disclose his name within a reasonable time. I find no evidence of any custom to that effect, and to my mind the word "settlement" must mean everything that is necessary to complete the transaction, that is the payment of the purchase money, the transfer of the shares and its acceptance either by the broker or his principal, who must be disclosed not later than on the day of settlement, if the broker wishes to free himself from any personal responsibility. The committee of the Toronto Stock Exchange, who were called upon to report on this transaction at the request of Cochran, admit that the brokers are bound to disclose their principals, but omit to mention when this should be done, although it is conceded it is never done at the board at the time of the sale. But in this instance, the disclosure was made on the transfer book of the bank three days after the day of settlement, and I easily understand why the committee would not decide whether, as a matter of fact, the two brokers, or even one of them, had acted as mere brokers or on their own account. In the absence of any custom to extend the time of the acceptance of the transfer, and consequently the disclosure of the real purchaser, beyond the day of settlement, I feel that I am bound to apply the ordinary principle of law, that a broker buying on a stock exchange, without disclosing his principal within the delay fixed by the regulations of the association, is personally responsible for the transaction, just as if he had acted on his personal account. It seems to me therefore that, as no transferee's name other than that of the buying broker, was mentioned on the day of settlement, the transaction was closed, "settled" on his behalf and for his own benefit and subject to all the burdens attached to the same.

1898

BOULTBEE v. GZOWSKI.

Girouard J.

Any other conclusion would lead to any amount of uncertainty which is not consistent with stock exchange operations. I am therefore of opinion that the appeal should be allowed, and the judgment of the Divisional Court restored with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Boultbee & Boultbee.*

Solicitor for the respondent: *Barwick, Aylesworth & Franks.*

1898

*Oct. 13.

CORDELIA VIAU.....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

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

Appeal — Jurisdiction — Criminal law — Criminal Code, 1892, *ss.* 742-750—*New trial—Statute, construction of*—55 *&* 56 *V. c.* 29, *s.* 742.

An appeal to the Supreme Court of Canada does not lie in cases where a new trial has been granted by the Court of Appeal under the provisions of the Criminal Code, 1892, sections 742 to 750 inclusively.

The word "opinion" as used in the second subsection of section seven hundred and forty-two of "The Criminal Code, 1892," must be construed as meaning a "decision" or "judgment" of the Court of Appeal in criminal cases.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, (Appeal Side) (1) on an appeal from the Court of Queen's Bench (crown side) in the District of Terrebonne, by which the verdict of guilty against the appellant was quashed and set aside

---

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

(1) Q. R. 7 Q. B. 362.

and a new trial ordered upon the indictment for murder presented against her.

The appellant was indicted for murder, and upon her trial the jury found a verdict of guilty on the 2nd February, 1898. In the course of the trial, objections were raised by counsel for the prisoner against the reception of some of the evidence adduced, upon four points, as follows:

"1. That certain admissions alleged to have been made by the prisoner, had been obtained under the influence of improper inducements by persons in authority;"

"2. That the prisoner's deposition made before the coroner at the inquest was not admissible in evidence against her;"

"3. That the evidence of a witness who was under accusation of having been a party to the murder, was not admissible against her; and

"4. That secondary evidence of the contents of two letters was not admissible, as there was no proof that their production was impossible."

The first point was reserved as a question of law by the presiding judge on the trial, but he refused to reserve the case upon the three other objections raised on behalf of the prisoner. Leave to appeal on the three last points was subsequently obtained on application to the Attorney General for Quebec and the trial judge accordingly stated the case to be submitted to the Court of Queen's Bench, sitting in appeal, for the opinion of the court upon all the objections so taken.

The Court of Appeal decided:

1. That it did not appear that the confession had been made under the influence of improper inducements, but was free and voluntary, and admissible as evidence before the jury;

1898

VIAU
v.
THE
QUEEN

2. That the deposition before the coroner should not have been received in evidence at the trial in consequence of the provisions of the Canada Evidence Act, 1893;

3. That the evidence of the witness accused of having been a party to the murder was admissible as he had not been indicted jointly with the prisoner, and was not being tried jointly with her; and

4. That the secondary evidence of the contents of the letters should not have been admitted, as it had not been proved that it was impossible to produce them, nor even that they had ever existed.

The Court of Appeal accordingly ordered and adjudged that there had been a mis-trial; that the verdict against the prisoner should be quashed and set aside, and a new trial of the prisoner had upon the indictment, two of the judges of the Court of Appeal dissenting from the opinion of the majority of the court, upon the question as to the admission of the confession in evidence.

The prisoner on this appeal did not attack the order for a new trial but her object was to obtain a reversal of the decision that the confession had been properly admitted in evidence, and was based upon the dissent of these two judges upon that question as above mentioned.

On the appeal being called for hearing a motion was made to quash the appeal for want of jurisdiction.

Cannon Q.C., Assistant-Attorney-General for Quebec, for the motion. No appeal lies, inasmuch as the conviction was not affirmed on the appeal to the Court of Queen's Bench, but on the contrary the conviction was quashed and set aside by the judgment of the Court of Queen's Bench and a new trial granted. See Criminal Code, s. 750.

1898

VIAU
v.
THE
QUEEN.

Poirier contra. The appeal in the court below was on several grounds, and as to one of the questions raised, that respecting the admission of the confession in evidence, the decision of the Court of Queen's Bench affirmed the decision of the trial judge allowing this evidence to go to the jury. We contend that the decision is not according to the law of evidence that should govern the case, and it may have a serious effect to the prejudice of the prisoner on her new trial unless that part of the judgment is reversed on the appeal now sought to this court. There are dissents from this part of the judgment by two of the judges who heard the appeal in the court below, and consequently an appeal on this ground should be allowed, as was done in the case of *McIntosh* v. *The Queen* (1), for there has been upon this point both affirmance and a dissent as contemplated by the statute.

Tbe judgment of the court was delivered by:

THE CHIEF JUSTICE (*Oral.*)—The court is unanimously of opinion that there is no jurisdiction to entertain the appeal in this case. Section 742 of the Criminal Code, 1892, makes provision for appeals to this court where there has been dissent in the Court of Appeal, but that appeal is given only as thereinafter provided; this proviso refers to section 750 of the Criminal Code, by which such appeals are restrictod to cases where the judgment of the majority of the Court of Appeal has affirmed the conviction on an appeal under section 742. In the present case the Court of Appeal did not affirm the conviction, but on the contrary quashed it and set it aside upon two of the grounds raised by the appellant and directed a new trial upon the indictment. This distinguishes the case from that of *McIntosh* v. *The Queen* (1), in which

(1) 23 Can. S. C. R. 180.

1898

VIAU
v.
THE QUEEN.

The Chief Justice.

the decision appealed from was affirmed by the Court of Queen's Bench. In this case, although the majority of the Court of Appeal affirmed the decision as to the admission of the confession in evidence against the prisoner, and two of the judges who heard the appeal dissented from the view of the majority of the court upon that question, yet this difference of opinion and the questions raised as to the confession and whether it was improperly obtained, and what effect this opinion of the majority of the Court of Appeal might have at the new trial of the prisoner, cannot in any manner affect the competence of this court. The jurisdiction of this court depends entirely upon the statutes from which it derives its powers in both civil and criminal matters, and we are given no jurisdiction to hear appeals in criminal cases except in those where there has been not only an affirmance of the conviction, but also some dissent amongst the judges in the Court of Appeal. We have been given no jurisdiction in cases where the Court of Appeal by a unanimous judgment has ordered a new trial.

In section 742 the word "opinion" must be construed as meaning the decision or judgment of the court as clearly appears on reading the context contained in the first sentence of the subsection in which that word is used.

The appeal must be quashed.

Appeal quashed.

Solicitor for the appellant: *Poirier & Leduc.*

Selicitor for the respondent: *L. J. Cannon.*

AMES-HOLDEN COMPANY AND OTHERS (DEFENDANTS)..... APPELLANTS;

1898

*Oct. 2.

AND

THOMAS A. HATFIELD (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Contract—Agreement to supply goods—Property in goods supplied—Execution—Seizure.

By an agreement between H., of the one part, and W. and wife of the other, the latter were to provide and furnish a store and H. to supply stock and replenish same when necessary; W. was to devote his whole time to the business; W. and wife were to make monthly returns of sales and cash balances, quarterly returns of stock, etc., on hand and to remit weekly proceeds of sales with certain deductions. H. had a right at any time to examine the books and have an account of the stock, etc.; the net profits were to be shared between the parties; the agreement could be determined at any time by H. or by W. and wife on a month's notice.

Held, that the goods supplied by H. under this agreement as the stock of the business were not sold to W. and wife but remained the property of H. until sold in the ordinary course; such goods, therefore, were not liable to seizure under execution against H. at the suit of a creditor.

APPEAL from a decision of the Supreme Court of the North-west Territories affirming the judgment of Rouleau J. on the trial of an interpleader issue.

The only question in this case is as to the title to goods supplied by Hatfield, the plaintiff, to one West, a merchant at Innisfail, in the district of Alberta, which agreement was as follows:

"An agreement made between Thomas A. Hatfield, of the City of Calgary, in the district of Alberta, in

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

1898

AMES-HOLDEN CO. v. HATFIELD.

the North-west Territories of the Dominion of Canada, general merchant, of the one part, and G. W. West, of Innisfail, in the said district of Alberta, merchant, and Mary Jane, wife of the said G. W. West, of the other part, whereby it is agreed as follows:

"1. The said G. W. West and Mary Jane, his wife, will during the continuance of these presents provide and furnish free of rent and taxes a store at Innisfail aforesaid suitable for carrying on the business of a general merchant.

"2. The said Thomas A. Hatfield will supply to the said G. W. West and Mary Jane, his wife, at Innisfail aforesaid, all such goods and stock in trade as are usually necessary and required in the trade or business of a general merchant, and replenish such stock in trade from time to time as occasion may require, and the said Thomas A. Hatfield deem expedient.

"The said G. W. West shall, except when prevented by sickness, devote the whole of his time and attention to carrying on the trade or business of a general merchant at Innisfail, aforesaid, and diligently employ himself therein and promote to the utmost of his powers the benefit and advantage of the same.

"4. The said G. W. West and Mary Jane, his wife, shall make a report to the said Thomas A. Hatfield of the sales made and the cash balances once in each and every month during the continuance of this agreement, and shall render unto the said Thomas A. Hatfield a general account of the stock in trade, credits, property and effects, debts and liabilities of the said business once every three months.

"5 The said G. W. West and Mary Jane, his wife, shall remit to the said Thomas A. Hatfield, at Calgary, all monies received by them from sales in the course of the business as aforesaid, such remittances to be made on Tuesday and Friday in each and every week

1898

AMES-HOLDEN CO. v. HATFIELD.

deducting freight charges and such amounts as may have been paid out in cash for local merchandise and farm produce.

"6. The said Thomas A. Hatfield may from time to time and at all times visit the said store at Innisfail and examine all and any of the books of accounts kept by the said G. W. West and Mary Jane, his wife, and take an account of the stock in trade, credits, property and effects, debts and liabilities of the business, and the said G. W. West and Mary Jane, his wife, shall whenever called upon give to the said Thomas A. Hatfield full explanations with regard to any matters concerning the said business as aforesaid.

"7. Proper books of account shall be kept by the said G. W. West and Mary Jane, his wife, and entries immediately made therein of all receipts and payments made and all such other matters and things as are usually entered in similar books of account.

"8 The net profits of the said business after deducting all freight charges shall be shared in equal proportions between the said Thomas A. Hatfield and G. W. West.

"9. This agreement may be determined at any time by Thomas A. Hatfield.

"10. If the said G. W. West and Mary Jane, his wife, wish to terminate this agreement they shall give to the said Thomas A. Hatfield one month's written notice of their desire so to do."

Several creditors of West, having obtained judgments against him, executions were issued and the goods supplied by Hatfield under the agreement were seized by the sheriff. Hatfield obtained an interpleader order, and an interpleader issue was tried resulting in his favour. The execution creditors then brought this appeal.

1898

AMES-HOLDEN CO. v. HATFIELD.

Latchford and *McDougall* for the the appellants. The agreement is inconsistent with West being a manager for, or partner with Hatfield. *Ex parte White: In re Nevill* (1).

The business was carried on in the name of West, and those dealing with him had, and could have, no knowledge of Hatfield being interested.

Knott for the respondent was not called upon.

The judgment of the court was delivered by:

GWYNNE J.—At the time when the agreement which is the subject of consideration in this case was entered into, there were executions in the sheriff's hands against the goods and chattels of West, one of the parties to the agreement, so that if the contention of the appellants should prevail, then *eo instanti* that the goods of Hatfield came into the possession of West and his wife, they became West's property under the agreement, and would be liable to the executions in the sheriff's hands. Now it is, I think, apparent upon the terms of the agreement, although I admit that this might have been more perfectly expressed, that the intention of Hatfield was to make impossible such a result. The parties never contemplated a sale of the goods by Hatfield to West, or to him and his wife. There is nothing in the agreement warranting such a construction There is no provision that West and his wife, or West, shall pay anything to Hatfield as the price of the goods to be placed in the possession of West and his wife under the agreement; in fact the construction of the agreement appears to me to be that Mrs. West should supply the shop where the goods should be sold; that she and her husband, acting as agents of Hatfield, should weekly render a statement

(1) 6 Ch. App. 397.

1898

AMES-HOLDEN CO. v. HATFIELD.

Gwynne J.

of the amount of sales made by them of Hatfield's goods, less certain allowed charges, and that West and his wife, for all their services rendered to Hatfield, should receive nothing whatever but one-half of the net profits arising from the business, and that Hatfield should have the right of determining that agreement at his pleasure at any moment.

Upon such a contract it is impossible for us to hold that the goods placed by Hatfield in the hands of West and his wife, or of West, under the agreement, became the property of West, and therefore liable to the executions in the sheriff's hands against his goods, or that Hatfield ever lost his property in the goods, except as to the goods sold by West and his wife, under the agreement, as to which there is no question here.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy & Stuart.*

Solicitors for the respondent: *Crispin E. Smith.*

JOHN HYDE (PLAINTIFF)-.....APPELLANT;

AND

THOMAS LINDSAY (DEFENDANT).....RESPONDENT.

1898

*Oct. 24.
Nov. 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Right to, in Ontario cases—60 & 61 V. c. 34—Application to pending cases.

The Act 60 & 61 Vict. ch. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario as therein specified, does not apply to a case in which the action was pending when the Act came into force although the judgment directly appealed from may not have been pronounced until afterwards.

---

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

1898

HYDE v. LINDSAY.

MOTION for approval of a bond for security for costs on appeal referred to the court by King J. in Chambers.

The application to the Judge in Chambers to have the security approved was opposed on the ground that the judgment for the plaintiff at the trial, which was reversed by the Court of Appeal, was for less than $1,000, and the case did not fall within any of the provisions of 60 & 61 Vict. ch. 34, which limits the right of appeal to the Supreme Court from judgments of the courts in Ontario. The plaintiff contended that the Act did not apply, as the proceedings in the cause were pending when it came into force.

The writ in the cause was issued in April, 1897. The trial was concluded and judgment reserved by the trial judge on June 25th, 1897, and the Act, 60 & 61 Vict. ch. 34, received the Royal assent on June 29th.

The trial judge pronounced judgment in favour of the plaintiff on August 3rd. The case then went to the Court of Appeal where judgment was given reversing the decision of the trial judge on May 10th, 1898.

The question for the determination of the court on the motion was whether or not the plaintiff was deprived of his appeal by the said Act.

Belcourt in support of the motion. This court has decided that the Act 54 & 55 Vict. ch. 25, which extended the right of appeal in Quebec cases to judgments of the Court of Review, did not apply to cases which were pending when it came into force. See *Hurtubise* v. *Desmarteau* (1); *Couture* v. *Bouchard* (2); *Williams* v. *Irvine* (3); *Cowen* v. *Evans* (4).

If that is the case with respect to an Act granting a right of appeal *a fortiori* must it be so in regard to the

(1) 19 Can. S. C. R. 562.
(2) 21 Can. S. C. R. 281.
(3) 22 Can. S. C. R. 103.
(4) 22 Can. S. C. R. 331.

1898

HYDE v. LINDSAY.

Act in question here by which such right is taken away.

Pratt, contra. The plaintiff applied to the Court of Appeal for special leave to appeal to this court under the Act which leave was refused and he cannot now obtain such leave indirectly.

The Act 60 & 61 Vict. ch. 34, is, by its terms, an enactment by Parliament of legislation previously passed in Ontario and cannot be treated as a new Act.

The judgment of the court was delivered by:

TASCHEREAU J.—Motion for leave to put in security for costs. The respondent opposes the application on the ground, 1st. That the appellant has made an application to the Court of Appeal in Ontario for special leave to appeal under section 1 (*e*) of 60 & 61 Vict. ch. 34, which application has been refused. 2nd. That the case is for less than $1000, and not appealable under that section, sub-secs. a, b, c, d. The appellant's answer is that this statute has no application, because the case was pending before it was passed.

The dates are: Writ issued April 10th, 1897; trial, 25th June, 1897; judgment reserved and rendered August 3rd, 1897; judgment in Court of Appeal, May 10th, 1898. The statute in question, 60 & 61 Vict. ch. 34, was sanctioned on the 29th June, 1897.

We have to hold under the decisions of this court that the case is appealable, and that the statute does not apply to cases then pending (on June 29th, 1897), though the judgment of the Court of Appeal has been rendered since. If we were not fettered by authority, I, personally, would hold that the statute applies to all cases in which the judgment of the Court of Appeal has been given since it was sanctioned, but I am not at liberty to give effect to my individual opinion. In

1898

HYDE v. LINDSAY.

Taschereau J.

Hurtubise v. *Desmarteau* (1), and *Couture* v. *Bouchard* (2), the judgments of the Quebec Court of Review appealed from were given, or held to have been given, on the very same day that the Act giving the right to appeal from that court was sanctioned. The appeals were quashed. The decisions on those cases, however, do not directly apply here, though it might perhaps be said that it was assumed in both that if the judgments appealed from had been rendered after the passing of the statute, they would have been appealable. Strong J. (now Chief Justice) gave his opinion that even in that case the judgments would not have been appealable. However, the subsequent decisions of the court on the matter leave no room for doubt.

In the case of *Williams* v. *Irvine* (3), the action had been instituted in 1890, tried in June, 1891, and judgment reserved, subsequently given on the 17th November, 1891. Judgment in Review appealed from 29th February, 1892. The statute giving an appeal from the Court of Review had been sanctioned on September 30th, 1891. The appeal was quashed, because when the action was instituted there was then no right of appeal from the Court of Review. In *Mitchell* v. *Trenholme* (4), the action was for $5,000; the judgment in first instance given on the 27th September, 1890, granted $300 to plaintiff. The Court of Appeal confirmed that judgment on the 28th February, 1893. The statute which enacted that when the right to appeal is dependent upon the amount in dispute, the amount demanded is thereby meant, was passed on the 30th September, 1891. The appeal was quashed, as when the action was instituted it was the amount granted that governed, and as the amount granted by the judgment appealed from was

(1) 19 Can. S. C. R. 562.
(2) 21 Can. S. C. R. 281.
(3) 22 Can. S. C. R. 108.
(4) 22 Can. S. C. R. 333.

1898

HYDE v. LINDSAY.

Taschereau J.

under $2,000 the case was not appealable. In *Cowen* v. *Evans* (1), the judgment in the Superior Court, dismissing an action for $3,050, had been rendered on the 5th December, 1891. The judgment of the Court of Appeal on 28th February, 1893, had reversed the judgment of the Superior Court, and granted $880 to plaintiff. The defendant's appeal to this court was quashed, because the statute passed on September 30th, 1891, giving the right to appeal in cases where the amount granted was less than $2,000, if the amount demanded had been $2,000 or over, did not apply to cases pending *en délibéré* before the Superior Court on that day. The words *en délibéré* in the report of that case seem to have crept in by error, for, on the same day, in *Mills* v. *Limoges* (2), the appeal was quashed in a similar case, where the judgment of the Superior Court had been given in April, 1891, five months before the statute, though the judgment appealed from had been rendered over twelve months later.

A similar case, *The Montreal Street Railway* v. *Carrière* (3), is noted as a foot note, at page 335. Here, upon this application, we have the converse of these cases. There, it was a statute giving the right of appeal that was held not to apply to cases pending before the statute, though the judgments appealed from had been rendered since the statute had been enacted. Here we have the question presented under a statute taking away the right of appeal in cases where it existed previously. But I cannot see that it alters the result. If the statute in the former cases does not apply to pending cases, I do not see upon what principle we could hold that the statute in the present case does apply to pending cases.

(1) 22 Can. S. C. R. 331. (2) 22 Can. S. C. R. 334.
(3) 22 Can. S. C. R. 335.

1898

HYDE v. LINDSAY.

Taschereau J.

In the objection taken by the respondent that the appellant's application should be refused because he had unsuccessfully applied for special leave to the Court of Appeal in Ontario before coming here, there is nothing. The mistake he made of his rights cannot deprive him of those rights, or constitute a waiver thereof.

Motion allowed with costs taxed at $25.

Motion allowed with costs.

Solicitors for the appellant: *Belcourt & Ritchie.*

Solicitors for the respondent: *Pratt & Pratt.*

1898

*Feb. 15.

Nov. 21.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION (DEFENDANT) ..... APPELLANT;

AND

MARGARET G. TAYLOR (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Accident insurance—Condition in policy—Notice—Condition precedent.

A condition in a policy of insurance against accidents required that in the event of an accident thereunder, written notice, containing the full name and address of the insured, with full particulars of the accident, should be given within thirty days of its occurrence to the manager for the United States or the local agent.

Held, reversing the judgment of the Supreme Court of New Brunswick, Gwynne J. dissenting, that the giving of such notice was a condition precedent to the right to bring an action on the policy.

APPEAL from a decision of the Supreme Court of New Brunswick in favour of the plaintiff on demurrer.

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

1898

EMPLOYERS' LIABILITY ASSURANCE CORPORATION v. TAYLOR.

The plaintiff sued on a policy of insurance against accidents in favour of her deceased husband Byron G. Taylor. One of the conditions in the insurance policy provided that:

"In the event of any accident within the meaning of this policy happening to the insured, written notice, containing full name and address of the insured, with full particulars of the accident, shall be given within thirty days of its occurrence to the manager for the United States, at Boston, Mass., or the agent of the corporation whose name is indorsed hereon."

The defendant pleaded, among other defences, that no notice was given as required by this condition. To this plea the plaintiff demurred, and her demurrer was sustained by the Supreme Court of New Brunswick which held that the giving of the notice was not a condition precedent to a right of action on the policy. From that judgment the appeal to this court was taken.

Owen Ritchie for the appellant. The effect of the judgment of the court below is to expunge the clause which was made part of the contract by the policy, requiring notice as a condition precedent to any right of action. In fire policies made on "terms and conditions" providing for notice of loss, compliance with such terms are conditions precedent; *Nixon* v. *The Queen Insurance Co.* (1); *Bowes* v. *National Insurance Co.* (2); *Gibson* v. *The North British and Mercantile Insurance Co.* (3); and the same principle applies to insurances against accidents; *The Accident Insurance Co. of North America* v. *Young* (4); *Cassel* v. *Lancashire and Yorkshire Accident Insurance Co.* (5); *Patton* v. *Employers' Liability Assurance Corporation* (6). See also

(1) 23 Can. S. C. R. 26.
(2) 4 P. & B. 437.
(3) 3 Pugs. 83.
(4) 20 Can. S. C. R. 280.
(5) 1 Times L. R. 495.
(6) 20 L. R. Ir. 93.

1898

EMPLOYERS' LIABILITY ASSURANCE CORPORATION v. TAYLOR.

Porter on Insurance (2 ed.), p. 186; *Trippe* v. *The Provident Fund Society* (1); *Whyte* v. *The Western Assurance Co.* (2). The rule "*Verba chartarum fortius accipiuntur contra proferentem*" is a doubtful one and was held to be unreasonable by Jessel, M. R. in *Taylor* v. *The Corporation of St. Helens* (3).

Pugsley Q.C. and *Blair* for the respondent. This is a case falling within the application of the maxim "*Verba chartarum fortius accipiuntur contra proferentem*" and the principles decided in *Stoneham* v. *The Ocean Ry. and Gen. Accident Insurance Co.* (4); see also *Bowes* v. *The National Insurance Co.* (5). The company has failed to use language sufficiently express to make the giving of the notice a condition precedent and the policy must be construed most strongly against the party making it; *Notman* v. *The Anchor Insurance Co.* (6); consequently reasonable notice, as actually given, was sufficient. We rely also upon the decisions in *Anderson* v. *Fitzgerald* (7); *Cassel* v. *The Lancashire and Yorkshire Accident Insurance Co.* (8), and we refer to Bunyon on Life Assurance, p. 82. There is in this case a distinction to be drawn between "conditions" and "collateral agreements."

TASCHEREAU J.—By a policy for $5,000 on which the action was brought the defendants (now appellants) insured one Taylor, the respondent's husband, against bodily injuries "subject and according to the agreements and conditions herein contained including those printed on the back of this policy." On the back of the policy, among the "agreements and condi-

(1) 140 N. Y. 23.
(2) 7 R. L. 106; 22 L. C. Jur. 215.
(3) 6 Ch. D. 264.
(4) 19 Q. B. D. 237.
(5) 4 P. & B. 437.
(6) 4 Jur. N. S. 712.
(7) 4 H. L. Cas. 484.
(8) 1 Times L. R. 495.

tions under which this policy is issued and accepted," it is provided among other things that:

In the event of any accident within the meaning of this policy happening to the insured written notice containing full name and address of the insured, with full particulars of the accident, shall be given within thirty days of its occurrence to the manager for the United States at Boston, Mass., or the agent of the corporation whose name is indorsed hereon, and on demand such certificate by medical practitioners qualified by law, and other papers of proof of claim shall be furnished by the insured or his representatives, at his or their own cost, as this corporation may reasonably require.

The declaration sets out the policy including the indorsed conditions and avers generally the performance of conditions precedent. The plea demurred to traverses the performance of the above condition, and on the demurrer judgment was given for the plaintiff (the respondent.) The defendants now appeal from that judgment.

The point of law upon this appeal is therefore, whether the above provision is a condition precedent to any right of action upon this policy, or an independent and collateral covenant. I think that it is a condition precedent.

That provision cannot be read out of the contract. It forms part of it, and is a stipulation that must be given effect to. Now, to say that it is not a condition precedent is to leave it without any effect whatsoever. The intention of the parties, which is the guide in interpretation of contracts, must necessarily have been that this notice should be a condition precedent to any right of action upon the policy. Otherwise, the stipulation is vain, frivolous, means nothing. It was not necessary to say that it was to be a condition precedent. It is so by its nature. It is not a condition at all if it is not a condition precedent. And we cannot so obliterate it from the contract. I would allow the appeal with costs.

1898

EMPLOYERS' LIABILITY ASSURANCE CORPORATION v. TAYLOR.

Gwynne J.

SEDGEWICK, KING and GIROUARD JJ. concurred.

GWYNNE J.—It is impossible, in my opinion, to read the policy of insurance against accidents in this case, as providing that unless written notice containing full name and address of the insured with full particulars of the accident shall be given within thirty days of the occurrence to the company's manager for the United States at Boston, or to the agent of the company whose name is indorsed on the policy, and unless such certificate by duly qualified medical practitioners as should be reasonably required by the company should be furnished on demand, and unless such other affirmative proof of the claim as the company should reasonably require should be furnished within thirteen months from the happening of the accident, no payment shall be made under the policy. Not being susceptible of such a construction the policy must be read as containing separate independent stipulations, one of which relates to furnishing notice of the accident within thirty days from its occurrence, compliance with which stipulation is not in express terms declared to constitute a condition precedent; and another having relation to the furnishing proof of claim, compliance with which is in express terms made a condition precedent. This stipulation is wholly independent of that as to notice of the occurrence of the accident, and is in these words:

> Unless affirmative proof of claim is furnished within thirteen months from the happening of the accident no payment shall be made hereunder.

That clause in express terms makes the furnishing proof of claim within the prescribed period a condition precedent. So compliance with the provision of the next clause is in like manner expressly made as condition precedent. It provides that;—

1898

EMPLOYERS' LIABILITY ASSURANCE CORPORATION v. TAYLOR.

Gwynne J.

No legal proceeding for recovery hereunder shall be brought within three months after receipt of proof at this office.

So that if proof should not be furnished until some time in the thirteenth month from the happening of the accident no action would lie until the expiration of the further period of three months. The case in short is undistinguishable from *Stoneham* v. *Ocean Railway and General Accident Assurance Co.* (1); and the sole question is whether, although we are not bound in law by the decision in that case, it so recommends itself to our judgment that we ought to adopt it as a correct exposition of the law, or on the contrary that we must pronounce our judgment to be adverse to it and therefore must reject it as not being a correct exposition of the law upon the subject. If we are of opinion that it is a sound exposition of the law although not bound in law we are, *in foro conscientiæ*, bound to follow it. We must concur in the judgment wherein it says that the question whether compliance with the stipulation as to notice of the happening of the accident is a condition precedent is purely a question of construction, and that it is for the court to say looking at all the terms of the policy what the true meaning of the contract is—or in other words what the true intention of the parties to the contract was to be gathered from the terms of the policy.

Now in the clause of the policy as to giving notice of the occurrence of the accident there are no words used expressing the intention of the parties to be that compliance in this particular is a condition precedent to the right of the assured to recover anything under the policy, whereas in the clause relative to the furnishing proof of claim there are used words plainly expressing the intention of the parties to be that com-

(1) 19 Q. B. D. 237.

1898

EMPLOYERS' LIABILITY ASSURANCE CORPORATION v. TAYLOR.

Gwynne J.

pliance with that clause is such a condition precedent. Now this difference in the mode of expression as to these two clauses reasonably points to a difference in intention as to their respective effect. But in addition to this it appears by clause E that the policy was intended to cover an accident occurring anywhere "within the limits of the civilized world." In such a case it was very reasonable that thirteen months should be allowed for furnishing proof of claim, and it is reasonable to infer that this was the reason for allowing such a length of time, but the period limited for furnishing proof of claim applies equally to every case irrespective of all question as to the place where the accident occurred. No distinction is made in the policy in any manner affecting the time within which either notice of the occurrence of the accident, or proof of claim must be given having regard to the place where the accident should occur, namely, whether in the remotest part of the civilized world or upon the very premises of the defendants. Now how can we with any reasonable regard to the intention of the parties to be gathered from the terms of the policy hold that if an accident should occur in some remote part of the civilized world notice of the occurrence of the accident must be given within thirty days of its occurrence, or in default, that all right of recovery is forfeited, while thirteen months are expressly given by the clause for furnishing proof of claim? This I confess appears to me to be so plainly inconsistent with a reasonable construction of the contract that for this reason coupled with those given in *Stoneham* v. *Ocean Insurance Co.* (1), I am of opinion that the appeal should be dismissed. It is said that the effect of this construction would be to eliminate the stipulation as to notice of the occurrence of the accident wholly from the contract, but this is by no means the

(1) 19 Q. B. D. 237.

case for if the company should sustain any damage by reason of a non-compliance with that stipulation they can recover compensation for such damage in an action instituted for the purpose. In the present action if in the courts of the Province of Ontario such compensation could be recovered upon a counter-claim, but if the defendants have received no damage by reason of such non-compliance it is not reasonable that they should recover anything, much less that the non-compliance should constitute a forfeiture of all claim under the contract when the defendants have not in express terms declared in the policy their intention to be that it should have such an effect; why should the defendants' vagueness in expressing their intention operate thus by implication and not by express terms as a forfeiture of the policy for their own benefit and to the prejudice of the assured.

In the present case it is quite possible that the notice may have been given on the 31st day from the occurrence of the accident, and that the defendants called for certain specific proof which was furnished by the plaintiff; the issues joined upon the pleas which the defendants pleaded but obtained leave to withdraw, may have shown this. We cannot tell, for the pleas withdrawn and the issues thereon are not before us, but however this may be I am of opinion that the parties have not by the terms of this policy plainly expressed their intention to be that non-compliance with the stipulation as to notice of the occurrence of the accident shall constitute a forfeiture of all right to recover anything under the policy, and that therefore the judgment of the court in New Brunswick upon the demurrer should be sustained and the appeal dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *H. H. McLean.*

Solicitor for the respondent: *A. G. Blair.*

1898

*Mar. 2.

*Nov. 21.

HER MAJESTY THE QUEEN (RESPONDENT) .... } APPELLANT;

AND

ALEXANDER SMYTHE WOODBURN (SUPPLIANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Public work—Formation of contract—Ratification—Breach.

On November 22nd, 1879, the Government of Canada entered into a contract with C. by which the latter undertook to do all the Government binding for five years from said date. The contract was executed under the authority of 32 & 33 Vict. ch. 7, sec. 6, and on November 25th, 1879, was assigned to W. who performed all the work sent to him up to December 5th, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's Printer as follows: "I am directed by the Honourable the Secretary of State to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution under the same rates and conditions as under the contract which has just expired." W. performed the work for two years under authority of this letter and then brought an action for the profits he would have had on work given to other parties during the seven years.

Held, that the letter of the Queen's Printer did not constitute a contract binding on the Crown; that the statute authorising such contracts was not directory but limited the power of the Queen's Printer to make a contract except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's Printer, and that he could not recover in respect of the work done after the original contract had expired.

On October 30th, 1886, an Order-in-Council was passed, which recited the execution and assignment of the original contract, the execution of the work by W. after it expired, and the recommendation of the Secretary of State that a formal contract should be entered into extending the original to December 1st, 1887, and then

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

1898

THE QUEEN v. WOODBURN.

authorized the Secretary of State to enter into such formal contract with W. but subject to the condition that the Government should waive all claims for damages by reason of non-execution or imperfect execution of the work, and that W. should waive all claims to damages because of the execution of binding work by other parties up to the date of said execution. W. refused to accept the extension on such terms.

Held, that W. could not rely on the Order-in-Council as a ratification of the contract formed by the letter of the Queen's Printer; that the element of *consensus* enters as much into a ratification of a contract as into the contract itself; and that W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it.

After an appeal from the final judgment of the Exchequer Court was lodged in the Supreme Court the Crown obtained leave to appeal from an order of reference to ascertain the amount of the suppliant's damages.

Held, that the Judge of the Exchequer Court had authority to allow the appeal and it was properly before the Supreme Court.

APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the suppliant.

The facts of the case are sufficiently set out in the above head-note and in the judgment of the court.

When the appeal was called for hearing a motion was made on behalf of the respondent to quash the appeal in so far as it related to the judgment of the Exchequer Court of 16th April, 1896, on the ground that it came too late and could not be entertained by the Supreme Court. It appeared that under a reference in that judgment the referee in his report found that respondent is entitled to be paid $38,829.03, being $23,553.58, damages for loss of profits between 1st December, 1879, and 1st December, 1884 (in respect to which finding no appeal was asserted by the Crown), and $15,275.45, damages for loss of profits between 1st December, 1884, and 9th November, 1886. The appellant and the respondent each appealed from the referee's report, and by a judgment of the Exchequer Court delivered on

(1) 6 Ex. C. R. 12.

1898

THE QUEEN v. WOODBURN.

the 29th November, 1897, the report was confirmed and judgment entered in the respondent's favour for the total sum of $38,829.03 and costs.

The present appeal was instituted on the 22nd December, 1897, by the Crown, by notice filed pursuant to 50 & 51 Vict. ch. 16, sec. 53, and limited to that portion of the judgment of 29th November, 1897, as to damages between the 1st of December, 1884, and the 9th of November, 1886. On 10th of January, 1898, after this appeal had been inscribed for hearing the Attorney General for Canada applied to the Exchequer Court Judge to amend the judgment of 16th April, 1896, or to extend the time for appealing therefrom, and on 17th January, 1898, the Exchequer Court Judge made an order dismissing the application to amend, but extending, until the 1st February, 1898, the time for appealing from the judgment so far as it dealt with that part of the respondent's claim based upon breaches of contract between 1st December, 1884, and 9th November, 1886.

Hogg Q.C. and *Sinclair* for the motion. This appeal ought to be governed by the decision in *The Queen* v. *Clark* (1), and the only question properly open is as to the accuracy of the referee's report respecting the amount of damages for the period between 1st December, 1884, and 9th November, 1886.

After the appeal was in this court the Exchequer Court Judge was *functus officio*, and the order made by him on the 17th January, 1898, is null and should be disregarded. *Lakin* v. *Nuttall* (2); *Walmsley* v. *Griffiths* (3); *Starrs* v. *Cosgrave Brewing and Malting Co.* (4); *Mayhew* v. *Stone* (5); *City of Toronto* v. *Toronto Street Railway Co.* (6); *McGarvy* v. *Town of Strathroy* (7);

(1) 21 Can. S. C. R. 656.
(2) 3 Can. S. C. R. 691.
(3) Cass. Dig. (2 ed.) 697.
(4) Cass. Dig. (2 ed.) 697.
(5) 26 Can. S. C. R. 58.
(6) 12 Ont. P. R. 361.
(7) 6 O. R. 138.

1898

THE QUEEN v. WOODBURN.

Agricultural Insurance Co. v. *Sargent* (1). The time for appealing cannot be extended under the provisions of the statute, 50 & 51 Vict. ch. 16, s. 51, unless the application for extension be made within thirty days from the date of judgment. *Glengarry Election Case* (2); *Re Oliver & Scott's Arbitration* (3).

Hon. Charles Fitzpatrick Q.C. (Solicitor General of Canada), and *Newcombe Q.C.* (Deputy of the Minister of Justice), *contra.*

THE COURT was of opinion that the order enlarging the time for appealing was within the competence of the Exchequer Court Judge and ordered the hearing to proceed upon the merits.

Newcombe Q.C. for the appellant. The appeal is limited to that portion of the judgment which holds that the present respondent is entitled to recover damages for alleged breaches of a contract, which contract the respondent claims came into effect by reason of the Queen's Printer's letter of 5th December, 1884. No question arises as to payment for any work done. What he claims and has been adjudged entitled to, and what the Attorney General resists, is payment of the profit which the respondent would have earned had he been given work which, after the date of the Queen's Printer's letter, was given to others. The expired contract referred to in the letter was dated 22nd November, 1879, and covered a period of five years from 1st December of that year. It was made pursuant to 32 & 33 Vict. ch. 7, sec. 6.

The Queen's Printer's letter was not authorized by the Governor-in-Council, nor was any extension of the contract of 22nd November, 1879, or any further contract with the respondent. There was no public notice or

(1) 16 Ont. P. R. 397. (2) 14 Can. S. C. R. 453.
(3) 43 Ch. D. 310.

1898

THE QUEEN v. WOODBURN.

advertisement for tenders for the purpose of the arrangement evidenced by the Queen's Printer's letter. The statutory requirements were not in any respect complied with. See *Frend* v. *Dennett* (1); *Young* v. *Mayor, etc., of Leamington, Spa.* (2); *The Queen* v. *McLean* (3) at pages 234-235. Yet the judgment gave $15,275.45 damages against the Crown for the period subsequent to 1st December, 1884, and must be wrong in so far as it finds the respondent entitled to these damages and that the portion of the claim relating to the period in question. Nothing was or is conceded as to the existence of any contract after 1st December, 1884. The Queen's Printer's letter merely expresses his intention as then existing. It does not bind the Government to anything. It was not intended either as a contract or the basis for a contract. It is uncertain and void as a contract. Beach on Contracts, sec. 80; *Fell* v. *The Queen* (4). The future arrangements intended could not have been mutual arrangements, otherwise the contract could never be terminated except by agreement of both parties. The arrangements must, therefore, have been such as either party might make independently. It was open upon the terms of the letter for the Crown to arrange at any time that the respondent should not receive the whole or any part of the work, or for the respondent to arrange that he should not receive it. If that be the construction *cadet quæstio*, because the damages complained of are given in respect of work done otherwise than by the respondent under arrangements made by the Government after 5th December, 1884. See *Henning* v. *The United States Insurance Co.* (5); *The People* v.

(1) 4 C. B. N. S. 576.
(2) 8 App. Cas. 517.
(3) 8 Can. S. C. R. 210.
(4) 24 Law J Journal, 420; L. T. Journal, 202.
(5) 4 Am. Reps. 332.

Flagg (1) at page 591; *Brady* v. *Mayor, etc., of New York* (2) at page 316; *Hague* v. *City of Philadelphia* (3) at page 529; *Henderson* v. *United States* (4). Persons who seek to obtain the obligation of the public must ascertain that the proposed act "is within the scope of the authority which the law has conferred." Mechem's Public Offices and Officers, sec. 829. *The Floyd Acceptances* (5) at pages 679 and 680; *Mayor, etc., of Baltimore* v. *Eschbach* (6) at page 282. Contractors dealing with the Government are charged with notice of all "statutory limitations placed upon the power of public officers especially where a statute expressly defines the powers." *Thompson* v. *United States* (7). See also per Richards C.J. in *Wood* v. *The Queen* (8) at pages 645 and 646.

There is no evidence of ratification or proof of any transaction on the part of the Government subsequent to the date of the Queen's Printer's letter which is referable to the idea that the Government had entered into any engagement to send all the binding work to the respondent. The contract was void and incapable of ratification; *Jacques Cartier Bank* v. *The Queen* (9); *The Queen* v. *Waterous Engine Works Company* (10); *The Queen* v. *Dunn* (11). See the observations of Lord Cairns in *Ashbury Railway Carriage and Iron Company* v. *Riche* (12) at page 672, and per Parker C.J. in *Despatch Line of Packets* v. *Bellamy Manufacturing Co.* (13) at page 232; and also Beach on Contracts, sec. 1161.

The instrument was in the first place void and the Order-in-Council has none of the requisites of an

(1) 17 N. Y. 584.
(2) 20 N. Y. 312.
(3) 48 Penn. St. 527.
(4) 4 Ct. of Clms. Rep. 75.
(5) 7 Wall. 666.
(6) 18 Md. 276.
(7) 9 Ct. of Clms. Rep. 187.
(8) 7 Can. S. C. R. 634.
(9) 25 Can. S. C. R. 84.
(10) Q. R. 3 Q. B. 222.
(11) 11 Can. S. C. R. 385.
(12) L. R. 7 H. L. 653.
(13) 12 N. H. 205.

1898

THE QUEEN v. WOODBURN.

estoppel. Everest & Strode on Estoppel, 4-10, 198, 200, 205, 219. There can be no estoppel in the face of an Act of Parliament. *In re Stapleford Colliery Co., Barrows case* (1), at page 441; *Kerr* v. *Corporation of Preston* (2), at page 468. The Crown is not bound by estoppel; per Holt C. J., at page 295 in *Coke's case* (3); Chitty on Prerogatives p. 381; *Humphrey* v. *The Queen* (4). The Governor-in-Council had no authority in October, 1886, at the date of the Order-in-Council to ratify any contract for Government binding, because the statute, 32 & 33 Vict. ch. 7, had then been repealed by the Act respecting the Department of Public Printing and Stationary, 49 Vict. ch. 22, and the Government printing establishment instituted where all binding required for the service of the Government should be executed. See remarks of Field C. J. in *McCracken* v. *City of San Francisco* (5), at page 624; also *Spence* v. *Wilmington Cotton Mills* (6); *Eyre & Spottiswode* v. *The Queen* (7). We refer also to *Churchward* v. *The Queen* (8); *Aspdin* v. *Austin* (9); *Dunn* v. *Sayles* (10); *Great Northern Railway Co.* v. *Witham* (11): *Burton* v. *Great Northern Railway Co.* (12); *Thorne* v. *City of London*, (13), and *Bulmer* v. *The Queen* (14).

Hogg Q.C. and *Sinclair* for the respondent. We contend that there was a contract between the Crown and the respondent between the 1st of December, 1884, and the 9th of November, 1886, under which he was entitled to do all the binding work of the Government, and in support of that view we rely on the reasons of the learned Exchequer Court Judge (15).

(1) 14 Ch. D. 432.
(2) 6 Ch. D. 463.
(3) Godb. 289.
(4) 2 Ex. C. R. 386.
(5) 16 Cal. 591.
(6) 115 N. C. Rep. 210.
(7) 3 Times L. R. 5. 304, 447.
(8) L. R. 1 Q. B. 173.
(9) 5 Q. B. 671.
(10) 5 Q. B. 685.
(11) L. R. 9 C. P. 16.
(12) 9 Ex. 507.
(13) L. R. 10 Ex. 112.
(14) 23 Can. S. C. R. 488, 496.
(15) 6 Ex. C. R. 12.

As to the Queen's Printer's Act, 32 & 33 Vict. ch. 7, secs. 7 & 8, the provisions there made are directory only with a view to secure system, uniformity and despatch in the conduct of public business. *Rex* v. *Loxdale* (1); 23 Eng. & Am. Encl. 258; *State of Wisconsin* v. *Lean* (2); *Pearse* v. *Morrice* (3); Maxwell on Statutes, (3 ed.) pp. 528-529; Wilberforce, Statute Law, p. 207; Endlich on Statutes, p. 621, s. 437; Hardcastle on Statutes (2 ed.) pp. 261-2, 276; See also *Caldow* v. *Pixell* (4); *Liverpool Borough Bank* v. *Turner* (5); and *Howard* v. *Bodington* (6), at page 211.

This is one of those cases where the Crown is bound by the act of a subordinate officer in the discharge of his duty. *The Queen* v. *St. John Water Commissioners* (7).

But even assuming the provisions of the statute to be obligatory the obligation only extends to the passing of an Order-in-Council, and where a contract has been entered into but not prefaced by an Order-in-Council there is nothing in the statute to prevent such a contract being ratified and affirmed by an Order-in-Council passed subsequent to the date of the contract; particularly so is this the case when the Order-in-Council is passed ratifying the contract after the parties have acted under it for years, as in this case. Evans Prin. & Agent (2 ed.) p. 87; *The Queen* v. *Lavery* (8). Section 7 of the Act in question empowers the Governor-General-in Council to authorize the making of contracts for printing and binding without compliance with the provisions of section 6 as to advertisement and tender. Moreover as the Queen's Printer's Act, 32 & 33 Vict. ch. 7, was repealed by 49 Vict. ch. 22, which came into force on the 2nd June, 1886,

(1) 1 Burr. 145.
(2) 9 Wis. 254.
(3) 2 Ad. & E. 84.
(4) 2 C. P. D. 562.
(5) 30 L. J. Ch. 379.
(6) 2 P. D. 203.
(7) 19 Can. S. C. R. 125.
(8) Q. R. 5 Q. B. 310.

1898

THE QUEEN v. WOODBURN.

there was no statute in force on the 30th October, 1886, when the Order-in-Council was passed, which prevented the Governor General from ratifying and adopting the arrangement for the continuance of the contract then existing under the terms of the letter of 5th December, 1884, acted upon by the parties, and so ratified and adopted such contract conferred and imposed upon the respondent the same obligations and rights as he was subject and entitled to under the contract which had existed from the 1st December, 1879, to the 1st December, 1884, and which would entitle him to the damages found due him by the referee's report under the authority of the case of *The Queen* v. *McLean* (1). The Order-in.Council was passed with a full knowledge of the facts, recognizing and adopting the extension, and stipulating for a waiver of claims which could only exist if the respondent was "contractor," and the appellant is now precluded by it from asserting that there is no liability for breach of the contract between December 1st, 1884, and November 9th, 1886, under the letter of the 5th December, 1884, and as all parties so understood it. The condition of the parties and the surrounding circumstances must be considered. *Baltimore and Ohio Rr. Co.* v. *Brydon* (2); *Nash* v. *Towne* (3); Addison on Contracts (9 ed.) p. 44. The appellant, desiring to get the binding work done, took the initiative and so wrote the letter and led the respondent to believe that he would get all the work, and the words of the instrument must be construed most strongly against the party using them. *Ford* v. *Beech* (4); *Garrison* v. *United States* (5). The practical interpretation put upon the instrument by the parties is entitled to

(1) 8 Can. S. C. R. 210.
(2) 65 Md. 198, 215.
(3) 5 Wall. 689.
(4) 11 Q. B. 852, 866.
(5) 7 Wall. 688.

great if not controlling weight. Am. and Eng. Encly. p. 519.

The judgment of the court was delivered by:

SEDGEWICK J.—On the 22nd November, 1879, one Charles Henry Carriere entered into a contract with the Crown by which he undertook to execute all the binding of the Statutes of Canada, Imperial Statutes, Orders-in-Council, Treaties and other similar printed documents, and all the binding required to be done by the several Departments of the Government of Canada of all the several quantities of work and materials specified in the schedules annexed to the contract. The contract was made pursuant to 32 & 33 Vict. ch. 7, sec. 6, which is as follows:

The printing, binding and other like work to be done under the superintendence of the Queen's Printer shall, except as hereinafter mentioned, be done and furnished under contracts to be entered into under the authority of the Governor-in-Council, in such form and for such time as he shall appoint after such public notice or advertisement for tenders as he may deem advisable, and the lowest tenders received from parties of whose skill, resources and of the sufficiency of whose sureties for the due performance of the contract the Governor-in-Council shall be satisfied, shall be accepted.

All the conditions required by this enactment was duly complied with prior to the execution of the contract. On the 25th November, 1879, Mr. Carriere, with the assent of the Government, assigned his interest in the contract to the present suppliant, who thereupon proceeded to do the work and supply the materials referred to therein. On the 5th December, 1884, Mr. Brown Chamberlain, the Queen's Printer, wrote the suppliant as follows:

I am directed by the Honourable the Secretary of State to inform you that pending future arrangements the binding work of the Government will be sent to you for execution under the same rates and conditions as under the contract which has just now expired.

1898

THE QUEEN v. WOODBURN.

Sedgewick J.

Subsequently to this letter the suppliant continued to perform the work for the Government upon request as he had previously done under the contract. For all of this work he has been paid; and the only claim now made is for profits which he would have earned had he been given work which after the date of the letter of the Queen's Printer was given to others. It is admitted by the suppliant that his claim rests solely upon the alleged contract contained in the letter of the Queen's Printer above set out. The first question to be considered is as to whether that letter admittedly acted upon for a time by the suppliant creates a contract binding upon the Crown.

We are all of opinion that the letter does not constitute such a contract. The letter was not authorized by the Governor-in-Council, nor did the Governor-in-Council authorize any extension of the contract on the 22nd November, 1879, nor any further contract with the suppliant. There was no public notice or advertisement for tenders for the work referred to in the letter of the Queen's Printer. In fact the statutory requirements were not in any respect complied with. In our view the statute is not directory, as contended by the suppliant, but limits the power of the Queen's Printer to make a contract except subject to its conditions. It is to be observed that the letter does not purport to be written on behalf of the Crown or of the Government; and in so far as the Queen's Printer purported to enter into a contract he not only exceeded his authority and violated, whether knowingly or not, makes no difference, the provision of the enactment in question. But the suppliant must be held to have known that he so exceeded his authority, and to have proceeded with the work at his peril. We have not here to deal with an executed contract, with a claim for goods sold or for work done and materials supplied

1898

THE QUEEN v. WOODBURN.

Sedgewick J.

in respect to which other principles may be applicable. It may possibly be that the Crown, like an individual, receiving the benefit of work or goods, may, notwithstanding the statute, be bound to recoup the person from whom the benefit has been received. So far as the present case is concerned the Crown has paid everything due for work done or materials furnished and the liability of the Crown for the profits claimed depends now solely upon the authority which the Queen's Printer had to bind the Crown in the manner claimed by the suppliant. It is perfectly clear that a contractor dealing with the Government is chargeable with notice of all statutory limitations placed upon the power of public officers. Where a statute expressly defines the power, it is notice to all the world. Nor had the Secretary of State, nor the Queen's Printer any statutory power to make the contract, and therefore any claim under it solely must necessarily fail. If, therefore, the suppliant can sustain his claim he must do so upon grounds other than those supplied by the letter of the Queen's Printer. He therefore has to contend that the contract was ratified and that ratification he claims was created by an Order-in-Council of the 30th October, 1886. This Order-in-Council is as follows:

On a report, dated 7th July, 1886, from the Secretary of State submitting that a contract was entered into with Charles Henry Carriere, of the City of Ottawa, on the twenty-second day of November, 1879, for the binding of the laws of Canada, and the binding required to be performed by the several Departments of the Government of Canada, for and during the term of five years reckoned and computed from the first day of December, 1879; that on the twenty-fifth day of November, 1879, the said contract was transferred by the said Charles Henry Carriere to Alexander S. Woodburn, and Her Majesty having consented thereto, the said Alexander S. Woodburn, on the thirtieth day of September, 1880, and Francis Clemow, of the City of Ottawa, as his surety, covenanted with Her Majesty that the said Alexander S. Woodburn would perform, keep and abide by all and singular the

1898

THE QUEEN v. WOODBURN.

Sedgewick J.

covenants, agreements and conditions contained in the first above mentioned contract, in place and stead of the said Charles Henry Carriere.

That the said contract expired on the first day of December, 1884, but that since that time the work has been executed under an understanding between the Secretary of State and the said Alexander S. Woodburn that the said contract should be continued until other arrangements should be entered into by the Government for the execution of its printing and binding.

That it is urged by the said Alexander S. Woodburn, among other reasons for this extension, that in expectation of this extention he has at very considerable expense increased his plant and enlarged his business premises.

The minister further submits that it is expedient that the said understanding should be embodied in a formal contract, and that (pending arrangements to be made under the Act, chapter 22, of the last session of Parliament) the first above mentioned contract and the covenant by and with the said Alexander S. Woodburn should be extended until the first day of December, 1887, the day upon which the extended contract for printing will expire.

The minister therefore recommends that he be authorized to enter into an agreement with the said Alexander S. Woodburn for the continued execution of the said binding work up to and until the date last above mentioned, conditional that on the one hand the Government waive all claims to damages for non-execution or imperfect execution or delays in the execution of this contract by the said Alexander S. Woodburn during the continuance of the said contract and its extension to this date; and that the said Alexander S. Woodburn on his part waives and renounces all claim or pretended claim which he may have to damages because of the execution by others than himself under orders of the Departments of the Government of binding work coming within his contract up to and until the same date, and any claim he may have to the binding of the Consolidated Statutes of Canada now about to be printed, the binding of which should be given by tender.

The committee advise that the required authority be granted under the conditions above specified.

On being notified of this Order-in-Council the suppliant wrote to the Queen's Printer, on 16th November, 1886, a letter in which he said:—

With reference to your letter of the 9th instant, enclosing for my information a copy of an Order-in-Council passed on the 30th October

1886, stating the terms on which the Government would be willing to extend my contract for departmental binding until 1st December, 1887, I have now the honour to inform you that, having given the said Order-in-Council my most careful consideration, I am quite unable to accept an extension of the contract on the terms proposed. * * *

1898
THE QUEEN v. WOODBURN.
Sedgewick J.

The suppliant now advances the proposition, and bases his right to recover upon the contention, that the Order-in-Council was a ratification of the original letter of the Queen's Printer and thereby validated his claim.

Without more than referring here to the point that the provisions respecting public advertisements were not complied with, we are clearly of opinion that there can be no ratification of a contract by one of the parties without the assent of the other party. The element of *consensus* enters as much into a ratification of a contract as into the contract itself; and it is out of the question for the suppliant to allege a ratification here when he expressly repudiated its terms and refused in any way to act upon or be bound by it. The Order-in-Council is nothing more than an unaccepted offer of settlement. It may doubtless be used by the suppliant as an admission of the facts therein stated as any other statement may be used as evidence, but these are the only benefits that the suppliant can claim from it. To say under the circumstance that it is a ratification of a letter which a Government officer had no authority to write, and was by statute in express terms forbidden to write except upon the compliance with precedent conditions, is opposed to fundamental and elementary principles of law.

Upon the main question therefore the suppliant's case fails, and the appeal must be allowed.

The question was raised at the argument as to whether the case was properly before this court. We expressed the opinion at the argument and are all of opinion that the learned judge of the Exchequer Court

1898

THE QUEEN v. WOODBURN.

Sedgewick J.

had ample authority to make the order allowing the appeal to this court, and that the case was properly before us.

The appeal will be allowed with costs and the Crown will be entitled to all costs in the court below so far as this particular portion of the suppliant's claim is concerned.

Appeal allowed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *R. V. Sinclair.*

1898

*Mar. 11.

*Nov. 21.

C. J. McCUAIG (DEFENDANT).....APPELLANT;

AND

ELIZA BARBER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Assignment of equity—Covenant of indemnity—Assignment of covenant—Right of mortgagee on covenant in mortgage.

C. executed a mortgage on his lands in favour of B., with the usual covenant for payment. He afterwards sold the equity of redemption to D. who covenanted to pay off the mortgage and indemnify C. against all costs and damages in connection therewith. This covenant of D. was assigned to the mortgagee. D. then sold the lands, subject to the mortgage, in three parcels, each of the purchasers assuming payment of his proportion of the mortgage debt, and he assigned the three respective covenants to the mortgagee who agreed not to make any claim for the said mortgage money against D. until he had exhausted his remedies against the said three purchasers and against the lands. The mortgagee having brought an action against C. on his covenant in the mortgage.

Held, reversing the judgment of the Court of Appeal (24 Ont. App. R. 492), that the mortgagee being the sole owner of the covenant of D. with the mortgagor assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage.

---

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

1898

MCCUAIG.
v.
BARBER.

APPEAL from the decision of the Court of Appeal for Ontario (1), reversing the judgment of Mr. Justice Rose at the trial in favour of the defendant.

The facts of the case are sufficiently set out in the above head-note and in the judgment of the court.

Aylesworth Q.C. for the appellant. The trial judge finds as a fact that when McCuaig assigned DuVernet's covenant to the plaintiff he was giving her a collateral security. If so she cannot enforce payment of the debt, unless prepared upon payment to restore the collateral security, and she has, by her subsequent agreement with DuVernet, put it out of her power to re-convey this covenant unimpaired and in the same condition as when she acquired it, and defendant has thereby become absolutely discharged of all liability in respect of the original debt. *Campbell* v. *Rothwell* (2); *Allison* v. *McDonald* (3); *Newton* v. *Chorlton*, (4); *Mayhew* v. *Crickett* (5). The defendant contends that upon the conveyance of the mortgaged land to DuVernet "subject to the mortgage," he became, as between himself and defendant, the principal debtor in respect of this mortgage debt, and defendant merely DuVernet's surety for payment of it. From the time notice of this change of relationship between the parties was acquired by the mortgagee she could no longer treat the original mortgagor as a principal debtor, but the obligation was imposed upon her to concede to him the right of a surety for DuVernet. *Mathers* v. *Helliwell* (6); *Blackley* v. *Kenney* [No. 2] (7); *Muttlebury* v. *Taylor* (8). After notice she was bound to do nothing to prejudice the interests of the surety. *Rouse* v. *Bradford Banking Co.* (9); *Oakeley* v. *Pasheller* (10);

(1) 24 Ont. App. R. 492.
(2) 38 L. T. N. S. 33.
(3) 23 Can. S. C. R. 635.
(4) 10 Hare, 646.
(5) 2 Swans, 185.
(6) 10 Gr. 172.
(7) 29 C. L. J. 108.
(8) 22 O. R. 312.
(9) [1894] A. C. 586.
(10) 10 Bligh N. S. 548.

1898

McCUAIG. v. BARBER.

Overend, Gurney & Co. v. *Oriental Financial Corporation* (1). We rely also upon *Small* v. *Thompson* (2) and *Maloney* v *Campbell* (3).

W. H. Irving for the respondent. The appellant continued liable upon his covenant as a full debtor, and did not become a mere surety; even if he did become a surety, the dealings with DuVernet did not work his release. If the right transferred to respondent by the appellant became in her hands a security, it was a collateral security only. The original mortgaged estate in the hands of the respondent unimpaired was and remained always the mortgage security, and if that right constituted a security when placed in the respondent's hands, it was only to the extent to which the appellant shewed himself injured by the respondent's dealing with it that he would be entitled to relief. See *Smith* v. *Pears* (4) and cases there cited. *Rouse* v *Bradford Banking Co.* (5) is distinguished from the present case on account of the higher class of obligation constituted by the appellant's covenant. The right against DuVernet was not, before its assignment to the respondent, the appellant's property in the full sense of the word; such a right has been held not to be the property of the mortgagor. *Ball* v *Tennant* (6). Even before the assignment any money payable by DuVernet under his obligation would have been payable to the respondent.

It is clear that the right assigned did not form part of the mortgaged estate, and for the reason given in *Chambersburg Ins. Co.* v. *Smith* (7) it would not seem to be a security at all. The fact that a creditor cannot return a collateral security to his debtor does not

(1) L. R. 7 H. L. 348.
(2) 28 Can. S. C. R. 219.
(3) 28 Can. S. C. R. 228.
(4) 24 Ont. App. R. 82.
(5) [1894] 2 Ch. 32; [1894] A. C. 586.
(6) 21 Ont. App. R. 602.
(7) 11 Pa., St. 120.

release the debtor, nor does it release a surety for that debtor. Colebrook, on Collateral Securities secs. 63, 87; Story, Equity Jurisprudence sec. 328; 1 Sutherland, Damages p. 382. The respondent can only be liable for actual loss and the onus is on the debtor to shew the extent of the injury. *Wiltiams* v. *Price* (1) at page 587, per Leach, V. C. *Synod* v. *De Blacquière* (2); *Capel* v. *Butler* (3); *Ex parte Mure* (4). There was no suretyship. *Baynton* v. *Morgan* (5); Baylies, Sureties, p. 259; *Trust and Loan Co.* v. *McKenzie* (6) at page 170; *Trusts Corporation of Ontario* v. *Hood* (7) at pages 591-593. The alteration necessary to release a surety must be an alteration in the original contract. *Wilson* v. *Land Security Co.* (8) at page 157. We contend that DuVernet's obligation is only an obligation to indemnify McCuaig; *Barham* v. *Earl of Thanet* (9) at page 624; and that it is not a "covenant." See *Credit Foncier Franco-Canadien* v. *Lawrie* (10), and authorities there cited. Barber had implied authority to deal with the assigned right as fully as McCuaig himself could have done if he had retained it. *Taylor* v. *Bank of New South Wales* (11); *Carter* v. *White* (12); *Polak* v. *Everett* (13). McCuaig having assigned away his right of indemnity cannot complain if time was given in respect of it by his assignee; DeColyar on Guarantees (3 ed.) pp. 423, 429, 430; and his right, if any is to prove and recover for any injury done him or loss suffered by him. *O'Gara* v. *Union Bank* (14) and authorities there collected; *Rainbow* v. *Juggins* (15). McCuaig must shew,

(1) 1 Sim. & Stu. 581.
(2) 27 Gr. 536.
(3) 2 Sim. & Stu. 457.
(4) 2 Cox 63.
(5) 22 Q. B. D. 74.
(6) 23 Ont. App. R. 167.
(7) 23 Ont. App. R. 589.
(8) 26 Can. S. C. R. 149.
(9) 3 Mylne & K. 607.
(10) 27 O. R. 498.
(11) 11 App. Cas. 596.
(12) 25 Ch. D. 666.
(13) 1 Q. B. D. 669.
(14) 22 Can. S. C. R. 404.
(15) 5 Q. B. D. 138.

1898

McCUAIG. v. BARBER.

in order to escape liability, that he is damnified to the extent of $4,400 by Barber's act, even after he has received back the assigned right in its present shape, and also the additional rights against DuVernet's purchasers procured by Barber; Brandt, Suretyship, (1 ed.) para. 373; Sutherland, Damages, (2 ed.) para. 229; *Bradford* v. *Fox* (1); and Barber can not be responsible for more than the reinstating of the right against DuVernet, or the expense of doing this and any damage to McCuaig, consequent on his act; *Strange* v. *Fooks* (2); *Ryan* v. *McConnell* (3); *Molsons Bank* v *Heilig* (4) and authorities there cited. These cases authorize reference as to damages, and if the provision in the judgment directing reference is not sufficient to fully protect McCuaig, the judgment of this court can direct any necessary variations under section sixty of "The Supreme and Exchequer Courts Act."

The judgment of the court was delivered by

GWYNNE J.—By an indenture of mortgage bearing date the 18th day of March, 1889, the defendant mortgaged certain lands therein mentioned to the plaintiff in security for the payment to the plaintiff of the sum of three thousand two hundred and fifty-six dollars with interest thereon, and covenanted with the plaintiff to pay the said mortgage money thereby secured with interest in accordance with the proviso of said indenture of mortgage; afterwards the defendant sold the said lands and premises subject to the said indenture of mortgage and to the payment of the monies thereby secured to one DuVernet who thereby covenanted with the defendant his executors, administrators and assigns, that the said DuVernet would assume the said mortgage and pay

(1) 38 N. Y. 289.
(2) 4 Giff. 408.
(3) 18 O. R. 409.
(4) 26 O. R. 276.

1898

McCUAIG.
v.
BARBER.

Gwynne J.

the monies thereby secured and indemnify and save harmless the defendant from all loss, costs and damages in connection therewith. Afterwards the said defendant at the request of the plaintiff did by a deed under his hand and seal assign, transfer and set over to the plaintiff, her executors, administrators and assigns, the said covenant of the said DuVernet made to the defendant to pay off and satisfy the said indenture of mortgage and all the rights which the defendant had to compel the said DuVernet to pay off the said mortgage monies and interest, either under a sale or conveyance of the said lands or otherwise, and all benefit and advantages to be derived therefrom, together with full power and authority to enforce the said covenant or right against the said DuVernet. Afterwards the said DuVernet by deed of bargain and sale sold and transferred the same lands and premises subject to the said indenture of mortgage made by the defendant to the plaintiff in three several parcels as follows:

1. One part to one Davidson subject to the payment by the said Davidson of the sum of $1,650.00 parcel of the principal sum of $3,256.00 secured by the said mortgage executed by the defendant to the plaintiff, which sum of $1,650.00 with interest thereon the said Davidson assumed and covenanted to pay with interest thereon.

2. One other parcel to one Maddsford subject to the payment by the said Maddsford of the sum of $525, other parcel of the said principal sum of $3,256.00 secured by the defendant's mortgage to the plaintiff, which sum of $525 with the interest thereon the said Maddsford assumed and covenanted to pay with the interest thereon.

3. Another parcel to one Bell subject to the payment by the said Bell of the sum of $1.081.00,

1898

McCUAIG. v. BARBER.

Gwynne J.

other parcel of the said principal sum of $3,256.00 secured by the mortgage executed by the defendant to the plaintiff, which sum of $1,081, with the interest thereon the said Bell assumed and covenanted to pay. Afterwards the said DuVernet, at the request of the plaintiff, by an indenture duly made and executed by and between the said plaintiff and the said DuVernet, after reciting that it had been agreed between the said parties that the said DuVernet should assign to the plaintiff the said respective covenants made by the said Davidson, Maddsford and Bell respectively for payment of the said respective parcels of said mortgage money and interest, and that the plaintiff, her executors, administrators or assigns, should not nor should any of them make or cause to be made any claim for the said mortgage money or interest or any part thereof, or any claim relating thereto, against the said DuVernet, his heirs, executors or administrators or his or their real or personal property *unless and until she should have exhausted her remedies against the persons aforesaid and against the said lands;* and after reciting further that by assignment of even date the said DuVernet had assigned to the said plaintiff the said covenants of the said respective parties and all his the said DuVernet's rights thereunder it was witnessed that in consideration of the premises the said plaintiff did for herself, her heirs, executors, administrators and assigns, covenant and agree with the said DuVernet that she, the plaintiff, would not make or cause to be made any claim whatever upon the said mortgage or in relation thereto or against the said DuVernet, his heirs, executors or administrators or against his or their real or personal property *unless and until she should have exhausted her remedies* by all reasonable and proper proceedings against the said Davidson, Maddsford and Bell re-

spectively their and each of their executors, administrators and assigns and *against the said lands*, and that she would make no claim against the said DuVernet for any costs of such proceedings.

The plaintiff has now sued the defendant upon the covenant in his mortgage and the defendant insists that the plaintiff by the above agreement with DuVernet, upon the faith of which she obtained from him an assignment of the covenants of Davidson and the others, has deprived herself of the right of asserting the present cause of action until she shall have exhausted all her remedies against the lands and under the covenants of Davidson and the other purchasers from DuVernet as provided in the agreement. Of this opinion was the learned trial judge, Mr. Justice Rose, who accordingly dismissed the action. This judgment, however, was reversed by the Court of Appeal which gave judgment for the plaintiff for the full amount of the money secured by defendant's mortgage and interest subject to a reference to the master as to what amount, if any, the defendant's remedy against DuVernet upon the latter's covenant with the plaintiff has been prejudiced by the agreement between the plaintiff and DuVernet, or rather it would seem by the plaintiff not pursuing her remedies under the provisions of that agreement.

It requires, I think, no reference to the master to see that as the plaintiff is assignee of DuVernet's covenant with the plaintiff she and the defendant are bound by that agreement which in effect provides that no remedy shall be sought under DuVernet's covenant with the plaintiff until all remedies against the lands themselves and under the covenants of the purchasers from DuVernet shall be exhausted. In effect, therefore, DuVernet's covenant to the defendant can be enforced solely for the recovery from DuVernet of so much as upon a sale of the lands themselves and the exhaust-

1898

McCuaig. v. Barber.

Gwynne J.

ing of the remedies against the other covenantors with DuVernet, the amounts so realised shall be insufficient to pay the defendant's mortgage in full.

The plaintiff has therefore prejudiced the defendant's remedy against DuVernet to this extent that until the remedies pointed to in the deed between the plaintiff and DuVernet shall be exhausted it cannot be ascertained whether any amount, and if any, how much, can be recovered in an action upon DuVernet's covenant with the defendant whether such action be brought by the plaintiff as assignee of the defendant or by the defendant who never can bring such an action unless under an assignment from and as assignee of the plaintiff who is possessed of all interest in DuVernet's covenant with the defendant. The plaintiff's assigns are bound by her covenant with DuVernet not to make any claim against him on his covenant until all the remedies against the lands and against the covenantors with DuVernet are exhausted by due process of law, by which alone can be determined the amount, if any, to which DuVernet is liable under his covenant with the defendant of which the plaintiff is at present sole and absolute owner. The plaintiff has so dealt with the collateral security placed in her hands at her request by the defendant that she has by her agreement with DuVernet divested herself of all power to restore it to the defendant unimpaired, and the extent to which it has been impaired can only be determined by an exhaustion of the remedies as provided in the agreement between the plaintiff and DuVernet. We are of opinion therefore that the appeal must be allowed with costs and the judgment of Mr. Justice Rose restored.

Appeal allowed with costs.

Solicitor for the appellant: *Hubert H. Macrae.*

Solicitors for the respondent: *Kilmer & Irving.*

THE TOWN OF CHICOUTIMI *et al*...APPELLANTS; 1898

AND *Oct. 12.

EVAN JOHN PRICE .....RESPONDENT.

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

Municipal corporation—By-law — Construction of statute — Art. 4529, *R. S. Q.—Approval of electors—Appeal as to costs.*

Under the provisions of Art. 4529 of the Revised Statutes of Quebec money by-laws for loans by town corporations require the approval of the majority both in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court, District of Quebec, which declared absolute the injunction restraining the Town of Chicoutimi from issuing bonds in payment of a bonus to the Chicoutimi Pulp Company and annulled the bonus by-law.

The by-law in question purported to grant a bonus of $10,000 to the company by an issue of debentures of the town bearing interest at 4½ per cent per annum, with the necessary sinking fund to extinguish the loan in fifty years, said interest and sinking fund to be raised by direct taxation upon the rateable real estate within the municipality.

The municipal rolls shewed that at the time of the voting on the by-law the total number of electors who were owners of real estate and entitled to vote thereon were 212, and the total valuation of taxable real estate

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

1898

THE TOWN OF CHICOUTIMI v. PRICE.

owned by them amounted to $228,955. A poll was held the result being that 109 electors owning real estate of the aggregate values of $112,035 voted in favour of the by-law, while 62 qualified electors owning real estate valued at $75,120, voted against it and this total valuation against the by-law together with the total valuation of the lands of the electors who did not poll their votes amounted to $116,920, and thus although a majority of the qualified electors approved the by-law yet they did not represent the majority in value of all the real estate shewn upon the valuation roll of the municipality. In the Superior Court it was held by the learned trial judge that the by-law had not been approved as required by art. 4527 of the Revised Statutes of Quebec which provides that "loans, whether by the issue of debentures or otherwise, are only made under a by-law of the council to that effect approved by a majority in number and in real value of the proprietors who are municipal electors," and the injunction was declared absolute with costs.

The present appeal was taken by the Corporation of the Town of Chicoutimi against the decision of the Court of Queen's Bench affirming the Superior Court judgment

Geoffrion Q.C. and *Belleau* Q.C. for the appellants. It is admitted that the majority in number and in value of the proprietors who voted, approved the by-law, but the contention is that the majority required is not of those who voted but of those who had the right to vote. We think that interpretation contrary to the usual meaning of the word "majority" as used in the statute and contrary to jurisprudence. See Am. & Eng. Encycl. (ed. 1888) *vo.* "Elections," tit. xxiv, as to "meaning of phrases;" also Beach, Public Corporations, secs. 901 and 1055; Thompson on Cor-

porations, (ed. 1895) sec. 725; *Price* v. *La Ville de Chicoutimi* (1); arts. 4532 and 4536 R.S.Q.

Where the act depends upon the prior sanction of "a majority of the qualified voters" residing in the municipality, the presumption is that all who vote are legal voters, and that those who do not vote acquiesce in the result and that a majority of those actually voting is sufficient, though in point of fact it may not be a majority of all who would be entitled to vote. 1 Dillon, (4 ed.) p. 78 *note*, and p. 356, sec. 277; *Walker* v. *Oswald* (2); Angell and Ames, (10 ed.) pp. 501 and 505; 2 Kent "Commentaries," p. 367; Morawetz, no. 354; *Giroux* v. *Town of Farnham* (3); *Hadley* v. *La Ville de St. Paul* (4).

Languedoc Q.C. and *Stuart Q.C.* for the respondent. The provisions of the statute do not permit of the contention that the majority required is of those who vote only. *The Atlantic & North West Railway Co.* v. *The Town of St. Johns* (5).

In any event this appeal is wholly unwarranted as there is evidence in the record that negotiations have taken place between the Town Council and the Company for which the bonus was intended that make the by-law now unnecessary and useless and leave nothing but a question of costs in dispute; the original matter in dispute has disappeared and the appeal should not be entertained; *Moir* v. *Village of Huntingdon* (6).

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

THE CHIEF JUSTICE (*Oral.*)—We are all except my brother King, agreed that the interpretation placed by both courts below upon the statute is correct and

(1) 2 Rev. de Jur. 551.
(2) 2 Cent. Rep. (Md.) 123.
(3) 9 Legal News 179.
(4) Q. R. 13 S. C. 88.
(5) Q. R. 3 Q. B. 397.
(6) 19 Can. S. C. R. 363.

1898

THE TOWN OF CHICOUTIMI v. PRICE.

The Chief Justice.

consequently we do not require to hear counsel for the respondent.

The majority of the court are of opinion that the construction of article 4529 of the Revised Statutes of Quebec is very plain and that the courts below rightly interpreted that provision as meaning that the by-law required the approval of the majority in number and in value of the electors in the municipality who were proprietors of real estate as ascertained from the municipal rolls. The Company for which the bonus was intended have declined to carry out the arrangement which makes the by-law useless and leaves nothing but a question of costs in dispute. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Belleau, Stafford & Belleau.*

Solicitors for the respondent: *Caron, Pentland & Stuart.*

EDMUND GUERIN (PLAINTIFF).....APPELLANT; 1898

AND *Mar. 17.
*Nov. 21.

THE MANCHESTER FIRE ASSURANCE COMPANY (DEFENDANT).. } RESPONDENT.

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

Fire insurance—Conditions of policy—Notice—Proofs of loss—Change in risk—Insurable interest—Mortgage clause—Arbitration—Condition precedent—Foreign statutory conditions—R. S. O. (1897) *c.* 203, *s.* 168 *—Transfer of mortgage—Assignment of rights under policy after loss—Signification of assignment—Arts.* 1571, 2475, 2478, 2483, 2574, 2576 *C. C.—Right of action.*

Where a condition in a policy of insurance against fire provided that any change material to the risk within the control or knowledge of the insured should avoid the policy, unless notice was given to the company;

Held, that changing the occupation of the insured premises from a dwelling to a hotel was a change material to the risk within the meaning of this condition.

A mortgagee of insured premises to whom payment is to be made in case of loss "as his interest may appear" cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest therein at the time of the loss.

In the Province of Quebec, an assignment of rights under a policy of insurance is ineffectual unless signification thereof has been made in compliance with the provisions of article 1571 of the Civil Code.

Where a condition in the policy provided that no action should be maintainable against the company for any claim under the policy until after an award should have been obtained in the manner therein provided fixing the amount of the claim;

Held, that the making of such award was a condition precedent to any right of action to recover a claim for loss under the policy.

Quaere, per Taschereau J.—Do Ontario statutory conditions printed on the back of a policy issued in Quebec and not referred to in the body of the policy, form part of the contract between the parties?

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

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, (appeal side) (1), reversing the judgment of the Superior Court, sitting in review, and restoring the judgment of the Superior Court, District of Montreal (1), which had dismissed the action with costs.

The circumstances under which the controversy arose and the questions at issue in the case are stated in the judgment reported.

Rielle and *Madore* for the appellant. The change in the risk from a dwelling-house to a hotel was the act of the owner who was insured, and the performance of the different acts mentioned in the conditions of the policy were likewise imposed upon the owner, so that the omission of these formalities is the fault of the owner or insured. The mortgage clause contained in the policy provides that the insurance, as to the mortagee, shall not be invalidated by *any act or neglect* of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy. The policy states that the mortgagee interested in the policy is, and that the loss, if any, should be payable to, Mr. James McCready, Jr. Consequently, the reasons given by Mr. Justice Hall, cannot be urged against McCready, the mortgagee, nor against appellant, his assignee, who is subrogated in all his rights.

The "Mortgage Clause" binds the company towards the mortgagee and is a part of the policy and equity favours such a clause for the protection of the mortgagee who may be an absentee. See *Stanton* v. *Home Fire Ins. Co.* (2); Griswold (rev. ed.), Fire Underwriters Text Book, Nos. 733 to 744*a*. Here although the mortgagee was not bound to give the

(1) Q. R. 5 Q. B. 434.

(2) 21 L. C. Jur. 211; 24 L. C. Jur. 38.

notice or furnish proof of the loss, he actually complied, as much as it was possible for him to do, with the conditions imposed upon the insured, by sending the company a statutory declaration of all the facts, mentioning in that notice and declaration that the insured had died.

Appellant submits, that at the date of the fire McCready had still some insurable interest in the mortgage transferred. For when he says that at the time of the fire he had no more interest in that mortgage, it is clear, that what he means is that at that time he had transferred his rights. That transfer was made to appellant under *all the usual legal warranties.* Art. 1574 C. C. says: "The sale of a debt or other right, includes its accessories, such as *securities*, *privileges* and *hypothecs*," and Art. 1508 C. C. adds "the seller is obliged by law to warrant the buyer against eviction of the whole or any part of the thing sold." So that, not only was McCready bound to warranty for the amount of the sum transferred, but also at the date of the fire bound to warranty for the accessories, amongst which was the policy in question. His interest in the mortgage transferred remained the same on account of his responsibility towards appellant. This interest was an insurable one and remained practically the same after the transfer as before, on account of that warranty. McCready in discharge of this warranty made the assignment of his rights against respondent in virtue of the policy which was served upon respondent previous to the action, and even if there were informalities in respect to this signification that cannot render the transfer irregular. Compare *The Montreal Ins. Co.* v. *McGillivray* (1). Art. 2576 C. C. does not apply to a mortgagee's claim but contemplates alienation of the thing insured.

(1) 8 L. C. R. 401; 2 L. C. Jur. 221.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

We also rely upon *Black* v. *National Ins. Co.* (1); *Vézina* v. *The New York Life Ins. Co.* (2); 2 May on Insurance (3), secs. 463, 464; *The National Ins. Co. of Ireland* v. *Harris* (4). As to notice within a reasonable time see *Donahue* v. *Windsor Co. Mut. Fire Ins. Co.* (5); *Wiggins* v. *Queen Ins. Co.* (6); *Lafarge* v. *The London, Liverpool and Globe Ins. Co.* (7).

Martin for the respondent. No notice of loss was given to the company as required by the policy nor were proofs of loss furnished in conformity with the policy and the requirements of Art. 2478 of the Civil Code. McCready could not make the proof of loss under the conditions of the policy, and even if the insured was dead it would be his heirs who should comply with these conditions. See *Whyte* v. *The Western Assurance Co.* (8). In any case no proof was made within the required or any reasonable time. The condition required notice and proofs "forthwith" after loss. Art. 2575 C. C. *Accident Insurance Company of North America* v. *Young* (9); *Trask* v. *State Fire and Marine Ins. Co.* (10); *Whitehurst* v. *North Carolina Mutual Ins. Co.* (11); *Edwards* v. *Lycoming Co. Mut. Ins. Co.*(12); *Laforce* v. *Williams City Fire Ins. Co.* (13); *Weed* v. *Hamburg-Bremen Fire Ins. Co.* (15). The company never was furnished with an *account of loss* or declaration verifying it, nor of value of premises at the time of fire; *Lindsay* v. *Lancashire Fire Ins. Co.* (8); *Banting* v. *Niagara District Mut. Fire Ass. Co.*

(1) 24 L. C. Jur. 65.
(2) 6 Can. S. C. R. 30.
(3) Ed. 1891.
(4) M. L. R. 5 Q. B. 345.
(5) 56 Vermont 374.
(6) 13 L. C. Jur. 141.
(7) 17 L. C. Jur. 237.
(8) 22 L. C. Jur. 215.
(9) 20 Can. S. C. R. 280.
(10) 29 Penn. 198.
(11) 7 Jones N. C. (Law) 433.
(12) 75 Penn. 378.
(13) 43 Mo. App. R. 518.
(14) 31 N. East. Rep. 231; 133 N. Y. 394.
(15) 34 U. C. Q. B. 440.

(1). These conditions precedent have not been complied with. We rely upon Art. 2478 C. C.; *Accident Ins. Co. of North America* v. *Young* (2); *Logan* v. *Commercial Union Ass. Co.* (3); *Western Assurance Co.* v. *Doull* (4); *Scott* v. *Phœnix Ins. Co.* (5); *Racine* v. *Equitable Ins. Co. of London* (6); *Simpson* v. *Caledonian Ins. Co.* (7).

By a condition of the policy it was stipulated that no suit or action against the company for the recovery of any claim by virtue of said policy should be sustainable until after an award should have been obtained fixing the amount of such claim in the manner therein provided. No proceedings by way of arbitration were had and no offer was ever made on the part of plaintiff to abide by such proceedings. This reference to arbitration is a condition precedent to suit; *Viney* v. *Norwich Union Fire Ins. Co.* (8); *Elliott* v. *Royal Exchange Assurance Co.* (9); *Braunstein* v. *Accidental Death Ins. Co.* (10); *Anchor Marine Ins. Co.* v. *Corbett* (11); *Viney* v. *Bignold* (12); *Corroll* v. *Girard Fire Ins. Co.* (13); *Gauche* v. *London & Lancashire Ins. Co.* (14); *Wolff* v. *Liverpool, London & Globe Ins. Co.* (15).

The plaintiff derives his title solely from McCready, under the transfer of 17th April, 1894, and consequently McCready did not have any insurable interest in the property in question at the time of the fire. The insurance is void for *transfer of interest* to a third person, unless made with the consent or privity of the insurer. Arts. 2472, 2474, 2475, 2476, 2480, 2482 C. C.;

(1) 25 U. C. Q. B. 431.
(2) 20 Can. S. C. R. 280.
(3) 13 Can. S. C. R. 270.
(4) 12 Can. S. C. R. 446.
(5) Stuart Rep. 152:354.
(6) 6 L. C. Jur. 89.
(7) Q. R. 2 Q. B. 209.
(8) 57 L. J. Q. B. 82.
(9) L. R. 2 Ex. 237.
(10) 31 L. J. Q. B. 17.
(11) 9 Can. S. C. R. 73.
(12) 20 Q. B. D. 172.
(13) 16 Ins. L. J. 764.
(14) 11 Ins. L. J. 361; 10 Fed. Rep. 347.
(15) 50 N. J. (Law) 453.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Saddler' Company v. *Babcock* (1). Although the transferer may have retained an interest in the objects insured and have suffered a loss by their destruction, the assignee cannot recover if at the time of the loss he has parted with his own insurable interest, any more than if he had insured in his own name. The interest must exist both at the time the insurance is made or the policy is transferred, *and at the time of the loss.* If the plaintiff had relied upon the transfer of 24th Oct., 1893, and the indorsement on the policy dated 30th Oct., 1893, he would have considered himself the party insured at the time of the fire, but every proceeding adopted subsequent to the fire shows that he did not consider that he was entitled to the insurance, but that McCready was the person covered by the policy. The alleged proofs of loss were made out in McCready's name, and the subsequent transfer, in April, 1894, of McCready's rights to plaintiff all tend to show this.

As to the change in the occupation of the premises, the mortgage clause did not protect McCready after he became aware of the change of hazard in the risk, and particularly after the interview had with the company's manager. This mortgage clause provided that the mortgagee should pay the increased rate in case of increase of hazard. From all this it must be held admitted that the policy was cancelled with the consent and approval of all parties interested, and no one ever paid the extra premium required to cover the premises as a hotel, or obtained from the company any policy covering the premises as a hotel; and having failed to do this, (particularly after being warned by the manager that the company would be off the risk) the company cannot be held liable in any manner whatsoever under the policy sued upon.

(1) 2 Atk. 557.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

The Chief Justice.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Court of Queen's Bench allowing an appeal from the Court of Review and dismissing the appellant's action.

The action is brought to recover the sum of two thousand five hundred dollars, the alleged amount of a loss by fire under a policy of insurance effected upon a building situate in the town of Longueuil, in the province of Quebec. The policy in question was issued by the respondents, an English company having its head office in Canada, at Toronto, but doing business through an agent at Montreal. This policy bears date 4th November, 1891, and thereby the respondents, in consideration of a premium of thirty-three dollars paid to them and the representations, covenants and warranties of the insured, did insure Bernard Maguire from the 13th October, 1891, to 13th October, 1894, against loss or damage by fire to the amount of $3,000, this amount being apportioned between a dwelling house which was insured for $2,500, and a barn, shed and stable in rear of the dwelling house which was insured for $500. The appellant does not seek to recover in respect of the latter building, but confines his claim to the loss in respect of the dwelling house. The policy has indorsed upon it a clause in the words following:

> At the request of the assured the loss, if any, under the policy is hereby made payable to James McCready, Jr., as his interest may appear subject to the conditions of the above mortgage clause.
>
> (Sgd.) JOHN WM. MOLSON,
> *Resident Agent.*
>
> Montreal, 13th November, 1891.

The mortgage clause referred to contained several provisions, only one of which is material to the questions raised by the present appeal. That provision is as follows:

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

The Chief Justice.

It is hereby provided and agreed that this insurance as to the interest of the mortgagees only therein, shall not be invalidated by any neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy.

The policy is also subject to certain conditions, twenty-three in number. These conditions are headed "statutory conditions" and are literally taken from the statutory conditions imposed upon Fire Insurance Companies by an Act of the Legislature of Ontario. They are followed by certain variations headed "Variations in Conditions." The only conditions which are material to the questions before us are the 3rd, 4th, 13th and 17th.

The third condition provides that any change material to the risk and within the control or knowledge of the assured shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent, and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium which the assured shall, if he desires the continuance of the policy, forthwith pay to the company, and if he neglects to make such payment forthwith after receiving such demand the policy shall no longer be in force.

The fourth condition is as follows:

If the property insured is assigned without a written permission indorsed thereon by an agent of the company duly authorized for such purpose, the policy shall thereby become void; but this condition does not apply to change of title by succession, or by the operation of the law, or by reason of death.

The 13th condition relates to proofs of loss and provides that:

Any person entitled to make a claim under this policy is to observe the following directions.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

The Chief Justice.

(*a*) He is forthwith after loss to give notice in writing to the company;

(*b*) He is to deliver, as soon afterwards as practicable, as particular an account of the loss as the nature of the case permits;

(*c*) He is also to furnish therewith a statutory declaration, declaring:

(1) That the said account is true;

(2) When and how the fire originated so far as the declarant knows or believes;

(3) That the fire was not caused through his wilful act or neglect, procurement, means or contrivance; and

(4) The amount of other insurances;

(5) All liens and incumbrances on the subject of insurance;

(6) The place where the property insured, if moveable, was deposited at the time of the fire.

(*d*) He is in support of his claims, if required and if practicable, to produce books of accounts, warehouse receipts and stock lists and furnish invoices and other vouchers; to furnish copies of the written portion of all policies; to separate as far as reasonably may be the damaged from the undamaged goods, and to exhibit for examination all the remains of the property which was covered by the policy;

(*e*) He is to produce, if required, a certificate under the hand of a magistrate, notary public, commissioner for taking affidavits, or municipal clerk, residing in the vicinity in which the fire happened, and not concerned in the loss or related to the assured or sufferers, stating that he has examined the circumstances attending the fire, loss or damage alleged; that he is acquainted with the character and circumstances of the assured or claimant, and that he verily believes that the assured has by misfortune and without fraud or evil practice, sustained loss and damage on the subject assured, to the amount certified.

14. The above proofs of loss may be made by the agent of the assured, in case of the absence or inability of the assured himself to make the same, such absence or inability being satisfactorily accounted for.

Condition 17 contains a stipulation that the loss shall not be payable until thirty days after completion of the proofs of loss.

The variations do not alter the terms of the conditions in any respect which requires to be now considered, save that an arbitration clause in the words following is added to condition 16:

It is furthermore hereby expressed, provided and mutually agreed, that no suit or action against this company, for the recovery of any

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

The Chief Justice.

claim by virtue of this policy, shall be sustainable in any court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided.

At the date of the policy the assured, Bernard Maguire, was the proprietor of the property insured, subject to two mortgages in favour of Hugh McCready, the tutor of the minor children of Robert McCready, dated respectively the 13th October, 1888, and the 13th of May, 1889. The amount of the hypothecary debt thus secured was $4,000.

This debt and the mortgages were on the 1st September, 1891, transferred to Robert McCready, who, by a notarial deed dated the 24th of October, 1893, transferred the same debts and mortgages to the appellant. The policy was never transferred to the appellant, but after the loss and on the 17th of April, 1894, the appellant procured Robert McCready to execute in the appellant's favour a transfer of all his right, title and interest in the policy and whereby he subrogated the appellant in all his rights against the company under the terms of the policy and authorized the appellant to collect the amount due thereunder by reason of the loss.

At the date of the insurance the building insured was occupied by Bernard Maguire as a dwelling house, in which he lived with his family. Subsequently it was used as a hotel or tavern, first by Maguire himself, who shortly before his death leased it to one Riendeau who occupied it as a tavern at the date of the loss.

The third condition does not appear to have been ever complied with. No proof of loss was ever made as required by this condition. On the 20th of December, 1893, the appellant made a statutory declaration stating the loss and other facts relating to the claim, no doubt with the intention of complying

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

The Chief Justice.

with the conditions requiring proof of loss, but it is not proved that this declaration ever reached the hands of the respondents' officers or agents, nor is it easy to see how it could have served any useful purpose if there had been such proof, in view of the fact that at the date at which it was made, McCready had ceased to have any interest in the mortages which, as before stated, he had absolutely transferred to the appellant on the 24th of October preceding the loss.

It is not very clear whether, according to the true interpretation of the policy read in conjunction with the so called mortgage clause, it ought to be considered as an insurance of the proprietary interest of Maguire, McCready being a mere *adjectus causâ solutionis* to whom the proceeds of any loss under the contract of insurance between Maguire and the company were to be paid, or whether the insurance was of McCready's mortagee's interest, and the contract one directly between him and the company. In the former case McCready, if he had not assigned his interest before the loss, might have been entitled to sue. According to the rule of law established in England, a person not himself a party to a contract, but to whom money is made payable under a contract entered into by other persons, cannot maintain an action to recover the money so made payable to him, and this rule prevails generally in the United States with the exception of the State of New York where the decisions have established a contrary rule. According to the modern law of France, however, the *adjectus gratiâ solutionis* can maintain an action in his own name where the payment is intended for his benefit (1). Therefore, had McCready retained an interest in the mortages up to the time of the loss he might have maintained an action for the insurance money though it was payable to him under a contract of

(1) 12 Duranton (4 ed.) no. 53, p. 80.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

The Chief Justice.

insurance between Maguire and the company to which contract he was himself no party, and this right of action he might have transferred to the appellant. The right to maintain an action in the character of a mere party to receive payment would, however, depend on a due performance of the condition of the policy by the assured who, in the hypothesis now being considered, would be Bernard Maguire. On the other hand if the proper construction of the policy and what is called the mortgage clause, is, that there was a direct agreement between McCready as a mortagee and the company, McCready could of course recover upon his own contract so long as he retained an insurable interest.

I do not consider it necessary to determine this question of construction for the reason that it is plainly manifest that in neither alternative can the present action be maintained.

First, there could be no recovery in an action by the appellant or by McCready under a contract of insurance between Maguire and the respondent treating McCready as a party adjected merely for the purpose of receiving payment, for the reason that in that case the policy must have been avoided by an unauthorized change in the use of the insured premises by converting the dwelling house into a tavern; (see Art. 2574 C.C.); and for the further reason that there was no proof of loss such as the stipulations of the policy called for.

If on the other hand the insurance is to be deemed one of McCready's interest as mortgagee, then the undeniable fact that McCready had ceased to have any insurable interest after the 24th of October, 1893, when he transferred all his interest in the mortgages to the appellant, would by itself be a conclusive answer to the action; (see arts. 2475, 2483 and 2576 C. C., Quebec.) There is no pretence that the policy was ever transferred to the appellant; his only title to

sue is therefore through the assignment from McCready to him of the 17th of April, 1894; but even if McCready had been entitled to recover for the loss this assignment would have been insufficient to confer on the appellant a title to maintain the action, since in order to perfect the legal cession of a debt the law requires that it be duly signified to the debtor, and here there is no proof whatever of any such signification. (Art. 1571, C. C., Quebec.)

A further fatal objection to the appellant's action is that there is no proof of the value of the property destroyed by the fire. The amount insured does not constitute any proof of this (art. 2575 C. C., Quebec), and the record contains no evidence whatever upon the point. A memorandum dated in October, 1894, and signed by one "George Robert" purporting to state the value of the destroyed property, but a memorandum which has never been proved, has been irregularly introduced into the record before this court.

Further the arbitration clause, added to the conditions by the variation to condition sixteen, provides that no action should be maintainable until after an award had been obtained pursuant to the terms of the conditions fixing the amount of the claim. The Court of Review considered this provision void as tending to oust the jurisdiction of the courts of law and so contrary to public policy. I do not think this view can be maintained. The law of England provides that any agreement renouncing the jurisdiction of legally established courts of justice is null, but nevertheless in the case of *Scott* v. *Avery* (1), the House of Lords determined that a clause of this nature and almost in the same words as that before us making an award a condition precedent, was perfectly valid and

(1) 5 H. L. Cas. 811.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

The Chief Justice.

that no action was maintainable until after an award had been made. This decision, which has been followed in many later cases, though of course not a binding authority on the courts of Quebec, proceeds upon a principle of law which is as applicable under French as under English law. This principle applies not merely to cases where the amount of damages is to be ascertained by an arbitrator, but also to cases where it is made a condition precedent that the question of liability should first be determined by arbitration. *Trainor* v. *Phœnix Fire Ins. Co.* (1); *Kenworthy* v. *Queen Ins. Co.* (2); *Lantalum* v. *The Anchor Marine Ins. Co.* (3); *Dawson* v. *Fitzgerald* (4).

The appeal must be dismissed with costs.

TASCHEREAU J.—On 4th November, 1891, the company respondent issued a three years policy for $3,000 on certain buildings near Montreal in favour of one Maguire, the owner.

On November 13th following the company, with Maguire's assent, attached thereto the usual mortgage clause (Holt, Insurance, No. 192), in favour of one James McCready, who had a mortgage for $4,000 on the said buidings "loss payable to James McCready as his interest may appear."

On the 24th of October, 1893, McCready assigned, with Maguire's assent, all his rights in that mortgage to appellant, who thereby became the mortgagee and Maguire's creditor.

On 1st December, 1893, Maguire's buildings were destroyed by fire.

In April, 1894, McCready assigned to appellant all claims he might have against the respondent, and

(1) 8 Times L. R. 37.
(2) 8 Times L. R. 211.
(3) 22 N. B Rep. 14.
(4) 1 Ex. D. 257.

1898

GUERIN
v.
THE MANCHESTER FIRE ASSURANCE CO.

Taschereau J.

signification of this assignment was duly made upon the respondent.

The appellant now claims from the respondent the amount of the said assurance, less $500 value of outbuildings not destroyed.

The respondent meets this demand by:—

First. The general issue.

Secondly. Non-compliance with the conditions of the policy as to notice of loss and proofs of loss, it being stipulated in the policy that in case of loss notice in writing should be forthwith given to the company by the assured, and "that proofs of loss must be made by the assured although the loss was payable to a third party," and that no such notice in writing of the loss was given, and that no proofs of loss were furnished by the assured or any one acting for him.

Thirdly. By a third plea the company averred that the parties had agreed by a clause in the policy (16th) to submit their differences to arbitration with the express condition that no suit or action against the company for the recovery of any claim under the policy should be sustainable until after an award should have been obtained fixing the amount of such claim.

Fourthly. By a fourth plea the company averred that by a condition indorsed upon the back of said policy, loss if any, under the policy was made payable to James McCready, of Montreal, mortgagee, as his interest would appear at the time of the loss as such mortgagee; that on the 1st of December, 1893, date of the fire, said James McCready had no insurable interest as mortgagee or otherwise in the property covered by the policy, having on the 24th of October, 1893, assigned to appellant all his rights and interest as mortgagee of the property in question; that as said James McCready had no insurable interest in the

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Taschereau J.

property at the time of the fire, he had no claim to assign to appellant after the fire, and neither appellant nor James McCready have now any rights under the policy in question.

Fifthly. By a fifth plea the company averred that the premises were insured as a dwelling only and that subsequently to the issue of the policy the property was occupied as a hotel, and was so used at the time of the fire, and that this was a change material to the risk within the the control and knowledge of the assured and voided the policy.

The Superior Court maintained respondent's second plea, and dismissed appellant's action, on the ground that under article 2478 of the Civil Code, notice of the loss must be given by the assured in conformity with the special conditions of the policy, and that no such notice had been given by Maguire, nor by any person on his behalf.

Appellant inscribed his case in review, where the judgment of the Superior Court was reversed and the company respondent condemned to pay to appellant the sum of $1,980 with interest from the 24th of April, 1894.

Respondent then brought the case before the Court of Queen's Bench, where the judgment of the Court of Review was reversed and appellant's action dismissed, on the two grounds as given in the formal judgment, that appellant failed to prove, first, that he had a legal right of action under the policy, upon which his action was based; and secondly, that the party assured under said policy had not given the notice of loss in the manner, within the delay, and under the conditions stipulated in the said policy.

It seems to me doubtful, I may premise by saying, if the Ontario statutory conditions that are printed on the back of this policy, form part of the contract

between the parties thereto. The policy does not in any way refer to them, the application is not in evidence, and by the Ontario statute, R. S. O., 1897, c. 203, sec. 168, these conditions, in express terms are made applicable exclusively to insurances in Ontario. *Cameron* v. *Canada Fire and Marine Ins. Co.* (1). How could a Quebec Court have the power to declare any of the variations unreasonable as the Ontario Courts have under their statute?

However, in my view of the case this is immaterial.

There is nothing in the respondent's plea as to arbitration, which I will dispose of first, assuming the other printed conditions to form part of the contract.

Condition sixteen, as varied, relied upon by respondent clearly can have no application, as there is, in the Province of Quebec, no County Judge to appoint a third arbitrator in certain cases as provided thereby for Ontario policies. Under these circumstances, it is unnecessary to determine here whether or not an arbitration under a clause of this nature, *clause compromissoire*, is, in the Province of Quebec, a condition precedent to the right of action, a question upon which there has been much controversy. De Lalande, "Assurance," Nos. 438, 439; Sirey, Table Gén. vo. "Arbitrage," Nos. 47 *et seq.*; Bioche, "Procedure," vo. "Arbitrage," No. 147. In England, *Scott* v. *Avery* (2); *Viney* v. *Bignold* (3); and cases cited in *Anchor Marine Ins. Co.* v. *Corbett* (4). Upon this point I would be against respondent's contention.

Then, as to the reason given by the Superior Court and by the Court of Queen's Bench that Maguire, the assured, failed to give notice of the fire as required by the policy, by art. 2478 of the Civil Code, it is evident that such a reason in this case must be due to

(1) 6 O. R. 392.
(2) 5 H. L. Cas. 811.
(3) 20 Q. B. D. 172.
(4) 9 Can. S. C. R. 73.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Taschereau J.

an oversight. Whilst undoubtedly such a want of notice would be fatal to the assured Maguire, yet it could not be held to defeat appellant's claim, were it otherwise well founded, without reading out of the mortgage clause which forms the contract between the mortgagee and the company, the express provision that the insurance, as to the interest of the mortgagee, was not to be invalidated by any act or neglect of Maguire. And that cannot be done. *Anderson* v. *Saugeen Mutual Fire Ins. Co.* (1). Joyce on Insurance, secs. 3304, 3308. Under that provision, the mortgagee has no action where the assured would have none. In *Kanady* v. *The Gore District Mutual Fire Ins. Co.* (2), for instance, and *Willey* v. *The Mutual Fire Ins. Co. of Stanstead and Sherbrooke* (3); the companies would have been condemned if there had been in the policies a mortgage clause such as this one.

A payment by the company to the mortgagee, under these circumstances, when the assured himself has forfeited all his rights under the policy, does not operate as a discharge of the mortgage. It simply substitutes the company to the mortgagee in the latter's rights. That is the remedy which the company gets in such a case. But, towards the mortgagee, they are liable. That part of the respondent's pleas seems to me unfounded.

The same as to the increase of the risk by turning the house into a hotel. By the mortgage clause it is expressly stipulated that this, as to the mortgagee, was not to invalidate the policy. Such increase of risk, in express terms, puts upon the mortgagee the obligation to pay the additional rate on reasonable demand, but that is all; it leaves the policy intact as to the mortgagee. Though the company here was notified by

(1) 18 O. R. 355.
(2) 44 U. C. Q. B. 261.
(3) 2 Dor. Q. B. 29.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Taschereau J.

the mortgagee of this change in the premises as soon as he knew of it, it never made a regular demand for the additional rate, so as to put him *en demeure*, and never cancelled the policy, or took any action to that effect.

I cannot see anything in the fact that, on the 9th November, 1891, the company's agent wrote to McCready that if the premises were to be occupied as a hotel the present policy would have to be cancelled. For it is after that letter, on the 13th November, that the mortgage clause was attached to the policy; and by its very terms, the policy was not to be cancelled or voided by an increase of hazard, the additional rate only being then payable by the mortgagee. That implied that the policy was to continue in full force. So that when the agent later on, upon being informed of the change in the occupation of the premises, told appellant that he would have to return the policy so that a new one could be issued, appellant had the right not to pay any attention to that requisition as he did.

So far, I would be with the appellant.

He cannot succeed, however. The loss, as I have said, was made payable to McCready, "as his interest may appear." McCready, therefore, was to have no claim against the company if, at the time of the loss, it appeared that he had no more interest in the mortgage. He could not have recovered judgment upon his contract with the company without alleging in his declaration, and proving at the trial, that he was still a mortgagee, and what was the amount due to him on the mortgage. His interest as mortgagee and his rights under the mortgage clause were correlative. The vitality of the latter depended on the existence of the former.

Now at the time of the fire he had no interest whatever in the mortgage. He had previously sold it to

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Taschereau J.

appellant, without a clause of *fournir garantir et faire valoir*, and had become entirely disconnected from it. He then had no action against the company and if he had none the appellant cannot now have one.

It appears to be true, as contended for by the appellant, that to make a loss payable to the mortgagee, is not an assignment of the policy; May, on Insurance, (3 ed.) sec. 379; Joyce, on Insurance, secs. 2305, 2314; *Anderson* v. *Saugeen Mutual Fire Ins. Co.* (1); *Fogg* v. *Middlesex Mutual Fire Ins. Co.* (2); and that the assignee of the sum payable in case of loss need not have an insurable interest. I do not see anything to the contrary in arts. 2474, 2475, 2482, 2483 and 2576 of the code, cited at bar. *McPhillips* v. *London Mutual Fire Ins. Co.* (3); Pouget, dict. des Assur. vol. 1er v. "Indemnité," par. 2, p. 368; v. "Paiement," pages 570, 571, vol. 2; v. "Transport," page 949; Huc. Transp. de cr. vol. 1er, nos. 172, 174, 297. Pand, Fr. vol. 10, v. "Assur. contre l'incendie," nos. 1294, 1520. If McCready, for instance, had remained the mortgagee, but had assigned his right of action to appellant, appellant might have recovered judgment against the company, if the assignment had been duly served upon them in accordance with Art. 1571 of the code. Or if McCready had been a mere chirographary creditor of Maguire, an assignment to him, accepted by the insurer in the terms of the one in question, "as his interest may appear," might have given him a right of action, though he would have had no insurable interest, upon his proving, and only upon his proving, that he was still Maguire's creditor at the time of the loss. But here there is no question of insurable or no insurable interest as pleaded that can affect the case. McCready was not the assured. *Omnium Securities Co.* v. *Canada*

(1) 18 O. R. 355.
(2) 10 Cush. (Mass.) 337.
(3) 23 Ont. App. R. 524.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Taschereau J.

Fire and Mutual Ins. Co. (1). It is a simple question of contract. The company has covenanted to pay McCready in case of loss, but only if at the time of the loss he was still a mortgagee of the property insured by Maguire, up to the amount of his interest at the time, as such mortgagee. Now, he had ceased to be such. He had absolutely assigned all his interest therein. Therefore, he had no action, and I repeat it, he could not afterwards assign to appellant a right that he did not himself have.

The maxim "*Nemo plus juris transferre potest quam ipse habet*" has here full application.

I would dismiss the appeal.

GWYNNE J.—This is an action brought by the plaintiff upon a policy of insurance against loss by fire issued by the above defendant to and in favour of one Bernard Maguire upon a dwelling house of his situate in the Province of Quebec. The policy was issued on the 4th November, 1891, and was declared to be in operation until the 13th October, 1894. The policy was in the form prescribed by a statute of the Province of Ontario as the form in which all policies against loss by fire should be framed as regards property situate within the Province of Ontario. But the company having issued outside of the Province of Ontario a policy the form and terms of which are made compulsory by statute as regards property situate in the Province of Ontario contains no less, and must be construed as containing, the terms by which the parties to the policy have agreed to be bound.

Among the conditions subject to which the policy in the present case was issued, are the following:

(1) 1 O. R. 494.

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Gwynne J

3. Any change material to the risk and within the control or knowledge of the assured shall avoid the policy as to the part affected thereby unless the change is promptly notified to the company or to its local agent in writing, and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand the policy shall be no longer in force.

12. Proof of loss must be made by the assured although the loss be payable to a third party.

13. Any person entitled to make claim under this policy is to observe the following directions:

(*a*) He is forthwith after loss to give notice in writing to the company;

(*b*) He is to deliver as soon afterwards as practicable as particular an account of the loss as the nature of the case permits;

(*c*) He is also to furnish a statutory declaration declaring;

1. That the said account is just and true;

2. When and how the fire originated as far as the declarant knows or believes;

3. That the fire was not caused through his wilful act or neglect, procurement, means or contrivance, and

4. The amount of other insurances.

15. Any false statement in the statutory declaration in relation to any of the above particulars shall vitiate the claim.

16. If any difference arises as to the value of the property insured, of the property saved, or amount of the loss, such value and amount and the proportion thereof, if any, to be paid by the company shall, whether the right to recover on the policy be disputed or not, and independently of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree upon one person, then to two persons, one to be chosen by the party insured and the other by the company, and a third to be appointed by the persons so chosen, or on their failing to agree by the county judge of the county wherein the loss has happened, and such reference shall be subject to the provisions of the laws applicable to references in actions, and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company. Where the full amount of the claim is awarded the costs shall follow the event and in other cases all questions of costs shall be in the discretion of the arbitrators. It is furthermore hereby expressed, provided and mutually agreed that no suit or action against

the company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided.

17. The loss shall not be payable until thirty days after completion of the proofs of loss unless otherwise provided for by the contract of insurance.

18. The company instead of making payment may repair, replace or rebuild within a reasonable time the property damaged or lost, giving notice of their intention within fifteen days after the receipt of the proofs herein required.

The policy was also made subject to a special clause called a "mortgage clause" which was attached to the policy and made part thereof, and is as follows:

Mortgage clause.—It is hereby provided and agreed that this insurance as to the interest of mortgagees only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further provided and agreed that the mortgagees shall at once notify said company of non-occupation or vacancy for over thirty days, or of any change of ownership or increased hazard that shall come to their knowledge; and that every increase of hazard not permitted by the policy to the mortgagor or owner shall be paid for by the mortgagees on reasonable demand from the date such hazard existed according to the established scale of rates for the use of such increased hazard during the continuance of this insurance. It is also provided and agreed that whenever the company shall pay the mortgagees any sum for loss under this policy and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once be legally subrogated to all rights of the mortgagees in all the securities held as collateral to the mortgage debt to the extent of such payment, or at its option the company may pay to the mortgagees the whole principal due or to become due on the mortgage with interest and shall thereupon receive a full assignment and transfer of the mortgage and all other securities *held as collateral* to the mortgage debt, but no such subrogation shall impair the rights of the mortgagees to recover the full amount of their claim. It is also further provided and agreed that in the event of the said property being further insured with this or any other office on behalf of the owner or mortgagee the company, except such other insurance when made by the mortgagee or owner shall prove invalid, shall only be liable for a ratable proportion of any loss or damage sustained.

1898

GUERIN
v.
THE MANCHESTER FIRE ASSURANCE CO.

Gwynne J.

At the request of the assured the loss, if any, under this policy is hereby made payable to James McCready, Jr., *as his interest may appear* subject to the conditions of the above "mortgage clause."

This clause thus described as "mortgage clause" appears by Mr. Griswold's underwriters' text book to have been introduced into policies of insurance in the United States of America by the Mutual Insurance Company of New York, in the year 1860. In sections 733 *et seq.* he thus treats of the introduction of the clause in use in policies in the State of New York from which the clause in the policy now under consideration appears to have been framed:

> This clause is a special stipulation operating only between the insurance company and savings banks and other money loaning institutions or individuals to which it may be conceded, usually accompanying a mortgagor's policy whose loss thereunder is made payable to such parties as mortgagees, and intended as a protection against any acts or omissions on the part of the insured, the mortgagor, by which the insurance might become invalidated as to such mortgagor, in which event the policy would continue to cover the interest of such mortgagees, though the insured may have set fire to the premises or otherwise wilfully caused the loss. Thus as the mortgagor has no interest in the clause—it not becoming operative until his legal interest in the insurance shall have entirely ceased—it is difficult to conceive why it should as in present practice form one of the stipulations attached to *his* policy.

Again at sec. 744 he says:

> These mortgage clauses are distinct waivers of the conservative stipulations of the policy; the property may be sold and resold or burned by the mortgagor during its currency but the liability of the underwriter still remains; and just why such special concessions should be made to money lending institutions to protect their interests when they are the very last to make concessions to others is one of the mysteries of the business especially when the effect of such concession is to bar the underwriter from the benefit of the saving conditions of his policy in cases of fraud or other voidable circumstances on the part of the mortgagor without any corresponding benefit in the way of extra premium or otherwise for such concession.

And in another place, sec. 734, he says that the clause when first introduced

was a source of such vexation and annoyance to the companies and to the courts as well until some of the more prominent offices refused to underwrite them.

To my mind it still remains an inexplicable mystery why the defendant should have attached this mortgage clause to the policy issued in the present case; its insertion appears to present a very difficult problem to be solved if it should be necessary to reconcile these apparently inconsistent conditions; however, in the present case it will not be necessary to attempt this task in view of the only right asserted by the plaintiff upon the record upon which alone his claim is based. That claim as presented in his statement of claim briefly is that one Bernard Maguire, being the owner of a lot of land situate in the town of Longueuil, in the province, with a dwelling house thereon, upon the 13th of October, 1888, executed a mortgage upon the said property in favour of the estate of one Robert McCready, then deceased, for securing payment to the said estate of the sum of three thousand dollars; that subsequently upon the 13th of October, 1889, the said Bernard Maguire executed another mortgage upon the same property in favour of the estate of the said deceased Robert McCready for securing payment to the said estate of the further sum of one thousand dollars.

That upon the 1st of September, 1891, the said estate of the said deceased Robert McCready did by deed of transfer duly executed before a notary public transfer to one James McCready all their (the said estate of said Robert McCready) right, title and interest in the said mortgages amounting to the sum of four thousand dollars.

That on the 4th November, 1891, the said Robert McCready insured the said dwelling house against loss by fire to the amount of two thousand five hun-

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Gwynne J.

dred dollars, with the defendant, who thereupon issued the policy under consideration (the material parts of which are above set forth.)

That on the 13th November, 1891, the defendant did at the request of the said Bernard Maguire make the loss under the said policy payable to the aforesaid James McCready, and he was fully vested with all the rights which might accrue in case a fire should happen to the property so insured.

That on the 1st of December, 1893, the premises so insured were destroyed by fire which resulted in a total loss, and that the ruins which remained are useless for any purpose whatsover, and the said fire made the said policy exigible in full; and

That the said James McCready did immediately notify the said company and did make a statutory declaration through his attorney and representative, and did request from the company the payment of the amount so due to him. That on the 17th of April, 1894, at the City of New York, in the United States of America, the said James McCready for a good and valid consideration did assign, transfer and make over to the present plaintiff all his right, title and interest in the said policy of insurance sued on in this case, and did subrogate the present plaintiff in all his rights under said policy.

That on the 21st April, 1894, signification of the transfer was made to the defendants, and

That by reason of the foregoing facts the plaintiff has a right to demand payment of the said sum (*i.e.* $2,500, amount of insurance on dwelling house) with interest.

The claim presented by this statement of claim is asserted to be vested in the plaintiff wholly by the assignment of the date of 17th of April, 1894, executed by James McCready whereby as is alleged he transferred to the plaintiff a right alleged to have been

then vested in him the said James McCready, to recover the indemnity, if any, payable to the said insured Bernard Maguire under the terms of the policy. There is no claim whatever asserted in right of James McCready to recover in his own interest as mortgagee under the provisions of the mortgage clause. The statement of claim is framed as upon a policy whereby the indemnity, if any, payable to the insured Bernard Maguire was directed to be paid to James McCready without there being any clause such as that termed the mortgage clause inserted in or made applicable to the policy.

To the statement of claim so framed the defendant pleaded several pleas and thereby respectively pleaded the above 3rd, 12th, 13th, 16th and 17th conditions. As to the third condition they pleaded that the property insured was insured as a dwelling house and that subsequently to the issue of the said policy the said insured property was occupied as a hotel and was so used and occupied at the time of said fire, that such occupation of said premises as a hotel was more hazardous than that permitted by the said policy and no notice of such change of occupation or change of risk was ever given in writing to the said company defendant or its agents; that by means of such change of occupation of said premises the said policy became and was at the time of the said fire cancelled and not in force, and the said defendant was by reason of such change of occupation relieved from all obligations under the said policy, and that the said James McCready was well aware of the said change in the occupation of said premises and failed to notify said company of such change, although the same came to his knowledge and was well known to him.

As to the twelfth condition and in breach thereof, the company pleaded, that the insured under the policy was

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Gwynne J.

Bernard Maguire, and that no proof of loss under said policy was ever made or given by said Bernard Maguire or his agents or representatives, and that the pretended proofs of loss (in the statement of claim alleged) to have been made by the plaintiff acting as agent of said James McCready, did not conform to the conditions of said policy and was and is irregular, illegal and insufficient.

As to the thirteenth condition and in breach thereof, it was pleaded, that no notice in writing was given said company defendant forthwith after said loss by the said assured or their agents or representatives, or by any person whomsoever, and that said condition was never complied with.

As to the sixteenth and seventeeth condition, and in breach thereof, it was pleaded that neither the plaintiff nor the said James McCready, nor the said Bernard Maguire ever complied with the said conditions in any manner. And it was further pleaded, that previously to the said fire on or about the 30th of October, 1893, the said James McCready sold and transferred to the plaintiff all his, the said James McCready's, right, title and interest in and to the mortgages then held by him upon said property and set forth at length in plaintiff's declaration, and that the said James McCready had not on the said 17th day of April, 1894, any rights or interest under the said policy to transfer to the plaintiff, and that the plaintiff did not thereby acquire any right or title to the amount of loss claimed under the said policy. To these pleas the plaintiff did not plead any matter whatever in reply, and so the case went down for trial solely as to the truth of the pleas, and their efficacy if proved to be true.

Now it appeared in evidence that when the company agreed to attach the mortgage clause to Bernard Maguire's policy, James McCready, the mortgagee,

1898

GUERIN
v.
THE MANCHESTER FIRE ASSURANCE CO.

Gwynne J.

was informed in writing by the agent of the defendant that if ever the insured building should be used as a hotel the company must be notified, and that a wholly new policy must needs be obtained at an increased rate, for that the company cannot underwrite a policy on a hotel at the same rate as a dwelling house, nor for three years, as that issued upon Bernard Maguire's building used as a dwelling house was; and indeed the mortgage itself points out to the mortgagee, James McCready, the duty imposed upon him in the event of its coming to his knowledge that the insured building was used for a purpose more hazardous than was permitted by the policy; that occupation of the building as a hotel was a much more hazardous risk than occupation as a dwelling house, and that a much higher premium was required by the company to be paid also appears in evidence. It further appeared in undisputed evidence. in fact by the evidence of a son of Bernard Maguire, that Bernard Maguire himself in the year 1892 converted the insured building into a hotel and for the greater part of that year occupied it as such, and that by a notarial deed executed on the 27th of February, 1893, he demised the said insured building to be used as a hotel to one Alexander Riendeau, who in virtue of such demise occupied and used the building as a hotel until it was destroyed by fire. It also appeared that no notice in writing of such change of occupation of the insured building was ever given to the defendant or its agent by the said Bernard Maguire, nor by any agent or representative of his, as required by the third condition, nor by any person at any time until the latter end of the month of October, or beginning of the month of November, 1893, when the plaintiff, professing to act in the interest of the mortgagee, James McCready, having ascertained that the building

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Gwynne J.

which had been insured as a dwelling house was being used as a hotel, informed the said McCready that it was necessary that the defendant should be notified thereof, and thereupon the plaintiff and James McCready went together to the defendant's agent, (Mr. Molson), and informed him of the change so made in the occupatien of the insured building. Until the plaintiff and James McCready so gave this information to the defendant's agent, it does not appear that the defendant had any information as to the change in the occupation of the insured building from a dwelling house into a hotel. The policy therefore, as regarded the interest of Bernard Maguire therein, had been avoided by force of the terms of the third condition long previously to the time when the notice above mentioned was given by the plaintiff and James McCready to the defendant's agent, and in fact in the lifetime of the said Bernard Maguire who, as appears in evidence, departed this life on the 17th of April, 1893.

Again, when the fire took place on the 30th November, 1893, the legal representatives of Bernard Maguire gave no notice thereof to the defendant and made no proof of loss as required by the conditions in that behalf in the policy. It is therefore conclusively established that no recovery in respect of the right or interest of Bernard Maguire or of his legal representatives could ever be maintained upon the policy set out in the plaintiff's statement of claim. There can be no recovery under the policy unless in the right and interest of James McCready as mortgagee, and under the provisions of the above mortgage clause.

Now the fair conclusion upon the evidence as to what took place when the plaintiff, professing to act as the agent of James McCready, gave notice to the defendant's agent in October or November, 1893, that

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Gwynne J.

the building insured as a dwelling house was being used as a hotel is I think this, that thereupon the defendants informed the plaintiff and McCready as he had informed McCready in writing when the mortgage clause was attached to the policy, that it would be necessary that the old policy should be returned and an increased premium paid, and a new policy taken out, and the agent promised that upon a return of the old policy and the payment of the increased premium, the amount of which was then named, he would issue a new policy but for no more than $2,000, and for one year only as the company could not underwrite a policy upon a hotel for any longer period; but that the old policy never was returned, and the increased premium never was paid or tendered and so no new policy had been issued.

Then when the fire took place it appears that the plaintiff, still professing to be acting as agent of the said mortgagee, James McCready, upon the 20th December, 1893, but not until then, gave notice to the defendant of the loss occasioned by fire on the 30th November, 1893, and made a declaration which plainly appears to have been intended to be by way of proof of loss on behalf of James McCready as still mortgagee and entitled to the benefit of the mortgage clause; but whether James McCready if he was the now plaintiff and was still claiming as mortgagee could recover under the circumstances as above appearing in evidence under the provisions of the mortgage clause, it is not necessary for us to determine, for it is pleaded by the defendant and proved that upon the 24th day of October, 1893, James McCready by notarial deed assigned and transferred to the plaintiff all his right, title and interest in the mortgages in the statement of claim mentioned and neither at the time of the occurrence of the said fire, nor at the time of the notice

1898

GUERIN v. THE MANCHESTER FIRE ASSURANCE CO.

Gwynne J.

given by the plaintiff and James McCready of the change in the occupation of the insured building from a dwelling house to a hotel, had he, the said James McCready, any estate, right, title or interest in the said mortgaged premises or any part thereof, and consequently, that nothing passed by the execution of the document in the statement of claim mentioned to bear date the 17th April, 1894, upon which alone the cause of action in the statement of claim asserted is based. By the express provisions of the mortgage clause the said James McCready was only entitled to demand and receive any monies secured by the policy in his character of mortgagee, and to the extent only that his interest as such should appear. If therefore the monies secured by the mortgages had been paid with the exception of say $500, James McCready, had he continued to be mortgagee, could have recovered no more than that amount, but having sold the mortgages and all interest in the mortgaged premises and so in the insured building two months before the happening of the fire, he could recover nothing.

The appeal must therefore be dismissed with costs.

SEDGEWICK and KING JJ. were of opinion that the appeal should be dismissed for the reasons stated in the judgment of His Lordship the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. C. Madore.*

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

THOMAS J. WALLACE AND MARIA KEARNEY (DEFENDANTS) } APPELLANTS;

AND

ALEXANDER G. HESSLEIN AND LEWIS J. HESSLEIN (PLAINTIFFS) ..... } RESPONDENTS.

1898

*May 3.

*Nov. 21.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Vendor and purchaser—Specific performance—Laches—Waiver.

The purchaser under contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time even though time was not of its essence ; nor when he has declared his inability to perform his share of the contract.

The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements.

APPEAL from the decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the plaintiffs.

In April, 1894, an agreement was entered into between the plaintiffs and the defendant Wallace in the following terms:

"It is hereby agreed that Thomas J. Wallace shall and does hereby purchase, for the sum of two thousand five hundred dollars, and Alexander Hesslein, as executor of his late father, agrees to sell, and does hereby sell, to said Thomas J. Wallace, that property near the lunatic asylum, Dartmouth, formerly owned by Lewis P. Fairbanks, including the water lot in front, if also owned by Mr. Hesslein, for the sum of

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

(1) 29 N. S. Rep. 424.

1898

WALLACE v. HESSLEIN.

two thousand five hundred dollars, with five hundred dollars off. The sale to be completed and property conveyed on or before the expiration of three months, interest to be paid from 1st May till completion of sale and purchase by said Thomas J. Wallace. A good title to be given in fee simple, and the said two thousand dollars also to be paid, or partly paid, and mortgage for balance to the satisfaction of Mr. Hesslein."

Wallace went at once into possession of the property described in said agreement, and afterwards leased it to the other defendant. He failed, however, to pay the purchase money within the specified time, and in 1895 the plaintiffs, having previously requested him to carry out his contract or deliver back the property, notified him that the agreement was at an end and demanded immediate possession. This demand not being complied with they took an action for possession in which the defendants set up want of title in plaintiffs and also counter-claimed for specific performance and damages.

On the trial the plaintiffs had judgment for possession of the property with damages for mesne profits which was affirmed by the full court, from whose judgment this appeal was taken.

Wallace, appellant in person, and *Sinclair* for the appellant Kearney. The plaintiffs were not entitled to rescind the contract. Fry on Specific Performance, pp. 485, 1060; *Stone* v. *Smith* (1); *Freeth* v. *Burr* (2); *The Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3); and they had no title to the water lot or to the right of way. Notice was given that plaintiffs intended to claim the benefit of a condition making time of the essence of the contract. *Crawford* v. *Toogood* (4). See

(1) 35 Ch. D. 188.
(2) L. R. 9 C. P. 208.
(3) 9 App. Cas. 434:
(4) 13 Ch. D. 153.

also cases cited in Fry on Specific Performance (3 ed.), sec. 1094.

Borden Q.C. for the respondents. The possession of plaintiffs alone is sufficient to establish their title. *Cunard* v. *Irvine* (1); *Smith* v. *McKenzie* (2); *Freeman* v. *Allen* (3). The defendants were tenants at will to plaintiffs and cannot dispute their title. A purchaser let into possession under contract is tenant at will to vendor. *Doe d. Hiatt* v. *Miller* (4); *Doe d. Tomes* v. *Chamberlaine* (5); Cole on Ejectment, pp. 58, 449, 450; and such purchaser cannot dispute his vendor's title. *Doe d. Milburn* v. *Edgar* (6); *Doe d. Bord* v. *Burton* (7); Cole on Ejectment, p. 213, 215.

Assuming however that plaintiffs were in default the purchaser is not entitled to possession unless he is in a position to enforce specific performance against the vendor. See *Walsh* v. *Lonsdale* (8); *Swain* v. *Ayres* (9); and from defendants' counter-claim, which claims specific performance, it will be seen that the defendant Wallace was not in a position to enforce specific performance. He is not entitled to such relief by reason of his delay and non-performance of the contract on his part. Fry on Specific Performance (3 ed.) secs. 922, 1100.

We also rely upon *Young* v. *Halahan* (10); *Harris* v. *Robinson* (11), per C. J. at page 397; and *Denison* v. *Fuller* (12) as to waiver of defects of title by the taking of frivolous objections.

THE CHIEF JUSTICE.—The action of the respondents for the recovery of the land was clearly maintainable

(1) James 31.
(2) James 228.
(3) 2 Old. 293.
(4) 5 C. & P. 595.
(5) 5 M. & W. 14.
(6) 2 Bing, N. C. 498.
(7) 16 Q. B. 807.
(8) 21 Ch. D. 9.
(9) 20 Q. B. D. 585; 21 Q. B. D. 289.
(10) 9 Ir. Rep. Eq. 70.
(11) 21 Can. S. C. R. 390.
(12) 10 Gr. 498.

1898

WALLACE v. HESSLEIN.

The Chief Justice.

so far as the legal title was concerned. The only question is: Were the appellants in a position to entitle them to the specific performance which they seek by their counter claim?

I am decidedly of opinion that they were not entitled to any such relief. In order to entitle a party to a contract to the aid of a court in carrying it into specific execution he must show himself to have been prompt in the performance of such of the obligations of the contract as it fell to him to perform, and always ready to carry out the contract within a reasonable time, even though time might not have been of the essence of the agreement. It appears from the evidence that the appellants do not bring themselves within these conditions. No doubt it was incumbent on the vendors to have made out a good title; the contract is express on this head; but on the other hand it does not appear that the appellants ever called for the production of the title. It was well observed by the learned counsel for the respondents that in this country sales of lands are not in practice carried out in the formal way in which such contracts are completed in England. It is usual for the vendee to examine the title in the registry office and to rest satisfied with that, and in many cases to complete the purchase without professional assistance. I do not say that the vendor is not bound to make out a title, even in the case of an open contract, and of course he is bound to do so where, as in the present case, he has expressly undertaken to do so. The comparatively small value of real estate would make it out of the question to carry out sales of land here according to the elaborate and costly practice which prevails in England. Mr. Wallace, so far as appears from the evidence of the vendor and his solicitor, Mr. Ritchie, never asked for an abstract or raised any question as

1898

WALLACE v. HESSLEIN.

The Chief Justice.

to the title except as to the sale under the foreclosure decree in the case of *Murdoch* v. *Fairbanks*.

The objection on this head seems to have been sufficiently answered by the statute referred to in the judgment of the full court delivered by the Chief Justice.

To the other objections, three in number namely: (1) that the vendor could not make a title to the water-lot; (2) that a strip of land had been expropriated or sold to the Crown for the railway; (3) that the wife of Mr. Fairbanks was entitled to dower, sufficient answers were given at the trial. First, it was show that Mr. Wallace when he entered into the agreement had full knowledge of the notorious fact that the railway had for years run across the land and therefore that the Crown must have acquired title to the strip so occupied either by purchase or expropriation. Next it appeared that Mr. Hesslein never owned the water-lot which had not been included in the mortgage by Fairbanks to Gray. Thirdly, Mrs. Fairbanks was not entitled to dower, her title to legal dower having been absolutely barred by the mortgage deed of her husband to Gray, and a right to equitable dower not having been conferred in Nova Scotia until the statute of 1884, and then only in cases where the husband died beneficially entitled to the land, and it having been shown here that the equity of redemption was sold at sheriff's sale and a conveyance to the purchaser executed by the sheriff in 1875.

Further, Mr. Fairbanks shows that there was generally a good title to the property under the statute of limitations, his father, uncle, himself, the vendors and their father, having been in successive uninterrupted possession since 1836.

The widow of the respondents' father, who was entitled under his will to an annuity charged upon the land, executed a deed releasing that charge.

1898

WALLACE v. HESSLEIN.

The Chief Justice.

There was moreover a clear waiver of all objections to title by Mr. Wallace, who took possession of the property and exercised acts of ownership by making repairs and improvements to the amount of $285, according to his own evidence, thus exercising acts of ownership sufficient to show a waiver.

Further, Mr. Wallace's whole course shows that he did not intend to raise any question of title. On the day fixed for completion he went to the vendor's place of business, taking with him a blank mortgage deed for the purpose of at once carrying out the purchase. Then he never made any objections to the title to Mr. Ritchie save as before mentioned.

There is, however, a distinct ground for refusing specific performance. We must of course give credit to Mr. Ritchie's evidence, and he most distinctly proves that Mr. Wallace declared his inability to perform his agreement. He had, it seems, previously applied to Mr. Ritchie for an extension of time for the payment of the purchase money, but any agreement on this head had fallen through. Then at an interview Mr. Ritchie says, "Mr. Wallace gave me to understand that it was inconvenient to pay the purchase money." Further, on what appears to have reference to a subsequent occasion, Mr. Ritchie says: "Mr. Wallace said he could not carry out his contract. He never said he could pay part. The only thing he could pay was interest and taxes, about $100. He could not complete his part of the agreement."

The respondents then, finding that their purchaser who had taken poseession of their property and had kept possession for some eighteen months without paying anything by way of rent or interest, was unable by his own admission, declared to their solicitor, to carry out the contract by paying the purchase money, had no alternative but to bring the action

which they brought to recover the land; and in the face of the declaration of Mr. Wallace that he could not pay, and after his application for an extension of time had been refused, it would be to set at naught all the principles regulating the exercise of the jurisdiction by way of specific performance, which require a purchaser to be ready, prompt and eager to complete, if the court were now to interfere and to interpose still further delay in the resumption by the respondents of the enjoyment of their property and to decree the execution of a contract which the purchaser had declared his inability to perform.

The judgment is perfectly right in giving the respondents the damages to which under one or other of the denominations of mesne profits, of damages for use and occupation, or on an equitable account against a purchaser in possession, the respondents were clearly entitled.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *J. T. Wallace.*

Solicitor for the respondents: *Joseph A. Chisholm.*

1898

*May 11.

*Nov. 21.

CONTROVERTED ELECTION FOR THE ELECTORAL DIVISION OF NICOLET.

NAPOLEON HAMEL (PETITIONER).....APPELLANT;

AND

JOSEPH HECTOR LEDUC (RESPONDENT)..... } RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE BOURGEOIS AT THREE RIVERS.

Election petition—Preliminary objections—Filing of petition—Construction of statute—54 & 55 V. c. 20, s. 5 (D.)—R. S. C. c. 1, s. 7, s.s. 27—Interpretation of words and terms—Legal holiday.

When the time limited for presenting a petition against the return of a member of the House of Commons of Canada expires or falls upon a holiday, such petition may be effectively filed upon the day next following which is not a holiday.

APPEAL from the judgment of Mr Justice Bourgeois, one of the judges of the Superior Court for Lower Canada, in the District of Three Rivers, maintaining certain preliminary objections to the petition against the return of the respondent as a member of the House of Commons of Canada for the Electoral Division of Nicolet, at the election held on the 21st of December, 1897.

A statement of the circumstances of the case and of the matters at issue on this appeal will be found in the judgment reported.

Ferguson Q.C. and *Martel Q.C.* for the appellant.

Fitzpatrick Q.C., *Solicitor-General*, and *Choquette Q.C.* for the respondent.

The judgment of the court was delivered by:

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

1898

NICOLET ELECTION CASE.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Superior Court of Three Rivers dismissing the petition of the appellant against the return of the respondent as a member of the House of Commons for the electoral district of Nicolet.

The polling at the election in question took place on the 21st of December, 1897. The appellant's petition was filed on Monday the 31st of January, 1898. Certain preliminary objections were filed by the respondent, all of which are now immaterial save that on which the judgment appealed from proceeded, namely, that the petition was not filed in due time as required by the Dominion Controverted Elections Act as amended by the Act 54 & 55 Vict. ch. 20.

Section nine, sub-section (*b*) of the original Act as amended by section five of the latter Act now reads as follows:

> The petition must be presented not later than thirty days after the day fixed for the nomination, in case the candidate or candidates have been declared elected on that day, and in other cases forty days after the holding of the poll, * * *

The remainder of the section has no application here.

By the "Interpretation Act," Revised Statutes of Canada, chapter 1, section 7, sub-section 27, it is enacted as follows:

> If the time limited by any Act for any proceeding, or the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday.

By the twenty-sixth section of the same Act it is declared that the expression "holiday" includes Sunday.

The second section of the same Act provides as follows:

> This Act, and every provision thereof, shall extend and apply to every Act of the Parliament of Canada, now or hereafter passed except in so far as the provision is inconsistent with the intent and object

1898

NICOLET ELECTION CASE.

The Chief Justice.

of such Act, or the interpretation which such provision would give to any word, expression or clause is inconsistent with the context, and except in so far as any provision thereof is in any such Act declared not applicable thereto ; and the omission in any Act of a declaration that the "Interpretation Act" applies thereto, shall not be construed to prevent it so applying, although such express declaration is inserted in some other Act or Acts of the same session.

At the election now in question the holding of the poll having taken place on the twenty-first of December, 1897, the fortieth day thereafter was the thirtieth of January, 1898, which was a Sunday. The petition in the case, as I have said, was not presented until Monday the thirty-first of January, 1898. The learned judge of the Superior Court has held that this presentment of the petition was too late.

We are all of opinion that the petition was presented in due time.

The provision embodied in sub-section 27 of the seventh section of the "Interpretation Act" must be read as if it had been expressly re-enacted in the "Controverted Elections Act" for we think the case cannot be brought within any of the exceptions contained in section two, and there is no declaration that the last mentioned Act shall not apply in the computation of time under the Controverted Elections Act or the Act amending it.

There is nothing to be found in the context requiring us to refuse to apply the prescribed interpretation to the clause in question, nor can it be said that it is inconsistent with the intent and object of the "Controverted Elections Act." If we were not to apply sub-section twenty-seven in the case before us we should be establishing a construction which would render this clause of the "Interpretation Act" useless and inapplicable in every case in which an Act of Parliament required some Act to be done within a prescribed number of days, and we should thus reduce this useful rule of statutory interpretation to a nullity.

The appeal must be allowed with costs, and judgment must be entered in the court below overruling the preliminary objection in question with costs.*

Appeal allowed with costs.

Solicitor for the appellant: *P. N. Martel.*

Solicitor for the respondent: *F. X. Choquette.*

* The Judicial Committee of the Privy Council refused leave to appeal from the judgment in this case.

1898

*May 18.

*Nov. 21.

CHARLES GEORGE MAJOR (PLAINTIFF) ..... APPELLANT;

AND

HIRAM PERRY McCRANEY AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Construction of statute--20 & 21 V. c. 54, s. 12 (Imp.)—Application—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.

The Imperial Act, 20 & 21 Vict., ch. 54, sec. 12, provides that "nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed; * * * and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated."

Held, affirming the judgment of the Supreme Court of British Columbia, that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts.

Semble, that the section only covered agreements or securities given by the defaulting trustee himself.

Quære. Is the said Imperial Act in force in British Columbia?

If in force it would not apply to a prosecution for an offence under R. S. C. ch. 164 (The Larceny Act) sec. 58.

An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. ch. 164, sec. 58, which was not re-enacted by the Criminal Code, 1892.

Held, that the alleged Criminal Act, having been committed before the Code came into force, was not affected by its provisions and the covenant could not be enforced. Further, the partnership property not having been held on an express trust the civil remedy was not preserved by the Imperial Act.

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

1898

MAJOR v. MCCRANEY.

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

The action was brought on a covenant contained in an agreement under seal, dated the 25th day of October, 1894, by which the defendants covenanted to pay to the plaintiff $7,000.00 at the end of three years from its date, with interest at 8 per cent.

The defence set up is that the agreement was executed in consideration that a criminal prosecution would be stifled.

The plaintiff claims that on the evidence no offence under the Criminal Code was disclosed and there could, therefore, be no abandonment of the prosecution. He also contended that under the Imperial Act 20 & 21 Vict. ch. 54, sec. 12, such defence could not be set up as against misappropriation of trust funds.

The trial judge concurred in the latter contention and gave judgment for the plaintiff which was reversed by the full court.

The questions at issue upon this appeal are stated in the judgment reported.

Robinson Q.C. for the appellant.

Chrysler Q.C. for the respondents.

The judgment of the court was delivered by:

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

It was found by both the courts below that the covenant of the 25th October, 1894, upon which this action is brought, was given for the express purpose of stifling a prosecution against H. P. McCraney for certain statutory offences with which he was charged in respect of the embezzlement or misappropriation of

(1) 5 B. C. Rep. 571.

1898

MAJOR v. MCCRANEY.

The Chief Justice.

the assets of a partnership firm of which he had formerly been a member, and which was comprised of the present appellant, H. P. McCraney and Thomas Robson Pearson. The evidence is so strong as to leave no doubt that the abandonment by the appellant of the prosecution which had been instituted and under which H. P. McCraney was then in prison, having been on a preliminary examination committed for trial by a police magistrate, was the express object which the respondents had in view in executing the covenant in question.

The principal question which has been raised is as to the application of an Imperial enactment (the 12th section of 20 & 21 Vict. ch. 54) to the case. It is said that this provision was in force in British Columbia at the time the covenant in question was given, and that it validates a transaction which but for it would be confessedly illegal and void.

The Act in question which made a breach of trust a criminal act provides that ;—

> Nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under this Act shall prevent, lessen or impeach any remedy at law or in equity which any party aggrieved by any offence against this Act might have had if this Act had not been passed, but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him, and nothing in this Act contained shall affect or prejudice any agreement entered into or security given by any trustee having for its object the restoration or repayment of any trust property misappropriated (1).

It has been contended in argument here that the Imperial Act referred to and consequently the 12th section just set forth, was not in force in British Columbia when the acts for which H. P. McCraney had been prosecuted or threatened with prosecution were committed and when the covenant was given.

(1) 20 & 21 Vict. ch. 54, s. 12.

It is in my view not material to the decision of the present appeal to inquire whether the Act in question was in force or not.

The statute in question would not, in my opinion, have applied to authorize such a prosecution as that which had been instituted against McCraney. The class of trustees referred to in the Act were trustees who had been guilty of misappropriation of property held upon express trusts.

From the evidence it appears that there was *primâ facie* a case warranting a prosecution against McCraney under the 58th section of the Revised Statutes of Canada, ch. 164, which enacts that:

> Every one who, being a member of any co-partnership owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles or unlawfully converts the same or any part thereof to his own use or that of any person other than the owner, is liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership or one of such beneficial owners.

This section was not re-enacted in the Dominion Act known as "The Criminal Code (1892)" and the Act in which it was contained was by that legislation repealed.

The acts however charged against H. P. McCraney and for which he was threatened with criminal prosecution, and for one of which he had actually been imprisoned, and was in prison at the time the covenant in question was executed, had been committed in 1892, the co-partnership having been dissolved in 1891. Then the second sub-section of section 981 of the Criminal Code expressly reserves the liability to criminal prosecutions and punishment for acts committed under the repealed statutes, a list of which is contained in a schedule to the Act which includes chapter 164.

1898

MAJOR v. MCCRANEY.

The Chief Justice.

The Criminal Code itself did not by the express provision in its second section come into force until the 1st of July, 1893, so that whilst it was in force at the date of the prosecution and the execution of the impeached agreement, it was not in force when the alleged criminal acts were committed and is therefore entirely without relevance in the present case.

Of course it is out of the question to say that section 12 of the Imperial statute, if in force in British Columbia, could apply to a prosecution for an offence under section 58 of the Larceny Act (ch. 264 Revised Statutes of Canada.)

That the offences with which McCraney was charged, embezzling the money raised by a mortgage of partnership lands and other moneys obtained by drawing on the partnership bank account were criminal acts within section 58 of chapter 164 Revised Statutes of Canada, is too plain to require demonstration. Therefore an agreement to stifle a prosecution for these alleged acts must, in the absence of any statutory provision to the contrary, have been illegal as in contravention of the rule of the common law which declares illegal all agreements to suppress criminal prosecutions.

Returning to section 12 of the Imperial Act I must say that even if that section were in force and applied to a case like the present, it appears to me that the judgment of the late learned Chief Justice of British Columbia was wrong in the construction which he placed upon the 12th section, for it appears very plainly to me that the enactment whilst it did provide that the civil remedies of a *cestui que trust* who had been defrauded should not be interfered with by the statute, and that he should be at liberty to accept reparation and restoration of the trust fund and securities therefor, did not authorize an express agreement

1898

MAJOR v. McCRANEY.

The Chief Justice.

to forbear criminal prosecution. Further, this section 12 would seem to be restricted to agreements or securities given by the defaulting trustee himself, and not to those given by third persons under no civil liability to the *cestui que trust* for the avowed purpose of rescuing him from criminal responsibility.

For the general law as to the illegality of agreements to stifle prosecutions I refer to *Jones* v. *Merionethshire Permanent Benefit Building Society* (1) and to *Flower* v. *Sadler* (2). In the first case there are important observations upon the difference between securities given by the wrong doer himself by way of reparation and those given by third parties under no civil obligation to the party wronged merely for the purpose of stifling the prosecution. I do not think that by section 12 it was intended to legalize securities of the last class.

The appeal must be dismissed and I see no reason why it should not be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Gordon E. Corbould.*

Solicitors for the respondents: *Davis, Marshall, McNeil & Abbott.*

(1) [1892] 1 Ch. 173. (2) 10 Q. B. D. 572.

1898

*May 18.
*Nov. 21.

FREDERICK MAKINS, AN INFANT, BY JAMES PARSONS, HIS FRIEND (PLAINTIFF)..... } APPELLANTS;

AND

PIGGOTT & INGLIS (DEFENDANTS)...RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Use of dangerous material—Evidence—Trespass.

Work on the construction of a railway was going on near the unused part of a public cemetery in connection with which were used detonating caps containing fulminate. M., a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick when it exploded and injured his hand. On the trial of an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place the workmen would hurriedly place any explosives they might have in their possession under their tool box, and then run away. It also was proved that caps of the same kind were kept in the tool box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require.

Held, reversing the judgment of the Court of Appeal, that in the absence of evidence of circumstances leading to a different conclusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shown to have had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M. in exploding the cap as he did did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and that whether or not M. was a trespasser, was also a question for the jury, who did not pass upon it.

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

1898

MAKINS v. PIGGOTT & INGLIS.

APPEAL from a decision of the Court of Appeal for Ontario affirming, by an equal division of opinion, the judgment at the trial in favour of the defendants.

The facts of the case are sufficiently stated in the above head-note.

Wallace Nesbitt, (*Gauld* with him,) for the appellant, cited *McGibbon* v. *The Northern Railway Co.* (1); *Williams* v. *Eady* (2); *Scott* v. *London and St. Katherine Docks Co.* (3) at page 601; Broom's Legal Maxims 298; *Snyder* v. *Wheeling Electrical Company* (4); Beven on Negligence, 561; Pollock on Texts, (5 ed.) pp. 21-41; *Clark* v. *Chambers* (5); *Consolidated Traction Co.* v. *Scott* (6); *Jewson* v. *Gatti* (7); *Dixon* v. *Bell* (8).

Osler Q.C. for the respondents, cited *Hughes* v. *MacFie* (9); *Mangan* v. *Atterton* (10) per Bramwell J.; *Carter* v. *Towne* (11), and cases there discussed; *Singleton* v. *Eastern Counties Railway Co.* (12); *Rogers* v. *Toronto Public School Board* (13); *Nagle* v. *Allegheny Railroad Co.* (14); Beven on Negligence (ed. 1889) p. 148.

TASCHEREAU J.—I would dismiss this appeal. The jury could not have reasonably given a verdict for the plaintiff upon the evidence adduced, and therefore the case was properly withdrawn from them. I adopt the reasoning of the Chief Justice of Ontario in the Court of Appeal.

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

KING J.—The negligence complained of, consisted in the leaving of a number of highly explosive detonators

(1) 14 Ont. App. R. 91.
(2) 10 Times L. R. 41.
(3) 3 H. & C. 596.
(4) 46 Cent. Law Jour. 254.
(5) 3 Q. B. D. 327.
(6) 55 Am. State Rep. 620.
(7) 2 Times L. R. 441.
(8) 1 Stark 287; 5 M. & S. 198.
(9) 2 H. & C. 744.
(10) L. R. 1 Ex. 239.
(11) 98 Mass. 567.
(12) 7 C. B. N. S. 287.
(13) 27 Can. S. C. R. 448.
(14) 88 Penn. 35.

1898

MAKINS v. PIGGOTT & INGLIS.

King J.

or caps in a place where they might innocently be picked up and handled in a way leading to their explosion by persons unaware of their dangerous character

At the trial the plaintiff was non-suited upon the ground that there was no evidence connecting the defendants with the act of leaving the caps where they were found. Upon direct appeal, the Court of Appeal upheld the non-suit, per Burton C.J.O. and Maclennan J.A , Osler and Moss JJ.A. dissenting.

The facts of the case are shortly stated in the opinions of the learned judges.

Assuming what, upon the evidence, the learned Chief Justice thought might properly be found by a jury, viz.. that the caps which were picked up were the property of defendants ; and having regard to the proof that such kind of caps were kept by defendants in the tool box, in front of and near which the caps in question were found, and that they were taken out and put back as occasion might require by defendants' workmen ; and having regard to the proof mentioned by the learned Chief Justice and Mr. Justice Maclennan, that workmen in defendants' service, upon the same work but in other gangs, found it useful and expedient when a blast was about taking place to hurriedly place any such explosives as they might happen to have in their possession under their tool box and then run away; it would seem to be a fair inference, (in the absence of circumstances leading to a different conclusion) to attribute the act of placing the defendants' caps upon the ground outside the box to those who alone are shown to have had the handling of them or the right of handling them. The alternative supposition that they may have been removed from the tool box by a stranger and then left upon the ground has no probabilities, and no evidence

in its support. If there were circumstances leading to such conclusion it was for defendants, with their fuller knowledge of the way in which their property was managed, to supply the proofs. On the case as it stands, the evidence seems sufficiently to connect defendants with the act or omission by which the caps were placed or left where they were found.

Then as to the negligence involved in such act or omission, the law imposes a duty of carefulness upon those who have the management or control of things which are or may be dangerous to human life or limb.

The danger to be apprehended from the indiscriminate handling of these detonators was so great and so obvious that a high degree of caution was reasonably to be observed on the part of defendants to prevent them falling into the hands of strangers. None of the learned judges suggested that there was any lack of evidence from which negligence might be deduced, provided that the defendants were proven to be responsible for the detonators being found outside the tool box.

As to the plaintiff's act in exploding the cap by picking the apparently harmless substance in the bottom of the case with a piece of wood, this was not an act necessarily importing want of due caution. Assuming that defendants negligently suffered such a dangerous instrument to fall into the hands of persons unaware of its character, they might reasonably have foreseen that it might in the hands of such persons be treated in such a way as to explode it, and the act of such person in ignorance of its dangerous character, whereby an explosion took place, could not be said to be his voluntary act in the sense that would incapacitate him from recovery. If he was negligent and thereby contributed to the result still, unless such

1898

MAKINS v. PIGGOTT & INGLIS.

King J.

negligence is necessarily to be imputed upon the evidence, it would be for the jury to pass upon it.

A question was raised as to whether the place where the caps were found was a place where the plaintiff had no right to be; this however (as stated by the judges of the Court of Appeal) was, upon the evidence, a question for the jury.

For these reasons the appeal should be allowed with costs, the non-suit set aside and a new trial had. The defendants must also pay the costs in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Nesbitt, Gauld & Dickson.*

Solicitors for the respondent: *Bruce, Burton & Bruce.*

THE EASTERN TOWNSHIPS BANK (DEFENDANT PAR REPRISE D'INSTANCE)..... APPELLANT;

1898
*Oct. 7.
*Nov. 21.

AND

SUSANNAH H. SWAN *et al.* (PLAINTIFFS PAR REPRISE D'INSTANCE) ..... RESPONDENTS.

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

Appeal—Question of local practice—Inscription for proof and hearing—Peremptory list—Notice — Surprise — Artifice—Requête civile—Arts. 234, 235, 505, *C. C. P. (old text)—R. of P. (S. C.) LV.*

Where a grave injustice has been inflicted upon a party to a suit, the Supreme Court of Canada will interfere for the purpose of granting appropriate relief although the question involved upon the appeal may be one of mere local practice only. *Lambe* v. *Armstrong* (27 Can. S. C. R. 390) followed.

Under a local practice prevailing in the Superior Court, in the District of Montreal, the plaintiffs obtained an order from a judge fixing a day peremptorily for the adduction of evidence and hearing on the merits of a case by precedence over other cases previously inscribed on the roll and without notice to the defendants. The defendants did not appear when the cases was taken up for proof and hearing and judgment by default was entered in favour of the plaintiffs. The defendant filed a *requête civile* asking for the revocation of the judgment to which the plaintiffs demurred. On appeal to the Supreme Court of Canada against the judgment maintaining the demurrer and dismissing the *requête* with costs;—

Held, reversing the decision of the Court of Queen's Bench, that the order was improperly made for want of notice to the adverse party as required by the Rules of Practice of the Superior Court, and that the defendant was entitled to have the judgment revoked upon *requête civile*.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), affirming the decision of the Superior Court, District of Montreal,

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

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

which maintained the plaintiffs' demurrer to a *requête civile* filed by the defendant asking for the revocation of the judgment by default and dismissed the *requête* with costs.

The circumstances under which the *requête civile* was filed and questions at issue upon the appeal sufficiently appear from the judgment reported.

Atwater Q.C. for the appellant. The judgment maintaining the demurrer gives as its sole reason that " the petition in revocation of judgment (*requête civile*) presented by the defendant does not disclose reasons which give rise to such a petition (*requête civile*)." In considering the demurrer, the allegations of the petition must be taken as admitted, and Art. 505, C. C. P. (old text) is designed to apply to cases where the parties might suffer from causes beyond their control, and an effective remedy could not be gained by appeal to a higher court, which would, of course, be bound by the record as it then stood. *Cooke* v. *Caron* (1); *Kellond* v. *Reed* (2).

The *requête* alleges that the judgment was obtained by surprise and artifice; that the defendant was in ignorance of the issue on the supplementary demand, was not represented by counsel, and had no opportunity of properly pleading to the action, or of setting up facts, which would entitle it to have the action and the supplementary demand dismissed. The article only states three of the cases where the petition is admissible. These have been held not to be restrictive of the cases where the petition will lie, but are merely indicative. The cases of *Lusk* v. *Riddell* (3), *Neil* v. *Champoux* (4), *Marcotte* v. *Guévremont* (5), *Marcotte* v. *Cour des Commissaires, de St. Casimir* (6),

(1) 10 Q. L. R. 152.
(2) 18 L. C. Jur. 309.
(3) 19 L. C. Jur. 104.
(4) 7 Q. L. R. 210; 11 R. L. 143.
(5) 33 L. C. Jur. 261.
(6) Q. R. 7 S. C. 236.

Doutre v. *Bradley* (1), *Bayliss* v. *Leddy* (2), all go to shew the unanimity of the jurisprudence in this respect, and the facts in many of them are very similar to those in the present case.

The remedy in law exists; the allegations of the petition and defence are sufficient to allow of its being exercised and the injustice which would be done to the appellant by the judgment now standing against it, and to which it was condemned unheard, should be remedied by the admission of the defence and allowing the issues to go to trial.

We refer your Lordships also to the special observations upon the fourth report of the Commission for the revision of the Code of Civil Procedure, chap. 58, which will be found at page lxviii of Mitchell's Manual of Procedure, (ed. 1897), and to the decisions in *Leet* v. *Lee Chu* (3); *Durocher* v. *Durocher* (4); *King* v. *Sandeman* (5); and *Mitchell* v. *Wilson* (6). See also Rule of Practice LV, (Superior Court,) Foran's Code of Civil Procedure (ed. 1879) p. 651.

Brousseau for the respondent. The petition in revocation does not disclose reasons which could give rise to such proceeding, and in the Court of Queen's Bench, Bossé, Blanchet, Würtele, Ouimet and Tellier JJ. unanimously affirmed the judgment of the Superior Court dismissing it. Then the judgment of the Superior Court in the original demand praying for the annulation of the deed of sale was susceptible of appeal as was also the judgment on the incidental demand, for the recovery of moneys paid on account and omitted in the principal demand. The appellant had appeared and pleaded to the principal demand, the Court of Appeal had ordered that the record be

(1) 17 L. C. Jur 42.
(2) 17 R. L. 408.
(3) 1 Que. P. R. 332.
(4) Q. R. 12 S. C. 373.
(5) 38 L. T. 461.
(6) 25 W. R. 380.

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

sent back to the Superior Court to pronounce a judgment annulling the sale, after the filing of the judgment in *Fairbanks* v. *The Eastern Townships Bank*, and *McDougall et al mis-en-cause*. There was no new appearance, no new demand of plea and no certificate of default or foreclosure required to proceed to judgment. The filing of the judgment in *Fairbanks* v. *The Eastern Townships Banks* and an inscription of the case upon the roll were the only documents required for the court to adjudicate finally on the principal demand, and when the case was called parties had a right to be heard. The appellant actually appeared by counsel who asked for an enlargement of the case, but on the day fixed did not appear and judgment was rendered accordingly. If appellants were not satisfied they had an appeal, and they did inscribe the case before the Court of Review but desisted from their inscription.

If this can be considered a judgment rendered by default to appear or plead it may be opposed according to articles 483a and 484 C. C. P, as amended by the R. S. Q., art. 5905 and 52 Vict. ch. 49 (Que). Petitions in revocation of judgment can be made only against judgments not susceptible of being appealed or opposed and as this judgment could both be appealed from and opposed, the appellant cannot petition in revocation.

Again the facts alleged in the petition do not constitute the fraud or deceit intended in article 505 of the Code of Procedure. There is no rule forbidding a judge to order a case to be added to the roll or put on in place of another case. There is a rule providing for eight days notice to the opposite party, but the appellant does not complain of the want of that notice. Yet he would have even in that case the remedy of opposition. There is no complaint that the judgment was rendered upon documents subsequently dis-

covered to be false, nor upon any unauthorized consent disavowed after judgment, nor that since the judgment documents of a conclusive nature have been discovered which had been withheld or concealed by the respondents. There is not, in fact, any complaint that brings the case within the operation of article 505 of the Code of Civil Procedure.

The following authorities are in point;—*Dawson* v. *Macdonald* (1); *Dow* v. *Dickinson* (2); Arts. 149, 152, 153, 192, 234, 235, 266; Dal. Rep. Gen. *vo.* Requête Civile, nos. 1, 2, 3, 4 and notes 16 & 17; nos. 6, 60, 63-70.

The judgment of the court was delivered by:

GIROUARD J.—The present appeal is from a judgment of the Court of Queen's Bench of the Province of Quebec, appeal side, which confirmed a judgment of the Superior Court sitting at Montreal maintaining a demurrer to a *requête civile*. It involves a mere question of local practice, and were it not for the grave injustice inflicted upon the appellant, we would not interfere. *Lambe* v. *Armstrong* (3).

The petitioners, defendants in the court below and present appellants, by their attorneys, Messrs. Atwater & Mackie, allege in their *requête civile*, that the respondents, plaintiffs

served a demand of plea upon the defendants' attorneys on the first day of June, 1896, and on the fifth day of June presented an inscription for proof and final hearing on the merits, as well upon the original action as upon a supplementary incidental demand, to Mr. Justice Curran and that the said judge, at the request of the plaintiffs *par reprise d'instance*, thereupon immediately fixed the said case upon the roll for proof and final hearing on both the said issues, for the sixteenth day of June, although the said role had been completed and prepared and no notice was given to the defendants, nor to their attorneys, of such application.

(1) Cass. Dig. (2 ed.) 586. (2) [1881] W. N. 52.
(3) 27 Can. S. C. R. 309.

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

Girouard J.

The *requête civile* further alleges:

That on the said sixteenth day of June, Mr. Mackie, one of the attorneys of record for the defendants, but who really was not conversant or familiar with the case or with the details thereof, appeared and protested against proceeding, but in spite of such protest, the plaintiffs *par reprise d'instance* were allowed to proceed and examine a witness who pretended to prove the items of the plaintiffs' supplementary incidental demand.

That the court continued the said case for the purpose only of allowing the cross-examination of the said witness until the nineteenth of June then instant.

That on the said nineteenth day of June, it being impossible, on the ground of public business, for the said A. W. Atwater to attend the trial of the said case, and it being practically useless to cross-examine the said witness or properly to present the defendants' case without a special answer or plea to the said supplementary incidental demand, the court nevertheless took the said case *en delibéré*.

On the twenty-fifth day of June, 1896, judgment was rendered for a large amount against the appellants, who finally set forth in their *requête civile*:

That the said judgment was obtained by the means aforesaid and by surprise and artifice with regard to the defendants, who were in ignorance of the issue of the supplementary demand, and who were not represented by counsel and had no opportunity of properly pleading to the action or of setting up the facts which, they are advised, would have entitled them to a dismissal of the action and of the supplementary demand. * * * * * *

That the undue haste and artifice made use of by the plaintiffs *par reprise d'instance*, in endeavouring to obtain the judgment complained of was prompted by the desire on their part to prevent, in bad faith, the bank from being able to carry out its obligations towards the plaintiffs and to enable them to escape from their obligation towards the bank to pay the price of the property which they had purchased and which was sold to them in good faith by the defendants, and of which they have had possession and the use since January, eighteen hundred and ninety-three.

Article 505 of the Code of Civil Procedure in force when the said petition was filed, provides that;

Judgments which are not susceptible of being appealed or opposed, as herein above provided, may be revoked, upon a petition presented

to the same court, by any person who was a party to, or was summoned to be a party to the suit in the following cases;

1. Where fraud or artifice has been made use of by the opposite party. [See Art. 1177 C P. Q.]

The judgment rendered against the appellants can be attacked only by a *requête civile*, if sufficient grounds be shown.

It is not necessary to decide the much vexed question as to whether or not article 505 of the Code of Civil procedure is limitative or simply illustrative. The appellants allege "artifice" and even "bad faith." True, articles 234 and 235 gave the respondents the right to inscribe the case for hearing upon giving to the opposite party at least eight days notice "before that fixed for the proof." But how is the day for the proof to be fixed? The Code does not say. At all events, article 235 does not authorize any one party in a pending suit to have a precedence or a preference over other cases previously inscribed. It is admitted that to avoid confusion and expense, the practice prevailing at the time, was to file inscriptions for proof and hearing in blank and leave them with the prothonotary to be set down for hearing in turn, notice to be given of the setting down at least eight days before trial. Under that course of practice, sanctioned both by the Bench and the Bar, it is conceded that the appellants' case could not have been called or heard before the September term. The appellants' counsel had therefore every reason to presume that he should not have to prepare for his case, or to summon his witnesses before that term, as it is alleged in the *requête civile*, that the June roll had been completed and there being no court to sit in the months of July and August.

But even if this view of the proceedure be wrong, the case should not have been set down by the judge

1898

THE EASTERN TOWNSHIPS BANK v. SWAN.

Girouard J.

for hearing on the sixteenth of June, without hearing the appellants.

Under the rules of practice of the Superior Court, (Rule LV)

no motion can be received or heard unless previous notice thereof, of at least one day, be given to the adverse party,

and this rule is one of common justice.

The application for a "day fixed" was a most important motion. Under articles 234 and 235 of the Code of Civil Procedure, the respondents were entitled to inscribe for hearing upon giving eight days notice, but they had to run their chance of being heard or not. These articles did not give them the privilege of securing a hearing on a fixed day without the order of the court and notice to the opposite party.

We are unanimously of opinion that notice should have been given, and, for that reason, the appeal is allowed with costs and the judgment of the Court of Queen's Bench as well as that of the Superior Court maintaining the said demurrer, are reversed and set aside and the said demurrer dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Atwater, Duclos & Mackie.*

Solicitors for the respondents: *Brosseau, Lajoie & Lacoste.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT)..... APPELLANT;

AND

ALEXANDER RAINVILLE AND ELIZABETH RAINVILLE (PLAINTIFFS)..... RESPONDENTS.

1898

*Oct. 31.

*Nov. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Findings of jury—Evidence—Concurrent findings of courts appealed from.

In an action against a railway company for damages in consequence of plaintiffs' property being destroyed by fire alleged to be caused by sparks from an engine of the company the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiffs' property which, in case of emission of sparks or cinders would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiffs' property. A verdict against the company was sustained by the Court of Appeal.

Held, affirming the judgment of the latter court (25 Ont. App. R. 242.) and following *Sénésac* v. *Central Vermont Railway Co.* (26 Can. S. C. R. 641); *George Matthews Co.* v. *Bouchard* (28 Can. S. C. R. 580); that the jury having found that the accumulation of rubbish along the railway property caused the damages, of which there was some evidence, and the finding having been affirmed by the trial court and Court of Appeal, it should not be disturbed by a second appellate court.

APPEAL from the decision of the Court of Appeal for Ontario (1) affirming the judgment of Mr. Justice Ferguson at the trial in favour of the plaintiffs.

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

(1) 25 Ont. App. R. 242.

1898

THE GRAND TRUNK RAILWAY COMPANY OF CANADA v. RAINVILLE.

The facts of the case may be stated as follows: The plaintiffs reside at the Village of Stony Point, in the township of Tilbury North, in the County of Essex, and adjoining the right of way of the defendants. On the 25th day of October, 1895, shortly after the passage of a locomotive along the defendants' line of railway, certain barns the property of the plaintiffs were observed to be on fire. The fire very rapidly spread and ultimately destroyed these buildings together with other property of the plaintiffs. The barns were situated about eight to ten feet from the fence bounding the company's right of way. Dry grass, the natural growth of that season, was on the company's right of way, and also on the plaintiffs' land between the said fence and barns.

The following were the questions submitted to the jury and their answers thereto:

"1. Was there any negligence on the part of the defendants in the construction or management of the engine? A.—No, except that the master mechanic admits that any engine will emit sparks and cinders."

"2. Did the defendants negligently permit an accumulation of grass or rubbish or both on their road opposite the plaintiffs' place which in the case of the emission of sparks or cinders would be dangerous? A.—Yes."

"3. Did the fire in question originate from or by reason of a spark or cinder from the engine? A.—Yes."

"4. If so, was the spark or cinder communicated directly by means of a high wind from the engine to the barn, or stack of the plaintiffs, or was the communication by way of a spark or cinder falling upon the defendants' land and the fire then running by reason of dry material from the place where the spark or cinder fell to the fence and then to the plaintiffs' property? A.—By falling on the company's premises, then to the plaintiffs' property."

1898

THE GRAND TRUNK RAILWAY COMPANY OF CANADA v. RAINVILLE.

"In any case assess the value of the buildings and the value of the chattel property separately? A.—Award to plaintiff on buildings $725. Award on chattels $440 with costs."

A verdict for the above amounts was entered for the plaintiffs and was sustained on appeal to the Court of Appeal. The defendant company then appealed to this court.

Osler Q.C. for the appellant, argued that the evidence was not sufficient to warrant the verdict and relied on *Sénésac* v. *Central Vermont Railway Co.* (1).

Cowan for the respondents, referred to *Smith* v. *London and South Western Railway Co.* (2); *Canada Atlantic Railway Co.* v. *Moxley* (3).

The judgment of the court was delivered by:

GIROUARD J.—The respondents reside at the village of Stony Point, in the County of Essex, and at a distance from the railway of the appellants of only a few feet. On the 25th October, 1895, shortly after the passage of a fast express, the premises of the respondents were observed to be on fire, and were soon entirely destroyed. The present action was instituted to recover the amount of the loss, namely, $1,500.

The principles of law governing cases of this kind are well known. A railway company, like an individual, is liable for the consequences of its negligence only when that negligence is the cause of the damage, or at least has materially contributed to it. That is the general rule. It is submitted on the part of the appellants that where they use the most perfect locomotives, and are not otherwise guilty of negligence, which was certainly the cause of the accident, they are not liable, a proposition which is supported by

(1) 26 Can. S. C. R. 641. (2) L. R. 5 C. P. 98.
(3) 15 Can. S. C. R. 145.

1898

THE GRAND TRUNK RAILWAY COMPANY OF CANADA v. RAINVILLE.

Girouard J.

considerable authority and seems to have received the sanction of this court in *The New Brunswick Railway Co.* v. *Robinson* (1). This particular point, however, does not present itself in the present instance, as the jury have found negligence on the part of the appellants which was the cause of the damage. The questions submitted to them and their answers are as follows:

1. Was there any negligence on the part of the defendants in the construction or management of the engine? A.—No, except that the master mechanic admits that any engine will emit sparks and cinders.

2. Did the defendants negligently permit an accumulation of grass or rubbish or both on their road opposite the plaintiffs' place which in the case of the emission of sparks or cinders would be dangerous? A.—Yes.

3. Did the fire in question originate from or by reason of a spark or cinder from the engine? A.—Yes.

4. If so, was the spark or cinder communicated directly by means of a high wind from the engine to the barn or stack of the plaintiffs', or was the communication by way of a spark or cinder falling upon the defendants' land and the fire then running by reason of dry material from the place where the spark or cinder fell to the fence and then to the plaintiffs' property? A.—By falling on the company's premises, then to the plaintiffs' property.

It must be conceded that the evidence in support of the last finding is weak, and it is not therefore surprising that the trial judge (Ferguson J.) charged the jury in favour of the defendants, but being of the opinion that there were relevant circumstances given in evidence to go to them, he refused a non-suit; and in appeal his judgment was unanimously maintained (Burton C.J. and Osler, Maclennan and Moss JJ.A.)

The appellants have relied upon the recent decision of this court in *Sénésac* v. *Central Vermont Railway Co.* (2) as supporting their contentions. If it has any application, it is against them. There the origin of the fire was a mystery; so two courts had found, and

(1) 11 Can. S. C. R. 688. (2) 26 Can. S. C. R. 641.

1898

THE GRAND TRUNK RAILWAY COMPANY OF CANADA v. RAINVILLE.

Girouard J.

we declared that in a case of that kind where mere questions of fact were involved, the jurisprudence of the Privy Council and of this court was not to disturb the unanimous findings of two courts; and in other cases we decided that it was especially so when they were returned by a jury, unless clearly wrong or erroneous.

In the present instance, we agree with the courts below that there is some evidence of negligence which in the opinion of the jury, affirmed by the two courts below, was the cause of the damage, namely, the accumulation of the dry rubbish along the railway property; and following *Sénésac* v. *The Central Vermont* (1), *The Geo. Matthews Co.* v. *Bouchard* (2) and other cases, we are of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John Bell.*

Solicitor for the respondents: *M. K. Cowan.*

(1) 26 Can. S. C. R. 641.

(2) 28 Can. S. C. R. 580.

1898

*Nov. 8.
*Nov. 21.

COMMERCIAL UNION ASSURANCE COMPANY (DEFENDANT) } APPELLANT;

AND

THOMAS A. TEMPLE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Fire insurance—Condition in policy—Notice of subsequent insurance—Inability of assured to give notice.

By a condition in a policy of insurance against fire the insured was "forthwith" to give notice to the company of any other insurance made, or which might afterwards be made, on the same property and have a memorandum thereof indorsed on the policy, otherwise the policy would be void; provided that if such notice should be given after it issued the company had the option to continue or cancel it.

Held, affirming the judgment of the Supreme Court of New Brunswick, that this condition did not apply to a case in which the application for other insurance was accepted on the day on which the property insured was destroyed by fire and notice of such acceptance did not reach the assured until after the loss.

APPEAL from a judgment of the Supreme Court of New Brunswick sustaining a verdict for the plaintiff at the trial.

The plaintiffs property was insured with the defendant company for $1,500, the policy containing the following, among other conditions:

"11. Persons who have insured property with this company must forthwith give notice of any other insurance already made, or which shall afterwards be made, on the same property, and have a memorandum of such other insurance indorsed on the policy or

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

policies effected with this company, otherwise this policy will be void; provided, however, that on such notice being given at any time after the issue of the policy, it shall be optional with the company to cancel such policy. In the event of any other insurance on the property herein described having been once declared as aforesaid, then this company shall, if this policy shall remain in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage whether such other insurance be in force or not, unless the discontinuance of such other insurance shall have been previously agreed to by this company by indorsement upon this policy.

The property insured was destroyed by fire on the eighteenth day of July, 1895. On the tenth of that month the plaintiff's son, the plaintiff being ill at the time, forwarded to the head office of the Quebec Fire Assurance Company at the City of Quebec an application for further insurance of one thousand dollars upon the property, which application was accepted by the Board on the seventeenth of July, 1895, the day before the happening of the fire. The plaintiff did not receive notice that the insurance in the Quebec Fire Assurance Company was accepted until after the fire occurred.

The question for decision was whether or not, under the circumstances, the policy was void for want of notice of the subsequent insurance and indorsement thereof on the policy as required by the above condition.

Stockton Q.C. and *Dixon* for the appellant. The condition requires the assured to give the notice even after a loss has occurred. See *Western Assurance Co.* v. *Doull* (1); *Logan* v. *Commercial Union Ins.*

(1) 12 Can. S. C. R. 446.

1898

COMMERCIAL UNION ASSURANCE COMPANY v. TEMPLE

Co. (1); *Inland Ins. Co.* v. *Stauffer* (2); *Jewett* v. *Home Ins Co.* (3); *Bruce* v. *Gore District Mutual Assurance Co* (4).

Pugsley Q.C. for the respondent. The notice is to be given "forthwith," which means within a reasonable time. *Mellen* v. *Hamilton Fire Ins. Co.* (5). Bunyon on Fire Insurance, 4 ed, p. 109.

The judgment of the court was delivered by:

SEDGWICK J.—On the 22nd day of August, 1891, the plaintiff insured his dwelling house for $1,500 with the appellant company for three years. The property was burned on the 18th of July, 1895. One of the conditions of the policy was as follows:

11. Persons who have insured property with this company must forthwith give notice of any other insurance already made, or which shall afterwards be made, on the same property, and have a memorandum of such other insurance indorsed on the policy or policies effected with this company, otherwise this policy will be void; provided, however, that on such notice being given at any time after the issue of the policy, it shall be optional with the company to cancel such policy. In the event of any other insurance on the property herein described having been once declared as aforesaid, then this company shall, if this policy shall remain in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage whether such other insurance be in force or not, unless the discontinuance of such other insurance shall have been previously agreed to by this company by indorsement upon this policy.

Upon the plaintiff suing for the amount of his policy, the defendants set up failure on the part of the assured to comply with this condition as a defence, alleging that the assured had effected other insurance on the property but had not forthwith given notice thereof and had a memorandum relating to it indorsed on the policy.

(1) 13 Can. S. C. R. 270.
(2) 33 Penn. 397.
(3) 29 Iowa 562.
(4) 20 U. C. C. P. 207.
(5) 17 N. Y. 609.

The facts upon which this defence is based are practically undisputed.

The plaintiff was an insurance agent in St. John, New Brunswick, where he lived, one company of which he was agent being the Quebec Fire Assurance Company, an institution having its head office in the city of Quebec. On the 10th July, several days before the fire, the plaintiff's son, in the absence of his father through illness, but with his implied authority, wrote to the office at Quebec requesting an additional insurance of a thousand dollars upon the property. On the 17th of July, the day before the fire, the directors of the Quebec company passed a resolution authorizing the additional insurance asked for to be effected. This resolution was not communicated to the plaintiff either directly or indirectly until the 20th of July, two days after the fire, and the plaintiff received notice of it in the course of mail on or about the 21st or 22nd July. The plaintiff being thereby expressly authorized by the Quebec company, after knowledge of the fire, to issue in their name the policy asked for did so, and the company paid him the amount of it, there being no question as to the accidental character of the fire and the property being worth an amount largely in excess of the insurance upon it.

We are of opinion that under the circumstances the verdict of the jury in favour of the plaintiff was right, and that upon two grounds: First, that there was no valid insurance such as that set up by the defence existing at the time of the fire; no policy was issued until some time subsequent to the fire. At the time of the fire there was no obligation on the part of the Quebec company to effect any insurance at all. The resolution authorizing the insurance passed on the 18th of July might have been rescinded immediately afterwards, and was not in any respect binding upon them

1898

COMMERCIAL UNION ASSURANCE COMPANY v. TEMPLE.

Sedgewick J.

until the 20th, after the fire, when it was communicated to the plaintiff. The fact that the company subsequently recognized the transaction as an insurance and paid it in fulfilment of what doubtless they conceived to be an honourable obligation does not support the allegation that there was an existing insurance at the time of the fire, and the ground upon which the court below proceeded was equally a bar to the defendants' contention.

Secondly, the condition in the policy must be given a reasonable meaning. It cannot mean that a party is bound to give notice of an insurance of which he has not and cannot have any knowledge. Neither can we presume that it was intended to provide for a case where an insurance happened to be effected subsequent to a fire of which the assured was bound to give notice, and that under such circumstances the company should have the option of cancelling the policy. That could not have been the intention of the parties. It could solely have reference to an insurance effected before a fire of which subsequent insurance the assured before the fire could have given notice to the company.

If it is in the interest of assurance companies that policy holders should give such a notice as that contended for, it will be necessary that the condition be changed so as to compel notice of application for subsequent insurance rather than of the insurance itself.

We are all of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *M. B. Dixon.*

Solicitor for the respondent: *William Pugsley.*

THE HARDY LUMBER COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

THE PICKEREL RIVER IMPROVEMENT COMPANY (DEFENDANT).... } RESPONDENT.

1898

*May 17.

*Dec. 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Incorporated company—Action against—Forfeiture of charter—Estoppel—Compliance with statute—Res judicata.

In an action against a River Improvement Company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, etc., for which tolls were claimed were not placed on the properties mentioned in the letters patent of the company; that the company did not comply with the statutory requirement that the works should be completed within two years from the date of incorporation whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters contrary to the provisions of the Timber Slide Companies Act, and could not exact toll in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the commissioner in fixing the schedule of tolls.

Held, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent judgment and were *res judicata*.

Held further, that the plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.

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

1898

THE HARDY LUMBER COMPANY v. THE PICKEREL RIVER IMPROVEMENT COMPANY.

By R. S. O. [1887] ch. 160, sec. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers "unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works."

Semble. The non-completion of the work within two years would not, *ipso facto*, forfeit the charter, but only afford grounds for proceeding by the Attorney General to have a forfeiture declared.

Another ground of objection to the imposition of tolls was that the commissioner, in acting on the report of the valuator appointed under the consent judgment erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value and the statement of claim asked that the schedule be set aside and a scale of tolls fixed.

Held, that under the statute the schedule could only be allowed or varied by the commissioner and the court could not interfere, especially as no application for relief had been made to the commissioner.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of Meredith C.J. in favour of the defendant.

The material facts and questions raised for decision are sufficiently set out in the above head-note and in the judgment of the court.

Kappelle and *Bicknell* for the appellant.

Walter Cassells Q.C. for the respondent.

The judgment of the court was delivered by:

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

Mr. Justice Moss in delivering the judgment of the Court of Appeal states the objections of the appellants to the judgment of Chief Justice Meredith as follows:

Upon the argument of this appeal five main grounds of objection to the defendant's right to impose and collect tolls, as against the plaintiffs, were presented for consideration by their counsel:—(1) That the dam, slides, booms, etc., in respect of which the claim of tolls is made, are not built or placed on properties mentioned in the letters

patent, or upon the streams or waters mentioned therein; (2) that the defendants did not within two years from their incorporation complete the works for the completion whereof they were incorporated, and so forfeited their corporate and other powers and authorities; (3) that the defendants made false reports or returns to the Commissioner of Crown Lands, upon which the schedule of tolls was from time to time fixed; (4) that under a consent judgment in a prior action between the same parties, the report of a valuator appointed by the Commissioner of Crown Lands was to be accepted in place of the report or return provided for by the Timber Slide Co's Act, and to be acted upon by the Commissioner in fixing the schedule of tolls, and the Commissioner erroneously adopted the report as to expenditure, instead of as to actual value, in fixing such schedule, and also improperly treated the company as one, the duration of whose existence was only ten years, and included in the tolls an amount computed to ensure a return of the capital of the company at the end of that period and; (5) that the defendants are by these works and improvements obstructing navigable waters contrary to the provisions of the Timber Slide Co's Act, and are not entitled to exact tolls in respect of such obstructions.

To one or the other of these heads all the objections raised by the appellants in argument in this court and in their factum may be referred.

I entirely agree with the judgments delivered in both the courts below regarding the effect of the consent judgment in the former action between the present parties. I am of opinion that it is conclusive against the appellants as regards the first, second, third and fifth grounds of impeachment before enumerated. It is impossible now in the face of that decree, and after the acquiescence and consent of the appellants on which it was founded, that the appellants can be permitted to insist that the respondents are not entitled to collect tolls for the use of their improvements by the appellants either for the reason that statutory requirements have not been complied with, or for the reason that the schedules of tolls in force anterior to the former action were improperly based

1898

THE HARDY LUMBER COMPANY v. THE PICKEREL RIVER IMPROVEMENT COMPANY.

The Chief Justice.

upon false reports or returns to the Commissioner of Crown Lands.

As regards the first, second, third and fifth objections, these are all covered by the former consent judgment and are *res judicata*. In addition to this estoppel, the objection that the respondents' corporate powers were forfeited by reason of their failure to complete the construction of their works within two years from the 9th of May, 1893, the date of their incorporation, it seems clear that the appellants who have all along treated the respondents as a corporation, using their works and paying tolls fixed by the commissioner under the statute, and who now in the present action sue the respondents as a corporation, are precluded from insisting in this same action that the respondents do not constitute a corporation, and that therefore their own action is brought against a body having no legal personality. By suing in the way they have they have precluded themselves from impugning the legal existence of the body they sue.

Further, it appears to me that there is great weight in the suggestion to be found in both the judgments delivered in the courts below that notwithstanding the strong words of the statute R. S. O. 1887, ch. 160, sec. 54, (which was the enactment in force at the date of the issue of the letters patent,) the non-completion of the works within two years would not have worked a forfeiture of the respondents' franchise *ipso jure*, but would only have constituted grounds for proceedings by the Attorney General on behalf of the Crown to have a forfeiture declared.

This enactment is as follows:

Every such company shall, within two years from the day of their becoming incorporated, complete each and every work undertaken by them and mentioned in the report required prior to the incorporation of the company, and for the completion whereof they may be incorporated, in default whereof they shall forfeit all the corporate and other

powers and authority which they have in the meantime acquired, and all their corporate powers shall thenceforth cease and determine unless further time is granted by a by-law of the county or counties. district or districts in or adjoining which the work is situate, or by the Commissioner of Public Works, and if any company formed under this Act for the space of one year abandons any works completed by them, so that the same are not in sufficient repair and cannot be used for the purpose proposed in the instrument of incorporation of the company, then the corporate powers of the company shall cease and determine.

Now it will be observed that the provision shows in plain unmistakable terms that forfeiture by lapse of time may be covered by an extension of time granted either by a public body, the county or district council of the adjoining municipality, acting of course in the public interest, or by a high and responsible officer of the Crown. This shows that the lapse of the corporate powers provided for in the section quoted was entirely in the interest of the Crown and public. Whatever effect might otherwise have been given to the words used I cannot bring myself to think that more was intended than to authorize a proceeding by the Attorney General on behalf of the Crown to have a forfeiture judicially declared, and that it was not competent to a private person indirectly to insist on the cesser of the corporate powers of the respondents under the circumstances alleged. However, I do not insist upon this as a ground for upholding the judgments appealed against as the reasons already stated for holding the appellants precluded from taking the objection to the legal existence of the corporation are sufficient for the purpose. There are still further reasons for not readily assenting to the contention of the appellants on this head. The act of the Commissioner of Crown Lands by exercising his statutory powers in prescribing the tolls to be taken by the respondents is a plain recognition of the respondents as a corporation, and therefore from it alone might

1898

THE HARDY LUMBER COMPANY v. THE PICKEREL RIVER IMPROVEMENT COMPANY.

The Chief Justice.

will be implied his assent to an enlargement of the time for completion of works as well as a waiver on the part of the Crown to any objection on the grouud of the locality of the works as not being authorized by the charter. Again the supplementary letters patent issued on the 21st February, 1896, are a clear recognition of the respondents as a subsisting corporation and therefore a waiver of any right to forfeiture by reason of effluxion of the statutory term before completion, and also a virtual extension of the time which the Crown by its officer the Commissioner had power to grant.

Further, this objection to the respondents as a corporation *de jure* is not only answered in the way already suggested but, even if there had been an absolute forfeiture and the respondents had therefore ceased to be a corporation *de jure*, it would be difficult to establish that they had ceased to be a corporation *de facto*.

This last head is entirely distinct from the principle of estoppel which I think is here amply sufficient to preclude the appellants from taking the objection they insist upon.

The third objection mentioned by Mr. Justice Moss, viz., that the respondents made false reports to the Commissioner of Crown Lands from time to time upon which the schedule of tolls were fixed, is a plain case "of harking back" as Mr. Justice Moss well says, to the complaints which were raised in the former action, and intended to be concluded by the consent decree in that cause. Since that judgment was entered there has been no schedule of tolls except one made under the judgment and based upon the report of an expert according to the terms agreed upon by the parties and embodied in the judgment.

The fourth objection which is the only one remaining to be considered has reference to the schedule of tolls fixed under the consent decree upon the report of the valuator agreed upon. This schedule of tolls is impeached upon the ground that the Commissioner fell into an error in settling it having made the mistake of basing it on the expenditure found to have been made instead of upon actual value. The court is therefore asked (see paragraph 7 of the claim for relief), for this alleged error of the commissioner, to set aside the schedule of tolls and to fix a new scale of tolls itself. The plain answer to this is that the court is here asked to do what the statute expressly delegates to the Commissioner who has express power conferred upon him by section 41 in a case in which tolls fixed by him are objected to as not having been fixed in accordance with the Act "to alter or vary the schedule of tolls so as to make them correspond with the true meaning of the Act." The interference of the court is therefore invoked to do that which the Commissioner alone has jurisdiction to do and that in the absence of any allegation or suggestion of an unsuccessful or any application to the Commissioner for relief.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Laidlaw, Kappelle & Bicknell.*

Solicitors for the respondent: *Blake, Lash & Cassels.*

1898

*Oct. 5.

*Dec. 14.

DAVID ROBERTS AND WILLIAM THOMPSON (DEFENDANTS) ..... } APPELLANTS;

AND

HENRY HAWKINS, *ès qualité* (PLAINTIFF) ..... } RESPONDENT.

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

Negligence—Trespasser—Dangerous way—Art. 1053 *C. C.—Warning—Imprudence—Arts.* 491, 496, 508 *C. P. Q.*

A cow-boy aboard a ship on the eve of departure from the port of Montreal, was injured by the falling of a derrick then in use which had been insecurely fastened. He was not at the time engaged in the performance of any duty and although he had been warned to "stand from under" he had not moved away from the dangerous position he was occupying.

Held, reversing the judgment of the Court of Queen's Bench, that the boy's imprudence was not merely contributory negligence but constituted the principal and immediate cause of the accident and that, under the circumstances, neither the master nor the owners of the ship could be held responsible for damages on account of the injuries he received.

APPEAL and CROSS-APPEAL from the judgment of the Court of Queen's Bench for Lower Canada maintaining in part the appeal of the defendants against the judgment of the Superior Court, District of Montreal, in favour of the plaintiff for $750 with interest and costs.

The appellants are the captain and the managing owner of the steamship Kildona, plying between Montreal and Liverpool, and the respondent as tutor of Herbert W. Ball, a minor, sued them for $4,000 damages, for injuries alleged to have been caused to

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

1898

ROBERTS v. HAWKINS.

Ball by the falling of a derrick on the ship in the port of Montreal. The case was tried with a jury and the Superior Court interpreting the verdict as being against the appellants, condemned them to pay respondent $750, interest and costs. The Court of Queen's Bench, on appeal, varied this judgment reducing it to $375, with costs, in the Superior Court, Bossé J. dissenting, and from the latter judgment the defendants now appeal, asking for its reversal and the dismissal of the action with costs. The plaintiff, by cross-appeal, asks to have the Superior Court judgment restored.

A further statement of the case will be found in the judgment reported.

Macmaster Q.C. and *Peers Davidson* for the appellants. We ask that, upon the findings made by the jury, a judgment should be entered for the defendants; Arts. 491, 496, 508 C. P. Q. The court below erred in varying the judgment, and had only jurisdiction to grant a new trial or to render a different judgment. There was no question of contributory negligence to be considered. The owners cannot be held insurers of trespassers going aboard their vessel, and they have not been shown to have committed any fault to make them responsible, under Art. 1053 C. C.; *Tooke* v. *Bergeron* (1); *Montreal Rolling Mills Co.* v. *Corcoran* (2). The boy Ball, after being warned to "stand from under," refused to move away, but remained as a trespasser in the dangerous position near the hatch where he ought not to have been.

The slipping of the knot did not constitute fault in law. The appellants are only responsible if guilty of the determining, principal or proximate cause, and the injury was found by the jury to have been the result of Ball's own fault or folly. Moreover the result of the findings of the jury is actually a verdict in favour

(1) 27 Can. S. C. R. 567. (2) 26 Can. S. C. R. 595.

1898

ROBERTS v. HAWKINS.

of the defendants; *Cowans* v. *Marshall* (1). The defendants owed no duty to Ball at the time of the accident; *The Caledonian Railway Co.* v. *Mulholland* (2). It is evident that the reasonable expectation of being engaged, as found by the jury, was the expectation which any cattleman might have had at that season of the year. It would be an engagement on the wharf. There is no evidence that cattlemen are ever engaged on the ship itself. Hence a reasonable expectation of being engaged in no sense warranted his presence on the ship. Neither was Ball at his work and duty when injured.

The appellant relies upon the following authorities to support the contention that upon the findings a verdict ought to be entered for the defendants. 7 Larombière, (ed. 1885) no. 29; Dal. supp. v. "Responsabilité" no. 198; v. "Travail" no. 370; *Prud'homme* v. *Vincent* (3); *Chartier* v. *Quebec Steamship Co.* (4).

The plaintiff moved for judgment on the verdict. By doing so he accepted the verdict as it stands and is now precluded from taking any exception to any of the answers. *Fletcher* v. *Mutual Fire Insurance Co. for Stanstead and Sherbrooke* (5).

We also refer to *Mercier* v. *Morin* (6), at page 90, and *Paterson* v. *Wallace* (7), per Cranworth L.J. at page 754, and to the French authorities summed up by His Lordship Mr. Justice Girouard in *The George Matthews Co.* v. *Bouchard* (8). Ball was *volens*; he took the risk of staying in a dangerous way and suffers solely on account of his own imprudence.

Geoffrion Q.C. and *J. M. Ferguson* for the respondent. Ball went aboard the ship with a lawful object, expect-

(1) 28 Can. S. C. R. 161.
(2) [1898] A. C. 216.
(3) Q. R. 11 S. C. 27.
(4) Q. R. 12 S. C. 261.
(5) 6 Legal News, 340.
(6) Q. R. 1 Q. B. 86.
(7) 1 Macq. H.L. 748.
(8) 28 Can. S. C. R. 580.

ing to be signed on the ship's articles. He was licensee and invitee of the owners and entitled to be protected from the consequences of their negligent acts; *The Canada Atlantic Railway Co.* v. *Hurdman* (1). The proof showed only an indefinite notice to "stand from under," a place where there would have been no danger but for a "slippery hitch" on the derrick chains, a negligently made knot which allowed the derrick to fall and cause the injuries at a spot beyond the usual area of danger in the swinging of the derrick. The defendants were guilty of gross fault in permitting such negligence in the working of a derrick, an operation which, under any circumstances, is attended with more or less danger. There is a presumption of fault against the defendants resulting from the mere fact of the fall of the derrick which is not rebutted and renders them liable; *Ross* v. *Langlois* (2); *Corner* v. *Byrd* (3); *Evans* v. *Monette* (4); *Dupont* v. *Quebec Steamship Co* (5) *Great Western Railway Co. of Canada* v. *Braid* (6); *Scott* v. *The London and St. Katharine Docks Co.* (7); *Smith* v. *Baker & Sons* (8); *Meux* v. *Great Eastern Railway Co.* (9). In matters of *délit* and *quasi-délit*, the French law applies. See in *Cossette* v. *Dun* (10), at page 247, per Fournier J. referring to *Carsley* v. *The Bradstreet Co.* (11). See also 2 Domat. *tit.* 8 sec. iv, par. 1; 7 Larombière p. 541, no. 8, p. 560, no. 28; 20 Laurent, nos. 466, 467, 468, 472, 485, 487, 489, 490, 491.

Contributory negligence, or what is called *faute commune*, does not bar plaintiff's right of action, but only tends to a diminution of damages in proportion to the

(1) 25 Can. S. C. R. 205.
(2) M. L. R. 1 Q. B. 280.
(3) M. L. R. 2 Q. B. 262.
(4) M. L. R. 2 Q. B. 243.
(5) Q. R. 11 S. C. 188.
(6) 1 Moo. P. C. (N.S.) 101.
(7) 3 H. & C. 596.
(8) [1891] A. C. 325.
(9) [1895] 2 Q. B. 387.
(10) 18 Can. S. C. R. 222.
(11) M. L. R. 2 S. C. 33.

1898

ROBERTS v. HAWKINS.

plaintiff's contributory share in the injury. S. V. 1875, 1. 204; S. V. 1879, 1. 463; S. V. 1885, 1, 129; S. V. 1894, 1, 223; S. V. 1894, 4, 4; S. V. 1895, 1, 285 and notes 1, 2, 3; S. V. 1896, 1, 461 and note 4; "Responsabilité," No. 198; S; V. 75-1-25; D. P. 75-1-320; D. P. 96-1-19; S. V 80-1-55; Dal. (1896) vo. "Responsabilité," No. 51; *Cossette* v. *Leduc* (1); *Ibbottson* v. *Trevethick* (2) and *Cowans* v. *Marshall* (3).

Even in English law it is not every species of contributory negligence that bars plaintiff's right of action; *Radley* v. *The London & North West Railway Co.* (4), per Penzance L. J. at pages 758-59 and 760; *Foulkes* v. *The Metropolitan District Railway Co.* (5); *Tuff* v. *Warman* (6); *Sewell* v. *British Columbia Towing Co.* (7), per Strong J. referring to *Davies* v. *Mann* (8); *Barnes* v. *Ward* (9); at page 420, *Lynch* v. *Nurdin* (10), approved in *Harold* v. *Watney* (11), which also refers to and approves *Jewson* v. *Gatti* (12). Ball's alleged fault contributed but little, if any, to the injuries, and the jury though probably somewhat led astray by the judge's charge, have a very wide latitude in the determination of an action of this nature. *Bridges* v. *Directors, etc, of North London Railway Co.* (13) and *The Connecticut Ins. Co* v. *Moore* (14) confirming the judgment of this court. Although the Court of Queen's Bench had power to enter the verdict in accordance with what they deemed to be the true construction of the findings, they had no power to set aside the verdict for the plaintiff, and direct a verdict

(1) 6 Legal News, 181.
(2) Q. R. 4 S. C. 318.
(3) 28 Can. S. C. R. 161.
(4) 1 App. Cas. 754.
(5) 5 C. P. D. 157.
(6) 27 L. J. C. P. 322.
(7) 9 Can. S. C. R. 545.
(8) 10 M. & W. 546.
(9) 9 C. B. 392.
(10) 1 Q. B. 29.
(11) [1898] 2 Q. B. 320.
(12) 2 Times L. R. 381, 441.
(13) L. R. 7 H. L. 213.
(14) 6 App. Cas. 644.; 6 Can. S. C. R. 634.

to be entered for the defendant in direct opposition to the finding of the jury on material issues.

The verdict of a jury assessing damages is not interfered with unless for very grave reasons. none of which appear in this case. Arts. 499, 500, 501, and 503 C. P. Q. are simply declaratory of the law, and settled jurisprudence as it existed previously; *Ford* v. *Lacey* (1); *Great Western Railway Co.* v. *Braid* (2); and Dorion C. J. in *Wilson* v. *Grand Trunk Railway Co.* (3) affirmed in this court (Cass. Dig. 2 ed. 722); *Metropolitan Railway Co* v. *Wright* (4); *Brown* v. *Commissioner for Railways* (5); *Wilkinson* v. *Payne* (6); *Lambkin* v. *South Eastern Railway Co.* (7).

The Court of Appeal held, inasmuch as the jury found that both sides were in fault, and awarded $750.00 without mentioning that they had reduced the damages to this figure on account of contributory fault, that there was nothing to show that this figure did not represent the entire damage suffered, and so reduced the verdict by one half to represent plaintiff's contributory share in the injury. It is respectfully submitted that in so doing the court entirely misapplied the law. The presiding judge properly instructed the jury on the question of contributory fault, that if they found that the defendants' fault was the cause of the injury, but also found that plaintiff's fault contributed thereto, they should take this fault of the plaintiff's into consideration in awarding damages and so reduce the damages accordingly, and there is a presumption *juris et de jure* that the jury followed their instructions and the trial court judgment ought to be restored.

30 L. J. Ex. 351.
(2) 1 Moo. P. C. (N. S.) 101.
(3) 2 Dor. Q. B. 135.
(4) 11 App. Cas. 152.
(5) 15 App. Cas. 240.
(6) 4 T. R. 468.
(7) 5 App. Cas. 352.

1898

ROBERTS
v.
HAWKINS.

GIROUARD J.

The judgment of the court was delivered by

GIROUARD J.—As we intimated at the time of the argument, we have come to the conclusion that this appeal should be allowed. The action was instituted by the tutor Hawkins, to recover $4,000 for compensation for certain injuries alleged to have been caused on the 17th July, 1897, to the minor, Ball, by the fault of the master and managing owner of the cattle steamship "Kildona," then lying in the port of Montreal, and on the point of sailing for Europe. It appears that the boy, aged about eighteen, was injured by the falling of a chain in connection with the derrick, after due warning had been given to him to move off the hatch. The case was tried with a jury in January, 1898, and to determine the question of responsibility it is sufficient to refer to the following questions submitted to them, and their answers:

4th. Was the injury to said Ball caused by any fault or imprudence of the defendants, and if so, state in what manner the same consisted?

Answer. Nine for; three against. Yes, imperfect hitching of the knot connecting the gantling with the chain.

5th. Was said injury caused by any fault or imprudence of said Herbert William Ball, and if so, state in what the same consisted?

Answer. Unanimous. Yes, after due warning had been given.

6th. Was the said Herbert William Ball engaged on board the said steamship "Kildona," at his work and duty at the time and place when and where the accident happened?

Answer. Unanimous. No, but on the ship with reasonable expectation of being engaged.

Did said Herbert William Ball persist in remaining at the spot where the accident happened, notwithstanding defendants' warning as to the danger?

Answer. Unanimous. Yes, in ignorance of the danger.

11th. Has the said Herbert William Ball and the plaintiff in his capacity suffered any damages from the injury above referred to, and if so, in what sum do you assess such damages?

Answer. Nine for; three against. Yes, seven hundred and fifty dollars.

Upon these findings the trial judge (Archibald J.) condemned the defendants to pay $750 and costs.

It is clear from the answers of the jury that they found fault both against the plaintiff and the defendants, but failed to determine what was the principal and immediate cause of the accident; and consequently, after weighing the evidence, the majority of the Court of Appeals thought that, under art. 496 of the new Code of Civil Procedure, the ends of justice would be attained by reducing the amount of the judgment one half, that is, to $375. Mr. Justice Bossé dissented, being of opinion that the facts disclosed show no right to damages, the accident being the result of the negligence of the boy alone. Mr. Justice Hall, who rendered the judgment of the court, stated that

> Ball had been engaged to go upon the voyage and assist in the care of the cattle, by one who was authorised to make such engagement.

This statement is certainly contrary to the finding of the jury, who, in answer to question six, returned that Ball was not engaged on the steamship at his work and duty, but that he was "on the ship with reasonable expectation of being engaged." There is evidence in favour of this finding. Walter Roffey, the only man authorised to engage the cattlemen for the voyage, does not remember having engaged Ball, but he further swears that when the time came to sign the ship's articles, the full list of the men engaged answered to the call. Ball's name was not among them. Therefore, it does appear that Ball was a mere trespasser on the ship, to whom the defendants owed no obligation or duty. But we do not rest our judgment upon that ground; even if he had any legitimate cause or right to be on the ship, for instance to seek for employment, he certainly was not employed in the movements of the derrick; he had no business to be

1898

ROBERTS v. HAWKINS.

Girouard J.

on the hatch, and when ordered to "stand from under," he should have moved from the hatch. The "due warning" is proved by Anderson, Greeshaw and other witnesses. It is not disputed; it is found by the jury and is admitted by the trial judge and the judges in appeal. But we do not share their opinion that the fault of the boy constitutes merely contributory negligence. We agree, on the contrary, with Mr. Justice Bossé, that it was the principal and immediate cause of the accident. See Dalloz, J. G. Sup. vo. Responsabilité, n. 193; vo. Travail, n. 370, where several decisions are collected. A recent *arrêt* of the Cour de Cassation (S. V. 83, 1, 402) is remarkably in point:

LA COUR.—Sur le moyen unique, tiré de la violation des art. 1382, 1383 et 1384 C. civ. Attendu que l'arrêt attaqué (Chambéry, 28 juill. 1880) déclare, en fait, que, si les blessures qui ont entrainé la mort de Pierre Duret ont eu pour cause l'effondrement d'un échafaudage établi par Encrenaz pour le compte de Carton, et si cet effondrement a été déterminé par un vice de construction imputable à Encrenaz, il est constant, d'autre part, d'après les éléments de la cause et des enquêtes, que Duret, loin d'avoir été engagé, soit par Encrenaz, soit par Carton, à monter sur cet échafaudage, où sa présence n'était motivée par aucun travail même accidentel, avait été expressément averti que son concours était inutile aux travaux alors exécutés sur le dit échafaudage; qu'il avait été formellement invité à se retirer et à aller travailler ailleurs:—Attendu qu'en décidant, dans ces circonstances, que Duret a été victime de son propre fait et de sa seule imprudence, et en rejetant pour ce motif, la demande en dommages-intérêts intentée par sa veuve contre les défendeurs éventuels, l'arrêt attaqué n'a violé aucun des textes précités;—Rejette, etc.

This court laid down the same principle in *Tooke* v. *Bergeron* (1).

We are therefore unanimously of opinion that the appeal should be allowed and the cross-appeal of the respondent, for a restoration of the judgment of the Superior Court, dismissed with costs. The action of

(1) 27 Can. S. C. R. 567.

the respondent is dismissed with costs before all the courts.

1898

ROBERTS v. HAWKINS.

Girouard J.

Appeal allowed with costs;
Cross-Appeal dismissed with costs.

Solicitor for the appellant: *Peers Davidson.*

Solicitor for the respondent: *J. M. Ferguson.*

1898

*Oct. 6.
*Dec. 14.

THE CORPORATION OF THE TOWNSHIP OF ASCOT (PLAINTIFF) ..... APPELLANT;

AND

THE CORPORATION OF THE COUNTY OF COMPTON (DEFENDANT) ..... RESPONDENT.

THE CORPORATION OF THE VILLAGE OF LENNOXVILLE (PLAINTIFF) ..... APPELLANT;

AND

THE CORPORATION OF THE COUNTY OF COMPTON (DEFENDANT) ..... RESPONDENT.

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

Municipal corporation—By-law—Railway aid—Subscription for shares—Debentures—Division of county—Erection of new separate municipalities—34 V. c. 30 (Que.)—Arts. 78, 164, 939 Que. Mun. Code—39 V. c. 50 (Que.)—Assessment—Sale of shares at discount—Action en reddition de comptes—Trustee—Debtor and creditor.

An action *en reddition de comptes* does not lie against a trustee invested with the administration of a fund until such administration is complete and has terminated.

The relation existing between a county corporation and the local municipalities of which it is composed, in relation to money by-laws, is not that of an agent or trustee, but the county corporation is the creditor and the several local corporations are its debtors for the amount of taxes to be assessed upon their ratepayers respectively.

Where several local municipalities formerly constituting part of a county municipality have been detached therefrom and erected into separate corporations they remain in the same position in

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

1898

THE TOWNSHIP OF ASCOT v. THE COUNTY OF COMPTON.

THE VILLAGE OF LENNOXVILLE v. THE COUNTY OF COMPTON.

regard to subsisting money by-laws as they were before the division having no further rights or obligations than if they had never been separated and they cannot, either conjointly or individually institute actions against such county corporation to compel the rendering of special accounts of the administration of funds realized upon the sale of county debentures issued before the separation, their proper method of obtaining necessary information being that provided by article 164 of the Municipal Code and through the other facilities afforded local municipalities by the Code.

APPEALS from the judgments of the Court of Queen's Bench for Lower Canada, (appeal side), affirming the judgments of the Sup rior Court, District of Saint Francis (1), which dismissed both actions with costs.

A statement of the cases and of the issues raised on these appeals appears in the judgment reported.

Lafleur and *Hurd* (*W. Morris* with them,) for the appellants. The actions were well founded, for the following among other reasons: 1. Appellants had a proprietary interest in the stock and funds obtained under by-law 37, and the respondents acted as their agents, trustees or managers; 2. Respondents so acted for the purpose of paying the debenture holders, who were the real creditors; 3. In this administration expenses have been incurred for a share of which appellants are liable, and in that respect they are entitled to an account.

The prime object of the by-law was to authorize the county to subscribe for shares in the capital stock of the St. Francis & Megantic International Railway Co., and to provide the means of paying for that stock. The appellants and other municipalities which separated from the county retained a proprietary interest in that stock, and in the dividends and proceeds thereof. (Arts. 80 and 81 Mun. Code, Que.) When municipalities separate the assets and liabilities

(1) 3 Rev. de Jur. 557.

1898

THE TOWNSHIP OF ASCOT v. THE COUNTY OF COMPTON.

THE VILLAGE OF LENNOXVILLE v. THE COUNTY OF COMPTON.

are divided on the basis of their respective valuations of taxable property, and Ascot's share would represent its interest in the stock subscribed. In 1880 the Village of Lennoxville separated from the Township of Ascot and the respondents consented to divide the indebtedness, and to deal thenceforward separately with Lennoxville, on the basis of a division assented to by all the parties interested. They, therefore, each have a separate share and proprietary interest in the stock and funds which entitles each of them to an account of the management of the stock and of its earnings, if any, and proceeds. 3 Rolland de Villargues "Compte" No. 1; Bioche, Dict. de Procedure, "Compte" Art. 1; 4 Carré & Chauveau, p. 438, tit. IV.; 27 Laurent, No. 495; Pothier Proc. Civ. (Bugnet Ed.), No. 274; 8 De Lorimier, Code Civil, pp. 99, 114-115.

If the stock had been sold at a premium the appellants would have been entitled to their share of any surplus, and their remedy against respondents clearly would have been an action *en redition de compte*. The fact alleged that the stock sold for less than par would not relieve them of the duty of accounting; nor could they successfully defend such an action on the plea that the proceeds were insufficient to pay the debt and expenses of administration.

The real creditors are the debenture holders, and the debtors are the County of Compton, as presently constituted, and those municipalities which separated from it owing a joint debt to the debenture holders. The Municipal Code, arts. 79, 80, 81, 82, 83 providing for the levy and collection of the joint debts govern these municipalities, as between themselves. The municipality from which the territory has been separated is alone authorized and bound to settle with the creditors; but it does not follow that the recourse of the creditors, the debenture holders, is limited to that

municipality. There is nothing to prevent the appellants from settling their own share of that joint debt with the debenture holders, and there are cases in which they might be bound to do so. *Eastern Townships Bank* v. *County of Compton* (1). They, therefore, have an interest in the proper administration of the funds collected and might be held responsible for maladministration.

The appellants are also entitled to an account of the expenses of administration. Under C. S. L. C. ch. 25, sec. 6, sub-sec. 2, they would be liable only for such expenses as could reasonably and legitimately be attributed to the by-law. They are entitled to these accounts in a formal way, so that if necessary they may contest by *debats de compte*.

H. B. Brown Q.C. for the respondent. Actions *en redition de compte* lie only against those who have administered the affairs of others; 3 Rolland de Villargues, vo. "Compte," no. 1; 10 Pothier (ed. Bugnet) no. 274; arts. 1043, 1713 C. C. In these matters the County of Compton has merely administered its own affairs and is not liable to such an action.

There is no distinction between the taxes imposed under this by-law and other municipal taxes. C. S. L. C. ch. 25, s. 6. The tax imposed by a county council is levied on all the local municipal corporations of the county, in accordance with the value of the taxable proderty in each. Mun. Code, Que., art. 938. The portion imposed on each local corporation constitutes a debt payable by such local corporation to the county corporation. Mun. Code, Que., arts. 939, 941, 946, 951; *Simard* v. *Corporation of Montmorency* (2); *Corporation of Missisquoi* v. *Corporation of St. George de Clarenceville* (3); *Corporation of St. Guillaume* v. *County of*

(1) 7 R. L. 446.

(2) 4 Q. L. R. 208.

(3) 15 R. L. 315.

1898

THE TOWNSHIP OF ASCOT v. THE COUNTY OF COMPTON.

THE VILLAGE OF LENNOXVILLE v. THE COUNTY OF COMPTON.

Drummond (1). The legal position of the parties therefore is clearly that of creditor and debtor simply.

When a local municipality is separated from a county, the position of one towards the other does not become changed in so far as regards the liability for taxes already imposed. There is nothing in the law to support the opinion that by such a separation the relation of creditor and debtor is converted into one of *mandataire* and *mandant*. Mun. Code, Que., arts. 78, 79, 82, 83, 84, 85, 88, 95. Cooley, Taxation, (2 ed.) p. 239, "Taxes apportioned by Benefits."

It would certainly be anomalous if the various separated local corporations, with their subsequent sub-divisions, should each have a right to *debats de compte*, with appointment of *practiciens*, *etc.*, as to the administration of the funds of the county under this by-law, and this before the completion of its administration.

The account asked for by the plaintiffs is not an account of their affairs alone, and it would be impossible for the county council to account to any one of the local municipalities for its own particular interest or share in the by-law so administered.

The judgment of the court was delive ed by:

GIROUARD J.—The present appeal is from a judgment of the Court of Queen's Bench sitting in appeal in Montreal, rendered on the 20th January, 1898, and confirming two judgments of the Superior Court (Sherbrooke), 12th January, 1897, dismissing plaintiffs' actions. They are two actions *en redition de comptes* brought by two local municipalities against the county corporation of which they formerly formed part, praying that the latter be condemned to account for its

(1) 7 R. L. 562.

administration of a railway by-law, known as by-law no. 37, and in default of their doing so, to pay $10,000 and $5,000 respectively as *reliquats de comptes*.

This by-law was passed on the 14th September, 1870, under the provisions of chapter 25 of the Consolidated Statutes of Lower Canada, an "Act respecting Municipalities taking stock in Railways and other Works"; and by its terms authorizes the warden to take shares in the "St. Francis, Megantic & International Railway Company," generally known as the "Pope Road," to the amount of $225,540, and to raise the money to buy the stock by an issue of debentures to the same amount payable in 25 years.

The by-law was submitted to the vote of the ratepayers in the various local municipalities, and approved by a majority thereof, and on the 26th December, 1870, it received the approval of the Lieutenant-Governor in Council.

From the outset, this railway by-law has been a fruitful source of litigation between the county corporation and divers local corporations. In the first place its validity was contested by the present appellants and others, but the by-law was declared valid on the 7th January, 1876.

Pending this litigation, a bill was introduced in the legislature at Quebec (which became law 24th Dec., 1870,) separating the Town of Sherbrooke and the Townships of Orford, Ascot and Compton from the County of Compton for municipal purposes, and forming them into the County of Sherbrooke. (34 Vict. cap. 30.)

A special provision was inserted in the Act that nothing in this Act contained shall affect or shall prevent the operation of a certain by-law, &c, &c., and that if the said by-law [To wit, By-law 37] is finally declared valid by the Courts of Justice, it shall have full force and effect, &c.

See also art. 78 of the Municipal Code.

1898

THE TOWNSHIP OF ASCOT v. THE COUNTY OF COMPTON.

THE VILLAGE OF LENNOXVILLE v. THE COUNTY OF COMPTON.

Girouard J.

Lennoxville was afterwards separated from the Township of Ascot as a village corporation, and Sherbrooke since its incorporation as a city, (1876), [39 Vict. cap. 50] has ceased to form part of either county corporation.

In consequence of this litigation, no levy of rates was attempted till 1876. As is usual in such cases, in order to pay the interest on the debentures and to create a sinking fund for their redemption, a tax of five mills in the dollar had been imposed by the by-law on all the real estate in the County of Compton; but in 1886, the county corporation sold all their shares to Sir George Stephen at 50 per cent discount, and realized $112,500 and in consequence reduced their rates to two mills.

The same local corporations refused to pay any assessment, and an action was brought in 1875 by the Eastern Townships Bank, (1), holders of 190 debentures of $1,000 each for overdue interest. This action was contested by the local corporations of Ascot, Compton and others, and the validity of the by-law again raised unsuccessfully.

The judgment of the Superior Court gives a *resumé* of the whole difficulty, and in the concluding part of the judge's note we find the following:

> Then it was submitted to the Lieutenant Governor in Council for consideration and approved; and lastly, and it is to be hoped finally, it has been brought again before this court, &c., &c.

This was in 1876, but the contest continues, and the Township of Ascot and the Village of Lennoxville have remained in rebellion to this by-law to the present day. History repeats itself, especially in railway matters. Ratepayers are generally very anxious to get railway facilities and they readily tell the promoters: "Build your railway, we will take shares in it," but,

(1) *Eastern Townships Bank* v. *County of Compton*, 7 R. L. 446.

1898

THE TOWNSHIP OF ASCOT v. THE COUNTY OF COMPTON.

THE VILLAGE OF LENNOXVILLE v. THE COUNTY OF COMPTON.

Girouard J.

in practice they too often mean "don't call for any money."

Suits have been instituted by the respondent against the appellants and others, wherein the county is seeking to recover assessments amounting to several thousands of dollars. In *Compton* v. *Bury* Mr. Justice Lynch condemned the Township of Bury to pay to the County of Compton $9,080.11 with interest and costs. In *Compton* v. *Orford*, the sum of $3,509 was ordered to be paid. On the 4th day of May, 1898, in *Compton* v. *Ascot*, the latter was condemned by Mr. Justice White to pay $6,494.81, interest and costs for rates up to the 1st January, 1892, the court reserving

> the rights of the defendants on a final adjustment of the rates, which may be made for the years 1893, 1894, 1895 and 1896, to establish if it be so, that the said rate of two mills during the nine years subsequent to 1886, is more than sufficient to pay their just proportion of said debt and interest.

The appellants did not wait for this judgment to demand a revision of the rates. On being sued in 1895, they sought to obtain relief by means of an action to account, taken in 1896, the object of which is well defined by Mr. Justice Würtele in these few words:

> They claimed they were entitled to obtain an account because they wished to ascertain their exact position. They alleged several grievances; in the first place that they were not allowed a sufficient amount of rebate for the proceeds of the sale of the stock in the railway to Sir George Stephen. They also alleged that the sinking fund had not been properly administered. They also alleged that the county council had paid large sums of money to cover up a defalcation in their accounts which had been made by their former secretary-treasurer; that the sum of twelve thousand dollars had been paid to that treasurer, and that he was not entitled to anything like that amount; that he might have been entitled under the by-law to a certain amount of salary for the work he had done in administering the by-law, but that he was not entitled to this amount, and they claimed, therefore, they had a right to obtain an account from the county council before they could be called upon to pay any amount of the tax.

1898

THE TOWNSHIP OF ASCOT v. THE COUNTY OF COMPTON.

THE VILLAGE OF LENNOXVILLE v. THE COUNTY OF COMPTON.

Girouard J.

The defendant denied that in law they were bound to render any account to the plaintiffs for its administration of the funds collected under by-law no. 37; that they do not occupy the position of agents or trustees, but that of creditors.

Art. 939 of the Municipal Code says:

The portion imposed on each local corporation constitutes *a debt* payable by such corporation to the county council, according to the conditions and on the terms fixed by such council.

The amount of such portion or debt is levied in the local municipality in the same manner as local taxes, on all the taxable property subject to such tax, without its being necessary to make other by-laws or orders for that purpose.

In the case of refusal or neglect on the part of the local corporation to pay the portion which has been imposed upon it, such portion may be recovered from it in the manner set forth in article 951.

The Superior Court adopted the contentions of the defendants and dismissed the two actions with costs. This judgment was confirmed in appeal by Lacoste C.J., Bossé and Würtele JJ., Blanchet and Hall JJ. dissenting.

We entirely agree with the two courts below, and we think we cannot do better than reproduce the following remarks of Mr. Justice Würtele, in which we concur:

The first question is whether these municipalities possess the right to bring an action of account.

In the first place we must recollect that the administration with which the county council was invested with respect to the by-law, and with respect to the collecting of the funds for the purpose of paying off their debentures, has not yet terminated. There are still a great many debentures outstanding which have to be provided for, and if an action of account could be brought, it is certain it cannot be brought until the administration is terminated. They cannot pretend, if they have such a right, that they would have a right to bring on actions of account from time to time every year, or any other period. They certainly would have to wait until the administration is completed. Have they the right, however, to bring that action? In the first place, the corporation of a county is composed of all the ratepayers living within that county. They are the corporators, the county council is merely

the administrator, the body who administers the interests of the ratepayers in the county, irrespective of the local municipalities. Then with respect to the levies in the interest of the whole county it is provided that amount shall be levied by a certain equal levy over the whole county, but that the amount due by the ratepayers in each individual municipality shall be collected and paid over to the county council by the local council administering the affairs of that municipality, and it is ordered by the Municipal Code that the amount thus payable is to be dealt with as if it was an ordinary debt, and is to be recovered by an action of debt, to be instituted by the county council against the local council.

The relations which exist between the two corporations are, therefore, that of creditor and debtor. The county council is the creditor and the local council is the debtor for the amount of the taxes payable or leviable by the ratepayers....., and even the local council has the power to levy that without passing any other by-law, to levy it under the original by-law, and they are the collectors for the amount due by the ratepayers within their limits, but does that give a right to any municipality or to any ratepayer of bringing an action of account against the county council? Would any ratepayer in any municipality, whether it be local or county, have the right to bring against the county council an action for account? Clearly not. The affairs administered by a county council are its own affairs, that is to say, the affairs of the corporators. They do not administer the affairs of another. The action of account, both by English and French law, is given against a person who administers the property of another, and who may be called upon to pay a certain amount on the accounts being stated and rendered.

In the present case, all the action of account asks for is that an account be rendered in order that these two municipalities may see the exact position in which they stand. They claim they have that right because they have been separated. Would any municipality which has not yet been separated from the County of Compton have that right? Clearly not. The county council administers their affairs. The affair for which they could ask for an action of account is not an affair of theirs independent of the affairs of the county. The county council only administers the affairs of its corporators, and therefore no corporator can have the right to bring an action of account against it. Because they have been separated, have they a right to bring this action, merely because they have been separated? The statute and the Code say that they shall remain in the same position *quoad* the by-law as they were in before the division. They have no more rights and are charged with no more obligations than if they had never been

1898

THE TOWNSHIP OF ASCOT v. THE COUNTY OF COMPTON.

THE VILLAGE OF LENNOXVILLE v. THE COUNTY OF COMPTON.

Girouard J.

separated. It seems to the majority of the court, therefore, that th action of account does not exist; it may be a matter of inconvenience; but still the municipalities interested, who wish an account, have every facility to obtain the information which they require. Under article 164 of the Municipal Code, it is provided that any mayor, or any municipal officer, or any ratepayer has the right at any time to go to the office of the county council or the local council and exact that all the books and papers of the municipal council be exhibited to him. He is authorised to take extracts, and the secretary-treasurer is ordered to give him every facility in the examination of the accounts and state of the affairs of the municipality. Then, in the beginning of January of each year, the secretary-treasurer is bound to make a complete statement of all the affairs of the municipality and to render an account to the council under which he acts, either county or local, of all the money transactions that have taken place. In the event of a by-law being passed to issue debentures he is also bound to submit to the county council a clear and distinct statement of the state of the sinking fund on the first of January of each year. Therefore, every municipality, and in the present case the municipalities that remain in the County of Compton, and those detached, have every facility in order to obtain the information they require, without it being necessary to bring an action of account. They have the annual statement made by the treasurer; if they doubt the correctness of that statement, their officers and any ratepayer have the right to examine all the papers and documents of the council in order to ascertain if the statement is correct or not. We think that these local councils do not possess the right to bring an action of account, and we think if they have not that right, that all that results from their being deprived of that right is a certain amount of inconvenience in being obliged, instead of having a document furnished to them, to go to the office of the council in order to obtain for themselves the information they require.

For the same reasons, we are of opinion that the two appeals should be dismissed, and they are dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellant, the Township of Ascot: *Lawrence & Morris.*

Solicitors for the appellant, the Village of Lennoxville: *Hurd & Fraser.*

Solicitors for the respondent: *Brown & Macdonald.*

WILLIAM J. COMMON, *ès qualité* (PETITIONER)..... APPELLANT;

AND

COLIN McARTHUR, (CONTESTANT).....RESPONDENT

1898

*Oct. 6, 7.

*Dec. 14.

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

Joint stock company—Irregular organization—Subscription for shares—Withdrawal—Surrender—Forfeiture—Duty of directors—Powers—Cancellation of stock—"The Companies Act"—"The Winding-up Act"—Contributories—Pleading—Construction of statute.

After the issue of the order for the winding-up of a joint stock company incorporated under "The Companies Act," a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company; such grounds can be taken only upon direct proceedings at the instance of the Attorney General.

The powers given the directors of a joint stock company under the provisions of "The Companies Act" as to forfeiture of shares for non-payment of calls is intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company and cannot be employed for the benefit of the shareholder.

APPEAL from the Court of Queen's Bench for Lower Canada (appeal side), (1) reversing the judgment of the Superior Court, district of Montreal, settling the list of contributories in the matter of The Dominion Cold Storage Company, in liquidation under "The Winding-up Act," and declaring the respondent to be liable as a contributory for the debts of the company, to the extent of the amount of $4,500 remaining unpaid in respect of his subscription for fifty shares in its capital stock.

---

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

(1) Q. R. 8 Q. B. 128

1898

COMMON v. MCARTHUR.

A statement of the case will be found in the judgment reported.

Buchan and *R. C. Smith* for the appellant. Agreements made by a company to the effect of discharging shareholders from responsibility as regards its creditors are null and a fraud against both the creditors and other shareholders. Thomson on Corporations (ed. 1895) secs. 1511, 1514, 1517, 1550, 1579-1582, and cases there cited; Morawetz, Private Corporations, (2 ed.) secs. 302-309; *Spackman* v. *Evans* (1); *In re Agriculturist Cattle Ins. Co., Stanhope's Case* (2). See the, "Winding-up Act," secs. 41-49. The shareholder's liability for the unpaid balances on shares subscribed constitutes an asset of a company in liquidation, and such a liability brings the person liable within the meaning of the word "contributory." *In re Accidental and Marine Ins. Corp., Bridger's Case* (3); *In re Blakely Ordnance Co., Creykes's Case* (4).

The respondent cannot be permitted to usurp the functions of the Attorney General as to forfeiture of charter or to plead irregularities in the company's organization in order to avoid his liabilities as a shareholder.

The appellant submits that the respondent was rightly placed on the list of contributories, because the pretended cancellation of his subscription was a release to the detriment of creditors, was invalid, *ultra vires*, and did not discharge the respondent from his obligation as a shareholder; that even if the shares had been validly forfeited, he should still be placed on the list of contributories subject to the extent of his liability being determined when an order for payment is applied for.

(1) L. R. 3 H. L. 171.
(2) 1 Ch. App. 161.
(3) 4 Ch. App. 266.
(4) 5 Ch. App. 63.

1898

COMMON v. MCARTHUR.

J. L. Morris Q.C. and *Béique Q.C.* for the respondent. The respondent ceased to be a shareholder when his shares were declared forfeited and taken over by the company. R. S. C. ch. 119, sec. 41.

The question is: Was the respondent liable as a contributor to the assets of the company at the time the winding up order was granted? There is no fraud or collusion complained of here and section 44 of the "Winding-up Act" does not apply to respondent, as he is not and was not a shareholder or member of the company when the company was put into liquidation. Sec. 45 applies only to shareholders who have transferred their shares under circumstances which by law do not free them from liability in respect thereof.

He could only have been held if he had retained his shares. The liquidator recognizes this and simply alleges that he is a shareholder. This being disproved his petition to fix respondent as a contributory, solely upon that ground, was rightly dismissed by the Court of Queen's Bench.

Sec. 41 of the Companies Act gives a right of action only to certain creditors of the company and not to the liquidator, and those creditors must first exhaust their remedies against the company under sec. 55.

The judgment of the court was delivered by:

SEDGEWICK J.—The Dominion Cold Storage Company was incorporated on the 28th of September, 1895, by Letters Patent, issued under the provisions of "The Companies Act" (Revised Statutes of Canada, chapter 119). In January, 1897, the company had become insolvent, and a winding-up order was made against it, the appellant William J. Common being appointed liquidator. On the 14th of June, 1897, he

1898

COMMON
v.
MCARTHUR.

Sedgewick J.

petitioned the Superior Court under the provisions of "The Winding-up Act" to settle the list of contributories, attaching to his petition a schedule in which appeared the names of all the persons whom he sought to hold liable as such contributories. In this list was the name of the present respondent, alleged to be liable in respect to fifty shares, the par value of which was five thousand dollars, and upon which five hundred dollars was credited.

The respondent, McArthur, contested his liability upon several grounds, the substantial ones being: First, that the Letters Patent incorporating the company had been obtained by false representations, and that the company had therefore never become legally organized; and secondly:

> That on the second of October, 1895, the respondent wrote to said company stating that he withdrew his subscription, and requiring it to remove his name entirely from their books, and from that date he supposed his subscription was cancelled and withdrawn; that the formal minute of the said company cancelling his subscription was only entered upon their books on the sixteenth of November last (1896), but it should date back to and have effect from the second of October, 1895.

The first ground was disposed of before the Superior Court, it having been there held, and we think rightly, that it is not within the power of a shareholder, at all events after the winding-up order has been made, to set up defects and illegalities in the organization of a company incorporated under "The Companies Act," and that such a ground only can be taken by direct proceedings at the instance of the Attorney General. So that when the case came before us it was assumed that up to the second of October, 1895, he had been a shareholder of the company and then liable as a contributory for the amount unpaid on his subscribed shares. The only question now before us is whether under the circumstances presented in the evidence he

1898

COMMON
v.
MCARTHUR.

Sedgewick J.

had subsequently been released from that admitted liability.

The facts are undisputed. One Johnston was the principal shareholder and was the managing director of the company from the time of its organization until its collapse. To this gentleman Mr. McArthur, on the second of October, 1895, wrote the following letter:

DEAR MR. JOHNSTON,—Yesterday before I was out of bed I was served with a demand of assignment which was delivered in an uncovered form and caused no little excitement at No. 52. Then before 11 a.m., I had telephones from both "Bradstreets" and Dun & Co., and from Elliott an inquiry about 1 p.m. We were fortunate enough to keep it out of the papers.

When we called on Taylor he had not the money, and I had to give a cheque for $1,250, which prevented me from paying my clerks and travellers their salaries for the first time since I have been in business. In fact, had I not had this in bank for salaries, I don't know what we would have done. On inquiry this a.m., Mr. Gilman replied, "not sufficient funds in bank," and I had to send up our Mr. Brown to get it righted. To-day I was sent for by "Molsons," and after answering quite a lot of questions, I was informed that I must give up indorsing or signing notes for anything outside of the regular wall paper business or they would not have my account. So you see you must relieve me of all responsibility and take me off the "Cold Storage" altogether. I regret this very much, but at the same time cannot help feeling that both you and Mr. Taylor are very much to blame for it. Nothing else can be expected from doing business in such a hap-hazard way.

It is bad enough for yourselves, but to have me injured who has nothing to do with it is too bad. Taylor has the two notes still on hand, which had better be returned.

No reply having been received on the 4th of November he wrote another letter calling attention to the previous one. On the 12th of November he received the following reply:

Your letter of the 4th instant has remained unanswered and acknowledged until this date owing to my absence from the city till this morning. I now hasten to advise that, as a director, your name will not appear after to-day, but as a stockholder it will of necessity have to remain, the allotment having been made.

1898

COMMON
v.
MCARTHUR.

Sedgewick J.

I shall take the opportunity of seeing you before many days, and am glad to learn from Mr. McGregor that your health is improving.

It is in evidence that the company never made any demand upon the respondent for any portion of his unpaid stock. There is no evidence that any call was made upon any of the shareholders. It is certain, however, that no call was ever made upon him. But on the 16th of November, 1896, the directors passed the following resolution:

> Resolved: That whereas Colin McArthur, of Montreal, appears as a shareholder upon the books of the company for fifty shares of the stock of the said company of the par value of five thousand dollars (5,000.00), and whereas the said McArthur has failed and refused, after due notice, to meet the two calls, amounting to thirty per cent made on said stock, and has refused to acknowledge any liability on the same, therefore it was resolved to declare said shares forfeited under the powers provided for by by-law ten of the company, and that said McArthur should be considered to have withdrawn from the said company and to have forfeited all interest in said shares.

A perusal of the evidence leads to the inevitable conclusion that this resolution was passed at the instance of Johnston, not for the purpose of enabling the company to realize upon the stock as forfeited stock, but solely to release McArthur from his liability as a shareholder of the company in accordance with his written request made the year previously. The resolution was passed at a time when the company was hopelessly insolvent to the knowledge of the directors, and its only object could have been as I have stated. In the pleadings the respondent did not rely upon this resolution as a forfeiture of his shares but rather as an acceptance by the company of his surrender of them. He did not in his pleadings set out his non-liability by reason of the directors having declared them forfeited.

But in the present case it is immaterial whether the transaction in question be considered as a surrender or

1898

COMMON v. MCARTHUR.

Sedgewick J.

a forfeiture, inasmuch as neither the one nor the other would have the effect of releasing him from his liability. It is elementary law that a shareholder cannot, without statutory authority, surrender his shares to a company and thereby get rid of his liability as a shareholder. It is *ultra vires* of a company to so traffic in its own stock, unless its instrument of incorporation gives it the power, and it is not pretended that any such power existed here.

The only question is as to the effect of the alleged forfeiture. It is I think quite clear that there was in fact no forfeiture in the present case. The resolution was a collusive one, passed, not for the benefit of the company or its creditors, not for the purpose of enabling the directors to realise upon the forfeited stock, but for the purpose of conferring a benefit upon their friend McArthur. It was in fact the same as if the directors had taken from the treasury of the company the four thousand five hundred dollars due and had made a present of it to him.

The power of forfeiture given by the statute to the directors is given, not to be exercised for the benefit of the shareholders, but for the benefit of the company and its creditors. If a resolution like the one here had the effect of releasing McArthur from liability, similar resolutions might have been passed releasing all the other shareholders from liability, thereby destroying the capital of the company and absolutely defeating the claims of creditors. To contend for the legality of transactions that might lead to such consequences is in my view absurd.

Reference need only be made to the leading case of *Spackman* v. *Evans* (1) where it was held in effect that the power of forfeiture for non-payment of calls is a power that is intended to be exercised only when the

(1) L. R. 3 H. L. 171.

1898

COMMON v. MCARTHUR.

Sedgewick J.

circumstances of the shareholder render its exercise expedient in the interests of the company. It is not a power to be exercised for the benefit of the shareholder. The duty of the directors when a call is made is to compel every shareholder to pay to the company the amount due from him in respect of that call, and it is only when payment cannot be obtained that the power of forfeiture is to be resorted to. The power must be exercised *bonâ fide* for the good of the company, not to relieve a shareholder from liability.

Upon the authority of this case, we think that Mr. McArthur never ceased to be a shareholder of the company, and therefore, that he was properly placed upon the list of contributories.

If this view be correct we are not now called upon to express any opinion as to the liability of a person whose shares have been legally forfeited to be placed upon the list of contributories in respect of those shares.

How a person contingently liable to contribute to the debts of a company under winding-up proceedings is to be dealt with in the settling of the list of contributories is a question which, so far as this court is concerned, remains open.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *J. S. Buchan.*

Solicitors for the respondent: *Morris & Holt.*

THE COLLINS BAY RAFTING AND FORWARDING CO. (DEFENDANT).. } APPELLANT;

AND

JOHN C. KAINE (PLAINTIFF)... .....RESPONDENT.

1898

*Oct. 12.

*Dec. 14.

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

Lease—Negligence—Hire of tug—Conditions—Repairs—Compensation—Presumption of fault—Evidence—Measure of damages.

The company chartered the tug "Beaver" from K., by written contract dated at Quebec, 22nd May, 1895, by which it was agreed that K. should charter the tug "Beaver" for not less than one month from date, at forty-five dollars per day of twenty-four hours. If kept longer than one month the rate to be forty dollars per day. K. to furnish tug, crew, provisions, oil, etc., and everything necessary except coal and pilots above Montreal. The tug to leave next morning's tide, and to be discharged in Quebec.

The company took possession of the tug, put her in charge of their pilot (who assumed the control, employment and navigation of the vessel), and used the tug for their purposes until 8th July, 1895, when, while still in their possession, the pilot took her, in the day time, into waters at the foot of the Cornwall Rapids, in the River St. Lawrence, where she struck against some submerged hard substance and sunk. She was raised a few days afterwards, towed to port and placed in dock for repairs at Montreal. The orders were to make the necessary repairs, to put the vessel in the same condition as she was immediately before the accident, and on 30th July, K. was notified that the repairs were completed, that the tug would be put out of dock the following day and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, that she was not in as good condition as when leased and requested the company to join in a survey, which, however, they declined to do. The survey was made by a naval architect who reported that, in addition to the repairs already made, it would cost $2,494.90 to restore the

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

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

vessel to the same condition as when leased to the company. On 1st August, K. took possession of the tug under protest and brought the action for the amount of this estimate in addition to the rent accrued with fees for survey and protest. The company admitted the rent due and tendered that portion of the claim into court. The Superior Court rendered judgment for the amount of the tender, dismissing the action as to the remainder of the claim on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The Courts of Review and the Queen's Bench increased the verdict to the full sum claimed, $4,909.90, by adding the amount of the surveyor's estimate and the fees. On appeal to the Supreme Court of Canada:

Held, Sedgewick and Girouard JJ. dissenting, that the contract between the parties was a contract of lease; that the taking of the vessel, in the day-time, into the waters where she struck was *primâ facie* evidence of negligence on the part of the company, and that as the company did not adduce evidence sufficient to rebut the presumption of fault existing against them they were responsible under the Civil Code of Lower Canada for the damages caused to the vessel during the time she was controlled and used by them.

Held, further, that the proper estimate of damages under the circumstances is the cost of the repairs which should be assumed to be the measure of depreciation in value occasioned by the accident, and that no substantial error arose from regarding the condition and value of the vessel at the commencement of the lease as that in which she ought to have been discharged.

Girouard J. was of opinion that the Superior Court judgment should be restored.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), affirming the decision of the Superior Court, sitting in Review, at Quebec, by which the judgment of the Superior Court, District of Quebec, at the trial, had been reversed with costs.

The appellant being engaged in the business of rafting timber and conveying it to Quebec, hired the steam tug "Beaver" from the respondent, the agree-

ment between the parties being embodied in the following memorandum:

QUEBEC, CAN., MAY 22nd, 1895.

"It is agreed between the undersigned, that Mr. "John C. Kaine charters the tug 'Beaver' to the "Collins Bay Rafting and Forwarding Company for "not less than one month from date at the rate of forty-"five dollars ($45) per day of twenty-four hours."

"Should the tug be kept longer than one month, "the rate per day for the balance of the period to be "forty dollars ($40)."

"John C. Kaine to furnish the tug, crew, provisions, "oil, &c., and everything necessary to run the boat, "except the coal and the pilots required above Mont-"real. The tug to leave here to-morrow morning's "tide and to be discharged here on expiration of "agreement.

"Signed on the day written above."

"JOHN C. KAINE,"

"N. FLOOD,

"Agent for Collins Bay Rafting Co."

The company took possession of the tug, put her in charge of their pilot, who assumed the control, employment and navigation of the vessel, and used her for its purposes until 8th July, 1895, when, while still in its possession, the pilot took her in the day-time into waters at the foot of the Cornwall Rapids, in the River St. Lawrence, where she struck against some submerged hard substance and sunk. She was raised a few days afterwards, towed to port and placed in dock for repairs at Montreal. The orders given by the company were to make the necessary repairs to put the vessel in the same condition as she was before the accident, and on

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

30th July, K. was notified that the repairs were completed, that the tug would be put out of dock the following day and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, that she was not in as good condition as when leased and requested the company to join in a survey, which however was declined. The survey was made by a naval architect who reported that, in addition to the repairs already made, it would cost $2,494.90 to restore the vessel to the same condition as when leased to the company. On 1st August, K. took possession of the tug under protest and brought the action for the amount of this estimate in addition to the rent accrued with fees for survey and protest. The company admitted the rent due and tendered that portion of the claim into court.

The Superior Court at the trial rendered judgment for the amount of the tender, dismissing the action as to the remainer of the claim on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The Court of Review increased the verdict to the full sum claimed, $4,909.90, by adding the amount of the surveyor's estimate and the fees. On appeal, this latter judgment was confirmed by the Court of Queen's Bench.

The appellant asked to have the judgment appealed from reversed, and that the judgment by the Superior Court at the trial should be restored.

Fitzpatrick Q.C. (Solicitor General for Canada), and *Walkem Q.C.* for the appellant. This was not a demise but an agreement to give the vessel's services for one month in the first place and thereafter from day to day at a certain rate per day, the possession and management of the vessel remaining with the respondent. The pilot to be part of the crew and the

servant of the respondent, the appellants paying for his services as well as for the coal. *Thompson* v. *Fowler* (1); *The Manchester Trust* v. *Furness* (2); *The "Beeswing"* (3); Abbott on Shipping, pp. 61-69. Respondent had a right to choose his own pilot if he wished to do so. The captain had supreme command and the pilot was under his jurisdiction. Abbott on Shipping, pp. 191-192.

Kaine agreed to furnish the tug, crew, provisions, &c., as the consideration of the payment to be made to him, and when the vessel sank he ceased to fulfil this agreement and cannot claim compensation after that time. The clause providing that the vessel should be discharged in Quebec, on the expiration of the agreement, does not mean an undertaking or warranty to deliver the vessel but rather to pay for her services until she was sent back to Quebec. Thus, the charterer would have to pay for the time the vessel would reasonably take to reach Quebec, after cessation of employment. When the vessel sank the charterers were under no obligation to raise her, and for doing so and bringing her to the dock in Montreal after notice of their intention to do so, they would be entitled to salvage under the admiralty law.

The provisions of the Code, art. 1627, are not applicable. If there was no negligence on the part of the appellants, there would be no responsibility on their part in this action except for the charter money. In the lease of a vessel the risks are incidental to ownership and user, the modes of user being by leasing or chartering. The accident was one of the ordinary incidents of the navigation in which the vessel was employed, one of peculiar risk and danger to the know-

(1) 23 O. R. 644. (2) 73 L. T. 110.
(3) 5 Asp. M. C. N. S. 484.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

ledge of the respondent. There was no evidence of negligence on the part of the pilot who was a competent, careful man, knew the river well and had been engaged in the business for many years. At the place of the accident there were thirty or forty feet of water.

The unfortunate result of the accident was due to the unseaworthy condition of the boat; the stern post was rotten, the heads of the spikes corroded, the planks at the stern loose. A vessel in our waters, particularly in the lakes and rivers, is expected to be able to stand concussion with the bottom. It is an every day experience that vessels touch in the rapids or in the river and any vessel in a seaworthy condition should have stood the shock without injury. See Abbott on Shipping, (13 ed.), pp. 384-385. The plaintiff should not recover damages sustained in consequence of unseaworthiness. The claim was covered by the amount paid into court, and the Superior Court found that the appellant had done all repairs necessary to put the tug in the same condition as she was before the accident.

The result of the judgments of the Court of Review and Appeal is to compel the restoration of the vessel to the condition in which she was when she left dock in Quebec in May, 1895, and the accident happened in July, up to which time the boat was constantly in use. No allowance is made for wear and tear during that period. Yet the judgment appealed from compels the appellant to renew the boat.

The respondent offered no evidence on which a correct estimate of the damages could be based, and the conduct of the respondent shows that he was satisfied with the repairs being done. The instructions were "to examine the boat carefully and make

her as good as before the accident," and these directions were fulfilled. These instructions must have been known to the respondent and his captain who were both about when the repairs were being made. After the repairs were made the respondent used the vessel in his business both above and below Quebec, and up to the time of the trial of the action no further repairs had been made upon her.

The appellant's conduct in dealing with the vessel should not prejudice the defence nor operate as an admission of liability. The company acted reasonably and prudently and for the benefit of all parties. If not at fault it would be entitled to salvage for raising the vessel, and, as wrecking is part of the company's business, raising the vessel and bringing her to Montreal was a safe adventure. It certainly would not have been wise to leave the boat at the bottom of the river at the foot of the rapids while the parties were fighting out a dispute as to liability for the accident. The repairs were necessary to float the vessel. Everything was done after a repudiation of liability and a termination by the defendant of the contract and was so done without prejudice.

We also refer to *Kopitoff* v. *Wilson* (1); *Steele* v. *State Line Steamship Co.* (2); and *Murphy* v. *Labbé* (3).

Languedoc Q.C. and *Stuart Q.C.* for the respondent. The evidence shows a complete demise, and that the appellant's pilot was actually in full charge as master of the tug at the time of the accident, also that he took her into shallow waters and had no chart aboard; Maclaughlan on Shipping (4 ed.) p. 283; *Baumwoll Manufactur von Carl Scheibler* v. *Furness* (4); arts

(1) 1 Q. B. D. 377.
(2) 3 App. Cas. 72.
(3) Q. R. 5 Q. B. 88; 27 Can. S. C. R. 126.
(4) [1893] A. C. 8.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

1601, 1627 and 2413 C. C.; *Christie* v. *Lewis* (1); *The Neptune the Second* (2); *The Eden* (3); consequently the appellant is responsible for the damages claimed, and responsible for injuries which happened during the lease, unless it is proved that the lessee is without fault; *Nugent* v. *Smith* (4), per James L.J. at page 444; Pothier, Louage, nos. 192, 183, 197, 199 and 200. There is no pretence here of a *vis major* or fortuitous event or of perils of the sea; Story on Bailments, no. 515*a*.

The offers of settlement by respondent are admissions of liability; *The V. Hudon Cotton Co.* v. *Canada Shipping Co.* (5); *The Picton* (6); *Nordheimer* v. *Alexander* (7).

The question of negligence decided by the trial judge, two judges of the Court of Review and unanimously by the Court of Queen's Bench, should not be disturbed by this court.

As the damages arise from tort the respondent is entitled to the full amount resulting from the accident. Marsden on Collisions, p. 110. The Beaver must have been very seriously damaged by straining and "hogging" for according to the pilot's evidence, he ran her ashore twice; the first time there were 5 feet of water forward and 13 feet aft, and the second time she had 6 feet forward and 9½ feet aft, which must of course have strained the vessel very much. The straining is established by the evidence; see *The Clarence* (8). The sufferer is entitled to *restitutio in integrum*. There is no difference between the admiralty and common law rules as to what damages are

(1) 2 Brod. & B. 410; 5 Moore C. P. 211.
(2) 1 Dod. 467.
(3) 2 Wm. Rob. 442.
(4) 1 C. P. D. 423.
(5) 13 Can. S. C. R. 401.
(6) 4 Can. S. C. R. 648.
(7) 19 Can. S. C. R. 248.
(8) 3 Wm. Rob. 283.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

recoverable. See foot note Parsons Maritime Law, vol. 2, p. 215, and *Giles* v. *Eagle Ins. Co.* (1). It is a principle of Maritime Law that the wrong doer cannot claim salvage for services rendered to the ship, etc. Marsden, Collisions, p. 46. In any case the contract was to deliver the vessel at Quebec and respondent should have tendered a sufficient sum to cover the expenses of bringing her to Quebec, as well as the charter money for the time occupied in doing so, which was never offered.

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

KING J.—As to whether or not there was a demise of the vessel, the question in such cases is not one of title but of control. Has the owner parted during the period of the charter party with the entire possession and control? *Baumvoll Manufactur von Scheibler* v. *Gilchrest & Co.* (2); *Steel* v. *Lester* (3).

The evidence of the master shows that the charterer controlled the employment and navigation of the vessel. "Macdonald, (the charterer's pilot) said 'Go here, go there,' and I took his orders * * I did nothing without he gave me his orders."

In this state of things the charterer is under the Code responsible for injuries and loss which happen to the demised vessel during his enjoyment of it unless he proves that he is without fault.

Apart from the provision of the Code, the fact that Macdonald personally directed the movements of the vessel, and took her in the day time into waters where she struck against a hard substance, is *primâ facie* evidence of negligence. The theory that she may

(1) 2 Met. 140.

(2) [1892] 1 Q. B. 253; [1893.] A. C. 8.

(3) 3 C. P. D. 121.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

King J.

have struck upon a floating log sunken at one end is wholly conjectural and has not been accepted by any of the courts below.

Then as to the amount of damages. The Superior Court held that this had been fully satisfied by the repairs made by the charterers, but the Courts of Review and Queen's Bench deemed that a further sum of $2,494 was needed to indemnify the plaintiff.

The charterers having undertaken to restore the vessel to the condition she was in just prior to the accident, the cost of repairs of damage occasioned by the accident is assumed by both parties to be the measure of depreciation in value.

The rule in the admiralty courts is that the owner of a vessel wrongfully injured by collision is entitled to have the damage occasioned by the wrongful act fully and completely repaired without deduction on account of the substitution of new for old material.

It is unfortunate that the appellants wholly ignored the request of the owner for a joint examination on the completion of the charterer's repairs in Cantin's dock. The report and conclusions of Auger, the person nominated by the owner, show clearly that the repairs made by the charterer in Cantin's dock were but partial. This is confirmed by Cantin's evidence who says that his orders did not require him to make full repairs.

But there is further a striking confirmation of Auger's report as to the condition of the vessel contained in the testimony of Mr. Leslie, the charterer's manager under whom the repairs at Cantin's were made.

Q. Will you look at it (Auger's report) now and go over it and make any remarks you think necessary, and say if you agree with that or not. (Witness takes communication of the paper.) Do you agree with the statements in the report?

A. I deny that the state of things described in Mr. Auger's report was occasioned by the accident. He refers to the butts being opened and filled with pine. That certainly could not have been occasioned by the accident.

Q. Do you deny the statements in the report itself?

A. No. What I deny is that this state of things described in the report was occasioned by the accident.

It is therefore to be taken as proved that the physical appearance and condition of the vessel after the repairs put on her by the charterer were as described by Auger in his report.

Then the question is: Was the damaged condition of the vessel occasioned by the accident? If it was not, or to the extent to which it was not, the wrongdoer is not under obligation to pay for or make good such damage. This is very clear.

Mr. Leslie in denying that the vessel's condition was the result of the accident specifies but one particular, viz., the butts filled with pieces of pine. Now it is obvious that the accident could not have the effect of filling butts with pieces of pine, and it is not to be supposed that Auger intended to say otherwise.

Following the usual form of such reports, the first part of it gives the physical appearance of the vessel, and then follow the proposed repairs and estimates of cost.

That the paragraph of the report dealing with the vessel's appearance is not a catalogue of things to be remedied is manifest from the fact that it notes, among other things, the new work done by the charterer on the vessel at Cantin's. In the same way reference is made to the butts filled with white pine, as a fact of appearance in connection with the straiks of planking sprung in on both sides of the keel.

In the recommendations for repairs there is nothing to show that the planks filled with pine at the butts are to be dealt with in any way in consequence of

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

King J.

their being so filled, certainly nothing in terms, and nothing impliedly except so far as repairs of the damage indicated by the springing of the planking would incidentally remedy the other at the same time.

There is therefore nothing in what is adduced by Mr. Leslie to show that Auger's estimate of cost covered damage not occasioned by the accident.

Auger's testimony stands as that of a man of proved experience and capacity who has been credited by the Courts of Review and Queen's Bench as a trustworthy witness. In these circumstances the appeal should be dismissed. The amount of ordinary wear and tear in the few weeks elapsing between the beginning of the charter and the date of the accident would be so trifling that no substantial error arose from regarding the condition and value of the vessel at the earlier instead of the later period.

For these reasons the appeal should be dismissed and with costs.

SEDGEWICK J. dissented.

GIROUARD J. (dissenting.) The respondent chartered the tug "Beaver" to the appellants by a written contract in the following words:

QUEBEC, May 22, 1895.

It is agreed between the undersigned that Mr. Kaine charters the tug *Beaver* for not less than one month from date, at forty-five dollars ($45) per day of twenty-four hours. If kept longer than a month the rate to be forty dollars per day.

Mr. Kaine to furnish tug, crew, provisions, oil, etc., and everything necessary except coal and pilots above Montreal. The tug to leave here tomorrow morning's tide, the tug to be discharged in Quebec.

J. C. KAINE,
N. FLOOD,
Agent for Collins Bay Rafting Co.

The appellants took possession of the tug in due time, and at the place indicated, and put her under

the charge of their pilot, Capt. Macdonald, and used the same until the 8th of July, 1895, when, in their possession, she was sunk in the St. Lawrence River, at the foot of the Cornwall Rapids.

On or about the 13th of July, 1895, the appellants, having raised the said tug, towed her down to the port of Montreal and placed her in Cantin's dock for repairs. These were made and completed on the 1st August, and paid for by the company to the amount of $664.89, exclusive of the expenses of raising the boat and transportation to Cantin's dock, amounting to the further sum of $1,201.69.

On the 30th July, 1895, the respondent was notified that the repairs were completed, and that the tug would be put out of dock the following day, and was requested to receive the same in Montreal.

The respondent answered that the boat was to be discharged in Quebec, and moreover that she was not in as good condition as when leased, and requested the appellants to be present at a survey to be held in Cantin's dock, at 11 o'clock of the 1st August, in which survey the appellants declined to take part.

The survey was made by one Auger, ship carpenter and naval architect of Quebec, who reported that the cost of repairing the tug, in addition to the repairs already made by Cantin, would amount to the sum of $2494.90. The survey was made on the 1st of August, but was written out and signed a day or two later on, and reads as follows:

MONTREAL, Cantin's Dry Dock, 11 a.m.

On examination I found the lower piece of stem made new. Stern post, after end keel, two after garboards and the plank above made new. The keel bruised at several places, sixty-five feet from stern post and six feet from keel five straiks of planking sprung in on both sides. The open butts of planking filled with white pine. The knee on the starboard forward wheel beam started. The stringer between wheel beam on that side broken, has been strengthened by a piece of

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

oak. The butts of the main deck open at covering board, windlass, butts, mooring butts and hatch coaming. The main deck joiner work started and moved forward. The pilot house, the cover of steam drum, casing of engine frame, two posts and mast started. The main keelson broken at cylinder. The butts of clamps and ceiling open. Beams and knees at wake of boiler started. The rods of two posts made to fit by seven-eighth washers. The after end of hull twisted to starboard. The boat was sighted and found to have sagged when afloat about eight inches from half-past three to five o'clock.

I recommend the boat to be placed on dry dock. The main broken piece of keelson replaced, the balance of the centre line to be fastened with seven-eighth iron, one bolt in each frame clinched on rings. The boiler to be lifted and replaced, all her connections made good. Two keelsons of elm about 110 feet, 11 x 12, to be fitted on both sides secured with one bolt of seven-eighth in each frame clinched on rings. The scarfs to be six feet bolted with seven bolts of three-fourth iron. Two elm straiks of arches to be bent on both sides about 110 feet, 5 x 10, secured with three-fourth iron bolts in each timber. Seven straiks of planking with two sheer straiks to be fastened with five-eighth screw bolts one in each frame. The started beams and hanging knees to be secured. Deck to be respiked and caulked, joiner work to be secured and renailed.

I recommend the above repairs to be done to put her in the same condition as when the boat came out from floating dock in the month of April, 1895.

I estimate the materials and labour for those repairs to cost two thousand four hundred and ninety-four dollars and ninety cents ($2,494.90).

ELZÉAR AUGER,
Naval Architect.

On the 1st of August the respondent took possession of the boat in Montreal under protest, and by an action taken on the 31st August, 1895, claims this amount in addition to the rents accrued to the day of delivery of the boat, and $30 for the surveyor and notary's fees, altogether $4,909.90.

The appellants pleaded that the contract was not one of lease and that, even if it was, the accident was not the result of any fault on their part, but was purely accidental and caused by the dangers of navigation and the unseaworthy condition of the boat.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

They, however, tendered and deposited in court all the rents due to the 4th August, namely, $2,385, covering the whole time required to reach Quebec, reserving their recourse for the recovery of the salvage and the repairs at Cantin's dock, a reservation which was not made when the first offer was made through Flood.

The Superior Court (Caron J.) maintained this tender with costs of contestation, and the appellants were condemned to pay $2,385, with interest from the date of service of process and costs of suit incurred down to the filing of the plea.

Considérant qu'il parait par la preuve de la Défenderesse a fait toutes les réparations nécesaires pour remettre le dit remarqueur tel qu'il était avant l'accident, ce qui lui a coûté six cent soixante-quatre piastres et quatre-vingt-neuf cents et qu'elle l'a râmené à Montréal à ses frais, etc.

In Review this judgment was modified, and the appellants were condemned to pay also the amount of the survey, $2,494.90, and the fees of the surveyor and costs of notarial protest, $30, altogether $4,909.90, Mr. Justice Routhier dissenting:

Considering that in this respect the said judgment errs inasmuch as it is satisfactorily proved by the survey and the testimony of the surveyor (Auger) that it will require a further expenditure of two thousand four hundred and ninety-four dollars and ninety cents to restore the said tug;

Considering the defendants were duly notified to be present at the said survey, but absented themselves, and have adduced no evidence whatever to contradict its conclusions or put in question its accuracy.

In appeal this judgment was unanimously confirmed.

None of the courts pronounced upon the plea of unseaworthiness; but the three courts held that the contract was one of lease and that the appellants were liable for the damage to the tug under art. 1627 of the Civil Code, unless they proved they were not in fault, and we agree in this proposition of law.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

The point at issue is as to the liability of the appellants for the amount of the survey made by Auger, namely, $2,494.90. Is it proved that it was necessary to place the vessel in the condition she was before the accident? Was she seaworthy?

The case was heard before the Superior Court at enquête and merits. We have no notes of Mr. Justice Caron, but in his text judgment he has entirely ignored the survey and testimony of the surveyor in its support.

The trial judge was sitting as a jury, and unless manifestly wrong it seems to me that a Court of Appeal, whether sitting in review or elsewhere, which did not see the witnesses, should not disturb his findings of facts. *Sénésac* v. *Central Vermont Railway Co.* (1); *Cossette* v. *Dun* (2); *Gingras* v. *Désilets* (3); *Levi* v. *Reed* (4). I find in the evidence ample proof that they were right.

I have given this case a good deal of time. I knew that upon a question of fact, the findings of two courts go very far before this court. I therefore did my best to reconcile myself to the judgment appealed from, and must confess that I cannot do so.

I believe that too much importance has been attached to the survey of Auger. The courts below took the view that his evidence is not contradicted. But is it conclusive? That is the least we should expect in a csse like this, where he proceeded by default, accompanied only by the respondent and his employees. True he certifies, in his unsworn report, that the repairs he recommended to be made were necessary to put the boat in the same condition as when she came out in April, 1895, from Russell floating dock, which was under his superintendence. But when in the

(1) 26 Can. S. C. R. 641.
(2) 18 Can. S. C. R. 222.
(3) Cass. Dig. 2 ed. 213.
(4) 6 Can. S. C. R. 482.

witness box, he is forced to admit that he made no examination of the boat in the Russell dock, or elsewhere, before he made the survey:

Q. Avez-vous vu les morceaux qui ont été enlevés? R.—Non, monsieur, parce que je n'ai pas fait un examen dans le dock, quand il était dans notre dock. On a rien que chevillé. Je n'avais pas ordre de faire ça non plus.

Finally, he swears that the boat, as repaired by Cantin, was not fit for towing below Quebec:

Q. A moins d'y faire des réparations que vous avez recommandées dans votre rapport? R.—Non.

The truth is that during the fall of 1895 the tug made several trips in the Gulf, as far as Father Point, and was used, without any repairs whatever, in the towing business the whole of the following navigation season, till the 7th November, 1896, when the trial took place. We do not know what has happened since.

It seems to me that what Auger meant was to report not what was necessary to repair the damage caused by the accident, but what was necessary to put her in good condition, and he says so in express terms:

Q. Vous avez recommandé dans ce survey là ce qu'il fallait pour mettre ce vaisseau là en bon était? R.—Oui.

Q. Entièrement en bon état de réparation? R.—Oui.

It is true that in answer to a leading question immediately following:

Voulez-vous dire, pour le mettre dans le même état qu'il était avant qu'il montè à Montréal et lorsqu'il est sorti de votre *dock* à la fin de mai?

He immediately answers "Oui, à peu près."

What is the value of this answer, in face of his statement that he did not examine the boat when in Russell's dock?

The same intelligence results from the testimony of Leslie, who although not in a position to deny that the

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

repairs recommended by Auger were not necessary, swears that they were not occasioned by the accident. He says:

I deny that the state of things described in Mr. Auger's report—plaintiff's exhibit "C"—was occasioned by the accident. He refers to the butts being opened and filled with pine. That certainly could not have been occasioned by the accident.

Q. Do you deny the statements in the report itself?

A. No; what I deny is that this state of things described in the report was occasioned by the accident.

It must be borne in mind that the appellants were not bound to build a new boat. In collision cases, it has been held that the wrongdoer is not expected to replace decayed timbers which had to be renewed to make the injured vessel seaworthy, this damage being caused not by the accident, but by the old age of the vessel, and this rule was enforced even when it is proved that the decayed parts, if undisturbed, would have lasted for some years. *The Princess* (1).

The "Beaver" was first built in 1858 for service in the construction of the Victoria Bridge. She was rebuilt in 1873, and re-registered that year under the same name but, as stated in the certificate of registry, with the old engine. She was again rebuilt in 1884, and this time new boilers were put in. Respondent swears that he spent $5,000 or $6,000 in this reconstruction, but if his memory is as reliable as when he speaks of the repairs at Russell's dock as amounting to $400 or $500, whereas in fact they came to only $298, we must accept the figures of the respondent as exaggerated, and suppose that $3,000 or $4,000 were likely the correct ones. Whether they were or not, the respondent admits that the hull built in 1873 was of no value in 1884, and had to be renewed. The accident at the foot of the Cornwall Rapids happened just eleven years after the hull was rebuilt in 1884.

(1) 5 Asp. M. C. N. S. 451.

No repairs had been made to the boat from that year to the spring of 1895, except small repairs, "not very large," remarks the respondent in his evidence, "just enough to keep her up." And the repairs in the spring of 1895 came only to $298, including $80 for docking charges. And in face of this indisputable fact, the respondent wishes us to believe that, after this third period of her existence, the hull of the boat was in good condition. The evidence shows that the vessel was a rotten one, unseaworthy, that is, unfit for the service for which she was chartered. The evidence adduced is conclusive that the tug was rotten in her stern, which struck the rock or log, and it may reasonably be inferred that the rest of her hull, considering her age, was in the same decayed condition; but whether it was so or not, we have the clearest proof that in her stern at least she was unseaworthy, and to my mind, it matters very little whether in this respect the appellants repaired the damage or not; the fact remains undisputed that she was unseaworthy, that is, not staunch, to use the expression of art. 2423 of our Code. The fact that they did not insist upon their right in so far as the repairs to the stern of the boat were concerned, does not take it away with regard to the remaining portions of the vessel. Consequently the appellants are not responsible for the damage, unless they exposed the vessel to extraordinary perils.

The learned Chief Justice of the Superior Court (Sir L. N. Casault), says that Capt. Macdonald directed the vessel to a dangerous spot of the river, but this is stated by only one witness, one Bergeron, the engineer of the "Beaver," who is not only contradicted by Macdonald, but is only reporting what the wheelman, Méthot, told him, although not examined.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

Under article 1612 of the Civil Code, the lessor is obliged to maintain the thing leased in a fit condition for the use for which it has been leased; the thing must be delivered in good state of repair in all respects, art. 1613; the lessor is even obliged to warrant the lessee against all defects and faults in the thing leased, which prevent or diminish its use, whether known to the lessor or not. Art. 1614. If the thing leased be a vessel, art. 2423 provides that the lessor is obliged to provide a vessel *tight and staunch*, and to keep her in that condition till the end of the service. Art. 2413 provides that a lease or contract of affreightment of a vessel and the obligation of the parties under the same, is subject to the rules relating to carriers contained in the title of *lease and hire*, when these are not inconsistent; and art. 1675, respecting carriers, says they are liable for the loss or damage of things entrusted to them unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself.

Seaworthiness implies that the hull is not only tight but sound, staunch and strong, that is sufficiently strong to stand the ordinary risks of her undertaking. *Eden* v. *Parkinson* (1); *Mills* v. *Roebuck* and *Lee* v. *Beach*, reported in Park on Insurance, (7 ed.), p. 335. *Parker* v. *Potts* (2); *Watt* v. *Morris* (3); *Foster* v. *Steele* (4); *Knill* v. *Hooper* (5); *Douglas* v. *Scougall* (6); see also decisions collected in 7 Am. & Eng. Ency. of Law (2 ed.) pages 211 and following; Valin Ord. de la Marine, 1681, liv. 3, tit. 3, art. 12. Pothier "Charte-Partie," n. 30, 68. In *Douglas* v. *Scougall* (6), a certificate of seaworthiness had been issued by a ship

(1) 2 Dougl. 732.
(2) 3 Dow 23.
(3) 1 Dow 32.
(4) 5 Scott 25; 3 Bing. N.C. 892.
(5) 2 H. & N. 277.
(6) 4 Dow 269.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

carpenter who had repaired the ship immediately before the voyage began, but without making any thorough inspection. The ship sailed, and at the outset appeared to have been for two or three days in a violent storm. In the protest, the master stated that the sea sprung the boltsprit and wrought the stem entirely loose, at the same time washed the boats out of the chocks, the ship making three feet of water per hour, and in consequence the master had to look for a place of refuge. In an action by the owners to recover from the insurers £1,420, cost of repairing the ship, it was proved she was an old boat and materially decayed. The action was maintained by the trial judge, but on appeal to the House of Lords this judgment was reversed. Lord Eldon said:

> The ship sails, and appears to have been for two or three days in a violent storm. If so damaged as that the damage might be fairly considered as the effect of the storm, that is one view of the case. But if damaged in such a manner as in common probability she would not be, if she had been sea-worthy when she sailed on the voyage, the implied warranty is not observed.
>
> On the ship coming into port she was surveyed by Scott and Steele and, whatever Scott might say in 1812, it is clear that he and Steele, applying particular assertions to particular facts, upon this survey, stated that part of the timbers were *decayed*, and that the iron work, in general, was very *much decayed* and wrought loose * *
>
> Having considered the whole of this evidence I never was more clear about anything than that it is proved to be perfectly manifest, and proved to my entire satisfaction, that this vessel was not sea-worthy for the voyage when she sailed, whatever might then have been the opinion of the owners and carpenters who repaired her.

Seaworthiness is not a fixed inflexible quantity; it is a question of fact which must be decided according to the circumstances of each case; the degree required has a relation to the length and hazardousness of the employment. *Dixon* v. *Sadler* (1). The appellants had reason to suppose that the boat was at least sound

(1) 5 M. & W. 405.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

and capable of touching bottom without going to pieces, a very common occurrence in river and canal navigation, especially in the navigation of a tug engaged in the towing of rafts between the rapids of the St. Lawrence river.

The repairs done at Cantin's and the examination which preceded the same, disclose the fact that the boat was in a rotten condition. The very assertion made by Auger that a further expenditure of $2494.90 was required to put the hull in as good condition as before (for the boilers and machinery were not injured), shows that a rebuilding was needed as was done in 1873 and 1884.

While collecting some dispersed portions of a raft at the foot of the Cornwall rapids, her stern struck a submerged log or a rock, it matters very little which under the pleadings, and she was shortly after beached on an even bottom of the river, without apparently receiving any further injury. Immediately Captain Fournier wrote to the respondent:

> When we struck that rock we were going to try to haul off drams on a shoal called the Crabs. In starting from a little bay on the south side of the river we struck a big rock near the stern post, they say that there never was any rocks there before; the stern post is split and a little piece of the rudder broke, and all the butts from her seven feet mark down to the keel are open from her stern post four inches, and three seams open about fifteen feet long and an inch wide and forehead the stem is about two inches open from the planking, and nearly all the butts from the wheel to the stern are open from the wheels to the stem. She bends five feet.

The boat was raised and towed down to Cantin's dock in Montreal, where she was examined by many experts, but by no one on behalf of respondent. Then was, however, the proper time for a survey. Instructions were given to put her afloat, and in a good condition to go about her usual work. This was done without any complaint on the part of the respondent,

or his captain, who watched the repairs and suggested some of them.

Cantin says:

Q. Did you examine the vessel pretty thoroughly?—A. No. I did not. I examined the stern where the work was done.

Q. What was the condition of the wood work at the stern? I mean independently of the accident?—A. It was pretty ripe.

Q. Well, I suppose ripe means rotten?—A. Yes.

Q. What did you find to be in that ripe condition you speak of?—A. The upper part of the stern post and the apron particularly were defective. We took them out and replaced them with new. They were rotten.

Q. Not in such a condition as they should have been had the vessel been sea-worthy?—A. The vessel if she had not touched anything would have got along all right.

Q. If she did touch something?—A. She would not resist it quite as well.

Q. How did you find the planking in the stern of the vessel?—A. They came off pretty easily.

Q. What did that indicate?—A. It would indicate, of course, that they had been started by this accident.

Q. How did you find the bolting or spiking at the stern of the vessel?—A. Some of them were somewhat corroded by, evidently, the salt water.

Q. What had corroded upon them?—A. Underneath the part between the plank and the frame—the inside.

Q. What was the result of the corrosion so far as holding the vessel together was concerned?—A. The vessel could have got along if she had not touched the bottom.

Q. That then was the condition of the vessel at the point where the accident occurred?—A. The principal part.

Trudeau, Cantin's foreman:

Q. Avez-vous vu dans quel état était le bois du bâtiment, le corps du bâtiment, dans quel état était-il? était-il pourri?—R. Bien, pour le sûr qu'il était pourri, vous savez bien ce qui était défoncé, était pourri. Le bordé qui était pourri, il fallait calfeutrer, et lorsque ça ne calfeutrait pas.....

Q. C'était tellement pourri qu'on ne pouvait pas calfeutrer?—R. Des places. Pas tout.

Q. Est-ce qu'il y en avait pas mal comme ca?—R. Pas bien bien, mais jusqu'en haut des échoirs.

Q. Jusqu'en haut de la ligne d'eau?—R. Oui, Monsieur.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

Q. C'etait tout pourri, n'est-ce pas?—R. Pardonnez, pas tout, il ne faut pas mettre tout, un morceau d'un bord, un morceau de l'autre.

Captain Macdonald:

Q. Did you see her put in Cantin's dock?—A. Yes.

Q. Did you examine her after she was put in?—Yes.

Q. First, as to the stern what did you find its condition to be?—A. I found her stern post knocked to one side.

Q. Which side?—A. Knocked over to the port side.

Q. And anything more?—A. There was a plank loose on the bottom; the carpenters went to pry the plank off and it came off quite easily; it almost fell alone.

Q. What was the condition of the other planks at the stern?—A. The timber was rotten, nothing to hold them.

Q. Which timbers do you refer to?—A. The frame where the planks were spiked.

Q. What was the condition of the stern post?—A. All the dead wood was rotten, that is there was nothing to hold the stern post.

Q. What did you find the condition to be of the bolts or spikes that fastened the timbers?—A. All the spikes were eaten off with rust. * *

The place where I beached her is a flat bottom and very level.

Leslie, manager of the company, appellants:

I went to the scene of the accident as soon as I heard of it. I went to the steamboat. I made no examination of the place.

Q. How did you find the vessel herself?—A. On the bank outside the Cornwall Canal, on the north bank of the river lying in a slanting direction. Her bow was in about six and a-half feet of water, and her stern nine and a half. She was lying on the bottom with a little list to port.

Q. Was she resting at both ends?—A. Yes. Resting straight through all the way; I had her examined by a diver there. He went all round her.

Q. If there had been any rocks in the middle between the stem and stern what would have been the result?—A. She would have her bottom pinned up. There was no indication of that kind. That is why we made the examination to see if we had to pump her at once.

Q. What did you do then?—A. We found out where the leaks were at the stern and we put some canvas and boards over it in the usual way and pumped her out and she floated. We put two pumps on her. In ordering the pumps, I thought it was as well to get two as one, as we had to bring the steamboat down with the pumps from Kingston. I sent for two. We pumped her out, patched her, and sent her to Montreal.

Referring to an examination he made of the boat in Cantin's dock, he continues:

Q. What did you find?—A. I found how the accident had occurred. She struck her stern and the post was broken—twisted off to port, probably a foot at the bottom and the garboard started and we found the stern post and all the apron inside perfectly rotten.

Q. Could you judge from the appearance of the stern post what had caused the accident?—A. Yes, distinctly how it occurred. My supposition was strengthened that she had struck a stick of timber because there was no abrasion on the bottom of the keel; just as though something caught her at the stern post and she cleared it evidently at once. I found another thing that probably went off. Her butts had been opened and wedged evidently when she had been in the docks before. The butts are where the planks come together.

Q. What had been done to these?—A. They had been open and pieces of pine put in from an inch to an inch and a half.

Q. What did you find to be the state of the bolts?—A. We had to pull the planks off aft. The oakum was taken out and they put in a bar to start the plank and the whole plank nearly fell off. They did not require to wedge it.

Q. As a matter of fact what does that indicate?—A. That the fastenings had all been rotted out; the iron fastenings.

Finally, he says:

Q. Was the vessel an old boat?—A. Yes.

Q. Had she been kept in good repair?—A. She was not in good repair when I examined her.

Q. In what way do you mean?—A. The stern posts were rotten, and the apron.

Q. And you alluded to the bow?—A. The stem had started and the opening had been filled up by driving in a piece of rope.

Auger also swears:

Q. Les butts qui étaient ouverts et qui avaient été arranges par vous autres, ce n'est pas l'accident qui avait causé ça?—R. Non. Comme je viens de dire, c'est l'âge du bâtiment.

It seems to me that the appellants have proved their plea of unseaworthiness, and upon that ground and also for the reason that there is no satisfactory evidence that the repairs recommended by Auger were occasioned by the accident, I feel disposed to allow the appeal with costs. Were it not for the admission of

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

the appellants in their pleas, and the tender made by Flood on their behalf, and renewed under reservation by their pleadings, I would dismiss respondent's action for everything beyond the rent due on the day of the accident, the appellants having rebutted, in my opinion, the presumption of article 1627, by proving that the loss happened without any fault on their part, and that the unseaworthy condition of the boat was the immediate cause of the damage.

In France and on the continent of Europe generally, when it is proved that the vessel was unseaworthy at the beginning of the service, she does not earn any freight, and the owner is further responsible for any damage which the lessee might suffer. Art. 297 of the *Code de Commerce* and the *Ordonnance de la Marine* of 1681, liv. 3, tit 3, art. 12, say so in express terms. Valin, in his comments, seems to think that such is the universal maritime law. The English law, which is followed also in the United States and the British Colonies, is not so severe. The charterer is always liable in damages, but he may, in certain cases, recover a certain proportion of the freight, and even the whole of it; and that seems to be the rule which was adopted by the Quebec Civil Code, arts. 1065, 2423, 2426, 2448. It is not necessary to dwell any longer upon this point, in face of the admission contained in the pleas, which is in these words:

> The defendants while denying any liability to the plaintiff except for the sum of two thousand three hundred and eighty-five dollars ($2,385) being the balance of the charter money, nevertheless tendered to the plaintiff, before this action was brought, the sum of two thousand three hundred and eighty-five dollars, without prejudice or admission of liability on the part of the defendants, in full satisfaction of the plaintiff's claim which sum the defendants allege was amply sufficient to pay such claim, but the plaintiff refused to accept the sum so tendered. And the said defendants deposit herewith the said sum of two thousand three hundred and eighty-five dollars and of the said tender pray *acte*.

1898

THE COLLINS BAY RAFTING AND FORWARDING CO. v. KAINE.

Girouard J.

It is undoubtedly a very unfortunate admission and tender, as it includes the rent accrued after the accident till the delivery of the boat supposed to have taken place in Quebec, on the 4th of August. It is in contradiction of the previous allegations in the plea. Evidently the appellants were anxious to avoid litigation, and on the 23rd August, 1895, they authorized their agent in Quebec, Flood, to offer, and through him did offer, the respondent,—but not *à deniers découverts*—the sum of $3,015, less $630, already paid, that is all the rent to the 4th of August "in full settlement of your claim against said company for services rendered by tug "Beaver." It is this offer which the company has repeated by their pleadings under reservation.

I am not willing to extend the scope of that admission or tender beyond its terms; and therefore, upon the two grounds that the tug was unseaworthy and that it is not proved that the repairs recommended by surveyor Auger were occasioned by the accident in question, I am of the opinion that the appeal should be allowed, and the judgment of the Superior Court restored, with costs before this court, the Court of Queen's Bench and the Court of Review.

Appeal dismissed with costs.

Solicitors for the appellant: *Fitzpatrick & Taschereau.*

Solicitors for the respondent: *Caron, Pentland & Stuart.*

1898

*Oct. 13.

*Dec. 14

ALFRED DESCHAMPS (PLAINTIFF).....APPELLANT;

AND

GEORGE BURY (DEFENDANT).....RESPONDENT.

AND

HON. R. J. THIBADEAU *et al*.....MIS-EN-CAUSES.

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

Title to land—Sheriff's sale—Vacating sale—Arts. 706, 710, 714, 715, *C. C. P.—Refund of price paid—Exposure to eviction—Arts.* 1511, 1535, 1586, 1591, 2060 *C. C.—Actio condictio indebiti—Substitution —Entail—Substitution non ouverte—Prior incumbrance—Discharge by sheriff's sale—Procedure—Petition to vacate sheriff's sale.*

The provisions of article 714 of the Code of Civil Procedure of Lower Canada, do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and the execution of a deed, nor does that article give a right to have such a sale vacated and the amount so paid refunded.

The *action condictio indebiti* for the recovery of the price paid by the purchaser of lands lies only in cases where there has been actual eviction.

The procedure by petition provided by the Code of Civil Procedure for the vacating of sheriff's sales can only be invoked in cases where an action would lie. *The Trust and Loan Co. of Canada* v. *Quintal* (2 Dor. Q. B. 190), followed.

Mere exposure to eviction is not a sufficient ground for vacating a sheriff's sale.

A sheriff's sale in execution of a judgment against the owner of lands, *grevé de substitution*, based upon an obligation in a mortgage having priority over the deed creating a substitution, discharges the lands from the unopened substitution without the necessity of making the curator to the substitution a party to the proceedings. *Chef dit Vadeboncœur* v. *The City of Montreal* (29 Can. S. C. R. 9) followed.

---

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

1898

DESCHAMPS v. BURY.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, (appeal side), affirming the decision of the Superior Court, sitting in Review at Montreal (1), which reversed the judgment of the Superior Court, District of Montreal (2), dismissing the plaintiff's action with costs.

A statement of the facts and questions at issue on the appeal will be found in the judgment of His Lordship Mr. Justice Taschereau.

Belcourt for the appellant. The purchaser at a judicial sale, who has paid the purchase price, need not await disturbance before asking the sale to be annulled. That principle does not apply to bidders at judicial sales. *Moat* v. *Moisan* (3); arts. 953, 959, 961, 2060 C. C.; arts. 710, 714 C. C. P. The case of *The Trust and Loan Co. of Canada* v. *Quintal* (4), did not rest upon a contrary doctrine. Numerous judgments have annulled judicial sales under article 714 C. C. P. even after the payment of the purchase price. *Thomas* v. *Murphy* (5); *Compagnie de pret et Crédit Foncier* v. *Baker* (6); *Desjardins* v. *La Banque du Peuple* (7). In the cases of *Desjardins* v. *La Banque du Peuple* (7), and *Moat* v. *Moisan* (3), the purchase price had not only been paid, but even distributed, and the collocated creditors were ordered to return to the purchaser the moneys so received. See also *Bigras* v. *O'Brien* (8), and *Perron* v. *Bouchard* (9) in which the payment of the purchase money did not prevent the setting aside of the sale. In *The Trust and Loan Co. of Canada* v. *Quintal* (4), the true decision of the Court of Queen's Bench was that the respondent

(1) Q. R. 12 S. C. 155.
(2) Q. R. 11 S. C. 397.
(3) 25 L. C. Jur. 218.
(4) 2 Dor. Q. B. 190.
(5) 8 R. L. 231.
(6) 24 L. C. Jur. 45.
(7) 8 L. C. Jur. 106; 10 L. C. R. 325.
(8) 11 R. L. 376.
(9) 13 Q. L. R. 220.

1898

DESCHAMPS v. BURY.

had failed in his proof to establish that he was exposed to disturbance, and moreover that the sale had been ratified. Judicial sales cannot be considered as subject to rules affecting private sales and consequently the judgment appealed from is wrongly based upon articles 1586 and 1587 of the Civil Code.

At the time of the codification of our laws, in 1866, the French doctrine and decisions required the calling in of the substitutes, even though the property be sold by law to satisfy a creditor of the grantor; 2 Pigeau—Procedure Civile (ed. 1779), no. 616: Denisart, J. P. Acte de notoriété (3 ed.) pp. 407, 408; Thevenot d'Essaules, nos. 821-824, note *a*, also nos. 689, 690; 2 Mourlon, no. 936; Demolombe, t. 22, no. 558, p. 500; Duranton, t. 9, no. 591; Aubry & Rau—t. 7, no. 696, p. 349: tome, 6 p. 51-52. Laurent, t. 14, no. 570; 9 Rolland de Villargues, p. 98, no. 254 & 255; De Héricourt, "Vente des immeubles par décret;" pp. 47, 48, 49. Other authors who lay down the contrary opinion base themselves on the ordinance of 1747 which was not enregistered in Canada, and on the presence at the trial of the Ministère Publique, an institution that does not exist in Quebec. See *Caty* v. *Perrault* (1); *Trust and Loan Co. of Upper Canada* v. *Vadeboncœur* (2). Arts. 2059 and 2060 C. C. make special reservation of the substitute's rights, even where an action against the institute is based on a hypothec anterior to the institute's possession, consequently on the grantor's debt. Duranton, t. 9, p. 573, no. 591, mentions the recourses of the substitute.

The purchaser is "exposed to be disturbed" in many ways and for many reasons, and asks to be freed from his purchase in virtue of article 714 C. C. P. There is an established precedent in *Jobin* v. *Shuter* (3),

(1) 29 L.C. Jur. 21; 16 R. L. 148. (2) 4 L. C. Jur. 358.
(3) 21 L. C. Jur. 67.

that a purchaser is not obliged to remain exposed to such hazards.

Barnard Q.C. and *Rielle* for the respondent. The Superior Court purported to follow *Moat* v. *Moisan* (1), which the learned judge considered in conflict with the *Trust and Loan Co. of Canada* v. *Quintal* (2). No such conflict exists. The first question is, whether the position of a buyer at sheriff's sale is similar to that of the buyer at an ordinary sale, or whether, under the circumstances indicated, his rights are different from those of the latter. Contractual sales are regulated by arts. 1506-1531 and 1535 of the Civil Code. The fact of the payment of the price regulates the rights of the buyer. Before payment the buyer can object or ask for security on the grounds either of actual disturbance, or of just cause to fear disturbance, but once the price has been paid the buyer can only reclaim it on the ground of actual disturbance or eviction, not even alleged here. Pothier, Vente, no. 282 ; Aubry & Rau, no. 356, p. 497 ; 1 Duvergier, pp. 430 *et seq.* Troplong, Vente, no. 614. Art. 4511 C.C. The position of the *adjudicataire* at sheriff's sale is similar. Arts. 1586-1591 C. C. ; Arts. 714 C. C. P. ; *Trust and Loan Co. of Canada* v. *Quintal* (2). This last case confirmed the jurisprudence on the subject and cites prior decisions. See also *Blondin* v. *Lizotte* (3) ; *Jobin* v. *Shuter* (4).

On the question whether the substitution was discharged by the sheriff's sale, the authorities on the old French law, the *arrêts* rendered under that law, and the settled jurisprudence of the province are all in favour of the respondent. De Héricourt, Vente d'immeubles pp. 47, 48, 49 ; Ancien Dénisart, vo. "Substitution," nos. 95, 99, 102 ; Nouveau Dénisart, vo.

(1) 25 L. C. Jur. 218.
(2) 2 Dor. Q. B. 190.
(3) M. L. R. 3 Q. B. 496.
(4) 21 L. C. Jur. 67.

1898

DESCHAMPS v. BURY.

"Douaire," no. 10, p. 223; Guyot, vo. "Substitution,' p. 526, 527, 528; Ordonnance des substitutions (1747), tit. 1, art. 55; 2 Pigeau, Procedure Civ. p. 407; Thevenot d'Essaulles, nn. 803, 1262; Ricard, Substitutions, 1re partie, no. 258, 2me partie no. 91; Aymar, commentaires de l'art. 55 du titre 2 de l'ordonnance de 1747, p. 224; D'Aguesseau, Subs. quest. 12, 13, 14, 37 rep. d'Aix, p. 386, 387; Opinion du parlement de Paris, pp. 390-391; Pothier (Bugnet) Substitutions n. 177. Merlin—Rép. vo. "Substit. Fid." (*Ed. Belge*) p. 228, art. 2; Bourjon (Ed. 1770) p. 179; Rousseau de la Combe "Substitution," p. 655; Laurent, no. 565; 22 Demolombe, no. 553. See also *Mandeville* v. *Nicholl* (1).

In principle the *grévé* is the representative of the substitution, all actions passive and active residing in his person, and all judgments against him binding the *appelé*, except in very exceptional circumstances, such as fraud, just as the judgments against the heir bind the legatee. Judging by the earliest *arrêts* to be found in the books, the power of the *grévé* as the administrator and representative of the substitution, to sell voluntarily and without restraint the property of the substitution in matters of necessity, was unlimited. A usage, however, gradually grew up, so far as appears after the establishment of the Conseil Supérieur at Quebec, to obtain the authorization of the judge after calling in the *appelés*. It is not necessary to decide how far the usage prevailed in Canada; it is sufficient, if it be admitted that it is a question whether art. 959 C. C. does not go further than the law, as it stood before the Code, and to what extent, as to the voluntary sale by the *grévé* of substituted property in cases of necessity. But at no time, in France, either before or since the ordinance of 1747, and at no time in Lower Canada since 1663, has

(1) 16 U. C. Q. B, 609.

it been doubted that the sale by *décret* on the *grévé* alone, for the debt of the *substituant*, bound the *appelé* although he has not been impleaded. The principle established by these authorities has been definitively adopted by arts. 953, 2058 and 2060 C. C. and art. 710 C. C. P.

In this case, the claim, on the face of the proceedings, was a prior one, being for a debt of the grantor, and the question has long been regarded as settled in our jurisprudence. *Macintosh* v. *Bell* (1); *Vadeboncœur* v. *City of Montreal* (2). See also *Gray* v. *Dubuc* (3).

THE CHIEF JUSTICE.—I concur in the judgment prepared by my brother Taschereau, and for the reasons he gives, which are the same as those given by the Court of Review, I am of opinion that the appeal should be dismissed.

I also concur with my brother Girouard and the Chief Justice of the Queen's Bench, in holding that the appeal was rightly dismissed for the reason given by the latter in his elaborate judgment, holding that the appellant had not brought himself within article 714 of the Code of Civil Procedure by showing that he was "liable to eviction" in the terms of that article.

TASCHEREAU J.—On the tenth of September, 1895, the appellant purchased a certain property at sheriff's sale in Montreal. On the sixteenth of October, following, he paid the price of adjudication, which was subsequently duly distributed among the creditors of the judgment debtor. On the third of February, 1896, he presented a petition under article 714

(1) 12 L. C. Jur. 121.
(2) 29 Can. S. C. R. 9.
(3) 2 Q. L. R. 234.

1898

DESCHAMPS v. BURY.

Taschereau J.

of the Code of Civil Procedure to have the sale set aside, *and the amount paid refunded to him* on the ground that he was liable to eviction by reason of a substitution on the property, not discharged by the sheriff's sale. The respondent demurred to this petition on the ground that such a sale cannot be so set aside when the purchase money has been paid, and the price refunded, merely because the purchaser is exposed to eviction; that in such a case, it is only when actually evicted, not upon the ground of a mere contingent liability to eviction, as alleged in the petition, that the purchaser is entitled to such relief.

I am of opinion that the demurrer is well founded. Article 714 of the Code of Civil Procedure does not give the right claimed by the petition to recover the money paid. And why? Because it is intended to apply only to a sale not yet paid for, to a sale not perfected by payment, a sale of which the sheriff has not yet given the deed. Art. 706, C. C. P.; Pothier, "Procedure Civile," page 254; "Guillouard, Vente, no. 315, *et seq.*

But, argues the appellant, if I cannot get my money back under such a petition, I am at least entitled to have the sale vacated. To my mind, he could not more clearly show how untenable is the position he takes. Could it be possible that a sale duly paid for might be vacated for mere liability to eviction under the Code of Civil Procedure, and yet, that the purchaser should, under the Civil Code (art. 1586), have to wait till he is actually evicted (which may never happen), to recover his money back? For by that article of the Civil Code, it is only when actually evicted that a purchaser at a judicial sale has the action *condictio indebiti* to recover his money back. Then article 1591 of the Civil Code enacts that such sales, as a general rule, are governed by the principles applicable to

1898

DESCHAMPS v. BURY.

Taschereau J.

ordinary contracts of sale, and ordinary contracts of sale, it is conceded, cannot after payment be set aside for mere liability to eviction. Articles 1511, 1535, Civil Code; Pothier, "Vente," no. 282; 4 Aubry et Rau, (4 ed.) page 397.

And the appellant does not allege that he was unaware of this substitution when he paid on the 16th of October; he simply alleges that he was unaware of it on the 10th of September, at the time of the adjudication.

This exceptional remedy by petition should not be extended by construction. It is not a new right that this article 714 purports to create, but simply an exceptional remedy. It gives the right, if the purchaser chooses to do so, to proceed by petition in the same case, instead of by action, but only in cases where the action lies. And the action does not lie, until actual eviction, to set aside any sale that has been duly paid, and recover the money paid. Art. 1586, C. C. An enactment of this nature in a Code of Procedure must be construed, when possible, as an enactment on procedure, and nothing more. Such is the decision given in 1882, by the Court of Appeal in the province in the case of *The Trust and Loan Co. of Canada* v. *Quintal* (1).

The Court of Review in the present case, in accordance with that decision, allowed the demurrer. The Court of Appeal, though dismissing the petition on another ground, overruled the case of *The Trust and Loan Co. of Canada* v. *Quintal* (1), and dismissed the demurrer. In my opinion the judgment of the Court of Review is the right one.

I would allow the demurrer and dismiss the petition as unfounded in law. The appeal therefore fails.

(1) 2 Dor. Q. B. 190.

1898

DESCHAMPS v. BURY.

Girouard J.

SEDGEWICK and KING JJ.—Concurred.

GIROUARD J.—Nous venons de juger dans la cause de *Chef dit Vadeboncœur et La Cité de Montréal* (1), qu'aux termes de l'article 710 du Code de Procédure Civile, le décret purgeait les substitutions non ouvertes lorsqu'il avait lieu pour une créance préférable, apparente dans la cause, et cela sans mettre en cause le tuteur de la substitution. A plus forte raison, doit il en être ainsi lorsque, comme dans l'espèce qui nous occupe, la créance est antérieure à la substitution. Le Code Civil, article 2060, en a une disposition formelle. Nous sommes donc d'avis de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *E. A. B. Ladouceur.*

Solicitor for the respondent: *N. T. Rielle.*

1898

*Nov. 2,3,4.

*Dec. 14.

JAMES H. WEST (PLAINTIFF).....APPELLANT;

AND

ELIJAH W. BENJAMIN (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Settled accounts—Releases—Setting aside releases and opening accounts.

One of two members of a firm not possessing business capacity the other managed and controlled all its affairs presenting at intervals to his partner statements of account which the latter signed on being assured of their correctness. In 1891 mutual releases of all claims and demands against each other, based upon statements so submitted by the active partner, were executed by each. In an action against the active partner to set aside these releases and open up the accounts.

Held, that all it was necessary to establish was, that in the accounts as settled there were such errors and mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed.

---

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

(1) 29 Can. S. C. R. 9.

1898

WEST v. BENJAMIN.

APPEAL from a decision of the Court of Appeal for Ontario varying the judgment at the trial which ordered a reference to take an account of the partnership affairs of the parties.

The material facts of the case are fully set out in the judgment of the court.

Aylesworth Q.C. and *Madden* for the appellant.

Clute Q.C. and *Masten* for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—This was an action instituted by the plaintiff for taking the accounts of a partnership formed in September, 1875, by and between one Joseph Connolly, the defendant and the plaintiff, in which the plaintiff had one-half interest, and Connolly and the defendant one-fourth each. The defendant says in his evidence that articles of partnership were signed but that they have been burned. There is however no dispute as to the terms upon which the partnership was formed which may be taken from the statement of the defendant who says—that he was to have absolute control of the business of the firm, and of the books, and was to keep the books. He was to be, and in fact was the banker of the firm, and that the monies of the firm were until he purchased out Connolly in 1885, paid into the bank to the credit of Connolly & Benjamin, and afterwards into the defendant's own name, which continued until November, 1890, when, as he says, the plaintiff went in with the defendant's boys; further he says that he was to be accountable for all the moneys of the firm, that the proceeds of all sales of the goods of the firm were received by him or by Baxter for him; this Baxter was a person in the employment of the firm, not a professional bookkeeper, but whom the defendant employed to keep the books

1898

WEST
v.
BENJAMIN.

Gwynne J

for him. He says that until January, 1883, no cash book was kept, but that until then cash received was entered in a day book. The defence set up to this action in the defendant's statement of defence is that as he alleges on several days between the 4th of February, 1882, and the 31st December, 1890, diverse settlements took place of all the partnership transactions between the plaintiff and the defendant, which as the defendant contends constituted, and were signed and accepted by the plaintiff as constituting, final and conclusive settled and stated accounts of the said transactions at the respective dates of such statements of account, and that thereby all right of the plaintiff to have the account now taken is barred, and as a separate defence the defendant pleaded a release bearing date the 23rd day of June, 1891. The question now is whether the documents or statements relied upon by the defendant as constituting settled and stated accounts are sufficient to bar the plaintiff's right to have an account taken of the partnership transactions. In the month of February, 1882, the defendant prepared or caused to be prepared by Baxter a statement purporting to show the money value of the capital stock of the firm at the formation of the partnership in September, 1875, and of the amounts alleged to have been received by the defendant on account of the firm up to the 31st December, 1881, thus—$54,010.38 disbursed—$64,964.94 received.

This statement assuming the defendant's statement of the amounts received and disbursed by him to be correct showed that upon the 31st December, 1881, there still remained due by the plaintiff on account of his share in the capital stock, the sum of $6,405.44. This paper, the plaintiff having no experience in accounts and bookkeeping and having, as he says he then had, most implicit confidence in the defendant,

1898

WEST
v.
BENJAMIN.

Gwynne J.

signed at the request of the defendant and upon his assurance and the assurance of Baxter, the bookkeeper employed by the defendant, that the statement was perfectly correct; and now although his confidence in the plaintiff is not as it then was he does not desire to question anything stated in that paper because that by reason of the complete control given to the defendant by the terms of the partnership and of his mode of keeping the accounts of the firm, and of the fact that he kept no cash book it would be futile for the plaintiff to attempt to prove any wrong in the statement so made by the defendant. He is therefore willing to let everything in it remain unquestioned, and that the account should be taken from the 1st of January, 1882, upon the basis that everything stated in that paper is correct. After the signing of the paper of the 4th February, 1882, the partnership continued as before but new articles dated the 14th April, 1882, were entered into whereby the partnership was continued as from the 1st of January preceding upon the old terms, and it was expressly declared that the defendant should have complete control as before—that he should have absolute power to buy, sell, collect, hire and discharge, and to do the full business of the firm, and he therein and thereby undertook to give half yearly a full account of all monies received and disbursed by him from the proceeds of the said business from the first day of January, 1882.

In the month of December, 1882, the defendant purchased from the plaintiff one-sixth part of his half share, thus reducing the plaintiff's interest to one-third share, and accordingly new articles were prepared and signed, bearing date the first day of January, 1883, providing for this change. By these articles the defendant retained as from the beginning absolute control over the business of the firm, and as to hiring

1898

WEST
v.
BENJAMIN.

Gwynne J.

and discharging all persons in the service of the firm, and the absolute right in himself to receive and disburse all the monies of the firm, and he continued under the obligation to render half yearly true accounts of all sums received and disbursed. In these articles, however, is introduced the following clause:

> There is now due by the said firm to the said Elijah Wesley Benjamin *as per settlement*, the sum of $1,932 $\frac{87}{100}$, which sum is to be paid to the said Benjamin as soon as the company can get the money.

The settlement here referred to has been produced, and it is simply a debtor and creditor account between "E. W. Benjamin and the Hub Factory" wherein he charges himself with having received during the year 1882 certain sums, and he credits himself with having monthly disbursed certain specific sums for the firm, and he draws the balance upon such debit and credit items in his own favour to the amount of $1,932 $\frac{87}{100}$. This document is signed by the defendant and Connolly and the plaintiff. The plaintiff set his signature to it as he had done to that of February, 1882, relying upon the assurance of the defendant in whom he had then most implicit trust and confidence that it was quite correct and showed truly all the sums received and disbursed by the defendant and for which he was accountable. The account does not profess to show the stock in hand of the firm, nor the debts outstanding due to the firm upon open account or commercial paper, nor the debts due by the firm, so that it does not purport to be a stated account of the partnership affairs at the respective dates named. It is in fact an account rendered by the defendant in compliance with the obligation resting on him by the partnership articles to render half-yearly accounts of his receipts and disbursements for the firm; and by signing it, neither the plaintiff nor the defendant is concluded from showing errors. In

the month of April, 1885, the defendant purchased Connolly's interest in the firm and the business continued to be conducted by the plaintiff and defendant on the former terms until the 10th of February, 1888, when the plaintiff and defendant signed new articles of partnership in which their appears a recital that on the 1st of January of that year a settlement was effected between the plaintiff and defendant of their partnership business and transactions up to that date, and that upon such settlement they had agreed to grant to each other mutual releases of all debts and demands up to the said first day of January, and by the said articles it was again provided, as formerly, that the defendant should conduct the financial part of the business and should attend to the selling of the goods of the firm and the collecting of the firm's debts, and the signing of all bills, notes and cheques for and on behalf of the firm, and shall further exercise a general superintendence and management over the whole business. On the 23rd day of June, 1891, an instrument was executed by and between the defendant and the plaintiff in which after reciting that a settlement of their partnership affairs was that day made between the plaintiff and the defendant to the effect therein stated the parties thereto, in consideration of the sum of one dollar therein stated to have been paid by each to the other, executed mutual releases to each other of all actions, suits, claims and demands, excepting as therein excepted, from the beginning of the world to date.

Up to this time the plaintiff continued to have the utmost confidence in the defendant but subsequently that confidence was lost and the plaintiff believing the accounts so as aforesaid rendered by the defendant and so as aforesaid procured to have been signed by the plaintiff to be materially incorrect instituted the present action wherein the sole issue was whether or

1898

WEST
v.
BENJAMIN.

Gwynne J.

not the right of the plaintiff to an account against the defendant as the partner who has assumed the position of being responsible for all the accounts and all the receipts and disbursements of the firm was barred by the statements relied upon by the defendant as stated and settled accounts or by the releases set up and relied upon by the defendant which appear to have been executed upon no other consideration than the assumption of the correctness of the said accounts.

The conclusion arrived at by the learned trial judge was that it was established as a fact upon the uncontradicted evidence of accountants examined before him that a thorough examination of the partnership books disclosed that if the accounts relied upon by the defendant should be treated as settled the result would be a clear loss to the plaintiff of about seven thousand dollars. And further, he found as a fact that the plaintiff was a man without business capacity and had not capacity to understand the subjects necessary to be taken into account in arriving at a proper adjusment of the partnership accounts; and that all the statements of account relied upon by the defendant were signed by the plaintiff in reliance upon the representations of defendant that the statements so signed were correct statements of the accounts, and he made a decree referring it to the master to take the accounts.

Upon an appeal by the defendant, the Court of Appeal at Toronto set aside that decree and made a decree referring it to the master to inquire into and to report upon eleven items amounting in the whole to about $1.900, and they adjudged that the plaintiff should pay to the defendant the costs of the appeal and of the action.

Now, part of the loss of $7,000 mentioned in the decree of the learned trial judge and in the evidence of the accountants examined before him consisted of

$2,800 distributed over forty items which the books of the firm showed that the defendant had received from debtors of the firm but that no charge to the defendant for such amounts had been entered in any book of the firm from which the statements of account signed by the plaintiff had been made up, and the items referred to the master by the Court of Appeal were eleven of those forty items. We do not think that the limitation of the inquiry to those eleven items can be maintained. The evidence given at the trial and adopted by the learned trial judge applied equally to the forty items as to the eleven, namely, that the books for which the defendant was accountable showed that the amounts had been received by him and did not show that he had charged himself therewith; and the learned trial judge has also found as a fact that the plaintiff signed the statements of account furnished by the defendant upon his assurance that they were correct; the defendant indeed admits this to be the fact. Then there is the evidence of the accountants who have examined the books which evidence the learned trial judge has adopted as uncontradicted, to the effect that the loss which would result to the plaintiff if those statements of accounts should be held to conclude him, would, as appearing on the books of the firm, result in a clear loss to him of about $7,000. Now all that it was necessary to establish in order to set aside the releases pleaded, and to open the accounts was that in the accounts as taken there were such errors or mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed. The defendant has throughout retained in his own hands absolute control over the receipts and disbursements of the firm and has assumed absolute responsibility and account-

1898

WEST
v.
BENJAMIN.

Gwynne J.

ability for the manner in which the books have been kept.

In the face of the evidence as to what a thorough examination of the books of the firm discloses it would be manifestly unjust that the plaintiff should be bound by releases executed under the circumstances as found by the learned trial judge. We are of opinion therefore that the appeal must be allowed with costs and that the decree of the learned trial judge for a general account varied so as to open and take the accounts only from and including the first of January, 1882, should be restored. The decree will declare all the releases in the pleadings and evidence mentioned shall be set aside, and the plaintiff consenting that the matters stated in the document bearing date the 4th February, 1882, shall remain undisturbed, declare all statements of account subsequent thereto to be set aside and of no effect, and refer it to the master to take the accounts from and including the first of January, 1882. The decree will adjudge to the plaintiff his costs of the action to the hearing and will reserve all further costs until the account shall be taken, in the usual form.

Appeal allowed with costs.

Solicitors for the appellant: *Deroche & Madden.*

Solicitors for the respondent: *Herrington & Warner.*

JOHN Y. COLE (DEFENDANT).....APPELLANT; 1896

AND *Nov. 7.
*Dec. 14.

RUFUS H. POPE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract—Rescission—Innocent misrepresentation—Common error—Sale of land—Failure of consideration.

An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation.

But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration a court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud.

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

In June, 1896, the defendant and others had taken up a gold mining claim in the neighbourhood of Rossland, British Columbia, of which he claimed and represented himself to be the owner of one-half. This claim was designated as the "Eldorado." The plaintiff, through his agent, Oscar G. Laberee, believing the representations of the defendant to be true and relying entirely on such representations, became the purchaser of the undivided half of the claim for the sum of $5,250, which Laberee paid to the defendant in cash,

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

(1) 6 B. C. Rep. 205.

1898
COLE
v.
POPE.

who therefore executed an assignment of his undivided half to the plaintiff. Soon afterwards it turned out that the greater part of the "Eldorado" plot was included within the limits of the prior claim called "Mascot," and that a strip which remained containing an area of some ten or fifteen acres was included in other claims. The plaintiff therefore got nothing for the money he paid. The defendant made the sale in perfect good faith, and his representation which turned out to be untrue was innocently made and the transaction was free from fraud. Both parties dealt upon the mistaken belief that the "Eldorado" was an actually existing mining right, whereas in truth, owing to other claims which were entitled to priority having been previously made, the whole of the "Eldorado" was included in pre-existing claims.

The plaintiff brought his action for rescission of the contract and return of the purchase money. Mr. Justice McColl who tried the case held that rescission would not be decreed for mere innocent misrepresentation and dismissed the action. His judgment was reversed by the full court and judgment entered for the plaintiff. The defendant then took an appeal to this court.

Clute Q.C. for the appellant. To obtain rescission of an executed contract fraud must be proved; *Bell* v. *Macklin* (1); even when there has been a mistake by which the party seeking relief has suffered injury; *Allen* v. *Richardson* (2); *Clare* v. *Lamb* (3); *Ducondu* v. *Dupuy* (4).

Travers Lewis and Hamilton for the respondent referred to *Granger* v. *Fotheringham* (4); *Huddersfield*

(1) 15 Can. S. C. R. 576.
(2) 13 Ch. D. 524.
(3) L. R. 10 C. P. 334.
(4) 9 App. Cas. 150; 6 Can. S. C. R. 425.
(5) 3 B. C. Rep. 590.

Banking Co. v. *Henry Lister & Son* (1); *Cooper* v. *Phibbs* (2); *Hart* v. *Swaine* (3).

1898

COLE v. POPE.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The facts of this case are few and simple. In June, 1896, the appellant and others had taken up a gold mining claim in the neighbourhood of Rossland, British Columbia, of which claim the appellant claimed and represented himself to be the owner of one-half. This claim was designated as the "Eldorado." The respondent, through his agent, Oscar G. Laberee, believing the representations of the appellant to be true and relying entirely on such representations, became the purchaser of the appellant's undivided half of the claim for the sum of $5,250, which Laberee paid to the appellant in cash, who thereupon executed an assignment of his undivided half to the respondent. Soon afterwards it turned out that the greater part of the "Eldorado" plot was included within the limits of a prior claim called the "Mascot," and that a strip which remained containing an area of some ten or fifteen acres was included in other claims. The respondent therefore got nothing for the money he paid. There can be no doubt on the evidence that the appellant represented himself to be the owner and made the sale in perfect good faith; that his representation which turned out to be untrue was innocently made and that the transaction was free from fraud. In short both parties dealt upon the mistaken belief that the "Eldorado" was an actually existing mining right, whereas in truth, owing to other claims which were entitled to priority having been previously made, the whole of the "Eldorado" was included in pre-existing claims.

(1) [1895] 2 Ch. 273. (2) L. R. 2 H. L. 149.
(3) 7 Ch. D. 42.

1898

COLE v. POPE.

The Chief Justice.

The respondent brought this action to have the contract rescinded and to obtain repayment of the money which he had paid for a consideration which had entirely failed. The action was tried before the present Chief Justice of British Columbia (then Mr. Justice McColl), and that learned judge acting upon what he considered to be the law applicable to the case, dismissed the action. On appeal to the full court (Walkem and Drake JJ.), this judgment was reversed and a judgment entered for the respondent. The learned trial judge considered the respondent's right to rescission dependent entirely on the misrepresentation, and held that in the present state of the law an executed contract—and especially an executed contract for the sale of an interest in land—will not be rescinded for mere innocent misrepresentation. That this was a correct view of the law as administered by Courts of Equity up to the date of the amalgamation of jurisdictions effected by the judicature Acts, and as it has existed down to the present time, I am not upon the authorities able positively to controvert. Strange as it may seem that there should be dearth of authority upon such a point I find that with the exception of one case, that of *Legge* v. *Croker* (1), there is no direct authority upon the point. That case of *Legge* v. *Croker* (1) supports the judgment of the chief justice, as Lord Manners there held that to entitle a party to have rescission of an executed contract for the sale of land upon the ground of misrepresentation there must be fraud. There are no doubt *dicta* the other way emanating from judges, some of great authority, for we find Sir Edward Sugden, Lord Justice Turner and Sir George Jessel, all stating the law to be that such a contract would be rescinded for innocent misrepresentation, provided, of course, that it formed the basis

(1) 1 Ball & B. 506.

of the contract. It would not, however, be safe to act on these *dicta*. Mr. Dart in the 6th edition of his work on Vendors and Purchasers (1), has this passage which I think a fair statement of the law. The learned writer says:

A Court of Equity would not only refuse its discretionary remedy of specific performance, but would go further and restrain a vendor from asserting his legal right to claim damages in a court of law, on the ground that it was unconscientious in him to do so. But the principle would not be extended to the taking away after completion the price of the property, which at law had become absolutely the vendor's, without advancing the interference of the Court of Equity further than has yet been authorized by judicial decision. In other words it seems that misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a court of law. Whether or not this limitation of the jurisdiction of Courts of Equity is satisfactory, either in practice or in principle, the present state of the authorities justifies its enunciation.

Sir Edward Fry in his treatise on Specific Performance (2 ed.) p. 295, commenting on *Edwards* v. *M'Leay* (2), says:

But it must not thence be inferred that every representation that the vendor has a good title will enable a purchaser to set aside an executed contract or successfully resist specific performance.

I conclude therefore in favour of the proposition that mere innocent misrepresentation will not warrant the rescission of an executed contract for the sale of an interest in land.

There is, however, another principle which I think may be invoked in the respondent's favour and which is quite open to him on the pleadings and evidence before us.

It has been determined by several authorities and is well established law that where by the mutual mistake of the parties to a contract of sale the subject of the

(1) P. 900. (2) G. Cooper, 308.

1898

COLE v. POPE.

The Chief Justice.

sale turns out to be non-existent or is already the property of the purchaser, both parties having fallen into error merely, and there being no fraud or deceit in the case, the purchaser who has paid his purchase money and taken a conveyance will be relieved and the contract rescinded by a Court of Equity. In such a case where there is a complete failure of consideration as in the present case it would be unjust and unconscientious that the vendor should retain money paid to him for a supposed consideration which has utterly failed.

In *Bingham* v. *Bingham* (1) Fortescue, M. R. holding that where it appeared that the estate for which the purchase money had been paid already before the sale belonged to the purchaser decreed rescission and said that

> though no fraud appeared and the defendant apprehended he had a right, yet there was a plain mistake such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right.

Sir Edward Fry in the work already quoted from at page 337 (2 ed.), says:

> Further, where both parties to a contract are at the time of the contract in mistake or error as to the matters in respect of which they are contracting, this will not only furnish a ground for resisting specific performance but enable the court to rescind the contract.

Dart (6 ed. p. 907) has this passage:

> If it appear that the estate belonged to the purchaser, he can in equity, and probably at law, recover his purchase money, although he might have discovered his right from the abstract of title; nor is it clear that the absence of fraud in the vendor will bar the relief. And it has been held that a purchaser who, although without any fault on the part of the vendor, buys an estate which in fact has no existence, (e. g. a remainder expectant on an estate tail which has been barred), can obtain relief in equity; but it is of course otherwise if the purchaser buys an estate the existence of which he knows to be doubtful. The principle has been doubted by Lord St. Leonards,

(1) 1 Ves. Sr. 126.

1898

COLE v. POPE.

The Chief Justice.

but it has been decided that, even at law, an action lies in such a case to recover the purchase money as money paid without consideration ;—as where a life annuity is sold after the death of *cestui qui vie*.

In *Cooper* v. *Phibbs* (1), Lord Cranworth and Lord Westbury both recognized the authority of *Bingham* v. *Bingham* (2) and acted on it in decreeing rescission in a case in which the facts were essentially the same. The observations of Lord Cranworth leave no doubt as to the principle that where there is by reason of a mistake of this kind an entire failure of consideration, the completion of the contract by conveyance and payment of the purchase money will constitute no bar to relief by a court of equity.

In *Cochrane* v. *Willis* (3), Lord Romilly M.R., in the court below, and Lord Justice Turner in the Court of Appeal, acted upon the authority of *Bingham* v. *Bingham* (2). Further in *Jones* v. *Clifford* (4), Vice Chancellor Hall, a very high authority on such a question, says speaking of *Cooper* v. *Phibbs* (1).

> Nothing can be clearer than this, that Lord Cranworth recognized the principle that the court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud.

Lord Westbury in *Cooper* v. *Phibbs* (1), says:

> If the parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.

See also Webster on Conditions of Sale (5), and Clerke & Humphrey on Sales (6).

The result is that the evidence in this record being clear that the consideration for the money paid by the

(1) L. R. 2 H. L. 149.
(2) 1 Ves. Sr. 126.
(3) 34 Beav. 359 ; 1 Ch. App. 58.
(4) 3 Ch. D. 779, 792.
(5) 2 ed. p. 64.
(6) P. 527.

1898

COLE v. POPE.

The Chief Justice.

respondent to the appellant utterly failed, as indeed appears from the admission of the appellant himself, the respondent upon the authorities referred to was entitled to the relief the court below has given him and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John S. Clute, Jr.*

Solicitor for the respondent: *Charles R. Hamilton.*

1898

*Oct. 10.
*Nov. 21.

CITY OF MONTREAL v. RAMSAY *et al.*

Municipal corporation—Expropriation—Widening streets—Assessments—Excessive valuation—52 V. c. 79, s. 228 (Que.)

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), (1) reversing the decision of the Superior Court, District of Montreal, and annulling the assessment roll for the widening of St. Nicholas Street, in the City of Montreal.

After hearing counsel for the appellant and without calling upon counsel for the respondent the court reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs

Ethier Q.C. for the appellant.

Rielle for the respondents.

---

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

(1) Q. R. 7 Q. B. 214.

HER MAJESTY THE QUEEN (PLAINTIFF) ..... } APPELLANT ;

AND

THE HONOURABLE A. W. OGILVIE (DEFENDANT) ..... } RESPONDENT.

1898
*Oct. 10, 11.

1899
*Feb. 22.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Debtor and creditor—Appropriation of payments—Error in appropriation —Arts. 1160, 1161 *C. C.*

A bank borrowed from the Dominion Government two sums of $100,000 each, giving deposit receipts therefor respectively numbered 323 and 329. Having asked for a further loan of a like amount it was refused, but afterwards the loan was made on O., one of the directors of the bank, becoming personally responsible for repayment, and the receipt for such last loan was numbered 346. The Government having demanded payment of $50,000 on account that sum was transferred in the bank books to the general account of the Government, and a letter from the president to the Finance Department stated that this had been done, enclosed another receipt numbered 358 for $50,000 on special deposit, and concluded, "Please return deposit receipt no. 323—$100,000 now in your possession." Subsequently $50,000 more was paid and a return of receipt no. 358 requested. The bank having failed the Government took proceedings against O. on his guarantee for the last loan made to recover the balance after crediting said payments and dividends received. The defence to these proceedings was that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the guarantee loan and that the president had instructed the accountant so to apply the two sums of $50,000 paid, but he had omitted to do so. The trial judge gave effect to this objection and dismissed the information of the Crown.

Held, reversing the judgment of the Exchequer Court (6 Ex. C. R. 21), Taschereau and Girouard JJ. dissenting, that as the evidence showed that the president knew what the accountant had done

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

1898

THE QUEEN v. OGILVIE.

and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within Art. 1160 C. C. no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so the bank could not now annul the imputation made by the accountant unless the Government could be restored to the position it would have been in if no imputation at all had been made which was impossible as the Government would then have had an option which could not now be exercised.

APPEAL from a judgment of The Exchequer Court of Canada (1), dismissing an information by the Attorney General for Canada on behalf of the Crown against the defendant.

The material facts are sufficiently stated in the above head-note, and more fully in the judgment of the majority of the court delivered by Mr. Justice King.

Fitzpatrick Q. C., Solicitor General for Canada, and *Newcombe Q. C.*, Deputy of the Minister of Justice, for the Crown. No defence is suggested except alleged payment. Nothing has been paid by the respondent and the only sums paid by the bank since receipt of the deposit represented by number 323 are the two payments of $50,000 each and interest, and the dividend of 66⅔ per cent upon the entire claim of the Government which was paid by the liquidators. The two sums were paid by the bank on 9th July, 1883, and 16th August, 1883, and those payments were appropriated by letters of the accountant, that with the first remittance requesting the return of deposit receipt no. 323, and the second expressly making the appropriation on deposit receipt no. 358. It was never suggested previous to this action that there was any error in making the appropri-

(1) 6 Ex. C. R. 21.

ations, nor that the accountant of the bank in making the payments and appropriations was not acting within the scope of his authority. The evidence as to conversations between the respondent and his co-directors with regard to the payment of the deposit guaranteed by the respondent out of the first moneys available by the bank was properly objected to. It is *res inter alios acta* and cannot affect the rights of the Crown in these proceedings. As to the scope of the accountant's authority the effect of the evidence is that it was part of his ordinary duties to make and apply payments such as that in question, and that he wrote the letters in the ordinary course of business and, in view of the fact that he had conducted a considerable part of the correspondence with the Government, was acting within the apparent scope of his authority. Evidence that he had in fact in this case acted contrary to specific instructions would not be material for the purpose of limiting his authority as between the bank and the Crown to whom no notice of his special instructions had ever been given. *Kershaw* v. *Kirkpatrick* (1).

The mistake, if any, was made within the scope of his authority, for the benefit of the bank, which thereby received further credit and acted upon and took the benefit of the appropriation. The bank cannot therefore now alter the appropriation. Pollock on Contracts (4 ed) p. 531 *et seq* : *Mackay* v. *Commercial Bank of New Brunswick* (2). The appropriation could only be changed by a rescision of the appropriation made by consent of all parties ; *Kershaw* vs. *Kirkpatrick* (1) ; and any agreement between respondent and his co-directors as to the manner in which the appropriation was to be made or the intention of the bank, undisclosed to the Government, can have no effect in con-

(1) 3 App. Cas. 345. (2) L. R. 5 P. C. 394.

1898

THE QUEEN v. OGILVIE.

trolling the appropriation clearly made by the correspondence. *Smith* v. *Hughes* (1); *Tamplin* v. *James* (2).

The dividend of 66⅔ per cent was paid under orders of the court in respect of the aggregate claim of $237,840.20, filed by the Government and cannot be applied on the guaranteed deposit receipt except *pro ratâ*. *Thompson* v. *Hudson* (3); *In re Accidental Death Ins. Co.* (4); De Colyar on Guarantees, (3 ed.) 458; *Dixon* v. *Clark* (5); *Martin* v. *Brecknell* (6); art 1160 C. C.

The bank had no right to appropriate its payment except at the time when the payment was made. The Crown is content with the appropriation which the bank then made. If that appropriation be set aside the appropriation made by the Crown as creditor to receipt number 323 will stand. *Devaynes* v. *Noble*; *Clayton's Case* (7); Tudor's Mercantile and Mercantile Law (3 ed.) p. 1 and notes at pp. 19, 21 *et seq.* In the absence of any appropriation by debtor or creditor the law would also appropriate to deposit receipt number 323 which was the earliest debt. Even if the guaranteed deposit might be considered the more onerous debt and imputation invoked according to the Civil Code of Quebec, art. 1161, that rule cannot apply in this case because the Crown's position has been changed and its rights prejudiced by the appropriation upon receipt no. 323 by the bank and, until the defence was filed in this action, upwards of twelve years afterwards, the Crown had no notice that the bank did not intend to stand by its appropriation. Meantime the bank had failed and its affairs had been wound up. If the imputation had been originally made upon the guaranteed account the Government would doubtless have pressed imme-

(1) L. R. 6 Q. B. 597.
(2) 15 Ch. D. 215.
(3) 6 Ch. App. 320.
(4) 7 Ch. D. 568.
(5) 5 C. B. 365.
(6) 2 M. & S., 39.
(7) 1 Mer. 585.

diately for payment of the unsecured account. It is therefore now too late to set aside the appropriation for error and allow the law to appropriate to the disadvantage of the Crown. The law presumes prejudice in such cases. *London and River Plate Bank* v. *Bank of Liverpool* (1). Finally the appropriation cannot be set aside or varied in this action to which the bank is not a party, nor after the bank, having been wound up, has ceased to exist.

Reference was also made to *Williams* v. *Rawlinson* (2), per Best C. J. at page 371; *Harding* v. *Tifft* (3), at page 464 to 466 as to undisclosed intention; *Stone* v. *Seymour* (4); *Robson* v. *McKoin* (5); *Plomer* v. *Long* (6); *Gordon* v. *Hobart* (7); *Ex parte Whitworth* (8); Monger on Appropriation, p. 75 and cases there cited; *Stamford Bank* v. *Benedict* (9); *Shaw* v. *The Bank of Decatur* (10), at page 713 where a summing up of the cases appears; and also to the remarks of Mr. Justice Story in *United States* v. *Wardwell* (11).

J. S. Hall Q.C. and *Hogg Q.C.* for the respondent. The law of Quebec governs this case; the application of the bank was from Montreal, the deposit was made at Montreal and the repayment was to be made there. The performance, or payment, or fulfilment of the contract, either under the deposit receipt or defendant's letter, was to be at Montreal, and in matters of deposit it is the law of the place of fulfilment that governs. Dicey Conflict of Laws, 570; *The Queen* v. *Doutre* (12); *Brooks* v. *Clegg* (13). The $100,000 paid back by the bank must be imputed on the loan covered

(1) [1896] 1 Q. B. 7.
(2) 10 Moo. C. P. 362.
(3) 75 N. Y. 461.
(4) 15 Wend. 20.
(5) 18 La. An. 544.
(6) 1 Stark. 153.
(7) 2 Story 243.
(8) 2 M. D. & DeG. 164.
(9) 15 Conn. 437.
(10) 16 Ala. 708.
(11) 5 Mason 82.
(12) 6 Can. S. C. R. 342.
(13) 12 L. C. R. 461.

1898

THE QUEEN v. OGILVIE.

by the defendant's letter, art. 1161 C. C., in the absence of imputation, or if left to the operation of law, so as to discharge the debt actually payable which the debtor had at that time the greater interest in paying. The authorities are unanimous that a secured debt is such a debt. Therefore, the money paid back by the bank must go to the discharge of the $100,000 in connection with which defendant gave his letter. It must be presumed to have been within the knowledge of the Minister of Finance, the bank and the respondent, at the time the letter was given, that defendant was entitled to have the first money paid back credited to the $100,000 for which he gave the letter, and nothing could have been done to change or alter his legal position without defendant's knowledge or consent.

The three deposits virtually became one debt merged together without one part having any priority over the other. When the demand for payment of $50,000 was made all the deposits were due. The numbers of deposit receipts had no significance. They were numbered simply as a convenience to the bank and the deputy-minister evidently viewed it in this way for in his letter of the 7th July, 1883, asking for $50,000, and a new receipt, he adds, "I will return you *one* of the receipts for $100,000 which we now hold." It, made no difference to the Government, and the surety was entitled to have the imputation made so as to discharge him. *Doyle* v. *Gaudette* (1); *Attorney General of Jamaica* v. *Manderson* (2).

The agreement by the bank, that the first monies paid back should be on account of the last $100,000, followed the law. There was error and mistake in the accountant's letter, and he wrote not only without authority, but contrary to the instructions of the president of the bank. We invoke the error and ask the payment to be

(1) 20 L. C. Jur. 134. (2) 6 Moo. P.C. 239.

made as was intended. Arts, 991 and 1160 C. C.; Rolland de Villargues *vo.*, "Imputation," no. 19 *bis*; *Ætna Ins. Co.* v. *Brodie* (1). The surety can urge the right of the debtor; he is the *avant cause* of the debtor and can also urge the error of the debtor. Art. 1958 C. C.; Fusier-Herman, Rep. vo. "Cautionnement," nos. 433, 459.

As to the Crown's claim for interest it cannot be sustained. The defendant's letter in no way covers any interest. The construction of a contract of suretyship must be strictly in favour of him who contracts the obligation. Under any circumstances the deposit receipts only bore interest if thirty days' notice was given of their withdrawal, and, in any event, the bank's liability to pay interest ceased on its insolvency and the appointment of the liquidators, and in such cases the Crown is not a privileged creditor. *Exchange Bank of Canada* v. *The Queen* (2).

The claim of the Crown in this action has been discharged by the payments made by the liquidator of the Exchange Bank amounting in the course of the liquidation to $160,503.21, or 66⅔ per cent. of the claim filed with the liquidator. As between the surety and the Crown this sum should be applied in the first place in payment of the amount guaranteed because it was, in fact, a payment by the debtor not specifically imputed by the Crown to any distinct portion of the debt, and if the guarantee remained outstanding and undischarged, it should now be imputed to discharge the debt so guaranteed under article 1161 of the code as being the debt in which the debtor had and has the greater interest in paying. *Walton* v. *Dodds* (3); *Doyle* v. *Gaudette* (4); *Devaynes* v. *Noble*; *Clayton's Case* (5). Where no expressed declaration has been

(1) 5. Can. S. C. R. 1.
(2) 11 App. Cas. 157.
(3) 1 L. C. L. J. 66.
(4) 20 L. C. Jur. 134.
(5) 3 Camp Eng. Ruling Cases 329; 1 Mer. 530.

1898

THE QUEEN v. OGILVIE.

made, the intention is presumed most favourably to the debtor. In *Young* v. *English* (1) an intention to discharge the secured debt was presumed, and in the *City Discount Company* v. *McLean* (2) it was said that though the English rule falls short of that of the Roman law already mentioned, there is a tendency in the same direction arising from the disposition to impute an intention to a debtor to appropriate his payments upon the most onerous debt. Even under the English authorities, where one of the debts is guaranteed the creditor must allow the composition or dividend in reduction, and charge the surety only for the balance. *Bardwell* v. *Lydall* (3); *Gee* v. *Pack* (4). But here, under art. 1161 C. C. the dividend must be applied, in the absence of specific appropriation, upon the debt or portion of debt which the debtor has the greater interest in seeing paid.

We also rely upon the decisions in *Paget* v. *Marshall* (5); *Chinnock* v. *Ely* (6); *Harris* v. *Pepperell* (7).

THE CHIEF JUSTICE.—I concur in the judgement of Mr. Justice King.

TASCHEREAU J.—I agree with my brother Girouard that this appeal should be dismised.

SEDGEWICK J.—I concur in the opinion of my brother King that the appeal should be allowed.

KING J.—This is an appeal from the judgment of the Exchequer Court (per Davidson J. *pro hac vice*) dismissing the claim of the Crown.

(1) 7 Beav. 10.
(2) L. R. 9 C. P., 692.
(3) 7 Bing. 489.
(4) 33 L. J. (Q. B.) 49.
(5) 28 Ch. D. 255.
(6) 4 DeG. J. & S. 638.
(7) L. R. 5 Eq. 1.

The claim was based on a letter of respondent dated 11th May, 1883, guaranteeing a loan or deposit of $100,000 then being made to the Exchange Bank of Canada at the request of the respondent.

The Exchange Bank had its head office in Montreal. Its president was one Thomas Craig, and Mr. Ogilvie was one of the directors.

In April, 1883, the bank was in financial difficulty and applied to the Finance Department for a loan of $100,000. The loan was made on the 12th of the month by way of special deposit, at 5 per cent interest withdrawable on thirty days' notice. The deposit receipt given by the bank was numbered 323.

Four days afterwards the bank made application for another $100,000, and on the 18th of April received this loan also, giving their deposit receipt for the amount. This deposit receipt was numbered 329, and is as follows:

No. 329.

$100,000.00. MONTREAL, 17th April, 1883.

The Exchange Bank of Canada acknowledges having received from the Hon. the Receiver General the sum of one hundred thousand dollars, which sum will be repaid to the Hon. the Receiver General, or order, only on surrender of this certificate, and will bear interest at the rate of five per cent per annum, provided thirty days' notice be given of its withdrawal.

The bank reserves the privilege of calling in this certificate at any time on written notice to the depositor, after which notice all interest on the deposit will cease.

If when notice be given by the depositor of withdrawal, the bank elects to pay immediately, it shall have the right to do so.

(Sd.) T. CRAIG,
President.

Entered.

(Sd.) ERNEST D. WINTLE,
p. Accountant.

Three days later the bank wrote the department that another $100,000 would be required to place them

1899

THE QUEEN v. OGILVIE.

King J.

in an independent position, but the department declined to make such further loan.

Then Mr. Ogilvie came to Ottawa and upon his undertaking to guarantee such further deposit, it was made on the 12th of May, 1883.

The letter of guarantee is as follows:

OTTAWA, 11th May, 1883.

MY DEAR SIR,—I beg that the Government will place a further sum of $100,000 at deposit with the Exchange Bank on the same terms as the former deposits of $200,000; and on the Government agreeing to comply with this request I hereby undertake to hold myself personally responsible for the further deposit of $100,000.

Yours very truly,

(Sd.) A. W. OGILVIE,

J. M. COURTNEY, ESQ.,
Deputy Minister of Finance, Ottawa.

The deposit receipt given in respect of this loan was numbered 346 and is as follows:

No 346.

$100,000. MONTREAL, 12th May, 1883.

The Exchange Bank of Canada acknowledges having received from the Hon. the Receiver General the sum of one hundred thousand dollars, which sum will be repaid to the Hon. the Receiver General or order, only on surrender of this certificate, and will bear interest at the rate of 5 per cent per annum, provided thirty days' notice be given of its withdrawal.

If when notice be given by the depositor of withdrawal, the bank elects to pay immediately, it shall have the right to do so.

(Signed,) T. CRIAG.
President.

Entered,

(Signed,) ERNEST D. WINTLE,
p. Accountant.

On the 31st of May, 1883, Mr. Courtney for the Finance Department wrote to the bank that "on the 1st day of July next the Dominion Government will require the sum of $50,000 to be transferred from the special deposit account with your bank to the general account."

In consequence of a letter from the bank of 29th June requesting that the repayment be postponed until after the 20th July, Mr. Courtney wrote on the 30th of June to the bank as follows:

I am sorry to say that I must have the $50,000 turned into ordinary cash on Tuesday. I had intended to have drawn out immediately (*i.e.* after it had been transferred to general account) in order to meet payments on account of subsidies, but this I will do, I will only draw $5,000 a day for ten days. I may as well inform you that we shall want another $50,000 to be turned into cash on the 1st August.

The following further correspondence in reference to this payment then took place:

Mr. Courtney to the President (Managing Director.)

OTTAWA, 7th July, 1883.

SIR,—Referring to previous correspondence, I have now the honour to request that you will be good enough to forward to me at your earliest convenience a receipt for the $50,000 which was to be turned into cash on the 1st instant, and also a fresh receipt for $50,000 at interest, and will return you one of the receipts for $100,000 which we now hold. Pray attend to this without delay.

James M. Craig, pro. Manager to Mr. Courtney.

MONTREAL, 9th July, 1883.

As requested in your letter of 7th instant I now forward the deposit receipt of this bank no. 358 in favour of the Hon. the Receiver General for $50,000, and enclose our receipt for $50,000 placed to the credit of the Finance Department account. Please return deposit receipt no. 323—$100,000 now in your possession and oblige.

Mr. Courtney to the President of the bank:

OTTAWA, 10th July, 1883.

I have the honour to acknowledge the receipt of your letter of the 9th instant enclosing special deposit receipt for $50,000, and I have now the honour to enclose herewith your deposit receipt no. 323 of the 13th April, 1883, for $100,000.

James M. Craig pro. Manager, to Mr. Courtney of 11th July, acknowledging receipt of deposit receipt no. 323.

Then with respect to the withdrawal or repayment of the second $50,000, of which Mr. Courtney had

1899

THE QUEEN v. OGILVIE.

King J.

given notice on 30th June for the 1st of August, there is the following correspondence:

Mr. Toller, acting Deputy Minister of Finance to the President of the Bank:

July 31st, 1883.

In reply to your letter of yesterday's date asking that the $50,000 which is to be taken from interest to ordinary cash to-morrow should be allowed to remain until the 1st of September, I regret to say that I am unable to comply with your request, as my instructions from Mr. Courtney were that the money was to be paid on the day named by him.....

President of Bank to Mr. Toller asking that Government will draw on the general account only at the rate of $10,000 every third day.

Toller to President of Bank, 15th August.

As I wrote to you the end of last month my instructions were to call upon you to place $50,000 (of which due notice has been given) at the credit of the Receiver General's ordinary cash from the amount now at interest. I do not see how I can consent to its remaining until the 1st of September. I shall, however, be most happy to comply with your request about drawing out the money. Please send us a receipt showing that the amount has been transferred from "interest" to current account with the accrued interest thereon.

James M. Craig, Pro. Manager, to Deputy Minister of Finance, 16th August, 1883.

I beg to acknowledge the receipt of your letter of the 15th instant, and herewith enclose receipt showing the current account with the department credited $50,315.07. Please return deposit receipt No. 358—$50,000, in favour of the Receiver General and oblige.

The bank suspended payment on the 17th of September, 1883, and on the 5th of December a winding-up order was issued under which the affairs of the bank have been fully wound up.

The Crown filed a claim for the amount of the two deposits as per receipts nos. 329 and 346, with interest thereon, and for the further sum of $37,840.24 in respect of other transactions and received in dividends

a sum $160,503 21, or sixty-six and three-eighths per cent.

The principal question relates to the application of the two payments of $50,000 each.

For the Crown it is contended that they were made upon the first indebtedness evidenced by the special deposit receipt no. 323, and by the receipt no. 358 given in substitution for the one-half of such loan remaining unpaid after the payment of the first sum of $50,000.

The respondent contends that such alleged application is null and void for error and want of authority in the person making it, and that in such event by the law of Quebec (which is claimed to be applicable) the payments are to be applied to the discharge of the guaranteed debt, thereby relieving the debtor of his obligations at once to the creditor and to his surety.

Arts. 1160 and 1161 (in part) of the Civil Code are as follows:

(1160.) When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt except upon grounds for which contracts may be avoided.

(1161.) When the receipt makes no special imputation, the payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying.

It may be noticed in passing that Art. 1160 seems to relate to cases where the creditor has made the imputation, and not to cases where the imputation has been made by the debtor.

The error assigned as sufficient under Art. 1160 to avoid the imputation of payment of the first loan or debt is briefly this:

It is said that in consequence of the bank having agreed with Mr. Ogilvie that the first moneys paid would be paid on account of the guaranteed debt,

1899

THE QUEEN v. OGILVIE.

King J.

Thomas Craig, the Bank President, gave instructions to the accountant, James M. Craig, so to apply the two sums of $50,000, but that without the knowledge or consent of the bank he omitted to do so, but on the contrary purported to make the payments on account of the first of the loans. It is not suggested that the Government knew anything of these transactions or understandings between the bank and Mr. Ogilvie, or of the instructions to James M. Craig.

The learned Judge has upheld these contentions of the respondent, and has directed that the payments be applied to the discharge of the guaranteed indebtedness, and dismissed the information of the Crown.

It may for present purposes be assumed that the view taken in the court below as to the case being governed by the law of Quebec is correct.

It has not been contended that the guarantor's responsibility under the terms of his letter of guarantee would cease whenever the banks special deposit indebtedness to the Crown should become reduced to $200,000, the amount at which it then stood. If it had been so contended, it might have been replied that the guarantee was that of a particular debt then being about to be contracted, and referred to as "the further deposit of $100,000." The several loans were distinguished by the respective deposit receipts or contracts entered into in respect of each, and which were not entirely similar in terms. The contract numbered 346 was that for the performance of which by the bank Mr. Ogilvie made himself responsible.

Then as to error and want of authority on the part of James Craig in purporting to make the imputation of payment.

The act of an agent binding the principal needs to be not only within the scope of the authority, but for the employer's benefit. As to the last point first,

The natural effect of Craig's imputation was to maintain the failing credit of the bank with its creditor, by preserving to the latter the personal security of Mr. Ogilvie, while at the same time the total liability was reduced. It was therefore clearly an act done by James Craig for the benefit of the bank under the circumstances in which it was placed.

Then as to the scope of Craig's authority. It seems manifest from the testimony of the bank president that, in the condition in which the bank was, things were left to be done by the accountant acting for the manager which perhaps at other times might not have been left to him. Thomas Craig, the president, says:

> At that time things were in a pretty bad shape and we did not know where we were standing, and instead of doing this myself as I ought to have done according to the agreement of the board (referring to the agreement with Mr. Ogilvie) by some means or other it was done by the accountant.

That is to say, owing to the confusion the president by some means or other left it to the accountant acting for him to transact this part of the bank's business. It further appears from the instructions said to have been given by the president to the accountant that the latter was recognized and treated as the officer charged with the signification of the imputation of payments.

Throughout the correspondence, beginning with the forwarding of the first deposit receipt, James Craig acts at every stage of the transactions as on behalf of the president, and with his knowledge.

In the letter to the bank president of 10th July, 1888, Mr. Courtney referred to James Craig's letter of the day before and enclosed "deposit receipt no. 323 of the 13th April."

There can be no reasonable question then that the president knew of what had been done, for the deposit

1899

THE QUEEN v. OGILVIE.

King J.

receipt was referred to not only by its number but its date, and not only did he not repudiate it, but concluded the arrangement by making out fresh deposit receipt no. 358.

Supposing however, that there was error, the annulment of the imputation by James Craig would still leave the act of the Crown in immediately sending back the deposit receipts as a sufficient act of appropriation on their part, no appropriation at all having been made by the bank on the hypothesis of error.

And even if this were not so, the bank could not get a benefit from their own error, and annul the imputation made by Craig, unless the creditor could be put in the same position as he would have been if there had been no imputation at all by the bank, and for obvious reasons no option can now be exercised by the Crown. There was clear prejudice to the Crown in being deprived of an option that would have belonged to it if Craig's act had, on the instant of making it, been nullified.

There seems therefore, upon these several considerations, to be no satisfactory ground for treating the case as though there had been no appropriation of payment either by the bank or the Crown.

It is further suggested that the imputation was invalid because not made at the time of payment.

With regard to the first payment of $50,000, Craig's letter of 9th July advises that the amount has been placed to the credit of the Finance Department, i. e., to the credit of the general or current account, and simultaneously asks for return of deposit receipt no. 323. This was at once assented to by the Crown (whose assent may be considered necessary upon a part payment of the debt), and acted upon by the return of the receipt asked for. Craig's letter con-

stitutes an immediate appropriation. If not, there was the appropriation instantly made by the Crown upon being notified of the fact of payment, or it was made by the joint assent to receiving part payment on account of such debt. In either way, therefore, there was valid application to the first debt.

If the actual payment of the money upon cheques drawn against general account be regarded, it must on principle be considered that the previous declarations and consents as to the application of the payments continued to operate so as to govern and explain the act of payment when it should take place, and to determine its character and quality.

So as to the second sum of $50,000, Craig's letter of 16th August advises of the transfer of the amount from the interest account to current account, and at the same time requests the return of deposit receipt no. 358. This also was acted upon and the deposit receipt returned. Until such return of the deposit receipt the transaction was incomplete.

Again, regarding the payments as not made until payment of the cheques drawn against general account, such subsequent payments would in the way already mentioned be considered as being made in pursuance of the subsisting declaration of intention and consent.

As to the dividends received by the Crown in the winding-up, the debts being distinct, the surety is entitled to have a ratable amount applied towards the reduction of the guaranteed debt.

As to interest, the respondent in his letter of 11th of May requested that the further deposit of $100,000 be made on the same terms as the former deposits of $200,000, and these terms included payment of interest by the bank at 5 per cent; the obligation to be respon-

1899

THE QUEEN v. OGILVIE.

King J.

sible for the deposit therefore reasonably includes interest at the named rate.

The result, therefore, is that the appeal is to be allowed with costs here and below, and judgment to be entered for the Crown for the amount of the deposit with interest at 5 per cent, deducting a ratable amount of the dividends received by the Crown upon the winding-up of the bank.

GIROUARD J. (dissenting.)—This is an appeal from a judgment of the Exchequer Court of Canada (Davidson J. *ad hoc*), which dismissed the information of the Attorney General of Canada, praying for judgment against the respondent for $77,337.03, as balance due under a letter signed by him on the 11th of May, 1883, and purporting to guarantee the last of three loans for $100,000 each, made by the Government of Canada to the late Exchange Bank of Canada. The bank failed on the 17th of September, 1883, and went into liquidation on the 5th of December of the same year. In 1892, its affairs were wound up in insolvency, the liquidators discharged and all the books and papers (except a few which were deposited in court) ordered to be destroyed. The information of the Attorney General was fyled on the 17th of September, 1895, and the trial took place in Montreal on the 21st of July, 1897. So the Government had been silent at least twelve years after the debt had been created and exigible, and three years after the affairs of the bank had been finally liquidated in insolvency, and their books, papers and vouchers burnt by order of court. The respondent had no reason to object to this destruction, as nothing had been said or done by the Government about their claim against him, either in the insolvency proceedings or elsewhere. The respondent not only lost what would have proved to be valuable written

evidence, but the living witnesses also disappeared. Nearly the whole board of directors died. The Government knew that any attempt to collect from the respondent would be resisted as they were informed by Mr. Thomas Craig, President of the bank, as early as November, 1883, that his letter of guarantee was considered as paid, without, however, alleging any error in the imputation; apparently he was not aware of it at the time, nor for years after, till the institution of the present suit, when the papers were produced by the Crown. The Department of Justice, to whom the matter was referred in 1883, advised the Department of Finance that the respondent was still liable. This opinion was only communicated to the bank then in insolvency, and not to the respondent who was never asked to pay, even verbally, although no doubt in frequent contact with the Crown representatives, as a member of the Senate. As the respondent says, referring to the period of time posterior to the delivery of the letter of guarantee: "I never had anything to do with the Government good, bad or indifferent; never heard of the debt; they never asked me for it for 14 years." Under the circumstances he naturally supposed that the Department of Finance had concluded that their claim was discharged by payment, if not by prescription. He says in his evidence:

Witness: I said, I asked if he (T. Craig) had paid back that $100,000 and he said he hadn't.

Q. When was this?—A. I suppose six or seven weeks afterwards or four or five weeks (after the letter of guarantee was given.) I asked him repeatedly, and he told me at last that he had paid back the $100,000 and I asked him where my letter was.

Q. Then what was his answer?—A. He told me that he would have my letter in a very few days, that he had written asking for it.

The letter was never remitted and remained in the possession of the Finance Department for at least

1899

THE QUEEN v. OGILVIE.

GIROUARD J.

twelve years before they thought of collecting it; and after that long silence, which would be fatal to an ordinary creditor, he is called up to answer the demand of the Crown for a very large balance alleged to have remained unpaid, after deduction of the dividends received in insolvency and amounting to sixty-six and three-eighths per cent. The case, therefore, affords a most remarkable illustration of the great hardship of the law, prevailing at least in the Province of Quebec, which allows the Crown to plead prescription against a subject, just as any individual can, but refuses the subject every plea of prescription against the Crown, even in commercial matters, except prescription of thirty years. Arts. 2211, 2215 C. C. We do not, however, sit here to reform the law, but to interpret and apply the same. The defendant has invoked prescription. The trial judge observes that the plea of prescription was not seriously argued at the trial, and finally holds, and correctly so, that prescription had not inured. The law is clearly against the respondent, but equity evidently is with him.

The respondent has also pleaded payment by the bank and, in connection with this, has raised delicate questions of imputation of payment, which were decided in his favour by the court below. In order to have an intelligent understanding of this decision, it is necessary, first, to recapitulate the facts.

On the 13th of April, 1883, the Government of Canada, which was already in current account with the Exchange Bank of Canada, then in financial difficulties, and with a view of coming to its assistance, advanced them $100,000, for which the bank issued a special deposit receipt, no. 323. That paper is not produced and was likely destroyed.

Four days later, on the 17th April, the Government deposited a further sum of $100,000 and received a second special deposit receipt, no. 329, which is produced.

On the 12th May following, the Government made a third advance of $100,000, and got a third deposit receipt, no. 346, which is also fyled; but this time the guarantee of the respondent was demanded and granted in these terms:

OTTAWA, 11th May, 1883.

MY DEAR SIR,—I beg that the Government will place a further sum of $100,000 at deposit with the Exchange Bank, on the same terms as the former deposits of $200,000; and on the Government agreeing to comply with this request, I hereby undertake to hold myself personally responsible for the further deposit of $100,000.

Yours very truly,

A. W. OGILVIE.

J. M. COURTNEY,
Deputy Minister of Finance.

All the deposit receipts are signed by the accountant and the president of the bank, T. Craig. They are of the same form and tenor, and read as follows:

No. 329,

MONTREAL, 17th April, 1883.

$100,000.00.

The Exchange Bank of Canada acknowledges having received from the Hon. the Receiver General the sum of one hundred thousand dollars, which sum will be repaid to the Hon. the Receiver General or order, only on surrender of this certificate, and will bear interest at the rate of five per cent per annum, provided thirty days' notice be given of its withdrawal.

The bank reserves the privilege of calling in this certificate at any time on written notice to the depositor, after which notice all interest on the deposit will cease.

If when notice be given by the depositor of withdrawal, the bank elects to pay immediately, it shall have the right to do so.

T. CRAIG,
President.

Entered.

ERNEST D. WINTLE,
p. Accountant.

1899

THE QUEEN v. OGILVIE.

Girouard J.

Receipt 346 does not contain the second paragraph, "The bank reserves, etc."

It is admitted that the respondent gave his letter of guarantee without having any understanding with the Government as to its future payment and discharge; but it is proved that he had gone to interview the Government at the bank's request; that he negotiated this third advance on consenting to become surety; that the Government cheque was remitted to him; and that finally upon his return to the head office of the bank in Montreal, he reported to the president and the directors what had taken place and informed them that he would not part with the cheque, unless they promised that the first money paid back would be applied to the loan he had so guaranteed, which request was immediately agreed to; and that upon this understanding the cheque was delivered to the bank, and deposit receipt no. 346 was issued. So says the respondent, and also Mr. Craig, the president, who adds that he personally undertook to see that the agreement would be carried out. Their testimony is not contradicted, although the appellant had ample opportunity to do so, if possible, by examining Mr. James M. Craig, the accountant, or Mr. E. K. Greene, the only surviving director (with the respondent and Mr. Thomas Craig), at the time of the trial. Mr. Craig believes that an entry of the agreement was made in the minute book of the board of directors, but speaking after that length of time, he could not say positively. It is not even possible to verify the correctness of his impression, as the minute book is not produced and was probably destroyed with the other papers. In the whole of this transaction the respondent did not make one farthing of profit, and acted generously to assist the bank, of which he was a director and shareholder, and it is unfortunate for him

that before giving the cheque he did not exact a written agreement and transmit the same to the Government.

Two payments of $50,000 each, it is alleged, were made in July and August, 1883. The three loans were payable on demand, the notice of thirty days being only required to save the interest. The payments were, however, only partial, and the creditor was not obliged to receive them; but not only did he accept the same, but he invited, in fact forced, the debtor to make them without even suggesting any imputation. On the 31st May, 1883, some three weeks after the respondent gave his letter of guarantee, the bank was informed by letter that "on the first day of July next, the Dominion Government will require the sum of $50,000 to be transferred from the special deposit account with your bank to the general account." On the 30th of June, Mr. Courtney notified the bank "that we shall want another $50,000 to be turned into cash on the 1st August." No reference is made to any particular loan.

Finally, on the 7th July, when Mr. Courtney, who had not yet drawn upon any money transferred to the current account in payment of the first $50,000 call, proposed to the bank a modification of the arrangement, which was finally accepted and carried out, he does not state that the money paid, or to be paid, will be imputed upon the first loan, but that he "will return one of the receipts for $100,000 which we now hold." It is therefore clear that the Government did not intend to make any special imputation of payment as a condition of the partial payment. The information of the Attorney General alleges that the imputation was made by the bank and agreed to by the Government and that is exactly what took place. It is proved that this imputation was done

1899

THE QUEEN v. OGILVIE.

Girouard J.

by the bank, acting not by its president, Mr. Thomas Craig, but by Mr. James M. Craig, its accountant, without authority, by error and contrary to his instructions. The evidence is clear upon this point. Mr. Thomas Craig, in his examination under a commission, as he was then carrying on business in the city of Brooklyn, N. Y., says:

Q. Mr. Ogilvie held this check or document and refused to hand it over until he was personally guaranteed by the directors to protect him against the guarantee which he had given to the Government; what took place? A. The directors agreed to give him that guarantee and it was not reduced to writing, but simply, as far as I can recollect, on the minute book of the bank. I cannot recollect whether it was placed in the minutes or not, but there is no question but they agreed to do it.

Q. Anything else? The understanding being that the first money that the bank repaid to the Government should release that guarantee, when it reached the amount of $100,000.

Q. Do I understand that he refused to do it until this guarantee was given, and the assurance made that the first money paid back should go against this last $100,000? A. Yes.....

Q. In connection with these two payments of fifty thousand dollars each, do you remember what instructions you gave to James N. Craig? (Objected to as illegal. Objection reserved by consent of parties). A. To the best of my recollection, he was instructed to apply this on the last loan—these two payments.

Q. By the last loan you mean the last sum of one hundred thousand dollars deposited by the Government, for which Mr. Ogilvie gave his letter of guarantee? A. Yes.

Q. I understand you to say that the correspondence, in connection with these matters, was intrusted to you as the officer of the bank? A. Yes. I should have carried on the whole correspondence.

Q. Then these two letters, written by Mr. James M. Craig, in connection with the return of the deposit receipts, were not authorized by the bank? A. No. Not especially authorized by the bank. He did it as a matter of routine, against my instructions.

In cross-examination he says:

Q. Will you please look at the correspondence contained in Exhibit "A" and tell me the number of the receipt issued for the first loan of one hundred thousand dollars? A. The number in 323.

Q. When the first fifty thousand dollars was paid back, the accountant of the bank asked for the return of that deposit receipt? A. Yes, but he asked that through error.

Q. But it was returned? A. It was.....

Q. You do not pretend to say that you gave positive instructions to your accountant not to apply that first $50,000 in payment of the first loan? A. His instructions were to apply those $50,000 on account of the last loan.

Q. Did you give him those instructions yourself? A. Yes. I remember perfectly well.

Q. You never notified the Government at any time, in any correspondence, that the first $50,000 paid back had been wrongly applied? A. No.

Q. Nor notified the Government when the second $50,000 were paid, what the application should be? A. But the accountant was instructed to apply it in that way.

Re-examination by Mr. Hall, on behalf of defendant.

Q. You say in your cross-examination that the Government were not notified in any way about there being an error in the application of these two sums of fifty thousand dollars each. I suppose you mean no notice was sent prior to the letter of the 10th and 19th of November 1883? A. Yes, when I asked to get the return of the letter of May 11th, 1883, that was given by the defendant, Mr. Ogilvie, to the Government.

This statement, so far as it relates to the agreement with the bank, is corroborated by the respondent, who was examined on his own behalf. The reply of Mr. Thomas Craig to the request of the respondent to get back the letter of guarantee and also the two letters of Mr. Craig written in November and October, 1883, demanding the surrender of the letter as being paid, confirm his statement under oath made fourteen years afterwards that he instructed his accountant, James M. Craig, to apply the two payments to the last loan.

The trial judge maintained the plea of error and I agree with him that it is well founded, not only in fact, not also in law.

The appropriation of payment was suggested by the bank, but it was agreed to and carried out by the Gov-

1899

THE QUEEN v. OGILVIE.

Girouard J.

ernment and may fairly be considered as one made by the creditor within the meaning of article 1160 of the civil code. The enactment of this article, moreover, is not limited to the case where the debtor has omitted to make an imputation, but provides generally for the case where the debtor has accepted a receipt in which the creditor has imputed, as was done in this instance by returning receipt no. 323, as requested.

It must be noticed that in this respect, the Quebec civil code is much broader than the Code Napoleon. Our own code, art. 1160, says:

> When a debtor of several debts has accepted a receipt by which the creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation to be made upon a different debt, except upon grounds for which contracts may be avoided.

The Code Napoleon, art. 1255, limits the remedy of the debtor to "*dol ou surprise de la part du créancier.*" The Louisiana code, art. 2161, has reproduced the latter. Error is not mentioned. Error, however, is a cause of nullity of contract, whether common to all the contracting parties or personal to one of them only, and can be proved by verbal testimony; arts. 991, 992, 1000 C. C. It can be invoked at any time before thirty years' prescription is acquired under art. 2242 C. C., different from art. 1204 of the C. N. which allows only ten years from the date of its discovery.

The appropriation of payment, made in this case, can therefore be attacked at the present time by the debtor for any of the causes for which he may impeach any contract he has made or assented to. The surety is in the rights of the debtor and it is an elementary principle that he can oppose all the exceptions which are not purely personal to him. Arts. 1031, 1958 C. C.

What are the legal consequences of this error? The principles which govern matters of error have been

recently laid down by this court in *Delorme* v. *Cusson*, (1), and it is sufficient to refer to what we said in that case. The imputation made by James M. Craig, in the name of the bank, although accepted and carried out by the Government in good faith, must be set aside, not only because it was unauthorized, but also because, even if authorized, it was made by error. The parties must be placed in the same position they were before the mistake or error was made. True, if any damage has thereby been suffered by the Government, the debtor, or in this case the surety, must indemnify them. But the Government has not pleaded any; none has been shown; the very opposite is proved. The first deposit receipt no. 323 has been returned, it is true, but it was a mere acknowledgement of debt which was never denied by any one, and if disputed could be otherwise proved. The Government continued to hold its equivalent in value, deposit receipt no. 346, for all the special deposit receipts were of like commercial value. They were collected on the estate of the bank without any question as to the amount. By timely notification on the part of the bank, they would have irrevocably lost their recourse against the surety. They had no control over that. The bank alone first could tell whether Mr. Ogilvie would be discharged or not. It was the privilege of the bank, free from any interference or action of the Government who could do nothing, except if the bank had been inactive. Without the error committed by the accountant of the bank, how could the Government reasonably expect to save the guarantee of the respondent? The Finance Department had so little hope of this result that when, on the 7th of July, they proposed to receive $100,000 in two payments, they did not say: We will keep deposit receipt no. 346, but, "we will return

(1) 28 Can. S. C. R. 75-77.

1899

THE QUEEN v. OGILVIE.

Girouard J.

you one of the receipts for $100,000 which we now hold," meaning any receipt you indicate. Under these circumstances the imputation should be set aside as having been made by error.

What is the position of the surety in such a case? No conventional imputation was made, and therefore he is discharged by operation of law, the debtor having more interest to pay the last loan than the first or second, because he frees himself of two creditors and relieves his friend at the same time. It may also be said that the third loan is the most onerous, as it is due by two debtors. Such is the meaning of Art. 1161 of the Civil Code, similar to Art. 1256 of the French Code, as laid down by a well settled jurisprudence both in Quebec and in France. *Brooks* v. *Clegg* (1); *Doyle* v. *Gaudette* (2); arrêt of the 3rd August, 1705, reported in Augéard; Dénisart Vo. Imputation de paiement, no. 6; Cass. 24th August, 1829; Grenoble, 29th July, 1832; Paris, 26th Nov. 1833, all reported in Delvincourt, 32, 2, 572, 594; Cass. 19th Mars 1834, Dal. Jur. Gén. vo. Cautionnement, n. 43; Orleans, 3rd April, 1851, S. 51, 2, 555; Dijon, 20th Dec. 1878; Cass. 19th Nov. 1879, S. 81, 1, 211; Agen, 24th May, 1886; Lyon, 27th Oct. 1888, and Bordeaux, 9th Jan. 1889, quoted in Pandectes Francaises Rép. Alph. 1893, vo. Oblig. n. 3541; Pothier, Oblig. n. 567; 7 Toullier, n. 179; 2 Delvincourt, p. 770; 12 Duranton, n. 199; 4 Mar. 726; 2 Poujol, p. 223; 4 Boileux, p. 552; Carrier, Obl. 245; 4 Aubry et Rau, n. 320, note 12; 5 Colmet de Santerre, 201, bis. 2; 5 Demolombe, 62; 17 Laurent, 619; 3 Larombière, art. 1256, n. 5; 8 Huc. p. 117; 2 Baudry-Lacantinerie, 5th ed., p. 761; Dal. Jur. Gen. 1893, 2, 425, notes 5 to 7; 2 Molitor, 986.

Let us suppose that no error has been committed by the bank in making the imputation; is the respondent

(1) 12 L. C. R. 461. (2) 20 L. C. Jur. 134.

yet liable? The issue presents another feature which has been merely alluded to by the learned trial judge, without drawing any conclusion applicable to the case, namely: Was the imputation made at the very moment of the payment or payments? The learned judge, taking the view he did of the plea of error, no doubt considered that it was not necessary to examine this point of fact, although he lays down the rule of law that any appropriation of payment, whether by the debtor or the creditor, must be made at the instant of payment, and he quotes arts. 1158 and 1160 of the Civil Code and also Rolland de Villargues, vo. Imputation, p. 169; he finally draws the attention to the difference that exists between the English and the Civil law; for our Code as well as the French Code have merely reproduced the Civil law.

Thus, (he concludes), both English and Civil law give the option in the first place to the debtor, but he must optate at time of payment. The like restriction as to immediate option in the event of the creditor coming to exercise his secondary right is preserved by us, but overthrown by comparatively recent decisions in England. The courts there, perhaps giving expression to long continued usage, have reversed the original principle of decision, enabled the creditor to make his election even up to time of trial, and in the absence of express appropriation, determined that it is his, and not, as with us, the debtor's, presumed intention which is to govern.

See also notes to Clayton's case in Tudor's leading cases.

The civil law, which must govern this case, is undoubtedly as stated by the learned judge. Art. 1158 C. C. says:

A debtor of several debts has the right of declaring when he pays what debt he means to discharge.

Art. 1160:

When a debtor of several debts has accepted a receipt by which a creditor has imputed what he has received in discharge specially of one of the debts, the debtor cannot afterwards require the imputation

1899

THE QUEEN v. OGILVIE.

Girouard J.

to be made upon a different debt except upon grounds for which contracts may be avoided.

The jurisprudence seems to be well settled that the imputation by the creditor, as well as that by the debtor, must be made at the very instant of payment, and that likewise the receipt mentioned in art. 1160 must be given, or supposed to be given, at that very time, and in accordance with the facts then existing. No doubt the creditor and debtor could agree, before or after, as to the imputation, but it cannot be so made to the detriment of third parties.

Toullier, vol 7, n. 176:

Si le débiteur ne fait pas l'imputation, le créancier a le droit de la faire, pour vu que ce soit a l'instant même du paiement, et dans la quittance.

Larombière, art. 1255, n. 2:

D'autre part, le créancier doit le faire à l'instant même du paiement.

Aubry et Rau, vol. 4, no. 320:

Lorsque le débiteur ne déclare pas qu'elle est l'obligation qu'il entend acquitter, l'imputation faite par le créancier, au moment où il reçoit le paiement, doit obtenir son effect.

Laurent, vol. 17, n. 611:

Pothier dit que si le débiteur, en payant, ne faite pas d'imputation, le créancier à qui il est dû pour différentes causes peut la faire par la quittance qu'il lui donne. L'article 1255 (1160 of the Quebec code) consacre implicitement ce droit.

Pothier y met deux conditions. Il faut d'abord que l'imputation ait été faite dans l'instant. L'article 1255 ne reproduit pas cette condition, mais elle résulte de la nature même du paiement. Imputer, c'est payer; donc l'imputation doit se faire lors du payement soit par le débitur, soit par le créancier.

Baudry-Lacantinerie, vol. 3, p. 761, 5th ed:

Le créancier doit faire cette imputation au moment même du paiement; après il serait trop tard, car il se trouverait en présence d'une imputation faite par la loi, et il n'aurait pas le droit de la modifier.

At no. 1058, he mentions the case of an imputation agreed to by both the creditor and the debtor; he holds

this imputation valid, but it must be made at the time of payment:

Cette imputation, effectuée au moment du paiement, devrait être respectée alors même qu'elle causerait prèjudice à des tiers.

He quotes in this sense an arrêt of Grenoble, 25th of June, 1892, D. 93, 2. 425. See also Pandectes Françaises, Rép. Alph. vo. Obl. n. n. 3484, 3489; *Bloodworth* v. *Jacobs* (1); *Adams* v. *Bank of Louisiana* (2). In *Bloodworth* v. *Jacobs* (1), Eustis C. J., of the Court of Appeals of Louisiana, said:

The rules concerning the imputation of payments were laid down with such admirable clearness and precision in the Roman law that they have undergone very little change since, and the learned counsel who argued this case concur in their exposition of them.

The debtor has first the right to make the imputation; if he does not exercise this right, it then appertains to the creditor; if neither makes the imputation, the law makes it for them; and in all cases the imputation takes place in one of these modes at the time payment is made, it being understood that where the imputation is made by the creditor, the debtor is always protected against surprise as well as against fraud.

After the debtor shall have accepted a receipt in which the imputation is made by the creditor to any particular debt, it becomes irrevocable, unless there has been surprise or fraud on the part of the creditor.

But can the debtor and creditor agree in advance. but after the creation of all the debts, that any future payment shall be applied to any particular debt, to the detriment of the surety who has not been consulted, although he has an eventual right of being discharged? I have not been able to find, in France or Quebec, any decision or opinion of the commentators in point, although the general principle is laid down that the creditor or debtor or both cannot interfere with the rights of third parties. Pand. Fr. Rép. Alph. vo. Obl. n. 3512. Of course, the authorities admit the legality of an imputation agreed to in advance by

(1) 2 La. An. 24.
(2) 3 La. An. 351.

1899

THE QUEEN v. OGILVIE.

Girouard J.

all the interested parties, including the surety; Caen, 17th April, 1869; D. 71, 2, 184; 17 Laurent, 613; 28 Demolombe, 62; Pandectes Françaises, vo. Ob., n. 3591; and a decision is quoted to the effect that an imputation made on a subsequent transaction, at the very time it was closed, would also bind the surety, although not consulted. But, if the imputation be settled only by the creditor and debtor on past transactions, no one has ventured to define the position of the surety, not assenting or even consulted. I cannot see how an agreement of that kind can have any effect in so far as he is concerned. Contracts have effect only between the contracting parties and cannot affect third parties, except in the cases specially provided by law. C. C. 1023, 1028. Articles 1158 and 1160 authorize imputations of payment by the debtor or creditor or both, provided they are made at the moment of payment. Therefore they cannot be made at any other time, and if not so made would not be binding upon third parties. Of course, an imputation made at the time of payment, as previously agreed to, would bind the surety, not in consequence of the agreement, but of the imputation being made at the time fixed by law. But this is not what took place in the present case.

The information of the Attorney General alleges, par. 5, that:

> On the 9th day of July, 1883, the said Exchange Bank paid to Her Majesty the sum of $50,000 on account of the first advance or loan above mentioned, and at the same time delivered to Her Majesty a deposit receipt No. 358 to cover the $50,000 remaining on deposit of such first loan, and Her Majesty, at the request of the said bank, returned the deposit receipt numbered 323, which had been issued by the said bank to the Government for the said first advance or loan of $100,000.
>
> 6. That on the 16th day of August, 1883, the said bank repaid to Her Majesty the remaining $50,000 of the first advance or loan, and

Her Majesty, at the request of the said bank, returned to the said bank the deposit receipt No. 358, which had been received in respect of the said balance, as mentioned in the last preceding paragraph hereof.

The respondent, in his pleas, does not allege any particular day of payment; he simply says that the $100,000 were paid by the bank "prior to its going into liquidation, and should be, and defendant claims, must be imputed and paid in payment of said last deposit."

In the course of the argument which was presented to this court, the parties seem to have overlooked the time the appropriation of payment was made. In my humble opinion this point cannot be ignored or dismissed, simply because it was not taken up at the hearing. It is clearly raised by the issue, and fully covered by the evidence, and I consider that the respondent is entitled to the benefit of the same. As I understand the case, it was the duty of the appellant to prove the allegation contained in his information that the imputation had been made by the Government at the request of the bank, and on the 9th of July and 16th of August, respectively. Has the appellant made that proof? What are the real facts? Mr. Dickieson, the bookkeeper of the Department of Finance, says that the money was

paid back by a transfer from the deposit to the ordinary cash account and we chequed against that.

Q. And then you got the whole of the amount?—A. Yes.

Q. And that explains the terms of those two receipts exhibits 5 and 4?—A. Yes.

Mr. NEWCOMBE: And the other $50,000 paid in the same way?—A. Exactly in the same way. I was going to say that the bank did not give us a cheque for the $50,000, but they transferred to our credit in the current account $50,000 twice, and sent us a receipt.

We have here the proof that the whole $100,000 were actually paid by the bank; but Mr. Dickieson does not say precisely when they were so paid; neither

1899

THE QUEEN v. OGILVIE.

Girouard J.

does he state whether the money was checked out in two payments of $50,000 or in parts of $5,000 or $10,000 extending over several days, as Mr. Courtney had agreed to do. The cheques of the Government are not produced; they were likely never retired from the bank, and shared the fate of the other papers.

The books of the Government show conclusively that the two payments were made on the 10th of July and 17th of August, and not on the first loan but on the three loans generally, without any special imputation. The receipt no. 358 is not even charged. The Government account is as follows:

Exhibit C.

Exchange Bank, Montreal.

(Special Account.)

1883.		$ cts.	$ cts.
April 12.	To cash	100,000 00	
17.	"	100,000 00	
May 11.	"	100,000 00	
July 10.	By cash		50,000 00
Aug. 17.	"		50,000 00
1885.			
Feb. 15.	By Exchange Bank liquidation account		200,000 00
		300,000 00	300,000 00

This statement *primâ facie* at least makes proof against the Crown; C. C. 1222; *Darling* v. *Brown* (1). It shows that no special appropriation was made and that, in consequence, the respondent was discharged by mere operation of law. No error is alleged and none is proved. No explanation is even offered. The burden of proof lies upon the appellant to show that the facts relating to the payments establish a different case.

Speaking from memory, Mr. Craig swears that the payments were made "at the date or about the date he (Mr. Courtney) requested." He adds:

(1) 1 Can. S. C. R. 360; 2 Can. S. C. R. 26.

By the correspondence, it seems that by letter of the 9th of July that fifty thousand dollars was sent to him and a new deposit receipt for fifty thousand dollars sent, with request to return the old one.

The fact is that, outside the Government books, the only available evidence is to be found in the correspondence between the bank and the Department of Finance, whether carried on by mail or otherwise, does not appear, but, from its perusal, we may infer that it was by mail, which would require one intervening day at least for transmission and reply. It is far from being satisfactory; it is not supplemented, nor explained by any verbal testimony. As it is, it must be accepted in its entirety and not in pieces; and, in my humble opinion, it does not support the contention of the Crown.

On the 31st of May the bank was informed by letter

that on the first day of July next, the Dominion Government will require the sum of $50,000 to be transferred from the special deposit account with your bank to the general account.

On the 29th of June Mr. T. Craig wrote: "I shall be greatly obliged if you will postpone it until after the 20th," meaning, of July.

On the 30th June, Mr. Courtney replies;

I must have the $50,000 turned into cash on Tuesday (which the calendar for 1883 indicates to have been the 5th July), but I will only draw $5,000 a day for ten days. I may as well inform you that we shall want another $50,000 to be turned into cash on the 1st August.

On the 4th of July, Mr. Courtney writes about the payment of interest, and adds in a P. S.:

I have not turned into cash yet the $50,000 of which notice was given,

meaning, if I understand him rightly, that he had not yet commenced to draw against the general account, and in face of his letter of the 30th of June, he could not have done so. The natural inference of this P. S. was, however, that the money was in the

1899

THE QUEEN v. OGILVIE.

Girouard J.

bank to the credit and at the disposal of the Government, to be withdrawn as agreed to.

On the 7th July, Mr. Courtney proposed a modification to the arrangement, but without altering his promise to draw only at the rate of $5,000 per day.

Referring, he said, to previous correspondence, I have now the honour to request that you will be good enough to forward to me at your very earliest convenience, a receipt for the $50,000, which was to be turned into cash on the 1st instant, and also a fresh receipt for $50,000 at interest, and will return you one of the receipts for $100,000 which we now hold. Pray attend to this without delay.

On the 9th of July, James M. Craig answers:

As requested in your letter of the 7th instant, I now forward the deposit receipt of this bank, No. 358, in favour of the Hon. Receiver General for $50,000, and enclose our receipt for $50,000 placed to the credit of the Finance Department account. Please return deposit receipt No. 323, $100,000, now in your possession and oblige.

On the 10th July Mr. Courtney replies:

I have the honour to acknowledge the receipt of your letter of the 9th instant, enclosing special deposit receipt for $50,000, and I have now the honour to enclose herewith your deposit receipt No. 323 of the 13th April, 1883, for $100,000.

The ordinary receipt for $50,000 "placed to the credit of the Finance Department account" has been produced by the Crown as exhibit No. 4. It is antedated 1st July, 1883, and shows upon its face that the money had been so "placed" on that day, and in this particular it agrees with the facts and circumstances as they appear from the record. It reads as follows:

Exhibit No. 4.

MONTREAL, July 1st, 1883.

Memorandum Form to
Exchange Bank of Canada,
Montreal.

Received from the Hon. the Receiver General for credit of current account with the Finance Department, fifty thousand dollars, being one-half of deposit receipt No. 323, dated 13th April, 1883, for $100,000 standing in the name of the Hon. the Receiver General.

Please reply on this slip. JAMES M. CRAIG.
4,000–4–8–'77. *For President.*

This document and the evidence establish that the imputation was suggested long after the first so called payment was made, and that no money actually reached the Government on the 9th of July or previously or even on the 10th, although at its disposal since the first. It was not a payment in specie or its equivalent, or even the delivery of an accepted cheque of the bank or of another bank, but a mere exchange of receipts or credits of the same nature and effect,—a mere substitution of the form of the debt—a different acknowledgement of the same, in words only, but not in substance, almost a mere matter of bookkeeping, the actual debit and credit remaining the same. Before this exchange of receipts or credits, the Government could collect at any time, on demand, but then without interest; and after the exchange, the position was the same. In both cases they were simple creditors, first as a special depositor and last as an ordinary one. The liability of the bank was not paid or discharged, but on the contrary continued the same. The operation was so far from being a payment—that is a mode of extinguishing the debt, as contemplated by article 1138 of the Civil Code—that if the bank had failed on the 9th, 10th or 11th of July, or any other subsequent day, but before the full withdrawing of the whole $50,000, the Government would have been a simple creditor as before, for any amount not withdrawn.

To sum up, these documents establish that at the time of the first payment, two receipts were substituted for receipt no. 323, namely a special one for $50,000, no. 358 (not produced), which was a renewal in part of no. 323, and an ordinary one, dated the 1st of July (exhibit no. 4) for $50,000 standing to the credit of the Government in the current account, to be drawn at the rate of $5,000 a day. Therefore no money was actually paid on the 9th or even the 10th of July, or before, but

1899

THE QUEEN v. OGILVIE.

Girouard J.

subsequently at the rate of $5,000 per day, and without any imputation being made at the time of payment or payments, so far as we can judge by the correspondence and the evidence.

The same operation was about repeated with regard to the second payment. On the 14th of August, Mr. T. Craig writes to the Department of Finance:

> Referring to our loan from you, and the $50,000 called, I should like to know if you have decided to wait until the 1st September for payment. Doing so would be a great convenience to us, but if that is impossible, I shall be greatly obliged if you will draw on us only at the rate of $10,000 every third day.

On the 15th the department answers:

> As I wrote you the end of last month, my instructions were to call upon you to place $50,000 (of which due notice had been given) at the credit of the Receiver General's ordinary cash from the amount now at interest. I do not see how I can consent to its remaining until the 1st September. I shall however, be most happy to comply with your request about drawing out the money and will make it as easy as I can. Please send us a receipt showing that the amount has been transferred from "interest" to current account with the accrued interest thereon.

On the 16th, the bank, through James M. Craig, replied:

> I beg to acknowledge the receipt of your letter of the 15th instant, and herewith enclose receipt showing the current account with the department credited $50,315.07 (the $315.07 being for interest). Please return deposit receipt no. 358—$50,000, in favour of the Receiver General and oblige.

Whether special deposit receipt no. 358 was returned or not, does it not appear from the evidence.

The ordinary receipt referred to in the letter of the 16th, is plaintiff's exhibit no. 5, and reads as follows:

Exhibit No. 5.

Memorandum Form To
Exchange Bank of Canada. MONTREAL, 15th Aug., 1883.
Montreal.

Received from the Receiver General, for credit of current account with Finance Department the sum of fifty thousand three hundred

and fifteen $\frac{95}{100}$ being for deposit receipt no. 358, within terest at the rate of five per cent. to date.

JAMES M. CRAIG,
D. M. G.

Please reply on this slip.
4,000-4-8-77.

It appears from this document that when the second payment was made—that is, when the transfer was made from the special deposit account to the general account on the 15th of August—no imputation was made; this was only done on the 16th by the letter of James M. Craig.

It may be said that the transfer was not completed till it was accepted by, or at least notified to, the Government, that is on the 16th or 17th of August. But the acceptance had been made in advance, the transfer being in fact requested by the Government. But suppose the transfer was not perfect till so notified or accepted; it is admitted that no cash was paid either on the 15th, 16th or 17th of August and that an ordinary receipt, dated 15th August, 1883 (Exhibit no. 5) was merely substituted for deposit receipt no. 358, to be drawn against "at the rate of $10,000 every third day."

To conclude, the above documents show only a provision or arrangement for payments, and no actual payments. With regard to the first payment, cheques could not be drawn before the 11th of July, and it must be remembered only at the rate of $5,000 per day, and with regard to the second one, before the 18th of August, at the rate of $10,000 every third day—that is in each case, after the imputation had been made by the bank. At all events, it is clear to me that the imputations were not made at the time of the payments.

It is not essential to the validity of a payment that it should be made in cash; its equivalent may be accepted; any form or mode of payment may

1899

THE QUEEN v. OGILVIE.

Girouard J.

satisfy the debtor and creditor, either by bills, notes, transfer of credits. novations, compensation, *dation en paiement*, or otherwise. But no matter how made, it must have the effect of extinguishing the debt. So say all the commentators, both modern and ancient; 17 Laurent 597; 18 Id. 323; 27 Demolombe 26; 4 Larombiére, art. 1235, n. 1; 4 Marcadé 661; Domat. liv. 4, tit. 1; Pothier, Obl. 493; Rousseaud de Lacombe, vo. Payement n. 12; Denisart, vo. Payement, nos. 1 and 14; C. N. Art. 1234. Likewise under the Quebec Code, a payment to be perfect must be one which *ipso facto* operates the extinguishment of the debt. Art. 1138. A payment will bind the surety only when so made; and consequently it is only when so made, and at the very time the debt becomes extinct, that any imputation of payment, whether conventional or legal, can affect him. Any other payment is a mere agreement. In this case, the substitution of receipts made in July and August, 1883, did not extinguish the debt and therefore did not constitute legal payments. At the time the payments were truly and really made, that is when the monies credited to the general account were checked out by the Government and were actually delivered by the debtor and received by the creditor, as contemplated by article 1139 C. C., no imputation was made by either of them, and consequently, according to the authorities, the surety was discharged under article 1161 of the Civil Code.

It may be said that the Government, by withdrawing the money as agreed to, has made the imputation at the time they actually received it. It cannot be contended that such imputation was stipulated at that moment; the Government simply received the money placed in its credit without saying anything. And how can an imputation be presumed from what had

1899

THE QUEEN v. OGILVIE.

Girouard J.

been done or agreed to previously? I have endeavoured to show, and I believe satisfactorily, at least to my mind, that any such action or agreement was null and void in so far as the surety was concerned, and cannot affect him.

Upon the correspondence and the evidence I have no hesitation in arriving at this conclusion; but even if any doubt was possible, I would give the benefit of it to the respondent, not only by reason of the equity of the case, but especially in face of the books of the Department of Finance, Exhibit C. To my mind, the absence of any conventional imputation at the time the moneys were checked out is a reasonable explanation of this exhibit, for I must presume that the Finance Department knew the laws governing the case.

For these reasons, I am of opinion that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *J. S. Hall.*

1898
*May 11, 12.
1899
*Feb. 22.

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

WILLIAM WARING PRIMROSE GIBSONE AND OTHERS (PLAINTIFFS PAR REPRISE D'INSTANCE)... RESPONDENTS.

WILLIAM WARING PRIMROSE GIBSONE AND OTHERS (PLAINTIFFS PAR REPRISE D'INSTANCE).... APPELLANTS;

AND

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY (DEFENDANT) ..... RESPONDENT.

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

Railways—Expropriation of land—Title to land—Tenants in common—Propriétaires par indivis—Construction of agreement—Misdescription—Plans and books of reference—Satisfaction of condition as to indemnity—Registry laws—Estoppel—R. S. Q. arts. 5163, 5164—*Art.* 1590 *C. C.*

In matters of expropriation where the railway company has complied with the directions and conditions of articles 5163 and 5164, Revised Statutes of Quebec, as to deposit of plans and books of reference, notice and settlement of indemnity with the owners, or with at least one-third of the owners *par indivis*, of lands taken for railway purposes, the title to the lands passes forthwith to the company for the whole of the property by mere operation of the statute, even without the consent of the other owners *par indivis*, and without the necessity of formal conveyance by deed or compliance with the formalities prescribed by the Civil Code as to registration of real rights.

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

1898

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

The provisions of the Civil Code respecting the registration of real rights have no application to proceedings in matters of expropriation of lands for railway purposes under the provisions of the Revised Statutes of Quebec.

Pending expropriation proceedings begun against lands held in common, (*par indivis,*) for the purposes of appellant's railway, the following instrument was signed and delivered to the company by six, out of nine of the owners *par indivis,* viz.: "Be it known by these presents that we the legatees Patterson of the Parish of Beauport, County of Quebec, do promise and agree that as soon as the Quebec, Montmorency and Charlevoix Railway is located through our land in Parishes of Notre-Dame des Anges, Beauport and L'Ange-Gardien, and in consideration of its being so located, we will sell, bargain and transfer to the Quebec, Montmorency and Charlevoix Railway Company, for the sum of one dollar, such part of our said land as may be required for the construction and maintenance of the said railway, and exempt the said company from all damages to the rest of the said property, and that, pending the execution of the deeds we will permit the construction of said railway to be proceeded with over our said land, without hinderance of any kind, provided that the said railway is located to our satisfaction. As witness our hands at Quebec, this 11th day of June, in the year of Our Lord, one thousand eight hundred and eighty-six."

Afterwards, the line of the railway was altered and more than one year elapsed without the deposit of an amended plan and book of reference to show the deviation from the line as originally located. The company however took possession of the land and constructed the railway across it and, in August, 1889, the same persons who had signed the above instrument granted an absolute deed of the lands to the company for a consideration of five dollars, acknowledged to have been paid, reciting therein that the said lands had "been selected and set apart by the said railway company for the ends and purposes of its railway and being already in the possession of the said railway company since the eleventh day of June, one thousand eight hundred and eighty-six, in virtue of a certain promise of sale *sous seing privé* by the said vendors in favour of the said company." Neither of the instruments were registered. G. purchased the New Waterford Cove property in 1889 and, after registering his deed, executed by all the owners *par indivis,* brought a petitory action to recover that part of the property taken by the railway company, alleging that the instruments mentioned constituted a donation of the lands

1898

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

and did not come within the operation of articles 5163 and 5164 of the Revised Statutes of Quebec.

Held, that the terms of sub-section 10 of article 5164, R. S. Q. were sufficiently wide to include and apply to donations; that the instrument in question was not properly a donation, but a valid agreement or *accord* within the provisions of said tenth sub-section, under onerous conditions of indemnity which appeared to have been satisfied by the company; that, as the agreement stipulated no time within which the new plan should be filed and the location appeared to have been made to the satisfaction of the required proportion of the owners, it was sufficient for the company to file the amended plan and book of reference at any time thereafter and that, as the indemnity agreed upon by six out of nine of the owners *par indivis* had been satisfied by changing the location of the railway line as desired, the requirements of article 5164 R. S. Q., had been fully complied with and the plaintiff's action could not, under the circumstances, be maintained.

APPEAL and CROSS-APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming the judgment of the Superior Court, District of Quebec, as to five-sevenths of the lands sought to be recovered by the petitory action herein and declaring the respondents to be the true and lawful owners thereof.

The facts are sufficiently stated in the head-note and also in the judgment of His Lordship, Mr. Justice Girouard.

Belleau Q.C. and *Bédard Q.C.* for the appellant. In cases of expropriation, the *acquéreur* cannot be ejected. The property passed to the company by mere operation of law. The consent of the owner is required only to fix the indemnity. C. C. 1590; Pothier, Vente, no. 513; 2 Aubry & Rau, n. 220. After the deposit of the plans, the expropriation can not be disturbed by any sale on the part of the proprietor. The land has become, for the purposes of the expropriation, *extra commercium*; and is replaced by the indemnity. R. S. Q. Art. 5164 s. 30. The transfer taking place by mere

1898

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

operation of law, no registration is required. R. S. Q. Art. 5164 s. 28; 23 Vict. ch. 61, s. 50; C. S. L. C. ch. 24, s. 50, s.s. 9; Mun. Code, Que., art. 903. Art. 5163, ss. 7, 11, R. S. Q. permits deviations within a mile of the original location, and in this case the alteration was made in satisfaction of the indemnity demanded by the requisite proportion of the owners *par indivis* as a benefit for themselves. The company was bound only to satisfy them and was not obliged to file amended plans within any fixed time as in cases of forced proceedings under the Act. The indemnity was settled under a valid agreement for valuable consideration, by the payment of some money and the performance of the onerous conditions imposed to the satisfaction of two-thirds of the owners *par indivis*.

In virtue of the *sous seing privé* of 11th of June, 1886, the appellant had a free right of way through the New Waterford Cove, to the satisfaction of the proprietors; it was confirmed by all the heirs by the reservation of the line in deed of January, 1889, when the old location had been abandoned and the new one adopted to their satisfaction, and also by the deed of August, 1889. Therefore, the contract having been fulfilled as a whole, the respondents are, as their *auteurs* were, estopped from repudiating part of it. When the plaintiff purchased he was aware that the legatees had sold the right of way through the New Waterford Cove and that at the date of the action the appellant had been for over a year the lawful proprietor in possession of the strip of land revendicated. Furthermore there was public notice of the expropriation on record by the deposit of the plans and books of reference in the registry office long prior to the purchase by plaintiff, and he was bound both by constructive and actual notice thereof.

1898

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Fitzpatrick Q.C. (Solicitor General for Canada), and *Gibsone* for the respondents. There are no registered title deeds prior to Gibsone's. No proper expropriation was made. The requirements of the Quebec Railway Act, under which the company purported to act, are peremptory and a condition precedent to the valid appropriation of land. The requisite formalities were not fulfilled and only a plan was deposited. The respondents rely upon *Corporation of Parkdale* v. *West* (1), per Macnaghten L. J. at pp. 613-615, a case decided under the Consolidated Railway Act, the provisions of which are similar to those of Quebec Railway Act and *The North Shore Railway Co.* v. *Pion* (2), per Selborne L. J. at pp 624-5-6, 628, 629, decided under the Quebec Railway Act.

The memorandum in writing was never intended to have reference to the location now in question and the deed cannot be deemed a title under the Railway Act, nor at civil law, and in any case it was gratuitous and the description of the lands indefinite,—said to be in the parishes of Notre-Dame des Anges, Beauport and L'Ange Gardien, whilst New Waterford Cove is situate in the Parish of St. Roch North. The contention that there had been a seigniory of Notre-Dame des Anges in this locality, and that as the parish of St. Roch North is within the old limits of this seigniory the memorandum must have reference to St. Roch North, if admitted would apply to the half-dozen other parishes within the old seigniory, a construction which would be unreasonable. Further the seigniory was divided into parishes in 1835, and thereupon ceased to be a territorial division and such a description would be unreasonable in a contract which involved $50,000. Even if the memorandum could have referred to the New Waterford Cove, the only location

(1) 12 App. Cas. 602. (2) 14 App. Cas. 612.

mentioned was the abandoned location, and to change this location the company must make a new contract with the owners of the land. The legatees have not approved the present location, in fact disapprobation was shown by the legatees Patterson refusing to convey it to the company.

The plan of the present location was deposited on the 7th of August, 1889, and two days later a deed was passed, transferring a road-bed across the Montmorency property. Reference to this deed will shew that it was signed by the Patterson legatees in July when they could have had no knowledge of the intended change of location. The deed of 21st January, 1889, is so obviously anterior to the change of location that comment would be superfluous. The memorandum appears to be a promise of sale made by four persons, three having an eventual interest and the fourth none whatever; it does not purport to transfer ownership, and cannot operate as a sale, whatever legal relations it might have created between the signers and the railway company. There having been no right of way granted, it follows that the reference in the deed of January, 1889, cannot estop the plaintiffs, at any rate so far as regards the present location.

The cross-appeal is on the ground that the court below should have held the railway company bound to register even its titles under the Railway Act, such as awards and contracts made under ss. 7 and 10, of R. S. Q. Art. 5164. Even if the plaintiff had known that the company had a title to the land which was unregistered, it would not have been any bar to his purchasing the land and registering the title. Art. 2085 C. C.; *Delesderniers* v. *Kingsley* (1); *Ross* v. *Daly* (2); *Thibeault* v. *Dupré* (3); *Farmer* v. *Devlin* (4). When

(1) 3 L. C. R. 84.
(2) 3 L. C. R. 136.
(3) 5 L. C. R. 393.
(4) 15 R. L. 621.

1898

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

plaintiff acquired this property he paid a fair price for it, and in purchasing, in considering the company a trespasser, and in taking the present suit, he acted in the fullest good faith. The judgment below gives effect against the cross-appellants, purchasers for value in good faith with registered titles, to an unregistered common law conveyance of a portion of the lands claimed. The amount also for which judgment was given is wrong. G. B. Hall and W. C. J. Hall could each give title to only one-ninth of the land, for the memorandum, and the clause in the deed of 21st of January, 1889, refer only to the extent of six-ninths, and G. B. Hall and W. C. J. Hall were only two of the six persons, who had one-ninth share each, concerned in the matter. The court below wrongly declared the respondent owner of two-sevenths interest in the land, and this court should reverse that part of the judgment complained of and restore the judgment of the Superior Court, and condemn the respondent to pay all costs in this appeal and the courts below.

THE CHIEF JUSTICE.—I agree with the majority of the court in the conclusion that this appeal must be allowed, but I am unable to concur in the reasons assigned for that judgment.

The learned Chief Justice of the Court of Queen's Bench, in whose judgment in this respect I concur, has, I think, satisfactorily demonstrated that the appellants acquired no title by expropriation under the provisions of the Railway Act. Further, it appears to me very clear that sec. 5164, subsec. 10 R. S. Q. does not apply in the appellants' favour. By that section it is enacted that:

> Whenever there is more than one person proprietor of any land as joint proprietor or proprietors in common, or *par indivis*, any contract or agreement made in good faith with any party or parties proprietor, or being together proprietors of one-third or more of such

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY

The Chief Justice.

and as to the amount of compensation for the same or for any damages thereto shall be binding as between the remaining proprietor or proprietors as joint proprietor or proprietors in common and *par indivis.*

The appellants have not brought their case within this section.

I refer again to the Chief Justice's judgment as showing that this sec. 5164 has no application.

I am not able, however, to agree with the Court of Queen's Bench in rejecting the defence of the railway Company founded on Art. 1485 C. C. This Art. is as follows:

Judges, advocates, attorneys, clerks, sheriffs, bailiffs and other officers connected with courts of justice, cannot become buyers of litigious rights which fall under the jurisdiction of the court in which they exercise their functions.

The depositions in this record show that Mr. Gibsone was at the time he purchased the lands which he seeks to recover in this action, an advocate practising in the courts of the district of Quebec, within the jurisdiction of which these lands were situated. Further, at the time of the purchase the property was in the possession of the railway company and in use by them as part of the line of their railway.

It is said that this defence fails for these reasons: First, it is said that the respondent had no notice of the litigious character of the property; that he did not buy or intend to buy litigious rights at all, but land which he purchased in good faith.

I should not be able to bring myself to the conclusion that these reasons were sufficient to show the purchase a permissible one, even if I found no authority in support of my views, for when a man buys immoveables knowing the fact to be, as Mr. Gibsone knew in the present case, that the land was in use as part of the line of a railway in actual operation, he must be taken to know that he could not make his

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY

The Chief Justice.

purchase effectual without litigation, which he must therefore be supposed to contemplate.

Art. 1485 is in all material respects an exact reproduction of Art. 1597 of the French Code. It is laid down by writers of authority that it is not essential, to bring a sale within Art. 1485, that an action should be actually pending at the time of the sale. That the provision of the law refers to rights in immoveable property as well as to other litigious rights is also the interpretation universally put on the Art. 1485 The character of litigiosity is said to apply to an immoveable when a vendor, not having the actual detention of it at the time of sale, is unable to deliver the possession.

That the term "litigious rights" is inclusive of the case last referred to is very clearly put in *Aubry & Rau* (1), as follows:

> Elle parait même devoir s'appliquer à la vente d'un immeuble dont la propriété est litigieuse aussi bien qu'à la cession d'un droit de propriété litigieux, alors du moins que le vendeur, ne détenant point l'immeuble vendu, se trouve hors d'état d'en faire la delivrance.

The law is laid down in the same terms by other commentators (2). These authorities might be greatly added to as well by citations from authors as by reference to the jurisprudence which seems to be uniform the same way. The point is one of some public importance inasmuch as speculative traffic in the land actually occupied by railway companies for the purposes of their permanent way is certainly one which ought not to be encouraged.

(1) Tome 4, p. 455, ed. 4th.

(2) See Troplong, Vente, Tome 2, p. 1001. Duvergier, Tome 2, p. 379. Also see Laurent, Tome 24 no. 58 et seq. Huc. vol. 10, no. 54; Arntz vol. 3, no. 941.

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Taschereau J.

I am of opinion that the appeal should be allowed and the action dismissed.

TASCHEREAU J.—I agree with my brother Girouard that this appeal should be allowed, and respondent's action dismissed. The heirs, Hall and Patterson would not have a right to this action. They would be estopped by conduct and by deeds. And that being so, the respondents acquired no rights from them. The appeal is allowed with costs, and the action dismissed with costs in all the courts against respondents. Cross-appeal dismissed with costs.

SEDGEWICK J. concurred.

KING J.—I am of opinion that the appeal should be allowed and the action dismissed for the reasons contained in the judgment of His Lordship the Chief Justice.

GIROUARD J.—A railway company incorporated by the Legislature of Quebec, and proceeding to expropriate for the purpose of constructing its line of railway, must follow the directions indicated in sections 5163 and following of the Revised Statutes of Quebec. The proceedings commence by depositing in the Department of Public Works and in the Registry Office of the county, through which it is intended to build the railway, a plan and book of reference, showing its location, and more particularly the lots of land to be traversed and the names of their proprietors; and if it becomes necessary to deviate, an amended plan and book of reference must also be deposited. Art. 5163, pars. 1, 7, 8.

One month after the notice of the deposit of the plan and book of reference, the company may settle the indemnity to be paid amicably, if agreed to with

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

the proprietors, or proceed to establish it by arbitration; and the statute declares that all contracts and arrangements made to that effect are to be valid and binding to all intents and purposes, and have the effect of vesting the property of said lands in the company, without any charge, restriction or limitation. Art. 5164, pars. 3, 5, 11. Even before the deposit of any plan and book of reference, an agreement, or *arrangement*, to use the French version of the statute, made with any proprietor, is binding and obligatory, if the location of the road be duly made during the year following; and in such a case paragraph 7 of the same section enacts that the company may, even against a third party who has since acquired in good faith, take possession of the land, according to the terms of the arrangement, to the same effect as if the price had been fixed by an award of the arbitrators. This law is so liberal that in order to facilitate the transfer of lands, special powers are granted to corporations, tutors, women, *grévés de substitution*, par. 3; and with regard to undivided property held in common by several persons, par. 10 provides that any contract or agreement or *accord*, made in good faith with the proprietors of one-third of the same, is binding upon all.

Upon tender or payment of the amount awarded or agreed to by the parties, the company is entitled to have immediate possession of the land, and upon payment or tender of the indemnity they may even forcibly procure the same through the ministry of the sheriff of the district. Par. 28.

Finally, if the amount awarded by the arbitrators be not paid by the company within two months, the proprietor may recover the property and possession of his land and also damages; par. 29. Admitting that this enactment applies likewise to the default of pay-

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

ment of the indemnity agreed to between the parties —a proposition which is perhaps open to some doubt —that is the only ground under the statute for which the company can be evicted, namely the non-payment of the indemnity. It is also the principle laid down in article 1590 of the Civil Code.

The respondent, by his petitory action, revendicates from the appellants some lots of land or their value, $6,500. These lots are in their possession for the purposes of their railway and are known as the New Waterford Cove, near the City of Quebec, on the eastern side of the River St. Charles, in the seigniory of Notre Dame des Anges, and being part of the cadastral numbers 560, 561, 562 and 570 of the cadastre of the parish of St. Roch North, in the County of Quebec.

This action was taken on the 13th day of November, 1892.

The appellants were incorporated in 1881, by an Act of the Province of Quebec, 44 & 45 Vict. ch. 44. They were empowered to build a railway from the City of Quebec to the Saguenay river. On the 9th March, 1883, they deposited the plan and book of reference for the first section of their line starting from the City of Quebec and going to the Montmorency River. But, for various reasons which it is not necessary to explain, the location of the track through the New Waterford Cove and through the extensive Montmorency lumber yards and mills was only roughly indicated in the plan and book of reference; it was made plain, however, that the line of railway was running through those lands, although the book of reference did not extend over the Montmorency property. The heirs Hall and Patterson, nine in number, were owners not only of the Montmorency mills and yards in Beauport and L'Ange Gardien, but also of the New Waterford Cove. Both estates, and espe-

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

cially the Montmorency one, were to benefit largely by the construction of this railway. The cove was the property of the heirs Hall, and the Montmorency mills and yards that of the heirs or legatees, Patterson; but, as already observed, the heirs Hall and the heirs or legatees Patterson were the same persons; and so the title to both the Montmorency mills and the New Waterford Cove was vested in the same proprietors in common.

On the 11th day of June, 1886, while the company was slowly proceeding with its work, six out of the nine proprietors signed and delivered to the appellants the following document, *sous seing privé:*

> Be it known by these presents that we, the legatees Patterson, of the parish of Beauport, County of Quebec, do promise and agree that as soon as the Quebec, Montmorency and Charlevoix Railway is located through our land in parishes of Notre Dame des Anges, Beauport and L'Ange Gardien, and in consideration of its being so located, we will sell, bargain and transfer to the Quebec, Montmorency and Charlevoix Railway Company, for the sum of one dollar, such part of our said land as may be required for the construction and maintenance of the said railway; and exempt the said company from all damages to the rest of the said property, and that, pending the execution of the deeds, we will permit the construction of the said railway to be proceeded with over our said land, without hinderance of any kind, provided that the said railway is located to our satisfaction.

The difficulty between the parties arises only with regard to the New Waterford Cove property valued at the time at $6,000 or 7,000, and has no reference to the Montmorency property valued at about $250,000, all the heirs having formally declared that, with regard to the latter, they were satisfied with the proceedings of the railway company and especially the location of its line, by granting them an absolute deed of sale of the land by deed of the 9th day of August, 1889, without making any reservation whatever as to the New Waterford Cove property, and in which deed they declare:

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

The above described parcels of land having been selected and set apart by the said railway company for the ends and purposes of its railway and being already in the possession of the said railway company since the eleventh day of June one thousand eight hundred and eighty-six, in virtue of a certain promise of sale *sous seing privé* by the said vendors in favour of the said company.

The railway was completed in September, 1888, from the Montmorency River to lot 562 of Saint Roch, North, through lot 570, which formed part of the cove.

On the 7th August, 1889, a deviation of the plan of 1883 was deposited showing the new location contemplated in the agreement of 1886, which showed a considerable change of the line through the New Waterford cove, and particularly lots 560, 561 and 562. The railway was built at once over the new location; the appellants were working at it in 1889, and the whole work was completed in the spring of 1890, and ever since the appellants have been in public possession of the lands for the purposes of their railway.

The first, and in fact the only, question to be decided is the validity of the agreement of 1886, and its effect. Was it an arrangement within the meaning of the Railway Act or simply a promise of sale? Was it binding upon all the proprietors? Was the approbation of the location a condition suspensive or precedent? Was it necessary to have a deed in the notarial form and registered like an ordinary deed of sale? Can the arrangement be enforced at the present time?

It seems clear to me that if the arrangement of 1886 is to have any validity, it must be under the provisions of the Quebec Railway Act. As I understand them, notarial deeds of transfer are not necessary, and in many cases not obtainable, for instance, when the proprietors are unknown or refuse to agree with the company and an arbitration becomes necessary. Registration of deeds of transfer in the usual form is not re-

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

quired; it is intended to be replaced by the deposit and registration of the plans and books of reference and all interested parties are bound to take notice of the same, and this is also the opinion which the Court of Appeal expressed when rendering the judgment appealed from.

The agreement of 1886 had in contemplation a new and definite location of the railway to be made over the lands therein mentioned, and not one already made; this clearly results from the following words. The legatees Patterson promised to sell and transfer "as soon" as the railway "is located through our land." It also affords an explanation why they provided that the said location should be made to their satisfaction.

Was this a suspensive condition of the transfer? The stipulation was not that their approbation be first obtained, but "that the said railway be located to our satisfaction." If the location was not satisfactory to them they should have protested, but they did not do so; quite the reverse; in signing the deed of the 9th August, 1889, without any reservation, they have acquiesced in writing in the location, and moreover, they allowed the work to be proceeded with without raising the slightest objection, either by injunction or action, or in any manner or form whatever. In fact the evidence shows that all the heirs were satisfied with the location.

The respondent says that their refusal to sign a deed of sale of the New Waterford Cove property was a sufficient protest. But I do not consider that such a deed was necessary; no promise of sale, in fact no sale, is required from the proprietor under the Railway Act; the settlement of the indemnity alone is required and thereupon the land passes by mere operation of the Act.

If the agreement of 1886 had any validity in 1889, when the said deed of sale was demanded, it was not as a promise of sale, but as an agreement or *accord* settling the indemnity; the parties intended evidently to have a deed of sale as an act of prudence, but in my opinion it was not necessary. The agreement and the deposit of the plan and book of reference as amended had the effect of transferring the lands in question by mere operation of law and the agreement was only necessary to ascertain the amount of the indemnity, in the absence of an award, and thus perfect the transfer.

But had the agreement of 1886 any force in 1889, as more than a year had elapsed from its date without the deposit of an amended plan and book of reference therein referred to, as required, it is contended, by paragraph 7, of article 5164 of the Revised Statutes? That seems to me to be the whole difficulty in the case.

In the first place, is the agreement to be governed by that enactment? Is it to be considered as an arrangement made before any plan and book of reference were deposited? Such a plan and book did exist, and were duly deposited; the New Waterford Cove property was indicated in it, roughly it is true as to the precise location of the railway, but with certainty as to the property to be traversed, a fact which the plan and the book of reference show beyond doubt; the case was therefore one of a plan and book of reference to be amended or completed to suit the proprietors. The agreement of 1886 was not one contemplated by article 5164, par. 7, that is before the proceedings in expropriation were commenced; it was an arrangement pending the expropriation and must be treated as such under paragraphs 7 and 8, of article 5163, and paragraphs 5 and 10, of article 5164. It had undoubtedly in view a location not yet determined, a new and

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

amended plan; the location to the satisfaction of the proprietors was the consideration for it, but this could be done at any time under the clause which permits deviations from deposited plans, art. 5163, par. 7; the agreement stipulates no delay within which the new plan must be fyled, and in my humble opinion it was sufficient for the company to do so at any time thereafter, provided it was done to the satisfaction of the proprietors, which was undoubtedly the case here, as I have already observed. The question of the indemnity being thus settled by the granting of a suitable location, nothing more remained to be done to vest the lands in the company; this took place by mere operation of the law without any other formality, and more particularly without any deed of sale, under paragraphs 5 and 10, of article 5164. The action of the respondent should therefore be dismissed with costs, as his title is posterior to that of the appellants.

The clerical error in the description of the New Waterford Cove in the agreement of 1886, as being in the "parish" of Notre Dame des Anges, instead of the "seigniory" of Notre Dame des Anges, is covered and rectified in the deed of the 21st January, 1889, where it is properly described as lots Nos. 560, 561, 562 and 570 of the official cadastre of the Parish of Saint Roch North. I do not moreover look upon an erroneous description of this kind as fatal to the arrangement; article 5163, par. 5, 12; the latter is supposed to cover the immoveables mentioned in the plan and book of reference deposited, and there is no dispute as to their identity.

It is not disputed that, at the time the above deeds were granted to the appellants, the grantors were the true and lawful owners *par indivis* of the lands in question, having a right to make an arrangement with the railway company within the meaning of the Railway

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

Act. True, the deeds of the appellants were never registered, but, as I have already observed, I have no hesitation in agreeing with the Court of Appeals that the registration regulations of the Civil Code do not apply to proceedings in expropriation under the Railway Act. The respondent, as subsequent purchaser, was bound to take notice of the registration of the plan and book of reference, and of their amendment made by the railway company, and if he did not do so it was at his risk and peril.

The respondent was fully aware of the arrangement; he had even signed the deeds of sale of the 21st of January, 1889, and 9th August, 1889, as attorney for two of the heirs, and if, under article 2085 of the Civil Code, bad faith is no answer to a plea of want of registration, that article must be limited to the case, therein mentioned, of a deed, document or right subject to the formality of registration, and not be applied to a case like the present one, where no registration is required and the transmission of real property or rights takes effect by mere operation of law.

It has been contended that the agreement of the 11th of June, 1886, if valid at all, was not an agreement or *accord* within the meaning of the Railway Act, and that more particularly paragraph 10 of art. 5164 contemplates agreements or contracts for money consideration and not mere donations or gifts which, it is alleged, could bind only the parties who consent. Paragraph 10 does not make any such distinction; its terms are wide enough to comprise all kinds and forms of contracts, even mere donations, the only restriction being good faith. It reads as follows:

Whenever there is more than one person proprietor of any land as joint proprietor, or proprietors in common or *par indivis*, any contract or agreement made in good faith with any party or parties, proprietor, or being together proprietors of one-third or more of such land as to the amount of compensation for the same or for any

1898

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

damages thereto, shall be binding as between the remaining proprietor or proprietors as joint proprietors or proprietors in common and *par indivis.*

Mere donations are sometimes highly beneficial to the donors, and frequently the construction of a line of railway will give value to estates which till then were almost valueless, and the New Waterford Cove proves to have been a property of that kind.

But it is not true to say that the agreement contained a mere donation. The stipulation that the line was to be located both at Montmorency and the Cove, to the satisfaction of the proprietors, was a very onerous charge and proved to be so, a fact which is fully established by the testimony of Mr. H. M. Price and of Mr. Wm. Russell; it was made in good faith, and in the interest of all concerned, and it is only fair and just that it should be binding upon all, especially as it was consented to by six out of nine proprietors, *par indivis.*

Finally, I look upon par. 29, of art. 5164 of the Railway Act as fatal to the action of the respondent. The indemnity agreed to between the appellants and six of the proprietors was undoubtedly paid; true it did not consist in the payment of money to the proprietors; but this is not required by the Act, as I understand it; parties may settle in any manner they please. Here it consisted in the location of the railway which would suit them; this was done and, as I read the above clause of the Railway Act, the company cannot be evicted and the proprietors cannot recover the property, nor the possession of their lands. The satisfaction of the indemnity is an absolute bar to the action.

Upon the whole, I am of opinion that the appellants are proprietors under the Railway Act of the New Waterford Cove, or part of lots 560, 561, 562 and 570 of Saint Roch North, in question in this cause, under

1899

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY v. GIBSONE.

GIBSONE v. THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY.

Girouard J.

the agreement of the 11th June, 1886; that the document in question required no registration and that being signed by the proprietors *par indivis* of more than one-third of the said lots it conveyed the whole property to the appellants, even in the absence of, or against the consent of, the other proprietors. The appeal of the railway company should be allowed and the cross-appeal of the respondent dismissed with costs, and his action also dismissed with costs, said costs to be taxed against the respondent *par reprise d'instance*.

Appeal allowed with costs and cross-appeal dismissed with costs.

Solicitors for the appellant: *Malouin, Bédard & Déchéne.*

Solicitor for the respondents: *F. G. Gibsone.*

1898

*Oct. 26, 27.

1899

*Feb. 22.

ALEXANDER McBRYAN (DEFENDANT)..APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF)..... } RESPONDENT.

AND

PEARSON SHAW.....THIRD PARTY.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Adjoining lands—Threatened damage to one—Right of owner to guard against without reference to neighbour—Sic utere tuo ut alienum non lædas.

Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level he has a right to protect himself against such injury by all lawful means without regard to any damage that may result to land of his neighbour from the measures he adopts.

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

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

APPEAL from the decision of the Supreme Court of British Columbia (1), affirming the judgment at the trial by which the plaintiff recovered damages and obtained an injunction restraining defendant from maintaining a dam on his land which flooded that of the plaintiff.

The action for damages and an injunction was brought under the following circumstances. The defendant McBryan is owner of lands bordering on a river. Behind his land is the property of the railway company, and beyond that land owned by Shaw, from which there is a slight depression through the railway property and McBryan's land to the river. Shaw every year brought water from a creek some distance away to irrigate his land, and in order to prevent the flow of such water through a culvert built by the railway company from flooding his property McBryan put a dam immediately below the railway track which sent the water back but not doing any injury to the other properties. In 1895 Shaw used much more water for irrigation than he had previously and the dam not being high enough to hold it back it was raised to the extent necessary to protect McBryan's property, but as a result the quantity of water sent back on the land of the railway company was such as to cause considerable damage, compensation for which, and to prevent a continuance of the same, was the object of the present action.

A judgment for the plaintiff at a former trial was set aside by the Supreme Court of British Columbia and a new trial ordered (2). On the second trial the plaintiff again obtained a verdict, and an injunction was granted restraining defendant from penning back the water from his land so as to injure the plaintiff's property. This judgment having been sustained by the full court the defendant appealed.

(1) 6 B. C. Rep. 136. (2) 5 B. C. Rep. 187.

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Aylesworth Q.C. and *Wilson Q.C.* for the appellant. This case cannot be distinguished from *Ostrom* v. *Sills* (1). Defendant had a right to protect his own property and was not obliged to look after the rights of his neighbour. *Nield* v. *London & North Western Railway Co.* (2); *Collins* v. *Middle Level Commissioners* (3).

S. H. Blake Q.C. for the respondent, cited *Whalley* v. *Lancashire & Yorkshire Railway Co.* (4); *Roberts* v. *Rose* (5); *Wilson* v. *Waddell* (6).

TASCHEREAU J.—I will not dissent, but it is with the greatest hesitation that I concur in allowing the the appeal.

GWYNNE J.—Prior to the year 1883, the owners and occupiers of a farm situate on the South Thompson River at a place called Shushwap in British Columbia of which one Shaw is and since about 1890 has been tenant under one Sullivan, the owner in fee, conducted by artificial works water for irrigation purposes on the farm but provided no means for carrying off any surplus waters so introduced. The defendant in 1883 owned an adjoining lot into which such waters, following the natural declivity of the soil, of necessity flowed by reason of there not having been constructed any mode of carrying off such waters, and instead of bringing an action against the owners and occupiers of the farm by whom the said waters were so introduced for irrigation purposes, to compel them to provide a proper mode for the escape of such waters so that they should not prejudice the defendant's lot, he in that year 1883 erec-

(1) 28 Can. S. C. R. 485.
(2) L. R. 10 Ex. 4.
(3) L. R. 4 C. P. 279.
(4) 13 Q. B. D. 131.
(5) L. R. 1 Ex. 82.
(6) 2 App. Cas. 95.

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Gwynne J.

ted a solid earth embankment on his own land close to the line between the two lots so as to prevent any of such irrigation waters so introduced into the adjoining lot from flowing on to the defendant's land to his prejudice. That he had a perfect right so to do cannot admit of a doubt. Subsequently, and in 1884 or 1885, the Canadian Pacific Railway Company purchased from the then owner in fee of the said lot adjoining the defendant's lot, for the purposes of their railway, the lowest part of the said lot adjoining the defendant's, and over which the irrigation waters so introduced passed until they reached the obstruction so erected by the defendant, and they built their railway thereon laying their track upon the surface of the land as it then was. Now the purchase of that strip of land by the railway company did not in any the slightest degree prejudice the right of the defendant to maintain the obstruction so as aforesaid erected upon his own land for the purpose aforesaid. The railway company were under no obligation to suffer or permit the waters, to pen back which the defendant had erected said embankment, to continue to flow over the land so purchased by them for their railway track, but they did suffer such waters so to continue to flow and things continued for many years in the same condition, namely, the waters being suffered by the railway company to flow over their land until they reached the said embankment on defendant's land, and that obstruction continued to serve the purpose for which it was erected, namely, to protect defendant's land from injury from such waters.

In or about the year 1892 Sullivan, the owner in fee of the said lot adjoining the land of the defendant except the piece thereof which had been purchased by the railway company for their railway, demised the part of which he was so seized in fee to one Shaw who has since been and still is tenant under such demise.

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Gwynne J

In 1895 the railway company resolved to fill up the lowest part of the said lot purchased by them at the place where the irrigation waters introduced by Shaw upon the farm leased to him by Sullivan entered upon the piece of land purchased by the railway company, and instead of preventing such irrigation waters entering upon their land as they could easily have done by the embankment they were constructing they constructed and placed a box culvert under the embankment which they constructed through which they caused Shaw's irrigation waters to pass and to discharge themselves as they had previously done over the natural surface on to the defendant's farm where they were stopped by the embankment erected by the defendant in 1883. Immediately after the completion by the railway company of their embankment and their so conducting the Shaw irrigation waters through the box culvert below to the defendant's land, Shaw brought upon his farm a much larger quantity of irrigation water than ever had previously been brought and the consequences were that these waters passing through the box culvert constructed by the railway company for their reception broke down and destroyed the defendant's embankment upon his land and washed away and destroyed a large piece of the soil of his farm. The defendant, instead of bringing an action to recover compensation for the injury so done to him, reconstructed the embankment which had been so destroyed and made it stronger and higher, and Shaw still continued to bring very large quantities of irrigation water on to his farm, which waters the railway company still continued to bring through the box culvert so as to reach the embankment so re-constructed on his land whereby such waters were penned back on to the railway company's track and did some damage to recover compensation for which this action is

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Gwynne J.

brought, and so instead of the defendant being a plaintiff in an action for the wrong done to him by the destruction of the embankment constructed by him in 1883 and the destruction of a considerable portion of the soil of his farm is defendant in an action for injury sustained by the railway company by their not merely permitting Shaw's irrigation waters to pass over their land so as to reach the defendant's embankment, but by so conducting such waters through a culvert constructed by them for that purpose on their lands. The jury have, very sensibly in my opinion, found that the railway company have thus themselves been the cause of the damage of which they complain.

It has been contended that *Roberts* v. *Rose*, in the Exchequer Chamber, (1), is an authority in support of the railway company's contention in the present case, but a moment's comparison of the facts in that case with those in the present case as stated above and a cursory consideration of the observation of Blackburn J. in that case will show the plain distinction between the two cases. There the plaintiff by parol license granted to him by one Lowe and the defendant, constructed a water course for carrying off water from certain mines of the plaintiff into and through Lowe's land on to and through the defendant's land. The defendant had revoked the license to plaintiff and refused to permit him any longer so to carry off such mine waters and, the plaintiff having refused to discontinue so passing them, entered upon Lowe's land to stop the water course where the plaintiff's mine waters entered the water course on Lowe's land. The plaintiff contended that the defendant had no right to do so, but that he should have stopped up the water course on his own land, the effect of which would have been to pen back

(1) L. R. 1 Ex. 82.

the waters and make a pond of Lowe's land. In this state of facts the court held that to have so done would have been a wrong to Lowe, who was an innnocent party inasmuch as he by an arrangement to which the defendant was himself a party had permitted the plaintiff so to discharge his mine waters through his land. For the defendant under such circumstances to have penned back the waters upon Lowe's land as plaintiff insisted he should have done would have been a serious wrong to Lowe, who under the circumstances was reasonably called an innocent party. There is nothing in the present case which can entitle the railway company to that designation upon the authority of anything in *Roberts* v. *Rose* (1), so far as affects the rights and interests of the defendant to maintain on his own ground a construction of the nature of that erected by him in 1883, and restored in 1895, when wrongfully destroyed by waters tortiously brought down over the railway company's land upon and against an embankment lawfully erected and maintained upon his own land for its protection.

The appeal must be allowed with costs, and the action in the court below be ordered to be dismissed with costs.

SEDGEWICK J.—The appellant Alexander McBryan is the owner of lands bounded on the lower side by the Thompson river. At the back of his lands are the track, roadbed and right of way of the Canadian Pacific Railway Company, the respondents, and on the other side of the railway are the lands of one Pearson Shaw. All these lands are, so far as the eye can see, practically level, there being, however, a fall, although almost imperceptible, towards the river. There is, however, a slight depression or valley, commencing

(1) L. R. 1 Ex. 82.

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Sedgewick J.

on Shaw's land extending across the railway track and along McBryan's land to the river. There is no water-course, either natural or artificial, along this depression, but in times of heavy rains or of melting snow surface water runs across the properties to the river. When the railway company built their line they used trestle work to carry the track across this depression, and subsequently they filled up the trestle work with earth, constructing a culvert to provide for the downfall of the water. Shaw, the upper proprietor, had been in the habit of irrigating his land for agricultural purposes, obtaining the water from a creek some distance away. In order to prevent the surface water which necessarily would flow down the depression through the culvert on to McBryan's land from injuring him the latter built a dam on his own land across the depression immediately below the railway track, the effect being that the water which came down was prevented from flooding it, the water being penned back both on to the property of the railway company and of Shaw, but at that time not doing any injury to either property. In the summer of 1895 Shaw brought a much larger quantity of water on his land than he had before done. This water flowed through the culvert and over McBryan's land, the dam there not being sufficient to hold it back. It did great damage to the crops and was tearing away the soil, washing a considerable portion of it into the river, and if it had been allowed to continue irreparable injury would have been sustained by McBryan. The defendant seeing his property injured and his lands washed away immediately proceeded to heighten the dam, doing it at a comparatively small expense, the result being that no further damage was done to his property. It happened, however, that the dam was higher than the roadbed and tracks of the railway.

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Sedgewick J.

The water coming down from Shaw's land flooded the railway track, damaging the company's property to the extent of $125. The company thereupon brought this action, not against Shaw who was the admitted *fons et origo mali*, but against McBryan. The case was tried and judgment was given in favour of the company. Upon appeal to the court *en banc* this judgment was sustained.

It was admitted by the defendant that he might have as easily built a dam on the other side of the railway track as on his own property, and it also appeared that neither the railway company nor McBryan ever gave any license for such a use of their lands. The contention of the plaintiff company is that the defendant had no right to erect the dam in question on his own land; that if he wished to abate the nuisance he was bound to erect the dam in such a way as not to cause damage to the railway property. In other words that it was not only his privilege, which every one admitted, but his duty either to take legal proceedings or to cross over the railway track and erect the dam upon the lands of the upper proprietor, whose action caused the mischief. The defendant on the other hand contends that he was acting within his strict legal rights; that the dam being built, not particularly for the purpose of abating a nuisance, but for the purpose of protecting his own property from destruction, he was justified in doing so even although the effect of it was to damage to some extent his immediate neighbour.

I am of opinion that the contention of the defendant is the correct one, and that the company, instead of proceeding against him, should have proceeded against the upper proprietor. It is, I think, a universal principle that a man may do what he likes with his own, provided that in so doing he does not interfere with

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Sedgewick J.

some legal right of his neighbour. In the present case, as I have stated, there was no natural watercourse, there was not even an artificial watercourse, and in so far as the defendant's lands were damaged it was a pure act of trespass on the part of Shaw from which the defendant had a clear right to protect himself by all lawful means irrespective of any consequences which might happen to other parties. To prevent the defendant under the circumstances, when he saw his lands being flooded, and his property washed away, from interposing a barrier at the boundary of his property and sending the water back the way it came, would, I think, be most unreasonable. To compel him to cross over and perhaps trespass upon the railway lands in order that he might erect a similar barricade on Shaw's land would be even more so. And I cannot see why, when he did nothing more than protect himself by the fair and reasonable methods he used, the company can compel him to pay the damages they sustained, particularly when they had ample means of redress from the originator of the mischief, and could as easily have protected themselves from injury as the defendant had done. It seems to me, with great deference, that any other contention is manifestly erroneous. Let me put a few illustrations demonstrating, as I conceive, that error.

I have a sheep ranch on the foot-hills of the Rockies. I descry in the distance a horde of mountain wolves evidently intending to attack my herds. Their course of attack is apparent. I summon my servants and we erect a barricade sufficiently strong to hurl them back. In consequence of their repulse they attack my neighbour's herd some distance off. Am I to be responsible for the damage the wolves have done my neighbour? Or, I see a prairie fire approaching me from the distance. It means inevitable destruction to my pro-

perty unless I can devise a method of arresting its progress. On the margin of my property I plough up a strip of prairie. The flames reaching this strip are unable to surmount it. The wind or other causes as often happens sends the fire in other directions and my neighbour's fields and buildings are burned. Am I responsible for that damage? Or, I surround my young orchard with a thick evergreen hedge to protect it from the northern blast. The cold winds thus turned from their accustomed course strike against the fruit trees of my neighbour, so that they wither and die. Am I responsible for the loss? Or take a case which continuously happens in every northern village and town on this continent. My second door neighbour allows snow to accumulate in his back garden. In the spring it melts, overflows my next door neighbour's garden and is on the point of attacking the foundation of my house and threatening my cellar I raise my cellar wall and as a consequence the garden of my immediate neighbour is overwhelmed by the flooding water. Am I responsible for that, and must I, as the contention is, in order to protect my cellar cross over my neighbour's property to the property of his neighbour and erect a wall of masonry there? That, I say, would be absurd.

In all these cases, instead of putting up protective works on my own estate I might with equal inconvenience to myself and equal benefit as well, have put them up on or beyond the limits of my neighbor's land. Does the obligation of neighbourhood impose that duty upon me. And if so, and I fulfil it, will not my neighbour's neighbour have a similar claim for the damage I have done him? And how far afield must I go? These illustrations contain their own refutation, otherwise it might be an actionable wrong to plant a hedge or erect a party wall or fence, or even build one's house upon a water-proof foundation. They are

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Sedgewick J.

common enemies, the wolf, the fire, the wind, the flood, and every one must of necessity have a right to defend himself within his own domain against them.

The English authorities, so far as they go, are, in my view, in favour of the appellant's contention. They well known case of *Chasemore* v. *Richards* (1), has definitely settled the question so far as percolating water is concerned, deciding that you may without incurring liability so work your own land by mining or otherwise as to do material damage to your neighbour by diverting water from his wells and depriving him absolutely of their use; and the cases would seem to show that there is no distinction between underground percolating water and surface water, no natural watercourse being concerned. Mr. Goddard in his work on Easements, fourth edition, page 85 (5 ed. p. 88) says:

> The case of flood water is different from that of flowing streams, and the principles of law relating to the latter do not relate to floods; but it may be mentioned in passing that every landowner has a right at common law to protect his land from damage from floods, and for that purpose to erect dams or other defences to divert the flood-water from its natural course.

In support of this, *Trafford* v. *The King* (2), and *Nield* v. *London & North-Western Railway Co.* (3), are cited. The author in a foot note proceeds to remark:

> From these decisions it does not appear clear whether the landowner who defends himself against floods, incurs liability to another person, if by his act the flood-water is thrown upon the other's land and does injury there. In *Trafford* v. *Rex* (2), Tindal C. J. said the exercise of the right was subject to the restriction that the person exercising it did not thereby occasion injury to the lands or property of other persons; but in the case of *Nield* v. *The London & North Western Railway Co.* (3), it was held that as the water was not brought into the canal by the defendants they were not liable for damage caused to a neighbour owing to their act of defence. The latter principle appears the more reasonable of the two, for the natural result of preventing water coming on

(1) 7 H. L. Cas. 349. (2) 8 Bing. 204.
(3) L. R. 10 Ex. 4.

one man's land is to force it to flow on to the land of another, where it is sure to be more or less prejudicial. How then can it be said that there is a right to defend one's own land by forcing the water on to another person's ground, and yet that it is wrong to cause the injury which must necessarily follow?

In this case a flood had occurred in a canal from the bursting of the banks of an adjoining river and the canal company placed a barricade across the canal above their premises and thereby flooded the plaintiff's premises. It was held the company was not liable.

The flood (says Bramwell B. at p. 7) is a common enemy against which every man has a right to defend himself. And it would be most mischievous if the law were otherwise for a man must then stand by and see his property destroyed out of fear lest some neighbour might say "you have caused me an injury." The law allows what I may term a kind of reasonable selfishness in such matters; it says "Let every one look out for himself and protect his own interest," and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it: Why did not you do the same? I think what is said in *Menzies* v. *Earl of Breadalbane* (1), is an authority for this and the rule so laid down is quite consistent with what one would understand to be the natural rule. Where, indeed, there is a natural outlet for natural water no one has a right for his own purpose to diminish it, and if he does so he is, with some qualification, perhaps, liable to any one who has been injured by this act, no matter where the water which does the mischief came into the water course. I say with some qualification because it may be that even in the case of a natural water course the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water.

In this country the question indirectly came up before the Court of Queen's Bench, Upper Canada, in the case of *L'Esperance* v. *The Great Western Railway Co.* (2), in the year 1856. In this case the railway company had purchased certain lands from the plaintiff and had built their railway upon them. It happened that there was an artificial underground drain which the company blocked up, the consequence being that the plaintiff's lands were flooded. It was held

(1) 3 Bligh N. S. 414. (2) 14 U. C. Q. B. 173.

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Sedgewick J.

that the company not being under a burden in regard to the drain, the plaintiff not having reserved a right of drainage in the conveyance, the action could not be maintained, the railway company having the right to deal with their land as they pleased. I do not cite this case with a view of expressing an opinion whether, under existing railway law and legislation, that decision would be now followed, but for the purpose of quoting what Mr. Justice Burns says in his judgment at page 178.

> The present case presents (he says) so far as disclosed by the declaration and what was proposed to be proved, the case of a party using his own land for his own purposes, in a way which prevents the use of an artificial work formerly constructed on that land, which no legal right to maintain is shewn on the one side, and no obligation arising either from contract or duty to be observed, having regard to the laws of nature to permit longer to exist on the other side. The passage in Domat, section 1581, seems to me to apply precisely to this case: "He who in making a new work upon his own estate uses his right, without trespassing either against any law, custom, title or possession which may subject him to any service towards his neighbours, is not answerable for the damage which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others, without any advantage to himself. For in this case it would be a pure act of malice, which equity would not allow of. But if the work were useful to him—as, if he made in his estate any lawful repairs, to secure it against the overflowing of a torrent or river, and his neighbours' grounds were thereby the more exposed to the flood or suffered from thence any other inconvenience, he could not be made answerable for it.

This passage from Domat, (Strahan's translation, Cushing's ed. Liv. ii. tit. viii, sec. iii, no. 9 of the French edition) must now in those provinces of Canada, where the English common law prevails, be modified so far as it refers to malice, having in view the late decision of the House of Lords in *Allan* v. *Flood* (1). But it shows clearly that the civil law on this subject is in accord with my view of what English law is.

(1) [1898] A. C. 1.

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Sedgewick J.

The recent case in this court of *Ostrom* v. *Sills* (1) is, I think, applicable to the present case and must conclusively lead us to the allowance of this appeal. In that case we simply confirmed the judgment of Mr. Justice Moss in the Court of Appeal. In that judgment the following passage occurs:

> I think that the defendants are entitled to judgment because in doing what is complained of they are protecting themselves against the acts of other parties by means of something put up on their own land as a barrier, and not as a medium for conducting the waters from their premises to, and casting them upon, the plaintiff's premises.

In that case water, not a natural stream, was allowed by the municipality to overflow defendants' land on the lower side of a highway. The defendants erected a building cutting off the water from flowing over them, and thereby necessarily diverted it so that it flowed upon and injured the lands of a neighbour; it was held there was no action. The object to be gained by the foundation wall in *Ostrom* v. *Sills* (1), and by the dam in the present case was the same; in the former to protect the foundation wall and cellar from the waters coming through the street drain, and in the latter to protect the farm from being washed into the river.

The plaintiff's counsel in support of his contention, supported it mainly from the maxim *sic utere*, etc., as illustrated in the cases of *Rylands* v. *Fletcher* (2); *Roberts* v. *Rose* (3); and *Whalley* v. *Lancashire & Yorkshire Railway Co.* (4). *Rylands* v. *Fletcher* (2), has no application to this case as between the plaintiff and the defendant. Its only application is as to the right of the railway company to proceed against Shaw. So far from the defendant here bringing upon his ground material which if let

(1) 24 Ont. App. R. 526; 28 Can. S. C. R. 485.
(2) L. R. 3 H. L. 330.
(3) L. R. 1 Ex. 82.
(4) 13 Q. B. D. 131.

1899

McBRYAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Sedgewick J.

loose might do damage to his neighbour, he did not bring or collect it there at all; his sole object in building the dam was to prevent the invasion upon his land of noxious material gathered from the lands of another. The facts in *Roberts* v. *Rose* (1), were different from those here. And Lord Blackburn in making his observations relied on at page 89, was referring not to what a man might do upon his own land for the purpose of protecting it from attack by water or otherwise, but was referring only to how one might upon the lands of another abate a nuisance. Besides in so far as it aids the plaintiffs it must be deemed to be modified by Lord Bramwell's subsequent decision in the *Nield Case* (2) above referred to. The facts were different to those in the *Whalley Case* (3). Had the defendant here after he had erected his dam and penned back the accumulating waters suddenly demolished it allowing the waters to pour down inundating lands on the other side of his property, that would give rise to a state of facts and possibly to a state of law not applicable here.

For a full discussion of the American law see Angell on Watercourses, sec. 108 *a*, *et seq.*

On the whole I am of opinion that the appeal should be allowed with costs both here and below, and that the action should be dismissed with costs.

KING and GIROUARD JJ. concurred.

Appeal allowed with costs

Solicitor for the appellant: *J. H. Senkler.*

Solicitor for the respondent: *Fred. J. Fulton.*

Solicitor for the third party: *Wm. H. Whittaker.*

---

(1) L. R. 1 Ex. 82.
(2) L. R. 10 Ex. 4.
(3) 13 Q. B. D. 131.

JEAN BAPTISTE MELOCHE *et al.* (PLAINTIFFS) ..... } APPELLANTS ;

AND

JOHN HENRY PELLY SIMPSON *et al.* (DEFENDANTS) ..... } RESPONDENTS.

1898
*Oct. 13.

1899
*Feb. 22.

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

Title to land—Substitution—Acceptance by institute—Parent and child—Rights of children not yet born—Revocation of deed—Prescription—Bona fides—Recital in deed—Presumption against purchaser—Arts. 930, 2191, 2193, 2202, 2207, 2251, 2253 *C. C.*

A substitution created by a donation *inter vivos* in favour of the children of the institute, even before they are born, is irrevocable after acceptance by their parent; and the law of the Province of Quebec on the subject, as declared by the Civil Code, is the same as the old law of that province in existence before the promulgation of the Civil Code of Lower Canada.

Where an institute has accepted a donation creating a substitution in favour of his children, his acceptance as institute constitutes valid acceptance of the substitution on behalf of his children thereafter born to him during marriage.

Where the title deed of a purchaser of lands bears upon its face recitals which would have led upon inquiry to evidence of the defeasibility of his vendor's title, he must be presumed to have been aware of the precarious nature of the title he was purchasing and prescriptive title cannot afterwards be invoked either by him or those in possession under him as holders in good faith under translatory title.

As good faith is required for the ten years prescription under the Civil Code, that prescription cannot be invoked against a substitution which has been duly registered, such registration being sufficient to constitute any third party, who might subsequently purchase from the institute a holder in bad faith.

---

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

1898

MELOCHE v. SIMPSON.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, (appeal side) (1), affirming the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

A statement of the case appears in the judgment reported.

Béique Q.C. and *J. E Martin* for the appellants. The donation had in view the marriage of the donee and the future condition of the wife and children, especially the establishment in life of the latter. The donor and donee intended to create what is known as "*une institution contractuelle ou d'hérédité.*" The deed was published and duly insinuated in 1832 and registered immediately after the institution of lands registration offices in the Montreal District in 1844, and Meloche, junior, accepted the donation to him as institute and entered into possession of the lands immediately after the execution of the deed of donation. He married within six months of the date of the deed of donation and referred to it as his title to the lands in his marriage contract. He continued in possession until 1850, when the first deed was revoked and the new deed executed in favour of himself and his wife. See 1 Bourjon, 189. The second deed was registered but never was published or insinuated as required for donations, up to the year 1855. See *Macintosh* v. *Bell* (1). The deed to Sir George Simpson, in 1854, also registered, refers to the second deed as the vendor's title, and the purchaser is charged with both actual and constructive notice of the existence of the undischarged substitution in favour of the appellants, the donor's grand children,

(1) Q. R. 5 Q. B. 490. (1) 12 L. C. Jur. 121.

under the deed of 1832. The defence of prescription must consequently fail as the respondents are affected by notice of the precarious title of the vendor and must be held to be in bad faith when claiming a superior title. Prescription did not run before the death of the institute in 1886. Art. 2207 C. C. See Duplessis, Œuvres, vol. 1 pp. 490, 521-523; Pothier, Prescription no. 34; 32 Laurent nn. 406, 410, 414; Le Roux de Bretagne, vol. 2 p. 107, no. 926; S. V. 27, 2, 181; Dalloz, 1888, 1, 130; 2 Troplong 921; 21 Duranton, 586; *Darling* v. *Brown* (1); Baudry-Lacantinerie, Prescription n. 61; 2 Aubry & Rau, nn. 213-218. Prescription does not run against a claim dependent upon a condition before the happening of that condition, Arts. 2236, 2237, C. C.; Gilbert sur Sirey, Art. 2257, nos. 1 and 2; 21 Duranton, 279. We also refer to Aubry & Rau, Vol. 2, p, 327, note 1; p. 367, sec. 215 bis; and p. 385, note 30; *Page* v. *McLennan* (2); *Dorion* v. *Dorion* (3); *Symes* v. *Cuvillier* (4), and authorities cited at page 389 of Beauchamp's Jurisprudence of the Privy Council.

As to the revocation of the substitution, it must be borne in mind that the present substitution was created by an ascendant with a view to marriage in favour of the institute and his children to be born, the acceptance being made by the institute as well for himself as for his said children. Arts. 772, 788, 790 and 930 C. C. declare such an acceptation for children to be born to be perfect, and the substitution irrevocable, and merely consecrate the previous existing law. *Herse* v. *Defaux* (5); *Stewart* v. *Molson's Bank* (6); *Smith*

(1) 1 Can. S. C. R. 360; 2 Can. S. C. R. 26.
(2) Q. R. 9 S. C. 193.
(3) M. L. R. 1 Q. B. 483.
(4) 5 App. Cas. 138.
(5) 17 L. C. Jur. 147; L. R. 4 P. C. 468.
(6) Q. R. 4 Q. B. 11.

1898

MELOCHE v. SIMPSON.

v. *Davis* (1); *Beaulieu* v. *Hayward* (2); *Joubert* v. *Walsh* (3).

Geoffrion Q. C., and *Fleet* for the respondents. The respondents are holders under translatory title in good faith and had acquired the prescription of ten years prior to the action and subsequent to the attainment of the age of majority by all the substitutes. The onus of proving bad faith is upon plaintiffs; art. 202, C. C.; and such bad faith must have existed at the date of the purchase; art. 2253 C. C. The appellants must show that Sir George Simpson *at the time of the acquisition* by him of the property was aware not only of the precise terms and legal effect of the deed of donation of the 11th January, 1850, but of the precise terms and legal effect of the deed of the 15th August, 1832. There is no proof that Sir George Simpson had knowledge of the existence of this deed *at the time of his acquisition* of the property on the 2nd September, 1854. Even supposing he had knowledge of such deed when he purchased the islands, there is nothing in the terms of the deed to show what the terms of the substitution referred to were, in whose favour it was created, or whether there was at the time an *existing* substitution or not. Knowledge of the terms of the substitution acquired during the *occupation* of Sir George Simpson, even if proved, would not have availed appellants, for, by arts. 2251 and 2253 C. C. it is not ten years possession in good faith that is required but *acquisition in good faith* followed by ten years possession, and this is so, whether the law applicable to the present case is to be governed by the code or by the law anterior thereto, for art. 2253 C. C. is old law in force before the Code. The defendants as universal legatees

(1) Q. R. 2 Q. B. 109. (2) 10 Q. L. R. 275.
(3) 28 L. C. Jur. 39.

of their father under the same title continued his possession and good faith. Art. 2200 C. C.; 32 *Laurent* 361.

The youngest appellant became of age in 1874; the action was instituted in 1893, and the respondents and their father had been in possession under translatory title in good faith, since the 2nd September, 1854. This possession is effective and avails as investing them with a prescriptive title in virtue of arts. 2206 and 2251 C. C. True, the substitution only opened in 1886, but the ten years' prescription runs against substitutes before the opening of the substitution.—Arts. 2207, 2270, C. C. This was also the law before the code: Ricard, Substitutions, 3 C. 13 pt. 2, nos. 92 and 93, referred to in Thevenot d'Essaule, (ed. Mathieu) no. 886; Domat, Lois Civiles, Liv. 5, tit. 4 S. 3, nos. 13 and 14, p. 526. But as it does not appear that prescription commenced under the old law, the prescription of ten years as regulated by the Code must apply.

The law determining whether the revocation is valid, is without doubt that existing in the years 1832 and 1850, and art. 930 C. C., in so far at least as respects the revocability of substitutions, is a departure from the principles as laid down under the old law. The codifiers intended to introduce such new law and the article, in its present form, embodies the amendments proposed by the codifiers, and is the second draft prepared by them. In the first report (p. 280) they state that the suggested amendments are made with the view of introducing uniformity with reference to the rules relating to the acceptability and irrevocability of substitutions. See *Beaulieu* v. *Hayward* (1); *Wood* v. *Blondin* (2); *Hutchinson* v. *Gillespie* (3); *Les Sœurs Hospitalières de St. Joseph* v. *Middlemiss* (4); and *Symes*

(1) 10 Q. L. R. 280.
(2) 1 Rev. de Jur. 73.
(3) 4 Moo. P. C. 378.
(4) 3 App. Cases 1102.

1898

MELOCHE v. SIMPSON.

v. *Cuvillier* (1); and it was held in *Symes* v. *Cuvillier* (1) that the *Ordonnance des Donations* of 1731 was never in force in Lower Canada, never having been registered. It was so decided in *Joubert* v. *Walsh* (2); *Jones* v. *Cuthbert* (3); and *Caty* v. *Perrault* (4). We also refer generally to Pothier (ed. Bugnet) vol. 8, p. 514, no. 174; *Thouin* v. *Leblanc* (5), at page 372 n. and the cases there cited, also to S. V. 1845, 1241 as to the question of good faith.

The rights of the parties in the present case are governed by the law in force in this province in the years 1832 and 1850, the years respectively in which the deed of donation invoked by appellants was executed and was revoked, being the law of France prior to the *ordonnance* of 1747, and under that law the donation of 1832 was validly revoked by the donation of 1850.

The judgement of the court was delivered by:

TASCHEREAU J.—The revocation forty-nine years ago of a fiduciary substitution created sixty-seven years ago by a deed of donation gave rise to the present litigation.

The principal point of law in controversy upon this appeal has been definitely settled for more than thirty years by the Civil Code of the province. It is therefore probably the last time that it will ever be brought up before a court of justice. Then the property in dispute, according to what the tenant in possession said of it at the trial, does not appear to be of very considerable value. I have nevertheless given to the case a great deal of consideration. It is a very interesting one indeed, and I have spent many pleasant hours over it.

(1) 5 App. Cas. 138.
(2) 12 R. L. 334.
(3) M. L. R. 2 Q. B. 44.
(4) 16 R. L. 148.
(5) 10 L. C. R. 370.

1899

MELOCHE v. SIMPSON.

Taschereau J.

The facts are simple. On the 15th of August, 1832, one J. B. Meloche (*et uxor*) conveyed by deed of donation a certain property to his son, J.B. Meloche, junior, then unmarried, a party to the said deed, and accepting said donation for himself, his heirs and assigns, with express stipulation that the said donee was to have but a life estate in the property, and with charge of fiduciary substitution in favour of his male children, or any one of them at his election "the donors divesting themselves of their right of ownership in favour of their said *grandchildren*."

A few months later the said Meloche, junior, married. Eighteen years later, on the 11th of January, 1850, he and his father agreed to revoke the substitution created by the said donation of 1832, thereby giving him the full ownership of the property, of which he was since then in possession, instead of a mere life estate that he previously had. For that purpose they went through the form of revoking the deed of 1832, and of executing a new deed of donation without the substitution proviso; but, immaterial though it be, in my opinion this was nothing but a simulation and a subterfuge. It was merely the substitution that was revoked, and that was intended to be revoked.

Subsequently, in 1854, the donee, Meloche, junior, sold this property to the late Sir George Simpson.

The appellants, the donee's children, alleging their father's death in 1886, their renunciation to his succession and the due publication and registration of the deed of 1832, now claim the property from the representatives of Sir George Simpson.

The only question upon this appeal, besides a plea of prescription which I will consider later on, is whether the aforesaid revocation of that substitution in 1850 was lawful or not. If not, the sale by Meloche to Sir George Simpson stands dissolved in law by

1899

MELOCHE v. SIMPSON.

Taschereau J.

Meloche's death, and the appellants are entitled to the property. Huc Code Civil, vol, 6, nos. 416, 418. In another form, the question is, whether the law on this point before the Code was the same as it is now under Art. 930 thereof. For it is conceded that, if the case were governed by the Code, the appellants would be entitled to the property.

Counsel on both sides have diligently elaborated the question and have given us invaluable assistance in the researches they have made. I have delved with them into the ancient law. I have examined every one of their quotations, Charondas, Auzanet, Lebrun, Ricard, Furgole, D'Aguesseau, Ferrière, Thevenot, Pothier, and others. I find that in not many of them is the precise point in controversy here considered; that is, whether in a deed of this nature, the acceptance by a father for himself constitutes an acceptance by the substitutes. The distinction between the case where the substitutes are the children of the institute as the appellants are here, and the case where the substitutes are not his children appears to have often been lost sight of by the commentators. Yet, it is a very important one. The code impliedly recognises it by restricting the irrevocability to the substitutions that are created in favour of the children of the institute. Thevenot, for instance, pages 57, 385, 448, invoked by the respondents, does not notice this distinction. The controversy had no actuality when he wrote, as it had then definitively been settled in France by the *Ordonnance* of 1747. He simply states what the law was previously according to Ricard, without reasoning the question. But Ricard has given two diametrically opposed opinions on the subject. Vol. 1 pp. 193-4; vol. 2 pp. 278-9. He is said by Thevenot himself, in his preface, to be a writer "who has often wandered away from the

true principles." He certainly must have wandered away once upon this question. Merlin, Rep. v. revoc. de substit., cites in support of the proposition that the *ordonnance* had introduced a change in the law in this respect, the works of Charondas, vol. 2, page 523, *réponse* XCII. Now the case there quoted does not touch the point at all. It appears to have been determined on the ground either that there was no substitution in the deed there under consideration, or that the substitution, if any, had lapsed by the death of the donee before the donor. And in his commentary on the Coutume de Paris, page 195, this same Charondas says that, in his opinion, if a donee accept a donation for himself with charge to deliver it over on the happening of a certain event to a third person not a party to the deed, the donation to this third party is irrevocable,

et me semble que le donateur et le donataire ne peuvent infirmer telle donation au préjudice de celui qui est dénommé en la condition.

Moreover, this opinion in Merlin is especially given as the law applicable to *Provence*, where the *ordonnance* had not been registered. Yet Lebret, the president of the parliament of Provence itself, its Chief Justice or Lord Chancellor, I might call him, and Decormis, a celebrated member thereof, are both of opinion, in answer to D'Aguesseau's questions, page 42, that such substitutions were always irrevocable. And Montvallon, des Succ. vol. 2, page 105, an eminent commentator upon the laws of this same parliament of *Provence*, says:

The ordonnance of 1747 is in conformity with our jurisprudence as to the irrevocability of substitutions created by donations *inter vivos*.

Domat, lois civiles, tit. X, sec. 1, part VI, has been cited to prove the undeniable proposition that donations are revocable with the donee's consent. Certainly, Meloche senior had the right to revoke the donation

1899

MELOCHE v. SIMPSOM.

Taschereau J.

to his son with his son's consent. But that is not at all the donation in dispute here. What is controverted, and all that is controverted by the appellants, is the donor's right to revoke, without their consent, not the donation made to their father, but the donation made to themselves, either with or without their father's consent.

Furgole, Donat. vol. 1, page 93, vol. 2, pages 39 to 48, Substit. page 47, who also would appear to admit the right of revoking such a substitution, though not very clearly, writes under the law of the parliament of Toulouse, a parliament *de droit écrit*, whilst Bourjon, dr. comm. de la France, vol. 2, page 125, par. XXXVI *et seq.*, who supports the doctrine of irrevocability, writes before the *ordonnance*, under the *Coutume de Paris*, the law of the province of Quebec. So does Lebrun, des Succ. part 2, page 30, no. 45, who, noticing the distinction I have alluded to, is of opinion that such a substitution when in favour of the children of the institute is irrevocable.

Terrasson, a celebrated lawyer, in vol. 2 of Claude Henri's works (*Nouvelles Observations page* 175) puts the question under the *Coutume de Paris*, and answers.

At first sight it would seem that the acceptance by the first donee is not an acceptance by the substitute ; however, in law it is so.

And Rousseau de Lacombe, rec. de jurisp. v. substit, page 688, sec. V. no. 5, says :

Fidéicommis par donation entrevifs acceptée par le donataire est irrévocable.

and in his commentaires sur les nouvelles ordonnances, p. 57,

donataire chargé de substitution, qui par son acceptation a rendu la donation irrévocable aussi bien en sa faveur qu'à l'égard des substitués.

I do not see, however, the usefulness of continuing here the review of the commentators. It would merely

further prove, to no purpose whatever, that, as stated by D'Aguesseau, Ferrière, Pothier and others, for a long time in France before the *Ordonnance* of 1747, there had existed a great diversity of opinions on the subject. And to count them would not do. *Ponderantur, non numerantur.* That is, no doubt, what was done by the eminent lawyers who were entrusted with the task of codifying the laws of the Province of Quebec, when they adopted in art. 930 of the Code, as pre-existing law, the doctrine of the irrevocability of such substitutions. And behind their determination of the question, principally based, it may well be assumed, on the opinion of the majority of the members of the parliament of Paris, then the highest Court of Justice in France, given in answer to the questions put by D'Aguesseau, we should not under the circumstances go.

It has been questioned if the codifiers really intended to draft this part of art. 930 as pre-existing law. But I do not see that there can be the least room for doubt about it. They were specially required by 29 Vict. ch. 41, to carefully distinguish in the Code, as it was to be printed for promulgation, the new law from the old law. In conformity with that enactment they reported that in the edition so officially printed they had inserted the new law between brackets. And the irrevocability of substitutions in favour of the children of the institute is not between brackets. It is designedly left out of the brackets immediately preceding it, though it had been unnoticed in the article first drafted as pre-existing law. Then, in their report they state unequivocally that it is only as regards the *acceptance* of such substitutions *inter vivos* subsequent to the deed (by persons able to accept of course, and when they are not the children of the institute), that they suggest an amendment. Some writers contended

1899

MELOCHE v. SIMPSON.

Taschereau J.

that, as it was then for donations, it was likewise only in express terms and in the deed itself or in a subsequent deed to which the donor was a party, (art. 181 of the codifiers' report), that the acceptance of any substitution created thereby when required could be lawfully agreed to. But the codifiers, having by art. 788 introduced a change in the law concerning donations as to this, suggested that the same rule should thereafter apply to the substitutions that have to be accepted by the substitutes, meaning clearly the substitutions where the substitutes are not the children of the institute. The legislature adopted their suggestion, and that is the only change that the article contains and purports to contain. The rest of it (not between brackets) is to be taken as declaratory law, as was done for other articles of the same Code in the two cases in the Privy Council of *Wardle* v. *Bethune* (1), and *Herse* v. *Dufaux* (2). Upon that ground alone, I would be opinion that this appeal should be allowed. For were I at liberty to do so, I would hesitate before holding that the codifiers have fallen into error upon a point that the learned D'Aguesseau, after the most elaborate consideration ever bestowed upon it, could not but report as doubtful. Pothier, Oblig. No. 73. Pothier, Substit. sec. 1, arts. 1 and 2; D'Aguesseau, Questions, p. 531. To use the words of Mr. Justice Hall, in *Stewart* v. *Molsons Bank* (3).

> Any attempt to go back of the promulgation of the Code and to establish an error or misconception, or even an omission, on the part of the codifiers as the basis of a judgment at variance with the accepted text of the Code, I consider unwarranted, unnecessary and dangerous in the extreme.

Or, as Mr. Justice Blanchet said in the same case:

> The learned judges who framed the Code having reported it to have been previously the law (by simply not inserting the article between

(1) L. R. 4 P. C. 33.
(2) L. R. 4 P. C. 468-489.
(3) Q. R. 4 Q. B. 11; [1895] A. C. 270.

brackets), that movables could be substituted, and the legislature having adopted their report, all doubts that existed upon the question should be considered as forever removed.

These observations upon Art. 931 concurred in unanimously by the Court of Appeal in that case, have their full application upon art. 930 in this case. It might be argued that, by enacting the irrevocability of such substitutions, the *ordonnance* of 1747 implied that they were previously revocable. But that argument cannot apply to these *ordonnances* of 1731 and 1747. It is conceded in all the books that they were, with not many exceptions, nothing but a consolidation of the previous law on donations and substitutions. Art. xi, for instance of 1731 and art. xii of 1747, cannot be, and are nowhere regarded as, changes in the law. The same may be said, to cite a few more instances, of arts. xxvii, xxviii, xxix, xxxi to xxxv of 1747, and likewise, according to the Parliament of Paris, and of the majority of commentators, of art. xi of 1747 by which the doctrine of the irrevocability of substitutions stipulated in deeds *inter vivos* is authoritatively affirmed.

Then, upon principle, assuming the question to be *res integra*, I would hold such substitutions to be irrevocable. As a general rule, no doubt, a stipulation in an ordinary contract for the benefit of a third person may be revoked so long as it has not been accepted. But that can have a reasonable application only where there exists as a matter of fact such a person. Art. 1029 C. C. And the substitution in this donation *inter vivos* is not a mere stipulation of that kind; it is a direct donation to the substitutes, the donor or grantor, to use the very terms of this deed itself, divesting himself of his ownership in favour of the substitutes, whose acceptance was out of the question since they were then unborn. Their father was to have it first

1899

MELOCHE v. SIMPSON.

Taschereau J.

as long as he lived, but, subject to that reservation, the donation to them is as full and ample as it could be. De Laurière, des instit. et substit. vol. 2, pp. 128, 134, 136, *et seq.* And what shows that this is not an ordinary contract, nor one to which all the rules applying to ordinary contracts can be extended, is that this donation in the form of a substitution was lawfully made, it is conceded, to persons not yet born. Art. 929 C. C. Such a substitution exists as a fictitious being as soon as the deed is executed. though there is yet not a single substitute in existence. Then, art. 303 authorises the father to accept a donation for his minor child, and that donation is irrevocable even with the father's consent. Compare arts. 772, 778, 789, 818, 823 C. C. And under art. 790 C. C., if one of the appellants had been born when the donation of 1832 was made, the acceptance for him, if a minor, by his father, the institute, would have constituted an acceptance for all the others not yet born. All of these special privileges and safeguards that attach to them are characteristic features of donations in favour of children or grandchildren that distinguish them from ordinary contracts. And the law recognises that substitutes, or the legal entity called the substitution, when the substitutes are not yet born, under a donation *inter vivos*, have some rights even before the opening. It cannot be denied that they, or the substitution for them before they are born, have an interest in the property. Art. 945 C. C. for instance (as at first in the Code) provided for a curator to protect their interests. Art. 956 C. C. empowers the curator to perform all acts of a conservatory nature whether against the institute or against third persons. Art. 2207 C. C. gives an action to interrupt any prescription that may run against them. These provisions clearly imply that they have an interest in the property, though that

1899

MELOCHE v. SIMPSON.

Taschereau J.

interest be conditional and in suspense. And that being so, the law would be irrational if it allowed to the donor the right to deprive them of that interest at his mere will and caprice, when they are themselves unable to act.

The respondents' case, it seems to me, rests on a fallacy. They argue that this substitution of 1832 and the donation to the appellants it imports could be revoked so long as it had not been accepted, and it had not been accepted, they say, when it was revoked. Now, that is not so. It was, in law, accepted by the deed of 1832, *in personâ donatarii ;* their father's acceptance for himself constituted in law an acceptance of the donation to themselves. That is what art. 930 impliedly says, and declares to have always been the law of the province. Bourjon, dr. comm. de la France, vol. 2, page 125, par. xxxvi. Guyot, v. Donation, 4me. partie, page 172. And that law is consistent with the fundamental principles of donations *inter vivos*, which under pain of nullity, cannot be revocable at the donor's will. Art. 783. Then would the law be reasonable if on the one hand it allowed, as it unmistakably does, donations by way of substitution to children not yet born, yet on the other hand, it left them, as contended for by the respondents, at the mercy of the grantor? It is for the protection of unborn children and of future generations and to protect and allow of the creation of family estates that such substitutions by deed *inter vivos* are authorised and favoured by the law ; it is for that purpose, and because of their nature, that they must be deemed to be irrevocable by the donor. For I do not see, when the donation to him is not affected, that the donee's consent could be required to rescind the substitution, if it could be rescinded at all. He thereby would get the property free from the substitution. The last part

1899

MELOCHE v. SIMPSON.

Taschereau J.

of art. 930 protects him; the revocation, if lawful, would inure to his benefit. So that the respondents are driven to contend that this donor by himself alone had the right to revoke the substitution as long as he left the donation to his son intact, as he has virtually done. I fail to see upon what principle the consent of his son, the donee, could at all make the revocation of the substitution lawful, if it could not be lawfully made by the donor alone.

Another view of the question strikes me, assuming again that art. xi. of the *Ordonnance* and this part of art. 930 of the Code may not be considered as enactments of a declaratory character. After hearing the reasons and opinions for and against the doctrine of irrevocability of the most learned men in France of that time, Chancellor d'Aguesseau came to the conclusion that the doctrine of irrevocability was the soundest, the most rational, the most equitable one. And to render it incontrovertible and remove the doubts that had been cast upon it, he drafted art. xi. of the *Ordonnance* of 1747. The *Ordonnance* of 1731 had merely declared these substitutions to be lawful as they had always been held to be, without, however, express mention of their irrevocability. Then, the distinguished judges who framed this art. 930 of the Quebec Code have adopted the same view of the question when the substitutes are the children of the institute. Further, at the present day in France, though the Code Napoleon has not reproduced art. xi of the *Ordonnance* of 1747, it is considered that, upon principle and from their character, such substitutions must be deemed irrevocable by lawyers of such eminence as Favard (Rep. subst., page 321, par. xx); Toullier, vol 3, ed. Belge, no. 737; Zachariæ (vol 3, page 130, par. 696); Demolombe, vol. xxii, 5 Donat., no. 442; Duranton, vol. 9, no. 550;

1899

MELOCHE v. SIMPSON.

Taschereau J.

Boileux, vol. 4, page 206; Aubry et Rau, vol. 7, par. 696, page 337; Laurent, vol. 14, nos. 581, 583, 585; Coin Delisle, Donats. et Tests., page 534, no. 44; Marcadé, vol. 4, no. 221; Michaux, Testaments, no. 1504; and the learned editors of the Pandectes Francaises, rép. v. Donat. et Test., nos. 10668, 10669, 10855. The respondents would ask us to determine here that all of these opinions are erroneous. I will not assume that responsibility.

There is another reason in favour of the doctrine of irrevocability which, though perhaps not conclusive by itself, yet adds force to it here, it seems to me, as applicable to the actual facts of this case. It is undoubted law that a substitution made in a contract of marriage is irrevocable. Arts. 772, 930, 1257 C. C. That is so upon the principle that marriages and procreation should be favoured and encouraged De Laurière des instit. et substit. vol. 2, page 151. Now here the substitution, though not contained in a contract of marriage, was nevertheless evidently stipulated in view of the donee's marriage, which did actually take place within six months thereafter, as it is a substitution in favour of his children, and the donation is moreover subject to the express condition that he will not hypothecate the property for the dower of his future wife. That being so, assuming the question to be still a doubtful one as it was before the Code, which is all that the respondents can possibly contend for, is it not reasonable to apply the rule *ubi eadem ratio ibi idem jus*, and give the benefit of the doubt, if any doubt remained, to a substitution so evidently created in favour of marriage? Arrêts de Louet, vol. 1, sommaire 51, lett D., page 564. Is it not in fact as clearly a donation in favour of the donee's marriage as if it had been inserted in the donee's contract of marriage

1899

MELOCHE v. SIMPSON.

Taschereau J.

itself? And that being so, should we not extend to the children issued of that marriage, the protection that the law aims at for them, though in form the deed might not be the necessary one to generally insure the incontrovertible irrevocability of such a substitution? I must not be understood as saying that a donation such as this one is equivalent to an *institution contractuelle* by a contract of marriage. All I say is that, assuming the question to be a doubtful one, unfettered by authority as we are, the rule of the *institution contractuelle* should be applied where the reason for that rule has full application.

A decision in that sense of 1596 is noted in Despeisses, vol. 1, page 429, in a case where a donation made four months before the marriage was held to be valid and irrevocable though at that time such donations were lawful only when made *causa dotis et propter nuptias*, D'Olive, p. 521, because it had been made in view of the future marriage, *quia matrimonium erat causa finalis*.

A woman, to suppose a very possible case, is induced to marry such a donee on the faith of the donation to him and of the substitution in favour of their children. If later on her husband, forgetful of his duties, casts her away with the children, she need not fear that her father-in-law, either alone or with the connivance of her husband, will revoke the substitution and deprive the children of the substituted property. The law protects them by refusing to the donor the right to do so; and he, the donor, knew at the time he made it that such a grant to his grandchildren would be irrevocable; the law told him so. But if the respondents' theory were to prevail, the donor would *ad nutum* have the right to revoke this grant at any time before the donee's death, and take away the property from these children. Here again, the reason

for the doctrine of irrevocability seems to me much stronger than anything that can be said by its adversaries.

An isolated case of 1770 (Tattegrain) quoted in 4 Ancien Dénisart, page 388, but of which no authentic report has been referred to at bar, is invoked by the respondents in support of their contention. That decision, however, does not seem to be entitled to much consideration. It is ignored or left unnoticed by every one of the numerous subsequent writers we have been referred to. Dénisart himself cannot have reported it, for he had died in 1765, five years before the date given to it. Then it appears to have been a decision upon the appeal of a judgment by default given by the Peronne Court under the Coutume de Peronne probably, Coutumier Général, vol. 2, p. 593, but which court gave that judgment in appeal, I have not been able to find out. It is certainly not the Parliament of Paris, then the highest Court of Appeal in France. Such a case carries no weight and cannot preponderate against the reasoning and authorities that support the doctrine of irrevocability.

I would be of opinion that the appellants are entitled to judgment on that point.

This does not dispose of the whole case, however. Have not the appellants lost their rights by the ten years' prescription which has been pleaded by the respondents?

I am of opinion that here again the appellants' contention should prevail. There is, it seems to me, hardly anything to be added on this point to what was said in the Court of Appeal, which was against the respondents on this plea. The new enactment in art. 2207, did it apply, that prescription runs before the opening, cannot be extended to the ten years' prescription. One of the essential elements of that prescription is good faith.

1899

MELOCHE v. SIMPSON.

Taschereau J.

And the knowledge of another one's right is in law bad faith. Troplong, Prescr. nos. 915, 926. Now the insinuation and publication of this substitution was notice of it to the world. The purchaser of such a property from the institute is in law presumed to have been personally aware at the time of the purchase and ever since that his vendor had none but a defeasible title. *Ignorantia juris non excusat.* 2. Troplong, no. 926; 7 Boileux, page 843. The case presents itself precisely as if it had been in the deed of sale to Sir George Simpson that Meloche senior had intervened to revoke the substitution. In his commentary on prescription, Pothier says, no 141:

> Les droits de substitution * * * ne sont pas sujets a cette prescription, lorsque la substitution a été duement publiée et insinuée.

And in Oeuvres de Cochin, vol. 6, pages 13 and 14, in the same sense, it is said by that great lawyer:

> Les tiers acquéreurs ne peuvent prescrire par dix ans entre présens et vingt ans entre absens * * * la substitution étant connue par la publication qui en a été faite, les acquéreurs et détenteurs sont nécessairement en mauvaise foi.

Bretonnier (sur Henrys) vol. 2, page 245, also says:

> Pour ce qui est de la prescription de dix et vingt ans, il est certain que les acquéreurs de biens substitués ne peuvent pas l'opposer au fidéicommissaire.

And Rousseau de Lacombe, page 511:

> Quant aux immeubles l'acquereur ne peut opposer la prescription de 10 et 20 ans au fidéicommissaire.

It is upon that principle that the sheriff's sale does not discharge the substitution, art. 710 C. C. P, if it had been duly insinuated and published (now registered since 1855, 18 Vict. ch. 101), because the purchaser is presumed to have known of the substitution. Thevenot, page 282, nos. 870, 871; Pothier, substit, sec. 5, art. 3; de Héricourt, vente des immeubles, 48; Pothier, proc. civ. 257.

1899

MELOCHE v. SIMPSON.

Taschereau J.

Les lois ont voulu que ceux qui acquierraient ce bien (un bien substitué) ne puissent en prescrire ni en purger la propriété contre les appelès.

1er. Pigeau, 720.

The effect of such publication (said C. J. Sir A. A. Dorion, for the Court in *Bulmer* v. *Dufresne* (1), is a notice to all the world of the limited right of the institute in the property of which he has only a life interest, and of the reversionary interest of the substitutes. And all parties are by law deemed to have acquired a knowledge of a duly published substitution, and this forms a presumption *juris et de jure* which cannot be controverted by any evidence to the contrary. * * In the present case, Dufresne (the institute) had no right to sell the property itself, and the appellants are by law presumed to have known it.

And in the formal judgment of the Court of Appeal in that case, it is held that:

Vû la publication et enregistrement du dit testament les appelants, lorsqu'ils ont acheté le sable en question étaient censés connaître la substitution y contenue et savoir que le dit Jean Baptiste Dufresne n'avait aucun droit de vendre ce sable.

That case came to this court, but is not to be found in our reports. A note of it in Cassels's Digest, (2), is to me unintelligible. There was no plea of prescription in the case (necessary for the prescription mentioned) and not a word of it in the judgments either of the Superior Court (3), or of the Court of Appeal (1), nor, as I have ascertained, in the record sent up to this court. However, the holding given in Cassels that publication of the substitution in that case was not sufficient notice to put third parties on their guard must be assumed to have been based on the same reasons as those that were given by the judges whose opinions are reported (*loc. cit.*) and that was simply because publication, though notice of the substitutes' title to the realty, is not a notice that affects personalty, or, as it was in that case, the purchase of sand removed from the land Here, it

(1) 3 Dor. Q. B. 90 (2) 2 ed. p. 873.
(3) 21 L. C. Jur. 98.

1899

MELOCHE v. SIMPSON.

Taschereau J.

is the title to the property that is in dispute, and Sir George Simpson must be presumed to have known that it was a substituted property that he bought from the institute.

It is for the very purpose of making it known to every one dealing with the institute that he has but a life estate in the property; Thevenot, pages 233, 243, 504; Demolombe, 5 Donats, no. 555; that these formalities were prescribed.

I would on this ground hold that the respondents' plea of prescription by ten years must be dismissed. But, even if the insinuation and publication were not in law notice to Sir George Simpson of the substitution, I do not see how it can be contended that he was personally unaware of it when it is expressly referred to in the deed of 1850, which his vendor represents to him in the deed of sale of 1854 as his own title to the property. It is true that it is by that same deed of 1850 that the substitution was revoked, but Sir George Simpson must be assumed to have known that such a revocation was unlawful, and ineffectual. Troplong, prescr. no. 930. Marcadé, prescr. page 200, par. IV; Leroux de Bretagne, nos. 909, 927; 32 Laurent, 408; Guyot, Prescr. pages 315, 342.

The learned Chief Justice of the Court of Queen's Bench was of opinion that this plea of prescription should be dismissed on the ground that the necessary ten years had not accrued under the law anterior to the code that in his opinion governs this case. I cannot make out by the record whether it is on that ground or on the ground of bad faith taken by Mr. Justice Blanchet that the judgment of the court unanimously dismissing the plea is based. However, though unnecessary for me to go further, I do not wish to be understood as holding that the ten years had accrued. On the contrary, the reasoning of the Chief Justice seems to me un-

1898

MELOCHE v. SIMPSON.

Taschereau J.

answerable. I cannot see that a law passed in 1866 could apply to a contract passed in 1832, or in 1854, without being retroactive.

I would allow the appeal with costs and order judgment to be entered for the appellants in conformity with the conclusions of their declaration. That is the unanimous judgment of the court.

*Appeal allowed with costs.**

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

Solicitors for the respondents: *Robertson, Fleet & Falconer.*

* An application to the Judicial Committee of the Privy Council for leave to appeal from this judgment was refused.

THE SUPREME TENT KNIGHTS OF THE MACABEES OF THE WORLD (DEFENDANTS) ..... } APPELLANTS;

AND

HARRIET HILLIKER (PLAINTIFF).....RESPONDENT.

1898

*Oct. 27, 28.

1899

*Feb. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life insurance—Benefit association—Payment of assessments—Forfeiture—Waiver—Pleading.

A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived.

Held, reversing the judgment of the Court of Appeal, that the waiver not having been pleaded it could not be relied on as an answer to the plea of non-payment. *Allen* v. *Merchants Marine Ins. Co.* (15 Can. S. C. R. 488) followed.

APPEAL from a decision of the Court of Appeal for Ontario affirming, by an equal division of the court, the judgment at the trial in favour of the plaintiff.

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

1898

THE KNIGHTS OF THE MACABEES OF THE WORLD v. HILLIKER.

The respondent is the widow of the late Asa E. Hilliker, who, on the 11th day of December, 1894, applied for membership into plaintiff's Order in Norwich Tent, no. 143, located at the Village of Norwich, in the Province of Ontario, and was duly admitted a member on the 31st day of December, 1894; and the benefit certificate sued on in this action for the sum of $3,000 payable to the respondent in case of the death of her husband was then issued by the appellants on that day. Asa E. Hilliker on the 21st of August, 1895, was killed by a railway train near the Village of Norwich. At the time of his death Hilliker was suspended under the rules of the society for non-payment of two assessments and to the respondent's action on the benefit certificate this suspension was pleaded and also misrepresentation in the application for membership, it being alleged that deceased was of intemperate habits, though in his answers to questions in said application he had stated that he never used intoxicating liquors to excess and had not been intoxicated during the preceding year.

On the trial a non-suit was refused and the jury gave a verdict for plaintiff finding in answer to questions submitted that there had been no misrepresentation as alleged. On appeal to the Court of Appeal the verdict was sustained by an equal division of the judges.

The non-payment of assessments was admitted by respondent who maintained, however, that the consequent forfeiture had been waived by the society.

Paterson for the appellant referred to *Fitzrandolph* v. *Mutual Relief Society of Nova Scotia* (1); *Venner* v. *Sun Life Ins. Co.* (2); *Peet* v. *Knights of Macabees* (3).

(1) 17 Can. S. C. R. 333. (2) 17 Can. S. C. R. 394.
(3) 83 Mich. 92.

Ball Q.C. and *Ball* for the respondent cited *Thomson* v. *Weems* (1); *Gravel* v. *L'Union St. Thomas* (2).

The judgment of the court was delivered by:

GIROUARD J.—This case is a simple one of life insurance. At the argument, however, the respondent has complicated it by raising numerous questions which do not come up under the issue between the parties.

The appellants are a friendly or benefit association, duly incorporated under the laws of the Province of Ontario, with power to issue benefit certificates to its members. There is a General or Supreme Tent, which is the governing body, and there are subordinate tents, which are called the local tents. On the 11th of December, 1894, Asa E. Hilliker, cattle drover, applied for membership to the local tent, known as Norwich Tent, No. 143, located at the Village of Norwich, in the Province of Ontario, and was duly admitted a member on the 31st December, 1894, and a benefit certificate for the sum of $3,000 payable to his wife, the respondent, in case of his death, was then issued by the appellants.

On the 21st of August, 1895, Asa E. Hilliker was killed by a railway train near the village of Norwich. Hence the present action by the respondent against the appellants, in which she alleges:

5. The said Asa E. Hilliker was assessed by the defendants for the said insurance at the rate of fifty cents per thousand dollars per month, and also some months a double assessment was made by the defendants, all of which assessments were regularly and duly paid, as well as his entrance fees, by the said Asa E. Hilliker to the proper officer appointed by the defendants to receive the same, except the last assessment, which was not due and payable until after the death of the said Asa E. Hilliker.

The appellants pleaded: 1st. Misrepresentation by deceased in his application for membership as to his

(1) 9 App. Cas. 671. (2) 24 O. R. 1.

1899

THE KNIGHTS OF THE MACABEES OF THE WORLD v. HILLIKER.

Girouard J.

drinking habits. 2nd. Non-payment of dues and assessments, and more particularly of the double assessment Nos 114 and 115, due May, 1895, monthly assessment No. 116, due June, 1895, and monthly assessment No. 117, due July, 1895.

The case was tried at Woodstock on the 22nd of March, 1897, before Chancellor Boyd and a jury. At the close of the plaintiff's case, the defendants moved for a non-suit, but the learned Chancellor refused the motion and allowed the case to go to the jury, who returned a general verdict against the appellants for the full amount of the certificate. Judgment was accordingly entered against them for $3,000 and costs

In appeal, the case was heard before four judges, who were equally divided, Burton C. J. and Maclennan J. being in favour of the appellants, and Moss and Osler JJ. against.

The evidence is contradictory as to the drinking habits of the deceased at the time of his application, and the non-payment of the double assessments Nos. 114 and 115, and we may fairly accept the findings of the jury in these particulars. But there is no dispute as to the non-payment of the monthly assesssments Nos. 116 and 117; they were payable at fixed dates under the regulations of the association (Rule 182) which form part of the certificate and provide that

> any member failing to pay the monthly assessment within thirty days from the date thereof shall stand suspended from all the rights and benefits of a beneficial member of the order.

The non-payment of these two monthly assessments is admitted by the respondent in her evidence; the most she can say is that her husband paid no. 116, but she did not see him do it. She admits that no. 117 was not paid. All the witnesses, who are in a position to know, agree that these two monthly assessments were not paid, and the fact is even conceded by the

respondent's counsel, both in his factum and at the hearing before us. He endeavours to meet the plea of non-payment of these two monthly assessments by alleging various facts and circumstances which, if well founded, would amount to a waiver of forfeiture of the certificate, for instance, that no notice of the call of said assessments was given; that at all events the deceased was entitled to a notice that he was in arrears; that he had been illegally suspended for non-payment of assessments; and finally that the local Tent of Norwich was suspended from June 1st to August 5th, and that in consequence it was impossible for him to make any payment. Mr. Justice Maclennan, in his elaborate opinion, clearly demonstrates that all these excuses are without foundation, and I have no hesitation in agreeing with him. But the judgment of this court is based upon another ground, namely that the facts and circumstances which are invoked as grounds of waiver of forfeiture of the certificate should have been pleaded by the respondent. The reason why the last assessment, probably no. 118, and clearly that due 1st to 31st August, was not paid, is set forth in the statement of claim, but nothing more. There is no such issue raised on the record as the one pressed by the respondent's counsel; and following the decision of this court in *Allen* v. *The Merchant's Marine Ins. Co.* (1), we are of opinion that the appeal must be allowed. The motion for a non-suit is therefore granted and respondent's action dismissed with costs before all the courts.

Appeal allowed with costs.

Solicitors for the appellants: *Kerr, McDonald, Davidson & Paterson.*

Solicitors for the respondent: *Ball & Ball.*

(1) 15 Can. S. C. R. 488.

1898
*Oct. 10.
1899
*Feb. 22.

HARRIETT ESTELLE HOLLESTER ET VIR (PLAINTIFFS)..... } APPELLANTS;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... } RESPONDENT.

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

Municipal corporation — Expropriation proceedings — Negligence—Interference with proprietary rights—Abandonment of proceedings—Damages—Servitudes established for public utility—Arts. 406, 407, 507, 1053 *C. C.—Eminent domain.*

Where, under authority of a statute authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. *Perrault* v. *Gauthier et al.* (28 Can. S. C. R. 241) referred to.

The Chief Justice dissented.

APPEAL from a judgment of the Court of Queen's Bench, (appeal side), affirming a judgment of the Superior Court, District of Montreal, which maintained a demurrer filed by the defendant and dismissed the plaintiff's action with costs.

A statement of the case will be found in the judgment of the majority of the court delivered by Mr. Justice Girouard.

Trenholme Q.C. and *Gilman Q.C.* for the appellants. The statutes which enabled the corporation to institute the expropriation proceedings must be construed as a contract authorizing dealings with private lands and the customary clauses as to indemnity to the

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

owners must be supplied as a matter of course. See arts. 407, 1017, 1589, 1591 C. C.; art. 903 Mun. Code, Que.; sec. 11, "Town Corporation General Clauses Act;" C. S. L. C. c. 70, s. 30. The statute did not authorize the long delays, about twenty years, that the corporation permitted to elapse in this case, leaving clouds on the title through all that period. The owner had no power to force the city to proceed with the extension of the street and is not to blame in any manner for that delay. For the whole period she had no beneficial use of her property. The taxes she paid on it form part of the damages sustained in consequence of the proceedings taken, so long delayed and finally abandoned; art 1053 C. C. The following citations were made on behalf of the appellants: *Grenier* v. *City of Montreal* (1); *Bell* v. *City of Quebec* (2); *Brown* v. *City of Montreal* (3); *City of Montreal* v. *Robillard* (4); *Harold* v. *City of Montreal* (5); 2 Dillon on Corporations, ch. 16; Cooley, Constitutional Limitations, ch. 15; *McLaughlin* v. *Municipality* (6); *Reeves* v. *City of Toronto* (7); *Desloges* v. *Desmarteau* (8); *Mersey Docks Co.* v. *Gibbs* (9): *Morrison* v. *City of Montreal* (10); *Turgeon* v. *City of Montreal* (11); 1 Sourd. at nn. 427-433; 2 Aubry & Rau, n. 233 at pp. 439 *et seq.*; Beven on Negligence, vol. 1 pp. 344, 345 and cases there cited.

Ethier Q.C. for the respondent. There is no fault chargeable against the corporation, which merely exercised, in the proceedings taken, not only the power, but the duty as well, provided by the statute, and the appellant is not entitled to any indemnity for the

(1) 25 L. C. Jur. 138.
(2) 5 App. Cas. 84.
(3) 4 R. L. 7; 17 L. C. Jur. 46.
(4) Q. R. 5 Q. B. 292.
(5) 11 L. C. Jur. 169.
(6) 5 La. An. 504.
(7) 21 U. C. Q. B. 157.
(8) Q. R. 6 Q. B. 485.
(9) L. R. 1 H. L. 93.
(10) 25 L. C. Jur. 1.
(11) M. L. R. 1 S. C. 111.

1899

HOLLESTER v. THE CITY OF MONTREAL.

inconveniences suffered, if any, either under the Code or under the special statutes relating to the expropriations. The effect of the Acts was merely to create a servitude for purposes of public utility, and the owner was not at any time, during the period in question, deprived of her property; she continued to use and enjoy it, subject to the restrictions imposed by the statute and to which she was obliged to submit without indemnification. As a matter of fact no real damages have been proved to have been suffered. We refer to Art. 1053 C. C.; 11 Toullier no. 119; 1 Delomcourt, p. 6; Rolland de Villargues, vo. "Dommage," no. 14; 5 Larombière, Obligations, p. 690, no. 10; 7 Laurent, nos. 476, 477; 6 Laurent, pp. 186 and 195; S. V. 1833, 1, 604 and 608; *City of Montreal* v. *Drummond* (1); *Boulton* v. *Crowther* (2); *Hammersmith Railway Co.* v. *Brand* (3); *The Queen* v. *The Vestry of St. Luke* (4); Angel on Highways, pp. 99 and 211 *et seq.*; Abbott on Corporations, nos. 185, 193, 197, 261, 463; Sedgwick on Damages, nos. 110-113.

THE CHIEF JUSTICE.--As I am alone in thinking that this appeal ought to succeed, I do not propose to discuss at length the arguments of the parties, but to state very concisely the reasons and authorities which have led me to concur in the dissenting judgment of Mr. Justice Blanchet.

A statutory power such as the respondent undobubtedly had to lay down the proposed line of the new street which had the effect of rendering the appellants' property for several years unmarketable and unfit to be put to any profitable use, is, we are told, not to be exercised arbitrarily, but with due regard to the interests of landowners. In *Geddis* v.

(1) 1 App. Cas. 384.
(2) 2 B. & C. 703.
(3) L. R. 4 H. L. 171.
(4) L. R. 6 Q. B. 572.

Proprietors of Bann Reservoir (1), at page 455, Lord Blackburn lays this down very emphatically.

The same principle in stated as law and applied to cases like the present, by many American courts. Amongst a great number of these authorities, I may refer to Dillon on Corporations (4 ed) p. 713; *The State* v. *Graves* (2); *Graff* v. *Baltimore* (3); *Mallard* v. *Lafayette* (4); *In re Roffignac Street* (5); Mills on Eminent Domain, sec. 313. In a note to Dillon at the page cited it is said:

> Where a Corporation commences proceedings to open a street and notifies the proprietor not to continue the making of improvements he had begun and the Corporation needlessly delays and finally abandons the proceedings, it is under these circumstances liable for the actual damages suffered by the proprietor, arising from the suspension of his improvements.

For this statement of the law the learned author refers to the case of *McLaughlin* v. *The Municipality* (6). And this decision, which is exactly in point with that before us, supports the text for which it is cited.

Although I concur with Mr. Justice Blanchet in thinking that the appellant is entitled to a remedy by way of damages, I could not agree with him as to the amount he proposes to award, but that, in the view the majority of the court have taken, is now immaterial.

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

GIROUARD J.—In October, 1874, the appellant purchased a lot of land, situate on Drummond Street, in the City of Montreal, measuring 72 feet 6 inches in front, by 100 feet in depth, and intended to build a large double villa thereon, jointly with a friend who

(1) 3 App Cas. 430.
(2) 19 Md. 351.
(3) 10 Md. 544.
(4) 5 La Ann. 112.
(5) 4 Rob. La. 357.
(6) 5 La. Ann. 504.

1899

HOLLESTER v. THE CITY OF MONTREAL.

Girouard J.

was the owner of the adjoining lot of the same size facing on Drummond Street. The services of architects were even retained for the purpose.

The same year the legislature of the Province of Quebec granted a new charter to the City of Montreal, which is known as 37 Vict. ch. 51, and by section 167 of that Act, it is enacted that

> it shall be lawful for the said corporation, at any time, to cause public streets, highways, places and squares within the whole extent of the limits of the said city, to be laid out, fixed and determined at the city's expense, under the direction and supervision of the road committee * * *

Under this section a plan or map of the city was made and duly confirmed by the Superior Court, as provided by that statute.

On this plan were laid down lines indicating the extension of a street through appellant's lot, known as Burnside Street, from Stanley to Guy Streets; and later on, at the request of the architects of the appellant and other parties, the city surveyor indicated on the premises, by marks and spikes, where the projected prolongation was to go.

This course became necessary in face of section 171 of the same Act, which provides that the homologated plan shall be binding upon the corporation and the proprietors, who were deprived of their right to any indemnity or damage

> for any building or improvement whatsoever that the proprietors or other persons whomsoever may have made or caused to be made, after the confirmation of said plan.

In consequence, the appellant abandoned the building of her double villa, paid her architects for their plans and labour, and built an ordinary house on the remaining portion of her lot situate at the corner of Drummond Street and the projected Burnside Street, leaving 30 feet front by 100 feet in depth for the pro-

jected street vacant, which was afterwards used by her as a garden.

Several statutes were subsequently passed amending the charter of the city or granting a new one in lieu of the former ones, but they have no bearing upon the issue between the parties.

Nothing was done towards the extension of Burnside Street, appellant paying taxes in the meantime on the vacant land; but in 1895, after twenty years of complete inaction on both sides, the City of Montreal was empowered to abandon the same by 59 Vict. ch. 49, s. 18:

If the proceedings in expropriation for the opening or prolongation of Burnside place or street have not been commenced by the 1st of October, 1896, the lines showing such extension or prolongation shall be removed and expunged from the homologated plan of St. Antoine Ward of the City of Montreal.

In November, 1896, the respondent petitioned the Supreme Court to erase the lines of said projected Burnside street from the homologated plan, and the Superior Court duly ordered said lines to be erased without opposition from the appellant or any one else.

On the 23rd November, 1896, the appellant instituted the present action against the City of Montreal to recover $15,000 in the nature of damages for having deprived her of the use of 3,000 feet of ground during the twenty years above mentioned, and also for fees paid to her architects, etc. The respondent demurred to the action and further pleaded a general denial. The demurrer was maintained by the Superior Court and the action dismissed with costs (Doherty J.), and this judgment was confirmed by the Court of Appeal, Mr. Justice Blanchet dissenting. We have no notes from the judges in appeal, and we must suppose that they simply concurred in the reasons set forth by the first court. The following are the chief grounds of its judgment:

1899

HOLLESTER
v.
THE CITY OF MONTREAL.

Girouard J.

Considering that neither by the allegations of plaintiff's declaration nor by anything established in evidence in this cause doth it appear that the damages alleged by plaintiff to have been suffered by her in consequence of the facts alleged in her declaration are the result of any fault of defendant, or of plaintiff being compelled by defendant or at its instance to give up any part of her property for a purpose of public utility :

Seeing articles 1053 and 407 C. C.

"(1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

407. No one can be compelled to give up his property except for public utility and in consideration of a just indemnity previously paid)."

Considering that under neither of these articles is plaintiff entitled to claim damages or indemnity from defendant by reason of the facts alleged in plaintiff's declaration ;

Considering that the only interference with the full enjoyment by plaintiff of her rights of ownership of the property described in her declaration which resulted from the making and the homologation of the plan in her declaration referred to, was the effect of the disposition of the Act 37 Vict. chap. 51, sec. 171 (re-enacted by sec. 207 of the Act 52 Vict. chap. 79) that "No indemnity or damage shall be claimed or granted at the time of the opening of any of the new streets, public places or squares shown on the said plan * * * for any building or improvement whatsoever that the proprietors or other persons whomsoever may have made or caused to be made, after the confirmation of the said plan, upon any land or property reserved for new streets, public places or squares" ;

Considering that the effect of said disposition was not to deprive proprietors of property indicated on the said plan as reserved for new streets of such property, or to compel them to cede it, but merely to create a servitude for a purpose of public utility upon said property, or to impose a restriction upon the enjoyment of it, in the public interest ;

Seeing articles 406 and 507 C. C.

"(406. Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations. 507. The servitudes established for public utility have for their object the foot road or tow-path along the banks of navigable or floatable rivers, the construction or repair of roads or other public works. Whatever con-

cerns this kind of servitude is determined by particular laws or regulations.)"

Considering that under the first of said articles the absolute right of enjoyment belonging to an owner of property is subject to restrictions resulting from prohibitory laws or regulations as regards the use thereof;

Considering that under the second of said articles restrictions upon the right of enjoyment or use of his property by owner, which have for their object the construction of roads, constitute servitude for purposes of public utility, and that whatever concerns them is determined by particular laws or regulations;

Considering that in the absence of express disposition of the particular law creating any such servitude declaring that the owners of properties subjected to it shall be entitled to indemnity by reason of the restriction of their enjoyment resulting therefrom, such properties are bound to submit to such restriction without compensation (7 Laurent, 474 and following; 11 Demolombe 304);

Considering therefore that plaintiff has by law no recourse against defendant for the loss or damage set up by her in her declaration as having resulted from the making and homologation of the plan aforesaid, and that as regards all allegations setting up damages, resulting from said causes, and plaintiff's conclusions for a condemnation against defendant to pay the same, the defendant's demurrer should be maintained;

Considering, as regards the amount claimed as having been paid to plaintiff's architects, because prior to the homologation of said plan she was notified by defendant that the land in question would be required for said street and not to build thereon, and was in consequence prevented from building thereon in conformity with the plans said architects had then made, plaintiff has not proved any such notification, and even had she done so, such notice had not the effect of preventing her building, and if she chose voluntarily to acquiesce therein and abandon her prospect of building on the strip of land which defendant then contemplated or intended including in said plan, she cannot hold defendant responsible for the loss resulting from such voluntary act;

Considering that the demurrer of defendant is well founded and further that plaintiff has failed to make good her demand, as against the plea of general issue filed by defendant, etc.

We entirely concur in the views thus expressed by the learned trial judge. In the first place, this is not a case of expropriation. Such a proceeding was

1899

HOLLESTER v. THE CITY OF MONTREAL.

Girouard J.

merely authorised, but not initiated. Finally, the respondent is not in fault, either when making a plan of the city indicating the continuation of Burnside Street or staking out said street on the premises according to said plan, and at the request of the appellant, but without any *prise de possession*, or not proceeding with the expropriation, or when abandoning said continuation. The city was acting within the limits of its rights as conferred by the legislature, and as the numerous French authorities quoted by the respondent establish, and according also to a recent decision of this court in *Perrault* v. *Gauthier* (1), whosoever acts within the limits of his rights commits no fault, and is not liable in damages.

For these reasons the appeal should be dismissed, and it is dismissed, with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *F. E. Gilman.*

Solicitors for the respondent: *Ethier & Archambault.*

(1) 28 Can. S. C. R. 241.

JAMES SPRATT (DEFENDANT).....APPELLANT; 1898

AND *Oct. 4.

THE E. B. EDDY COMPANY (PLAINTIFF).....RESPONDENT. 1899 *Feb. 22.

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

Bornage—Concession line—Survey—Evidence.

In an action *en bornage* between E. the owner of lots 7, 8 and 9, in the tenth concession of the Township of Eardley, Que., and S. the owner of like numbered lots, in the ninth concession, the question to be decided was the location of the line between the two concessions, E. claiming that it should be one straight line to be traced from the south-easterly angle of lot 14, in the tenth concession easterly on a course S. 87° 30′ E. to the town line between Eardley and Hull, while S. claimed that as to the lots in question it was about a quarter of a mile north of where the straight line would place it. A survey of part of the line was made in 1828 and the remainder in 1850, and in 1892 the whole line was surveyed again and the result was held by the court below to establish it in accordance with the claim of E. In 1867 there was a private survey which established the line further north as claimed by S. who contended that it, and not the survey in 1892 was a retracing of the original line.

Held, affirming the judgment of the Court of Queen's Bench, Strong C. J. dissenting, that the original surveys were made in accordance with the instructions to the surveyors and established the straight line as the true concession line; that the survey in 1892 was the only one which retraced the original line in an efficient and legal manner; and that the evidence failed to support the contention that it was retraced in 1867, such contention depending on assumptions as to the manner in which the original surveys were made which the courts would not be justified in acting upon.

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

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

1898

SPRATT v. THE E. B. EDDY COMPANY.

judgment of the Superior Court, sitting in review at Montreal, which had reversed the judgment at the trial in favour of the defendant.

The facts of the case are sufficiently stated in the above head-note and fully set out in the judgment of Mr. Justice Gwynne.

Aylen for the appellant.

Geoffrion Q.C. and *L. N. Champagne* for the respondent.

THE CHIEF JUSTICE.—I would allow the appeal for the reasons given by Chief Justice Lacoste.

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

GWYNNE J.—The sole question upon this appeal is as to the true location of the concession line between the 9th and 10th ranges or concessions of the Township of Eardley, in the Province of Quebec.

For the purposes of this suit it is admitted that the plaintiffs are seized of lots nos. 7, 8 and 9, in the 10th concession, and the defendant of the lots so numbered in the 9th concession, or at least of the north parts of those lots, and the contention between the parties is reduced to this, that the plaintiffs in the action, the now respondents, contend that the concession line between those concessions is one continuous straight line to be traced from the south easterly angle of lot no. 14, in said tenth concession easterly on a course S. 87° 30′ E. to the town line between the townships of Eardley and Hull, while on the contrary the appellant, while not contesting the location of the concession west of lot no. 13, and east of lot no. 5, in the tenth concession to the town line of Hull to be as contended by the respondents, contends that at least as regards

the said lots nos. 7, 8 and 9, it is situate about a quarter of a mile north of the place where the straight line as contended for by the respondents would place it.

The township of Eardley appears to have been surveyed by the Crown in three several parcels, one in 1803 by a Mr. Watson, another in 1828 by a Mr. Burrowes, and the third in 1850 by a Mr. Driscoll. It is only with the two last that we are at all concerned.

We are not furnished with the instructions given by the Surveyor-General in 1828 to Mr. Burrowes in accordance with which to make his survey, but we are furnished with the report made by him to the Surveyor-General upon the completion of his survey, which is sufficient for our purpose as it is not contended that his survey upon the ground was not as reported by him. His report is so short that it will be convenient to set it out in full. It is dated the 2nd April, 1828, and is as follows:

Sir,—Agreeably to your instructions dated Hull, the 6th day of October, I proceeded to survey and subdivide in the field the township of Eardley—commenced from an old decayed post at the foot of the mountain marked VII on east side and VIII on west side, also Con. VII on north side; measured and ran across two concessions being a distance of 161 c. 60 l., which brought me in front of the 9th range; planted a large substantial post properly marked; continued westerly from lot no 8, to the side of the Ottawa, which is on no. 22, continued by offsets northerly to the front of the 10th concession, on which ran easterly to lot no. 14, where the mountain from appearance of its roughness and steepness bids defiance to cultivation; from post XIII and XIV ran north to the front of the 11th concession; ran west to the division side line of the township. North 80 c. 80 l. to the 12th concession. East to lot no. 18, being at foot of hill. Returned on the concession line and ran north 80 c. 80 l. being the front of the 13th concession. Continued north to the front of the 14th concession, returned on the same line to the front of the 13th concession and ran east to lot no. 24, after which scaled the river to the side town line from lot no. 22 to 28, the particulars of which are stated in the field book herewith. Resting on the certainty that this survey has been properly performed, I remain Sir, &c., &c.

JOHN BURROWES,
D. Provl. Surveyor.

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

This report establishes that Mr. Burrowes commenced his survey on a concession line previously established in front of the seventh concession at a point constituting the south east angle of lot no. 8 and the south-west angle of lot no. 7 in that concession. He then proceeded across the 7th and 8th concessions in a northerly direction along the eastern limit of the said lots numbered 8 in those concessions, 161 chains, 60 links, to where he established the concession line in front of the 9th concession, which he laid down upon the ground westerly marking the angles of the lots from nos. 8 to 22, both inclusive, upon which latter lot he reached the River Ottawa, and from the point so reached he laid off the lots in the 9th concession along the banks of the river westerly, until he reached the concession line in front of the 10th concession near to the south westerly front angle of lot no. 25, in said 10th concession. He then laid down the lots in the said 10th concession from lot 25 to lot no. 14, both inclusive, and at the south easterly front angle of said lot no. 14, where he determined also the south westerly front angle of lot no. 13, in said 10th concession, he planted a post marked xiii-xiv from which he measured northerly along the line between the said lots numbered 13 and 14, 80 chains, 80 links to the concession line in front of the 11th concession. Thence he proceeded westerly along that concession line as described in his report, but not necessary to be further noticed here.

By this survey of Mr. Burrowes, the front lines of lots nos. 8 and 9, and the south west front angle of lot no. 7, in the ninth concession, were fixed and determined upon the ground, as were also the front line of lot no. 14, and the south west front angle of lot 13, in the 10th concession, and the depth of those concessions was fixed and determined at 80 chains, 80 links.

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

So much being determined by Mr. Burrowes' survey instructions were given by the Government in November, 1849, to Mr. Driscoll, to complete the survey of the residue of the Township of Eardley, that is to say, the part not already surveyed by Mr. Watson and Mr. Burrowes. By these instructions he was (among other matters not requiring notice as regards the question in issue on this appeal) directed to

repair along the line of division between the Townships of Hull and Eardley to a post erected by the said Mr. Watson to divide the 6th and 7th ranges of Eardley which range line you will verify and trace and admeasure to the post erected between lots nos. 7 and 8 in the said line where Mr. Burrowes fixed his point of departure for the survey he performed in the said Township of Eardley.

He was also directed to

chain the several range lines in continuation of those already drawn commencing respectively at the posts planted in the field as reported by Mr. Burrowes in his survey of 1828 and represented on a diagram (furnished to Mr. Driscoll) by the letters A, B, C, D and E, and to set off in each range lots of the breadth of 26 chains planting between each lot a square post properly inscribed and offset pickets indicating the course of the side line parallel to the township line;

and he was directed further to carefully admeasure the depth of each range, as marked off by Mr. Burrowes on the lines run by him and edged red on the plan furnished to him. He was directed further to note in his field book the quality of the soil and timber, and finally to report the result of his survey accompanied with a plan to the Government. On the 14th May, 1850, Mr. Driscoll made his report to the Government of the survey made by him under these instructions and therein he stated that he had commenced his operations on the 1st of January, 1850, and he then proceeds as follows:

Having ascertained the position of the boundary mentioned in the instructions as at lots 7 and 8, I verified the said line to the town line where I ascertained the bearing of the said line and found it to be N. 2° 37′ E. magnetically. I subsequently traced the same up to the rear

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

of the township planting posts at the depth of 80 chains 81 links for the depth of the ranges up to the 13th range, which I found to be 86 chains. I then proceeded to draw the several range lines on the magnetical course S. 87° 37′ E. planting posts for the lots at a distance of 26 chains, the variation of the needle I found to be 6° 57′ W.

Now by this report it is established and there is no dispute upon this point, that before proceeding to continue the several concession lines from the points of the termination thereof respectively as determined by the survey of Mr. Burrowes, Mr. Driscoll determined by posts planted by him on the town line of Eardley and Hull the precise depths of the several concessions in accord with the survey of Mr. Burrowes, and precise points at which the several parts of the concession lines as surveyed by Burrowes when continued, would reach the eastern boundary line of Eardley; all that remained, therefore, to complete such concession lines in accordance with the only survey authorized and directed by the Government, was to run a straight line from the several points of termination of the said several concession lines as determined by Burrowes's survey to the several posts so planted by Driscoll on the town line of Eardley and Hull. This report is addressed to the Commissioner of Crown Lands, Montreal, and is accompanied by Mr. Driscoll's field book and diary and a plan of the line as run by him, and the report concludes with the following sentence:

> Accompanying the field book and diary is a plan on the scale of 40 chains to the inch, the whole of which I submit for your approval.

We have been furnished, from Mr. Driscoll's field book, with certified copies of extracts of so much as is material to the case before us, that is to say, of the lines run by him in continuance of the concession lines run by Burrowes in front of the parts of the 9th and 10th concessions as reported to have been surveyed by him to the eastern limit of the township and of so

much of the town line as extended from the post planted by Mr. Driscoll in front of the 9th concession to the post planted by him in front of the 10th concession. In such extracts he describes the nature of the soil and of the timber as he proceeded, mentioning also the streams crossed by him and their courses, &c., as directed in his instructions. In running the continuation of the 9th concession line he commenced as directed by his instructions at the termination of the line as run by Mr. Burrowes at the south east front angle of lot no. 8, and proceeded thence on a course S. 87° 30′ east 26 chains, determining thus the front boundary of lot no. 7 at the S. E. angle of which he planted a post marked 6 and 7 "on the face of a precipice." He then proceeded on the same course laying out the several lots with a frontage of 26 chains each and marking the respective front angles of each lot to and including no. 1 with posts marked respectively 6-5 and 5-4 and 4-3 and 3-2 and 2-1, until he reached the town line which constituted the eastern limit of lot no. 1 at post marked 8 and 9 for designating the concession line in rear of the 8th and in front of the 9th concession, whence he proceeded on a course N. 2° 30′ E. along such eastern limit of said lot no. 1 describing minutely the nature of the land so traversed until he reached "post 9 and 10 on north side of pond" so marked plainly to designate the eastern terminus of the concession line in rear of the 9th and in front of the 10th concession. He then as appears by his field book "repaired to station B on range line X at post between lots xiii and xiv," and thence ran out concession line east—S. 87° 30′ E.,—and on such line marked the front angles of each lot with posts numbered in like manner as on the 9th concession line describing also the soil, timber, &c., on the course traversed until he reached the south east angle of lot

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

no. 2, which he marked with "post ii and i, rough and rocky," thence he proceeded along the front line of lot 1, describing minutely the character of the ground thus:—at the distance of 50 links from the south east angle of lot no. 2 "Creek 6 links." At the distance of 10 chains "steeply descending;" at the distance of 15 chains "intersect road across portages;" at the distance of 19 chains "small creek going into pond;" at the distance of 21 chains, 50 links "pond shore;" at the distance of 26 chains "post I and O, town line."

The plan which accompanied the report shewed continuous straight lines for the continuation of the several concession lines from the respective points of termination of those lines as surveyed by Burrowes, run out to the eastern limit of the township and this is the only plan of the survey made by Driscoll ever received by the Government. Now this plan accompanied with the above extracts from Driscoll's field book constitute *primâ facie* positive and direct evidence that the concession lines in front of the 9th and 10th concessions respectively were run by Driscoll in precise conformity with the Government instructions given to him from the eastern termination of those lines as run by Burrowes in a continuous straight line to the eastern limit of the township. In corroboration, however, the plaintiff has produced a man named George Hébert, employed as picket man on the Driscoll survey in 1850. This witness of the age of 76 when examined in 1893, confirms in the clearest manner the evidence furnished by the surveyor's report and field notes. This witness was on the survey by Driscoll of the concession lines in front of the 8th and of the 9th concessions and also of the concession line in front of the 10th concession as far as lot 4 in that concession, when he left the work and returned to his home which was

on lot 8 in the 8th concession. Having been asked how he knew it was lot 4 he had reached when he left, he said that when leaving the surveyor informed him that there remained but three lots to the town line. All the lines were run from the west to the east. In front of the 10th concession they commenced at a post pointed out by a Mr. Rayside, who lived in the neighbourhood, whether it was on lot 15 or lot 14, or what lot in particular he could not say, but it was from an old post east of Mr. Rayside's place and situate at the foot of the mountain. Now it will be remembered that Mr. Burrowes in his report remarks that where he terminated his survey on lot 14 "the mountain from appearance of the roughness and the steepness bids defiance to cultivation." The witness then states that from this the point of commencement, they continued the survey on a straight line east without any jog, angle, or deviation whatever, blazing and planting posts as they went along, some of the blazing having been done by himself, until they reached the lot at which the witness left the work and which he believed to be lot 4, for the reason already stated. About the last thing which he did on the evening of which he left was, as he said, that he made a post out of a spruce tree which was there, and the post so cut by him was planted on the lot where he left off working and returned to his home; a few years after he left the township and has ever since resided in another township and was never again on the concession line until just before his examination. Having been subpœnaed as a witness, as a person employed on the original survey, he went over the line in company with one Bourgeau. On this occasion he observed on the top of the mountain an old blaze on a pine tree which had fallen, then another in the middle of a ridge of hardwood, and a third further on, which is

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

between lots 9 and 10. The witness did not profess to swear that these blazes were made at the Driscoll survey, but that he believed them to be such, and that they were old blazes, and were on the line run as the concession line at the running of which the witness was employed. He said further, and this is certainly of special value as showing the witness to be a very intelligent and observant man, when he came to a creek which they crossed on the line, he said to Bourgeau that a little further on they would cross another creek where there was a flat, square rock over which the concession line passed, and accordingly that as they proceeded they came to the creek and the rock. He also as he said recognized a large blazed spruce tree which was near the rock and which he had seen on the survey. He said further that they proceeded east until they reached the place where he had left the work after having made a post from a spruce tree and which was planted there, and he saw there lying on the ground an old square spruce post, rotten at the stump but partly still solid and having still marks on it which he believed to be the post he had cut from the spruce tree as already mentioned. Now this witness is corroborated by Bourgeau as to what he had said when crossing a creek on the line as to there being another a little further on, and as to the rock, and that the fact occurred as Hébert had said it should occur. Bourgeau also says that they started on the concession line in front of lot no. 13 in the 10th concession which he knew well and they proceeded in a straight line easterly in continuation of the line in front of lots 15, 14 and 13 to lot 4, where Hébert recognized the old post found lying there, as he had said. He also fixed the last two blazes spoken of by Hébert, one as being at the line between lots 9 and 10, and the other as being at the line between lots 11 and 12.

Julien Delorme, aged 68 at the time of his examination in 1893, was born on lot 15 in 8th concession of Eardley, and has lived in the township all his life, and since the year 1867 on the north half of lot no. 13, in the 9th concession, which lot abuts on the concession line between the 9th and 10th concessions. This line so far as the witness has ever heard, has always been called, and known as the Driscoll line. He did not see the line when being run, but he remembers the time and hearing it spoken of at the time it was being run. He had known the lot for four years before he went to reside on it, that is as far back as 1863. He knows also the line called the Baldwin line, the line north by the distance of 7 or 8 arpents of the line called the Driscoll line. Before ever the Baldwin line was run, and as far back as 1865, he saw a post on the southern or Driscoll line at the line between lots 11 and 12. It was a marked post, but as he could not read he could not say what the marks were; but it was a marked post. He had gone to look for wood on lots 11 and 12, as the rest of the lots were taken up. The first fire which occurred about 1868 partially destroyed that post and the subsequent fires, of which there were two, wholly destroyed it. He has often been in that part of the country gathering blueberries and he has often travelled eastward upon this line to where he has spoken of the post having been before it was destroyed by fire. The line was quite visible before the fires. He has never travelled east of lot 11.

Leon Lebrun, aged 53, has lived on the south half of lot 15, in the 10th concession since the year 1858. The concession line in front of that lot ran easterly in front of 15, 14 and 13, and was quite visible, and it was then and always since has been called and known among the neighbours as the Driscoll line. About 24 years before his examination and before any of the fires

1899

SPRATT
v.
THE
E. B. EDDY
COMPANY.

Gwynne J.

he was employed by one Gibson, getting out timber in the bush in the 10th concession and in front of the lot on which he was working he saw a post marked 9 on south side and 10 on north side, indicating the concession line in front of the lot on which he was working; that post was situate from 6 to 8 arpents south of a post on the Baldwin line which he knew well. He only saw the post that once for when he next was that way was after the fire and it was gone; the other sides of the post were also marked, but he could not from memory say what were the marks which he saw on it. He described the post as having been on a rock near which was "*un basin d'eau*" where the water ran in wet weather; his description corresponds with the work of which Hébert had spoken. When he was there next after the fire he says the post was gone and nothing remained but the rock, and there has never been a post there until George C. Rainboth ran the line in 1892. After Rainboth had finished his line he took witness over that part extending from lot no. 9 to his own lot no. 15, and witness says that Rainboth's line runs within fifteen feet of the place where he saw the post, which now he understands to be at the line between lots 11 and 12.

Charles Lusignan, aged 56, in 1863 bought the west half of lot no. 14, in the 9th concession of Eardley, and lived on it for 14 years when he moved to lot 16, in the 9th concession, where he has lived ever since. His lot abutted on the concession line. When he went to live on 14 in 1863 there were old posts between 15 and 16, and between 15 and 14, and at the front angle of 14 and 13, in the concession line there was a tree blazed marking the line between 14 and 13; that blazed tree was used to guard his land, that is, to shew the line between 14 and 13. About the year 1865 he was employed by a Mr. Baldwin, who had a saw mill,

1899

SPRATT
v.
THE
E. B. EDDY
COMPANY.

Gwynne J.

to get out lumber on lots 12 and 13 in the 10th concession; had then to know the line in front of the lots; they worked by that line, the Driscoll line; used to go by the blazes; did not look for a post. He used to go up between 12 and 13; that line was indicated by a blaze on the Driscoll line; did not look for a post, the blaze was sufficient for his purpose. The Driscoll line east of 12 was visible but he never travelled on it east of that lot until about a fortnight before he was examined as a witness in this case. He was working on lot 12 together with one of his brothers making saw logs for Mr. Baldwin, who owned a saw mill in the neighbourhood where the Baldwin line was run down from the mountain; had to look for the Driscoll line then so as not to cross that line; the Baldwin line was brought down into lot 15 and to the concession line near to the line between 14 and 15; it crossed the line between 14 and 15 about three and a half acres north of the Driscoll line. He knows where the Baldwin line runs and the country through which it passes well, and he never saw any sign of a line there before Thistle and Baldwin ran their line.

Christie Miner, aged 42, says his father owned and lived upon the west half of lot 11, in the 9th concession of Eardley, and witness himself lived on it until 15 years before he gave his evidence in 1893; when he was a boy about 13 or 14 he and his father were out together and that in rear of their lot 11, in the 9th concession, on which they lived, he saw a post, it had marks on it. Again about 18 or 19 years ago when ascertaining boundaries with the owner of the other half he again saw the post and he and his neighbour took it to determine the boundary of their lot. There was a post, also another post, on the concession line, then on the east corner of lot 11. These were then old posts but have since been burned to the ground.

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

That concession line has always been called the Driscoll line. He saw the beech tree at the line between 9 and 10 about 18 years ago; the tree was blazed on four sides, its appearance was for a post.

Mr. Geo. C. Rainboth, a licensed surveyor, testified that in 1892 he was employed by the plaintiffs to ascertain and lay down the boundaries of lots 7, 8 and 9 in the 10th concession. This work necessitated his ascertaining the true concession line as originally surveyed by Driscoll in front of the 10th concession. So far as appears this was the first occasion upon which a surveyor had attempted to trace that line in an efficient and legal manner. He first determined the line in front of lots 1, 2, 3 and 4 to accord precisely with Driscoll's field notes. He then continued on that line projected in a straight line westerly until he reached about the centre of lot 6; he found many old blazes, 42 years old, corresponding precisely with the period of the Driscoll survey. He proceeded up to the western extremity where he found a post between lots 15 and 14; from lot 6 to lot 14 he found no reliable traces but he says that from lot 9 westward the country has been so badly burned that no trace of the original line remained. Apart from the destruction by fire the evidence shewed that the whole country round had been lumbered over for a period of from 40 to 50 years.

Mr. Driscoll in his report in 1850, has this paragraph:

> From the mountainous nature of the country and the position of the hills with regard to the settlement on the old survey there are no facilities for making a good road without great expense. The roads which are at present used by the inhabitants are those which have been cut by enterprising lumberers, and although very rough in the summer season are nevertheless good and of great service during the winter.

And Mr. Robert Kennedy Lusk, who was the first to see posts in 1851 across lots 7, 8, 9, 10 and 11, says that he himself got that year a Crown license over lots 9, 10 and 11, and that at that time a Mr. Smith was lumbering in that neighbourhood who wanted to get a road to the front and that Lusk undertook to make and as he says, did make one for him, but where is not stated.

Mr. Rainboth having so reached lot 14, surveyed the line back from lot 14 to lot 4, and divided the distance in the manner required by art. 4155 of the revised statutes which announces the law as it has been ever since the passing of the statute of the late Province of Canada 12 Vict. ch. 35, sec. 20. In the course of his survey Mr. Rainboth observed two or three points of special importance. 1st, that the line in front of lots 1, 2, 3 and 4, was run from the west on the original survey. 2nd. Where the Driscoll line crosses the line between lots 9 and 10, his field notes describe the land and timber found there thus: "fine level hardwood land, good soil," and he testifies that this is correct, while where the northern or Baldwin line crosses the same line it is a spruce swamp all around and no hardwood within eight or ten chains. And all this is confirmed by several other witnesses. Then, 3rd. On the original line run by Driscoll, as described in his field notes, there is a creek on lot 10 said to be distant 7 chains from the line between 11 and 10. Mr. Rainboth found the distance of the creek from the line as established by his survey to be 5 chains, 58 links, while the distance of that same creek from the said line between 11 and 10 is by measurement made by Mr. Rainboth, 14 chains, 20 links. These two latter facts afford strong confirmation that the southern line was the line run and reported by Driscoll.

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

Now the answer of the appellant to all this evidence is that Driscoll never ran the southern line at all, but that the line which he ran is the same line as that which Baldwin ran in 1867 which line is contended to be a simple retracing of the original Driscoll line and by way of explanation of the extraordinary circumstances that a surveyor should deviate from his instructions so as to leave the Burrowes line which it was his duty to continue in a straight line eastward and to go north to a point distant about a quarter of a mile from the true line he was directed to run and then to turn and run easterly nearly parallel with the Burrowes line continued on the true line and after traversing such easterly course for a couple of miles to diverge again south and to go precisely the distance necessary to reach a point which would be on the Burrowes line if continued from west to east, all that is offered is a suggestion, not founded upon any evidence whatever, that the line was run by two persons, one commencing at the eastern extremity of the township at the town line, and the other at the western end at the extremity of the Burrowes survey. But this suggestion, if it has any effect at all, only increases the difficulty, for it assumes that two parties made mistakes of which there appears no natural explanation whatever. For why should the party surveying from the east across four lots along the true line after planting a post which indicated the southeast angle of lot no. 5, go north on the side line of that lot? A surveyor surely could not imagine that by going up a side line of a lot in the 10th concession he could make that side line a part of the concession line in front of the concession, or that after determining the situs of the south-east angle of lot no. 5, on the concession line as first run, he could move it to a point 17 chains 47 links north; and why did the surveyor go north at all,

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

and why stop at reaching the distance of 17 chains 47 links, and then diverge to the west upon a line nearly parallel to the line he had first run and had left? Then how did it happen that the surveyor commencing at the west end left the Burrowes line altogether and instead of continuing it by running a course S. 87° 30′ East ran on a course north-easterly until he reached a point distant nearly a quarter of a mile north of the true line as directed to be run, and then diverge on a course south-easterly so as to meet exactly somewhere, the party running from the east? What determined the point where the north-easterly course should cease and the divergence upon the south-easterly course should commence? It is quite obvious that such a state of things could never occur without prearrangement of a very precise character between the two surveyors on the survey; but the suggestion requires this further addition to be made to it, namely, that while the survey was conducted by Mr. Driscoll in this manner designedly in violation of his instructions and his authority, he made a false report to the Government showing the line to have been run as if it had in fact been run on the course directed. It is impossible that a suggestion so utterly unfounded upon any evidence can be entertained for a moment.

Now as to the survey called the Baldwin survey, in 1867, which is claimed to have been simply a retracing of the Driscoll line. It appears that Mr. Baldwin under whose name the line run in 1867 is known, was not a licensed surveyor in Lower Canada, but was in Upper Canada, where he resided, and was a partner of a Mr. Thistle, who was a licensed surveyor in Lower Canada, and that a young man named Lang was Thistle's articled clerk. The lines run in 1867, of which the line called the Baldwin line was one, appear to have been run by Lang under the direction

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

of Baldwin. As to the particular line in question here we have Lang's testimony that the course pursued was this:

They first found what he calls the range line at the post between lots 11 and 12, where he says: "the range line was found." They commenced then, plainly on the assumption that the line upon which they found the post between lots 11 and 12 was the concession line. He then says that under the directions of Mr. Baldwin, the line was run westerly to the brow of the mountain at about lot 13, then he says that the line was found "west of the mountain at about the line between lots 15 and 16." The point here designated plainly is on the old Burrowes line and is the point which is made the western extremity of the Baldwin line, but Mr. Lang gives no particulars as to the mode by which Mr. Baldwin determined and reached such point. He was most probably not present with Baldwin at that portion of the work, for he says that he himself afterwards commenced from about between lots 11 and 10 (he probably meant 11 and 12 from which Baldwin had proceeded westward) and continued eastward. We have however the evidence of Mr. Joseph Lusk, one of the appellant's witnesses, who though not himself employed on the work was present when Baldwin was proceeding with that work. He says that

> they built a fire between lots 12 and 13 on the mountain and they came down to between lots 14 and 15, and they ran a line through lots 13 and 14 and they connected these two points together where they could not find any old line.

Again he says that there was a piece of the line gone there through lots fourteen, thirteen and twelve, and that they had a lot to survey around for him, namely, lot 13, in the 10th concession "and they had to get a concession line there, and they ran one across and con-

nected both together;" so they made a fire on the mountain between 12 and 13; and he says "they went afterwards between lots 14 and 15 where they got a post of the old survey and they connected these two points." And he adds from the line so determined they ran round his lot 13 in the 10th range and he adds that this was all they had to do from lot 15 to lot 12, for that the fire had burned the old line and they could not trace it. But there is not a particle of evidence that any trace of an old line had ever been seen there. Pierre Lusignan says that he saw the Baldwin party coming down from the mountain, where they had built a fire and that they crossed the line between lots 14 and 15 about 3 arpents north of the post on the Burrowes concession line, and that they crossed lot 15 to the post in front between lots 15 and 16; that is on the old Burrowes line. This is the only evidence we have of the manner in which Baldwin's line from the post on the line between lots 11 and 12 was connected with the Burrowes concession line in front of the 10th concession, and it is manifest that the survey proceeded wholly upon the assumption that the line claimed by the appellants as marked by the posts across lots 7, 8, 9, 10 and 11, situate nearly a quarter of a mile north of the line as reported by Mr. Driscoll, constituted the true concession line.

Now Lang, as to the work done by himself, says that he

> followed up the range line preparatory to the running of the side lines between several of the lots, from about the point marked E, to the point marked B, and from the point marked A, to a point eastward of lot number 2 as shewn upon plan exhibit "*C*";

and he said that he did not recollect reaching the town line. The plan so referred to he said was a plan made by himself and on it the point marked E, is placed on the line between lots 11

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

and 10. This is probably placed there by mistake instead of at the line between lots 11 and 12, where as he had said they had "first found the range line," and from which Baldwin had proceeded westward. The point marked B on the plan is placed on the side line between lots 5 and 4, at the distance of 17 chains, 47 links north of a line found upon the ground and which is shown by the evidence to be the eastern end of the line as reported by Driscoll to be the line run by him for the concession line. The point A is at the south-west angle of lot no. 4, and the south-east angle of lot no. 5, in the 10th concession, fronting on the concession line as reported by Driscoll. The space from B to A is shown to be not upon a concession line at all, but upon a side line of lots in the 10th concession, whose front is on a line south 17 chains 47 links from the Baldwin line; and the line from A eastward is precisely where the eastern end of the Driscoll line if run as reported by him would be, from the front of the side line between lots 5 and 4, to the town line.

It may here be observed that upon this plan the western extremity of the Baldwin line from the line between lots 11 and 12 is drawn across lot 12 and for a short distance, about five or six chains into lot 13 where it reaches the mountain at a point where presumably the fire may have been built, so far the line runs in apparent continuation of the course of the line across lot 11, but where no post or trace of a line was found, or so far as appears ever was, and upon reaching the point in lot 13 where presumably the fire may have been built, it diverges upon a wholly different line across the residue of lots 13 and the whole of lots 14 and 15 to the post on the Burrowes concession line between lots 15 and 16 which Mr. Lang makes the western extremity of the line as surveyed by Mr. Baldwin, and not the post between lots 14 and 15.

This line so run by Mr. Baldwin is called a retracing of the line as run by Driscoll in 1850, as the concession line in front of the 10th concession, but it obviously was nothing of the kind. Had the object been to determine where Driscoll had run that concession line the surveyor's plain duty was with copies of Driscoll's instructions, report, and field notes in his hand to have commenced at the point where alone his instructions authorised Driscoll to commence his survey of the continuation of the Burrowes line in front of the 10th concession, and to have continued therefrom on the line indicated by Driscoll's report and field notes, and if he had deviated from the straight line which his instructions directed him to follow, the place where and the reason why such deviation had taken place and the course taken upon the deviation would have appeared; but nothing of the kind was done, and moreover, upon no part of the Baldwin line west of the post on the line between lots 11 and 12 which Mr. Baldwin made his point of commencement was any post or trace found of a prior line having been run, and neither upon it nor upon any part of the Baldwin line from the Burrowes concession to the point B. on the plan made by Lang, is there a particle of evidence that Driscoll was seen engaged in a survey; his instructions invested him with no authority to run such a line, nor did there appear anything in his report or field notes, or upon the ground to warrant the supposition that he had run such a line. Now as to the work done by Lang on his survey eastward, we have a fuller and different account from a witness named Paul Lebrun who accompanied Lang and was employed in breaking down branches, twigs, &c, to enable him to get a straight sight ahead for his line. This witness says that from the point of commencement they found no

1899

SPRATT
v.
THE
E. B. EDDY
COMPANY.

Gwynne J.

line or posts. Blazes there were enough in the woods around but none in a straight line as run by a surveyor. Lang made a straight line and they chained along, but planted no posts on the route eastward. The evidence of Joseph Lusk affords confirmation of this evidence of Lebrun that Lang found no straight line previously run, for he says that between the Baldwin line and what he calls the old line there was a difference of some rods at the lines between lots 9 and 10 and between lots 11 and 12. And the line between 7 and 8 is the only place spoken of where the two lines are said to have agreed. Then on arriving at the point which Lang on his plan marked with the letter B which is the western side line of lot 4, Lebrun says that Lang "*il s'est trouvé comme désolé*" at not finding a line. Then some of the party suggested that there was an old man on the town line who knew the line better than any one and could shew it to them, accordingly they went over to the town line, found a person who shewed them the terminus of the concession line near a little lake or pond there; and from this point the next morning Lang proceeded westward along the line in front of lots 1, 2, 3 and 4 without the aid of a compass; on arriving at the line between lots 4 and 5, Lebrun says that he was proceeding straight on westward in advance as he had done all along, and that he had not gone further than one hundred feet when Lang called him back saying that the line went no further, and he went north to where he had stopped the work the previous evening and there then planted a post; from that post they proceeded westward on the line run the day before and planted posts at such places as Lang directed until they reached the line between lots 11 and 12 where their work stopped.

Now upon this evidence it is abundantly proved that the line run by Driscoll as and for the concession line in front of the 10th concession is the one he was directed to run and which alone he had authority to run as such concession line, namely from the eastern extremity of the Burrowes line in a straight line to the town line, the eastern extremity of which line so run by him has always been known in front of lots 4, 3, 2 and 1. This really determines the whole question, for that line having been run by Driscoll, the line which George C. Rainboth ran in 1892 was that which under the circumstances in evidence, the law required him to run in retracing the Driscoll line. It is also clear that there is no evidence that any line was run by any person westward of the post on the line between lots 11 and 12 on the northern or Baldwin line to the Burrowes concession line at any point. It is unnecessary therefore to inquire if there had been evidence that Driscoll had run the line run by Baldwin between those points thus crossing lots 15 and 14 the whole of whose boundaries were determined by the Burrowes survey, and across lot 13 the south western angle of which was determined by and was upon the Burrowes concession line, and the western side line of which was run by Burrowes, whether such a line being wholly illegal in its inception as crossing those lots in the 10th concession fronting on the Burrowes line could have constituted a legal concession line in front of the 10th concession or of any part of it. Then east of lot 7 the evidence failed to show any line run eastward prior to the Baldwin line run in 1867, unless what Mr. Genest says in his report be accepted as such evidence. He there says that he found a beech tree upon lot 6, and a spruce tree upon lot 5, the blazes upon which indicated that they had been made 44 years before he examined them,

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

which as he made his inspection in the end of October of 1895 would seem to point to 1851 as the year in which they were made, whereas the Driscoll concession line was run in January, 1850. This witness, like all other witnesses of the appellant assumes that blazes being proved to have been made in or about the year 1850 affords proof of their having been made by Driscoll in 1850, although he was never seen running a line where the blazes are found. However, east of the above spruce tree Mr. Genest concurs that there was no trace of any line having been run prior to the Baldwin survey, and the spruce tree is placed on Mr. Genest's map as upon lot 5, at a point about 8 chains east of the line between lots 6 and 5. Now there being no trace whatever of a line east of that spruce tree nor west of the line between lots 11 and 12, it is plain that the line between those points must have been run for some other purpose than a concession line in front of the 10th concession from which concession line the line so run is as absolutely separate and distinct as it is from the line in front of the 11th concession, and whether it was run by Mr. Driscoll in 1850 or not, matters not, although I am unable to see any evidence which would justify a court in adjudicating that in point of fact it was run at all by Mr. Driscoll. But all this is irrelevant in reality, for as already observed it is impossible upon the evidence in the case to come to any other conclusion than that Mr. Driscoll ran the concession line precisely as he was directed, and as alone he had authority to run it, namely, upon the straight line from the terminus of the Burrowes line in continuation of that line to the town line, as reported by Driscoll, and as testified by Hébert in his evidence, of which line so run by Driscoll, that in front of lots 4, 3, 2 and 1 constitutes the eastern extremity and no other line can be pronounced to be

1899

SPRATT v. THE E. B. EDDY COMPANY.

Gwynne J.

the true concession line than the line so run, and Mr. George C. Rainboth under the circumstances in evidence adopted the only course which the law authorised for relaying the concession line west of lot 4. That line must therefore be affirmed, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Henry Aylen.*

Solicitors for the respondent: *Rochon & Champagne.*

THE BANK OF MONTREAL (PLAINTIFF) ..... } APPELLANT;

AND

GEORGE DEMERS (DEFENDANT).....RESPONDENT.

1899

*March 7.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW, AT QUEBEC.

Appeal—Jurisdiction—Special leave—R. S. C. c. 135, ss. 40, 42—Form of application and order—Cross-appeal to Privy Council—Inscription pending such appeal—Stay of proceedings—Costs.

In an order granting special leave to appeal to the Supreme Court of Canada under the provisions of the forty-second section of the Supreme and Exchequer Courts Act after the expiration of the time limited by the fortieth section of that Act, it is not necessary to set out the special circumstances under which such leave to appeal has been granted nor to state that such leave was granted under special circumstances.

Where the appellant had inscribed an appeal for hearing in the Supreme Court of Canada after he had received notice of an appeal taken in the same matter by the respondent to the Privy Council, upon motion on behalf of the respondent the proceedings on the Supreme Court appeal were stayed with costs against the appellant pending the decision of the Privy Council upon the respondent's appeal. (*Eddy v. Eddy* [Coutlée's Dig. 23] followed.)

---

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

1899

THE BANK OF MONTREAL. v. DEMERS.

APPEAL from a judgment of the Superior Court for Lower Canada, sitting in review, at Quebec, affirming the judgment of Sir Louis Casault, Chief Justice of the Superior Court, (which condemned the defendant to pay the plaintiff $5,689.24,) and dismissing an appeal therefrom by the plaintiff seeking to have the amount of the said judgment increased.

This appeal was brought under an order of a judge of the court appealed from granting leave to appeal under the provisions of the forty-second section of the Supreme and Exchequer Courts Act, after the expiration of the time limited for bringing appeals to the Supreme Court of Canada, under the fortieth section of that Act. No special circumstances were mentioned in the order granting leave to appeal nor did the order state that leave had been granted under special circumstances, but it was admitted that due notice of the application had been given to the defendant, that the whole record was before the judge at the time he made the order and that the application had not been opposed in the court below. It also appeared that the inscription of the appeal for hearing in the Supreme Court had been made after the plaintiff had received notice of the taking of an appeal by the defendant to Her Majesty's Privy Council from a judgment of the Court of Queen's Bench on appeal by him from the Superior Court and before the hearing of such appeal in the Privy Council.

MOTIONS were made on behalf of the respondent when the appeal was called for hearing in the Supreme Court. First: that the appeal to the Supreme Court should be quashed on the grounds that it had not been taken within sixty days from the pronouncing of the judgment appealed from, and that the application and order for special leave did not shew special circumstances necessary to give jurisdiction to the judge of

the court appealed from to grant such special leave for the appeal; and secondly: that all proceedings upon said appeal should be stayed and suspended until the respondent's appeal pending before the Privy Council should have been disposed of.

Belleau Q.C. for the motions, cited sections 40 and 42 of the "Supreme and Exchequer Courts Act," and the cases of *McGreevy* v. *McDougall* and *Eddy* v. *Eddy*, mentioned in Coutlée's Supreme Court Digest, at pages 9 and 23.

Fitzpatrick Q.C. (Solicitor General for Canada) contra. The defendant had notice of the application for leave and did not oppose it in the court below. The question should not be as to the form of the application or order or what allegations they may contain, but whether there actually did exist special circumstances which, in the judge's discretion, should entitle the party making the application to have leave to appeal. The record which was before the judge on the application shewed that such special circumstances did exist and consequently the judge had full jurisdiction to act and, as a judge of a superior tribunal, he was not obliged to shew his jurisdiction upon the face of his order. The judge's discretion once exercised cannot be reviewed by this court.

After hearing counsel, the court was of opinion that the judge of the court below had jurisdiction and that the order granting leave to appeal had been properly made and accordingly dismissed the motion to quash with costs.

The motion to stay proceedings pending the decision of the appeal to the Privy Council was granted and, as the inscription for hearing had been made subsequent to the decision in *Eddy* v. *Eddy* (1), which settled the jurisprudence of the Supreme Court of

(1) Coutlée's Dig. 23.

1899

THE BANK OF MONTREAL v. DEMERS.

Canada in such cases, it was held that the appellant should not have inscribed the case and the respondent was allowed costs on the latter motion.

Motion to quash dismissed with costs.

Motion to stay proceedings allowed with costs.

Solicitors for the appellant: *Fitzpatrick & Taschereau.*

Solicitor for the respondent: *Louis G. Demers.*

1899

*Mar. 14.

GEORGE A. EASTMAN (PLAINTIFF)....APPELLANT;

AND

RICHARD & CO. (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Landlord and tenant—Lease for 11 *months—Monthly or yearly tenancy—Overholding.*

R. & Co. made the following offer in writing to the owner of the premises mentioned therein :—"We are prepared to rent that store where the "Herald" offices used to be and will give $400 a year for the whole of the ground floor as well as the cellar. We will rent for 11 months from the 1st of August next at the rate of $400 per year." * * * This offer having been accepted R. & Co. occupied the premises for a year and seven months, no new agreement being made after the 11 months expired, paying their rent monthly during said period. They then gave a month's notice and quitted the premises. The landlord, claiming that the tenancy was from year to year brought an action for rent for the two months after the tenancy ceased according to the notice.

Held, affirming the judgment of the Supreme Court of the North-west Territories, that the tenancy was one from month to month after the original term ended and the month's notice to quit was sufficient.

---

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

1899

EASTMAN v. RICHARD & Co.

APPEAL from the decision of the Supreme Court of the North-west Territories affirming the judgment at the trial by which plaintiff's action was dismissed with costs.

The action was for two month's rent of premises occupied by defendants under the following agreement:

"CALGARY, July 16th, 1894.

"P. MCCARTHY, Esq, Banff.

We are prepared to rent that store where the 'Herald' offices used to be and will give $400 a year for the whole of the ground floor as well as the cellar. We will rent for 11 months from the 1st of August next at the rate of $400 per year. The fixings can remain or be taken out its no advantage to us one way or the other. If this is satisfactory we want an answer by wire to-morrow and you will oblige.

Yours truly,

RICHARD & CO."

The defendants occupied the premises up to the end of April, 1896, without any fresh agreement after the term of 11 months expired. In March, 1896, they sent to Messrs. McCarthy & Bangs, agents of the plaintiff, the following notice:

"We hereby give you notice that we will on the 30th day of April, 1896, vacate the premises at present occupied by us, as monthly tenants on the south side of Stephen Avenue, Calgary, and owned as we understand by Messrs. Lucas & Eastman, or by Mr. Eastman, for whom you are acting as agents. Kindly acknowledge receipt of this notice and oblige."

On the date named defendants quitted the premises but the lessor refused to accept possession and subsequently brought action for rent for the two months following April, 1896, claiming that the tenancy was from year to year, and the notice was not sufficient.

1899

EASTMAN v. RICHARD & Co.

His action was dismissed at the trial and the judgment affirmed by the full court. He then appealed to this court.

On the appeal being called Lougheed for the respondent took an objection to the jurisdiction, namely, that the case was one in which there was no appeal to the court below *en banc* from the judgment at the trial without special leave which had not been obtained. The court, however, refused to entertain the objection holding that as the court appealed from had assumed jurisdiction they would not question it.

Latchford for the appellant.

Lougheed Q.C. for the respondents.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (*Oral.*)—We are all of opinion that the judgment appealed from was right; that the tenancy was one from month to month and the month's notice to quit was sufficient. The action, therefore, cannot be maintained.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McCarthy & Bangs.*

Solicitors for the respondents: *Lougheed & Bennett.*

THOMAS J. LAWLOR (DEFENDANT).....APPELLANT; 1899

AND *Mar. 15.

LEWIS J. DAY (PLAINTIFF), AND OLIVER G. RUTLEDGE AND HATTIE A. RUTLEDGE (DEFENDANTS)..... } RESPONDENTS.

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

Mortgage—Sale of mortgaged land for taxes—Purchase by mortgagor—Action to foreclose—Pleading.

Lands under mortgage were offered for sale by the municipality for arrears of taxes and purchased by the wife of the mortgagor. The tax sale certificate was afterwards assigned to L., who obtained a deed from the municipality. In an action against the mortgagor, his wife and L. for foreclosure the mortgagee alleged that the purchase at the tax sale was in pursuance of a fraudulent scheme by the mortgagors to obtain the land freed from the mortgage, and the trial judge so held in giving judgment for the mortgagee. The Court of Queen's Bench did not pronounce on the question of fraud but affirmed the judgment on other grounds.

Held, affirming the decision of the Court Queen's Bench, that L. could not claim to have been a purchaser for value without notice as such defence was not pleaded, and it was not a case in which leave to amend should be granted.

Held further, that the facts proved on the trial were sufficient to put L. on inquiry and so amounted to constructive notice.

APPEAL from a judgment of the Court of Queen's Bench, Manitoba (1), affirming the judgment at the trial in favour of the plaintiff.

The facts of the case are sufficiently stated in the above head-note.

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

(1) 12 Man. L. R. 290 sub nom. *Day* v. *Rutledge*.

1899

LAWLOR v. DAY.

Ewart Q.C. for the appellant argued that it was not necessary to plead purchase for value without notice, and that it could not have been pleaded considering the manner in which the statement of claim was framed. He cited *Keate* v. *Phillips* (1), on the question of estoppel.

S. H. Blake Q.C. and *Smythe Q.C.* for the respondents, were not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (Oral).—This appeal fails on the grounds relied on by the Judges in the Court of Queen's Bench. I cannot hold that Lawlor was a purchaser for value without notice; first because that defence was not pleaded, and it is not a case in which, even with the large powers given us by the statute, we should grant leave to amend; secondly, the facts found amounted to constructive notice, in other words they were sufficient to put the appellant on inquiry.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Ewart, Fisher & Wilson.*

Solicitors for the respondent Day: *Mulock & Robarts.*

(1 18 Ch. D. 560.

ALEXANDER McGREGOR AND ELIZABETH McGREGOR, (PLAINTIFFS.) ..... APPELLANTS;

1899

*Mar. 23.

AND

THE MUNICIPALITY OF THE TOWNSHIP OF HARWICH (DEFENDANT.) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Negligence—Necessary proof—Statutory officer—Ratepayer—Statute labour.

In an action against a municipal corporation for damages in consequence of a carriage having been upset by running against a pile of sand left on the highway, and one of the occupants thrown out and seriously injured, there was no direct evidence as to how the obstruction came to be placed on the highway, but it appeared that statute labour has been performed at the place of the accident immediately before under the direction of the pathmaster, an officer appointed by the corporation under statutory authority. The evidence indicated that the sand was left on the road by a labourer working under directions from the pathmaster or by a ratepayer engaged in the performance of statute labour.

Held, affirming the judgment of the Court of Appeal, that the action must fail for want of evidence that the injury was caused by some person for whose acts the municipal corporation was responsible.

Per Strong C.J. *Quære.* Is the corporation liable for the acts of a statutory officer like the pathmaster, or of a ratepayer in performance of statute labour?

APPEAL from a decision of the Court of Appeal for Ontario, reversing the judgment of Mr. Justice Ferguson at the trial in favour of the plaintiffs.

The material facts of the case are sufficiently stated in the above head note.

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

1899

MCGREGOR v. THE TOWNSHIP OF HARWICH.

Gundy for the appellants cited *Stalker* v. *Township of Dunwich* (1); *Hesketh* v. *City of Toronto* (2); *City of St. John* v. *Campbell* (3).

Matthew Wilson Q.C. for the respondent was not called upon.

THE CHIEF JUSTICE (Oral):—We are all of opinion that this appeal must be dismissed, and as it does not involve any question of law we may decide it at once. The Court of Appeal were of opinion that the evidence was insufficient to establish the material fact, indispensable to the maintenance of the action, that the dumping of the gravel complained of was done by somebody for whose acts the municipal corporation was responsible. This conclusion was entirely right.

Speaking for myself I concur on the grounds relied on by Osler and Moss JJA. in the Court of Appeal, though I am unable to agree with Mr. Justice Maclennan that it was a case of non-repair. If it was there would be no liability because, first, there was no notice of action; and secondly, there would have been no proof that the municipality had notice of the want of repair which could only have existed between the hours of 3 and 8 p. m. of the day of the accident.

Then as to the question as to whether or not the gravel was dumped on the road by some one acting under the orders of the council or of some person for whom the council was responsible, there is not a tittle of evidence. It is useless to talk of presumptions in such a case for, in such a case, so to act would be merely to guess. If there had been any evidence I should have wished to consider how far the council was responsible for the acts of a statutory officer like the pathmaster. Then, again, the dumping might have

(1) 15 O. R. 342. (2) 25 Ont. App. R. 449.
(3) 26 Can. S. C. R. 1.

1899

MCGREGOR v. THE TOWNSHIP OF HARWICH.

The Chief Justice.

been done by a ratepayer in which case there would have arisen a similar question of law, with which we are not now called upon to deal, namely, how far the council is responsible for the acts of such a person.

The appeal is dismissed with costs.

GWYNNE (Oral) :—I entirely concur in what His Lordship has said, and would like to add a few words. It does not appear to me that the corporation can be made liable at all for the gravel having been left where it was by some of the persons engaged in repairing the road. It was not wrongful to leave it there; the only wrong of the corporation, if any, was in suffering it to remain there during the night without a light. But there is not a particle of evidence that the corporation, or any one belonging to the corporation, knew it was there at all, and how could they be guilty of negligence?

SEDGEWICK, KING and GIROUARD, J.J. concurred.

Appeal dismissed with costs.

Solicitor for the appellants: *W. E. Gundy.*

Solicitors for the respondent: *Wilson, Kerr & Pike.*

BYRON v. TREMAINE.

1898

*Nov. 7, 8.

*Dec. 14.

Trust—Lien for costs—Evidence—Husband and wife.

APPEAL from a judgment of the Supreme Court of Nova Scotia (1), dismissing the plaintiff's action without costs and vacating the judgment of the Chief Justice at the trial who held that there was a cause of action, but that the evidence was insufficient to justify a verdict for the plaintiff.

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

(1) 31 N. S. Rep. 425.

1898

BYRON v. TREMAINE.

On the appeal the judgment of the court *en banc* was not attacked but the appellant urged that on the evidence given at the trial, she should have had a verdict. The court however agreed with the trial judge that there was not sufficient evidence and dismissed the appeal.

Appeal dismissed with costs.

Russell, Q.C., and *Congdon* for the appellant.

Gormully, Q.C., for the respondant.

1899

*May 25.

BENJAMIN ETHIER *et al.* (PETITIONERS)..... } APPELLANTS;

AND

SAMUEL H. EWING *et al.* AND THE CITY OF MONTREAL..... } RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW, AT MONTREAL.

Appeal—Court of Review—Right of appeal to Privy Council—Construction of statute—Final judgment—R. S. C. c. 135, ss. 24 (j), 28 & 29—54 & 55 V. c. 25 s. 3 (D).

Certain ratepayers of the City of Montreal having objections to one of the commissioners named in proceedings taken for the expropriation of land required for the improvement of a public street, in which they were interested, presented a petition to the Superior Court demanding his recusation. The petition was dismissed; on an appeal to the Court of Review, the judgment dismissing the petition was affirmed, and further appeal was then taken to the Supreme Court of Canada. On motion to quash the appeal for want of jurisdiction ;—

Held, that no appeal *de plano* would lie from the judgment of the Court of Review to Her Majesty's Privy Council, and consequently there was no appeal therefrom to the Supreme Court of Canada under the provisions of the Act, 54 & 55 Vict. ch. 25, sec. 3, amending *The Supreme and Exchequer Courts Act.*

Held, further, that the judgment of the Court of Review was not a final judgment within the meaning of section 29 of *The Supreme and Exchequer Courts Act.*

---

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

1899

ETHIER v. EWING.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review, at Montreal (1), affirming the judgment of the Superior Court, District of Montreal, which dismissed the petition of the appellants for the recusation of the respondent Ewing as a commissioner in expropriation proceedings taken for the improvement of a public street in the City of Montreal.

During the course of proceedings for the expropriation of lands for the purpose of widening a street in the City of Montreal, the appellants, being ratepayers interested in the lands sought to be expropriated, took objection to the appointment of the respondent Ewing as one of the commissioners on the ground that he was related to an owner of some of the lands in question, and petitioned the Superior Court for his recusation and removal. The petition was dismissed with costs, and on appeal to the Court of Review the judgment was affirmed, whereupon a further appeal was taken to the Supreme Court of Canada.

MOTION by the respondents to quash the appeal for want of jurisdiction.

Atwater Q.C. and *Ethier Q.C.* for the motion. The judgment from which the appeal is sought is not a final judgment within the meaning of sec. 29 of *The Supreme and Exchequer Courts Act*, and sub-sec. *j*, of sec. 24 does not apply; *Demers* v. *Bank of Montreal* (2); art. 68 C. P. Q. There cannot be an appeal in this case from the Court of Review to the Supreme Court of Canada as the matter in controversy is not appealable as of right to Her Majesty's Privy Council; *Dufresne* v. *Guevremont* (3).

(1) Q. R. 12 S. C. 134. (2) 27 Can. S. C. R. 197.
(1) 26 Can. S. C. R. 216.

1899

ETHIER v. EWING.

Lemieux contra. The decision appealed from is final, as it deprives the appellants of their right to have the objectionable commissioner removed, subjects them finally to an injustice and absolutely decides upon the merits of the petition. Had the petition been allowed, the whole matter would have been finally decided and the roll so far as made nullified. The controversy affects titles to land, and will bind rights in future, consequently an appeal would lie to the Privy Council, and under the statute 54 & 55 Vict. ch. 25 sec. 3, there is jurisdiction in this court to entertain the appeal. We refer to *Murray* v. *The Town of Westmount* (1); *Les Eèclésiastiques, etc., de St. Sulpice* v. *The City of Montreal* (2); *Reburn* v. *La Paroisse de St. Anne* (3); *Mayor etc., of The City of Montreal* v. *Brown and Springle* (4); *Stevenson* v. *City of Montreal* (5).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—We are of opinion that there would be no appeal in this case *de plano* to the Privy Council, and consequently there can be no appeal to this court under the Act of 54 & 55 Vict. ch. 25, sec. 3, and further, that the judgment in question does not come within the provisions of section 24 (*j*), and that it is not a final judgment within the meaning of The Supreme and Exchequer Courts Act.

The appeal must be quashed with costs.

Appeal quashed with costs.

Solicitors for the appellants: *Gouin, Lemieux & Décarie.*

Solicitors for the respondents: *Ethier & Archambault.*

(1) 27 Can. S. C. R. 579.
(2) 16 Can. S. C. R. 399.
(3) 15 Can. S. C. R. 92.
(4) 2 App. Cas. 168.
(5) 27 Can. S. C. R. 187.

THE INSURANCE COMPANY OF NORTH AMERICA *v.* McLEOD. 1898

*May 5, 6, 7.

*Nov. 21.

THE WESTERN ASSURANCE COMPANY *v.* McLEOD.

THE NOVA SCOTIA MARINE INSURANCE COMPANY *v.* McLEOD.

Marine insurance—Abandonment—Repairs—"Boston clause"—Findings of jury—Setting aside verdict.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1), affirming the judgment of the trial court in favour of the plaintiff in the three cases tried together by consent.

After hearing counsel for both parties the court reserved judgment, and on a subsequent day allowed the appeal with costs in the Supreme Court of Canada and in the Supreme Court of Nova Scotia, and ordered that a new trial should be granted on payment of the costs of the former trial by the appellants within thirty days after taxation, otherwise that the appeal should stand dismissed with costs.

Appeal allowed with costs.

Newcombe Q.C and *Harris Q.C.* for the appellants.

Sir C. H. Tupper Q.C. and *Borden Q.C.* for the respondents.

---

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

(1) 30 N. S. Rep. 480.

1898
Oct. 24, 25, 26.
1899
*May 30.

FRANK VICKER HOBBS (PLAINTIFF)...APPELLANT;

AND

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Sale of land—Agreement for sale—Mutual mistake—Reservation of minerals—Specific performance.

The E. & N. Ry. Co. executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him which he refused to accept as it reserved the minerals on the land while the agreement was for an unconditional sale. In an action by H. for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning land minus the minerals.

Held, reserving the judgment of the Supreme Court of British Columbia (6 B. C. Rep. 228), Taschereau J. dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance.

APPEAL from a decision of the Supreme Court of British Columbia (1), varying the decree at the trial which declared the plaintiff entitled to a conveyance but not to specific performance:

The action was brought by the appellant to enforce specific performance of an agreement by the railway company to sell to him certain land in British Columbia. The agreement is contained in the follow-

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

(1) 6 B. C. Rep. 228.

ing document delivered to appellant in pursuance of his request for an allotment.

"ESQUIMALT & NANAIMO RAILWAY CO.—LAND DEPARTMENT."

VICTORIA, B.C., Nov. 28th, 1889.

"Received of Frank Vicker Hobbs, the sum of one hundred and twenty dollars ($120.00), being a first payment on account of his purchase from the E. & N. Ry. Company of one hundred and sixty (160) acres of land in Bright District, at the price of three dollars ($3.00) an acre. Commencing at a point about two (2) miles west of Louis Stark's Crown Grant in Cranberry District; thence running west forty chains to Berkeley Creek: thence south 40 chains; thence east 40 chains; thence north 40 chains to place of commencement, the balance of purchase money to be paid in three equal instalments of seventy-five (75) cents an acre, at the expiration of one, two and three years from date, with interest at the rate of 6 per cent per annum."

(Sgd.) JOHN TRUTCH,

"*Land Commissioner.*"

The question in dispute between the parties is whether or not the railway company, in executing the conveyance to carry out this agreement, is entitled to reserve the minerals in the land therein described.

The company claims that Mr. Trutch had no authority to convey the minerals, and that in its forms of conveyance the word land is always used to mean surface rights only. The trial Judge held that the claim as to want of authority was well founded, but that the company had ratified the agreement. As he was of opinion, however, that the ratification was made under a mistake as to the legal effect of the agreement he refused to decree specific performance but declared in his judgment that the plaintiff was entitled at his option to a conveyance as offered by de-

1898

HOBBS v. THE ESQUIMALT AND NANAIMO COMPANY COMPANY.

fendants or to repayment of the purchase money with interest and compensation for improvements. The plaintiff appealed and the decree was varied by a direction that the plaintiff was entitled to a conveyance reserving the minerals without option of repayment. The plaintiff then appealed to this court.

Riddell for the appellant. The trial judge held that Trutch had no authority to sell minerals. But corporations cannot invest agents with authority and then limit it by private instructions. *Royal British Bank* v. *Turquand* (1); *Mahony* v. *East Holyford Mining Co.* (2); *South of Ireland Colliery Co.* v. *Waddle* (3); *Canada Central Railway Co.* v. *Murray* (4).

A mistake as to the legal effect of an agreement is no answer to a claim for specific performance. *Stewart* v. *Kennedy* (5).

Hogg Q.C. and *Marsh Q.C.* for the respondent. As to the effect of a mistake in a contract for a sale, see *Ball* v. *Storie* (6); *Alvanley* v. *Kinnaird* (7). Also *Hussey* v. *Horne-Payne* (8); *Day* v. *Wells* (9), where specific performance was refused.

Courts have granted relief against mistakes in law. *Hood* v. *Oglander* (10); *Coward* v. *Hughes* (11). And it makes the case stronger where there is a mistake both of law and fact. *Broughton* v. *Hutt* (12).

TASCHEREAU J.—I would dismiss this appeal. The reasons given in the courts below against the appellant's right to specific performance are, in my opinion, unanswerable. There has been no contract between this company and Hobbs. The company thought they

(1) 6 E. & B. 327.
(2) L. R. 7 H. L. 869.
(3) L. R. 3 C. P. 463.
(4) 8 Can. S. C. R. 313.
(5) 15 App. Cas. 75.
(6) 1 Sim. & Stu. 210.
(7) 2 M. & G. 1.
(8) 4 App. Cas 311.
(9) 30 Beav. 220.
(10) 34 Beav. 513,
(11) 1 K. & J. 443.
(12) 3 DeG. & J. 501.

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Taschereau J.

were selling the land without the minerals; Hobbs thought he was buying the land with the minerals. So that the company did not sell what Hobbs thought he was buying, and Hobbs did not buy what the company thought they were selling. Therefore there was no contract between them. Hobbs would not have bought if he had known that the company were selling only surface rights, and the company would not have sold if they had thought that Hobbs intended to buy the land with the minerals. The ratification by the company stands upon no better ground. It was nothing but the ratification of a sale without the minerals. *Banque Jacques Cartier* v. *Banque d'Epargne de la Cité et du District de Montréal* (1). Appellant's contentions on this ratification savour of a *petitio principii*.

The rule that any one dealing with another has the right to believe that this other one means what he says, or says what he means, is one that cannot be gainsaid. But it has no application here. Assuming that the agent sold the land with the minerals, he did what he had not the power to do. However, he did not do it.

I would dismiss the appeal with costs.

GWYNNE J.—This case is in my opinion reduced upon the evidence into a simple question of the construction of a contract initiated in an application signed by the plaintiff dated the 28th November, 1889, and a payment of $120 then made and receipt given therefor signed by the land commissioner of the defendant and culminating in a letter dated the 2nd of March, 1896, written by the land commissioner, by direction of the vice-president and managing director of the company in pursuance of which the plaintiff

(1) 13 App. Cas. 111.

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

paid the balance of purchase money agreed upon in November, 1889, with interest. In the year 1887 a Mr. Trutch was appointed land commissioner of the company and under him was placed the transaction of all contracts for the sale of the company's lands which constituted a very extensive estate. The mode of dealing with persons desirous of purchasing lands of the company was as follows: Persons desirous of purchasing were required to make an application in writing to the land commissioner describing as best they could what piece of the unsurveyed land of the company they wished to purchase, and upon receipt of a first instalment the land commissioner gave a receipt therefor signed by himself stating the terms of the contract; and then an entry of the contract was made in books of the company kept for the purpose. Neither in this application nor in the land commissioner's receipt could the piece of land applied for be described with accuracy by reason of the land not being surveyed, and the practice therefore was this, that when a deed should come to be issued the purchaser was required to produce a survey of the premises for which upon being approved by the land commissioner the deed was issued. Now upon the 28th November, 1889, the plaintiff having selected a quarter section which he desired to purchase and having planted thereon a post or stake to indicate that it was taken up made an application which he handed to Mr. Trutch, the land commissioner, at the offices of the company, which is as follows:

28th November, 1889.

The description of a piece of land I wish to pre-empt or purchase. A piece of dry land and swamp situated in or about two miles west of Stark's place, Harwood Lake, Cranberry District, commencing at the top of a ridge, running west to Berkeley's Creek; thence south down Berkeley's Creek to a corner post at a swamp; then east, then north to the top of the ridge at the place of commencement. It is on

or about two miles west of Lower Harwood Lake, and about a mile or a mile and one-half or two miles from Donahue's claim and contains in or about 160 acres, it was formerly claimed by Mr. Stamp.

(Sgd.) FRANK VICKER HOBBS.

A price of $3 per acre was then agreed upon between the plaintiff and the land commissioner, and the plaintiff then paid to the land commissioner the sum of $120 and received from him a receipt in the terms following a copy of which the land commissioner retained:

ESQUIMALT & NANAIMO RAILWAY CO. LAND DEPARTMENT.

VICTORIA, B.C., November 28th, 1889.

Received of Frank Vicker Hobbs the sum of one hundred and twenty dollars ($120.00) being a first payment on account of the purchase from the E. & N. Ry. Company of one hundred and sixty (160) acres of land in Bright District, at the price of three dollars ($3.00) per acre, commencing at a point about two (2) miles west of Louis Stark's Crown Grant in Cranberry District; thence running west 40 chains to Berkeley's Creek; thence south 40 chains; thence east 40 chains; thence north 40 chains to place of commencement; the balance of purchase money to be paid in three equal instalments of seventy-five (75) cents an acre at the expiration of one, two and three years from date, with interest at the rate of six per cent per annum.

(Sgd.) JOHN TRUTCH,
Land Commissioner.

The contract was then entered in the land sales book of the E. & N. Railway Company by the gentleman who is now land commissioner of the company, but who was then bookkeeper in the land department. The entry is made as being on lot no. 6, in "the Bright District," date of purchase, "28th November, 1889," name "Frank Vicker Hobbs." How acquired, "by purchase." Acreage, "160 acres." Price, "$3.00." Date when first payment made, "28th November, 1889." Amount paid, "$120." Remarks, "balance in three yearly payments of $120. "Interest at 6 per cent." It was subsequently discovered that

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

the land which the plaintiff had applied for was entered in the land book wrongly as being in "the Bright District," and that in truth it was in a district designated by the company the Douglas District, and accordingly an entry was made in the land sales book in the Douglas District, as follows: "Lot 6, in Douglas District, and all the other particulars transferred from the Bright District entry" which latter was erased. In 1890 the plaintiff erected a log house upon the land as located by him, but did not reside upon the premises having gone into business instead. In the month of April, 1892, the plaintiff wrote the following letter:

NANAIMO, 4th April, 1892.

To the E. & N. Railway Co's Land Agent:

DEAR SIR,—As I am about to survey the piece of land recorded by me on the 28th November, 1889, I wish to know who is your surveyor in this district. I am all alone out in that part and I do not know where the nearest corner post is, it is certainly a very long way from my claim and I can only survey from my post, about two miles from Louis Stark's Crown Grant. I have already paid $120 on it and I am anxious to survey and complete the purchase so an early reply would greatly oblige.

Yours faithfully,
FRANK VICKER HOBBS,
Sawmill, Nanaimo, B.C.

This letter was received by a Mr. T. S. Gore who was then land commissioner of the defendants, and who by a letter addressed to the plaintiff replied to it as follows:

ESQUIMALT & NANAIMO RAILWAY CO. LAND DEPARTMENT.

VICTORIA, B.C., April 6.

DEAR SIR,—I beg to acknowledge the receipt of your letter dated the 4th instant in reference to your purchase of land in Douglas District. In reply I would say that you can employ any Provincial Land Surveyor you wish, probably Mr. Fry, of Duncan's, or Mr. Priest, of Nanaimo, would be the best.

As near as I can tell from your description of the location of the land in question the portion coloured red on the enclosed tracing will

include what you describe in your application. In any case the survey will have to be made in such a way as to leave no fractional portions of land between yours and other claims in the neighbourhood.

Yours truly,
(Sgd.) T. S. GORE,
Land Commissioner.

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

The piece of land designated in this letter was inaccurate and was afterwards in 1895 corrected by the company when by the log cabin which had been built by the plaintiff upon the land applied for by him they were enabled accurately to discern the quarter section applied for by the plaintiff and which now appears to be a piece of land designated by the company as lot no. 6, Douglas District.

In the month of May, 1894, Mr. Solly, the present land commissioner of the company was appointed to that office. In the fall of the year 1895, the plaintiff called upon the officers of the company in Victoria for the purpose of paying the balance due upon his purchase. Mr. Solly's account of this interview is as follows: He says that the plaintiff came to his office in the Esquimalt and Nanaimo Railway Company's offices in November, 1895, and said that he wished to make a payment on some land in Douglas District, and that he informed the plaintiff that he could not accept *any further* payment on the land without *further* consulting Mr. James Dunsmuir, that he thereupon left the plaintiff in his office and went into the private room of Mr. James Dunsmuir, who was vice-president and managing director of the company. Now in the summer of 1895 coal was discovered in the neighbourhood of the land which the plaintiff had applied for. In the course of the prospecting for the coal so discovered the parties engaged therein came across the plaintiff's log cabin, and it was found to be on unsurveyed land of the company, but which neverthe-

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

less was designated on their office plan as lot No. 6, in the Douglas District, and the cabin was marked by the company upon their plans as on that lot. Some little time prior to the plaintiff's calling on Mr. Solly, in November, 1895, the vice-president of the company had, upon the discovery of coal in the neighbourhood, sent for Mr. Solly, the land commissioner, and called for the production of all plans and books containing entries and information relating to all purchases and pre-emptions in the neighbourhood. Mr. Solly produced them to him and gave him all the information he required. At that time the plaintiff's name appeared on the plan on lot No. 6, Douglas District, and the books showed him to be in arrear in his payments. Mr. Solly says that the vice-president was not in any doubt as to where the plaintiff's land was, that he, Solly, showed him that that was the lot which stood in the plaintiff's name, and that is the same piece which he now claims.

Mr. Solly having gone into the vice-president's room as above stated, upon the occasion of the plaintiff calling to pay the arrears of his purchase money, and having had an interview with the vice-president upon the subject, returned to his office and told the plaintiff that the company considered he had forfeited his right and interest by not making his payments, and he also told him that he expected that the amount the plaintiff had paid was also forfeited, whereupon the plaintiff left the office and placed the matter in the hands of his solicitors who entered into a correspondence with the company through their land commissioner upon the subject. There was a good deal of this correspondence, as Mr. Solly says, during which he had several coversations with the vice-president, and was at length instructed by Mr. Dunsmuir *to see the plaintiff personally and to make some arrangement with*

him. Accordingly in February, 1896, Mr. Solly called on the plaintiff at his store in Victoria, and told him if he would come down to the company's office and talk the matter over with himself and Mr. Dunsmuir it was most likely it could be arranged. The plaintiff accordingly shortly afterwards went down to the company's office but nothing took place because Mr. Dunsmuir was not in and the plaintiff went away. What next occurred was the receipt by the plaintiff of the following letter from the land commissioner:

ESQUIMALT AND NANAIMO RAILWAY COMPANY.

LAND DEPARTMENT, March 2nd, 1896.

DEAR SIR,—I am instructed to inform you that the railway company are now prepared to issue a conveyance to you of the land you agreed to purchase in Douglas District, providing that within two months from this date you have the land surveyed and the notes sent in to this office, and also pay up the overdue charges on the same which are as below. Kindly send me a line in reply to say if this arrangement will suit you.

By purchase of 160 acres of land in Douglas District.

Balance of purchase money	$360 00
Six years simple interest at 6 per cent	129 60
Title fee	10 00
	$499 60

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Commissioner.

The survey was accordingly made by a Mr. Priest, a land surveyor, who sent in his plan and field notes to the company, and in a letter dated April 11th, 1896, Mr. Solly informs the plaintiff that he had received the field notes from Mr. Priest, and that they are quite satisfactory, and "a deed will be at once prepared on receipt of charges as stated in my letter to you of March 2nd."

In a letter dated 28th April, 1896, the plaintiff enclosed to the land commissioner his marked bank cheque for the balance of his purchase money as

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

calculated in Mr. Solly's letter of March 2nd. The cheque was upon the Bank of British Columbia, and directed that the bank pay to the E. & N. Railway Company in full payment of purchase money for Lot 6, Douglas District, four hundred and ninety-nine $\frac{60}{100}$ dollars ($499.60), and was deposited by the company to their credit in the same bank. By a letter dated the 29th April, 1896, the land commissioner acknowledges receipt of the above cheque and adds,

> your deed will be prepared at once and signed as soon as Mr. Dunsmuir returns to Victoria, which will be about ten days.

And on the 8th May, 1896, he encloses to plaintiff the deed which the plaintiff refused to accept (and which constitutes the foundation of the present action) because of the reservations which are contained in it. The description therein contained as being a lot known as and numbered Lot 6, in the Douglas District upon the official map of the said district, a plan of which is annexed to the deed the plaintiff admits to be correct and to correspond with the land for which he made application in November, 1889, and upon which he paid his first instalment of $120.00. The error in describing the land applied for as being lot 6 in the "Bright" District was altogether an error of misdescription of Mr. Trutch's. The insertion of the word "Bright" instead of Douglas, was admitted by Mr. Trutch to have been a manifest error made by him, and it has always been known by the company to have been such.

Apart from that clerical error Mr. Priest who made the survey of land which has been accepted by both the company and the plaintiff as the land for which the plaintiff made application in 1889, says that the description in the receipt signed by Mr. Trutch in November, 1889, is as good a description as in the then unsurveyed condition of the country could have been

given of the lot No. 6, in the Douglas District. That this was the land which the plaintiff had applied for is abundantly proved in evidence. On it were the log cabins erected by the plaintiff in 1890, then there is the evidence of one Murray and also of Mr. Priest, both of whom testify to their having been as far back as 1892 or 1893 a post planted on the lot within about 100 yards of its northern boundary as surveyed by Mr. Priest. This may reasonably be assumed to be the post which the plaintiff says he planted to indicate that the land upon which it was was taken up, but there is much other evidence to the like effect. Mr. Dunsmuir who has been vice-president of the company ever since its formation, tells us that the company was formed by his father to protect his own private coal interests; that he took and the family still hold half of the capital stock and have the control of the company and of the directorship by arrangement made to that effect. "We dont care" he says, "about telling those things, but we have the control, "we have the majority of the directors," and he himself has always been managing director as well as vice-president. In fact from his evidence he appears to be substantially the company. He says "every "thing comes before my notice, any matter whether "it is land or whatever it is." In answer to a question relating to his knowledge of the plaintiff's agreement, he said:

> You see I know all these things; they will come to me and say, so and so has applied for such and such land in such and such a district, can I let them have it? and they will bring a plan and I will say yes, or will say no; that is the reason I know it; it all comes before me.

He was conversant with the transaction with the plaintiff in 1889 and knew that it related to the land in the Douglas District, and that it was a transaction of sale by the company; he knew the contents of the

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

receipt given to the plaintiff by Trutch, a copy of which was kept in the office. No other form of agreement until recently was ever entered into by the company; he plainly considered that receipt to constitute a contract for the sale of surface rights only. He said that in their office they treat "surface" as "land." "We do not" he says, "say" *surface rights*, we say "*land*," and by "land" they understand land without minerals—that is to say they understand the minerals to be reserved. This was formerly the view of the company, but recently they have changed the form of receipts now given on contracts of sale, which expressly say that the amount paid is received on account of the purchase of "*surface rights*." It was he, he said, who cancelled the plaintiff's agreement in 1895 when Mr. Solly after the discovery of coal in the neighbourhood came into his room and told him that the plaintiff wished to pay upon his land, but he afterwards relented and let him have it. Mr. Solly's letter of the 2nd of March, 1896, expresses the terms upon which he let him have it, namely, the payment for the land he had agreed to purchase in 1889, the balance of purchase money then agreed upon with interest and title fee.

Then Mr. Solly, who was in the land commissioner's office from the beginning and has himself been land commissioner since May, 1894, says that the company never laboured under the slightest misapprehension as to the lot the plaintiff had applied for, they always knew that the land was in the Douglas District, and that the insertion of the word "Bright" District was a clerical error of Mr. Trutch's—that all the dealings between the plaintiff and the company were in relation to land in the Douglas District, and to his application in 1889; that there never was but the one transaction with the plaintiff, and there never was

any dispute about what land he was to have; its precise boundaries, however, could not he stated until the survey should be made, and such survey was made by Priest and approved by the company, as appears by Mr. Solly's letter to the plaintiff of the date April 11th, 1896. The land so surveyed by Priest is that entered as lot No. 6, Douglas street in the company's book containing an entry of the original sale to the plaintiff in 1889, and on their plans, and is the land which the plaintiff always wanted to get, and expected to get, and the only dispute between the plaintiff and the company was as to the form of the coveyance tendered by the the company and the reservations therein. Mr. Trutch gave evidence that he was in the habit when giving receipts for purchase money similar to that given by him to the plaintiff to tell the purchasers that the company only sold surface rights, but he cannot say that he so told the plaintiff, and the latter swears positively that he did not, nor did he, the plaintiff, know nor had he heard such to be the practice of the company. We need not therefore inquire what effect such a statement should have if made to a purchaser to whom at the same time an express written contract for the sale of a piece of land containing no limitations or reservations whatever should be given.

Upon the whole of the above evidence it is, I think, abundantly clear that the company through their officer having complete control and management of of all the company's affairs ratified and affirmed the transaction between the plaintiff and the land commissioner in November, 1889, as being a contract for the sale to the plaintiff of a quarter section of land designated by the company and known by them as lot No. 6 in the Douglas District, upon the terms mentioned in the receipt given by the land commis-

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

sioner to the plaintiff for the first instalment of purchase money paid by him upon that lot, and not only did they ratify and affirm that transaction, but they did much more, for the letter of the 2nd March, 1896, written to the plaintiff by the express authority of the managing director and those of the 11th and 29th of April, and the receipt inclosed in the letter of the latter date for the balance of the purchase money while affirming the contract made with the plaintiff through the land commissioner in November, 1889, contain within themselves a complete contract for the sale by the company to the plaintiff of the lot No. 6 in Douglas District for which the company received from the plaintiff the purchase money in full as required by the company. Now with intent of fulfilling that contract the company executed under their corporate seal the deed sent to the plaintiff and which he refused to receive as a fulfilment of the contract made with him by reason of the reservations therein contained which he insists are not authorised by his contract, and so as I had said at the beginning the sole question to which the case is resolved is whether or not the reservations are authorised by the contract upon which the plaintiff has paid the balance of his purchase money in full, and this question I must say can, in my opinion, for the reasons I have given, be only answered in the negative, and the plaintiff is entitled to a decree directing the company to execute to the plaintiff a deed of the land specified in the deed already executed and tendered to the plaintiff, but without the reservations in that deed contained.

The appeal must be allowed with costs, and a decree made in the terms above stated with costs.

SEDGEWICK J.—I am of opinion that the appeal should be allowed with costs for the reasons stated by Mr. Justice King.

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

King J.

KING J.—The facts are stated in the judgment of the late Chief Justice Davie before whom the case was tried.

It is found by him that Mr. Trutch acted beyond the scope of his authority in agreeing to a sale of the land without reservation of the minerals, but that the contract so made was rectified by the company. He, however, was of opinion that, in so ratifying it, the company were under a mistake as to its legal effect, and upon this ground he declined to compel performance but left the plaintiff to his common law remedy for breach of contract.

A first question is as to whether there was, by reason of the alleged mistake, a contract at all.

In *Kennedy* v. *Panama Mail Co.* (1), Blackburn J. says:

> Where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.

Gompertz v. *Bartlett* (2), and *Gurney* v. *Womersley* (3), are instanced,

> where the person who has honestly sold what he thought a bill without recourse to him was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the stamp laws in the other; in both cases the ground of decision being that the thing handed over was not the thing paid for. * * *
>
> The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going as it were to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.

In *Stewart* v. *Kennedy* there were two separate appeals (4). They were Scotch cases and the Scotch law (differing from the English) gives the right to specific

(1) L. R. 2 Q. B. 580.
(2) 2 E. & B. 849.
(3) 4 E. & B. 133.
(4) 15 App. Cas. 75, and 15 App. Cas. 108.

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

King J.

implement or performance as an ordinary legal remedy. The first appeal was in an action by the vendee for (amongst other things) a declaration that the vendor was bound to implement the contract, and the substantial question was whether it was an absolute or a conditional contract. This was decided adversely to the vendor. The second appeal was in an action brought by him for reducing or setting aside the contract upon the ground of essential error as to its absolute character. The Scotch court had held (Lord Shand dissenting) that the alleged error was not in the essentials of the contract, and hence not a ground for setting it aside. The House of Lords held that the error, if it existed, was one affecting the substance of the contract, and to that extent agreed with Lord Shand; but that it did not (apart from any question as to the conduct of the respondent contributing to the error) entitle the appellant to have the contract set aside. Their lordships, however, considered that the appellant was entitled to an issue (rejected by the court below) as to alleged representations of respondent's agent

In the course of his opinion Lord Watson says (p. 121):

> Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that in case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the contract which he has undertaken, will not be sufficient to give him the right (to rescind) unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract. * * * Lord Shand held, I think rightly, that the error averred by the appellant is error in substantials. * * But Lord Shand goes a good deal further than holding that the appellant's error with reference to the nature of the contract of sale was an error in substantials. He expresses the opinion that the existence of such an erroneous belief in the mind of the appellant affords a sufficient ground for annulling the contract. So far as I can judge, his opinion rests upon the inference or assumption that in such a case there cannot be that *duorum in idem placitum consensus*

atque conventio which is necessary to the constitution of a mutual contract. To give any countenance to that doctrine would in my opinion be to destroy the security of written engagements. In this case I do not think it has any foundation in fact. By delivering his missive offer to Mr. Glendinning (respondent's agent), the appellant represented to the respondent that he was willing to be bound by all its conditions and stipulations construed according to their legal meaning whatever that might be. He contracted, as every person does who becomes a party to a written contract, to be bound in case of dispute, by the interpretation which a court of law may put upon the language of the instrument.

Here the parties were *ad idem* as to the terms of the contract. It was expressed in perfectly unambiguous language in the offer of the plaintiff and in the acceptance of defendants, and the alleged difference is in a wholly esoteric meaning which one of them gives to the plain words.

Then the legal right existing (as held by the court below) is it a case (as also held by it) where a court of equity will leave the party aggrieved by a breach to his common law remedy? As already mentioned, *Stewart* v. *Kennedy* (1) is not a case relating to the effect of mistake upon the exercise of the equitable jurisdiction of English Courts of Equity, but English authorities having been referred to, the jurisprudence is thus summarized by Lord Macnaghton (p. 105):

> It cannot be disputed that the Court of Chancery has refused specific performance in cases of mistake when the mistake has been on one side only, and even when the mistake on the part of the defendant re-isting specific performance, has not been induced or contributed to by any act or omission on the part of the plaintiff. But I do not think it is going too far to say that in all those cases—certainly in all that have occurred in recent times—the court has thought rightly or wrongly that the circumstances of the particular case under consideration were such that (to use a well known phrase) it would be "highly unreasonable" to enforce the agreement specifically.

In *Tamplin* v. *James* (2) James L J. says.

(1) 15 App. Cas. 75, 108. (2) 15 Ch. D. 215.

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

King J.

If a man will not take reasonable care to ascertain what he is buying he must take the consequences. It is not enough for a purchaser to swear: "I thought the farm sold contained twelve fields which I knew, and I find it does not include them all," or 'I thought it contained 100 acres and it only contains 80." It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far (*i.e.* in the direction of allowing such defence) but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain and it was unreasonable to hold him to it.

Hence it may be, as stated in Fry on Specific Performance, that the court considers with more favour as a defence the allegation of mistake in an agent than in a principal

The alleged mistake is given in the evidence of Mr. Dunsmuir, the vice-president of the company. Speaking of the contract entered into by Mr. Trutch, he says:

It only sold the surface. That is, we term it land in our office. We do not say surface right, we say land, land minus the minerals.

It is evident then that we may put Mr. Trutch aside, and treat the case on this point as if the company, upon an application by plaintiff for purchase of the 160 acres of land, had entered into an agreement to sell the land in the identical words used by Mr. Trutch. In effect they say:

We agreed to sell the land, but this means land reserving the minerals.

It may well be that in the administration of their varied business a loose but convenient form of speech may have been used in the office, but it is not stated that it was supposed to be a correct one, and it appears incredible that a company, a large part of whose business is that of a land company, could reasonably suppose that in dealings with third persons for the sale of land, the word "land" means land with reser-

vation of minerals. Mr. Trutch does not say that he misconceived the meaning of the word. His impression was that he had verbally notified the plaintiff that the minerals were to be reserved, and if he had done so the plaintiff would be precluded from obtaining the specific performance he seeks; but it has been found that notice was not given. The form of the company conveyances expressly reserving the minerals show that they were aware how to effect such object. The alleged mistake was therefore an unreasonable and careless one, and in view of the fact that the plaintiff went into possession under the contract, I do not think that it can be said to be unconscionable or highly unreasonable to enforce the specific performance of the contract.

GIROUARD J.—Concurred.

*Appeal allowed with costs.**

Solicitor for the appellant: *C. C. Pemberton.*

Solicitors for the respondent: *Davie, Pooley & Luxton.*

**The Judicial Committee of Her Majesty's Privy Council has granted leave to appeal from this judgment.*

1899

*Feb. 24, 27.

*May 30.

THE NORWICH UNION FIRE INSURANCE COMPANY (DEFENDANT)..... APPELLANT;

AND

CHARLES LEBELL (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Fire insurance—Application—Ownership of property insured—Misrepresentation.

A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation and occupancy of the property, or any omission to make known a fact material to the risk would avoid the policy. In the application for said policy the insured stated that he was sole owner of the property to be insured, and of the land on which it stood, whereas it was, to his knowledge, and that of the sub-agent who secured the application, situated upon the public highway.

Held, reversing the judgment of the Supreme Court of New Brunswick, that as the application was more than once referred to in the policy it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the judgment at the trial in favour of the plaintiff.

The facts of the case are fully stated in the judgment of the court.

Wallace Nesbitt and *C. J. Coster* for the appellant The representation that the applicant was owner of

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

the land was untrue, at the time the application for the insurance was made, to the personal knowledge of the applicant. He deliberately misrepresented this material fact in order to obtain the insurance, and concealed the circumstance of the building being upon the highway. The policy incorporates the application by reference and under its conditions this misrepresentation and breach of warranty avoided the insurance. We contend that a non-suit should be entered pursuant to leave reserved at the trial.

Reference is made to *Sowden* v. *The Standard Fire Ins. Co.* (1); *London Assurance* v. *Mansell* (2), at pages 368-370; *Draper* v. *Charter Oak Fire Ins. Co.* (3); *Billington* v. *The Provincial Ins. Co. of Canada* (4); and *Watkins* v. *Rymill* (5) with cases there collected.

Baxter for the respondent. There is no special condition incorporating the application as part of the policy and it is not a warranty or part of the contract. The mention of an application made in the policy does not constitute an incorporation by reference; *North British and Mercantile Ins. Co.* v. *McLellan* (6). The applicant had an insurable interest and made truthful statements to the company's agent who filled up the application and bound the company by his knowledge of the actual facts. The applicant did actually own the building and stock insured; *Miller* v. *Alliance Ins. Co* (7). And even if he were on the highway without title, he would take a fee until dispossessed by some one; (see notes to *Nepean* v. *Doe* (8),); and he would be correctly described as owner. Even if the answer be treated as a warranty, it is strictly and technically fulfilled. On the other hand as a repre-

(1) 5 Ont. App. R. 290.
(2) 11 Ch. D. 363.
(3) 2 Allen (Mass). 569.
(4) 3 Can. S. C. R. 182.
(5) 10 Q. B. D. 178.
(6) 21 Can. S. C. R. 288.
(7) 7 Fed. Rep. 649.
(8) 2 Smith's L. Cas. (10 ed.) 542; see also Hobart 323.

1899

THE NORWICH UNION FIRE INSURANCE COMPANY v. LEBELL.

sentation it was true "so far as known to the applicant" See May on Ins. (2 ed.) sec. 284. See also *Benson* v. *Ottawa Agricultural Ins. Co.* (1), at page 293 per Harrison C.J.; *Naughter* v. *Ottawa Agricultural Ins. Co.* (2); *Graham* v. *Ontario Mutual Ins. Co.* (3), at page 372; *Sinclair* v. *Canadian Mutual Fire Ins Co.* (4); *Ashford* v. *Victoria Mutual Assur. Co.* (5); *Connely* v. *Guardian Ass. Co.* (6), at page 327, per King J.; *Hough* v. *City Fire Ins. Co.* (7); *Curry* v. *Commonwealth Ins. Co.* (8); *Stevenson* v. *London & Lancashire Ins. Co.* (9), per Draper C.J. at page 152; *O'Neill* v. *Ottawa Agricultural Ins. Co.* (10).

Treating the house as a chattel, LeBell's title to it and the rest of the personal property was that of sole owner. Williams Personal Property (10 ed.) pp. 8 and 37. *Lingley* v. *Queen Ins. Co.* (11).

There was evidence upon which the finding of the jury could be sustained and the court should consequently refuse to interfere.

We rely also upon the following authorities: *Bean* v. *Stupart* (12); *Fisher* v. *Crescent Ins. Co.* (13); *Standard Life & Accident Ins. Co.* v. *Fraser* (14); *Bawden* v. *The London, Edinburgh & Glasgow Assur. Co.* (15); Porter on Ins. p. 154, 155, 157-8, p. 159, 168, 455; *Liverpool & London & Globe Ins. Co.* v. *Wyld* (16); *Brogan v. Manufacturers Mut. Ins. Co* (17).

Ths judgment of the court was delivered by:

SEDGEWICK J.—On the 31st August, 1896, the respondent insured his dwelling house and store,

(1) 42 U. C. Q. B. 282.
(2) 43 U. C. Q. B. 121.
(3) 14 O. R. 358.
(4) 40 U. C. Q. B. 206.
(5) 20 U. C. C. P. 434.
(6) 30 N. B. Rep. 316.
(7) 29 Conn. 10.
(8) 10 Pick. (Mass.) 535.
(9) 26 U. C. Q. B. 148.
(10) 30 U. C. C. P. 151.
(11) 1 Han. 280.
(12) 1 Doug. 11.
(13) 33 Fed. Rep. 549.
(14) 76 Fed. Rep. 705.
(15) [1892] 2 Q. B. 534.
(16) 1 Can. S. C. R. 604.
(17) 29 U. C. C. P. 414.

1899

THE UNION FIRE INSURANCE COMPANY v. LEBELL.

Sedgewick J.

with the goods and stock in trade therein, with the appellant company for the sum of $1,430. On the 24th November, 1896, the property insured was burned and the company contested the loss. The case was tried before Mr. Justice McLeod and a jury, judgment being entered for the plaintiff.

This judgment was confirmed by the court *en banc*, Tuck C.J. and Vanwart J. dissenting.

Among the conditions indorsed on the policy were the following:

(1.) If an application, survey or plan or description of the property herein insured is referred to in this policy such application, survey, plan or description shall be considered a part of this contract and a warranty by the assured; and if any false representations be made by the assured of the condition, situation or occupancy of the property, or if there be any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise * * * then and in every such case this policy shall be void.

(4.) If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured * * * it must be so represented to the society, and so expressed in the written part of this policy, otherwise the policy shall be void.

The application for insurance, by the first condition just set out made a part of the iusurance contract, and a warranty, contained the following questions and answers:

Q. Are you the sole owner of the property to be insured?—A. Yes.

Q. Are you the owner of the land on which the above described building stands?—A. Yes.

The application, which was signed by the plaintiff in his own hand, contained at the foot the following clause:

And the said applicant declares that the foregoing is a full and true exposition of all the facts and circumstances in regard to the property to be insured, so far as the same are known to the applicant, and that the annexed diagram (if any), shows all buildings or combustible

1899

THE NORWICH UNION FIRE INSURANCE COMPANY v. LEBELL.

materials within 150 feet of the property proposed for insurance, and agrees that the whole shall form the basis of the insurance contract. If the agent of the company fills up or signs this application, he will in that case be the agent of the applicant, and not the agent of the company.

(Sgd.) CHARLES LEBELL,
Merchant.

Sedgewick J.

The building was originally owned by Messrs. Ross & Company, of Quebec, who carried on large lumbering operations in the locality. They sold it to one Charles LaPoint, with the understanding that it was to be removed from the property of Ross & Company, on which it then stood. LaPoint in pursuance of this arrangement moved it, not upon any land which he himself owned or had an interest in, but upon the edge of the travelled highway adjoining the property of Ross & Company, where it remained until it was burned. LaPoint subsequently died leaving a widow and several children, the widow in the following year, 1895, marrying the assured, Charles LeBell. Evidence is produced to show that she, then Mrs. LeBell, verbally gave the house to her husband upon condition that he should stay at home and support her family LeBell subsequently made an addition to the house and kept a small store, the goods in which together with the building forming the subject matter of the insurance in question in this case.

The only question open upon this appeal is as to whether there was such misrepresentation in the application for the insurance as would avoid the policy. The evidence upon the point is very short and is not contradicted, and the finding of the jury is in accordance with the evidence. One David McAllister was the local sub-agent of the company, the head agency for the province being in St. John, N.B. McAllister had no authority other than to receive and forward to the provincial head office any applications

1899

THE NORWICH UNION FIRE INSURANCE COMPANY v. LEBELL

Sedgewick J.

for insurance which he might receive from time to time. In fact the jury found that he acted as agent for the defendants only for the purpose of receiving applications. The evidence in regard to the alleged misrepresentation on the part of the assured is substantially uncontradicted, it being that of McAllister and the plaintiff. The former testifies that LeBell made application to him for an insurance on his building and stock; that subsequently he, McAllister, went to the house taking a blank application with him, and that he read over to him all the questions contained in the application. His evidence proceeds:

Q. With reference to the first question—can you remember the words you used in asking this question?—A. I read this to LeBell and he said he was on the highway.

Q. And to this, "Are you the sole owner of the property to be insured?—A. Yes; I read that question to him.

Q. What was the answer?—A. He said, "Yes he was."

Q. *To the first part of the question—are you the owner of the land on which the above described building stands. Did you read that to him?*—A. *Yes.*

Q. What reply did he make to you?—A. He said he was on the highway.

Q. Did you make any reply to that?—A. Yes.

Q. What?—A. I told him "I will put you down in the application that the ground belongs to you."

Q. And then you wrote this word "yes" in there?—A. Yes.

From this evidence it would clearly appear that both McAllister and the plaintiff had a clear idea of the fact that the latter was not the owner of the land on which the building stood, but that it was on the highway, and that they deliberately, for what object does not expressly appear, agreed in answering the question incorrectly. The plaintiff's evidence substantially agrees with that of McAllister.

I asked McAllister (he swears), if he was an insurance agent. He told me he was, and I told him I would like to be insured, and he told me he would come up some day, so a few days afterwards he came to my place, and he asked me about the size of my building,

1899

THE NORWICH UNION FIRE INSURANCE COMPANY v. LEBELL.

Sedgewick J.

and I measured it right before him, and I gave him the size, and he came into the store and he asked what was the stock, and I told him I thought I had $1,000 or $1,500, to the best of my knowledge. That is, $1,000 at cost.

Q. And when you say $1,500 you mean selling price?—A. Yes; he looked over it and thought it was all right, and he asked me about who owned the land where the building stood, and I told him it was on the public highway, and he said we will call it your own, and I said it was all right, and that was all said about it.

Mr. Justice McLeod in his judgment upon appeal gives this account of it:

When he, the plaintiff, made his application to McAllister, in answer to the question in the application, "Are you the owner of the land on which the above described building stands?" he told McAllister that he was not, that the building stood on the highway. McAllister told him that the proper answer to that was "Yes," and therefore in the application the answer was put down "Yes."

The application after it was filled up and signed was sent by McAllister to the head office and the policy sued on was eventually returned.

I am clearly of opinion that the statement made by the assured in answer to the question as to ownership of the land upon which the building was erected was a misrepresentation sufficient to avoid the policy. He was not, it would seem, an illiterate man; he knew perfectly well what he was saying and doing, and irrespective of McAllister altogether, he knew that he was putting his name to a false statement in regard to the ownership of the land. It is not necessary to inquire minutely as to what his object might be, but it seems patent that both he and the sub-agent must have had a strong suspicion that had the principal officers of the company known that the house to be insured was within the limits of the public highway, not indeed upon the roadway itself but within the fences and boundaries defining it from the adjoining land, they would have refused the risk. So that it was alike the interest of the sub-agent as well as of

the plaintiff to make the misstatement. Neither has attempted in his evidence to make any explanation of the motives or objects they had in view prompting them to the extraordinary course they took, and to my mind the object I have suggested is the only one at all probable. It is clear to me they both participated with a view to their common benefit in misrepresenting the true facts upon a point most material to the company in determining upon the risk and the plaintiff must therefore bear the necessary consequences which such conduct involves.

It does not, therefore, appear to be necessary to discuss the effect of that clause in the application which purports to make the agent where he fills up the blanks in the application the agent of the assured instead of the agent of the company. Being in collusion for the purpose of perpetrating a fraud upon the company for their joint benefit neither of them can contend that McAllister was the company's agent for that purpose.

At the argument before us it was strongly contended that the application was not made part of the policy. But the answer to this contention is that the application is referred to in the policy more than once and the first condition of the policy makes the application if referred to in the policy a part of the contract as well as a warranty of the assured.

We are therefore of opinion that the appeal should be allowed, and that a non-suit should be entered pursuant to the leave reserved at the trial; the whole with costs.

Appeal allowed with costs.

Solicitor for the appellant: *C. J. Coster.*

Solicitor for the respondent: *J B. M. Baxter.*

1899

*Mar. 21, 22.

*May 30.

THE CANADIAN COLOURED COTTON MILLS CO. (DEFENDANT)..... } APPELLANT;

AND

MARGARET KERVIN AND OTHERS (PLAINTIFFS) .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Dangerous machinery—Statutory duty—Cause of Accident.

K., a workman in a cotton mill, was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident, and it could not be ascertained how it occurred. In an action by his widow and infant children against the company the negligence charged was want of a fence or guard around the machinery, which caused the death of K., contrary to the provisions of the Workmen's Compensation Act.

Held, Gwynne J. dissenting, that whether the omission of such statutable duty could or could not form the basis of an action at common law, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming by an equal division of opinion the judgment of the Chancery Division of the High Court of Justice (2) in favour of the plaintiffs.

James Kervin was killed in November, 1894, in one of the mills of the defendant company, in the town of Cornwall, being at the time in the employment of the company and charged with the duty of oiling all the machinery and attending to the water wheels, &c. The action was brought by the widow and children who claimed damages both in common law and under the Workmen's Compensation Act.

---

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

(1) 25 Ont. App. R. 36. (2) 28 O. R. 73.

1899

THE CANADIAN COLOURED COTTON MILLS CO. v. KERVIN.

No one saw how the accident happened. Shortly after, however, his body was found lying face downward across one of the timbers referred to, about seven feet north of the journal or shaft of the northern pulley. The head was towards the west, the chest was on the timber. The deceased had been seen about ten or fifteen minutes before standing about thirty or thirty-five feet to the west of that place, with his oil can in his hand. On a *post mortem* examination, it was found that there was a bruise over the left temple; a cut on top and one on the back of the head; a fracture on the upper part of the sternum which was driven in upon the chest, evidently by some external violence; also fracture of four ribs on left side; there was also a compound fracture of both bones of the right leg, just above the ankle. In the opinion of the surgeon who performed the *post mortem*, death was caused by the body coming violently in contact with the beam on which it was found. The wounds in the head, he was of opinion, were caused by the head coming in contact with the brick work of the trench, where he himself and two others found some hair, and a part of the skin of the scalp, which, in his opinion, belonged to the deceased. The wound of the leg was probably caused, he said, by being caught in the large belt, before referred to.

It also appeared in evidence that there were two loose planks laid across the trench, over which the deceased and other servants in the defendant's employment had on two or three occasions crossed, in order to get from one side of the trench to the other, and that these planks were only three feet one or two inches below the upper belt, and that there was great danger in doing this, as a man would have to stoop down in order to pass clear under the belt; and further, that deceased had been told some weeks before

1899

THE CANADIAN COLOURED COTTON MILLS CO. v. KERVIN.

his death by an overseer in the mill, that he should not pass over in that way—that it was dangerous to do so—and the planks were then removed, but appeared to be there at the time of the accident. But it was not in evidence that he had ever passed over in that way since the overseer had told him not to do so.

A nonsuit was asked for and refused. The case having gone to the jury a verdict was found for the plaintiffs with $3,500 damages. The jury found that the company was neglectful in not having a fence or other guard at the place where the accident happened.

The verdict was affirmed by a majority of the Divisional Court (1), and by an equal division of opinion in the Court of Appeal (2). The defendants then appealed to this court.

Osler Q.C. and *Pringle* for the appellant. The plaintiffs are not entitled to a verdict at common law as the case cannot be distinguished from *Wakelin* v. *London & South Western Railway Co* (3), and cases following it in this court. *Montreal Rolling Mills Co.* v. *Corcoran* (4); *George Matthews Co.* v. *Bouchard* (5). See also *Dominion Cartridge Co.* v. *Cairns* (6); *Tooke* v. *Bergeron* (7); *Finlay* v. *Miscampbell* (8).

Nor can plaintiffs recover under the Workmen's Compensation Act. Failure to comply with the provisions of that Act does not give rise to a cause of action, but merely subjects the owners of the factory to penalties. *Wilson* v. *Merry* (9) at page 341; *Finlay* v. *Miscampbell* (8); *Montreal Rolling Mills Co* v. *Corcoran* (4). Moreover no notice was given within twelve weeks from the death of deceased as the Act

(1) 28 O. R. 73.
(2) 25 Ont. App. R. 36.
(3) 12 App. Cas. 41.
(4) 26 Can. S. C. R. 595.
(5) 28 Can. S. C. R. 580.
(6) 28 Can. S. C. R. 361.
(7) 27 Can. S. C. R. 567.
(8) 20 O. R. 29.
(9) L. R. 1 H. L. Sc. 326.

requires, and there is no reasonable excuse for want of such notice. *Moyle* v. *Jenkins* (1). And see also *Rudd* v. *Bell* (2); *Miller* v. *Reid* (3).

Aylesworth Q.C. and *Cline* for the respondents. *Wakelin* v. *London & South Western Railway Co.* (4) is discussed in Beven on Negligence (5), and the principle governing this class of cases pointed out. The present case is easily to be distinguished from *Wakelin's Case* (4).

As to the statutory duty to guard the revolving wheel, see *Thomas* v. *Quartermaine* (6), and as to notice *Stone* v. *Hyde* (7); *Cox* v. *Hamilton Sewer Pipe Co.* (8). These cases decide that notice of intention to sue is sufficient.

Under the evidence plaintiffs could not have been nonsuited. See *Fenna* v. *Clare Co.* (9); *Moore* v. *Ransome's Dock Committee* (10).

TASCHEREAU J.—I am of opinion that the appeal should be allowed and the action dismissed.

GWYNNE J.—I am of opinion that the appeal should be dismissed upon the grounds stated in the judgment of Osler J. in the Court of Appeal to which I desire to add nothing.

SEDGEWICK J.—I am of opinion that this appeal should be allowed and the action dismissed for the reasons stated by the learned Chief Justice of the Court of Appeal.

KING J.—I concur in the judgment allowing the appeal.

(1) 8 Q. B. D. 116.
(2) 13 O. R. 47.
(3) 10 O. R. 419.
(4) 12 App. Cas. 41.
(5) 2 ed. p. 162-3.
(6) 18 Q. B. D. 685.
(7) 9 Q. B. D. 76.
(8) 14 O. R. 300.
(9) [1895] 1 Q. B. 199.
(10) 14 Times L. R. 539.

1899

THE CANADIAN COLOURED COTTON MILLS CO. v. KERVIN.

Girouard J.

GIROUARD J.—This is one of those unfortunate cases where a poor workman accidentally met his death while working in the factory of the appellants. As in *Corcoran* v. *The Montreal Rolling Mills Co.* (1) there is no witness to tell how the accident happened. The deceased was alone, and, as in the case of Corcoran, we are left to hypotheses, theories and conjectures, but as we laid down in that case, both under the civil law and the common law of England, it is not upon mere suppositions that the legal responsibility of the master towards his employees or their heirs can rest. Upon the authority of *Wakelin* v. *London & South Western Railway Co.* (2), we decided that all cases of this kind involve the determination of two essential facts; 1st, negligence on the part of the master, and 2nd, that that negligence was the cause of the injury to the employee. Without satisfactory evidence of both these facts, there is no case to go to the jury.

The jury found against the company upon both facts, the negligence consisting in the want of fence or guard round the machinery which caused the death of deceased, contrary to the provisions of the Workmen's Compensation Act of Ontario.

The trial judge refused a non-suit. In the Divisional Court, Boyd C. and Robertson J. were of the same opinion, Meredith J. dissenting. In appeal the court was equally divided, Burton C. J. and Maclennan J. for the appellants, Osler and Falconbridge JJ. contra.

Without deciding that the omission of a statutable duty can create a civil liability on the part of the owner and be the basis of an action at common law, we have no hesitation in agreeing with the learned Chief Justice of Ontario that there is no evidence whatever that the negligence imputed to the appellant was the cause of the accident, and that conse-

(1) 26 Can. S. C. R. 595. (2) 12 App. Cas. 41.

quently the action, whether considered at common law or under the Workmen's Compensation Act, must be dismissed.

The appeal is allowed with costs in all the courts.

Appeal allowed with costs.

Solicitors for the appellant: *Leitch & Pringle.*

Solicitors for the respondents: *Maclennan, Liddell & Cline.*

1899

THE CANADIAN COLOURED COTTON MILLS CO. v. KERVIN.

Girouard J.

1899

*Mar. 6, 7.
*May 30.

HER MAJESTY, THE QUEEN, *ex rel.* THE ATTORNEY GENERAL FOR THE PROVINCE OF QUEBEC (PLAINTIFF)..... } APPELLANT;

AND

MARJORIQUE MONTMINY (DEFENDANT)..... } RESPONDENT.

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

Scire facias—Title to land—Annulment of letters patent—Tender on taking action—Sale or pledge—Vente à réméré—Concealment of material fact—Arts. 1274-1279 *R.S.Q.—Registration—Transfer of Crown lands—Art.* 1007 *C.P.Q.—Art.* 1553 *C.C.*

A sale of land subject to the right of redemption, (*vente à réméré,*) transfers the title in the lands to the purchaser in the same manner as a simple contract of sale. *Salvas* v. *Vassal*, (27 Can. S. C. R. 68), followed.

The locatee of certain Crown lands sold his rights therein to B, reserving the right to redeem the same within nine years, and subsequently sold the same rights to M., subject to the first deed. These deeds were both registered in their proper order in the registry office for the division and in the Crown Lands Office at Quebec. M. paid the balance of Crown dues remaining unpaid upon the land and made an application for letters patent of grant thereof in which no mention was made of the former sale by the original locatee. In an action by *scire facias* for the annulment of the letters patent granted to M.,

Held, Taschereau J. dissenting, that the failure to mention the *vente à réméré* in the application for the letters patent was a misrepresentation and concealment which entitled the Crown to have the grant declared void and the letters patent annulled as having been issued by mistake and in ignorance of a material fact, notwithstanding the registration of the first deed in the Crown Land Office. *Fonseca* v. *Attorney General for Canada*, (17 Can. S.C.R. 612), referred to.

---

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

Held further, Taschereau J., dissenting, that it is not necessary that such an action should be preceeded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side, reversing the decision of the Superior Court, District of Beauce, and maintaining as valid the letters patent of which the annulment had been sought upon *scire facias*.

The facts are stated in the above head-note and in the judgment of the majority of the court delivered by His Lordship Mr. Justice Girouard.

Fitzpatrick Q.C. (Solicitor General for Canada) and *Lane* for the appellant. The deed to Beaudoin in 1888 is a *vente à réméré* and the decision in *Salvas* v. *Vassal* (1) rules. The letters patent were obtained through false and fraudulent representations and the concealment of material facts and issued by mistake and inadvertence. The *vente à réméré* of 1888 vested all the rights and title of the original locatee in Beaudoin; art. 1553 C. C.; and consequently, that deed being still in force, nothing passed to the respondent under the deed of 1889. The deed of 1888 was of record in the County Registry Office; respondent had agreed to hold the land subject to it and yet suppressed all mention of it in the application for patent. See *Casgrain* v. *Caron* (2); *Bourque* v. *Lupien* (3). The want of delivery of possession to Beaudoin does not alter the character of his deed; arts. 1025, 1027, 1472 C. C.; it cannot be a pledge; arts. 1966, 1967, 1970 C. C. See also *Laurin* v. *Lafleur* (4); *Attorney General of Quebec* v. *Morin* (5); *The Queen* v. *Normand* (6). We refer also to the Ontario cases on *scire facias* cited in *Fonseca* v. *Attorney General for Canada* (7).

(1) 27 Can. S. C. R. 68.
(2) 4 Rev. de Jur. 96.
(3) Q. R. 7 S. C. 396.
(4) Q. R. 12 S. C. 381.
(5) 1 Dor. Q. B. 88.
(6) Ramsay App. Cas. 419.
(7) 17 Can. S. C. R. 612.

1899

THE QUEEN v. MONTMINY.

Chase-Casgrain Q.C. and *L. Taschereau* Q.C. for the respondent. There was no concealment or fraudulent misrepresentation but, on the contrary, the application made special reference to the deed of 1888 as a lien upon the lands, and thus the case is distinguished from those cited by the appellant. We are not chargeable with fraud and must have all presumptions in our favour for the honour of the Crown. The action itself is bad for want of a tender, before or with the action, to reimburse the Crown dues paid by respondent. *Cridiford* v. *Bulmer* (1); *Waterous Engine Works Co.* v. *Collin* (2); *Lemieux* v. *Bourassa* (3); *Filiatrault* v. *Goldie* (4). The filing and registration of the deed of 1888 in the Crown Lands Office charges the Crown with notice of the full text of the instrument which the applicant called a lien or hypothec, and which is in fact nothing more; art. 1546 C. C.; Troplong "Nantissement," p. 40, n. 39; this was the meaning and intention of the parties as disclosed by the evidence. See *Salvas* v. *Vassal* (5) at pages 77 and 81 by their Lordships the Chief Justice and Girouard J.

TASCHEREAU J. (dissenting).—I would dismiss this appeal. I agree with the Court of Appeal that the appellant has entirely failed to prove the allegations of facts in his declaration. There is no evidence of fraud, or of fraudulent concealment by the respondent. Under arts. 1274 to 1280 of the Revised Statutes, he was the only one entitled to the letters patent in question. On this ground I am of opinion that the action of the Attorney General was rightly dismissed by the Court of Queen's Bench. I also agree that the

(1) M. L. R. 4 Q. B. 293.
(2) Q. R. 1 Q. B. 511.
(3) 1 Dor. Q. B. 305.
(4) Q. R. 2 Q. B. 368.
(5) 27 Can. S. C. R. 68.

1899

THE QUEEN v. MONTMINY.

Taschereau J.

following remarks of Mr. Justice Ouimet in rendering the judgment of the court

il ne me reste qu'à ajouter que dans l'opinion de cette Cour, le défaut d'offrir à l'appelant le remboursement de ce qu'il a payé à la Couronne pour obtenir les lettres patentes et acquitter les arrérages dus sur le terrain concédé serait également et quand même fatal à la présente action,

are conclusive, and that, under any circumstances, the plaintiff's action could not be maintained.

If the Attorney General had proceeded under articles 1283 and following of the Revised Statutes, the monies paid by the respondent to the Crown for his letters patent would have been forfeited. But, in a common law action, the Crown is bound by the common law, and the maxim that "*il n'est permis à personne de s'enrichir aux dépens d'autrui*," must receive its application here. It is upon that principle that the Court of Queen's Bench held in *Charlebois* v. *Charlebois* (1), that a plaintiff who asks that a deed of transaction be set aside must offer, with his action, to restore the money he has received as a consideration for the said transaction. Upon the ground only that the plaintiff had not tendered and deposited in court the money she had so received, the appeal in that case was allowed, and her action dismissed. The Superior Court had disposed of that objection by reserving the respondent's recourse to recover back this money. But the Court of Appeal rightly held that it is by his action that a plaintiff under these circumstances has to tender back the money.

In *Filiatrault* v. *Goldie* (2), the Court of Queen's Bench, upon the same principle, dismissed an action whereby a vendor who had received part of the price of sale, asked to have that sale set aside, but without tendering the amount he had received. The judgment appealed from had ordered the dissolution of the sale

(1) 26 L. C. Jur. 376.

(2) Q. R. 2 Q. B. 368.

1899

THE QUEEN v. MONTMINY.

Taschereau J.

upon the plaintiff reimbursing what he had received, but the Court of Queen's Bench reversed that judgment, holding, and rightly holding, that the action in such a case wholly fails if not preceded or accompanied by the tender and deposit of the money received.

The cases of *Lemieux* v. *Bourassa* (1), and *Cridiford* v. *Bulmer* (2), have been determined by the same court, upon the same principle.

In fact the jurisprudence is uniform. Not a single case to the contrary has been cited by the appellant. And, as was held in *Filiatrault* v. *Goldie* (3), a special plea is not necessary to enable a defendant to avail himself of the objection to the plaintiff's right of action upon that ground. A general denegation is sufficient. In fact, where by the declaration the payment to plaintiff appears, the action would be dismissed on demurrer.

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

GIROUARD J.—Il s'agit de la validité de lettres patentes d'une concession de terre de la Couronne, située dans la paroisse de Saint-Evariste de Forsyth, comté de Beauce, province de Québec. Elles furent octroyées par le département des terres à Québec le 7 juillet 1897, en faveur de l'intimé, qui en fit la demande quelques mois avant. Le procureur-général, à la requête de Louis Napoléon Beaudoin et Louis Théodule Beaudoin, en demande l'annulation, par bref de *scire facias*, alléguant qu'elles ont été émises par erreur et dans l'ignorance d'un fait essentiel caché par l'intimé, contrairement à l'article 1034 de l'ancien code de Procédure reproduit à l'article 1007 du nouveau code. La

(1) 1 Dor. Q. B. 305. (2) M. L. R. 4 Q. B. 293.
(3) Q. R. 2 Q. B. 368.

cour de première instance (H. C. Pelletier J.) se prononça contre l'intimé, mais ce jugement fut infirmé par la cour d'appel.

En 1862, Cyrille Beaudoin, père, obtient de la couronne un billet de location du lot 15 A. du cadastre du canton de Forsyth. Il est admis qu'il remplit toutes les conditions d'établissement voulues par la loi et les règlements; mais, probablement parce qu'il restait une petite balance à payer sur le prix d'achat, il ne demanda pas de lettres patentes. Après plus de vingt-cinq ans de possession par lui-même et son père, Cyrille Beaudoin fils vend l'immeuble à deux acheteurs différents, d'abord, le 13 février, 1888, à Wenceslas Beaudoin (mais non son parent), l'auteur des requérants, pour $300, et ensuite le 27 octobre, 1889, à l'intimé, pour $217. Les deux titres sont notariés, parfaits à leur face et furent dûment enregistrés.

La première vente contient une stipulation de rachat conçue dans ces termes ;

> Le vendeur aura, pendant neuf années à compter de ce jour, la jouissance et usufruit de l'immeuble ci-dessus vendu et des bâtisses sus-érigées pourvu qu'il le cultive en bon père de famille ; qu'il entretienne les bâtisses en bon état de réparations ; qu'il paye les taxes et cotisations municipales, scolaires et autres obligations auxquelles l'immeuble sus-désigné est tenu et obligé, ou pourra être tenu et obligé à l'avenir, de plus qu'il paye au dit sieur Wenceslas Beaudoin, l'intérêt annuel sur la dite somme de trois cents piastres, au taux de huit pour cent par an à compter de ce jour.
>
> En outre, le vendeur se réserve pendant le même délai de neuf années à compter de ce jour, le droit de réméré et de rentrer en la propriété de l'immeuble et bâtisses sus-designés en remboursant à l'acquéreur Wenceslas Beaudoin, la dite somme de trois cents piastres, avec tous les intérêts dus et échus sur icelle, mais le dit délai de réméré expiré, si le vendeur n'a pas fait le remboursement de la dite somme de trois cents piastres et les intérêts dus sur icelle, *et même si un*] *mois après l'écheance de chaque année, le vendeur n'a pas payé tous les dits intérêts,* ou encore si le vendeur commet des dégradations sur le dit immeuble et bâtisses sus-érigées, ou les détériore par et de quelque manière que ce soit, alors et dans ces cas, le dit vendeur Cyrille

1899

THE QUEEN v. MONTMINY.

Girouard J.

Beaudoin sera déchu de son droit de réméré, l'acquéreur demeurera propriétaire incommutable de la dite terre et des bâtisses sus-érigées et pourra entrer en la possession d'icelles, sans aucune formalité de justice et sans être tenu d'indemniser en quoi que ce soit le dit vendeur.

L'intimé prétend que le titre de Wenceslas Beaudoin est imparfait, en ce qu'il stipule une faculté de rachat; mais celui de l'intimé également en contient une de cinq ans et il est postérieur, quant à la date et l'enrégistrement, à celui des requérants, qui, par conséquant, lui est préférable. Nous avons décidé dans *Salvas* v. *Vassal* (1) que les ventes à réméré étaient de véritables ventes translatives de la propriété.

L'acte de vente, dont il est question dans la présente cause, va beaucoup plus loin que celui dans *Salvas* v. *Vassal* (1). Il y est déclaré:

Au cas où l'acquéreur viendra à prendre possession de la dite terre et bâtisses, et que le prix d'icelles serait insuffisant pour rembourser au dit acquéreur la susdite somme de trois cents piastres et tous les intérêts produits par icelles, le dit acquéreur se réserve son recours contre le vendeur pour la balance lui revenant sur la dite somme et les frais faits pour la recouvrer.

Il est loisible aux parties d'apposer à leur contrat telles charges et conditions qui ne sont pas incompatibles avec sa nature. Il est évident que dans l'espèce qui nous occupe, comme presque toujours d'ailleurs, le créancier n'a eu recours à la vente à réméré que pour éviter les longueurs et les frais d'une vente judiciaire et mieux assurer ses avances d'argent; mais, comme nous le disions dans *Salvas* v. *Vassal* (1), il n'y a aucune loi qui prohibe ces conventions. Le seul point à constater est de savoir s'il y a eu aliénation. Ici, comme dans *Salvas* v. *Vassal* (1), l'acte le dit en toutes lettres. La clause par laquelle le vendeur garantit que l'immeuble vaut le prix payé et que la vente en rapportera le montant n'a rien d'incompatible avec la vente.

(1) 27 Can. S. C. R. 68.

1899

THE QUEEN v. MONTMINY.

Girouard J.

Il est vrai que le titre de l'intimé fait mention de celui de Wenceslas Beaudoin comme étant simplement une obligation hypothécaire, mais il lui était facile de se renseigner au Bureau d'Enregistrement; s'il ne l'a pas fait, c'est sa faute et il doit en subir les conséquences.

Le 7 juillet 1897, l'intimé obtient les lettres patentes, en produisant son titre où celui des requérants apparaît comme simple hypothèque, bien qu'il en connut le véritable caractère, et sans en informer le département des terres. C'était un fait essentiel dont l'ignorance a été la cause de l'émission des lettres patentes, qui doivent, pour cette raison, être révoquées, quand bien même il ne serait pas prouvé que l'intimé a sciemment et frauduleusement caché ce fait essentiel. Il suffit de prouver l'erreur et l'ignorance de ce fait de la part de la Couronne. C. P. C. art. 1007, par. 2. C'est le principe qui a été énoncé par cette cour dans une cause analogue, en interprétation de semblables dispositions qui ont force de loi dans tout le pays. *Fonseca* v. *The Attorney General of Canada* (1), aux pages 650-651.

Il y a plus dans la présente cause. La mauvaise foi de l'intimé, au moment où il demanda les lettres patentes, est admise par lui même :

Q. Quand est-ce que vous avez su que c'était une vente à réméré et non une hypothèque qui avait été consentie?—R. Je l'ai su que le printemps, quand Cyrille Beaudoin est parti, en mil huit cent quatre vingt-seize (1896).

Q. Quand vous avez su que c'était une vente à réméré, les Lettres Patentes n'étaient pas émises?—R. Non, monsieur.

L'intimé savait même que les requérants n'avaient pas été remboursés des deniers qui leur étaient dûs en vertu de la vente du 13 juillet 1888. Le 16 juillet 1896, il écrit à l'un d'eux qu'il sait qu'ils ont

(1) 17 Can. S. C. R. 612.

1899

THE QUEEN v. MONTMINY.

Girouard J.

une vente à réméré de trois cents piastres. Seriez-vous assez bon d'accepter les trois cents piastres avec les intérêts de trois ans qu'ils m'ont dit n'avaient pas été payés.

En tout et partout, de 1888 à 1892, Cyrille Beaudoin n'avait payé, en quatre versements, que $155. Le 13 juillet 1896, il devait donc huit années d'intérêt, savoir $192, étant arrieré de plus d'une année d'intérêts, sans parler des taxes municipales, des cotisations scolaires, et des repartitions pour la construction de l'église, payées par les requérants. Cyrille Beaudoin était alors en défaut; et un mois après le 13 juillet 1896, et même en 1895, aux termes de l'acte, il était déchu de l'exercise de la faculté de réméré qu'il y avait stipulée. L'intimé, qui est aux droits de Cyrille Beaudoin (C. C. art. 1553), ne pouvait donc pas demander en 1897 à être reconnu le propriétaire incommutable de l'immeuble en question.

Ce qui démontre davantage la mauvaise foi de l'intimé, c'est la production qu'il fit au département des terres d'un certificat du garde-forestier qu'il avait occupé le lot en question "depuis dix-huit ans," tandis qu'il est en preuve, admise par lui même, qu'il ne fut jamais en possession et qu'il n'en paya jamais les taxes et redevances, qui furent soldées par Cyrille Beaudoin ou les requérants

L'intimé invoque les articles 1279 et suivants des Statuts Revisés de la province de Québec, concernant les régistres du départment des terres et l'effet des transports qui y sont inscrits. Mais ces dispositions n'ont pas l'effet de faire disparaître celles du Code de Procédure concernant l'annulation des lettres patentes, qui demeurent en pleine force. Si le transport dans le régistre du département a eu lieu "par erreur et dans l'ignorance de quelque fait essentiel," ou dans aucune des circonstances prévues en l'article 1007 du Code de Procédure Civile, il n'aura aucun effet.

1899

THE QUEEN v. MONTMINY.

Girouard J.

Enfin, l'intimé prétend que la présente action ne peut être maintenue, parce que la Couronne ne lui offre pas le remboursement de ce qu'il lui a payé pour obtenir les lettres patentes et acquitter les arrérages dus sur le terrain concédé. Il suffit de répondre que ce moyen n'est pas plaidé, le montant par lui payé n'étant pas même mentionné. D'ailleurs, l'effet immédiat du jugement de cette cour n'est pas de conférer des lettres patentes aux requérants, mais simplement de révoquer celles qui ont été octroyées à l'intimé et de remettre les parties intéressées, fussent elles même étrangères à ce litige, dans le même état où elles étaient auparavant.

Pour ces raisons, nous sommes d'avis d'accorder l'appel et de rétablir le jugement de la Cour Supérieure, avec les dépens devant toutes les cours.

Appeal allowed with costs.

Solicitor for the appellant: *J. A. Lane.*

Solicitors for the respondent: *Taschereau & Pacaud.*

1899

*March 7.
*May 30.

EVAN JOHN PRICE (DEFENDANT)....APPELLANT;

AND

MARIE ARMAÏSSE ROY (PLAINTIFF)..RESPONDENT.

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

Negligence—Volunteer—Common fault—Division of damages.

P. was proprietor of certain lumber mills and a bridge leading to them across the River Batiscan. The bridge being threatened with destruction by the spring floods, the mill foreman called for volunteers to attempt to save it by undertaking manifestly dangerous work in loading one of the piers with stone. While the work was in progress the bridge was carried away by the force of the waters and one of the volunteers was drowned. In an action by the widow for damages:

Held, Gwynne J. dissenting, that the maxim "*volenti non fit injuria*" did not apply, as the case was one in which both the mill owner and deceased were to blame, and that, being a case of common fault, the damages should be divided according to the jurisprudence of the Province of Quebec.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side (1), affirming the judgment of the Superior Court, District of Three Rivers, by which a verdict had been entered in favour of the plaintiff for damages incurred in consequence of the death of her husband.

The facts are sufficiently stated in the above headnote, and in the judgment of His Lordship Mr. Justice Girouard.

Stuart Q.C. and *Olivier* for the appellant.

R. S. Cooke for the respondent.

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

(1) Q. R. 8 Q. B. 170.

1899

PRICE v. ROY.

Taschereau J.

TASCHEREAU J.—I do not dissent, but, had the result of this judgment depended upon my conclusions, I would have greatly hesitated before reducing the amount given to the respondent by the courts below. The appellant's right to have the damages reduced by saying, "it is true I ordered the deceased to go upon that bridge, but he should have disobeyed my orders," seems to me doubtful. If as now held he, the appellant, was guilty of imprudence in ordering the deceased to go upon that bridge on the occasion in question, it seems to me that the judgment should stand for the whole amount. Should he not be estopped from invoking the obedience to his orders as a ground to oppose wholly or partly the respondent's claim?

GWYNNE J. (dissenting.)—However much entitled to sympathy the family of the brave young man who lost his life when exposing it to such manifest danger in the interest of the appellant is, I do not, with great deference, think that the case can be regarded as raising any question of negligence on the part of the appellant, or of contributory negligence on the part of the deceased. The case is rather one in which the deceased quite voluntarily, at the suggestion of his father, who was in the employment of the appellant, exposed his life to very manifest danger by entering upon the bridge which was perishing by the force of the waters of the stream over which it was built, in the forlorn hope of preventing its absolute destruction. He may have been guilty of rashness but not of negligence. The latter term is not applicable to the case. The risk he was running was quite apparent to himself and to every one present, but he was under no obligation whatever to undertake the risk and expose himself to such manifest danger. The case, in

1899

PRICE v. ROY.

Gwynne J.

my judgment, is a plain case for the application of the principle *volenti non fit injuria*, and therefore the appeal should be wholly allowed with costs, and the action in the court below dismissed.

SEDGEWICK J—I am opinion that the appeal should be in part allowed by reducing the judgment as specified in the judgment prepared by Mr. Justice Girouard. I concur with him also as to the disposition of the costs.

KING J. concurred in the judgment reducing the damages to nine hundred dollars with interest from the 22nd of April, 1898, and with costs incurred in the Superior Court, and also that each of the parties should bear their respective costs in the Court of Queen's Bench and the Supreme Court of Canada.

GIROUARD J.—Il s'agit encore de la responsabilité du patron envers l'ouvrier. L'appelant est propriétaire d'un moulin à scie et d'un pont sur la rivière Batiscan, dans la paroisse de Saint Stanislas. Lors de la débâcle en avril 1897, l'eau est montée à une hauteur qu'on n'avait jamais vue depuis près de trente ans. Le 27 avril, la glace avait fait des dégâts considérables au pont qui menaçait d'être emporté par le torrent. A la vue de ce danger, les représentants de l'appelant demandent à des hommes de bonne volonté, généralement employés à leur établissement, de venir sauver la propriété de leur maître, en consolidant un des piliers. Trois hommes s'offrent, entr'autres Gédéon Trudel, le fils du contre-maître qui dirigeait les travaux. Ce fut pendant que cet ouvrage se faisait, le 28 avril, que le pont fut emporté et que tous les travaillants furent précipités à l'eau. Gédéon Trudel y perdit la vie. L'appelant est-il responsable de cet accident?

1899

PRICE v. ROY.

Girouard J.

Il est admis que l'ouvrage était dangereux, mais tout le monde connaissait le danger, le défunt comme les autres. L'appelant était certainement en faute d'autoriser un pareil ouvrage; le défunt l'était davantage en exposant sa vie. C'est donc le cas de faute commune et de diviser le dommage souffert selon la jurisprudence hautement équitable de la province de Québec.

La cause de l'accident fut la faute du patron ; celle de l'ouvrier n'en a été que la conséquence immédiate. Je ne crois pas que l'on doive appliquer ici la maxime *volenti non fit injuria*. Sans avoir été forcé à ce travail dangereux, l'on peut difficilement dire que l'ouvrier s'est exposé de son chef; il ne s'est pas offert sans requisition ; son père l'envoya chercher ; il aurait pu refuser, mais il voulut faire preuve de son dévouement aux intérêts de son maître, et par là même mieux assurer la continuation de ses services dans son établissement.

Je suis d'avis d'accorder l'appel et de réduire le jugement de la Cour Supérieure à neuf cents piastres avec intérêt à compter du 22 avril, 1898, et les dépens encourus devant la Cour Supérieure. Vu que l'appelant n'a rien offert et a contesté toute la demande, je serais aussi d'avis de laisser chaque partie payer ses frais tant devant la Cour du Banc de la Reine, que devant cette cour.

Appeal allowed in part with special directions as to costs.

Solicitor for the appellant: *Arthur Olivier.*

Solicitor for the respondent: *R. S. Cooke.*

SAMUEL BURRIS (PLAINTIFF) .....APPELLANT;

1899

AND

*Feb. 21.

*June 5.

WILLIAM RHIND AND CAROLINE RHIND (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Conveyance—Duress—Undue pressure—Trust property.

The owner of land having died intestate leaving several children, one of them, W. R., received from the others a deed conveying to him the entire title in the land in consideration of his paying all debts against the intestate estate and those of a deceased brother. Subsequently W. R. borrowed money from his sister and gave her a deed of the land, on learning which B., a creditor of W. R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a re-conveyance of the land to him and then gave a mortgage to B. The re-conveyance not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she had taken legal advice in the meantime and destroyed the deed. B. then brought an action against W. R. and his sister to have the deed to the latter set aside and his mortgage declared a lien on the land.

Held, affirming the judgment of the Supreme Court of Nova Scotia (30 N. S. Rep. 405), that the sister of W. R. was entitled to a first lien on the land for the money lent to her brother; that the deed of re-conveyance to W. R. had been obtained by undue influence and pressure and should be set aside, and B. should not be allowed to set it up.

B. claiming to be a creditor of the father and deceased brother of the defendants wished to enforce the provision in the deed to W. R. by his brothers and sister for payment of the debts of the father and brother.

Held, that this relief was not asked in the action, and if it had been the said provision was a mere contract between the parties to the deed of which a third party could not call for execution, no trust having been created for the creditors of the deceased father and brother.

---

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

1899

BURRIS v. RHIND.

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

The facts of the case are sufficiently stated in the above head-note and in the judgments published herewith.

Sedgewick and *Congdon* for the appellant.

Drysdale Q.C. for the respondents.

THE CHIEF JUSTICE.—The appellant, who was the plaintiff in the action, founds his claim upon a mortgage of certain lands situate at Musquodoboit, in the county of Halifax, which was executed in his favour by the respondent William Rhind, on the 26th of February, 1896, to secure the sum of $718. The amount of the alleged mortgage debt was, according to the statement of the appellant, made up of debts due to him by William Rhind himself, and by his father, Alexander Rhind, and his brother, George Rhind. Alexander Rhind, the father of the respondents, was in his lifetime seized in fee of the land in question. He died in 1877, intestate, leaving a widow and several children, amongst others George Rhind, the eldest son, and the respondents William and Caroline Rhind. Upon the death of Alexander, George Rhind, the eldest son, took the management of the farm and carried it on supporting his mother and the younger children out of the proceeds. The respondent William, then seventeen years of age, remained at home. The respondent, Caroline, some time after her father's death went to Boston to earn her own livelihood. George died in 1890, also, as appellant alleges, indebted to him. After George's death William undertook the working of the farm,

(1) 30 N. S. Rep. 405.

1899

BURRIS v. RHIND.

The Chief Justice.

and up to the date of the action provided for the maintenance of his mother and the younger children. On the 28th of June, 1890, a deed was executed by which his brothers and sisters conveyed the land in question to William Rhind, who was at that time not quite twenty years of age. In this deed it was expressed to be made

> in consideration of William Rhind paying all the debts due and owing by the late George Rhind, and discharging all debts against the estate of the late Alexander Rhind as they may become due and demandable.

William finding himself straitened in means for the support of his mother and the family, appealed for assistance to his sister Caroline who from time to time remitted him money, and none of the previous remittances having been repaid, William, in December, 1895, being much pressed, applied to his sister for a further advance of $200. In answer to this application Caroline remitted her brother, about the 10th of January, 1896, $120, which with the previous loans made up a sum of $450, for which William Rhind on the 16th of February, 1896, gave his sister security by executing in her favour an absolute deed of the land in question. This deed having been registered was in some way brought to the notice of the appellant, to whom, according to appellant's own statement, William Rhind was then in debt to the amount of $315.28. The appellant immediately applied to William to obtain a re-conveyance from his sister Caroline, and then to secure the appellant by a mortgage William Rhind in his deposition swears that the appellant accused him of fraud and threatened to prosecute him criminally unless he complied with his demand. The appellant it is true denies this, but I am satisfied from a perusal of the evidence that the Supreme Court of Nova Scotia were entirely right in holding, as they do in the judgment delivered by Mr.

Justice Graham, that undue pressure and influence was exercised by the appellant, who was a country merchant, a postmaster, and apparently an experienced man of business, and who was accompanied by one Henry Cruickshanks, who also appears to have exerted himself in the appellant's behalf, and to have intimidated the respondent William, an inexperienced country bred lad. Under this influence William wrote to his sister Caroline reporting to her the threats which had been made by the appellant and Cruickshanks, and urging her to execute a re-conveyance to him. Influenced by the threats of the appellant thus communicated to her by William, Caroline executed a deed by which she purported to re-convey to William the land in question, and on this deed reaching William he executed the mortgage to the appellant, on which the present action is based. The conveyance from Caroline not having been sufficiently acknowledged for registry, was returned to her in order that an acknowledgment in proper form might be made. Upon thus regaining possession of the deed Caroline Rhind took legal advice in Boston, and acting on it refused to return the deed, and not only withheld it, but very improperly destroyed it. The appellant then brought this action claiming to set aside the deed from William to Caroline, and for a declaration that his mortgage is a lien on the lands.

Caroline Rhind counterclaims for a declaration that she is entitled to a first lien on the property for her debt of $450 and interest, and also that the deed by which she purported to re-convey the land to William should be set aside. The learned judge before whom the action was tried having pronounced a judgment in favour of the appellant, this judgment was on appeal to the Supreme Court *in banc* discharged and a judgment entered in favour of Caroline Rhind, as

1899

BURRIS v. RHIND.

The Chief Justice.

prayed by her counterclaim, and the appellant was also restrained from setting up the deed of re-conveyance or release. And subject to these declarations and directions, the action was dismissed.

I am of opinion that the decree appealed against was in all respects right. The execution of the re-conveyance was beyond all doubt upon the evidence obtained by undue influence and fraudulent pressure, and that deed could not have been allowed to stand without an entire disregard of the principles upon which courts of equity act in such cases. I do not go into the evidence with any particularity for we may well adopt in its entirety the judgment which Mr. Justice Graham delivered for the court.

As something was said at the argument as to enforcing the provision in the deed by which the land was conveyed to William, and by which it was stated that the consideration was the payment of the debts of Alexander and of George, it is as well to point out why no relief such as that thus suggested can be given in this action.

In the first place, no case is made for it in the statement of claim. Then this provision is one entirely "*res inter alios*" as regards the appellant, the benefit of which the appellant is not entitled to avail himself of. It created no trust for the creditors of Alexander and George, but was a mere contract between the parties to the deed, and the respondents are entitled to invoke the well known rule, thoroughly established in equity as well as at law, that a mere contract enures to the benefit exclusively of the party from whom the consideration moves; *Tweddle* v. *Atkinson* (1); *Colyear* v. *Lady Mulgrave* (2); and that no third party however directly a covenant or contract may appear to be designed for his benefit can call for its

(1) 1 B. & S. 393. (2) 2 Keen, 81.

1899

BURRIS v. RHIND.

The Chief Justice

execution. To give the appellant any relief on this head would be to violate this well established rule of law.

There is no doubt that the whole of the land was originally assets available for the payment of the debts of Alexander Rhind, and that the undivided share of George according to the number of children of Alexander was also available for the payment of his own debts, and if there remain any of these debts still unbarred by the statute of limitation (which as the statute began to run on the lives of the original debtors is not very probable; *Rhodes* v. *Smethurst* (1),) such creditors may possibly still make the land available for their payment. But this can only be done in an action properly constituted for that purpose, and not in the present action.

The appeal is dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—The facts upon which the judgment upon this appeal must rest appear to be that in 1877, one Alexander Rhind died intestate seized in fee of a farm situate at Musquodoboit, in the county of Halifax, in the province of Nova Scotia, containing about 100 acres, and leaving him surviving a widow and two sons, George, and the defendant William, who was then only six years of age, and of some daughters, of whom the defendant Caroline was one. Alexander also left some chattels consisting of some farm stock, and implements, and household effects, but no letters of administration of his estate appear to have been taken out although he left some debts. His widow with her family continued to reside upon the farm which was worked by George, the eldest son.

(1) 6 M. & W. 351.

1899

BURRIS v. RHIND.

Gwynne J.

The defendant Caroline, in 1882, left home and went to reside at Boston, in the State of Massachusetts, where she has ever since resided, maintaining herself. George during his life purchased 100 acres or thereabouts, which he added to the farm, and of which early in 1890, he died seized, intestate and unmarried. During the latter years of George's life he was in delicate health, but with the assistance of the defendant William, who at George's death was about nineteen years of age, he managed to continue working the farm and maintaining their mother. In the year 1888, and from thence until George's death, the defendant Caroline having prospered in life advanced and lent from time to time to George divers sums of money amounting in the whole to $225, a portion of which, amounting to about $130, was advanced to him for the purpose of being applied and was applied in payment of a debt or debts of their father Alexander. No letters of administration of the estate and effects of George Rhind appear to have been taken out, but upon the 28th of June, 1890, the heirs of George, who were also the heirs of Alexander Rhind by a deed executed by them, the consideration of which was stated to be one dollar, and

> in consideration of William Rhind paying all debts due and owing by the late George Rhind and discharging all debts against the estate of the late Alexander Rhind

conveyed the said respective parcels of land whereof the said Alexander and George Rhind respectively died seized to the said defendant William Rhind, his heirs and assigns in fee simple. At the date of this deed, namely, the 28th of June, 1890, William Rhind, the grantee therein, was not yet twenty years of age. He undertook, however, the working of the farm and the maintenance of his mother thereon, and became seized of the lands conveyed by the deed,

1899

BURRIS v. RHIND.

Gwynne J.

subject, however, to the trust imposed by the deed for the payment and discharge of the debts of his deceased father and brother respectively, and to the right of dower of his mother in that portion of the land of which his father [Alexander had] died seized. On the 15th October, 1891, William gave to his sister Caroline his promissory note for $225, payable on demand, with interest at 5 per cent per annum by way of security to her for the $225 already mentioned as having been advanced by her in the lifetime of George. Between that date and the month of January, 1896, the defendant Caroline advanced to her brother William the further sums of $65, $40 and $120, to be applied in payment of debts of her brother George for which respectively William gave her his promissory notes dated respectively June 1st, 1893, May 1st, 1895, and January 10th, 1896, with interest on said respective sums at 5 per cent. This latter sum of $120 was advanced in compliance with a request in a letter from William to her dated December 9th, 1895, that she would advance the further sum of $200 to pay debts of George's, still unpaid. In this letter he pledged himself to give her ample security for all her past advances as well as for that then asked for. In her reply dated December 17th, she declares her inability to advance in addition to the sums already advanced by her so large a sum, but promises to send as much as she could, and in January, 1896, she sent the $120. In her letter of December, 1895, and in one of January, 1896, enclosing the money then sent, she insists upon the necessity of her being given some better security for her advances than notes of hand, and adds that of course she would give them up when he should give her security, promised in his letter of December 9th, and that before doing anything more she was very anxious to know how matters stood. In

1899

BURRIS v. RHIND.

Gwynne J.

reply to the defendant, William Rhind mailed to her a deed in fee simple dated the 11th day of February, 1896, and duly registered on the same day in the proper registry office in that behalf whereby in consideration of the sum of $750 therein expressed to have been paid to him by Caroline, he conveyed to her all the lands and tenements so as aforesaid conveyed to him by the deed of the 28th June, 1890. The effect and operation of this deed of the 11th February, 1896, was to vest in Caroline all the estate of her brother William in the said lands as security to her for repayment of her said advances with interest as aforesaid, and subject to whatever right the creditors of Alexander and George respectively might have to enforce their claims upon the lands so conveyed to Caroline as equitable charges imposed by the deed of the 28th June, 1890, ratably with Caroline herself in so far as her said advances were applied in payment and discharge of claims against the estate of Alexander and George respectively. Now the plaintiff who claimed to be himself a creditor of both Alexander and George respectively, and as such to have a charge upon the lands so conveyed to William Rhind by the deed of June 28th, 1890, instead of asserting his claim for an equitable charge on the said lands procured the defendant William by threats of criminal prosecution, as stated in the pleadings, to get a reconveyance from Caroline, and then took from William a conveyance to himself by way of mortgage.

The plaintiff's case is thus stated in his statement of claim. It alleges first the execution of a mortgage dated the 26th February, 1896, upon the lands in question to secure the payment of $718. It then alleges that $315.28 of that amount was a private debt of William Rhind to the plaintiff. It then alleges the

execution of the deed by William to Caroline Rhind dated 11th February, 1896, and avers

that the said deed was executed for the purpose and with the intent to hinder and delay the creditors of the said William Rhind, and to prevent the creditors from obtaining payment of the debts due to them and there was no consideration for the making of the said deed.

Then it alleges that by deed of the 28th June, 1890, the property was by all of the heirs of Alexander and George respectively other than the defendant William, conveyed to William upon the consideration, as already set out above. It then alleges

that the defendant William agreed to procure from the defendant Caroline a reconveyance to himself of said property, and to give the plaintiff a mortgage thereon for the sum of $718, if the plaintiff would pay off the debts then remaining due and owing by the said George Rhind, deceased, to which the plaintiff agreed; the defendant William Rhind thereupon procured the said reconveyance and the plaintiff paid off said debts amounting in all to the sum of $472.38, and delivered up to the said defendant William Rhind notes made by the late George Rhind to various parties, which were still due and unpaid, and on which the said sum of 472\frac{38}{100}$ was owing.

This sum together with the sum of $315.28 previously mentioned, made the total indebtedness of William Rhind to plaintiff $787.66 from which plaintiff agreed to deduct $69.66, leaving the sum of $718 for which said defendant then gave the said mortgage. It then alleges that at the time the said defendant delivered the said mortgage to the plaintiff he also delivered to him the said deed from the said Caroline to the said William for the purpose of having the same recorded; that the said deed was executed by the said Caroline, but that the registrar declined to register it owing to some alleged defect in the certificate of the notary as to the execution thereof; that the deed was thereupon returned for correction to the said Caroline, who at the instance of and connivance with the defendant William in order to defraud the plaintiff and

1899

BURRIS v. RHIND.

Gwynne J.

prevent the said mortgage from binding the property therein described failed, neglected and refused to return said deed for registry, but either retained the same or delivered it to the defendant William who fraudulently retains the same, and the plaintiff prayed

1st. To set aside the deed from William to Caroline Rhind.

2nd. For a declaration that the mortgage is a lien upon the lands therein described.

3rd. For an injunction to restrain the defendant Caroline from transferring or conveying the said land to any person other than to the said William Rhind, or in the alternative that the plaintiff recover the said deed from the defendants.

We have already seen that there is no foundation for the present claim in so far as it is rested upon the allegation that the deed of the 11th of February, 1896, was executed without any consideration therefor and with a fraudulent intent, and as to the mortgage of the 26th February, 1896, it seems to have been executed upon a consideration similar to that upon which the deed to Caroline of the 11th February, 1896, was executed, namely to secure payment of sums which the plaintiff claimed to be charged upon the lands conveyed by the deed of 28th June, 1890. Of the $315.28 which the plaintiff in his statement of claim alleges to have been a private debt due to him by William Rhind, it appears upon the plaintiff's own evidence given in the action that $273, or thereabouts were monies due to him by Alexander and George respectively, and were as the plaintiff claims charged upon the lands conveyed by the deed of June, 1890.

William Rhind in his evidence at the trial said that on the evening of the execution of the deed of the 11th February, the plaintiff having heard of it and

1899

BURRIS v. RHIND.

Gwynne J.

taking with him one Henry Cruikshanks, a brother-in-law of William Rhind, went to see the latter and charged him with having committed a fraudulent and criminal act in executing the deed to his sister for which he was liable to prosecution—that it was a penitentiary case, and he threatened to institute proceedings against him therefor unless he should write at once to his sister and explain to her the position in which he was, as stated to him by the plaintiff and Cruikshanks, and get her to deed back the property to him.

After a long discussion wherein the plaintiff and Cruikshanks persuaded the defendant William that he had committed a criminal offence, they parted on the understanding that William should write to his sister and inform her of the position in which he was as stated to him by the plaintiff and Cruikshanks, and get her to reconvey the property to him as required by the plaintiff. William accordingly wrote to his sister, and told her what had taken place at the interview, and of the threats made by the plaintiff, and in consequence thereof he entreated her in piteous terms to reconvey the property to him—thus—

Burris says I have got myself into a bad fix. He says that I could not lawfully deed my property to you on any consideration being that you was my sister—a near relation, and furthermore he says that the deed that James Cruikshanks wrote (the deed of 28th June, 1890) holds me for my brother's debts. He says it is a bad thing for me. He said it was a fraud. It would put me into the penitentiary. Henry Cruikshanks said it was a bad thing for me, that my lawyer had advised me wrong; that they wanted a job and are deceiving me just to get me into law. Burris says the same. He says you better deed the property back to me at once or he will take it into law. Burris says he will have George's debts out of the place if it costs him all he is worth. I don't know what to do, as I do not understand law, and Burris says I have done wrong. I did not intend to do wrong. I felt it right that you should have security for your money which you have loaned me from time to time. But if as

1899

BURRIS v. RHIND.

Gwynne J.

Burris and Cruikshanks say the deed holds me for my brother's debts what can I do? I think you had better deed the property back to me as soon as possible to save further trouble. For they will make trouble for me if they can. If it was not for mother I would let them see what they could do, but mother cries and worries so much, thinks I better have it in my name again so as to save further expense. Donald Archibald will send a deed up to you to sign. Return the deed to me after you sign it. I will try in some other way to secure you for the money I have got from you. Try and get this done as soon as possible.

In due course Archibald sent to Caroline a deed prepared under instructions of plaintiff which she returned to her brother William. She says that she received the above letter from her brother, and on the same day a letter from Mr. Archibald enclosing a deed for her to sign. After reading her brother's letter she instantly without consulting any one signed the deed. It was her brother William's letter which induced her so quickly to sign the deed. She says:

After I read William's letter I was greatly alarmed and frightened and thought he would be shut up and be behind the bars, and the sooner I attended to it the better. I was nervous for my mother's sake, and being so far from home I thought he had got into trouble.

Upon the return of the deed to William, the plaintiff, who was postmaster at the place where William resided, obtained thereby notice of its arrival. The plaintiff says that he saw in the post-office a large envelope addressed to William which he supposed contained the deed, and he would not say that he did not get Henry and James Cruikshanks to go and see William and ascertain whether the deed had not came from his sister. He did not, he said, remember. Henry Cruikshanks was the one who was with the plaintiff in his first interview with William a week previously, and James was a lawyer in the Province of Quebec, and who had drawn the deed of the 28th June, 1890 These two did go up to see William the evening of the day after he had received the deed,

1899

BURRIS v. RHIND.

Gwynne J.

and this is his account of what took place. Henry and James Cruikshanks he said, came to his house the night after he got the deed, about eight o'clock, and asked him if he had got the deed, to which he replied that he had, and thereupon James asked to see it. William put the letter containing the deed on the table, and James took it up and read it and said, "Yes, it is the deed," and he put it in his pocket, and said to William that he must come right up with him to the plaintiff. He said that the plaintiff was in a rage and was determined to have the deed, and he added that it was a bad thing, and that he knew a case just like it in Montreal where a young man and his sister had done the same thing, that they thought they had done nothing wrong, but they had been put in the penitentiary. William then said that being ignorant of law he got alarmed, he was frightened about the penitentiary, and being urged by James to go with him up to the plaintiff's, he went. James took the deed with him, and on arriving at the plaintiff's told him that he had it, and James in the plaintiff's presence repeated the story about the young man and his sister at Montreal. Then the plaintiff suggested the execution of a mortgage to himself, he to pay the debts of George upon the estate, and the plaintiff prepared the mortgage which he then procured William to sign.

It appears that the deed sent by Caroline to William was not executed, or not proved to have been executed in the manner required by the law of Nova Scotia as regards deeds conveying lands therein executed abroad, and it was sent back to Caroline to Boston through Mr. Archibald, who had originally sent the deed to her with a request to have the defect removed. She, however, heard in the meantime of the execution by her brother of the mortgage to the plaintiff. This she

1899

BURRIS v. RHIND.

Gwynne J.

considered to be in violation of the terms upon which she had signed the deed back to her brother, and she then took advice, and in accordance with such advice burned the deed. Now the evidence as already observed clearly shows that there is no ground whatever for the charge which is repeated in the plaintiff's statement of claim as the foundation stone upon which he rests the main prayer for relief, viz., "To "set aside the deed from William Rhind to Caroline E. "Rhind," and Caroline in her counter-claim, claims to have the deed executed by her to William set aside, and that it may be declared that the deed of the 11th day of February, 1896, is a security to her to secure payment of $450 advanced by her with interest, and that it is a first lien upon the lands described therein.

The learned trial judge has found as matters of fact, that the deed of the 11th February, 1896, was executed to Caroline for good and valuable consideration, and that her brother William requested her to reconvey the property to him from fear of criminal consequences, which fears were the result of plaintiff's and Henry Cruikshanks's conversations when he was threatened with proceedings by the plaintiff, and that William under such impressions wrote for the deed and informed his sister as he believed that he had made himself criminally responsible, and that the defendant Caroline acting on the information so conveyed to her by William, and in the belief that her brother had made himself criminally liable, executed a deed reconveying the property to William.

Now it is not questioned that, and I think there can be no doubt that if the deed which was executed by Caroline to her brother had been executed by a father for the relief of a son from a criminal prosecution under the circumstances appearing in evidence here, it could not have been maintained at the suit of and

1899

BURRIS v. RHIND.

Gwynne J.

in the interest of the plaintiff, but the learned trial judge was of opinion that the rule applicable to a father entering into a contract for the purpose of relieving a son from a criminal prosecution does not apply in the case of a sister doing the like for a brother. He could, he said, find no such case in the English reports although there are several in the American courts in which the same principle is applied in both cases.

The principle as gathered from the judgment of Lord Westbury in *Williams* v. *Bayley* (1) is that

> a contract to give security for the debt of another, which is a contract without consideration, is above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving the son in that perilous condition, or of taking on himself the amount of the civil obligation.

The case before us presents an illustration, if any were needed, of the fact that the sympathies and affections of a sister for a brother equally as those of a father for a son are susceptible of being called into action so as to deprive her of the power of considering whether she ought to have executed the deed as required by the plaintiff—whether it would be prudent for her so to do and in short to deprive her of the power of acting with that freedom and power of deliberation which her own interests and the nature of the case required. That her interests were subordinated to her sympathies and affection for her brother in the peril to which she believed him to be exposed there can be no doubt, and I can therefore see no reason why the principle as laid down in *Williams* v. *Bayley* (1) should not apply to her case.

Seear v. *Cohen* (2) is an authority that in the case of a contract entered into like the present upon

(1) L. R. 1 H. L. 200.

(2) 45 L. T. 589.

1899

BURRIS v. RHIND.

Gwynne J.

threats of criminal prosecution it is not necessary that actual ground for the prosecution should exist in fact. We now see that in the present case none did in point of fact exist. The deed of the 11th February, 1896, is established to have been executed for good and valuable consideration. The plaintiff in his statement of claim bases his claim for the relief upon an allegation that it was executed with a fraudulent intent and without consideration. If he could have succeeded in establishing that contention William Rhind might have been exposed to criminal prosecution under sec. 363 of the Criminal Code upon the contention that under the deed of the 28th June, 1890, William Rhind became a trustee of the land in favour of the creditors of his father Alexander and his brother George, and this no doubt was the criminal prosecution referred to. But as already said the question is not whether there was any good ground for a criminal prosecution but whether the plaintiff having charged William Rhind with a criminal offence in his executing to his sister Caroline the deed of the 11th February, 1896, and having threatened to prosecute him therefor and having procured him, as I think we must upon the evidence hold that the plaintiff did procure him, to write to his sister and to persuade her that in executing to her that deed he had committed a criminal offence and had subjected himself to a criminal prosecution therefor which the plaintiff threatened to institute against him unless Caroline should reconvey the land to her brother, and she having without any consideration whatever other than of releasing her brother from such threatened prosecution executed in favour of her brother a reconveyance of the land which she afterwards destroyed as appearing in evidence, and the plaintiff having got possession of that deed before it was destroyed under the circumstances stated by

1899

BURRIS v. RHIND.

Gwynne J.

William Rhind, can he now, having failed to establish any fraud whatever in the execution of the deed of 11th February, 1896, which is shewn to have been executed for good and valuable consideration, establish any equity to claim the benefit of the deed of reconveyance from Caroline to William Rhind so as aforesaid executed and afterwards destroyed as still being a good, valid and subsisting deed in support of the mortgage executed by William Rhind on the 26th February, 1896, under the circumstances appearing in his evidence? I think that he cannot, but that on the contrary the counter claim of the defendant Caroline must prevail, and that this appeal must be dismissed with costs, and that the judgment of the Supreme Court of Nova Scotia, with a slight variation therein, must be maintained, such variation consisting in adding to the last paragraph but one of that judgment after the words "$450 advanced by defendant Carolina Rhind to the defendant William Rhind" the following "subject however to any claim which the plaintiff may be able to establish ratably with her the said Caroline, as a charge upon the said lands under the terms of the deed of the 25th June, 1890, as a creditor of the late Alexander or George Rhind respectively, or for monies actually paid by the plaintiff to persons who as creditors of said Alexander or George Rhind had claims upon the said lands by virtue of the said deed for debts due to such creditors by said Alexander and George Rhind respectively, and also subject ratably to the claims of any other creditors if any there be of the said Alexander or George Rhind having charges on the lands under the said deed of the 28th June, 1890."

SEDGEWICK J.—I am of opinion that this appeal should be dismissed with costs for reasons given in a judgment prepared by the Chief Justice.

1899

BURRIS v. RHIND.

KING and GIROUARD JJ. concurred.

Appeal dismissed with costs.

Solicitor for the appellant: *Fred. T. Congdon.*

Solicitor for the respondent William Rhind: *F. H. Bell.*

Solicitor for the respondent Caroline E. Rhind: *Hector McInnes.*

1899

*Feb. 21, 22.
*June 5.

EDWARD ZWICKER AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

CALEB FEINDEL (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Misrepresentation by vendor—Estoppel.

A vendor of land who wilfully misstates the position of the boundary line and thereby leads the purchaser to believe that he is acquiring a strip not included in the deed, is estopped from afterwards claiming such strip as his own property.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial in favour of the defendants.

The material facts of the case are fully set out in the judgment of the court delivered by Mr. Justice Gwynne.

W. B. A. Ritchie Q.C. and *McLean* for the appellants. In cases where false misrepresentation is made by a party to an agreement, the power of equity is extensive, and the contract itself may be set aside, or the person who made the assertion compelled to make it

---

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

(1) 31 N. S. Rep. 232.

good. *Burrowes* v. *Locke* (1), at page 474; *Williams* v. *Williams* (2), at page 857; *Derry* v. *Peek* (3), at page 360; *Mills* v. *Fox* (4), at pages 162-166; *Hammersley* v. *De Biel* (5), at pages 87-88; *Hutton* v. *Rossiter* (6), at page 18. Upon the authorities above referred to, the plaintiff is estopped from laying claim to any portion of the land in dispute, and from denying that the title thereto is vested in the defendant under the conveyance in question. Moreover, the court below dealt with the case as if all necessary amendments had been made. No amendments were necessary in this respect. *Sanderson* v. *Collman* (7); *Freeman* v. *Cooke* (8). The defendant Edward Zwicker relies on the ground that he is entitled to ratification of the conveyance from plaintiff to himself as claimed in the counter-claim. The findings of fact with respect to the terms of the contract have not been materially varied by the finding of the court on appeal. The majority of that court refused relief to the plaintiff on the ground that the secret fraudulent intention in the plaintiff's own mind enables him to repudiate his representation to the plaintiff, and to say that there was no mutual or common mistake. The plaintiff cannot take this position. He is estopped from denying the truth of his representation to the defendant. If he believed that representation to be true there was a common mistake. If he did not believe that representation to be true he was guilty of fraudulent conduct, and the court will not draw fine distinctions for the purpose of enabling him to benefit by that fraud. "No man can be heard to say that he is to be assumed not to have spoken the truth." Knight Bruce, L.J. in *Price*

(1) 10 Ves. 470.
(2) 37 L. J. Eq. 854.
(3) 14 App. Cas. 337.
(4) 37 Ch. D. 153.
(5) 12 Cl. & F. 45.
(6) 7 DeG. M. & G. 9.
(7) 4 M. & G. 209; 4 Scott (N. R.) 638.
(8) 2 Ex. 654.

1899

ZWICKER v. FEINDEL.

v. *Macaulay* (1), at page 346. As to the cases in which rectification will be granted upon oral evidence, see *Clarke* v. *Joselin* (2); Story, Equity Jurisprudence, sec. 153. Buller & Leake, Pleading, p. 693 *note*.

The court below have unduly extended the doctrine that reformation cannot be obtained unless a common mistake is clearly established. A secret fraudulent intention in the mind of the plaintiff cannot be invoked for the purpose of claiming on his behalf that there was not a mistake on his part. He is bound by his acts and declarations, even when these are inconsistent with his secret fraudulent intention. See Kerr, on Fraud and Mistake, p. 498. The language of the text writer is qualified by the expression "without fraud," the clear inference being that in a case where fraud existed the rule would be otherwise. In *Garrard* v. *Frankel* (3), Sir John Romilly M.R. at page 451 said, "the court will, I apprehend, interfere in cases of mistake where one party to the transaction, being at the time cognizant of the fact of the error, seeks to take advantage of it."

All the facts upon which the appellants mainly rely are supported by the finding of the judge of first instance as well as by the judgment of the Court of Appeal. Before that finding will be disturbed it must be shown with absolute clearness that it was wrong. *Allen* v. *Quebec Warehouse Co.* (4); *Schwerenski* v. *Vineberg* (5); *George Matthews Co.* v. *Bouchard* (6), at page 588 per Girouard J.

The defendant Edward Zwicker is entitled to specific performance of the plaintiff's agreements to sell to him the land in dispute up to the Grinton line, on the authorities already cited, and also on *Olley* v. *Fisher* (7).

(1) 2 DeG. M. & G. 339.
(2) 16 O. R. 68.
(3) 30 Beav. 445.
(4) 12 App. Cas. 101.
(5) 19 Can. S. C. R. 243.
(6) 28 Can. S. C. R. 580.
(7) 34 Ch. D. 367.

Newcombe Q.C. and *F. B. Wade* Q.C. for the respondent. The disputed strip has remained in the possession of respondent, showing the interpretation placed upon their contract by the parties themselves, and that there was no mutual mistake, and there has been no fraud pleaded or established by the evidence. The parties went upon the ground, measured it, and established the bounds; and the deed, which was drawn under their joint direction, comprised exactly what land was agreed, and what both parties understood, to be sold and purchased. Where the party purchasing knows exactly the limits of the land he is buying, and accepts a deed correctly describing it, he can never reform that deed, because there has been no mistake upon his part. How much greater the difficulty when the seller also claim she made no mistake. The plaintiff intended to sell only the land up to the pine tree, and the defendant thought that he was purchasing only up to that tree. If the Grinton line was to be the boundary, why did the defendant allow instructions to be given in his presence to insert in the deed the pine tree as the bound; why did he accept and record that deed; why was the pine tree blazed; why did the defendant mark the tree with his initials; why did he claim the land along the road to that tree, and why were the number of rods inserted in the deed. It would have been much simpler to have inserted the Grinton line as the boundary than to locate a fixed bound as was done.

As to rectification, see *Irnham* v. *Child* (1), Pollock on Contracts, (5 ed.) p. 495; Taylor on Evidence (9 ed.), sec. 1139; *Wright* v. *Goff* (2); *Cowen* v. *Truefitt* (3), at p. 554; *Llewellyn* v. *Earl of Jersey* (4); *Penrose* v.

(1) 1 Bro. C. C, 93.
(2) 22 Beav. 207; 25 L. J. Ch. 803.
(3) [1898] 2 Ch. 551.
(4) 11 M. & W. 183.

1899

ZWICKER v. FEINDEL.

Knight (1); *Duke of Sutherland* v. *Heathcote* (2), at p. 486.

The deed cannot be rectified except for mistake, which must be mutual and established by the clearest and most satisfactory evidence. *Bradford* v. *Romney* (3), at page 438; *Garrard* v. *Frankel* (4), at page 457; *Bloomer* v. *Spittle* (5); *Paget* v. *Marshall* (6); Fry on Specific Performance (3 ed.), p. 367; *Fowler* v. *Fowler* (7); *Dominion Loan Society* v. *Darling* (8); *Sylvester* v. *Porter* (9), at page 106 *et seq.* A deed cannot be rectified, but only set aside on account of fraud. *Watt* v. *Grove* (10); *Rawlins* v. *Wickham* (11), at pages 320, 321; *McNeill* v. *Haines* (12), at pages 481, 484 and 485.

The court cannot take notice of fraud unless it be pleaded. *Hardman* v. *Putnam* (13); *Wallingford* v. *Mutual Society* (14), at pages 701 and 709; *Lawrance* v. *Norreys* (15); *Redgrave* v. *Hurd* (16), at page 12; R. S. N. S. (5 Ser.), pages 849 to 851, rules 4, 6 and 15.

Estoppel has not been pleaded. Odgers on Pleading (2 ed.), pp. 190 and 191, and note on p. 190; Everest & Strode on Estoppel, pp. 391 and 392. Estoppel must be established with certainty. Bigelow on Estoppel (5 ed), p. 490; *Preble* v. *Conger* (17).

There being no pleading by way of reply, issue was joined on the defence to the counterclaim by virtue of the statute. R. S. N. S. (5 Ser.) p. 867, rule 12.

There was no necessity to appeal from the trial judge's direction to amend as the appeal from the

(1) Cass. Dig. (2 ed.) 776.
(2) [1892] 1 Ch. 475.
(3) 30 Beav. 431.
(4) 30 Beav. 445.
(5) L. R. 13 Eq. 427.
(6) 28 Ch. D. 255.
(7) 4 DeG. & J. 250.
(8) 5 Ont. App. R. 576.
(9) 11 Man. L R. 98.
(10) 2 Sch. & Lef. 492.
(11) 3 DeG. & J. 304.
(12) 17 O. R. 479
(13) 18 Can. S. C. R. 714.
(14) 5 App. Cas. 685.
(15) 15 App. Cas. 210.
(16) 20 Ch. D. 1.
(17) 66 Ill. 370.

judgment on the merits raises the question as to the propriety of the amendment. And in any case the judge did not make any finding or amendment to cover estoppel as that question was not raised at the trial. *Laird* v. *Briggs* (1).

The judgment of the court was delivered by:

GWYNNE J.—This appeal relates only to a portion of the causes of action in the statement of claim mentioned, namely trespasses alleged to have been committed by the defendants upon a strip of land in the second paragraph of the statement of claim alleged to be the property of the plaintiff, which piece of land is there described as situate in or near New Germany, upon the main post road, and bounded on the north-east by the Bridgewater Road so called; on the south-east by property of the defendants; on the south-west by the LaHave River; and on the north-west by property of the defendants. The defendants in their statement of defence, besides denying that this piece of land is the property of the plaintiff, counterclaimed to the effect following: that the plaintiff agreed to sell to the defendant Zwicker all his, the plaintiff's, right, title and interest in a piece of land situate in New Germany, on the eastern side of the LaHave River, and on the western side of the road leading to Annapolis, and bounded as follows:

> Beginning three rods from the line of John Chesley and running westerly parallel to said line until it strikes the LaHave River; thence up the said LaHave River by its several courses until it strikes the property of one Alexander Grinton; thence north-eastwardly until it strikes the main road thence eastwardly along such road to the place of beginning.

This description includes the piece of land under consideration in this appeal. The counterclaim, in short

(1) 16 Ch. D. 440.

1899

ZWICKER v. FEINDEL.

Gwynne J.

substance, proceeds to allege that the plaintiff executed to the defendant Edward Zwicker a deed by which it was intended to convey the whole of the plaintiff's interest in the said piece of land to the defendant Edward Zwicker, and upon the execution of the deed the defendant Edward Zwicker in virtue thereof entered into possession and still is in possession of the whole of the land as above described up to the Grinton line, but the description inserted in the said deed was erroneous by reason of the plaintiff having represented that a pine tree mentioned in such description was on the western extremity of his, the plaintiff's, land, and on the boundary between the land of the plaintiff and that of Alexander Grinton. The description so inserted is as follows:

> Beginning three rods from the line of John Chesley and running westwardly parallel to said line until it strikes the LaHave River; thence up stream by the several courses of said river seventy-four rods *to a pine tree* marked "Bound" nearly opposite the pound; thence northeasterly until it strikes the main road aforesaid; thence easterly down along said road to the place of beginning.

That such description does not correctly state the true boundaries of the whole of the land purchased by said defendant from the plaintiff, but leaves a strip which is part of the land bought by said defendant from the plaintiff, and which is the portion of land described in the second paragraph of the statement of claim, and the use of which as part of the land purchased by said defendant, is the trespass of which the plaintiff complains. The counterclaim concludes with a prayer for a decree for the reformation of the deed from the plaintiff to the said defendant so as to include all the land bought and paid for by said defendant up to the Grinton line as described in paragraph one of the counter claim *or* a decree for specific performance of the sale of the land as described in said paragraph

one of the counterclaim, and such further relief as the nature of the case may require.

It appeared in evidence that the defendant Edward Zwicker at the time of his agreement of purchase from the plaintiff being entered into contemplated acquiring a further piece from Grinton for piling grounds and with that in view it was a matter of importance to the defendant that his purchase from the plaintiff should extend to the Grinton line; and the learned trial judge has found as matter of fact

that the agreement was to purchase up to the Grinton line, that while the pine tree was marked and intentionally inserted in the deed it was done upon the representation of the plaintiff that the pine tree fairly indicated the locality of the boundary line between the plaintiff and Grinton, and that this representation was false in fact as the plaintiff well knew.

The plaintiff had in his evidence stated that he thought the line between him and Grinton to be six rods from the pine tree, but that he did not consider he was under any obligation to tell Zwicker where the true boundary was. The learned trial judge accordingly gave judgment on the counterclaim for reformation of the deed by the insertion therein of the true boundary up to the Grinton line according to the original agreement of purchase and sale. Upon appeal by the plaintiff the majority of the Supreme Court of Nova Scotia, Henry J. dissenting, have reversed that judgment. Ritchie J. pronouncing the judgment of the majority says:

After a careful consideration of the evidence I have come to the conclusion that the defendant Zwicker at the time he made the agreement to purchase the lot, and when he got the deed intended to purchase up to the *Grinton line* and believed that the deed he received conveyed to him the whole lot and that such belief was caused wholly by the misrepresentations of the plaintiff who induced him to complete the purchase under that idea, but I am unable to find that it was the intention of the plaintiff to convey the whole lot. The evidence as I view it points pretty conclusively to the fact that the plaintiff by

1899

ZWICKER v. FEINDEL.

Gwynne J.

taking the pine tree as marking the Grinton line which he knew at the time was untrue, and representing that to defendant, intended to defraud him and to retain for his own use a portion of the lot next the Grinton line, and at the same time to induce the defendant to purchase what he supposed was the whole lot, leaving no interval between it and the Grinton lot, which lot the defendant Edward Zwicker, as the plaintiff well knew, then contemplated purchasing and afterwards acquired. There is no allegation of fraud in the counter claim which proceeds on the ground of mutual mistake only. To rectify the deed in this case as claimed by defendant would not in my opinion carry out the real intentions of both parties *as I think the plaintiff at the time he gave the deed did not intend to sell the portion above the pine tree* although he had defrauded the defendant and had led him to believe that the deed covered the whole lot.

And he concludes saying

no doubt the defendant Edward Zwicker has a remedy against plaintiff for the fraud, but not I think in the form asserted in his counterclaim.

The Supreme Court of Nova Scotia were thus of opinion that the defendant Edward Zwicker was chiefly entitled to some measure of relief against the fraud practiced upon him by the plaintiff, but not by rectification of the deed upon the ground of mutual mistake. But by the statute law of Nova Scotia, 5th series, ch. 104, it is enacted that at any time during the progress of an action the necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings, and further that the court and every judge thereof shall recognise and take notice of all equitable estates, titles and rights, duties and liabilities appearing incidentally in the course of any cause or matter, and by the Supreme Court Act of 1880, 43 Vict. ch. 34, (R. S. C. c. 135, ss. 63-65.) this relief may and should be granted by this court in appeal if it should have been omitted to be granted in the courts below. Now the Supreme Court of Nova Scotia were of opinion that the error made in the description of

the piece of land which Zwicker was intending to purchase and for which he had agreed to pay $650, was made by the plaintiff's procurement designedly false with intent to defraud the purchaser and to induce him to accept the deed containing an incorrect description as containing a true description of the piece of land he was purchasing, and that by such fraudulent means the plaintiff procured Zwicker to complete the purchase and pay the purchase money agreed upon. If there was any necessity for an amendment of the statement of claim by insertion therein of an averment that the plaintiff had fraudulently procured an erroneous description to be inserted in the deed which he induced the defendant Edward Zwicker to accept upon the faith and assurance that the description was correct such amendment could readily have been made by force of the Nova Scotia statute, and accordingly should have been made by the mere insertion of the words "falsely and fraudulently" after the words "owing to the plaintiff," and before the words "representing that" in the second line of the sixth paragraph of the counterclaim in the printed case, and such amendment if necessary can by force of the Dominion Statute 43 Vict. ch. 34 be still made so as to make the allegation in the pleading accord with the facts as proved and found in the courts below and dealing with the facts as so found, I think it is clear that the defendant Edward Zwicker has established his right to the benefit of the well established principle of equity that where a person makes a false representation for the purpose of fraudulently influencing the conduct of another person who acts upon the representation, the person making the representation is estopped from denying the truth of the representation and may be compelled by the court to give effect to it upon the authority of *Jorden* v.

1899

ZWICKER v. FEINDEL.

Gwynne J.

Money (1); *Citizens Bank of Louisiana* v. *First National Bank of New Orleans* (2); *Hammersley* v. *De Biel* (3), and many other cases to the like effect. I must, however, say that I do not think that the absence of an averment in the counterclaim that the representation of the plaintiff whereby he procured an erroneous description of the piece of land Zwicker was purchasing to be inserted in the deed was designedly false and fraudulent prejudiced in any respect the purchaser's right to relief upon the ground of estoppel because of the representation proving in point of fact to have been false and fraudulent. The appeal must therefore be allowed with costs, and the judgment of the learned trial judge restored with a declaration added thereto that the plaintiff is estopped from claiming as his own the piece of land in the pleadings mentioned which lies between the line at the pine tree and the Grinton line, and by the insertion of a clause rendering judgment for the defendants in the plaintiff's action as to so much thereof as relates to a claim against the defendants for trespass on such piece of land.

Appeal allowed with costs.

Solicitor for the appellants: *A. K. McLean.*

Solicitors for the respondent: *Wade & Paton.*

---

(1) 5 H. L. Cas. 185. (2) L. R. 6 H. L. 352.
(3) 12 Cl. & F. 45.

EZRA ZWICKER AND EDWARD ZWICKER (DEFENDANTS)..... } APPELLANTS;

AND

ERI ZWICKER, ADMINISTRATOR OF THE ESTATE OF JOSEPH ZWICKER (PLAINTIFF)..... } RESPONDENT.

1899
*Feb. 22, 23.
*June 5.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Deed—Delivery—Retention by grantor—Presumption—Rebuttal.

The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument.

The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately the grantor retained the possession and enjoyment of it until his death.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the plaintiff at the trial.

The facts material to the case are stated in the judgment of the court delivered by His Lordship the Chief Justice.

W. B. A. Ritchie Q.C. and *McLean* for the appellants. Undue importance has been attached to the fact that the deed was apparently retained in the possession of the grantor during his lifetime. It seems clear that Joseph Zwicker intended to make the deed operative

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

(1) 31 N. S. Rep. 333.

1899

ZWICKER v. ZWICKER.

in every respect. The evidence of the defendant Ezra Zwicker shews that Benjamin Zwicker, the subscribing witness, was present when the deed was given to him. The fact that the deed was taken back and retained does not necessarily render the deed inoperative. The whole transaction amounted to a family settlement or arrangement respecting the property of the intestate, an arrangement made for the purpose of convenience and in order to avoid expense. The plaintiff throughout assented to that arrangement both in the testator's lifetime and afterwards. He should not now be permitted, by taking out administration in respect of an estate in which he and the defendants are solely interested, to interfere with an arrangement so made and acquiesced in by himself. We rely upon *Clinch* v. *Pernette* (1), and cases there cited; *Xenos* v. *Wickham* (2); *Clavering* v. *Clavering* (3); *Roberts* v. *Security Co.* (4); *McDonald* v. *McMaster* (5).

Even if the evidence were insufficient to establish a delivery by Joseph Zwicker in his lifetime the acts of the plaintiff in assenting to the deed as a binding instrument, causing it to be recorded, paying his share of the cost thereof, and in taking possession and claiming under it the property of Joseph Zwicker, prevent him from setting up any title inconsistent with the conveyance in question. 1 Williams on Executors, (9 ed.) 344, 345; *Kenrick* v. *Burgess* (6); *Whitehall* v. *Squire* (7). The intestate, having executed the deed, would be estopped from denying its delivery and the plaintiff as his administrator is therefore also estopped in the same manner and to the same extent.

(1) 24 Can. S. C. R. 385.
(2) L. R. 2 H. L. 296.
(3) 2 P. Wm. 388, 8 Ruling Cases. Dig. (2 ed.) 246. 576, 580.
(4) [1897] 1 Q. B. 111.
(5) 17 N. S. Rep. 438; Cass.
(6) Moo. K. B. 126.
(7) 1 Salk 295.

1899

ZWICKER v. ZWICKER.

Wade Q.C. for the respondent. The respondent as administrator is entitled to possession and control of all the personal property, documents and writings owned by Joseph Zwicker at the time of his death. The deed of 1877 was never delivered and was not intended to operate as a deed, but as a testamentary writing. It is inoperative as a will by reason of insufficient attestation. It is a question of fact whether the deed was or was not delivered and the findings of the trial judge unanimously upheld by the Supreme Court of Nova Scotia on appeal should not be disturbed.

The appellants, in their ignorance of the law as to delivery, evidently considered as soon as the deed was discovered that it gave them all the personal property Joseph Zwicker owned at the date of the deed. Their conduct in giving up some of the property and only claiming the property they considered their father owned at the date of the deed is consistent with that theory, and not consistent with the theory that the appellants understood the agreement to record the deed to mean an agreement to share the property as set out in the deed, for in the latter case the appellants would have got all the personal property and would not have given up any of it.

The respondent as administrator is not bound by his acts before he was appointed administrator, for those acts were not beneficial to the estate. *Doe d. Hornby* v. *Glenn* (1); *Metters* v. *Brown* (2); *Morgan* v. *Thomas* (3) per Parke B, at page 307.

In any case the respondent was entitled to succeed in his action to recover the release signed by the grandsons, without which the estate could not be settled up in the Probate Court, and, in any case, to

(1) 1 Ad. & El. 49.
(2) 1 H. & C. 686.
(3) 8 Ex. 302.

1899

ZWICKER v. ZWICKER.

the accounting, for it appeared the appellants were holding some property acquired by Joseph Zwicker since the date of the deed and also some property belonging to the estate, not included in the inventory. *Coote* v. *Whittington* (1).

All the circumstances of the case rebut any presumption as to delivery of the deed. See *Doe d. Garnons* v. *Knight* (2) at pages 684 and 694 where cases are discussed; *Murray* v. *Earl of Stair* (3); *National Provincial Bank* v. *Jackson* (4). There is no plea as to estoppel by the registration of the deed; Odgers on Pleading; *McDonald* v. *Blois* (5); *Morgan* v. *Thomas* (6).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of Nova Scotia in an action brought by the respondent as administrator of his father, Joseph Zwicker, seeking the delivery up of certain specific chattels, of a deed dated the 5th of April, 1877, described in the statement of claim as being from the intestate Joseph Zwicker to Eri, Ezra and Edward Zwicker, and of a document dated the 2nd October, 1884, described in the statement of claim as being from Eri, Ezra and Edward Zwicker to Reuben Ernst, Edward Ernst and Eliah Ernst, and generally the delivery up of all personal property and documents belonging to the estate of Joseph Zwicker. The appellants who were the defendants in the action deny that the documents and personal property specifically claimed by the respondent belonged to the estate of the intestate, and also deny that they have in their possession any property belonging to the respondent as adminis-

(1) L. R. 16 Eq. 534.
(2) 5 B. & C. 671.
(3) 2 B. & C. 82.
(4) 33 Ch. D. 1.
(5) 3 N. S. Dec. 298.
(6) 8 Ex. 302.

1899

ZWICKER v. ZWICKER

The Chief Justice.

trator. At the trial before a judge without a jury, the facts appeared to be that the deed of the 5th of April, 1877, was an indenture made between Joseph Zwicker, the intestate, of the one part, and his three sons the respondent and the appellants of the other part, whereby the grantor purported to convey certain lands to his sons in fee. It also contained a disposition of chattel property in the following words:

> I also give unto my two sons, Ezra and Edward, all my stock of cattle, household furniture, farming implements, all personal property but the notes of hand and mortgages, and the house shall be jointly owned by my three sons.

The defendant in his deposition says that Benjamin Zwicker, the witness to the deed, was present when it was given to him. There was no dispute as to the signatures of the subscribing witness and the grantor being genuine, but the death of the subscribing witness, Benjamin Zwicker, was not proved, nor was his signature proved. This, it is explained in an affidavit of Mr. McLean, the appellant's solicitor, filed on the appeal and motion for a new trial, was in consequence of his mistake as to the extent of the admission made between the solicitors for the purposes of the trial. On the motion there was put in an affidavit of Jacob Pickles, a justice of the peace, who deposes that the execution of the deed was sworn to before him by Benjamin Zwicker, the subscribing witness, on or about the 17th of April, 1877. The same deponent also proves the death of Benjamin Zwicker and his handwriting and signature to the deed. This affidavit, which was rejected by the court below, ought in my opinion to have been received, and it sufficiently establishes the execution of the deed so far as regards the signing and sealing of the instrument.

It is however urged, and the court below have given effect to the objection, that there is no proof of the

1899

ZWICKER v. ZWICKER.

The Chief Justice

delivery of the deed. It is assumed, and it is I think the proper conclusion from the evidence, that the deed was retained in the possession of the grantor until his death, and this fact has been considered sufficient to show that the deed never was so delivered as to take effect as a duly executed instrument. It is in the face of decided cases of the highest authority out of the question to say that a deed must be presumed to have been inoperative for want of delivery merely because the grantor has retained it in his possession for many years and up to the time of his death. The following cases may be selected from a greater number as controverting any such proposition: *Doe d. Garnons* v. *Knight* (1); *Exton* v. *Scott* (2); *Fletcher* v. *Fletcher* (3); *Xenos* v. *Wickham* (4); *Hall* v. *Palmer* (5); *Moore* v. *Hazelton* (6).

In all these cases it was held that the retention of the deed after its signing and sealing by the grantor did not show that the execution was defective for want of delivery even in the case where the fact of its existence had never up to the grantor's death been communicated to the parties claiming under it. In *Fletcher* v. *Fletcher* (3), Wigram V.C. says:

> The case of *Doe* v. *Knight* (1) shows that if an instrument is sealed and delivered the retainer of it by the party in his possession does not prevent it from taking effect. No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back but such is unquestionably the law.

In *Xenos* v. *Wickham* (4) Mr. Justice Blackburn in delivering his opinion to the House of Lords thus states the law:

> No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. * * It is clear on the authorities as well as on the reason of the thing that the deed is

(1) 5 B. & C. 671.
(2) 6 Sim. 31.
(3) 4 Hare 67.
(4) L. R. 2 H. L. 296.
(5) 3 Hare 532.
(6) 9 Allen (Mass.) 102.

binding on the obligor before it comes into the custody of the obligee, nay before he even knows of it.

In the same case Lord Cranworth says:

In the first place the efficacy of a deed depends on it being sealed and delivered by the maker of it, not on his ceasing to retain possession of it. This as a general proposition of law cannot be controverted.

In *Moore* v. *Hazelton* (1) the court says:

Execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer a delivery.

Although these authorities are not referred to in the judgment under appeal I assume they were cited in the court below, and that their decision holding the deed inoperative proceeded on the ground that the facts in evidence rebutted the presumption in favour of the due execution of the instrument. These facts are said to consist not only in the retention of the deed by the grantor, but also in the fact that it comprised all the property which he possessed, and that it professed to dispose of this property immediately and that inconsistently with its tenor the grantor retained the possession and enjoyment of his property until his death. No case is referred to as warranting the proposition that this is sufficient to control the effect of the deed, and in the absence of authority I see nothing to authorise it. The circumstance of non-communication to those taking benefits under the deed (if we are to assume such to have been the fact), is shown by the cases referred to to be immaterial, and it may well be that the intestate thought fit to trust to the good feeling and affection of his sons not to disturb him in his enjoyment. At all events we could not disregard a rule of law sanctioned by such high authority and in so many reported decisions without making a precedent which we should be compelled to follow in other cases.

(1) 9 Allen (Mass.) 102.

1899

ZWICKER v. ZWICKER.

The Chief Justice.

When Joseph Zwicker died in 1894 this deed came into the possession of his sons, and they, including the respondent, agreed to act upon it, and did act upon it by placing it upon the county registry of deeds in order to do which they had of course to treat it as a valid and subsisting instrument by proving it in the manner required by the law. The respondent, moreover, contributed his share of the expense of registration.

Further, it is out of the question to say that there was no communication of the deed to the sons during the grantor's lifetime. One of the documents sought to be recovered is the bond already mentioned dated the 2nd of October, 1884. By this instrument the three sons became bound to pay certain sums to three grandsons of the intestate named Ernst, sons of two of his daughters, both of whom were dead. These sums were duly paid on the testator's decease. To this bond there is appended a memorandum also under seal of the intestate himself as follows:

All the real estate already divided amongst my three sons Eri Zwicker, Ezra Zwicker and Edward Zwicker, to stand and remain as at present provided. The remainder of my real estate to be divided amongst my three aforesaid sons as they shall agree amongst themselves, after my death. My said three sons to divide equally amongst themselves all notes, judgments, mortgages or written obligations to pay money as remain after the death of my wife Barbara Zwicker.

All the household furniture, live stock and farming implements to be equally divided between my two sons, Edward Zwicker and Ezra Zwicker after the death of my wife, Barbara Zwicker.

(Sgd.) JOSEPH ZWICKER (L.S.)

Witness :—

(Sgd.) GEORGE WILSON.

The division referred to in this memorandum must be taken to have reference to the division effected by the deed as no other division is suggested.

As the testator lived for some ten years after this and retained the bond which upon his death the sons

were compelled to implement (as they did), the arrangement then come to, having the deed for its basis, was a clear recognition of the distribution effected by the deed and to disturb it now would be most inequitable and unjust.

The testator's widow died soon after him.

Upon receiving the several sums mentioned in the bond the three grandsons released and discharged the estate from all claims. It is not shown or even alleged that there are any debts due by the estate. The only persons therefore beneficially interested were the three sons, the appellants and the respondent. Soon after their mother's death, which took place in 1895, they agreed to a distribution of the personal property, and it was accordingly divided. There can be no doubt of this agreement having been come to and having been acted upon. The judgment of Mr. Justice Henry who tried the case without a jury contains the following passage:

> Notwithstanding the transaction by which it clearly seems to me that the plaintiff previous to his becoming administrator of his father's estate, agreed with his two brothers, who were the only persons interested in the estate, to act upon the deed and divide the property in accordance with its terms, I feel bound to hold that the plaintiff in his capacity as administrator is entitled to recover.

After this the respondent took out letters of administration, the expenses of which were paid in equal proportions by the three brothers, and now by this action seeks to repudiate the arrangement to which he was a party for the division of the personal property as well as the deed.

The learned judge who tried the case thought he was not bound in his character of administrator by what he had been a party to and had acquiesced in before he administered. Two cases are referred to in his judgment for this proposition; they are, however, easily distinguishable. They were both cases at com-

1899

ZWICKER v. ZWICKER.

The Chief Justice.

mon law in which it was held that the acts of an administrator before the grant did not affect him. Here, however, all equitable considerations are open, and it is manifest that there are no persons beneficially interested but the three parties to the family arrangement, of whom the respondent was one. Is it then to be said that the respondent is to be at liberty to break up this arrangement in order that he may as administrator get into his hands property which upon the most ordinary principles of equity he might be called on to return the next day in another action instituted to compel him to carry out his agreement. Surely this would be encouraging a circuity of litigation which we are told it is the policy of courts of justice to prevent.

I am of opinion that the appeal must be allowed with costs and the action dismissed also with costs.

Appeal allowed with costs.

Solicitor for the appellants: *A. K. McLean.*

Solicitors for the respondent: *Wade & Paton.*

THE ATLAS ASSURANCE COMPANY (DEFENDANT)..... } APPELLANT;

1899

*Feb. 23, 24.

*June 5.

AND

FERGUSON BROWNELL AND JAMES W. BROWNELL (PLAINTIFFS..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire insurance—Condition in policy—Time limit for submitting particulars of loss—Condition precedent—Waiver—Authority of agent.

A condition in a policy of insurance against fire provided that the assured "is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits."

Held, following *Employers' Liability Assurance Corporation* v. *Taylor* (29 Can. S. C. R. 104), that compliance with this provision was a condition precedent to an action on the policy.

Held, also, that a person not an officer of the insurance company, appointed to investigate the loss and report thereon to the company, was not an agent of the latter having authority to waive compliance with such condition, and if he had such authority he could not, after the fifteen days had expired, extend the time without express authority from his principal.

Held, further, that compliance with the condition could not in any case be waived unless such waiver was clearly expressed in writing signed by the company's manager in Montreal, as required by another condition in the policy.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the plaintiff.

The questions to be decided on the appeal are indicated in the above head-note, and the material facts

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

(1) 31 N. S. Rep. 348.

1899

THE ATLAS ASSURANCE COMPANY v. BROWNELL.

will be found in the judgment of the court delivered by Mr. Justice Sedgewick.

Drysdale Q.C. and *Currie Q.C.* for the appellant. The scope of an agent's authority is always a question of fact for the jury, and in the face of the evidence the court cannot supply the necessary finding that Jarvis had authority to waive any condition. Even if the jury had found that he had authority, that finding would of necessity be set aside, as the evidence is all the other way. *Mason* v. *Hartford Fire Ins Co.* (1); *Acey* v. *Fernie* (2). The plaintiff or his agent held the policy, and must be presumed to have known the time within which proofs of loss should have been delivered. *Accident Ins. Co.* v. *Young* (3). The furnishing of a blank to assured, or the filling of it up by adjuster or agent for the company, is not to be considered as a waiver of the rights of the company; *Caldwell* v. *Stadacona Fire and Life Ins. Co.* (4). The evidence does not support the second finding of the jury that Jarvis "by his acts, words and conduct," caused or induced the plaintiff to delay sending proofs of loss. Estoppel is not pleaded nor relied upon, and no evidence was given in support of it. This case is governed by *Logan* v. *Commercial Union Ins. Co.* (5). See also *Hiddle* v. *National Fire and Marine Ins. Co. of New Zealand* (6), and *Employers' Liability Assurance Corporation* v. *Taylor* (7).

It is clear that better particulars could have been given. The plaintiffs could have obtained invoices within a week after the loss; and the business was a new one carried on for only one year before the fire. The burden is upon the respondents to show that they

(1) 37 U. C. Q. B. 437.
(2) 7 M. & W. 151.
(3) 20 Can. S. C. R. 280.
(4) 11 Can. S. C. R. 212.
(5) 13 Can. S. C. R. 270.
(6) [1896] A. C. 372.
(7) 29 Can. S. C. R. 104.

could not furnish complete proofs within the fifteen days as the contract makes this a condition precedent to recovery, and they offer no excuse for delay. *Nixon* v. *Queen Ins. Co.* (1); *Hiddle* v. *National Fire and Marine Ins Co. of New Zealand* (2).

Dickie Q.C. and *Congdon* for the respondents. The defence did not allege that the statutory declaration had not been furnished within fifteen days, but only that the plaintiff delivered to the company as proofs of loss an account and statutory declaration which was fraudulent and contained false statements to the knowledge of the plaintiff, etc. At the close of the case, after both addresses to the jury, counsel for the defendant applied for leave to amend the defence by setting up that the declaration was not furnished within fifteen days at all. Such an amendment should not have been allowed at so late a stage of the proceedings, and there was nothing before the court justifying the allowance thereof; the defendant abandoned the amendment and never put any plea upon the record in pursuance thereof. Even if the request of the counsel can be deemed the plea upon the record, it is demurrable and shews no defence to the action. The condition has not been proved and does not appear upon the record. The policy shews the requirement as to statutory proof to be a mere direction and not a condition.

As particular an account of the loss as the nature of the case permitted was delivered by the plaintiff within the meaning of the policy. The term "full particulars" must mean the best particulars the assured can reasonably give; and the condition is not to be construed with strictness; *Mason* v. *Harvey* (3); Porter on Insurance, 3 ed. p. 206; May on Insurance, 3 ed. par. 475. The

(1) 23 Can. S. C. R. 26.
(2) [1896] A. C. 372.
(3) 8 Ex. 819.

1899

THE ATLAS ASSURANCE COMPANY v. BROWNELL.

letter and telegram sent at the instance of assured were notice to the company, and contained as particular an account of the loss as the nature of the case permitted: (*a*) time of fire; (*b*) that the loss was total; (*c*) that there was $500 other insurance on store; (*d*) that the fire was probably of incendiary origin; (*e*) that stock was worth $3,000 and over; (*f*) particulars as to state of premises before fire. Books, invoices and drafts were furnished to Jarvis within the fifteen days, and all information the nature of the case then permitted was submitted to him, and he expressed himself as satisfied. Jarvis waived compliance with the direction as to time for putting in the proofs of loss, and the company is estopped by matter *in pais* from setting up non-compliance; (*a*) by stating that the proofs of loss should be sent in within thirty days, and by his acts leading plaintiffs to rely on such statement; (*b*) by appointing a time to meet plaintiffs and prepare proofs of loss which was later than fifteen days after the fire; (*c*) by post card and by letter. The finding of the jury on this phase of the case cannot be disturbed. *Caldwell* v. *Stadacona Fire and Life Ins. Co.* (1), per Ritchie C.J. at pages 224-5.

The court below erred in treating this as a waiver, but should have held the defendants estopped by matter *in pais* from setting up non-compliance with the condition; *Western Assurance Co.* v. *Doull* (2); *Searle* v. *Dwelling House Ins. Co.* (3); Beach on Insurance, sec. 1,240; *Jennings* v. *Metropolitan Life Ins. Co.* (4), per Allen J. at p. 65; *Union Mutual Ins. Co.* v. *Wilkinson* (5). Jarvis was acting within his authority as agent and could by his language and acts waive the condition in question and estop the company from setting it up,

(1) 11 Can. S. C. R. 212.
(2) 12 Can. S. C. R. 446.
(3) 152 Mass. 263.
(4) 148 Mass. 61.
(5) 13 Wall. (U. S.) 222.

and the company was so satisfied to adopt his acts that until the trial was about concluded the issue as to delivery of proofs of loss was not raised, and no other attack made on them except that they were fraudulent and false. See also *Stoneham* v. *Ocean, Railway & General Accident Ins. Co.* (1); *Manufacturers Accident Ins. Co.* v. *Pudsey* (2); *Carroll* v. *Charter Oak Ins. Co* (3); *Travellers Ins. Co.* v. *Edwards* (4).

SEDGEWICK J.—The plaintiff Ferguson Brownell, a general merchant, carrying on business at Northport, Nova Scotia, had insured his stock in trade to the extent of $2,000, in the appellant company. Fire having occurred the claim was disputed upon several grounds, and the case having been tried before Mr. Justice Townshend and a jury there was judgment for the plaintiffs, which was sustained by the court *en banc*, Mr. Justice Henry dissenting. The policy was in the usual form with conditions indorsed and made part of the policy. The thirteenth condition was in part as follows:

(*b*) He is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits.

(*d*) He is, in support of his claim, if required, and if practicable, to produce books of account and furnish invoices, plans, specifications and other vouchers; to furnish copies of the written portions of all policies; and to exhibit for examination all that remains of the property which was covered by the policy, which property, if moveable, the insured shall, by separating the damaged from the undamaged and otherwise, assort and arrange in as good order as the circumstances of the case will allow, so as to facilitate the taking of an account and estimating the value of the same.

Another condition was:

6. No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing, signed by the company's manager in Montreal.

(1) 19 Q. B. D. 237.
(2) 27 Can. S. C. R. 374.
(3) 40 Bab. N. Y. 292.
(4) 122 U. S. 457.

1899

THE ATLAS ASSURANCE COMPANY v. BROWNELL.

Sedgewick J.

It is admitted that the plaintiff did not deliver to the company or its agent within fifteen days after the fire as particular an account of the loss as the nature of the case permitted, as required by the condition above set out; and the main question upon this appeal is as to whether this condition was waived by the company so as to enable the plaintiff to recover.

The plaintiffs rely upon the acts and statements of one Charles E. L. Jarvis, who after the fire was sent by the company to report on the fire and the amount of the loss, as sufficient proof of waiver on the part of the company. And the question was put by the learned trial judge to the jury:

> Did Charles E. Jarvis by his acts, words or conduct, cause or induce the plaintiff to delay in sending to the company or its agent the necessary proofs of loss within the fifteen days expressed in the condition?

and the jury answered "Yes."

There was no finding of the jury that Jarvis had any authority from the company so to bind it, but inasmuch as the trial judge entered judgment for the plaintiff although at the same time expressing very grave doubts as to whether Jarvis occupied such a position towards the company as to make his conduct and statements binding upon it by estoppel, it must be assumed for the purpose of this appeal that the learned judge found that he had such authority. The authority of Mr. Jarvis and his relation to the defendant company will appear from the evidence. (It must be remembered that the plaintiff applied for insurance to Mr. Logan, a local agent for the company at Amherst, Nova Scotia; that he had no power to issue a policy but only to solicit therefor; that the policy issued from and was sent to the plaintiff by

the provincial head office of the company at Halifax.) Mr. Jarvis's evidence is as follows:

Reside at St. John, N.B. I am a fire insurance agent and fire insurance adjuster. I have been thirty years in fire insurance, also in marine insurance. I am not an officer of the Atlas Insurance Company. I have done a good deal of adjusting of fire losses for that company. I get no regular salary for it, but I am paid the particular bill I put in in each case I adjust. In Nova Scotia Mr. Bell pays me. I have no authority of my own motion to go and adjust. I went at the request of Alfred J. Bell to adjust the loss in this case. Adjusting is to ascertain the amount of the loss from the evidence obtainable and to report on the circumstances of the loss. I am not appointed until the fire takes place. I have nothing to do with receiving the notice of loss or putting in the proofs, no authority or instruction in that respect at all. I did not represent myself to plaintiff as having any such authority.

This evidence is not disputed. The plaintiffs' case is that Jarvis told him that he had thirty days within which to deliver his proofs of loss, whereas the condition requires the proofs to be in within fifteen days.

I told him (he swears), the people I traded with where he would get the invoices. He said to send and get others as soon as I could as it should be made out within thirty days—the proofs of loss (objected.) He said the proofs of loss should be in on or within thirty days.

Jarvis swears,

I did not tell him he had thirty days to put proofs in. If he had asked I would have told him correctly as to the time. I did not purport to waive the time and had no authority to do it nor did I do so.

This is the only evidence of waiver relied on. Jarvis never had the policy in his possession and never saw it. It was at the very time spoken of either in the possession of the plaintiff or of his solicitor, and he, the plaintiff, had a much better opportunity of knowing what its contents were than Jarvis. The jury, however, upon this evidence, found, as is usual in such cases, that Jarvis induced the plaintiff to delay sending in his proofs within the stipulated time.

It is clear from the evidence that at the time this alleged conversation between Jarvis and the plaintiff

1899

THE ATLAS ASSURANCE COMPANY v. BROWNELL.

Sedgewick J.

took place the fifteen days had expired and that the policy had then become void by reason of failure to produce the proofs of loss within the stipulated time. These are, I think, all the facts bearing upon the case so far as necessary to determine this appeal.

I am of opinion that whatever Jarvis's authority may have been, and whether under given circumstances he might not have had power to extend the time within which the proofs of loss might be given notwithstanding the fifteen days condition in the policy, yet inasmuch as fifteen days after the fire the policy had become absolutely forfeited by reason of failure of delivery of the proofs nothing that Jarvis could thereafter do without the express authority of the company could reinstate it and revive the company's liability upon it.

I am further of opinion that the evidence does not dislcose any facts from which it can be inferred that the company waived the condition. At the time of the conversation relied on twenty-seven days after the fire the policy as I have said had already become forfeited. Nothing within those twenty-seven days that Jarvis had said or done could have induced the plaintiff to alter his position in any way, nor so far as I can see was his position altered in consequence of what he says Jarvis told him, nor does he even allege that his position was in any way changed. In addition to that besides assuming the plaintiff's statement to be true he merely asked Jarvis for his opinion, which it must be presumed he honestly gave, and that he believed the contents of the policy was as he stated. Had the policy been in Jarvis's possession, and had he been the only one capable of giving the information asked for there might be something to be said in favour of the plaintiffs' view, but all the time it was in his own possession or in that of his solicitor

1899

THE ATLAS ASSURANCE COMPANY v. BROWNELL.

Sedgewick J.

as he knew, and the proper method to ascertain what these stipulations were was to peruse the policy itself or to inquire from its custodian what they were. I cannot see that Jarvis's answer to his question, assuming it to have been as stated, was anything more than if his own solicitor had made it, or even any stranger.

Nor do I think that Jarvis had any authority, whether within or beyond the fifteen days, by any act or representation of his, to extend the time limit in question. I am inclined to think that the name which he gives to his profession, namely that of an insurance adjuster, is somewhat inaccurate. To adjust an insurance loss in my view implies a dealing between two or more parties, a settlement or determination of something in dispute, a fixing of an amount in respect of which there has been a controversy, but that, it would appear from the evidence, was no part of Mr. Jarvis's duty or within the scope of his authority. He was simply appointed to make inquiries. investigate and report to his employers what in his view was the amount of loss sustained. Had he the larger power to which I have just referred, then, as already stated, I am not prepared to determine the extent of his implied authority to bind the company so far as the making up and delivery of proofs of loss are concerned. But in the present case the evidence is that no such authority was possessed by him, and we must take his duties and powers to be no greater, no less, than the evidence shows them to have been.

It seems to me further that this case is settled by the decision of this court in *Logan* v. *The Commercial Ins. Co.* (1). Condition twenty of the policy in that case was as follows:

(1) 13 Can. S. C. R. 270.

1899

THE ATLAS ASSURANCE COMPANY v. BROWNELL.

Sedgewick J.

No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing, signed by the company's manager in Montreal,

the same condition as in the present case. There the waiver was of the condition in respect to the certificate of two magistrates most contiguous to the place of the fire. There the evidence of the authority of Salter, the Halifax agent of the company, was much stronger than in the present case, and the jury found against the company. Upon appeal to this court the learned Chief Justice of this court at page 276 says as follows:

I am of opinion that, irrespective altogether of the requirement of the 19th condition that any waiver should be in writing, there was no evidence showing that the stipulations as to the magistrate's certificate required by the 14th condition had been, in fact, waived in such a way as to bind the respondents, even if a verbal waiver had not been provided against. Salter, as agent, apart from the authority expressly conferred on him to waive in writing, had no power so to bind the respondents, and granting that the plaintiff's account of what passed at the interview at Halifax was, as the jury found, the true one, what was then said could not in any way have precluded the company from setting up the want of the certificate as a defence, simply for the reason given that Salter was exceeding his powers in assuming (even if the plaintiff's evidence is to be so construed) to dispense with it. Further, even if there could have been any doubt of this in the absence of the 19th condition, that condition clearly excludes any authority in the agent to waive otherwise than according to its terms. Lastly, there was not the slightest evidence of any waiver of the 19th condition itself, and moreover, it is manifest that nothing Salter, the agent, might have said, could have had the effect of enlarging the limited power to waive which the company had thought fit to impose upon him.

The judgment of the Supreme Court in *Western Assurance Co.* v. *Doull* (1), was to the same effect, Mr. Justice Henry in his judgment pointing out that any waiver would have to be evidenced by writing according to the terms of the condition.

(1) 12 Can. S. C. R. 446.

1899

THE ATLAS ASSURANCE COMPANY v. BROWNELL.

Sedgewick J.

The only point remaining is that the condition requiring proofs of loss within fifteen days is not a condition precedent. This question was fully considered by this court in the recent case of *The Employers Liability Co.* v. *Taylor* (1), where most of the authorities upon the question were referred to. In that case it was held that a condition indorsed upon the policy to the effect that the assured was within twenty days after the accident to give notice to the company was held to be a condition precedent. In the present case the argument is much stronger in that view. The condition is,

> Any person entitled to make a claim under this policy is to observe the following directions. * * * He is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits.

That, it seems to me, is equivalent to a stipulation that before any one can make any demand against the company or sue the company under the policy he must deliver the proofs within the fifteen days. To hold otherwise would be in effect to overrule the decision in the case referred to as well as to disturb the jurisprudence of both England and Canada upon this point as it has existed for many years.

I am of opinion that the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Hector McInnes.*

Solicitor for the respondents: *William T. Pipes.*

---

(1) 29 Can. S. C. R. 104.

1899

*Feb. 24.

*June 5.

JOSIAH WILLIAMS (PLAINTIFF).....APPELLANT;

AND

WILLIAM W. BARTLING AND JAMES C. BARTLING (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Matters of fact—Finding of Jury.

W. was working on a vessel in port when a boom had to be taken out of the crutch in which it rested and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced which the master undertook to do. When the boom was taken out it fell to the deck and W. was injured. In an action against the owners for damages the jury found that the fall of the boom was owing to the said rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants

Held, affirming the judgment of the Supreme Court of Nova Scotia (30 N. S. Rep. 548) Gwynne J. dissenting, that the first part of the finding did not necessarily mean that the rigging had never been secured, or that if secured originally it had become insecure by negligence of defendants, and the jury having negatived negligence their finding should not be ignored.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the defendants.

The action was brought to recover damages for injury to plaintiff while working on defendants' vessel in Halifax Harbour. The facts constituting the alleged negligence by which the injury was caused and the finding of the jury thereon are sufficiently

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

(1) 30 N. S. Rep. 548.

stated in the above head note and in the judgment of Mr. Justice King on this appeal.

1899

WILLIAMS v. BARTLING.

W. B. A. Ritchie Q.C. and *King Q.C.* for the appellant. *Drysdale Q.C.* for the respondents.

GWYNNE J., dissenting—This case presents to my mind a painful instance of the miscarriage of justice and of the injury which is occasionally inflicted upon litigants by the law's delay.

In the month of May, 1892, the plaintiff sustained a very serious injury resulting in the loss of a leg while rendering service as a ship carpenter to the defendants on a schooner of theirs.

The cause of action is thus stated in the statement of claim.

2. On the 6th day of May, 1892, the plaintiff was in the employ of one Young who was employed by the captain of the said schooner on behalf of the defendants to make such repairs in and upon the said schooner *Topaz* then lying at the port of Halifax as might be required and pointed out by said captain, and plaintiff had by said Young's instructions proceeded to the deck of said schooner for the purpose of doing any work that might be required of him by the captain of said vessel.

3. In order to do said work, the plaintiff, under the direction of the said captain, was obliged to pass under, around and upon the boom of the said schooner and to remain there for some time in order to remove the band of said boom and repair the same, and it was necessary and the duty of the defendants, and the said captain undertook on their behalf, properly to secure the said boom, and then to turn the crutch of the same aside so as to expose the said band and the defects which they desired the plaintiff to repair, and the captain having represented to the plaintiff that the said boom had been properly secured and that all was in readiness for the said work to go forward, the plaintiff at the request of the said captain and under his direction proceeded to the said boom to repair the band thereof.

4. Owing to the negligence of the servants of the defendants in discharging their said duty in wholly neglecting and omitting to secure the said boom, or in negligently, improperly and insufficiently securing the same, and in negligently, wrongfully and improperly swinging said boom to one side while the same remained improperly

1899

WILLIAMS v. BARTLING.

Gwynne J.

and insufficiently secured, and while the plaintiff in the discharge of his duty was astride the same the plaintiff was precipitated upon the deck of the said schooner and the said boom fell upon the plaintiff with great violence and broke and crushed his leg and crushed and paralized his left arm and shoulder and effected internal and other injuries.

The defendants in their statements of defence plead as follows:

1. They do not admit that they are owners of the schooner *Topaz*.

2. They deny that it was their duty to secure said boom.

3. They deny that the captain undertook on their behalf or on behalf of either of them or at all to secure the said boom.

4. They deny that the captain represented to the plaintiff that the said boom had been properly secured.

5. They deny that they or any of their servants swung said boom while the plaintiff was astride the same or while he was engaged on said vessel.

6. They aver and plead that the said boom was properly and sufficiently secured when the plaintiff began to work at the same, and that if the said boom afterwards became insecure it was made so by the plaintiff and not by the defendants or any of their servants.

7. They aver and plead that the plaintiff by his own negligent acts in loosening the topping lift ropes contributed to the accident, and lastly

8. They aver and plead that the plaintiff was a workman and was engaged as a fellow servant in one common service and employment with certain of defendants' servants who were also workmen and competent to do that work and the said injuries, if caused by negligence of any person or persons for whose negligence the defendants would be answerable (all of which is denied) were caused by defendants' said servants while they and the plaintiff were such fellow

servants and engaged in such common service and employment, and in course thereof and not otherwise without any personal negligence or interference on the part of the defendants.

Issue was joined on these pleas and the whole material question raised by such issue and which in fact the parties went down to try was: First, whether or not the defendants were under any obligation of duty arising either from the nature of the work on which the plaintiff was engaged or from express contract with the captain of the vessel as the defendants' agent to secure the boom; and secondly, whether the injury sustained by the plaintiff was caused by the negligence of the defendants as charged in the plaintiff's statement of claim *or* on the contrary by his own negligence as charged by the defendants in their statement of defence.

The case went down for trial first in 1893 when the learned trial judge took the case from the jury and rendered judgment for the defendants. The Supreme Court of Nova Scotia sustained the judgment, but upon appeal to this court it was reversed and a new trial ordered. Accordingly the case was tried a second time in 1895 when a verdict was rendered for the plaintiff with $2,800 damages, but this verdict was set aside by the Supreme Court of Nova Scotia on the alleged ground of misdirection and the exclusion of certain questions from the jury and a new trial was again ordered. The third trial proved abortive by reason of the jury being unable to agree and the case was brought down to trial for the fourth time in 1897. It is against the result of this trial, namely a judgment in favour of the defendants rendered by the Supreme Court of Nova Scotia, the Chief Justice of that court dissenting that this appeal is taken.

1899

WILLIAMS v. BARTLING.

Gwynne J.

It was not disputed that the defendants were owners of the schooner and there was no evidence in support of the allegations contained in the eighth paragraph of the defendants' statement of defence, and in fact the sole contestation between the parties upon each of the trials was: First, whether as the defendants had denied in their statement of defence any duty or obligation lay upon the defendants to secure the boom; and secondly, whether the accident had happened as alleged by the plaintiff by reason of the negligence of the defendants or their servants in not properly securing the boom upon which the plaintiff was engaged in working, which the plaintiff alleges it was the duty of the defendants to do, and which, as he also alleges they, through the master of the schooner as their agent, expressly undertook to do, and assured the plaintiff was effectually done when he went to work on the boom *or* in negligently, wrongfully and improperly swinging the said boom on one side whilst the same remained improperly and insufficiently secured and while the plaintiff was engaged in working upon it *or* on the contrary was caused by the plaintiff's own negligence as alleged by the defendants in the sixth and seventh paragraphs of their statement of defence.

Now by the plaintiffs uncontradicted evidence it appeared that he was sent by his employer, one Young, a master ship carpenter, to do what carpenter work the captain should require to be done on the schooner —that the first thing pointed out by the captain to the plaintiff was the band on the main boom which the captain said must be taken off—the plaintiff observed that there was no topping lift aloft and the boom was resting upon a crutch alone, in order to take the band off the boom it had to be taken out the crutch, and for that purpose it was a necessity that the boom should

1899

WILLIAMS v. BARTLING.

Gwynne J.

be secured by the topping lift. The captain said that this should be done so soon as he should return from Richmond where he was going to discharge his cargo and he then said to his mate "when the carpenter takes off that band you assist him and see the boom secured."

The importance and in fact the absolute necessity of the topping lift being made secure to the boom arose from the fact established by undisputed evidence that when the boom should be taken out of the crutch it would be held up by the topping lift alone, and if that should not be securely fastened, the boom as soon as the crutch should be removed must fall upon the deck, and on the contrary that the boom could not fall if the topping lift should be properly fastened.

The plaintiff further said that on the morning of the 6th May, 1892, while he was doing other repairs upon the vessel as required by the captain, the latter said to him "carpenter you have forgotten the band" to which the plaintiff replied "no I have not forgotten the band but you have forgotten to secure the boom" whereupon the captain said "is not the topping lift aloft," and on the plaintiff answering "no" the captain addressing one Willis, a rigger employed on the vessel, said "why don't you put up that topping lift and secure the boom," whereupon Willis and some others proceeded to put up the topping lift and had it up at about 11 o'clock, and then the same persons proceeded to unbend the mainsail in taking down which two or three men were working on the boom. This work was completed about one o'clock and before the plaintiff went to work on the boom at all. The plaintiff also said that while taking his dinner on the vessel he asked the captain if the boom was secured and that he said it was, with all new gear, and that the plaintiff need not be afraid, whereupon the captain

1899

WILLIAMS v. BARTLING.

Gwynne J.

went ashore after having given directions to the mate to assist the plaintiff.

The evidence as so far extracted was undisputed and having regard to the nature of the work required to be done, namely the removal of the band from the boom, and to the necessity, established by the evidence in order to the performance of that work, that the boom should be removed from resting on the crutch and should depend for its sole support so as to prevent its falling and injuring the plaintiff, upon the topping lift being securely fastened to it, it cannot, in my opinion, admit of a doubt that a duty and obligation rested on the defendants, as well from the nature of the service required to be rendered by the plaintiff as from the express undertaking and assurance of the captain to take care that the boom should have been so fastened, and that the duration of such duty and obligation was co-extensive with the period during which the plaintiff should be engaged in the performance of his work (undertaken upon the faith of the boom being so secured) and exposed to danger in the event of its proving not to be securely fastened, to hold that any less duty rested upon the defendants would be utterly illusory and would be in effect to hold as the defendants in their statement of defence plead that no duty to the plaintiff to secure the boom rested upon them.

The plaintiff having gone to work on the boom on the assurance of the captain that it was secured and that plaintiff had nothing to fear gives this account of the accident which befell him.

There was, he says, a mat over the band of the boom which the captain had asked him not to destroy. He got on the boom to take the mat off and having loosened it he was taking off the band when, as he says, the mate who was, by the captain's directions, assisting

1899

WILLIAMS v. BARTLING.

Gwynne J.

him to take off the band, cast off the crutch tackle and instantly the boom fell on the plaintiff and crushed his leg from the knee down; the guy, he said, had to be cast off to let the crutch out to enable the plaintiff to go on with his work, and the mate said "we will have to cast off this guy" to which the plaintiff says he did not object. The mate said that the plaintiff told him to unhook the crutch tackle which he did, but this variation in the evidence is immaterial for the evidence is conclusive that if the topping lift had been properly secured the boom could not have fallen. It thus appears that within about two hours after the topping lift was put up and almost immediately after the defendants' riggers had ceased working on the boom in bending down the mainsail and upon the very instant of the removal of the boom from the crutch to provide against any damage arising from which the boom was required to be secured by the topping lift the accident happened, in short *eo instanti* of the topping lift being required to render the service for the purpose of rendering which it was put up it failed. The plaintiff throughout all the trials which have been had in this case has persistently contended that upon this evidence the defendants are responsible to the plaintiff for the injuries sustained by him as occasioned by the negligence of the defendants' servants, such negligence consisting in the inefficient manner in which the topping lift served the purpose for which, in discharge of a duty due from the defendants to the plaintiff it was put up.

The defendants on the contrary besides denying that they owed any duty to the plaintiff to secure the boom, insist that the topping lift was properly secured and that it became insecure afterwards either as pleaded by the defendants in their statement of defence by some careless conduct of the plaintiff himself or

1899

WILLIAMS v. BARTLING.

Gwynne J.

else from some other unknown and unsuggested cause for which the defendants contend that they cannot be held to be responsible As to the topping lift having been secured the defendants called one Allan who said that he was the man who fastened the topping lift to the cleat. He, there is no doubt, said that he had fastened it properly—that it could not have become unfastened unless it had been interfered with after he left it. The topping lift he said, was a new one, of wire rope, he could not say with certainty whether the sheet was stretched before putting it on, but he said, "when I fasten a piece of rope on a vessel I know I do right. I hauled the sheet taut and made it fast on the cleat," and he is one of the many witnesses who testified that "the boom could not fall even if the crutch were removed if the topping lift had been properly secured." Now the only interference with the boom after the topping lift was put up is shewn by the evidence to have been caused by those same riggers who had put up the topping lift and who continued to be engaged for about two hours more in working on the boom in bending down the mainsail. There does not appear in the case any evidence to justify the conclusion that the plaintiff by any act of his, as pleaded by the defendants, had caused, or contributed to the causing of the accident, and there does not appear to have been any one upon the vessel but the plaintiff and the servants of the defendants who were engaged in putting up the topping lift and rigging the vessel.

Willis who was in charge over the men so employed said that he looked at the cleat immediately after the accident and that the rope was entirely clear of it and the boom was down on the starboard side. *He did not examine the cleat, nor the way the rope was belayed around it*; he said he did not need to look at that

because he goes upon what he believes his man did. There is, he said, a proper way of taking a turn "in the cleat" and added "I can't say it was properly belayed. If not properly fastened the fall would run around the cleat when the strain came suddenly upon it." Now under these circumstances and notwithstanding the evidence of the witness Allan who said that he was the one who had put up the topping lift the fact of its failure, upon the very instant of its being called upon to serve the purpose for which it was required to be securely fastened to the boom, coupled with the fact of there having been no explanation offered in evidence reasonably to account for its becoming unfastened without fault of the defendants if it had been properly secured, and the undisputed testimony that if it had been properly secured the accident could not have happened, seem to afford conclusive proof that the topping lift never had been properly fastened—that seems to be the natural and rational inference to draw from the evidence. The suggestion that the topping lift could have become unfastened in the presence of the defendants' servants employed on the vessel from some unknown cause within about two hours after it was properly fastened, and that therefore the defendants are exculpated appears to be quite illusory.

There cannot, I think, be entertained a doubt that the defendants owed a duty to the plaintiff to secure the topping lift to the boom in such a manner as to prevent as far as practicable the occurrence of its falling when the crutch should be removed which was the event against the consequences of which the plaintiff required that the boom should be secured. That it was practicable so to fasten it was not denied, and that it was not done is beyond doubt. It was argued that to impose such a duty on the defendants would

1899

WILLIAMS v. BARTLING.

Gwynne J.

be to make them insurers of the plaintiff against all damage that might be occasioned to him by the falling of the boom. Well there is no hardship in holding that they are insurers against damage occasioned by the non-execution or the imperfect execution by them of a work which was capable of being made practically effective, and which it was the duty of the defendants to have made as effective as practicable. It could only be during the period that the plaintiff was working on the boom that they owed to him the duty of keeping it secured from falling; except while so employed the defendants owed the plaintiff no such duty, nor was it of any importance to him whether the boom was so secured, but if it was not properly secured during that period and by reason thereof it fell and did injury to the plaintiff then the defendants have failed to discharge the duty they owed the plaintiff and so are liable to him in this action. This must be so unless the defendants are entitled to succeed upon the issue joined upon the first paragraph of their statement of defence namely, that they owed no duty whatever to the plaintiff to secure the boom.

The learned trial judge submitted certain questions to the jury, some of which they answered, some they did not. It is only necessary to refer to the three following:

1. What was the proximate cause of the injury?
2. Was it occasioned by the negligent act or omission of the defendants or their servants?
3. Could the plaintiff by the exercise of ordinary care have avoided the *consequence* of the accident?

To the first question the jury answered as follows:

The falling of the boom owing to the topping lift sheet not being secured.

To the second they answered "no," and to the third "yes."

1899

WILLIAMS v. BARTLING.

Gwynne J.

The natural and reasonable construction of the above answer of the jury to the first question is that the jury were of opinion as the evidence as already pointed out fully warranted that the topping lift never had been properly secured. This appears also to have been the finding of the jury on the second trial. That it was not secured at the only time when it was of any importance that it should be secured is undisputed. It is now contended however that the jury in the recent trial having answered the second question in the negative must have meant that the defendants had properly secured the topping lift as stated by Allan, but that it had subsequently become unfastened by some unknown cause not constituting negligence of the defendants. Such a strained construction cannot be put upon the answers of the jury. It is not very intelligible how, the cause being unknown, there having been none in evidence the jury could intelligently say that it did not constitute negligence in the defendants; moreover such a construction put upon the answers of the jury implies that the jury have assumed to determine matters which they were not competent to decide, namely, that the defendants owed no duty to the plaintiff to keep the boom secured while he was working upon it, and that its not having been secure during that period constituted no negligence in the defendants. The difficulty which has arisen from the conflicting answers of the jury to the first and second questions is, I think, attributable to confusion in the minds of the jury both as to what was the duty which the defendants owed to the plaintiff and what constituted negligence in the discharge of such duty.

Then as to the third question. It is difficult to see what was meant by this question or upon what material the jury could have been expected intelligently to answer whether the plaintiff could, and in what man-

1899

WILLIAMS v. BARTLING.

Gwynne J.

ner have avoided the *consequence* of an accident which there was no evidence to justify the finding that he had either caused or contributed to the causing of.

Upon the whole for the above reasons and for those given in the judgment of the learned Chief Justice of the Supreme Court of Nova Scotia in his dissenting judgment I am of opinion that this appeal must be allowed and the judgment of the Supreme Court of Nova Scotia set aside with costs and that a rule for another trial, without costs, must be ordered to issue in the court below.

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

KING J.—This is an action to recover damages for injuries sustained by the plaintiff while working on board a vessel owned and managed by defendants. The vessel was lying in the port of Halifax and work was being done on her spars and rigging. The defendants employed a master carpenter to do the carpenter work who sent the plaintiff with others on board with instructions to do such work as they might be directed by the master of the vessel to do. A master rigger was also employed, and he also sent several men aboard with the like instructions. Amongst the things which the master of the vessel required of the plaintiff was the removal of an iron band from near the outer end of the main boom. In order to the doing of this it was considered by the plaintiff necessary that the boom should be taken out of a crutch in which it was resting for support. When the plaintiff was directed by the master to do this work he pointed out to the latter that it could not then be safely attempted as the topping lift had been removed—the topping lift being that part of the rigging running from the mast head to the end of the boom and by which the boom

is ordinarily supported. The master acquiesced in this very obvious view and said that he would have a topping lift set up, and accordingly he directed the riggers to do it.

Allan, one of the riggers, says:

> We put a new topping lift on the main boom between 8 and 10 a.m. I made it fast to the cleat myself. I fastened the topping lift sheet properly. It could not have slipped or become unfastened had it not been interfered with after I left it. * * * The boom could not fall even if the crutch were removed if the topping lift had been properly secured. * * * I hauled the sheet fast and made it fast on the cleat.

The topping lift sheet thus referred to was a manilla rope attached to the lower end of the topping lift and which after passing through a sheave in the boom was led forward and made fast to a cleat upon the boom near the mast.

Several hours afterwards the riggers, assisted by the mate and one of the crew, unbent the mainsail. In this operation two or three men were at work on the main boom, but there is no evidence that the fastening of the topping lift sheet was disturbed.

Soon afterwards the plaintiff went to work upon the main boom to remove the band. When the boom was taken out of the crutch and its weight came upon the topping lift, this was found to be insufficiently secured, and the boom fell to the deck injuring the plaintiff. Upon the trial before Mr. Justice Townshend the jury found, in answer to questions, that the injury was caused by the falling of the boom owing to the topping lift sheet not being secured, but that this was not occasioned by the negligent act or omission of defendants or their servants. Judgment was thereupon entered for the defendants and was confirmed by the Supreme Court of Nova Scotia (per Graham and Ritchie JJ., Macdonald C.J. dissenting.)

1899

WILLIAMS v. BARTLING.

King J.

The reported notes of the charge of the learned trial judge are meagre, but, so far as the argument here went, its adequacy to the circumstances of the case is not impugned.

The defendants owed to the plaintiff a duty to take reasonable care to provide that the tackle and appliances upon which he would have to depend for his safety in doing defendants' work were maintained in a proper state and condition. In *Heaven* v. *Pender* (1) Cotton and Bowen, L. JJ. (p. 515) say as applied to the facts in that case:

> To these persons, (*i. e.* persons going to the vessel in dock for the purpose of repairing her,) the dock owner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used, that is in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they were employed.

The corresponding duty as between employer and employed is stated by Lord Herschell in *Smith* v. *Baker & Sons* (2) in these terms:

> It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

Reasonable care is matter of degree dependent upon the particular facts of each case, and is in all cases a question of fact, where there is any substantial evidence on the point at all. There is nothing in the evidence warranting a conclusion that the plaintiff was himself to attend to the securing of the tackle. The obligation, such as it was, was upon the defendants alone. The jury having found that the topping lift sheet was not secured, there was, so far, and in the result, a failure to insure that which was,

(1) 11 Q. B. D. 503. (2) [1891] A. C. 325.

or ought to have been the object of defendants' care. But that is not enough; and the further finding that the accident was not occasioned by the negligent act or omission of the defendants or their servants negatives the conclusion that such result arose from any want of reasonable and proper care on their part.

If (as contended) the first answer of the jury is to be construed as meaning that the sheet was not at any time secured, then this omission could not well be reconciled with the exercise of proper care. But such interpretation is to be given to the findings as will, if possible, render them consistent. The words "the topping lift sheet not being secured," taken in connection with the question to which it forms part of the answer, point to the facts and causes in existence and operative at the precise time of the accident, and are not to be construed as if they were, "the topping lift sheet not having been secured."

The learned counsel for the appellant addressed to us a very strong argument to show that the sheet having been found not secured at the time of the accident it either had never been properly secured or, having been secured, as testified to by the rigger Allan, it afterwards was suffered to become and remain unsecured through the negligence of the defendants. There may be (and probably is) a preponderance of reason in favour of this view, but its weight is not so considerable as to leave no room for a different opinion. The opinion of the learned Chief Justice in dissenting is, upon this part of the case, a very able presentation of the like view, and if we were free to deal with the facts apart from the opinion of the jury it might appear decisive; but there is the finding of the jury upon a matter entirely one of fact and in respect of which their observation and experience might qualify them peculiarly to judge, and we do not think that we

1899

WILLIAMS v. BARTLING.

King J.

ought to ignore such findings. The result of this view is that the appeal should be dismissed,

Appeal dismissed with costs.

Solicitors for the appellant: *King & Barss.*

Solicitor for the respondents: *Hector McInnes.*

1899

*Mar. 14.

*June 5.

H. W. ARCHIBALD (DEFENDANT) .....APPELLANT;

AND

JAMES McNERHANIE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract—Partnership—Dealing in land—Statute of frauds—British Columbia Mineral Act.

Sections 50 and 51 of the Mineral Act of 1896 (B.C.), which prohibit any person dealing in a mineral claim who does not hold a free miner's certificate, does not prevent a partner in a claim recovering his share of the proceeds of a sale thereof by his co-partner though he held no certificate when he brought his action having allowed the one he had up to the time of sale to lapse.

A partnership may be formed by a parol agreement notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case.

Judgment of the Supreme Court of British Columbia (6 B. C. Rep. 260) affirmed, Gwynne and Sedgewick JJ. dissenting.

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

The action was brought to recover from defendant the plaintiff's share of the proceeds of the sale by defendant of the mineral claim which the parties

---

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

(1) 6 B. C. Rep. 260.

1899

ARCHIBALD v. McNER-HANIE.

owned in partnership. The facts are not in dispute and the appeal involves only the decision of two questions of law, namely:

1. Does the Mineral Act of 1896 prevent the plaintiff from recovering where he did not hold a free miner's certificate when he brought his action?

2. Does the Statute of Frauds apply to the case of a partnership formed by parol agreement for dealing in lands?

The provision of the Mineral Act relied on by defendant is the following:

"Subject to the proviso hereinafter stated, no person or joint stock company shall be recognized as having any right or interest in or to any mineral claim, or any minerals therein, or in or to any water right, mining, ditch, drain, tunnel, or flume, unless he or it shall have a free miner's certificate unexpired." The proviso does not affect this case.

The trial judge non-suited the plaintiff for want of a certificate under the Act. His judgment was reversed by the full court whereupon the defendant took this appeal.

Christopher Robinson Q.C. for the appellant. As to the want of a certificate under the Mineral Act being a bar to this action, see *McCormick* v. *Grogan* (1). McPherson & Clarke on Mines, p. 695 et seq.

The Statute of Frauds applies to the case of a partnership in lands. *Stuart* v. *Mott* (2); *Dale* v. *Hamilton* (3); *Maddison* v. *Alderson* (4).

As to the objection that the statute cannot be relied on to support a fraud, see *Rochefoucauld* v. *Boustead* (5).

(1) L. R. 4 H. L. 82.
(2) 23 N. S. Rep. 524; 14 Can. S. C. R. 731.
(3) 5 Hare 369.
(4) 8 App. Cas. 467.
(5) [1897] 1 Ch. 196.

R

1899

ARCHIBALD v. MCNER-HANIE.

Moreover this was not a partnership; *Kay* v. *Johnston* (1); Lindley on Partnership (6 ed.) p. 52.

S. H. Blake Q.C. and *Latchford* for the respondent, referred on the question of the Mineral Act to Bainbridge on Mines, (4 ed.) 541 and 545 where co-ownership and partnership are dealt with.

As to the Statute of Frauds, see Browne on Statute of Frauds (6 ed.) p. 261; Am. & Eng. Ency. of Law, vol. 17 p. 99; *In re Duke of Marlborough*; *Davis* v. *Whitehead* (2); *Heard* v. *Pilley* (3); *Haigh* v. *Kaye* (4); *Chester* v. *Dickerson* (5).

THE CHIEF JUSTICE.—In July, 1895, the appellant, the respondent and one Murchie, formed a partnership to deal in mining claims. That this partnership existed was found by the jury, and it is recognised as having been so found by the learned judge, Mr. Justice Irving, before whom the action was tried, as appears from his judgment pronounced on entering the verdict.

After having acquired and sold several claims, in June, 1896, the partnership acquired a claim which was known as the "Blanch Lamont." This claim they allowed to lapse, but afterwards acquired an interest in it again under the denomination of the "Dorothy Morton." This claim was taken out in the name of one Chick, who in consideration of doing the necessary work and recording the claim was to have half of it. Chick thereupon assigned an undivided one-half interest to the appellant for the behoof of the partnership, retaining the other half for himself.

On the 19th July, 1897, Chick and the partnership sold the whole claim for $20,000 and the purchasers at once took possession.

(1) 21 Beav. 536.
(2) [1894] 2 Ch. 133.
(3) 4 Ch. App. 548.
(4) 7 Ch. App. 469.
(5) 54 N. Y. 1.

1899

ARCHIBALD v. MCNERHANIE.

The Chief Justice.

There do not appear to be any outstanding debts or claims due by or made against the partnership, and the $10,000 was therefore on its being paid to the appellant a net sum in his hands to be divided amongst the three partners each being *primâ facie* entitled to one-third of the amount.

The respondent had a free miner's certificate from the date of the formation of the partnership up to the time of the sale of the claim and afterwards until the 26th of July, but he allowed this certificate to lapse on the 26th of July, 1897, not renewing it till the 8th of August, 1897. The purchase money was not paid to the appellant until after the 26th of July, but soon after that date it was paid, one-half to Chick and the other moiety amounting to $10,000 to the appellant for the behoof of the partnership.

The respondent brought this action for the recovery of $3,325, his share of the purchase money remaining in the appellant's hands.

At the trial before Mr. Justice Irving and a jury it appeared on the pleadings as they originally stood after the jury had found the facts that there was no real defence to the action, but the learned judge permitted the appellant to amend his statement of defence by setting up the Statute of Frauds and the fact of the lapse of the respondent's free miner's certificate at the date mentioned and the Mineral Act of British Columbia. And upon this latter ground the learned judge nonsuited the respondent, who appealed to the Supreme Court *in banc* where the first judgment was reversed and a judgment ordered to be entered for the respondent for the amount sued for. No question of fact is in dispute; the jury found there was a partnership agreement, and the appellant in his factum concedes this and admits that the only questions are the two questions of law as to whether the respondent is

1899

ARCHIBALD v. MCNERHANIE.

The Chief Justice.

to be debarred from recovering his share of the money by reason of the statutory defences set up by the amendment. The passage in the factum referred to is the following; at page 15 the appellant says:

> The finding of the jury settles all questions of fact leaving only two defences open to the defendant, both of which are questions of law.

As regards the Mineral Act it ceased to have any application when the claim had been sold and nothing remained but the money arising from the sale made whilst the respondent had his certificate; from that time he had no interest in the claim which had been alienated and converted into a mere money demand by the sale, and the money when it came into the hands of the appellant was therefore impressed with a trust for the respondent to the amount of one-third. To say that the respondent has forfeited his right to this money representing a mining claim in which he had ceased to have any interest, and not even arising directly out of the sale but being money had and received to the use of the respondent by the appellant, would be not only enlarging the words of the statute, but would be placing upon it an arbitrary and unreasonable construction, not warranted either by its language or by a consideration of the object which it had in view. Even if the action had been one to recover the price from the purchasers the Act could not have applied, much less can it apply between the present parties where no mining right is in question. If the respondent had died after the sale and before the payment of the money it might just as well be said that his executors could not have recovered because they had not mining certificates. Could it be said that where a partnership of this kind had been dissolved for years, and the parties had abandoned the pursuit of mining altogether and had left the mining country, that one of the partners on

1899

ARCHIBALD v. MCNERHANIE.

The Chief Justice.

discovering that the other partner owed him money upon the footing of the partnership accounts, could be precluded from recovering that money because he had not kept up his free miner's license? Such an application of the statute would be absurd, but yet it would follow that the certificate was in such a case necessary to entitle the party to sue, if we should give effect to the objection in the present case.

As to the Statute of Frauds, that can have no application. It never applies to exclude parol evidence of a partnership for dealing in land. This was determined as far back as the case of *Forster* v. *Hale* (1), for we find Lord Loughborough in that case saying:

> That was not the question; it was whether there was a partnership. The subject being an agreement for land, the question then is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery in which land was necessary to carry on the trade the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by operation of the law held for the purposes of that partnership.

In *Dale* v. *Hamilton* (2), Vice Chancellor Wigram expressly decided that a partnership formed for the sole purpose of dealing in land like that in question here might be proved by parol, and although Lord Cottenham on appeal decided on another ground holding that there was written evidence, he expressed no disapproval of this doctrine applied by the Vice Chancellor. In *Caddick* v. *Skidmore* (3), cited for the appellant, no partnership was proved. In *Gray* v. *Smith* (4), Mr. Justice Kekewich recognises the authorities before quoted to have established the law for he says:

(1) 5 Ves. 308.
(2) 5 Hare 369; in app. 2 Ph. 266.
(3) 2 DeG. & J. 52.
(4) 43 Ch. D. 208.

1899

ARCHIBALD v. MCNERHANIE.

The Chief Justice.

The first point raised upon that was whether it was necessary for such a contract that there should be an acknowledgment in writing signed by the party to be charged within the meaning of the Statute of Frauds? The authorities when looked into seem to establish that you may have an agreement of partnership by parol notwithstanding that the partnership is to deal with land. This was established by the case of *Forster* v. *Hale* (1), and in *Dale* v. *Hamilton* (2), Wigram V.C. went a step further and said that the same rule would hold good where the partnership was to deal exclusively with land, and he proceeded to apply it to such a case.

I take it to be established now that a partnership may always be proved by parol, and if it turns out that the assets consist of lands, or interests in land bought for the purpose of being sold again, such lands will be treated as any other property not coming within the statute. The principle is this; all assets of a partnership are considered as personalty, and that upon an application of the doctrine of equitable conversion, for ultimately in order to a winding up of the partnership everything must be sold and converted into money. This is applied to other questions besides that of the applicability of the Statute of Frauds, for instance in a partnership for dealing in land the lands acquired are not considered as realty going to the heir of one of the partners but as belonging to the personal representative for whom a court of equity treats the heirs as a trustee. *Darby* v. *Darby* (3); *Wylie* v. *Wylie* (4).

I find it laid down in a text book published during the present year (Thompson on Equity, p. 603), that this is now the accepted doctrine in England. It is there said:

> A partnership may be constituted by a mere parol agreement notwithstanding that the partnership is to deal with land.

I agree entirely in the judgment of the learned Chief Justice of British Columbia, and for the reasons

(1) 5 Ves. 308.
(2) 2 Hare 369.
(3) 3 Drew 495.
(4) 4 Gr. 278.

before stated I am of opinion that the appeal should be dismissed.

TASCHEREAU J. concurred.

GWYNNE J.—The only claim relied upon by the plaintiff in this action is an agreement in the 5th paragraph of the statement of claim alleged to have been entered into between the plaintiff, the defendant, one Murchie and one P. J. Chick. There is no evidence in the case before us of any such agreement having been entered into. There is in fact no evidence produced in the appeal case, and in the absence of evidence of the agreement relied upon by the plaintiff it appears to me to be impossible to render justice in the premises. The appeal I think should be allowed and the case remitted to a new trial.

SEDGEWICK J.—I am of opinion that this appeal should be allowed and the original judgment restored.

GIROUARD J.—I concur in the judgment of the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Harris & Bull.*

Solicitor for the respondent: *D. G. Macdonell.*

1899

*Mar. 22, 23.

*June 5.

FREEMAN GREEN AND ISABEL GREEN (DEFENDANTS)..... } APPELLANTS;

AND

ELIZABETH WARD (PLAINTIFF)..... RESPONDENT.

AND

MARGARET WILBUR AND PALMER R. WILBUR..... } DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of deed—Partition—Charge upon lands.

A deed for the partition of land held in common contained a conveyance of a portion thereof to M. W., for certain considerations therein recited of which one was the condition that she should procure from her minor children, upon their coming of age, the necessary quitclaim deeds for the release of their interests in another portion of the land in question apportioned and conveyed to her coparceners, and the amount of certain payments of money then made for the purpose of effectuating the partition, was by the deed of partition declared to remain a lien on that portion of the land thereby conveyed to M. W. until such quitclaims should have been obtained and delivered to her said coparceners.

Held, that the said recital was sufficient to charge that portion of the said land so conveyed to M. W. with the amount of the said payments of money as a security for the due execution and delivery of the quitclaims in conformity with the condition stipulated in the deed of partition.

APPEAL from the judgment of the Court of Appeal for Ontario, affirming the judgment of Mr. Justice Robertson in the High Court of Justice, with certain variations and amendments.

The facts and questions at issue upon the present appeal are sufficiently stated in the head-note and in

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

the judgment delivered by His Lordship Mr. Justice Gwynne. The second paragraph of the order in the judgment appealed from is as follows:

"2. And this court doth further declare that the plaintiff is entitled to a charge upon the north twenty-five acres of the east three-quarters of the east half of lot 12, in the eleventh concession of the Township of Howard, in the County of Kent (to the extent or sum of $400, * * *) as security for the due execution by the said Mary Elizabeth Wilbur and Levi Wilbur, of a conveyance to the plaintiff granting, remising, releasing and forever quitting claim to the plaintiff, her heirs or assigns, all and every right, title and interest which they or either of them may have now or hereafter, into or out of the south-east two-thirds divided crosswise of the north-easterly three-quarters divided lengthwise, of the north-easterly half divided lengthwise of lot number twelve in the eleventh concession of the said Township of Howard, containing fifty acres more or less.

Gundy for the appellants.

John A. Robinson for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—So exhaustively has this case (the value of what is in contest in which is admitted to be only $400), been treated by the judgments in the courts below that it is unnecessary to review the facts or to do more as to them than to say as is pointed out in those judgments, that the object of the parties in entering into the agreement which they did enter into for the partition among them of the lands in question was to give to each a fee simple estate in the portions conveyed to each, and that the defendant Margaret Wilbur should procure from her children upon their coming of age quitclaim deeds in favour of Freeman

1899

GREEN v. WARD.

Gwynne J

Green and of Mrs. Ward respectively of whatever interest they might have in the lands. The evidence also establishes that the agreement as taken down by the solicitor employed by the parties for the purpose and signed by them is correctly recited in all of the deeds as prepared by the solicitor for execution. That in favour of the appellant was signed by Mr. Wilbur and her husband, and that in favour of Mrs. Wilbur by the appellant. In these deeds the agreement is recited as follows:

> Whereas the said Margaret Wilbur, Palmer R. Wilbur, Elizabeth Ward, Freeman Green and David Green, each having or claiming to have an individual interest or share in the east half, otherwise the northeasterly half divided lengthwise of lot number twelve, in the eleventh concession of the Township of Howard, in the County of Kent and Province of Ontario, have agreed to a partition and purchase of the said part of the said lot on the following conditions, namely, the said Freeman Green shall take and receive the southwesterly quarter of said northeasterly half of said lot divided lengthwise, and shall receive from said Elizabeth Ward the sum of two hundred dollars, and shall pay to the said David Green the sum of one hundred dollars. The said Margaret Wilbur shall take and receive the northwest one-third of the remaining three-quarters of said northeasterly half of said lot, and shall receive from the said Elizabeth Ward the sum of three hundred dollars, and shall pay to the said David Green the sum of three hundred dollars, and shall also further pay to Mary Elizabeth Wilbur and Levi Wilbur, the only surviving children of the said Margaret Wilbur and Palmer R. Wilbur (the other children of the said Margaret and Palmer Wilbur having died intestate and without issue), any moneys that may be due to them, if any, out of said lands, *and shall also obtain for the said Freeman Green and Elizabeth Ward quit claim deeds from the said Mary Elizabeth Wilbur and Levi Wilbur respectively when they shall severally arrive at the age of twenty-one years.* The said payments to the said Mary Elizabeth Wilbur and Levi Wilbur are hereby declared to be and remain a lien on the part of said lands taken by the said Margaret Wilbur until any money due to the said Mary Elizabeth Wilbur and Levi Wilbur are fully paid *and the said quitclaim deeds are obtained* from them and delivered to the said Freeman Green and Elizabeth Ward. And the said Elizabeth Ward shall take and receive the southeast two-thirds of the said remaining three-fourths of said half lot being the remainder thereof

and shall pay to the said Margaret Wilbur three hundred dollars, to the said Freeman Green two hundred dollars, and to the said David Green two hundred dollars. And whereas the said parties have agreed to execute and deliver proper deeds of conveyance to carry out the above partition and purchase and to pay the said payments as above set forth, and that Palmer R. Wilbur, the husband of the said Margaret Wilbur, and the wives of the said Freeman Green and David Green, respectively, shall join in the said deeds and bar their respective dowers.

The intention of all the parties being, by reason of the claim of David Green that the wills of his deceased sisters were invalid, to come to an arrangement among themselves for a partition of the estate in question between them in fee simple, and as the interests of Mrs. Wilbur's children could not be bound by anything done to their prejudice during their minority it was natural and indeed necessary to give any validity to the contemplated partition for the effecting which the plaintiff was paying $700 that Mrs. Wilbur and her share in the lands partitioned should be required to assume the responsibility of procuring the necessary quitclaim deeds to be executed by her children on their coming of age. There is no question before us as to whether the partition as made was fair and equitable to all the parties to it.

That the agreement was entered into is conclusively established by the evidence of the solicitor who took it down from the lips of the parties who signed it in the solicitor's presence as his instructions to prepare the necessary deeds, and the only question before us is whether or not that agreement as recited in the deed in virture of which Mrs. Wilbur acquired the portion of the land allotted to her justifies and supports the charge imposed upon it by the second paragraph of the judgment which is appealed from, and and we are of opinion that the charge so imposed is in accordance with the agreement recited in the deed, and upon the faith of which alone the land mentioned

1899

GREEN v. WARD.

Gwynne J.

in the deed was conveyed to Mrs. Wilbur, and having accepted the land upon the faith of that agreement the appellants as claiming under her and a party to the same agreement must fulfil its terms.

We cannot but express our surprise that a solicitor to whom these deeds were sent for the mere purpose of witnessing their execution should have permitted Mr. Wilbur to make the alteration which he did in the recital of the agreement in the deed to the plaintiff, and we concur in the judgment of the courts below that notwithstanding the evidence of the solicitor who permitted the alteration without any authority to do so, the plaintiff did not understand and could not have understood the fact and the intent of the alteration, but our judgment rests not solely upon her ignorance of the fact or her misunderstanding of anything which may have been said to her as to the fact or the intent of the alteration, but also upon this, that the alteration made by Mr. Wilbur is only in the deed to Mrs. Ward, whereas the deed to determine the liability of Mrs. Wilbur, and of the appellant as purchaser from her and her husband, is the deed in virtue of which Mrs. Wilbur, until the sale to the appellant, held, and in virtue of which the appellant now holds the land conveyed to Mrs. Wilbur in pursuance of the agreement between the parties thereto and therein recited, and the true construction of the agreement recited in that deed, we think, is that the land conveyed to Mrs. Wilbur on the faith of the agreement is bound to indemnify the plaintiff against the claims of Mrs. Wilbur's children, who are now of age. The appeal therefore must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. E. Gundy.*

Solicitor for the respondent: *John A. Robinson.*

THE LONDON ASSURANCE CORPORATION (DEFENDANT)..... } APPELLANT;

AND

THE GREAT NORTHERN TRANSIT COMPANY (PLAINTIFF)..... } RESPONDENT.

1899

*Mar. 24.

*June 5.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Condition in policy—Ship insured "while running"—Variation from statutory conditions.

A policy issued in 1895 insured against fire the hull of the S. S. *Baltic* including engines, &c., "whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building." The *Baltic* was laid up in 1893 and was never afterwards sent to sea. In 1896 she was destroyed by fire.

Held, reversing the judgment of the Court of Appeal (25 Ont. App. R. 393) that the policy never attached; that the steamship was only insured while employed on inland waters during the navigation season or laid up in safety during the winter months.

Held also, that the above stipulation was not a condition but rather a description of the subject matter of the insurance and did not come within sec. 115 of the Ontario Insurance Act relating to variations from statutory conditions.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming by an equal division of the court the judgment at the trial in favour of the plaintiff.

The plaintiff brought actions against seven insurance companies on policies insuring his S. S. *Baltic* against loss by fire. The action against the Alliance Assurance Co. was tried and resulted in a verdict for the plaintiff, and on the company appealing it was

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

(1) 25 Ont. App. R. 393 sub. nom. *Great Northern Transit Co. v. Alliance Assur. Co.*

1899

THE LONDON ASSURANCE CORPORATION v. THE GREAT NORTHERN TRANSIT COMPANY.

agreed that the evidence on that trial should be treated as the evidence in all the cases. The appeal resulted in the verdict at the trial being sustained by an equal division in the Court of Appeal. The Alliance Assurance Co. then settled with the plaintiff, the other six companies joining in an appeal to this court.

Wallace Nesbitt and *McKay* for the appellant referred to *Slinkard* v. *Manchester Fire Assur. Co.* (1) : *Benicia Agricultural Works* v. *Germania Ins. Co.* (2) ; *Pearson* v. *Commercial Union Assur. Co.* (3).

Osler Q.C. and *Douglas* for the respondent cited *Wanless* v. *Lancashire Ins. Co.* (4) ; *Goring* v. *London Mutual Fire Ins. Co.* (5) ; *Parsons* v. *Queen's Ins. Co.* (6)

The judgment of the court was delivered by :

SEDGEWICK J.—On the 5th September, 1896, the steamer *Baltic* owned by The Great Northern Transit Company, Limited, the present respondents, was burned while in dock at Collingwood, Georgian Bay. At the time of the fire she was insured against fire to the amount of $11,000 in seven companies, all of them except the Alliance Assurance Company being the present appellants. The companies having disputed their liability actions were brought and one of these cases was tried before Armour C.J., with a jury at Toronto in September, 1897. Judgment was there given in favour of the plaintiffs, which judgment was sustained upon appeal by an equally divided court, Maclennan and Moss JJ. being of opinion that the judgment should stand, the Chief Justice and Osler J. dissenting. The appeal is from that judgment to this court.

(1) 55 Pac. Rep. 417.
(2) 97 Cal. 468.
(3) 1 App. Cas. 498.
(4) 23 Ont. App. R. 224.
(5) 10 O. R. 236.
(6) 2 O. R. 45.

1899

THE LONDON ASSURANCE CORPORATION v. THE GREAT NORTHERN TRANSIT COMPANY.

Sedgewick J.

It is an admitted fact that the last trip of the *Baltic* was made in the season of 1893. In September of 1893 she was laid up at Collingwood and from that date she never again went to sea. It also appeared that during 1894, 1895 and 1896 she never obtained a certificate of inspection provided by the Dominion Act without which she could not have been run; that her planking, her frames and her engine bed were in such a condition that it would have been impossible for her to have been moved from her position by her own motive power; that her electric light plant and certain portions of her furniture had been removed, and that she was in such a condition that she could not in any sense be described as a running boat.

Only two questions are raised; first, as to whether at the time of the fire the vessel insured came within the risk described in the policy; and secondly, as to whether the provisions of the Ontario Fire Insurance Act in regard to conditions had been or should have been complied with.

The wording of the description of the risk in each of the policies is identical and is as follows:

On the hull of the S. S. *Baltic*, including engines, boilers and appurtenances thereto, anchors, chains, masts, spars, rigging, sails, cabin and office furniture, beds, bedding, linen, silverware and platedware, cutlery, china, glassware and earthenware, looking glasses, mirrors, wheelbarrows, trucks, clocks and apparel on board said steamer whilst running on the inland lakes, rivers and canals during the season of navigation.

To be laid up in a place of safety during winter months from any extra hazardous building.

Ordinary outfit to be allowed in winter and spring.

It is understood and agreed that the steamer insured under this policy has permission to carry merchandise, hazardous and non-hazardous, as freight from port to port with one barrel of coal oil for steamer's use.

And the controversy mainly turns upon the interpretation to be given to the words "whilst running on

1899

THE LONDON ASSURANCE CORPORATION v. THE GREAT NORTHERN TRANSIT COMPANY.

Sedgewick J.

the inland lakes, rivers and canals during the season of navigation."

Three contentions have been put forward:

The first (and it is that upon which the judgment of the trial judge is based and is followed by Mr Justice Maclennan in the Court of Appeal) is that the clause was intended to confine the risk to fire whilst the vessel was inland, whether on the lakes, rivers or canals during the season of navigation, and not upon the ocean, the emphatic word being *inland* as distinguished from *ocean*. In other words, that the clause might read "whilst being (whether running or laid up) in the inland lakes, rivers and canals during the season of navigation, but not on the ocean or in any ocean port." Another interpretation is that the phrase "whilst running," &c., applies to and qualifies not the S. S. *Baltic* itself but only some of the property and articles intended to be included in the risk. The third interpretation is that by the words in question the companies undertook to insure not a vessel laid up during the season of navigation but a vessel actively engaged or employed during that period upon the inland lakes, rivers or canals—that during the season of navigation she must be a vessel in use or as they say "in commission," (a term only applicable to national ships of war)—with the necessary ship's papers and properly provided with master, crew and everything requisite for the ordinary prosecution of the business of a merchant vessel.

I am not able to agree with the view of the learned Chief Justice of the Queen's Bench Division. It is true that the word "inland" is an emphatic word confining the risk so far as locality is concerned to inland lakes, rivers and canals, so that if a loss should occur while the vessel happened to be, say at Halifax or any other Atlantic port or on the high seas, she would not

1899

THE LONDON ASSURANCE CORPORATION v. THE GREAT NORTHERN TRANSIT COMPANY.

Sedgewick J.

be covered But there are, it seems to me, other equally emphatic words and one of these words is "running." The learned Chief Justice's interpretation gives no effect to it. But not only that; it necessarily introduces into the clause an idea which is opposed to the idea conveyed by the word "running," namely, the idea that whether the ship was "running," that is, in active employment or use, or whether she was laid up either at anchor or in dock or upon dry land, she was still within the words of the policy. This, I think, is not interpreting the contract but enlarging it, making a contract not contemplated by the parties. I have not been able to appreciate the second interpretation given to this clause to which I have referred. It is a clause qualifying either the word "Baltic," or the word "steamer." It contemplates not engines, anchors, office furniture, etc., running, but a steamer running, nothing more, nothing less.

The third interpretation is, I think, the correct one. It is an element of importance that this is a fire policy, not a marine policy. Two elements much more important in a fire policy than in a marine policy are those of locality and mode of use. The risk of a thing being burned depends not so much upon the thing itself as upon its location and the uses to which it is put. A wooden building used for the manufacture of dynamite in a crowded city surrounded by factories continually emitting sparks from their chimneys or smokestacks may be absolutely uninsurable. The same structure removed for farming purposes to the open prairie might be insured at almost a nominal sum. Now this is not a "time" policy. A time policy is a phrase used only in marine insurance to distinguish it from a voyage policy. It in no material respect differs from a policy upon a building or upon anything else capable of insurance

1899

THE LONDON ASSURANCE CORPORATION v. THE GREAT NORTHERN TRANSIT COMPANY.

Sedgewick J.

against fire. Neither is it a policy insuring the subject matter from one definite period to another. It is rather a policy insuring it during such periods within two defined points of time as she may happen to come within the description and terms of the risk. In the present case she is insured, first, whilst running upon the inland lakes, rivers and canals during the season of navigation, and secondly, whilst she is laid up in a place of safety during winter months (removed) from any extra-hazardous building. There may be within the year many periods, longer or shorter, in which she is not covered at all. She may during the season of navigation be running on the high seas. Whilst so occupied she is not insured. So likewise during the winter months she may be running either on the high seas or upon the unfrozen waters of the inland lakes, or as at the City of Quebec engaged as a ferry boat from one side of the St. Lawrence to the other. Still she is not insured. I do not know and it is not material to determine to what extent the element of locality influenced the insurance companies in making these policies. I do not know whether navigation upon salt water is carried on at a greater risk than on fresh water or why the operations of this steamer were confined to the latter, but admitting that the parties in limiting the operations of the vessel to inland waters had in view the prohibition of navigation in ocean waters, it is perfectly clear that they had also in contemplation two distinct classes of risk, namely, the risk of fire whilst she was in actual use during the season of navigation and likewise the risk of fire whilst she was not in use but laid up in a place of safety during the winter months. The mode of use in both cases was material to the risk. In the summer months no special provision was made for her safety Then she would

1899

THE LONDON ASSURANCE CORPORATION v. THE GREAT NORTHERN TRANSIT COMPANY.

Sedgewick J.

be running. She would have her master and crew; she would have her life saving and fire saving apparatus; she would be under constant supervision and the danger of fire would be reduced to a minimum. In the winter months, however, she must be laid up. She may be laid up anywhere, whether in an inland port or an ocean port, but wherever laid up it must be in a place of safety and removed from an extra hazardous building. Looking at the whole clause it seems to me that the words "running during the season of navigation" are mainly used in contrast with the words "laid up during the winter months." She is only covered by the clause whilst during the season of navigation she is running and whilst during the winter months she is laid up in a place of safety. This, it seems to me, is the true construction of the clause. It gives a natural and reasonable meaning to each of its words and it does not necessitate as the first interpretation does the insertion of the additional stipulation to which I have referred in order to give effect to it. If the view I take is incorrect and the first interpretation is the right one; if it is not necessary that during the season of navigation the vessel should be in actual use; if all that was contemplated by the parties was that during that season the vessel should exist *in situ* whether running or laid up, then she might be laid up anywhere, whether in a place of safety or not; she might be anchored or even let run adrift upon the open lakes; she might be moored or hauled up high and dry in immediate proximity to any factory or building no matter how dangerous such proximity might be. Surely, as I view it, this consideration alone shews the untenable character of the ground upon which the judgment below is based.

One other point remains. It is contended that the stipulation contained in the words "whilst running,"

1899

THE LONDON ASSURANCE CORPORATION v. THE GREAT NORTHERN TRANSIT COMPANY.

Sedgewick J.

&c., is a condition within the meaning of the Ontario Insurance Act, and inasmuch as it varies from or is in addition to the conditions by that Act made statutory, the policy should comply with section 115 of the Act which provides that such variations or additions should be printed in conspicuous type and in ink of different colour. So far as this point is concerned I entirely agree with the view taken by the learned Chief Justice of the Court of Appeal and Mr. Justice Osler. The stipulation in question is in no sense a condition but rather a description of the subject matter insured. It is descriptive of and has reference solely to the risk covered by the policy and not to the happening of an event which by the statutory conditions would render the policy void. The statute, therefore, does not apply.

On the whole I am of opinion that the appeal should be allowed and the action dismissed; all costs to follow in the usual course.

*Appeal allowed with costs.**

Solicitors for the appellant: *Beaty, Blackstock, Nesbitt, Chadwick & Riddell.*

Solicitors for the respondent: *McCarthy, Osler, Hoskin & Creelman.*

---

*Leave to appeal from this judgment to the Judicial Committee o the Privy Council has been refused.

ESTHER WOLFF (DEFENDANT)..... APPELLANT; 1899

AND *Mar. 24.
*June 5.

GEORGE SPARKS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of statute—14 & 15 *V. c.* 6 (*Ont.*)—*Will*—*Devise to heirs.*

The Ontario Act 14 & 15 Vict. ch. 6, abolishing the law of primogeniture in the province, placed no legislative interpretation on the word "heirs." Therefore, where a will made after it was in force devised property on certain contingencies to "the heirs" of a person named, such heirs were all the brothers and sisters of said person and not his eldest brother only. Judgment of the Court of Appeal (25 Ont. App. R. 326) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Mr. Justice Rose at the trial.

The appeal in this case involves a single question of law as to the construction of a will, namely, who would take by a devise to heirs under the Act 14 & 15 Vict. ch. 6, abolishing primogeniture in Ontario. The nature of the contentions of the respective parties are stated in the judgment of the court.

O'Gara Q.C. and *Wyld* for the appellant, relied on *Tylee* v. *Deal* (2), and *Baldwin* v. *Kingstone* (3).

A. E. Fripp for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—George Sparks, in his lifetime of the Township of Gloucester, in the Province of Ontario,

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

(1) 25 Ont. App. R. 326. (2) 19 Gr. 601.
(3) 18 Ont. App. R. 63.

1899

WOLFF v. SPARKS.

Gwynne J.

departed this life in the month of November, 1867, having first duly made his last will and testament in writing bearing date the 15th day of October, 1867, whereby among other things, he devised certain real property in the will mentioned situate in the said Township of Gloucester, to his wife Sarah Sparks, for the term of her natural life, or until she should marry again, and upon her decease or marrying again, he gave and devised the said property to his son Frederick Sparks, if he should be living at the happening of either of the said contingencies, and to his heirs and assigns forever. And if the said Frederick Sparks should not be living when either of the said contingencies should happen, then he gave and devised the same property unto the heirs of the said Frederick Sparks, their heirs and assigns forever. Frederick died unmarried in 1882, in the lifetime of the devisee for life, who died in 1887, without having married again. The sole question is, who upon the decease of the tenant for life became entitled to the property under the above devise to "the heirs of the said Frederick Sparks, their heirs and assigns forever"? The plaintiff claims that it passed to all the brothers and sisters of Frederick, of whom there were several, and of whom the plaintiff is one and the defendant another, while on the contrary the defendant, the now appellant, claims that it passed to Abraham Sparks alone as being the eldest brother of Frederick and who was his heir if 14 & 15 Vict. ch. 6 of the statutes of the late Province of Canada had never been passed, by title derived from whom the plaintiff claims. The contention of the defendant is that the words in the will "the heirs of the said Frederick Sparks" in the event which has happened *must* by force of the 19th section of the above Act be construed to be the person who would have been the heir-at-law of Frederick if

1899

WOLFF v. SPARKS.

Gwynne J.

that statute had never been passed. This contention, if sound, involves the necessity of construing the 19th section of the Act as putting a legislative and therefore a peremptory interpretation on the word "heirs" wherever occurring in a devise of real property, and so equally when occurring in a deed, for the words of the section are, "nor shall the same effect any limitation of any estate by deed or will," but there is not an expression in the Act which warrants a surmise that the legislature entertained any idea of putting a legislative interpretation upon the word "heir" or "heirs" when occurring either in a will or in a deed. The interpretation of those instruments is unaffected by the Act which deals not with their interpretation at all; that is left to the rules of law established for the purpose, namely, that the intention of the testator or grantor is to be ascertained from the language used by him, such language being construed in its ordinary acceptation unless there be something to show that a special technical signification was intended. The Act provides for a wholly different purpose, namely, the purpose of abolishing the right of primogeniture in the succession of real estate held in fee simple or for the life of another. This is the only matter with which it professes to deal. The statute in its sections numbered from 1 to 18 inclusively, prescribes how after the 1st day of January, 1852, real estate which a person shall die seized of, for an estate in fee simple, or for the life of another without having lawfully devised the same shall descend or pass by way of succession. Then follows the 19th section which enacts *ex abundanti cautelâ*, 1st, that the estate of a husband as tenant by the curtesy, or of a widow as tenant in dower shall not be affected by any of the provisions of the Act, nor, 2ndly, shall the same affect *any limitation* of any estate by deed or will; nor, 3rdly, any estate

1899

WOLFF v. SPARKS.

Gwynne J.

which although in fee simple or for the life of another is so held in trust for any other person, but all such estates shall remain, pass, and descend as if this Act had not been passed. It is not very clear to my mind what the precise object and intent of the draftsman was in inserting in this 19th section the sentence that the provisions of the Act "shall not affect any *limitation* of any estate by deed or will." What is said shall not be *affected* by any of the provisions of the Act is "*any limitation*" of any estate by deed or will. Now the expression "limitation" of an estate is a word used for determining how long estates conveyed by deed or will shall last—for limiting the duration of such estates. Thus, if real property be conveyed by deed or will to A. for life, then to B. in tail male, with remainder to C. in fee simple, the instrument passing such estates contains limitations of, 1st, an estate for life, 2ndly, an estate in fee tail, and, 3rdly, an estate in fee simple. Now how the fact of the estate in fee simple upon the decease of the tenant thereof intestate passing to several persons as his heirs instead of to one person as sole heir could be said to "affect the *limitation*" of the estates conveyed by the deed or will, I do not, I confess, clearly perceive. The "limitations" of the estates as expressed in the deed or will would remain the same, namely, for life, in fee tail, and in fee simple, whether those to take in succession to the tenant in fee simple or on his dying intestate should consist of many or of one person only.

I rather incline to think that the expression was used without full consideration of its aptness, and that what was intended was to leave limitations of estates by deed or will *then existing* under the operation of 4 Wm. IV. ch. 1, which deals with such estates, and the words "that all such estates shall *remain*, etc., etc," as pointing to something then

having existence seems to me to support this view. But whatever may have been the precise object and intent of the expression used we can, I think, confidently assert that it does not say, nor can it be construed as saying, that all estates in fee simple or for the life of another whether created by a deed or a will already executed or which should at any time be created by any deed or will to be at any time thereafter executed, and of which any person should at any time die seized and intestate should descend to the common law heir of such person, and that those only which a deceased intestate had inherited should pass by way of succession under 14 & 15 Vict. ch. 6. If such should be held to be the law then an estate which in one generation should pass under the provisions of the Act might in a subsequent generation, a deed or will intervening, bring the property back to the old common law heir and thus complicate the law of succession to real property and defeat the main object of 14 & 15 Vict. ch. 6 which was to abolish primogeniture. However all that we are at present concerned with is to determine who are the parties to whom the testator has devised the land in question under the designation of the heirs of Frederick Sparks and their heirs and assigns forever.

The will was made in the Province of Ontario relating to property situate therein and fifteen years after the coming into operation of the Act 14 & 15 Vict. ch. 6. At that time the words "heirs of Frederick Sparks" in their ordinary acceptation denoted the persons who by the laws of the Province of Ontario would have succeeded to such real property, if any, as Frederick Sparks died seized of and intestate. Such being the ordinary acceptation of the terms used we must hold that the testator used them in that sense in the absence of anything to show a contrary

1899

WOLFF v. SPARKS.

Gwynne J.

or different intent. The Court of Appeal for Ontario in so holding have followed the case of *Tylee* v. *Deal* (1), and *Baldwin* v. *Kingstone* (2), where similar words in wills made before the passing of the Act were held to mean the heir at common law for the same reason and upon the application of the same rule of construction of wills as in the present case necessitates the same words to mean the statutory heirs.

It was argued that the Ontario statute, 43 Vict. ch. 14 s. 2, passed on the 5th March, 1880, amounts to a statutory declaration that up to the passing of that Act the word "heirs" in a will meant the heirs at common law. The following is the section:

> 2. Where any real estate is devised by any testator dying after the passing of this Act to the heir or heirs of such testator or of any other person and no contrary or other intention is signified by the will the words "heir" or "heirs," shall be construed to mean the person or persons to whom such real property would descend under the law of Ontario in case of intestacy.

That section expresses an accurate enunciation of the result of the rule of law applicable independently of the statute to the construction of a will made subsequently to the passing of 14 & 15 Vict. ch. 6 in the Province of Ontario, in relation to property situate therein; but the section seems to go further and to apply that rule to *all* wills *wherever* or *whenever* made affecting property in Ontario, provided only that the testator should die after the passing of the Act. Consequently if a case similar to *Tylee* v. *Deal* (1), in which the will was not only made before the passing of 14 & 15 Vict. ch. 6, but in England, or similar to *Baldwin* v. *Kingstone* (2), where the will was made in Canada, but before the passing of the Act, should again arise, if only the testator should die after the passing of 43 Vict. ch. 14, it would seem to be necessary in compli-

(1) 19 Gr. 601.

(2) 18 Ont. App. R. 63.

1899

WOLFF v. SPARKS.

Gwynne J.

ance with 43 Vict. ch. 14 to hold that the word "heirs" as used in these wills meant the statutory heirs and not the common law heirs. That statute gives a legislative interpretation of the word "heirs" which the statute 14 & 15 Vict. ch. 6 did not do or purport to do.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *O'Gara, Wylde & Gemmill.*

Solicitor for the respondent. *A. E. Fripp.*

1899

*Mar 28.

*June 5.

SAMUEL S. CARROLL AND WILLIAM E. CARROLL (PLAINTIFFS)... } APPELLANTS;

AND

THE ERIE COUNTY NATURAL GAS AND FUEL COMPANY AND THE PROVINCIAL NATURAL GAS AND FUEL COMPANY OF ONTARIO (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Res judicata—Rectification—Damages.

In an action relating to the construction of a deed the plaintiff claimed the benefit of a reservation contained in a prior agreement, but judgment was given against him on the ground that the agreement was superseded by the deed. He then brought an action to reform the deed by inserting the reservation therein.

Held, that the subject matter of the second action was not *res judicata* by the previous judgment.

In an action for rectification of a contract the plaintiff may be awarded damages.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the plaintiffs.

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

1899

CARROLL v. THE ERIE COUNTY NATURAL GAS AND FUEL CO.

A former action between the same parties was brought to enforce an agreement for the supply of gas to the plaintiff embodied in a deed executed on April 20th, 1891. In that action the plaintiff claimed the benefit of a reservation in an agreement entered on April 6th, but failed to secure it, the courts holding that only the deed could be looked to and that did not contain such reservation (1). The plaintiff then brought an action to reform the deed by incorporating the reservation therewith and recovered judgment on the trial before Armour C. J. That judgment was reversed by the Court of Appeal which held that the question was *res judicata* by the judgment in the previous action, and that no notice of the error had been brought home to the defendants. Burton C.J.O. dissenting in the Court of Appeal, held that the evidence was sufficient to charge defendants with notice. The plaintiffs appealed to this court.

Aylesworth Q.C. for the appellants. The action in this case was for rectification of the deed of April, 1891, which is not *res judicata* by the judgment in the former case. *Cooper* v. *Molsons Bank* (2).

Defendants cannot rely on *res judicata* when they did not plead it. *Farwell* v. *The Queen* (3).

Douglas for the respondent Erie Natural Gas Company, referred to Kerr on Fraud, (2 ed.) p. 102; *Dominion Loan Society* v *Darling* (4); *Ferguson* v. *Winsor* (5): *Bentley* v. *Mackay* (6).

Cowper for the respondent Provincial Natural Gas Co.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This case came before this court on an appeal which is reported in the 26th volume of the Supreme Court reports (7).

(1) See. 26 Can. S. C. R. 181.
(2) 26 Can. S. C. R. 611.
(3) 22 Can. S. C. R. 553.
(4) 5 Ont. App. R. 576.
(5) 11 O. R. 88.
(6) 31 L. J. Ch. 697.
(7) 26 Can. S. C. R. 181.

1899

CARROLL
v.
THE ERIE COUNTY NATURAL GAS AND FUEL CO.

The Chief Justice.

The judgment there given contains a full statement of the facts and of the questions arising between the parties in that action which related to the construction of the deed of the 20th of April, 1891, there stated, and referred to a reservation in favour of the present appellants contained in a preceding executory agreement of the 6th of April, the question being whether that reservation was to be considered as still in force or was to be treated as having been superseded by the later deed. In that action as is observed in the judgment no case for rectification of the deed was made. The present action has been brought for the purpose of having the deed in question reformed by the insertion of the reservation referred to. The cause was tried before the Chief Justice of the Queen's Bench Division who gave judgment for the appellants directing the rectification asked for. On appeal this judgment was reversed by a majority of the Court of Appeal (Osler and Maclennan JJ.), the Chief Justice dissenting. This latter judgment proceeded upon two grounds; first, the question was considered to be *res judicata* having, as it was held, been concluded by the judgment in the former action; secondly, it was considered that no notice of the error had been brought home to the respondents, The Provincial Natural Gas & Fuel Co. of Ontario, and that that company were therefore *bonâ fide* purchasers for value without notice.

No case for rectification having been made by the first action, as was there most distinctly held, it is impossible upon any recognised principle applicable to the defence of *res judicata* to hold that such an answer to the action can be maintained. I need not go fully into that question as we all agree entirely in the judgment of the Chief Justice of Ontario on that head. It is not material to say that the appellants might, if they had so elected, have made an alternative

1899

CARROLL v. THE ERIE COUNTY NATURAL GAS AND FUEL CO.

The Chief Justice.

case for relief on the ground of mistake in their first action; it is sufficient to say that they did not in fact do so and that no such question was there in issue.

Upon the second point, that of notice, we agree with what is said in the judgments delivered by both the learned Chief Justices who decided in the appellants' favour, and we adopt in their entirety the observations on that part of the case made in the dissenting judgment delivered in the Court of Appeal.

As to the right to recover damages in an action for rectification, I see no objection to it. It was formerly held that a party could not have a decree for specific performance in the suit for rectification, that is specific performance of the agreement as altered by the decree, but no sound reason was ever given for this doctrine and it is no longer law. *Olley* v. *Fisher* (1).

The appeal must be allowed, the judgment of the Court of Appeal vacated and that of Chief Justice Armour restored with costs to the appellants in all the courts.

Appeal allowed with costs.

Solicitors for the appellants: *German & Crow.*

Solicitors for the respondents: *Harcourt, Cowper & Macoomb.*

(1) 34 Ch. D. 367.

JOHN HYDE (PLAINTIFF).....APPELLANT; 1899

AND *Mar. 29.
*June 5.

THOMAS LINDSAY (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Purchase of insolvent estate—Refusal to complete—Action by curator—Completion of purchase after judgment—Subsequent action for special damages—Res Judicata—Practice.

A merchant in Ottawa, Ont., purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel him to do so and obtained judgment whereupon he accepted delivery and paid the purchase money. The curator subsequently brought another action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery.

Held, reversing the judgment of the Court of Appeal for Ontario, that under the law of Quebec, by which the case was governed, the curator was entitled to recover the expenses and disbursements which, as a prudent administrator, he was obliged to make for the safe-keeping of the property.

Held also, that these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec courts and the right to recover them was not *res judicata* by the judgment in that action.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment at the trial in favour of the plaintiff.

This appeal involves the decision of two questions of law which, with the facts from which they arose, are sufficiently stated in the above head-note and in

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

1899

HYDE v. LINDSAY.

the judgment of the court. The Court of Appeal for Ontario did not deal with the question of *res judicata* as it held that the plaintiff had no right of action.

Belcourt for the appellant.

Aylesworth Q.C. and *Pratt* for the respondent.

The judgment of the court was delivered by:

GIROUARD J.—This is an Ontario appeal, but the merits of the case are to be determined by the laws of the Province of Quebec. On the 9th day of April, 1896, in the City of Hull, in the Province of Quebec, the respondent purchased for cash from the appellant, as curator to the insolvent estate of one F. X. Martin, merchant, of Hull, the stock in trade and all the assets abandoned by the said F. X. Martin, for the benefit of his creditors, but a short time afterwards he repudiated the sale and refused to take the goods. In consequence of this refusal, on the 21st April, 1896, the respondent was put in default and protested and finally sued. It was not till the 18th of March, 1897, that, in satisfaction of a judgment of the Superior Court of the Province of Quebec against him, he took possession and paid the balance of the purchase money, amounting to $11,712.57, together with the interest thereon from the date of service of process and costs of suit.

Now the appellant demands from the respondent the further sum of $953.63, as special damages which his default has caused to the creditors of the said estate.

The respondent pleaded *res judicata*, alleging that he had satisfied the judgment rendered against him, in principal and damages, the latter consisting in the interest on the balance of the purchase money and all the costs, and as stated in his plea, he contends

1899

HYDE
v.
LINDSAY.

Girouard J.

that the claim of the plaintiff sued for in this action is one which the plaintiff included or might and ought to have included in his claim in said action in the Superior Court, in the Province of Quebec.

Whatever may be the meaning of *res judicata* under the laws of Ontario, there is no possible doubt that under the laws of Quebec the Quebec judgment is not *res judicata* of the present claim. The payment of the interest and costs means that and nothing more; C. C. Arts. 1077, 1534; it does not mean other damages resulting from the default in accepting delivery of goods, such as insurance, care-taking, etc., which are specially excluded and reserved by the declaration in the former suit,

the plaintiff, *ès qualité*, reserving to himself all rights to claim from the defendant all damages, costs, expenses, caused by the defendant's default.

Art. 1065 of the Civil Code of Quebec says:

Every obligation renders the debtor liable in damages in case of a breach of it on his part.

Art. 1071:

The debtor is liable to pay damages in all cases in which he fails to establish that the inexecution of the obligation proceeds from a cause which cannot be imputed to him, although there be no bad faith on his part.

Article 1073:

Damages due to the creditor are in general the amount of the loss that he has sustained and of the profit of which he was deprived.

The loss here consisted not only in the loss of the purchase money for a time, but also the cost of keeping the property in dispute. The appellant could not include the damages which he now claims in the Quebec suit, either in the principal action or by an incidental demand. Some had happened before the institution of the suit, but the greatest part were in the future and could not be ascertained when the case was instituted or argued, less when it was decided. In fact these damages could not be ascertained before the default had ceased *de facto*, that is before the pay-

1899

HYDE
v.
LINDSAY.

Girouard J.

ment of the full amount of the purchase money, on the 18th of March, 1897. They are necessary expenses and disbursements which the curator and the creditors had to incur pending the default of the respondent, which might have been of several years if the respondent had resorted to the appellate courts of the country. He wisely submitted to the judgment of the first court; he is nevertheless responsible for all the damages caused by his default. C. C. Arts 1065, 1067, 1069, 1070, 1071, 1073, 1074.

The respondent contends that he never authorized these expenses. This is perfectly true. The appellant was not his agent; he was not even a *negotiorum gestor* under article 1043 and following of the Civil Code; he was simply a curator of an insolvent estate; and it is only in that capacity that he can succeed.

Now, what is the legal position of such a curator? What are his duties, obligations and powers? They are defined in article 771 of the Code of Civil Procedure in force when this matter was pending:

The curator takes possession of all the property mentioned in the statement (of abandonment) and administers it until it is sold in the manner hereinafter mentioned.

The curator is therefore in possession and an administrator, and his administration ends only when the property is sold in the manner indicated by the Code, that is, if for cash, till the cash is paid.

As an administrator, was the appellant justified in making the claim he has preferred? Mr. Justice Moss has very accurately and concisely summarized its particulars, and I cannot do better than reproduce his observations:

The claim made in this action is in respect of four different classes of items:

(1.) At the date of the abandonment by Martin the property was insured in certain insurance companies under policies in respect of which Martin had paid premiums to a period far beyond the 11th of April, 1896, the date of the defendant's purchase. These policies were

1899

HYDE v. LINDSAY.

Girouard J.

allowed to continue until they expired, instead of being put an end to, and a return secured of a proportionate part of the premiums as would have been done if the defendant had fulfilled his contract according to its terms. The plaintiff claims the proportion of these premiums, amounting to $164.77.

(2.) When some of these policies expired after the sale to the defendant, short term risks were effected and premiums were paid out of the moneys of the estate in respect of them. These are claimed and amount to $42.60.

(3.) Certain disbursements were made out of the moneys of the estate for the care and feed of some horses forming part of the property sold, for coals supplied to heat the shop where the stock of goods was, and for men carrying some of the goods upstairs and removing ice from the basement of the shop. These are claimed and amount to $60.25.

(4.) A person named Mutchmore was directed by the plaintiff to look after the stock of goods, and he visited the place once, and occasionally twice a day, lit fires in the winter months, turned over the goods, packed away furs, and otherwise cared for the property until the defendant took it away. For this he had not been paid at the time of the trial, but in respect of these services and of the plaintiff's *supervision* a claim is made of $686.00.

I would, however, add to the word "supervision" in the last line of the item, the words "and responsibility."

All these expenses and disbursements were made in the safe keeping of the property in question. Can it be pretended seriously that a prudent administrator, for instance, a tutor or an executor, or a trustee, is not in duty bound to keep the property entrusted to his care and administration insured against accidents by fire? Is the appellant to be less careful than the insolvent who kept the same property insured while in his possession? Is he not justified in keeping a caretaker or guardian of an estate worth nearly $13,000? He had one before the sale, as is the practice pending the liquidation of insolvent estates. Why not one also after the sale, till the payment of the purchase money and the delivery according to the terms of the sale? Why not one till the property is removed from the curator's hands? Is he to continue to discharge

1899

HYDE v. LINDSAY.

Girouard J.

his duties and obligations for another year or more for nothing? I think all the classes of items contained in the bill of particulars, except the first, should be allowed, not because they were incurred in the interest and for the benefit of the respondent, but because they were the necessary consequence of his default, in the interest of the creditors. The creditors are responsible to the curator for the amount of the damage he claims, and it is only just that they be refunded or indemnified by the wrong doer. The respondent is clearly liable.

The first class of items, composed of insurance premiums paid by the insolvent before the abandonment, cannot be entertained, because the respondent not only bought the stock in trade, but also all the assets of the insolvent, and this item was certainly one of his assets.

We are therefore of opinion that the appeal should be allowed with costs before all the courts and that this action be referred to William L. Scott, Esquire, one of the masters of the High Court of Justice of Ontario, at Ottawa, to take an account ot the amount reasonably and properly paid or incurred by appellant as such curator in respect of the above items 2, 3 and 4, in respect of insurance upon the stock in trade and fixtures of the said estate from the 21st of April, 1896, date of the default, to the 18th of March, 1897, date of the payment and delivery, and also in respect of the care and guardianship of the said property during the above period, including the curator's fees or remuneration, and those of his guardian, and generally all the items of the bill of particulars filed, excluding only said item no. 1 in respect of insurance premiums paid by the insolvent previous to the assignment.

Appeal allowed with costs.

Solicitors for the appellant: *Belcourt & Ritchie.*

Solicitors for the respondent: *Pratt & Pratt.*

THE COMMERCIAL UNION ASSURANCE COMPANY (DEFENDANT) ..... APPELLANT;

AND

FENWICK MARGESON AND CONSTANTINE SALSTONSTALL MILLER (PLAINTIFFS) ..... RESPONDENTS.

1899

*May 2.

*June 5.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire insurance—Construction of contract—"Until"—Condition precedent—Waiver—Estoppel—Authority of agent.

Certain conditions of a policy of fire insurance required proofs, etc., within *fourteen days* after the loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that *until* such proofs were produced, no money should be payable by the insurer and for forfeiture of all rights of the insured if the claim should not, for the space of *three months* after the occurrence of the fire, be in all respects verified in the manner aforesaid.

Held, that the condition as to the production of proofs within fourteen days was a condition precedent to the liability of the insurer; that the force of the word "until" in the subsequent clause could not give to the omission to produce such proofs, within the time specified, the effect of postponing recovery merely until after their production, and that the clause as to forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period.

Neither the local agent for soliciting risks nor an adjuster sent for the purpose of investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment, and as the policy in question specially required it, there could be no waiver unless by indorsement in writing upon the policy signed as therein specified. *Atlas Assurance Co.* v. *Brownell* (29 Can. S. C. R. 537) followed.

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

1899

THE COMMERCIAL UNION ASSURANCE COMPANY v. MARGESON.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) refusing the defendant's application to have the judgment entered for the plaintiffs set aside and the action dismissed, or for a new trial.

The facts of the case and questions at issue on this appeal sufficiently appear from the statement given in the judgment of the court delivered by His Lordship Mr. Justice King.

Drysdale Q.C. for the appellant. It was a condition precedent that assured, within fourteen days after the loss, should deliver a particular statement and account of the loss; no attempt was made to comply with this requirement until at least thirty-seven days after the fire. There could be no waiver except by indorsement upon the policy signed by the agents of the company at Halifax; there was no waiver in the manner provided, and waiver is out of the question in the action. The findings of the jury do not aid the plaintiffs, and under the contract they are irrelevant and notwithstanding such findings, the appellant is entitled to judgment. The finding that the delay in respect to the proofs were reasonable, has nothing to do with the position of the parties under the contract. The finding that the adjuster knowingly caused Margeson, to believe up to a period later than fourteen days after the fire, that it was not necessary to prepare proofs of loss, does not contain the elements of estoppel, as there is no finding that acting or relying upon such belief and by reason thereof he failed to put in his proofs. The finding that Margeson, after the fourteen days had expired, proceeded with diligence in the preparation of proofs, is immaterial. There was no evidence to warrant any suggestion or finding of waiver by, or estoppel as against, the company in connection with condition 14. The adjuster had no

(1) 31 N. S. Rep. 337.

authority to bind the company, he was not an officer of the company having authority to waive conditions in the policy; *Logan* v. *Commercial Union Insurance Co.* (1); *Western Assurance Co.* v. *Doull* (2); *Caldwell* v. *The Stadacona Fire and Life Ins. Co.* (3); *Employers Liability Assurance Corporation* v. *Taylor* (4); *Atlas v. Brownell* (5), and cases there cited.

Borden Q C. for the respondents. The company prevented the making of proofs and cannot set up the delay as a defence to plaintiffs' claim. The law does not require performance if it has been prevented by the person sought to be fixed with liability. *Edwards* v. *Aberayron Mut. Ship Ins. Soc.* (6), at p. 580; Leake on Contracts (3 ed.) pp. 379, 380; *Hotham* v. *East India Co.* (7); *Goldstone* v. *Osborn* (8); *Tredwen* v. *Holman* (9); *Thomas* v. *Fredricks* (10). Refusal by the insurer to appoint an appraiser or a denial of liability under the policy relieves the insured. *Uhrig* v. *Williamsburgh City Fire Ins. Co.* (11); *Phœnix Ins. Co.* v. *Stocks* (12); 4 Joyce on Insurance, secs. 3255, 3257 and cases there cited; 2 May on Insurance (3 ed.) sec. 496 *b.*; 1 Hudson, Building Contracts, 321, 327, 330; *Mackay* v. *Dick* (13); *Roberts* v. *Bury Commissioners* (14), at pp. 320, 326 and 330.

The non-delivery of proofs within fourteen days did not occasion a forfeiture of plaintiffs' rights under the policy the only provision for such a forfeiture being that "if the claim shall not *for the space of three months* after the occurrence of the fire be in all respects verified, in manner aforesaid, the insured

(1) 13 Can. S. C. R. 270.
(2) 12 Can. S. C. R. 446.
(3) 11 Can. S. C. R. 212.
(4) 29 Can. S. C. R. 104.
(5) 29 Can S. C. R. 537.
(6) 1 Q. B. D. 563.
(7) 1 T. R. 638.
(8) 2 C. & P. 550.
(9) 1 H. & C. 72.
(10) 10 Q. B. 775.
(11) 101 N. Y. 362.
(12) 149 Ill. 319.
(13) 6 App. Cas. 251.
(14) L. R. 5 C. P. 310.

1899

THE COMMERCIAL UNION ASSURANCE COMPANY v. MARGESON.

shall forfeit every right to restitution or payment by virtue of this policy and time shall be the essence of the contract." The plaintiffs refer to *Lafarge* v. *Liverpool, London & Globe Ins. Co.* (1); *Hutchinson* v. *Niagara District Mut. Fire Ins. Co.* (2); *Weir* v. *Northern Counties of England Ins. Co.* (3); 2 Beach on Insurance, sec. 1203, 1210; 2 May on Insurance, (3 ed.) sec. 465; 4 Joyce on Insurance, sec. 3282 and cases cited. In the fourteenth condition the following provision is found, after the provision requring proofs of loss: "And *until* such accounts, etc., are produced * * * "no money shall be payable under this policy." Upon a reasonable construction of this provision in connection with that requiring proofs within 14 days and that creating a forfeiture if the proofs are not delivered within three months, the delivery of proofs within 14 days cannot be a condition precedent, otherwise the provision just quoted, as well as that creating a forfeiture, would be unnecessary, inconsistent and useless.

If the delivery of proofs of loss within 14 days is a condition precedent, the defendant is estopped from setting it up. The findings are conclusive on this point. The company induced plaintiff to refrain from preparing proofs of loss, promised that its adjuster should prepare the necessary proofs, and sent him to plaintiffs for that, among other purposes. It is significant both as to the adjuster's authority and as to his intention that upon his second visit he took blank proofs of loss with him; forms supplied by the company suited to the conditions of its own policy. See *Western Assur. Co.* v. *Doull* (4) per Strong J. at p. 456; *Jennings* v. *Metropolitan Life Insurance Co.* (5) at p. 65; *Goodwin* v. *Robarts* (6); *Indiana Insurance Co.* v. *Cape-*

(1) 17 L. C. Jur. 237.
(2) 39 U. C. Q. B. 483.
(3) 4 L. R. Ir. C. L. 689.
(4) 12 Can. S. C. R. 446.
(5) 148 Mass. 61.
(6) 1 App. Cas. 476, 490.

hart (1); *Heath* v. *Franklin Insurance Co.* (2); *Clark* v. *New England Mutual Fire Ins. Co.* (3); *Shannon* v. *Hastings Mutual Fire Ins. Co.* (4); *Smith* v. *Commercial Union Ins. Co.* (5); 2 May on Insurance, (3 ed.) secs. 497, 498, 499. The nineteenth condition requiring indorsement of waiver does not apply to waiver of the provisions relating to appraisal or to proofs of loss; *Blake* v. *Exchange Mutual Ins. Co. of Philadelphia* (6); 1 Joyce on Insurance, sec. 437, and the cases cited, and May on Insurance (3 ed.) sec. 511.

The judgment of the court was delivered by:

KING J.—This is an appeal by defendants from a judgment of the Supreme Court of Nova Scotia in an action on a policy of insurance against fire upon a stock of merchandise. In the clause of the policy binding the company to pay the amount of a loss, it is expressed that the obligation shall be subject to the conditions and stipulations indorsed on the policy.

By the 14th of such conditions and stipulations, persons sustaining loss or damage are forthwith to give notice thereof in writing at the office of the company at Halifax or to the local agent, and are, within fourteen days after the loss, to deliver in writing in duplicate a particular statement and account of their loss or damage, specifying a number of particulars, and also stating when and how the fire originated as far as the insured may know or believe. It is further required that the insured shall verify such statement and account by the production of books of account and vouchers and by his affidavit, and when practicable by the testimony of domestics, servants or clerks. He is further required to procure a certificate of two

(1) 108 Ind., 270.
(2) 1 Cush., 257.
(3) 6 Cush. 342.
(4) 26 U. C. C. P. 380.
(5) 33 U. C. Q. B. 69.
(6) 12 Gray 265.

1899

THE COMMERCIAL UNION ASSURANCE COMPANY v. MARGESON.

King J.

magistrates most contiguous to the place of the fire, stating their belief that the loss was an honest one, and, if required, he is to submit to an oral examination under oath as to the loss and his claim; and is (amongst other things) also to supply such other vouchers and produce such further evidence and give such other explanation as the company may reasonably require to prove his account of the loss or damage and of his right to recover the amount claimed. It is then stipulated that

> until such accounts, declaration, testimony, vouchers and evidence as aforesaid are produced and examination (if required) and such explanation given no money shall be payable by the company under this policy. * * And if the claim shall not, for the space of three months after the occurrence of the fire be in all respects verified in manner aforesaid the insured shall forfeit every right to restitution or payment by virtue of this policy, and time shall be of the essence of the contract.

By the 16th condition it is declared that

> payment of losses shall be made within sixty days after the loss shall have been ascertained and proved in accordance with these conditions.

The fire occurred on the 22nd day of February, 1897. Notice in writing was forthwith given by the assured, in a formal way that showed that he was acting under the condition of the policy; but no statement or account of loss was furnished withing the fourteen days, nor was it furnished until about thirty-seven days after the fire.

In reply to the defence of the company setting up this breach of condition, the insured claims that the company are estopped from availing themselves of such defence upon the alleged ground that he was induced to delay making the statement and proof through the action and representations of the local agent of the company and of their adjuster. Upon findings of the jury to this effect, the court below

affirmed a judgment of the trial judge entered for the plaintiffs.

In the course of his argument for the respondent, Mr. Borden contended that the requirement of the contract as to the furnishing of statement of loss, etc., within fourteen days, is not a condition precedent to recovery.

The question whether stipulations are to be held to be dependent or independent is to be determined by the intention of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression are to give way. *Stavers* v. *Curling* (1).

Where, from a consideration of the whole instrument, it appears that the one party relied upon his remedy and not upon performance of the condition by the other, the performance is not a condition precedent; but where it appears that the intention most probably was to rely substantially upon the performance of the condition rather than upon a remedy in damages for its breach, then the reasonable view is that performance is a condition precedent. *Roberts* v. *Brett* (2).

Looking at the nature of the requirement here, and the close connection between its performance and the principal obligation of the company, it does not seem at all likely that the company was stipulating for an independent advantage, or intending to rely on what in any event must prove a barren remedy. The more reasonable construction is that performance was meant to be a condition of the obligation which in the body of the policy was expressly stated to be subject to it; not that these latter words would of themselves suffice to make of a stipulation a condition precedent, unless

(1) 3 Bing. N. C. 355. (2) 18 C. B. 561

1899

THE COMMERCIAL UNION ASSURANCE COMPANY v. MARGESON.

King J.

upon consideration of the whole contract such appears to be its effect.

Two clauses are, however, relied upon by the respondent. One, already cited, is that

> until such accounts, declaration, testimony, vouchers and evidence, etc., are produced, no money shall be payable by the company under this policy ;

and it was contended that by force of the word "until," as distinguished from "unless," the effect of an omission to give the particular statement or account within the fourteen days is merely that recovery is postponed until it is given, citing *Weir* v. *Northern Counties Ass. Co.* (1). It was pointed out by Mr. Drysdale that it was there stipulated that in default of the proofs no action should lie "*until*" etc. In *Whyte* v. *Western Ass. Co.* (2), the Judicial Committee held that a clause requiring proofs to be made within a prescribed time was a condition precedent to recovery in a contract where a subsequent clause restrained recovery until proofs made. In point of construction the clause relied upon by respondent is a general one covering a number of things variously dealt with by the preceding clauses, and makes their performance in the way previously indicated a condition precedent to the company's liability. If the word "accounts" as used in it includes the statement or account in question, there is nothing in the general words which purports to render the particular provision as to its production within fourteen days wholly useless and superfluous.

The other clause relied on is this, that

> if the claim shall not for the space of three months after the occurrence of the fire be in all respects verified in manner aforesaid, the insured shall forfeit every right to restitution or payment by virtue of this policy and time shall be of the essence of the contract.

(1) 4 L. R. Ir. C. L. 689. (2) 22 L. C. Jur. 215.

This does not mean that the three months are given for the performance of any act of proof whatever, but that all that is required to be done in the way of verifying the claim shall be done within the three months. Proof required to be given within a lesser prescribed time is to be so given; and, as to things in respect of which no time is specifically fixed, these also are to be done within the three months, so as that, within such time, everything in the way of verifying and perfecting the claim shall be then completed.

The 16th condition declaring that

> payment of losses shall be made within sixty days after the loss shall have been ascertained and proved in accordance with these conditions

clearly makes the giving of the proofs in accordance with the conditions a condition precedent to the liability of the company, and leaves the only question to be one as to the construction of the terms of the condition precedent. If the giving of the principal statement or account is a condition precedent, the giving of it within the fourteen days is equally so. See also *Mason* v. *Harvey* (1); *Roper* v. *Lendon* (2); *Employers Liability Assurance Corporation* v. *Taylor* (3).

Next as to the alleged estoppel. The plaintiff says that after the fire he had a conversation with a local agent as to what was to be done, and that the latter said

> to keep quiet until the adjusters arrived, that nothing could be done until they arrived.

Upon receiving notice of the loss the company sent their adjuster, Mr. Butcher, to the spot. He reached the plaintiffs' on February 25th.

Condition 15 provides that

> where merchandise or other personal property is partially damaged, the insured shall forthwith cause it to be put in as good order as the

(1) 8 Ex. 819.
(2) 1 E. & E. 825.
(3) 29 Can. S. C. R. 104.

1899

THE COMMERCIAL UNION ASSURANCE COMPANY v. MARGESON.

King J.

nature of the case will admit assorting and arranging the various articles according to their kinds, and shall cause a list or inventory of the whole to be made naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of said damage on each article by disinterested appraisers mutually agreed upon whose detailed report in writing shall form part of the proofs required to be furnished by the insured.

These proofs are not part of the particular statement or account required to be furnished within fourteen days after the fire.

Butcher first set about getting the articles sorted out so as to expedite the work of appraisal. The plaintiff says:

> The morning Mr. Butcher arrived he said he wanted the goods all arranged so that they could list them. He wanted to go back that week. He said the company always paid losses in full and expected to pay mine. * * * After that I proceeded with the sorting of the goods. I had not got through when Mr. Butcher went away on Saturday. Before he went away he said that when the goods were assorted and listed he would return and make out the proofs of loss. He wished me to let the local agents know when we got through. I got through the following Thursday or Friday, and I then notified the local agent. * * * After I gave the notice to the local agent, Mr. Butcher returned the first of the following week. That would be a fortnight from the day of the fire. * * * That time he remained three days, I think. During that time he examined the goods and made out a list. When he got through with making out the list he did not come to see me or give me a copy of it. He went away without showing me the list.
>
> Q. (By plaintiffs' counsel) Tell me why it was—I am speaking of the second time Butcher went away—why it was that before that you had not got the proofs of loss completed and put in?—A. I thought Mr. Butcher came there for the purpose of helping to make up the proofs of loss. I did not do so because they had a list of the goods and I thought the proofs of loss could be made up from the appraisement they were making.

Mr. Butcher denies that he said that he would make out proofs of loss, but he admits that if he could have got the prices arranged (which according to him was

prevented by plaintiff,) he would have made out the proofs of loss and sent them to the company.

On leaving Kentville on the first occasion he wrote the following letter to plaintiff, dated 26th February:

In confirmation of my verbal instructions of this morning, I require you to conform to the conditions printed in your policy with the Commercial Union Assurance Co. When your stock is ready for appraisement please notify Mr. Roscoe, agent here at Kentville.

The plaintiff says that after receiving this letter he looked over the conditions of the policy, and that sometime during the week following the fire (which occurred on Monday) he consulted a Mr. Shaffner about making out proofs of loss; and he further says

It was about the time I got Butcher's letter that I went to Shaffner. I could not say whether it was before or after. I did not take the policy to him. I read the conditions all over at that time. I knew very little about proofs of loss before reading these. I knew that they were required. I had a slight idea of that from the first. I always supposed I would have to prove the loss. I had a discussion with the adjusters about the appraisement, not about the proof, on their first visit.

The following question (amongst others) was left to the jury:

Did the acts and words of the local agent and adjuster of the defendant company before the adjusters left Kentville the first time, reasonably cause the failure of plaintiff to deliver proofs of loss before March 31, 1897? If so, state in detail what were such acts and words.

And the jury answered:

Yes. The local agent informed plaintiff to keep quiet until adjuster arrived, that nothing could be done until then. That plaintiff was told by Butcher that he would make up proofs of loss on his return.

Assuming that Butcher's letter of 26th February primarily referred to the assorting of the goods, it contains a clear intimation to the insured that he is to look to his contract and comply with its conditions. And that he so understood it himself is clear, for he thereupon read the conditions all over and appears to

1899

THE COMMERCIAL UNION ASSURANCE COMPANY v. MARGESON.

King J.

have consulted a Mr. Shaffner about making out proofs of loss. It is idle, therefore, for the plaintiff to say that the reason he did not make out the proofs of loss was because he thought that Butcher had come for the purpose of helping to make out such proofs (supposing that this is a sufficient reason.) Again, and as an alternative answer to the question of his counsel as to why he did not make out the proofs of loss, he says:

> I did not do so because they (*i.e.* Butcher and one Jarvis, the adjuster for another company) had a list of the goods and I thought the proofs of loss could be made up from the appraisement they were making.

This (if it amounts to anything) clearly relates to a time after the expiration of the fourteen days prescribed for furnishing the particular statement or account. It consequently appears that there was no substantial evidence upon which the jury could reasonably find as they did upon this question, and the plaintiff is in the position of having omitted to comply with a condition precedent to his right of recovery. The implied authority of a person acting in Mr. Butcher's capacity was considered under somewhat similar circumstances in *Atlas Ins Co.* v. *Brownell* (1) decided this term.

Were the evidence much stronger than it is, the plaintiff under the circumstances of this case, would find himself precluded from availing himself of any waiver on the part of Mr. Butcher by the full and explicit provisions of the 19th condition stipulating that

> no one of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company unless the waiver be clearly expressed in writing by indorsement upon this policy signed by the agent of the company at Halifax, N. S.

(1) 29 Can. S. C. R. 537.

1899

THE COMMERCIAL UNION ASSURANCE COMPANY v. MARGESON.

King J.

There were other substantial objections to recovery argued upon the appeal which it is not necessary to decide upon.

The result is that the appeal is allowed, the judgments of the Supreme Court of Nova Scotia and of the Honourable Mr. Justice Meagher are reversed and set aside, and the action is dismissed with costs to the appellant in all the courts.

Appeal allowed with costs.

Solicitor for the appellant: *Hector McInnes.*

Solicitor for the respondents: *Joseph A. Chisholm.*

JOSEPH NARCISSE GASTONGUAY (PETITIONER) ..... APPELLANT;

AND

J. ALFRED SAVOIE (CURATOR) AND FRANÇOIS THÉODE SAVOIE (INSPECTOR)..... RESPONDENTS.

1899

*May 17.
*June 5.

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

Insolvency—Purchase by inspector—Mandate—Trusts—Arts. 1484, 1706 *C. C.—Art.* 748 *C. P. Q.*

An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto and he cannot be allowed to become purchaser, on his own account, of any part of the estate of the insolvent. *Davis* v. *Kerr*, (17 Can. S. C. R. 235,) followed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, (appeal side), affirming the decision of the Superior Court, District of Arthabasca, which dismissed the appellant's petition with costs.

---

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

1899

GASTONGUAY v. SAVOIE.

The appellant petitioned for the cancellation of a sale of part of an insolvent estate, sold under the provisions of the Code of Civil Procedure in the Province of Quebec, upon the advice of the inspectors appointed by the creditors of the insolvent, on the ground, amongst others, that one of the inspectors had become purchaser on his own account of the property sold by the sheriff under an order by the court. The petition was refused by the Superior Court, and the present appeal is from the judgment of the Court of Queen's Bench affirming that decision.

Fitzpatrick Q.C. (Solicitor-General for Canada), and *Crépeau*, for the appellant, cited arts. 1484 and 1706 C. C. and art. 748 C. P. Q.

Geoffrion Q.C. and *Coté* for the respondents (*Méthot* with them). Articles 1484 and 1706 C. C., and art. 748 C. P. Q. do not apply to sales made under judicial authority, nor to inspectors of insolvent estates. The powers and duties of inspectors are given by arts. 877-879 C. P. Q. They have not possession of the property and cannot control sales; their duties are merely advisory.

The judgment of the court was delivered by:

TASCHEREAU J.—Upon the ground that the inspector to an insolvent estate cannot be allowed to purchase any of the property of the insolvent, as the respondent has done, I would allow the appeal and annul this sale. It is a principle of law which courts of justice are bound to strictly apply that no one having duties of a fiduciary character to discharge should be allowed to put his duties in conflict with his interest. *Davis* v. *Kerr* (1), at page 246.

Nous écarterons donc ces mandataires afin de ne pas les placer entre leur intérêt et leur devoir. Boitard, Proc. vol. 2, (10 ed.) p. 353 (2).

(1) 17 Can. S. C. R. 235. (2) 15 ed. p. 453.

That is the principle upon which are based articles 1484 and 1706 of the Civil Code, and article 748 of the Code of Procedure.

The respondent himself alleges that it was upon the advice of the inspectors that this property was sold as two separate lots. This shows that the inspectors have more to do with the sale of the insolvent's estate than he contended for at the argument. They advise merely, it is true, but that advice must be wholly disinterested, and, for instance, the very time or season chosen by them for the sale may be one where the property is likely to be sold at a lower rate, and if they are allowed to buy, their interest would be adverse to the creditors' interests. I cannot divest my mind of the opinion that it would be opening the door to frauds if the courts failed to forbid such dealings. Such was Mr. Justice Ouimet's opinion in the Court of Appeal, and I fully share in it.

Appeal allowed with costs, and petition to set aside sale granted with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Crépeau & Crépeau.*

Solicitors for the respondent, J. A. Savoie: *Méthot & Noël.*

Solicitors for the respondent, F. T. Savoie: *Coté & Girouard.*

1899

*May 22.

*June 5.

THE CITY OF MONTREAL (DEFENDANT)..... } APPELLANT;

AND

HECTOR G. CADIEUX (PLAINTIFF)...RESPONDENT.

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

Evidence—Concurrent findings on questions of fact—Reversal on Appeal.

Although there may be concurrent findings on questions of fact in both courts below, the Supreme Court of Canada will, upon appeal, interfere with their decision where it clearly appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary.

Taschereau J. dissented, holding that as there had been concurrent findings in both courts below supported by the evidence, an appellate court ought not to interfere.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

A statement of the facts and questions at issue in this case as made by Mr. Justice Hall, in the Court of Queen's Bench, is quoted in the judgment of His Lordship Mr. Justice Girouard.

Atwater Q.C. and *Ethier Q.C.* for the appellant.

Beaudin Q.C. for the respondent.

THE CHIEF JUSTICE concurred in the judgment of the majority of the court allowing the appeal with costs, and dismissing the plaintiff's action with costs.

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

1899

THE CITY OF MONTREAL v. CADIEUX.

Taschereau J.

TASCHEREAU J. (dissenting.)—The appellant in this case asks to reverse, upon mere questions of fact, the concurrent findings of both the Superior Court and the Court of Appeal, in which the six judges who sat in the case were unanimous. There is nothing in the record which, in my opinion, would justify us in doing so.

Whatever personal opinion I may have of the respondent's claim I cannot forget, I need hardly say, that I am not a witness in the case, and that it is upon the evidence and only upon the evidence, as found in the record, that we have to determine the controversy between the parties. Now that evidence is with a single exception all one way, and the trial judge did not hesitate to maintain *instanter* the respondent's action. The Court of Appeal unanimously affirmed that decision.

That the respondent was employed by the appellant is admitted by the pleas to numbers 1, 2, 3, 4, 8 and 12, not by the day or by the month but, as he claims, at so much a lot, and the only contestation raised by the appellant is as to the *quantum meruit* and value of the respondent's services. Now the witness Bourque, a civil engineer, who was the secretary of the Expropriation Commissioners, swears that he notified the respondent of his appointment, that he requested him to proceed with his work, and only notified him to cease in November or December; that he officially certified his claim as correct, and that leaving aside all tariffs and preceding relations between the parties in similar matters the claim of the respondent was a just and reasonable one and did not exceed the value of his services. James Nelson, an architect, who had a personal knowledge of the respondent's work, says:

I consider the plaintiff's account is a fair one. * * * I reason on the basis of the value of his services. Mr. Cadieux is a very com-

1899

THE CITY OF MONTREAL v. CADIEUX.

Taschereau J.

petent man indeed. * * * (By the Court.)—Then you think the amount charged in his account is a fair and reasonable one?—A. I think so, your honour.

James Rafter, a real estate agent, who also had a personal knowledge of the respondent's services, and of the nature of his claim, being asked:

> Now will you tell us what is your opinion of the value of the plaintiff's services?—A. Well, I know that I would not like to go through the same work again for the same pay.

And on cross-examination, he says that the respondent was working for the city for the whole time from June to December, and that he considers his account a fair one. "For myself," he adds again, "I would not do the same work for the same pay."

Simeon Lesage, an architect and civil engineer, testifies in the same sense. The respondent himself, examined as a witness, testifies to the correctness of his claim as to the work done, the number of the lots and as to the value of his services, and Isaie Préfontaine corroborates him in all particulars.

Against all that evidence the appellant invokes the evidence of Robb, the city treasurer, who simply swears, on cross-examination, that he adheres to the opinion he expressed in a report of a special committee of which he formed part, filed in the case as exhibit 65 at *enquête*. Now, on reference to that document, it seems clear that all that was referred to that special committee, and all that they could deal with, were the claims of the proprietor's witnesses, not the claims, as the respondent's is, of the city's witnesses. But assuming that Robb, with no personal knowledge whatever of the details of the respondent's services, has sworn that the respondent has been fully paid, and even overpaid therefor by the amount he has already received, I do not see how his evidence, entirely unsupported as it stands in the record, could pre-

1899

THE CITY OF MONTREAL v. CADIEUX.

Taschereau J.

ponderate against the evidence so clear and conclusive of the other six witnesses, each and every one of them heard before the trial judge, believed by him and by five judges in appeal. They have, it is true, claims of the same nature against the city, but that by itself alone is, under the circumstances, insufficient to justify us in reversing the judgment appealed from. I would hesitate here to stigmatise as incredible and unworthy of belief all of these witnesses. And it seems to me that is what the appellant asks us to do upon this appeal. We cannot do so, it seems to me, without setting at naught a constant jurisprudence of the House of Lords and of the Privy Council, strictly adhered to by us heretofore, as to appeals upon questions of fact from the concurrent findings of two courts. *Smith* v. *St. Lawrence Tow Boat Co.* (1); *Allen* v. *Quebec Warehouse Co.* (2); *McIntyre* v. *McGavin* (3); *Colonial Securities* v. *Massery* (4).

GWYNNE J.—Plaintiff could only recover on a *quantum meruit*, and although he claims for service of several months, yet he had not offered any evidence whatever to show how much of such period was occupied in the service claimed for. In fact his only evidence is that upon a former occasion for like services he charged in the same manner and was paid; but we must bear in mind that the corporation are the ratepayers whose funds are sought to be made liable, and that if their servants on a former occasion, or upon several former occasions, submitted to extortion, that is no reason for the continuance of the practice being sanctioned by the court.

KING J.—concurred with the majority of the court.

(1) L. R. 5 P. C. 308.
(2) 12 App. Cas. 101.
(3) [1893] A. C. 268.
(4) [1896] 1 Q. B. 38.

1899

THE CITY OF MONTREAL v. CADIEUX.

Girouard J.

GIROUARD J.—I entirely concur in the statement of facts as presented by Mr. Justice Hall, speaking apparently for the whole court, but I cannot accept his conclusions. The learned judge says:

> The respondent and two others, with Mr. Nelson, architect, were appointed by the City Council of Montreal, on the 21st June, 1895, to act as experts for the tenants under the expropriation proceedings of 1894. Three other persons were appointed by the same resolution to act as experts for the proprietors under the same expropriations. Public notice was given that the commissioners for settling the terms of expropriation would not be appointed until 4th September. In the months of July and August the subject of discontinuing all expropriations was discussed in the City Council, and in the latter month a resolution was adopted that the Superior Court be asked to grant a month's delay in all the cases, which application was granted, and on the 19th of that month a formal judgment was pronounced, terminating all the procedure in the matters of expropriations. On the 21st December of that year, the Legislature of the Province of Quebec confirmed and legalized this termination of the expropriation proceedings which had been commenc.d in this city.
>
> In the meantime the persons who had thus been appointed to act as experts in case the expropriations were proceeded with, without any instructions from the city officials, and without the knowledge, apparently, of those of the officials who would naturally have been called upon to superintend such work, but with a diligence which could not have been too highly applauded had it been exercised under other circumstances, were quietly proceeding with the examination and valuation of all the properties which the expropriation proceedings of 1894 had designated as the next in order for the widening of streets in case the city should continue that work. Engrossed apparently in the discharge of these assumed duties, they appear neither to have heard in the public deliberations in the council, nor to have read in the reports in the public press, the determination of the City Council, for reasons of economy, to seek relief from the burden of these expropriations. The Act of the legislature in December appears to have been the first information which arrested their attention. They ceased then their labours, and presented to the council their bills for the work thus performed by them since the preceding 21st June, about five months, amounting to the sum of $7,605.60 each, for the three unprofessional experts, and $9,278 for the architect—a little over $32,000 for the tenants' experts alone—for work for which the city had no use, which it never required and has never used. The bills were

made out upon the basis of $20 for each 25 feet frontage of improved properties, and of $8 per 25 feet frontage of vacant properties, which it appears was the scale upon which the experts had been paid in the previous expropriations. Some opposition was made in the council to the payment of these bills, but principally upon the ground that a new tariff had been adopted of $20 per improved and $8 per vacant lot, irrespective of extent of frontage; but upon investigation it did not appear that this modification of the tariff had been communicated to those to whom it was intended to apply—and the experts therefore claimed payment upon the basis of their previous settlements.

A committee of the city officials was appointed to examine and report upon the matter, which they did to this effect, that one-half the amounts charged would be ample compensation for the work done under the existing tariff. By authority of the finance committee of the city, payments were made to these experts from time to time, amounting in the aggregate to one-half the amount of their several claims.

Payment of the balance being refused, the plaintiff took the present action for the balance of his account, $3,805. The city contested the action upon the ground that the plaintiff had never been employed or set to work to make the valuations in question, and moreover, even if he had been so employed, the value of his services did not exceed the tariff regulation therefor, to wit $20 per improved and $8 per vacant lot—being one-half the amount of the account sued upon.

The plaintiff examined as witnesses, himself, his colleagues, the secretary of the city expropriation bureau and the city treasurer. The latter testified only to the payments made on account by order of the finance committee. All the others supported plaintiff's claim to its fullest extent, whether based on the tariff recognised for previous expropriations, or even for the actual value of the service rendered. The city examined no witnesses in defence.

It is doubtful if, independently of payment on account, the plaintiff had any legal right of action against the city for pretended services volunteered by him merely upon a resolution of the council appointing him, and without any instruction from a responsible city official as to the commencement, prosecution or termination of his work. But, by a payment of 50 per cent upon his claim, the city has deprived itself of this ground of its defence, and was left only with what remained, viz., a contestation over the real value of the services actually rendered. When it is considered that plaintiff's bill is upon the basis of $18,000 per annum for the services of a carpenter expert,

1899

THE CITY OF MONTREAL v. CADIEUX.

Girouard J.

whose regular business, it is proved, was not much interfered with by the attention he was obliged to give in examining the properties designated for expropriation, and that three others were engaged to perform the same service, it would seem that a reasonable opportunity existed of sustaining defendant's plea in this respect. The city, however, appears to have considered the effort a hopeless one, or was perhaps convinced that this estimate of the value of the plaintiff's services was, after all, not exaggerated. At all events, they examined no witnesses in support of their plea, and hence the trial judge, with nothing before him but plaintiff's own evidence, had no alternative but to maintain plaintiff's action to its fullest extent, without the formality even of taking it *en délibéré*, and we equally, for the same reason, have none but to dismiss the city's appeal.

I do not agree that there is no evidence adduced on behalf of the city. When Treasurer Robb is cross-examined, Mr. Archambault Q.C. of counsel for the defendant,

declares his intention of examining witness as his own witness to save recalling him.

The witness is asked:

Q. Will you please look at this exhibit, Mr. Robb, now shown you, marked plaintiff's Exhibit P. 5, and state whether this purports to be signed by you at the end of the report?—A. Yes.

Q. That's your signature there?—A. Yes, I have no doubt that it is an exact copy of the report which has been prepared by Mr. Ethier and myself.

Q. And you are still of the same opinion as you were when you gave that?—A. I am still of the same opinion as I was then.

Exhibit P. 5 is the report of the city officials to which Mr. Justice Hall refers, in which the majority of them, MM. Ethier Q.C., Dufresne and Robb (Bourque, dissenting), considers that half of the amount charged is ample compensation for the work done, and Mr. Robb, under oath, persists in his report. It is true that there is some evidence that the value of the respondent's services was as claimed by him. That evidence was given by interested parties, his colleagues, who have similar claims still pending—

and also by the secretary of the city expropriation commissioners, Bourque, who, for reasons not explained, dissented from the three other city officials, Ethier, Dufresne and Robb. It is based upon the fact that like services were previously paid at the same rate; but if the corporation or their servants, on a former occasion, or upon several previous occasions, submitted to what appears to have been most exhorbitant claims, that is no reason for the continuance of the practice in the present instance, where it is resisted. The evidence of Mr. Robb and his report, concurred in by MM. Ethier and Dufresne, are more satisfactory; they establish clearly, to my mind, that a gross injustice has been done to the appellants, and although this appeal only involves a question of facts decided by two courts, we have no hesitation in arriving at the conclusion that the respondent has been well paid and that his action for the other half of his account must be dismissed. We are therefore of opinion that the appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Ethier & Archambault.*

Solicitors for the respondent: *Beaudin, Cardinal, Loranger & St. Germain.*

1899
*June 6.

THE CONSOLIDATED PLATE GLASS COMPANY OF CANADA (DEFENDANT) ..... } APPELLANT;

AND

HARRY E. CASTON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Master and servant—Hiring of servant by third party—Control over service —Negligence.

A Plate Glass Co. hired by the day the general servant and horse and wagon of another company for use in its business, and while so hired the servant in carrying a load of glass knocked a man down and seriously injured him.

Held, reversing the judgment of the Court of Appeal (26 Ont. App. R. 63) that the Plate Glass Co. was not liable in damages for the injury; that the driver remained the general servant of the company from which he was hired and not that of the Plate Glass Co.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division of the High Court of Justice in favour of the plaintiff.

On the 13th of February, 1895, the plaintiff was injured by colliding with a vehicle while crossing from the curbstone to the railway track on Church Street, in the City of Toronto, to board a street car going north on said street. The vehicle with which he collided was a waggon belonging to The Cobban Manufacturing Company, and the horse attached thereto was owned by said company and driven by one of its servants.

For the purpose of doing its cartage business in the City of Toronto, the defendants had entered into an

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

(1) 26 Ont. App. R. 63.

1899

THE CONSOLIDATED PLATE GLASS CO. OF CANADA v. CASTON.

agreement with The Cobban Manufacturing Co. by which The Cobban Company agreed to supply a horse, wagon and driver to the defendant whenever required for the use of their business, at $3 a day. On the day in question the defendant had procured a horse, waggon and driver from The Cobban Company, under the above arrangement, and had requested the driver to deliver some glass at the office of Scott & Walmsley on the west side of Church Street, in the said city. Upon the glass being delivered it was discovered that the windows in which the glass was to be placed were so high that it would be impossible to do the work without procuring a ladder, and accordingly the defendant's foreman asked the driver to take him to the shop of one Phillips, on Church Street, above King Street, where he could procure a ladder and place it on said waggon and have it delivered at said office of Scott & Walmsley, and it was whilst going for such ladder that the accident occurred.

The plaintiff brought an action for damages in consequence of said injury, and on the trial before Mr. Justice MacMahon said action was dismissed. This decision was reversed by the Chancery Division whose judgment was sustained by the Court of Appeal The defendants then appealed to this court.

C. J. Ritchie Q.C. for the appellant.

J. W. McCullough and *Roche* for the respondent

The judgment of the court was delivered by

THE CHIEF JUSTICE (*Oral*).—We are of opinion that this appeal must be allowed and the judgment of MacMahon J. restored. The cause does not turn upon any nice distinction between the facts of this case and those upon which previous authorities have proceeded. It depends upon well settled principles con-

1899

THE CONSOLIDATED PLATE GLASS CO. OF CANADA v. CASTON.

The Chief Justice.

cerning the responsibility of masters for the acts of their servants. The leading case is *Quarman* v. *Burnett* (1), and the facts proved in that case do not make it an exception to the principle of that decision in which the Court of Exchequer adopted the opinions of Lord Tenterden C J. and Littledale J. in *Laugher* v. *Pointer* (2).

This case of *Quarman* v. *Burnett* (1) has been recognized as an authority and acted on as such in several subsequent cases. *Rapson* v. *Cubitt* (3); *Dalyell* v. *Tyrer* (4); *Jones* v. *Corporation of Liverpool* (5); *Little* v. *Hackett* (6).

The two cases relied on in support of the judgment under appeal are not in point. In *Rourke* v. *White Moss Colliery Co.* (7) the engineer was held not to be the servant of the defendants inasmuch as it had been expressly stipulated by the parties for whom the work was being done that they should have entire control of the engine and engineer.

In *Jones* v. *Scullard* (8) the facts were different; the whole control of the driver was in the defendant who was the owner of the carriage, horse and harness, and the Lord Chief Justice so far from indicating any intention to overrule *Quarman* v. *Burnett* (1), expressly adopts it, for he cites approvingly a passage from the judgment of Bowen L. J. in *Donovan* v. *Laing Syndicate* (9) to that effect and then proceeds as follows:

> The principle then to be extracted from the cases is that if the hirer simply applies to the livery stable keeper to drive him between certain points or for a certain period of time and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver.

(1) 6 M. & W. 499.
(2) 5 B. & C. 547.
(3) 9 M. & W. 710.
(4) E. B. & E. 899.
(5) 14 Q. B. D. 890.
(6) 116 U. S. 366.
(7) 2 C. P. D. 205.
(8) [1898] 2 Q. B. 565.
(9) [1893] 1 Q. B. 629.

1899

THE CONSOLIDATED PLATE GLASS CO. OF CANADA v. CASTON.

The Chief Justice.

A fair and reasonable test to apply, is this: Could the hirer have himself taken absolute control of the vehicle, horse and harness, taking it altogether out of the possession of the driver? In the present case the appellants clearly had no right to do so; under the facts proved in *Jones* v. *Scullard* (1) the defendant could undoubtedly have done so.

The appeal is allowed and the action dismissed with costs to the appellants in all the courts below as well as the costs of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Ritchie, Ludwig & Ballantyne.*

Solicitor for the respondent: *J. W. McCullough.*

FREDERICK MOORE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE WOODSTOCK WOOLLEN MILLS COMPANY (PLAINTIFF).... } RESPONDENT.

1899

*May 3, 4, 5.
*June 7.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Highway—Dedication—User—Evidence.

In order to establish the existence of a public highway by dedication it must appear that there was not only an intention on the part of the owner to dedicate the land for the purposes of a highway but also that the public accepted such dedication by user thereof as a public highway.

In a case where the evidence as to user was conflicting, and the jury found that there had been no public user of the way in question, the trial judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full court.

Held, that as such decision did not take into account the necessity of establishing public user of the locus, it could not stand. Judgment of the Supreme Court of New Brunswick reversed.

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

(1) [1898] 2 Q. B. 565.

1899

MOORE v. THE WOODSTOCK WOOLLEN MILLS CO.

APPEAL from the judgment of the Supreme Court of New Brunswick *en banc*, affirming the decision of the trial judge which directed that a verdict should be entered for the plaintiff for damages and costs.

The defendants moved, pursuant to leave reserved at the trial, to set aside the said verdict, and to enter a verdict for the defendants or for a new trial. The present appeal is from the judgment of the Supreme Court of New Brunswick refusing the motion. The questions at issue on the appeal are stated in the judgment of the court delivered by His Lordship Mr. Justice King.

Gregory Q.C. for the appellants.

Stockton Q.C. and *Connell* Q.C. for the respondent.

The judgment of the court was delivered by:

KING J.—The action is for encumbering or obstructing a public highway which adjoins the plaintiff's property and preventing access to the main road.

It was sought to establish the existence of the public highway by dedication. This involves two things; (1) an intention on the part of the owner of the land to dedicate, and (2) an acceptance by the public of such road as a highway. This is evidenced by user.

As to the intention of the owner to dedicate, the plaintiff (the present respondent), relies upon a lease from the Connell heirs to Craig, through whom the defendants claim. Immediately following the description of the land, which made no reference to a road, and in which there was no reservation of a road, there was a diagram showing a public road in the place where the plaintiff claims it to have been and there was a covenant by the lessees, their, etc.,

that the road or street now open between the rear of the land deede to the late Richard English (the plaintiff's land), and the bank of the

Maduxnakik to the River St. John and Maduxnakik Creek will be kept open for the use of the public, ten feet wide.

Assuming that, upon the construction of the lease, there must be taken to have been an intention on the part of the lessors to dedicate the way as shown in the diagram, still there remains the question of acceptance by the public.

There was evidence on the part of the plaintiff that there was a public user of a road where it is shown by the diagram, but the defendants had an equally large body of testimony showing that the user was where they claim that the road was, viz., nearer the bank of the creek. The jury have adopted the defendants' view, and according to their findings there was no way used by the public except where the defendants say it was.

The learned trial judge directed a verdict for the plaintiff, notwithstanding the findings, upon his construction of the lease, and the Supreme Court of New Brunswick has sustained his judgment. This conclusion, however, takes no account of the necessity to establish a public use of the alleged way. The company has entirely failed to get a finding in its favour upon the point of user, and has therefore failed in making out the case it set out to make. The judgment below must therefore be reversed, and, as all the facts were fully gone into, it would best meet the justice of the case to direct that judgment should be entered for the defendants.

Appeal allowed with costs.

Solicitors for the appellants: *Hartley & Carvell.*

Solicitors for the respondent: *Fisher & A. B. Connell.*

1899

*June 7.

IN RE LAZIER.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Habeas corpus – Extradition—Necessity to quash.

By sec. 31 of The Supreme and Exchequer Courts Act (R. S. C. ch. 135) "no appeal shall be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty." On application to the court to fix a day for hearing a motion to quash such an appeal.

Held, that the matter was *coram non judice* and there was no necessity for a motion to quash.

APPLICATION to the court by Mr. A. F. May to have a day fixed to hear a motion to quash the appeal in this case.

An order for extradition of the appellant having been made, he applied to Meredith C.J. to be discharged on habeas corpus which the learned chief justice refused (1). An appeal from his judgment to the Court of Appeal having been dismissed a further appeal to the Supreme Court of Canada was taken.

Notice of motion to quash this appeal for Friday, June 10th, 1899, having been served, and the May session being about to close, Mr. May applied on June 7th to have the court name the 10th or some subsequent day to hear the motion. His application was refused, the decision of the court being announced by:

THE CHIEF JUSTICE (oral).—Mr. May has made application to the court to have a day fixed for hearing a motion to quash an appeal in a case of Habeas Corpus arising out of extradition proceedings, in

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

(1) 30 O. R. 419.

1899

In re LAZIER.

The Chief Justice.

which there has been an order for the delivery up of the prisoner. No such appeal can be taken to this court, as section 31 of the Supreme and Exchequer Courts Act expressly provides that "No appeal shall be allowed in any case of proceedings for or upon a writ of Habeas Corpus arising out of any claim for extradition made under any treaty." The original Act did not contain this limitation, but in the year after that Act came into force, as soon, in fact as the court was properly organized, it was amended by the insertion of the provision I have mentioned, and from that time to the present there has never been any question as to our want of jurisdiction in such cases.

We are now asked to hear a motion to quash an appeal which section 31 prohibits. There is no necessity for such a motion. The matter is *coram non judice*. We have no jurisdiction, and the authorities who have charge of the extradition proceedings will, no doubt, on being advised as to the appeal being entirely nugatory, take the proper steps.

Such appeals should not be encouraged, and as there is no necessity for a motion to quash the court declines to name a special day to hear one.

Application refused.

1899
*June 7.

THE CANADA ATLANTIC RAILWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

ALEXANDER ALLAN HENDERSON (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway—Running of trains—Approaching crossing—Warning—Shunting—Railway Act, 1888, *s.* 256.

Sec. 256 of the Railway Act, 1888, providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway" applies to shunting and other temporary movements in connection with the running of trains as well as to the general traffic.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of MacMahon J. at the trial in favour of the plaintiff.

The action was brought against the Canada Atlantic Railway Company by the plaintiff, who is a physician practising in the City of Ottawa, to recover damages for injuries sustained by him in an accident alleged to have been caused by the negligence of the defendant.

The accident in question occurred on Elgin Street, in the City of Ottawa, on the 21st day of August, 1896. At a point on Elgin Street, about 150 feet south of the centre line of Catherine Street, which crosses Elgin Street at right angles, Elgin Street is crossed on the level by the main line of the defendant company's

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

(1) 25 Ont. App. R. 437.

railway, and to the north and south of the defendant company's main line are side lines which are used by the defendant for the purposes of its business. A flagman in the employ of the defendant company, was stationed at the crossing at the time of the accident in question.

On the day on which the accident happened the plaintiff was driving southward on Elgin Street in the direction of the railway crossing, intending, as he says, to proceed to his summer residence, situated on the Rideau River. When the plaintiff's horse had reached a point some distance north of the most northerly track, and which was about fifty feet to the north of the main line of the defendant's railway, the plaintiff and his coachman, who was driving, became aware of an engine approaching on the main line. The horses were immediately turned and headed north on Elgin Street, but, owing, as the plaintiff alleges, to the fright occasioned by the appearance of the locomotive and the noise it made in crossing Elgin Street, they became restive; one of the horses reared violently, and, in so doing, broke the poll-strap attached to his collar and fell, tearing away the other horse's bridle. The driver then, in consequence of the harness being thus rendered useless for the purpose, could not guide or rein in the team, and the horses ran away, upsetting and breaking the carriage and harness and injuring the plaintiff and his son, who was riding in the carriage with the plaintiff.

The action was tried before Mr. Justice MacMahon and a jury to whom certain questions were submitted, which with their answers thereto are as follows:—

1. At what distance from Elgin street crossing did No. 1 engine start westward?—A. About 300 feet.

2. When the engine started westward was the bell rung, and did it continue ringing at short intervals until it crossed Elgin street?—A. It did not ring.

1899

THE CANADA ATLANTIC RAILWAY COMPANY v. HENDERSON.

3. If you find the bell was not rung as mentioned in question No. 2, did the neglect to so ring the bell cause the driver of Dr. Henderson's carriage to do any act which he would not otherwise have done?—A. Yes.

4. What was such act?—A. Drove forward.

Q. And did it contribute to the accident?—A. Yes.

5. Was engine No. 1 when going west, and before it reached Elgin street running faster than six miles an hour? If so, how fast?—A. Believe train was going over six miles an hour; not competent to say how much faster.

6. Did the flagman give warning to the plaintiff's driver not to cross?—A. Do not believe that flagman raised his hand.

7. Did the horses rear or bolt before or after the engine crossed Elgin street?—A. After.

8. What caused the horses to rear and bolt?—A. Fright from engine.

9. Was the pole-strap reasonably fixed for the purpose for which it was used?—A. Yes.

10. Is the injury of which Dr. Henderson complains wholly due to mental shock, or is it attributable partly to mental shock and partly to shock caused by a blow?—A. Partly from shock and blow.

At what do you assess the damages?

(*a.*) In respect of injury to horses, carriage, and harness?—A. $380.

(*b.*) In respect of personal injury resulting exclusively from mental shock, $600.

(*c.*) In respect of shock caused by blows?—$400.

On these findings judgment was entered for the plaintiff with $780 damages, the learned judge refusing to allow the $600 assessed by the jury for mental shock. The company appealed, and plaintiff took a cross-appeal for the $600. Both appeals were dis-

1899

THE CANADA ATLANTIC RAILWAY COMPANY v. HENDERSON.

missed by the Court of Appeal, and the company then appealed to this court.

Chrysler Q.C. and *Bethune* for the appellant. It was a shunting engine that passed the crossing when the plaintiff was injured, and sec. 253 of the Railway Act requiring the bell to be rung or whistle sounded does not apply in such case. *Hollinger* v. *Canadian Pacific Railway Co.* (1); *Bennett* v. *Grand Trunk Railway Co.* (2).

Wallace, Nesbitt and Macfarlane for the respondent.

THE CHIEF JUSTICE (Oral).—We think it is not desirable to reserve judgment in this case, as we are all satisfied with the decision of the Court of Appeal which affirms the judgment of Mr. Justice MacMahon at the trial in favour of the plaintiff. It was indeed the only judgment that could have been entered upon the evidence given.

As regards section 256 of the Railway Act, I consider that that section applies not only to the general traffic, but also to shunting and other temporary movements in connection with the running of trains. This section provides that a bell should be rung or a whistle sounded at *at least* eighty rods distance from a crossing. It is a very great indulgence to railway companies to be allowed to run their trains through streets on the level subject only to the requirements of giving warning on approaching the crossings.

The jury found that this section was not complied with, and that the plaintiff's coachman was induced to go ahead by the non-ringing of the bell, and that contributed to the accident, and when the horses became terrified by the sound of the approaching engine, a part of the harness broke, and they became unmanageable. I think that is quite sufficient to

(1) 23 Ont. App. R. 264. (2) 3 O. R. 446.

1899

THE CANADA ATLANTIC RAILWAY COMPANY v. HENDERSON.

make the company liable under the statute, without any finding of common law negligence. The fact that the signalman did not raise his hand was not the cause of the accident, and I think the jury evidently meant that he did not make any signal, and that they intended to find, as in the answer to the other question, that that fact also contributed to the accident.

Further, I think it right to say that on this evidence we should be justified in holding that there was common law negligence as in the case of *The St. Lawrence & Ottawa Railway Co.* v. *Lett* (1).

I think there was no case made out for a new trial, and the appeal must be dismissed with costs.

TASCHEREAU J.—I concur in what His Lordship has said. I think it would be absurd to hold that section 256 of the Railway Act does not apply to a shunting engine approaching a crossing as well as to the regular trains.

GWYNNE J.—I do not wish to express an opinion as to whether or not section 256 applies in the case of shunting. I consider it unnecessary to do so, but on the case found by the jury I am of opinion that if ringing the bell would prevent an accident to a person crossing the highway there is an obligation at common law to ring it, and it is negligence not to do so. It is for the jury to say whether or not the neglect to ring the bell contributed to the accident, and they have done so.

KING J.—also concurred.

GIROUARD J.—I think the appeal should be dismissed for the reasons given by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Chrysler & Bethune.*

Solicitor for the respondent: *A. Macfarlane.*

(1) 11 Can. S. C. R. 422.

ERNEST PACAUD (DEFENDANT).....APPELLANT; 1899

AND *Mar. 13. *Oct. 3.

HER MAJESTY THE QUEEN (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW AT QUEBEC.

Condictio indebiti—Repétition de l'indu—Fictitious claims—Misrepresentation—Evidence—Arts. 1047, 1048, 1140 *C. C.—Railway subsidies—* 54 *V. c.* 88 *(Que.)—Insolvent company—Construction by new company—Payment by Crown—Transfer by payee.*

A company formed for the construction of a subsidised railway having failed, another company undertook to complete it, and the Government of Quebec agreed to pay all the actual debts against the road out of the unearned subsidies. A., the contractor of the former company, presented a claim which was approved of and paid to the extent of $175,000, whereupon he paid over $100,000 of the amount to P. for services performed in organizing the new company and obtaining payment of the claim. The Government afterwards brought an action against P. to recover back the $100,000 on the ground that A.'s claim was fictitious and was paid on fraudulent misrepresentations.

Held, that the action must fail if it could not have been maintained against A.; that the onus was on the Crown of proving A.'s claim to be fictitious; that the Crown not only failed to satisfy such onus but the evidence clearly established the claim to be a just and reasonable one; and that the action could not be maintained as it did not ask for cancellation of the Order-in-Council and the letter of credit issued and that the payment made by the Crown thereunder should be set aside.

Held, further, that the payment to A., with the consent of the new company, was a discharge to the Government *pro tanto* of the subsidy due to the company, and if wrongfully paid the latter only could recover it back.

---

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

1899

PACAUD v. THE QUEEN.

Held, also, that even if the Crown could have recovered the amount from A., it could not succeed against P., who, as the record showed, had ample reason for believing that the company was indebted to A., as claimed.

Evidence received before the a Royal Commission was filed of record by consent "to avail as evidence" on the trial.

Held, that, notwithstanding the consent, such evidence could not be accepted as proof in the cause.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review, at Quebec, affirming the judgment of the Superior Court, District of Quebec, maintaining the action with cost.

The action was upon information by the Attorney General for Quebec against the defendant, (with Armstrong, a contractor, and the Baie des Chaleurs Railway Co., *mis en cause*,) for the recovery from defendant of $100,000 alleged to have been obtained from the Quebec Government by unlawful and improper means contrived by him and Armstrong with the aid of others, who obtained the passing of an Order-in-Council for payment by the Provincial Government of a subsidy to the railway out of which $175,000 was paid to Armstrong and $100,000 thereof handed over by him to the defendant. It was alleged that neither Armstrong nor defendant had any claim which could entitle either of them to any part of said subsidy, nor had the defendant any legal claim against Armstrong and, consequently, that the money had been misapplied and paid out in error. The information prayed judgment against defendant for $100,000 and that the other parties should be summoned to hear such condemnation. The defendant alone appeared and pleaded a demurrer and perpetual exception setting up that the money paid to him belonged to Armstrong, and that the province had no claim thereto.

1899

PACAUD v. THE QUEEN.

The Superior Court, Andrews J., dismissed the demurrer and plea and entered judgment for the $100,000 and costs on the following grounds, viz.:

"Considering the said demurrer is unfounded in law;

"Considering it is proved that the said C. N. Armstrong had in fact no legitimate right to any portion of the said subsidy, and the said Ernest Pacaud, on his part, no right, even as against the said C. N. Armstrong, to be paid any amount whatever, his only claim thereto being based on an unlawful agreement with the said C. N. Armstrong, contrary to public order, whereby he was to use his influence with certain members of the then executive of this province to bring about the passing of the said order in council, and the recognition of rights in Armstrong having no legal existence;

"Considering it has been made apparent that the payment of the said sum of one hundred thousand dollars out of the Provincial treasury was the contemplated result of a scheme continued by the said Ernest Pacaud and C. N. Armstrong to obtain from the said treasury to their mutual gain, a sum of one hundred and seventy-five thousand dollars, whereof it was from the first designed and understood between them that the said Ernest Pacaud should get one hundred thousand dollars as his share;

"Considering that as to the said sum of one hundred thousand dollars, Armstrong was a mere instrument and confederate aiding the said Pacaud to possess himself of it;

"Considering it is also proved that the Baie des Chaleurs Railway Company did not complete the works which they undertook as a consideration for said subsidy, and only on the completion of which they would become entitled thereto;

1899

PACAUD v. THE QUEEN.

"Considering it is also proved that the said Baie des Chaleurs Railway remains encumbered by a privileged claim carrying with it a lien, in favour of one Henry Macfarlane for work by him done on the said railway as a sub-contractor of the said C. N. Armstrong, for a sum much exceeding one hundred thousand dollars;

"Considering that the said plaintiff, as the custodian of the said subsidy, has a legal interest and right to recover the said sum of one hundred thousand dollars, forming part thereof, and so misapplied and unlawfully taken therefrom, in order to apply it to its legitimate purpose of freeing *pro tanto*, the said railway from the said lien of the said Henry Macfarlane;

"Considering not only that the said Ernest Pacaud has no right whatever to the said sum of one hundred thousand dollars, but that it is also against public order that he should be allowed to retain it."

The present appeal is from the judgment of the Court of Review affirming the decision of the Supreme Court.

Fitzpatrick Q.C. (Solicitor General of Canada), and *O'Gara Q.C.* for the appellant. The money paid to the defendant appears, even by the notes of the trial judge, to have belonged to Armstrong. It had been certified to by the directors of the railway company and the engineer in charge, in settlement of a genuine claim and payable to him on handing over the road free from debt to the new company. Armstrong had fulfilled this condition and was entitled to full control of the $175,000. There has been no duress or unlawful action shown against either him or the defendant. The Crown had no control or right of action in respect of it after it had been paid, and cannot inquire as to what disposition was made of the funds. We refer to the following cases as bearing on

the questions at issue, viz.; *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1); *Allen* v. *Flood* (2); *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (3); *The Queen* v. *Dunn* (4), at page 402; *Canada Central Railway Co.* v. *The Queen* (5); *Clarke* v. *Eckroyd* (6); *Hereford Railway Co.* v. *The Queen* (7). Even if the contract between Armstrong and the defendant had been illegal, the money paid cannot be recovered back; *Kearley* v. *Thomson* (8).

Matthew Hutchinson for the Crown. The money was paid under misapprehension, in error of law and in error of fact. It was a payment *sine causâ* without the existence of any lawful debt, and through the misrepresentation made by the defendant and *mises en cause*. See Dalloz '55, 1, 108. The pretended services, or more accurately artifices, for which defendant himself admits he did not expect to receive more than four or five thousand dollars, are essentially immoral and contrary to public order, and the payment made of them bears, in itself, this character of immorality and illegality which removes all possibility of claiming payment There was thus between Armstrong and the defendant illegality and immorality of consideration, *condictio ob turpem causam*, and there was a nullity contrary to public order, and to these there was added the nullity of the execution itself by which they knowingly appropriated Government money to themselves. Both of them must then be declared to have been in bad faith and if the defendant was in bad faith there is a direct action against him. 3 Arntz, no. 473, p. 255; 13 Locré, p. 39, no. 7; 5 Pothier, no. 170, p. 119; *St. Michel* v. *Guilleminot* (9); 2 Mourlon, p. 885;

(1) [1892] A. C. 25.
(2) [1898] A. C. 1.
(3) [1892] 3 Ch. 447.
(4) 11 Can. S. C. R. 385.
(5) 20 Gr. 273.
(6) 12 Ont. App. R. 425.
(7) 24 Can. S. C. R. 1.
(8) 24 Q. B. D. 742.
(9) Dal. 55, 1, 108.

1899

PACAUD v. THE QUEEN.

4 Aubry et Rau, p. 739, par. 40, no. 3; Dalloz, Rép. Vo. Obl. no. 5489. See also arts. 989, 990 and 1047 C. C.

The defendant argues that the Government has no right of action, as it has lost nothing; that this money was to be handed over to the railway company. That is true, but only upon certain conditions which were not executed, that is to say, after the completion of works which were not done, and especially upon the conditions that the privileged debts should be paid with the moneys which have been diverted from their express destination. Again a Government subsidy to a railway is not so much for the railway company as for the section of country to be developed, a political, social obligation, a need to satisfy. If the grant is diverted the need still subsists, and with it the obligation to satisfy it, a matter of public interest which the Government is bound to see properly discharged.

THE CHIEF JUSTICE.—I concur with Mr. Justice Taschereau and Mr. Justice Girouard.

TASCHEREAU J.—The facts that bear upon this case are not complicated. Of the formidable volume of over 1,000 pages containing the inquiry of the Royal Commission, more than two thirds of the eighty-nine depositions and two hundred exhibits thereof filed by consent as part of this record (assuming them to have been legally filed) are altogether irrelevant and have no application whatever to the issue between the parties, besides being in a large measure inadmissible as evidence in a court of justice. As to the law, a correct appreciation of the facts leaves no room for controversy.

In 1891, the undertaking known as the Baie des Chaleurs Railway was on the verge of a total failure.

1899

PACAUD v. THE QUEEN.

Taschereau J.

The company, the contractors, the sub-contractors, were all insolvent; the whole of the earned subsidies granted by both the federal and the provincial governments had been exhausted; all work on the ground had been suspended for over a year; whatever had been done was in a dilapidated state and deteriorating more and more every day; the distressing condition and sufferings of the contractors' unpaid workmen were engaging the attention of the whole country; a statute had been passed enabling the Government to cancel the company's charter and wind up its business, 54 Vict., ch. 37, and all previous attempts to reorganize the company and enable it to continue and complete its undertaking had proved abortive.

It was under these circumstances that, in March, 1891, one Thom, who was a creditor of the company, as a member of the firm of Cooper, Fairman & Co., taking advantage of an additional subsidy granted by the provincial legislature on the 30th December preceding (54 Vict., ch. 88), at the suggestion of one Armstrong, the contractor of the company and interested therein, succeeded in forming a syndicate accepted as being of sufficient financial strength to complete this railway, which, it was admitted on all hands, was a work greatly needed in the public interest and of vast importance not only to the large extent of the country which it was intended by the legislature thereby more directly to benefit, but also to the whole Dominion as a feeder to the federal road known as the Intercolonial Railway.

Having come to an understanding with the owners of the charter, Thom, acting for the syndicate so formed, entered with the Government into negotiations, which resulted in the acceptance by the Government of his propositions by the order-in-council no. 237, approved of by the Lieutenant-Governor on

1899

PACAUD v. THE QUEEN.

Taschereau J.

the 23rd April, 1891. This order-in-council appears to have been carefully drawn and bears intrinsic evidence of the Government's desire to protect the company's creditors by the right thereby reserved to the Government to itself pay under certain conditions the actual debts of the company, through an officer appointed for that purpose, out of the land subsidy converted into cash (conceded to be equivalent to $280,000), granted by the Act of the then last session of the Legislature, 54 Vict., ch. 88, already referred to, which said subsidy, converted into cash to the amount necessary therefor, the Government bound itself by the said order-in-council to pay to the creditors of the company whose claims would be approved of by Thom or determined by arbitration. On the same day, by another order-in-council, one J. C. Langelier was appointed the commissioner to pay these claims as provided for by aforesaid order-in-council no. 237.

Afterwards, on the same day again, Armstrong handed to the said Commissioner Langelier a claim of $298,943.62, which he had against the company.

Immediately, or on the next day, Langelier sent this claim to Thom for the approval required from him by the order-in-council no. 237. Thom, who had seen or heard of it before, answered that he approved it, but only to the amount of $175,000. Langelier then wrote to the Commissioner of Public Works that Thom had deposited in his hands $500,000 worth of debentures as required by his contract with the Government contained in the order-in-council no. 237, and had otherwise fulfilled all the obligations imposed upon him by the said order-in council, asking at the same time, as prompt action was required, that the funds necessary to enable him to immediately commence the payment of the debts of the company be placed at his disposal. The commissioner, or his

1899

PACAUD v. THE QUEEN.

Taschereau J.

deputy, being subsequently shown Armstrong's claim, the consent by Thom that $175,000 of that claim should be paid by the Government, the certificates of the engineers, and the admission by the managing director and by the secretary of the old company that the claim as filed was a correct statement of the work done by him remaining unpaid, after, moreover, getting the opinions of the law officers of the Crown, and acting altogether as cautiously as possible in the matter, ordered the payment of the claim to the amount of $175,000 and informed Langelier of it. Langelier accordingly paid $100,000 thereof to Armstrong by his cheques on the Union Bank to Armstrong's order, five in number, for $20,000 each, which cheques Armstrong immediately indorsed and handed over to the appellant, who later on got them cashed. The balance of $75,000 was also paid to Armstrong or to his order, but these $75,000 are not in question here. It is simply the $100,000 paid as aforesaid to Armstrong, and repaid by Armstrong to appellant, of which the Crown now demands the reimbursement from the appellant. This demand is based exclusively on the ground that Armstrong's claim was a fictitious and a fraudulent one, and that the company did not owe him anything, to the knowledge of the appellant; that it was the appellant who, at Armstrong's request, had succeeded by undue influence and corrupt means in obtaining from the Government these $100,000, which immediately upon receiving them, under a previous agreement between them, Armstrong had paid over to him, the appellant, without consideration, or for an illegal and immoral consideration.

It is admitted by the appellant, whilst denying all fraud on his part or on the part of Armstrong in the matter, and all the allegations of the information as to bribery, undue influence or fraudulent acts whatso-

1899

PACAUD v. THE QUEEN.

Taschereau J.

ever on their part, that under a previous agreement with Armstrong, he, Armstrong, immediately upon receiving those $100,000 from Langelier, indorsed the cheques and handed them over to him, the appellant, as remuneration and payment for his services in acting as agent for the said Armstrong in the negotiations with the Government relating to the formation of the new syndicate and the settlement of said Armstrong's claim.

It results from this synopsis of the case that the fact to be first investigated is the one declared upon on the part of the Crown, that Armstrong had no claim whatever against the railway company. For it was conceded at the argument that the Crown cannot recover these $100,000 from the appellant if they could not recover them from Armstrong. And it is a rather singular fact, which remains unexplained, that no condemnation is asked by the Crown against Armstrong in this case. If consideration was given to Thom or to the company by Armstrong for the payment of these $175,000 to him by the Crown for the company, the case is at an end. What Armstrong did with the money, whether he spent it illegally or repaid it to appellant for an immoral consideration, assuming that to be so, cannot give to the company, and still less to the Crown, the right to recover it back from him, Armstrong, and *a fortiori* not from the appellant if it was due or if consideration was given by Armstrong for it.

Now the *onus probandi* was on the Crown. It had to prove that these $100,000 were not due to Armstrong, and that it had paid them through error, upon false representations. And on the present issue with appellant more especially. the proof of these facts had to be clear. positive and convincing. The Crown's demand is based on a negative allegation, the alle-

1899

PACAUD v. THE QUEEN.

Taschereau J.

gation that nothing was due to Armstrong; the establishment of that negative is an essential element of their case. Appellant could not be expected to have to prove that Armstrong's claim was a legitimate one. Then the Crown had to prove not only that it was a fictitious one, but also that appellant knew that it was a fictitious one. Now the Crown has failed on both these points. As to Armstrong's claim there is abundant evidence, and what should in this issue between the Crown and the appellant be taken as conclusive evidence, that it was a just one. He repeatedly himself swears to its accuracy, and his evidence is unimpeached. It seems to have been given fairly and frankly. It is, moreover, certified for a large portion thereof by Leduc, his engineer, and by Light, the company's engineer and inspector for the local Government, who by Armstrong's contract with the company was stipulated to be the sole judge of the quality and the quantity of the work done. It is moreover admitted as correct by the managing director and the secretary of the old company whose contractor he was. What more could the Government require, as Mr. Garneau, the Commissioner of Public Works, says in his evidence, than these certificates and the admission of the company itself, coupled with the admission of Thom himself, for the new syndicate as to $175,000 thereof that the claim filed was a correct and legitimate one, at least to that amount? It is true that it was not cash, but bonds only, that Armstrong had then a right to demand according to his contract, and that the whole was not then exigible; but it was a compromise, a new contract virtually that intervened between him and Thom with the consent of the old syndicate or company. In consideration of these $175,000 he signed the following document:

1899

PACAUD
v.
THE
QUEEN.

Taschereau J.

I, Charles N. Armstrong, contractor for the construction of the Baie des Chaleurs Railway, do hereby grant a full and complete discharge and quittance to the Baie des Chaleurs Railway Company of all and every claim, of whatsoever nature and kind, that I have or may have against the said company; and I further agree to cancel and annul, and I do hereby cancel and annul the contract and agreement entered into with the said company on the 9th day of June, 1886, for the construction of the said railway. I hereby authorize the said company to take possession of the works on the said railway and all materials provided for the construction of the line, together with all the rolling stock placed on the line in furtherance of the provisions of said contract of the 9th June, 1886. And I further transfer, assign and make over to the said company, all and every claim which I have or may have against Henry MacFarlane & Son, and the said company is hereby authorized to use my name in enforcing or collecting such claim.

Signed at Quebec, this 28th day of April, 1891.

C. N. ARMSTRONG.

If he had not agreed to accept these $175,000 for his claim, the whole of these negotiations would have failed, and the company would most probably have been put into liquidation. He gave up all claim against the company under his contract; he gave up not only his contract itself, but also the possession of the railway, of the rolling stock and of the construction materials and plant on the ground; he further assigned to the company a claim he had against the Macfarlanes. It cannot therefore be contended that this sum of $175,000 was paid to him without consideration, even if it was paid to buy him out, to use his own expression. And even if paid before it was due, it cannot be recovered under the express terms of Art. 1090 of the Civil Code. But, in fact, by mutually putting an end to the contract, what was due thereunder became unconditionally immediately exigible. It was, moreover, one of the express conditions of his so giving up his contract that he be paid these $175,000 immediately. He was master of the situation; he had, or his sub-contractors had, *de facto*

possession of the road; he had the contract. It was only upon payment of these $175,000 as a compromise that the new company could succeed in going on with the enterprise, as it appears by the evidence they satisfactorily did soon thereafter. And the company never complained that they had paid too much for that compromise. How can the Crown be admitted to complain of it? It is true that Armstrong would have taken $75,000 for his claim in 1890, but that is satisfactorily explained in his evidence and in Thom's evidence. Rather than lose everything, as he then had to fear, he would have taken that amount, or perhaps less. But as the company had since been granted an additional subsidy of $280,000, he positively refused thereafter to be satisfied with $75,000. The fact that his claim was not filed in the Department of Public Works before it was filed with Langelier has been insisted upon on the part of the Crown as a suspicious one. But that is also satisfactorily explained. Armstrong had no claim whatever against the Government. It was with the company and the company alone that he had contracted, and he had duly filed his claim in the office of the secretary of the company. He could not reasonably be expected to file his claim with the Government when the Government owed him nothing. It had all along the previous negotiations in 1890 been known that he had a claim against the company which had to be settled some way or another before any attempt to reorganize the company and put it in a sound financial position could be expected to succeed.

It has been urged, though but faintly, on the part of the Crown, that Armstrong's claim was not a privileged claim under the terms of the statute granting the $280,000 subsidy, 54 Vict., ch. 88. But Thom or the company, the interested parties, do

1899

PACAUD v. THE QUEEN.

Taschereau J.

not attack this payment, and such a ground more specially cannot be invoked by the Crown against this appellant in an action of this nature. Then Armstrong had possession of the road and the right of retention. That constituted a privilege; and it was so treated as a privileged claim by Thom himself, by the Government special commissioner, Langelier, and by the Commissioner of Public Works. How could the appellant have been expected to know that this was not a privileged claim, assuming that to be so? How could he be expected to make an investigation of the matter? Then by the order-in-council no. 237, the Government was bound to pay out of the subsidy the actual debts, not only the privileged debts of the company, as Thom had proposed. The contention by the respondent that the acts of the Lieutenant-Governor-in-Council are to be assimilated to the acts of a subordinate officer who cannot exceed his mandate are totally unfounded. The acts of the Lieutenant-Governor-in-Council are the acts of the Crown. However, in this case, this point does not necessarily come up for adjudication. The expression, "actual debts," clearly included the privileged debts, and the order-in-council is supported by the statute. Then, by the statute, these payments had to be made to the satisfaction of the Lieutenant-Governor-in-Council, and the Lieutenant-Governor-in-Council, through Langelier, its commissioner specially authorized to determine which were and which were not privileged, treated Armstrong's claim as a privileged one.

Then it is not as a condition precedent nor necessarily out of the subsidy that, by the statute, the privileged debts of the company were to be paid. The subsidy could legally have been paid to the company upon condition, the performance of which guaranteed to the satisfaction of the Lieutenant-Governor-in-Coun-

1899

PACAUD v. THE QUEEN.

Taschereau J.

cil, that these debts were to be thereafter paid. We have been asked on the part of the Crown to read sub-section (*j*) of the statute (1) as if the words "out of the said subsidy" were in it after the word "paid" but there is nothing in the statute that would justify this being done.

Moreover there is no allegation whatever in the information that there were at that time other outstanding claims against the company privileged or not privileged.

It has further been urged on the part of the Crown that the conversion into cash of the land subsidy granted by 54 Vict. ch. 88, was not authorized by the statute. But there is nothing in that contention, could the Crown lawfully avail itself of the objection in this case against the present appellant. That statute, section 7, authorizes the conversion and, it is obvious, necessarily authorized it as regards the creditors of the company, without requiring any previous formality whatever.

If the Lieutenant-Governor-in-Council ordered that the creditors privileged and not privileged were to be paid by the Government out of this subsidy, as it could be done and has been done in this case, before any part of it was paid to the company (2), then the conversion of the land grant into cash was in that case necessarily implied by the statute to have been provided for, at least to the amount of their claims, as it was cash, not land, with which the Legislature must have intended them to be paid. The resolution of the directors required by the said statute could not be required in such a case. Then this might be an objection on the part of the company, but it is not one open to the Crown, after having paid the money knowingly without asking for such a resolution. And

(1) 54 V. c. 88, s. 1 (*j*), (Que.). (2) 51 & 52 V. c. 91, s 14 (Que.).

1899

PACAUD v. THE QUEEN.

Taschereau J.

the company, a party to this case, never took this or any objection whatever against this payment to Armstrong, and never could have taken it, as it was made with their consent and by their order.

There is another obstacle to the respondent's demand, which Armstrong could have successfully invoked had it been instituted against him, and which, therefore, is available to the appellant. The payment was a direct one to Armstrong, as conceded by paragraph 37 of the information. It was a payment for and in the name of the company in satisfaction of the company's debt, with the company's assent. In fact, the warrant is "to pay or cause to be paid unto the Baie des Chaleurs Railway," to be taken from 40 Vict. ch. 2, "An Act Respecting the Consolidated Railway Fund." This payment made with the company's assent is a discharge to the Government *pro tanto* towards the company of the subsidy granted to the company in 1890. It is so much less that the company can expect to receive from the Government. If since the company has not fulfilled its obligations, that is a matter which does not concern Armstrong, still less the appellant. If the Government had given that money to Thom for the company, and Thom had repaid it over to Armstrong, it is the company alone who could recover it back, if any one could, not the Crown. Who would benefit by it if the Crown succeeded in this case? Evidently the company and the company alone. Whose monies did the Crown pay to Armstrong? The company's money, the money voted to the company. Thom's approval of Armstrong's claim for $175,000 was equivalent to an order on the Government to pay so much to Armstrong out of the grant by the Legislature, in satisfaction of the company's indebtedness to him (Armstrong), with the company's assent. The Crown, therefore, has no right to this

action, even if the facts established any liability whatever by Armstrong or the appellant.

For these reasons, I am of opinion that the Crown could not have recovered these $100,000 from Armstrong, and that, consequently, they cannot be recovered from the appellant.

But even if the Crown was in a position to recover from Armstrong, it does not follow that it can recover against the appellant. One of the essential conditions required to enable the Crown to maintain its demand against the appellant is that he, the appellant, knew, assuming it to be so, that Armstrong had no right to these $100,000, or to any part thereof. Now, there is not the least ground for that contention in the whole record. And how could he have any but the sincere conviction that the company was indebted to Armstrong, when not only did Armstrong himself always assert it, and it was conceded by every one to appellant's knowledge in all the previous negotiations that had taken place to re-form the company, but also when he had before him not only the engineers' certificates and the confession of judgment, as it were, by the officers of the old company, for a much larger amount than the one compromised for, but also Thom's acknowledgment of the legitimacy of the claim up to $175,000, an acknowledgment acquiesced in and never complained of by the new company he represented. The fact that his agreement to get $100,000 was kept secret cannot be taken by itself as evidence of fraud. When fraud is charged, it has to be proved, and proved clearly. Suspicions will not do.

It is true that Mr. Garneau, the commissioner of public works, swears that if he had known that the appellant was to get anything out of these $175,000, Armstrong would not have had a cent. But that is obviously a voluntary statement made by the witness

1899

PACAUD v. THE QUEEN.

Taschereau J.

before the Royal Commission with a political object, or to emphasize his repudiation of any dishonourable conduct whatever on his part in the whole transaction. In law, if the money was due to Armstrong, it had to be paid to him, whether the commissioner knew or not that he was to spend it illegally or immorally, or to give it or throw it away. And what Mr. Garneau says only tends to prove that the interests of the railway required the secrecy of this agreement between Armstrong and the appellant.

The allegations of the information, as to deception, circumvention, bribery, immorality and undue influence in the negotiations with the Government, of either the company or Thom or Armstrong and the appellant as his agent, are not made out in the case. There is nothing in this record to cast any doubt upon the statement of the Commissioner of Public Works when he swears that everything was done honestly, openly and regularly.

As to this agreement for $100,000 between the appellant and Armstrong, it is certainly an extraordinary one. No doubt the appellant performed some services for Armstrong and was entitled to some remuneration therefor. And there is nothing to find fault with in the fact that Armstrong, who lived in Montreal, employed an agent in Quebec to transact his business with the Government in Quebec and paid for his services. Neither was he guilty of any improper conduct because he chose as such a friend of the Ministers and a supporter of the Government, and gave him an interest as one of the promoters of the enterprise. If any one in his position wishes to employ an agent, he is not obliged, as evidence of the honesty of his claim, to resort to an adversary of the Government or to a personal enemy of the officials to be dealt with. Influence should not be required, it is true, to procure

1899

PACAUD v. THE QUEEN.

Taschereau J.

the payment by the Government of an honest claim; but, if one requires more than usual promptness in the matter, the use of legitimate influence with the officials to procure it does not justify accusations of a nature to throw discredit on the whole country. Evidently Armstrong thought that if he did not succeed in getting up a new syndicate and obtain then a settlement of his claim, he was in immediate danger of irretrievably losing everything. No time, he had reason to think, was to be lost. The act then recently passed empowering the Government to revoke at will the charter of the company was hanging as a heavy cloud over the whole business. There might at any time intervene a political crisis and a change in the Government with an entire change of policy as to subsidies to these companies. Then other parties unfriendly to him might at any moment offer to organize a syndicate and take up the charter. Thom himself, unable as he was to take up the charter unless Armstrong's claim was settled, threatened that if the Government did not settle it without delay he would give up the transaction. The forty days delay fixed by his agreement with the old shareholders for the necessary assignment of their rights and of the charter were very soon to expire when the order-in-council was passed. There were only five days left. Evidently, he and the appellant as his agent were justified in pressing the matter and employing all the legitimate influence they could obtain to hasten a final settlement.

The amount the appellant received is, however, altogether out of proportion to his services. But that is a matter entirely between himself and Armstrong. It does not in the least concern the Crown. It is a dealing that leads to suspicion, no doubt, but all suspicion is dispelled as against the Crown's demand in this case by the evidence adduced; 1st, that Armstrong's claim

1899

PACAUD v. THE QUEEN.

Taschereau J.

was a legitimate one ; 2nd, that were there now, or had there been at any time since, any room for doubt on that first point, the appellant had no reason whatever then to doubt that it was a legitimate one.

I would allow the appeal with costs and dismiss the action with costs. Such is the unanimous judgment of the court.

SEDGEWICK and KING JJ. Concurred.

GIROUARD, J.—Sans vouloir faire l'appréciation de la preuve faite devant la Commission Royale, pour les raisons que j'indique plus loin, je ne puis m'empêcher d'observer que cette action ne me paraît pas avoir été intentée dans le but d'obtenir le remboursement des milliers de piastres que la Couronne allègue avoir été soustraits du trésor public. Comment en effet expliquer le défaut de conclusions contre Armstrong et le défaut d'assignation contre d'autres personnes qui ont aussi bénéficié des procédés de Pacaud et Armstrong. D'ailleurs, dans les pays régis par le droit constitutionnel anglais, les crimes politiques, comme celui que l'on reproche à l'appelant, sont poursuivis et punis devant les tribunaux de juridiction criminelle ou la haute cour du parlement ou l'électorat. On n'a pu nous signaler un seul précédent analogue à la poursuite civile que nous sommes appelés à décider. M. le juge Andrews cite bien quelques exemples où les tribunaux français, à la demande de l'une des parties, ont annulé des contrats comme celui que signèrent Pacaud et Armstrong, ce qui ne peut être contesté sérieusement ; mais quant à la répétition de l'indu dans les circonstances de la présente cause, il n'en indique aucun. Avant de confirmer le jugement dont est appel, il faut donc examiner si l'action est bien fondée et prouvée. Je suis obligé de donner à la Couronne ses justes droits, mais je ne me

1899

PACAUD v. THE QUEEN.

Girouard J.

sens pas disposé d'être généreux à propos d'amendements ou de consentements sur la procédure suivie. Je suis entièrement opposé à tout ce qui tend à faire des tribunaux une arène politique.

Les particuliers n'ont l'action en répétition de l'indu, qu'en alléguant et prouvant 1o, que ce qui a été payé n'était pas dû, et 2o, que le paiement a été fait par erreur. C.C., Art. 1047, 1048, 1140. Lorsque le débiteur paie en pleine connaissance de cause et sans erreur, il ne peut répéter ; il est censé faire une libéralité. Il est vrai que l'article 1140 dit tout simplement que "ce qui a été payé sans qu'il existe de dette est sujet à répétition," mais l'article 1047 y supplée en ajoutant que la répétition de l'indu n'a lieu que s'il y a erreur. C'était l'opinion de Pothier, *Cond. Ind.* n. 160, et des anciens auteurs. Laurent ajoute, et son opinion est généralement enseignée par la majorité des commentateurs modernes :

> L'article 1235 dit que ce qui a été payé sans être dû est sujet à répétition. Cela est trop absolu. Il ne suffit point que j'aie payé ce que je ne dois pas pour que j'aie le droit de répéter, il faut que j'aie payé par erreur. Vol. 20, nn. 352, 368.

Il y a dans ce sens un arrêt de la Cour de Cassation du 11 mars, 1885, S. V. 86, 1, 49. C'est aussi ce que cette cour décida en 1882 en *Bain* v. *Cité de Montréal* (1). Le Recueil des Arrêts de Sirey pour l'année 1884, note (1), part. IV, p. 1, contient un résumé complet de la jurisprudence et de la doctrine sur le sujet. Voir aussi 8 Huc, n. 388.; 2 Baudry-Lacantinerie, (5e. éd.) n. 1342.

Si les particuliers ne peuvent répéter sans invoquer l'erreur ; il doit en être autrement des gouvernements qui ne peuvent faire des libéralités sans l'autorité de la législature ; mais si le paiement a été fait en vertu d'actes ou de documents obtenus par fraude ou dol, la résolution de ces actes doit être demandée. La fraude n'est pas une cause de nullité absolue. L'article 1000

(1) 8 Can. S. C. R. 252.

1899

PACAUD v. THE QUEEN.

Girouard J.

de notre code dit qu'elle donne seulement un droit d'action ou une exception pour faire rescinder les actes et contrats qui en sont entachés. A mon avis, la Couronne, qui allègue dol et fraude, aurait dû demander la rescision du paiement et de la lettre de crédit, au moins de l'ordre en conseil qui les autorisait, et dont la nullité n'était pas apparente à la face même de ces documents. En effet, c'est l'ordre en conseil qui autorisait le paiement des dettes de la compagnie, sur le certificat de Thom, un des actionnaires de la nouvelle compagnie, et apparemment son représentant dans le cours de toutes les négociations. Laurent enseigne, avec raison que

> si la résolution ou la révocation doit être demandée en justice, l'action en répétion de l'indû se confond avec l'action qui tend à résoudre ou à révoquer le contrat. Vol. 20, n. 346.

Voir 5 Larombière, p. 614.

L'intimée a demandé la nullité du traité secret entre Pacaud et Armstrong. Mais cela n'était pas nécessaire, car les contrats n'ont aucun effet à l'égard des tiers. Si le montant payé eût été dû à Armstrong, ce dernier pouvait en faire présent à Pacaud ou à d'autres, et il est en preuve qu'il lui permit de toucher la somme de $100,000, ce qui paraît extraordinaire et fut la cause de toute l'agitation politique de l'époque, où nous n'avons rien à voir ; mais je ne puis voir l'intérêt que l'intimée peut avoir de demander la nullité du traité, indépendamment de l'ordre en conseil, de la lettre de crédit et du paiement ; elle n'allègue pas la déconfiture d'Armstrong afin de lui permettre d'exercer l'action qu'il pouvait avoir contre Pacaud. D'ailleurs, ce ne fut pas ce traité secret qui fut la cause du paiement et du tort fait à la Couronne, mais bien l'émission de la lettre de crédit et la passation de l'ordre en conseil ; et ce sont ces documents, particulièrement le dernier, dont on aurait dû demander la résolution.

1899

PACAUD v. THE QUEEN.

Girouard J.

Est-il bien vrai qu'il n'était rien dû à Armstrong? Il est prouvé par le témoin Macfarlane, entendu dans la cause, qu'Armstrong avait fait des travaux considérables sur la ligne du chemin de fer, dont il ne peut estimer le montant. Il est difficile d'en fixer la valeur sans examiner toute la preuve qui a été faite devant la Commission Royale, et qui forme un volume d'au delà de 1000 pages. Armstrong demandait $298,943.62 certifiées comme dues, suivant les stipulations du contrat, par l'ingénieur de la compagnie, agissant en même temps comme le surintendant du gouvernement, et aussi par l'ingénieur des contracteurs, le secrétaire-trésorier et le directeur-gérant de la compagnie. L'ingénieur de la compagnie jure devant la Commission que le compte d'Armstrong était exagéré de 50 par 100, et qu'il ne l'avait approuvé que sur les représentations du président. Mais alors il lui était réellement dû près de $150,000, à tout événement plus que les $100,000 demandées. Le gouvernement paya plus que cette somme à Armstrong, ou à d'autres pour son compte, dont il ne demande pas la répétition, bien que payée en vertu du même ordre en conseil et par suite des mêmes manœuvres. Thom avait vu la réclamation d'Armstrong au bureau des Travaux Publics à Québec le ou vers le 23 avril 1891. Il croyait qu'elle était bien fondée, au moins en partie, et après l'avoir vérifiée par l'examen des certificats de l'ingénieur et avoir consulté M. Cooper, le plus fort actionnaire de la nouvelle compagnie qui succédait à l'ancienne, il l'approuva jusqu'à concurrence de la somme de $175,000.

L'intimée prétend que ce qui était alors dû à Armstrong n'était pas exigible et dépendait d'une condition suspensive, savoir, le parachèvement du chemin de fer. Mais le contrat déclare en termes formels que si les subsides en terres étaient convertis en argent, Armstrong "shall be paid and receive the said cash." C'est

1899

PACAUD
v.
THE
QUEEN.

Girouard J.

précisément ce qui eut lieu en vertu d'actes de la législature.

Enfin la demande est sans preuve, si l'on écarte le dossier de la Commission Royale, produit dans cette cause du consentement des parties et déclarant qu'il

shall avail as evidence in the present cause, in the same manner as though the several depositions has been taken and sworn herein and as though the several Exhibits had been filed herein ; all copies of authentic instruments as printed therein shall avail as though authentic and other Exhibits to the extent to which the same may be proved by the said deposition.

L'autorisation du tribunal ne fut pas même demandée contrairement à l'article 319 du Code de Procédure.

Le Code de Procédure donne bien aux parties le pouvoir d'examiner leurs témoins, de consentement, devant le protonotaire, ou un commissaire ; mais il a fallu l'intervention de la législature. *Pinsonnault v. Valade.* (1) C.P.C. Art. 255, 285 ; 33 Vict., c. 18. Egalement, il a fallu un texte de loi pour leur permettre de procéder de consentement à la preuve *au long*. C. P. C. Art. 284. L'Article 25 indique comment on peut transmettre un dossier d'une cour à une autre et ajoute que cette transmission peut se faire de toute autre manière du consentement des parties. Dans des circonstances spéciales, un juge peut bien accepter la preuve faite dans une autre cause, avec ou sans le consentement des parties ; mais je ne sache pas qu'il puisse admettre une preuve prise en dehors des tribunaux. Toutes ces exceptions établissent que la règle générale promulguée par le Code de Procédure, art. 263—que la preuve doit être faite en justice—est d'ordre public et qu'il n'est pas permis d'y déroger par des consentements. Carré, *Lois de la Procédure civile*, (3e. éd.,) t. 1er, p. XVI, n. 43, dit que les lois qui établissent les formalités substantielles ou intrinsèques de la procédure civile font une

(1) 13 L. C. Jur. 169 ;

partie essentielle du droit public ; puis il cite l'auteur de l'article *Droit public*, au nouveau répertoire qui ajoute que

Les particuliers ne peuvent y déroger que dans le cas où la loi leur en a laissé la faculté.

Voir aussi Carré, n. 118. Il y a d'autant plus de raison de refuser cette preuve que l'on sait qu'une commission royale, comme le comité des Privilèges et Elections, ne sont pas assujettis à ces règles. M. le juge Baby, l'un des commissaires, en réponse à l'un des avocats, remarquait au commencement de l'enquête :

We have endeavoured to proceed as far as possible in the same way as proceedings are before the courts, but you must know that before the courts this is not done.

La preuve fut cependant admise, sur les précédents politiques cités. Todd, Parl. Gov., 2e éd., t. 2e, p 445, observe :

Within the limits of their prescribed functions and subject to the provisions of any Act of Parliament defining the same, commissions have the absolute power of regulating the proceedings of their own tribunal.

S'il y a lieu d'appliquer l'article 1204 du C. C. c'est bien dans le cas présent : la preuve offerte doit être la meilleure dont le cas, par sa nature, soit susceptible.

Je suis donc d'avis d'accorder l'appel, de maintenir la défense en droit et de renvoyer l'action de l'intimée avec dépens, pour les raisons suivantes : 1o. L'intimée ne demande pas la résolution du paiement, de la lettre de crédit ou même de l'ordre en conseil pour cause de fraude et dol ; 2o. En dehors de la preuve devant la Commission Royale, que je ne puis accepter nonobstant le consentement des parties, il n'y a aucune preuve légale de la part de l'intimée qu'au moins la somme de $100,000 n'était pas légitimement due à Armstrong.

Appeal allowed with costs.

Solicitors for the appellant : *Fitzpatrick & Taschereau.*
Solicitor for the respondent : *F. X. Drouin.*

1899

*May 2, 3.

*Oct. 3.

HER MAJESTY THE QUEEN, (PLAINTIFF) ..... APPELLANT;

AND

THE SAILING SHIP "TROOP" COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Certiorari—Merchants' Shipping Act, 1854—*Distressed seaman—Recovery of expenses—"Owner for time being"—Proof of ownership and payment.*

An appeal lies to the Supreme Court of Canada from the judgment of a provincial court making absolute a rule *nisi* for a certiorari to bring up proceedings before a police magistrate under The Merchants' Shipping Act with a view to having the judgment thereon quashed.

Sec. 213 of The Merchants' Shipping Act, 1854, makes the expenses of a seaman left in a foreign port and being relieved from distress under the Act a charge upon the ship and empowers the Board of Trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being"

Held, affirming the judgment of the Supreme Court of New Brunswick, that the latter words mean the owner at the time of action brought.

Held further, that a certificate of the Assistant Secretary of the Board of Trade that such expenses were incurred and paid is sufficient proof of payment under the Act though the above section does not provide for a mode of proof by certificate.

Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceedings under The Merchants' Shipping Act of 1854 proof of ownership of a ship may be made according to the mode provided in The Merchants' Shipping Act, 1894, by which the former Act is repealed.

---

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

1899

THE QUEEN v. THE SAILING SHIP "TROOP" COMPANY.

Under the Act of 1894 a copy of the registry of a ship registered in Liverpool, certified by the Registrar General of Shipping at London is sufficient proof of ownership.

Quære.—Where the Merchants' Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will certiorari lie to remove the proceedings into a Superior Court?

APPEAL from a decision of the Supreme Court of New Brunswick making absolute a rule *nisi* for certiorari to remove the proceedings before the Police Magistrate of St. John with a view to having the order made therein quashed.

The action was brought by the Imperial Board of Trade to recover the amount paid for hospital fees and board at Hong Kong on account of a seaman on board a ship of the defendant who was injured and left at Hong Kong, and also the expenses of carrying the seaman to London.

The questions raised on the appeal were:

1. Did an appeal lie when the order of the magistrate was neither quashed nor affirmed on certiorari?

2. Defendant having become owner of said ship after the expenses were incurred was it an "owner for the time being" under sec. 213 of The Merchants' Shipping Act, 1854?

3. Was the payment of said expenses by the Board of Trade properly proved by a certificate of the assistant secretary?

4. Was the ownership of the vessel proved by a copy of the registry certified by the Registrar General at London?

5. Did certiorari lie to remove the proceedings before the magistrate whose order is made final by the Act?

The certificates in evidence are set out in the judgment of the court.

The Supreme Court of New Brunswick held that the ownership of the vessel was not proved and gave

1899

THE QUEEN v. THE SAILING SHIP "TROOP" COMPANY.

judgment for defendant on that ground. The Crown appealed.

Newcombe Q.C. (Deputy Minister of Justice) for the Crown. The Merchants' Shipping Act of 1894 is the governing enactment in this case and the 64th and 695th sections are complete statutory authority for proof of ownership of the vessel in the manner here adopted. The position is not the less clear if we are to rely upon the previous legislation under which the Supreme Court of New Brunswick dealt with the question. The court did not refer to section 15 of the Merchants' Shipping Act Amendment Act, 1855, (1) which provides, (sec. 1,) that that Act shall be taken to be part of the Merchants' Shipping Act, 1854, (2) and shall be construed accordingly. The copy or transcript certified by the Registrar General might therefore have been properly admitted under the combined effect of sections 107 of the Act of 1854 and section 15 of the Act of 1855. If necessary, also, sections 14 and 11 of the law of Evidence Amendment Act, 1851, (3) may be called in aid. If not admissible upon other grounds, then the copy or transcript kept by the Registrar General is a document to which section 14 applies and it has the same effect as the original under section 64 of the Merchants' Shipping Act of 1894 (4). See also the Canada Evidence Act, 1893, secs. 13 and 14 (5).

As to the certificate of the Assistant Secretary of the Board of Trade as to the payment of expenses, sec. 208, ss. 1 and 3 of the Merchants' Shipping Act, 1894, in effect provide that if the expenses referred to in the section are paid by any British consular officer or "other person on behalf of the Crown" then in any proceeding for

(1) 18 & 19 V. c. 91 (Imp.)
(2) 17 & 18 V. c. 104 (Imp.)
(3) 14 & 15 V. c. 99 (Imp.)
(4) 57 & 58 V. c. 60 (Imp.)
(5) 56 V. c. 31 (D.)

recovery a certificate signed by the consular officer or "other person" shall be sufficient proof that the expenses were duly paid by that officer or "other person." The words "other person" are very wide and seem intended to provide for various possible stages. The Board of Trade is the government department which ultimately bears the expenses on behalf of the Crown, and obviously the Board is the body, or its proper officer is the person to certify the fact. Sections 695 and 719 of the Merchants' Shipping Act, 1894, (sec. 7 of the Act of 1854) come in aid of section 208 (3) if required. The shipping master at Hong Kong could not certify the whole expenditure, but only that which he himself incurred and paid. Necessarily there have been other expenses paid by the Board of Trade which were not incurred at Hong Kong so that the Board is the only body, or its officer is the only person who can certify the full amount. The Legislature cannot have intended that a British consular officer or shipping master in a colonial port should always prepay the conveyance and subsistence money under ss. 228-9, of the Merchants' Shipping Act, 1854. That is too narrow a construction, and one which is not required by the wording of those sections, or sections 207-8 of the Act of 1894 in which they are reproduced. The certificate of the Board of Trade which had first inquired into and satisfied itself of the propriety of the expenditure is really the best evidence and, in this case, the only certificate which the statute contemplates.

As to the point that the action could not be maintained against the company inasmuch as it had acquired ownership after the expenses were incurred, section 208 of the Merchants' Shipping Act, 1894, charges the expenses upon the ship to be recovered from the owner for the time being as a debt to the

1899

THE QUEEN v. THE SAILING SHIP "TROOP" COMPANY.

Crown. This obviously refers to the owner at the time proceedings are taken, the only construction consistent with the expenses being constituted a charge upon the ship. The wording of the section seems quite inappropriate to the proposition that the owner for the time being means the owner at the time when the expenses are incurred. *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (1).

The judgment of the police court having been made final by statute could not be reviewed upon certiorari except for want of jurisdiction or on the ground of fraud. The writ was allowed upon the ground that the evidence was insufficient, but the court has no jurisdiction to review the judgment upon certiorari on any such ground. Tidd's Practice (9 ed) 400; Paley on Convictions, (7 ed.) 373, *et seq.*; *Queen* v. *Bolton* (2); *Cave* v. *Mountain* (3); *Colonial Bank of Australasia* v. *Willan* (4); *Fox* v. *Veale* (5); *Kemp* v. *Balne* (6). We refer also to *Hespeler* v. *Shaw* (7); *In re Trépanier* (8); *The Queen* v. *Ambrose and Winslow* (9); *The Queen* v. *Coulson* (10); *The Queen* v. *Scott* (11); and *Royal Insurance Co.* v. *Duffus* (12).

A. L. Palmer Q.C. for the respondent. The extracts or copies of transcripts, etc., were not certified in accordance with the 107th and 229th sections of the Merchants' Shipping Act of 1854. The copy or extract of transcript is not a certificate of registry or an examined copy thereof, or a copy thereof purporting to be certified under the hands of the registrar, or person having charge of the original; the same is, and professes to be, a copy of a transcript or copy, which has been trans-

(1) [1894] A. C. 508.
(2) 1 Q. B. 66.
(3) 1 Man. & G. 257.
(4) L. R. 5 P. C. 417.
(5) 8 M. & W. 126.
(6) 1 Dowl. & L. 885.
(7) 16 U. C. Q. B. 104.
(8) 12 Can. S. C. R. 111.
(9) 16 O. R. 251.
(10) 24 O. R. 246.
(11) 10 Ont. P. R. 517.
(12) 18 Can. S. C. R. 711.

mitted by the Registrar, or other persons having charge of the same, at Liverpool, to the Registrar General of Shipping and Seamen at London. The statute under consideration, and the Evidence Act of New Brunswick (1), make provision for the reception in evidence of a copy certified by the official having charge of the original, but there is no provision for a certificate such as the one given. The other certificate of Cosmo Monthouse or documents produced before the police magistrate are not a certificate within the meaning of the 229th section of the Act; that section requires the certificate of the consular officer, or other person on behalf of Her Majesty, who makes the payment. It would be a manifest injustice and an absurdity to allow an officer in the office in London, to issue certificates with reference to payments made by consular officers, and the other persons named in the Act at the various ports and places throughout the world where ships of Her Majesty's subjects trade. The Act contemplates that the owner of the ship, when called upon to repay expenses, should have the certificate of the consular officer or other person who has actually made the disbursement on account of the alleged distressed seamen, at the place and at the time when he was so in distress, and not a mere statement from some official of the Board of Trade in London that the Board of Trade had paid the money to some person, without any certificate from such person that the money had been properly expended.

It appears that the alleged expenses were all incurred long before the respondent was incorporated or became owner of the ship, and even if the papers produced are sufficient, judgment could only be entered against the former owners. The 229th section of the Merchants' Shipping Act are clearly words of limita-

(1) C. S. N. B. ch. 46, s. 15.

1899

THE QUEEN v. THE SAILING SHIP "TROOP" COMPANY.

tion; first, because that is their ordinary and grammatical meaning; secondly, because any other interpretation of them will cast a liability in the nature of contract upon a person who at the time of the arising of the liability under the contract was non-existent. It would be absurd to hold that a company incorporated in 1892, under an Act of the legislature of New Brunswick, is liable for acts and happenings in Hong Kong and London in 1891. All liability under the Merchants' Shipping Act is based upon actual or supposed contract or agreement between existing parties.

The judgment is declared to be final as to matters of fact, but this declaration cannot affect matters of law which go to the jurisdiction; Paley, p. 424. The defect in the convicting court here is that it had not power to inquire into the matter before it. The case of *Hespeler* v. *Shaw* (1) carries out this same principle, and certiorari is the correct and only remedy in the case. The stricter and narrower rules of evidence laid down in the Act of 1854 are saved by the Act of 1894 and they apply here. See the Interpretation Act of 1889 as to the effect of repeals and sec. 745 of the Merchants' Shipping Act, 1894. Consequently the certificates, transcripts or copies produced cannot make evidence, nor could there be jurisdiction in the police magistrate; see sec 188 of the Merchants' Shipping Act, 1854.

KING J.—This is an appeal from a judgment of the Supreme Court of New Brunswick making absolute a rule *nisi* for a certiorari to remove, (with a view of quashing,) a judgment rendered in the Police Court of the City of St. John, for the Queen, in the

(1) 16 U. C. Q. B. 104.

sum of $58.65, and all proceedings upon which such judgment is based.

The action was brought by the Imperial Board of Trade in the name of Her Majesty to recover hospital fees and board at Hong Kong, and expenses of conveyance to London of Carl Silstrom, a seaman on board the ship *Troop*, who had sustained injuries in the service of the vessel, and who was discharged and left behind by the master in the year 1891.

Section 213 of the Merchants Shipping Act, 1854, enacts that:

If any seaman * * * belonging to any British ship is discharged or left behind at any place out of the United Kingdom without full compliance on the part of the master with all the provisions in that behalf in this Act contained, and becomes distressed and is relieved under the provisions of this Act * * " the wages (if any) due to such seaman * * * and all expenses incurred for his subsistence, necessary clothing, conveyance home, burial, etc., shall be a charge upon the ship whether British or foreign, to which he so belonged as aforesaid, and the Board of Trade may in the name of Her Majesty (besides suing for any penalties which may have been incurred), sue for and recover the said wages and expenses with costs either from the master of such ship as aforesaid, or from the person who is the owner thereof for the time being or, in the case of such engagement as aforesaid for service in a foreign ship, from such master or owner, or from the person by whom such engagement was so m e as aforesaid; and such sums shall be recoverable either in the same manner as other debts due to Her Majesty, or in the same manner and by the same form and process in which wages due to the seaman would be recoverable by him; and in any proceedings for that purpose production of the account (if any) to be furnished as hereinbefore is provided in such cases, together with proof of payment by the Board of Trade or by the Paymaster General of the charges incurred on account of any such seaman, * * shall be sufficient evidence that he was relieved, conveyed home, or buried (as the case may be), at Her Majesty's expense.

Section 229 provides that:

If any such expenses in respect of the illness, injury or hurt of any seaman or apprentice as are to be borne by the owner are paid by any consular officer or other person on behalf of Her Majesty * *

1899

THE QUEEN v. THE SAILING SHIP "TROOP" COMPANY.

King J.

such expenses shall be repaid to such officer or other person by the master of the ship, and if not so repaid the amount thereof with costs shall be a charge upon the ship and be recoverable from the master or owner of the ship for the time being as a debt due to Her Majesty, and shall be recoverable either by ordinary process of law or in the manner in which seamen are hereby enabled to recover wages; and in any proceeding for the recovery thereof the production of a certificate of the facts signed by such officer or other person, together with such vouchers (if any), as the case requires, shall be sufficient proof that the said expenses were duly paid by such consular officer or other person as aforesaid.

The provisions of the statute as to the recovery of seamen's wages are, so far as material, as follows:

Section 188:

Any seaman may * * sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seamen * * has been discharged, or at which any person upon whom the claim is made is or resides * * for any amount of wages due to such seaman * * not exceeding £50 over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable, and every order made by such justices * * in the matter shall be final.

By sec. 519 it is declared that:

Any stipendiary magistrate shall have full power to do alone whatever two justices of the peace are by this Act authorized to do.

The defendant company, a corporation incorporated by the laws of New Brunswick, has its principal place of business at Rothesay, in New Brunswick, a place near to the City of St. John, N.B., and Robert J. Ritchie, Esq., who exercised the functions of the Police Court in the proceedings in question, was a stipendary magistrate in the City of St. John, and in these proceedings was acting as such.

The evidence adduced to prove the ownership of the *Troop* by the defendant company was a document certified by the Registrar General of Shipping, in London, England. It embraced (first), a transcript of register for transmission to the Registrar General of Ship-

ping and Seamen. (Secondly), a copy of transactions subsequent to registry showing the vesting of the entire ownership in the defendant company in March, 1892, with a statement of ownership and encumbrances after such registration by which it appeared that the defendant company were the sole owners down to the date of the following certificate:

I hereby certify that the foregoing particulars of the registry and present ownership and interest of the *Troop*, official number 87977 have been truly extracted from the records in my charge.

(Sgd.) J. CLARK HALL,
Registrar General.

General Register and Record Office of
Shipping and Seamen, Customs House,
London, E., 24th January, 1897.

Then, in proof of payment, there was the following certificate of an assistant secretary of the Board of Trade.

It is hereby certified that the Board of Trade have paid on behalf of Her Majesty the sum of £12 1s 9d, being the amount of expenses incurred in the months of August, September, October and November, 1891, by the harbour master at Hong Kong, and the superintendent of the Mercantile Marine Office at Victoria docks, London, in the relief according to the provisions of the Merchants' Shipping Act of 1854, of Carl Silstrom, formerly of the ship *Troop*, distressed British seaman. And it is further certified that the documents hereunto annexed and marked B. C. and D. are the original signed receipts which include the payments making up the said sum of £12 1s 9d. And it is further certified that this certificate is issued by the Board of Trade under the provisions of the Merchants' Shipping Act of 1854.

(Sgd.) COSMO MONTHOUSE,
L.S.

An Assistant Secretary of the Board of Trade,
London. Dated this 22nd of May, 1895.

The documents referred to in the certificate were put in evidence.

In the Supreme Court of New Brunswick, (as before the Police-Magistrate,) it was maintained by the defendants that these certificates were insufficient,

1899

THE QUEEN v. THE SAILING SHIP "TROOP" COMPANY.

King J.

and it was also contended that persons who became owners of the vessel after the transaction were not "owners for the time being" within the meaning of the Act. As to this last point the New Brunswick Supreme Court held that these words mean the owners at the time of action brought. This seems clearly so. The words import a fluctuating body of persons. They are not the determinate owners who made default but the owners for the time being, the words "for the time being" denoting not a time fixed by the transaction in question but one that is variable according to the happening of another event. Then, inasmuch as the debt is made a charge upon the vessel following and binding her even on change of ownership, and even when she has ceased to be a British and becomes a foreign ship, the evident intention is to make the personal liability co-extensive with this.

The Supreme Court of New Brunswick also held that there was sufficient proof of payment by the Board of Trade.

Upon the remaining objection, however, they were with the defendant company, and held that the certificate of ownership was defective upon the ground that the Registrar General not being the person having charge of the original register (the vessel being registered at Liverpool) it was not competent for him to give a certificate sufficient under the Act; and upon this ground the rule was made absolute.

In the argument of the appeal Mr. Palmer, for the respondents, contended that an appeal does not lie in a case of certiorari except from a judgment ordering the quashing (or otherwise) of the judgment or order of the inferior court.

By force of the Act of 1891 (read in conjunction with the principal Act R. S. C. ch. 135), an appeal lies

from the judgment in any case of proceedings for or upon a writ of *habeas corpus*, certiorari or prohibition not arising out of a criminal charge.

A judgment in a case of proceedings for a writ of certiorari in proceedings such as these seems, therefore, in explicit terms to be within the Act.

The practice in certiorari in the Supreme Court of New Brunswick is similar to that expressed in the following passage from Paley on Convictions, p. 434:

> If a rule *nisi* only be granted in the first instance yet the argument on such rule generally decides the case and if it be made absolute after argument, the conviction is quashed almost as a matter of course when it is afterwards brought up on the certiorari.

Next, as to the grounds of appeal. It is argued for the appellant that in a case where by statute the judgment of the inferior court is declared to be final, the effect is, not indeed to take away the right of certiorari, but to limit it to cases of the want, excess or defect of jurisdiction, or of fraud.

It is settled, in cases where no restraint is imposed by the legislature upon review by certiorari, that an adjudication by a tribunal having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found. It has been also settled that even where the right is taken away by statute it is to be deemed as still existent in cases of want or excess of jurisdiction or fraud. In the case of *Colonial Bank of Australasia* v. *Willan* (1) there is a discussion of the various conditions which may be said to determine the jurisdiction of tribunals of limited jurisdiction. A marked distinction exists between the merits of the case and points

(1) L. R. 5 P. C. 417.

1899

THE QUEEN v. THE SAILING SHIP "TROOP" COMPANY.

King J.

collateral to the merits upon which the limit to jurisdiction depends. In the former, it is conceived that, where by statute the adjudication is final, no mere error of the tribunal whether as to law or fact involved in such determination, can suffice to make the adjudication open to review upon certiorari.

Treating the matter otherwise, however, and without formally deciding it, it would appear that there was a sufficiency of evidence to warrant the conclusions of the police magistrate.

First, as to the evidence of ownership, sec. 15 of the Merchants' Shipping Amendment Act, 1855, declares that the copy or transcript of the register of any British ship which is kept by the Chief Registrar of Shipping at the Customs House in London or by the Registrar General of Seamen under the direction of Her Majesty's Commissioners of Customs, or of the Board of Trade, shall have the same effect to all intents and purposes as the original register of which the same is a copy or transcript. What, therefore, the custodian of the original register might certify under sec. 107 of the Act of 1854, the registrar general may certify under the same section, by force of sec. 15 of the Act of 1855.

By the Merchant Shipping Act, 1894, the prior Acts alluded to were repealed, and by one provision of the new Act, the returns transmitted by the local registrars to the registrar general are declared to constitute the register of British ships, and by sec. 64 it is enacted that a copy or transcript of the register of British ships kept by the registrar general

shall be admissible in evidence in manner provided by this Act and have the same effect to all intents as the original register of which it is a copy or transcript.

By sec. 695 it is provided that a copy of any such document as is by the Act declared to be admissible in evidence, or an extract therefrom, shall be admissible

in evidence, if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was entrusted. By the expression "original document," is manifestly meant the document previously referred to as that which by the Act is made admissible in evidence, and the expression is used as in contradistinction to the copy or extract of which it is the original. Naturally the person capable of certifying to a copy of or extract from a particular document would be the person having custody of such document, and not a person having custody of an original of such "original document."

Mr. Palmer met this argument by referring to the clause of the Interpretation Act of 1889, by which it is enacted that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, and argued that the remedy would be affected if a new statutory mode of proof were admitted. If the new provision related to matters the proof of which was provided for in the provisions of the repealed Act establishing the remedy, the effect might perhaps be as contended for, but independent and general provisions as to proof contained in the later Act would seem to be *primâ facie* applicable to all cases where such proof has to be made.

Next, as to the evidence of payment; the difficulty arises from the fact that section 213 of the Act of 1854 which empowers the Board of Trade to sue for and recover the expenses in the name of Her Majesty, and which declares the effect of proof of payment by the Board of Trade, does not provide for a mode of such proof by certificate. The form of the certificate rather leads to the conclusion that the Board of Trade was advised that such a certificate could be given under section 7 of the Act of 1854. The Supreme Court of

1899

THE QUEEN v. THE SAILING SHIP "TROOP" COMPANY.

King J.

New Brunswick, however, find a warrant for it under section 229, by treating the Board of Trade as a person making the payment on behalf of Her Majesty. In this case the vouchers show that the account for the hospital fees, (the largest item in the claim,) was made in terms against the Board of Trade. I do not think it is any straining of the statute to read it as the Supreme Court of New Brunswick have done, for manifestly the Board of Trade is the real paymaster by whosesoever hands the money may have passed.

A question was raised as to the jurisdiction of the Police Court. But the facts and references already stated show that the Stipendiary Magistrate of St. John had jurisdiction to entertain a claim for wages against the defendant company, and indeed the question was not raised in the court below.

The appeal, therefore, should be allowed. The proper order below was to discharge the rule *nisi* for a certiorari.

Appeal allowed with costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *C. A. Palmer.*

ROBERT WHITE (PETITIONER).....APPELLANT;

AND

THE CITY OF MONTREAL (CONTESTANT) ..... } RESPONDENT.

1899

*May 19.

*Oct. 3.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA, SITTING IN REVIEW, AT MONTREAL.

Municipal corporation—Assessment—Montreal harbour improvements—Widening streets—Construction of statute—57 V. c. 57 (Que.)—52 V. c. 79, 139 (Que.).

A by-law passed in 1889 under the Quebec statute, 52 Vict. ch. 79, s. 139, provided for a special loan in aid of the Montreal harbour improvements, and appropriated $163,750 thereof for the construction of a tunnel with approaches, as shewn on a plan annexed, from Craig street, in a line with Beaudry street, to the tunnel, passing by the side of W.'s land, and subsequently a resolution was passed to open, alongside the open-cut approach, a high-level roadway to give communication from Craig street to Notre-Dame street, on the surface of the ground. These works constituted in fact an extension of Beaudry street, from the line of Craig street, 77 feet in width, of which 42 feet constituted an open-cut approach to the tunnel and the remainder, the high-level roadway, as shewn on the plans, this prolongation being 42 feet wider than Beaudry street. The resolution provided that a portion of the expense should be paid by the parties interested and benefited as for local improvements made by the "widening" of Beaudry street. Upon proceedings to quash the assessment, the Superior Court held that it was authorized and legalized as an "existing roll," by the Act, 57 Vict. ch. 57, s. 1, (Que.), and this judgment was affirmed by the Court of Review.

Held, reversing the decision of both courts below, that notwithstanding the reference therein to "existing rolls", the application of the latter Act should be restricted to the cost of the "widening" only of the streets therein named in cases where there were, at the time of its enactment, existing rolls prepared by the commissioners fixing the limits for that purpose, and these words could not have the

*PRESENT;—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

1899

WHITE v. THE CITY OF MONTREAL.

effect of extending the nature and character of such works so as to include works manifestly forming part of the harbour improvement scheme and chargeable against the special loan.

APPEAL from the judgment of the Superior Court for Lower Canada, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, which dismissed the petition of the appellant to quash an assessment roll imposing a special tax upon his lands in connection with certain expropriation proceedings and local improvements in the City of Montreal.

The petitioner contested the assessment substantially on the ground that part of the works were not, as contended, for the widening of the street upon which his property was situated, but were actually part of works in connection with the Montreal harbour improvements, the expenses of which ought to have been defrayed from funds appropriated therefor out of a special loan under a city by-law founded upon the Quebec statute, 52 Vict. ch. 79 sec. 139.

The facts of the case are stated in the judgment of the court delivered by His Lordship Mr. Justice Gwynne.

Trenholme Q.C. and *Beïque Q.C.* for the appellant. The resolution of April 13th, 1891, so far as it attempts to authorize a special assessment, is illegal. The statute 57 Vict. ch. 57 does not apply to the expropriations and works in question. The Act only applies to *widenings* in cases where there might be "existing rolls" at the time of the enactment. It cannot apply to *openings*, nor to the tunnel, nor to the "open-cut approach," nor the "high-level roadway" which were all part of the scheme for harbour improvements. See *Joseph* v. *City of Montreal* (1).

Atwater Q.C. and *Ethier Q.C.* for the respondent On the 16th January, 1891, a number of proprietors,

(1) Q. R. 10 S. C. 531.

including appellant, presented a petition for the prolongation of Beaudry street; on the 13th day of April, 1891, the council, after having received reports on the petition from the roads and finance committees, resolved that Beaudry street should be so opened at a width of 77 feet, as shown on the plan; that the land required should be expropriated, and the cost of opening said street to the line fixed upon, 42 feet, borne by the parties interested in and to be benefited by the improvements, and the cost of the 35 feet *extra* required for the high-level road should be paid by the city out of the funds for harbour improvements. Afterwards, on the 30th of June, 1891, commissioners were appointed, and in the month of September, 1891, they reported fixing the limits of proprietors interested, and subsequently fixed the indemnities to be paid for land expropriated. In 1894 a projected roll of assessment was prepared, but subsequently discontinued, and finally the present assessment roll was prepared according to the special law then in force, 57 Vict. ch. 57, ss. 1 & 3 (Que.).

The commissioners, acting within their powers under section 3, set aside any distinction of tunnel or high-level roadway and, considering the improvements as a whole, divided the cost into two equal parts, the city being charged with the payment of one-half, and the other half assessed on the properties of the interested parties. Their report was duly advertised and afterwards signed by the commissioners on the 28th September, 1891. This final roll was ratified by the commissioners on the 31st January, 1896, and on the 3rd of February of the same year the city treasurer gave public notice to the effect that he would proceed to the collection of said roll.

All required formalities have been strictly complied with. The statute was fully applicable to the improve-

1899

WHITE v. THE CITY OF MONTREAL.

ments thus made in the prolongation of Beaudry street, and the second sentence of sec. 1 is not confined to a "widening" of that street, but was passed with special reference to the whole cost of the prolongation under the plans and resolution. The provisions of this Act (57 Vict. ch. 57) are the only enactments applicable to the matter in dispute, and that Act authorizes the taxation of the interested parties benefited by the improvement.

The judgment of the court was delivered by:

GWYNNE J.—The sole question involved in this appeal is whether or not an assessment made in the month of January, 1896, upon certain real estate situate on Craig street, in the City of Montreal, the property of the appellant, and upon the appellant as the owner thereof, whereby the appellant is charged with the sum of $3,596.74, by way of contribution to the purchase money of land situate on Craig street, of two several pieces of which the appellant was seized, and acquired by the City of Montreal, in the year 1891, is made legal and binding upon the appellant under, and by force of, the provisions of the Quebec statute, 57 Vict. ch. 57.

The facts upon which the solution of this question depends are as follows:

Beaudry street in the year 1891 was and still is a street which extends from Sherbrooke street, in the City of Montreal, and after proceeding in a south-easterly direction crossing several streets parallel with Sherbrooke street, terminated at Craig street, which is a street parallel with Sherbrooke street. Now Beaudry street for the greater part of the above distance, that is to say, from Robin street, the second street from Sherbrooke street, was only thirty-five feet in width down to Craig street where it terminated.

From the opposite side of Craig street to Notre-Dame street which is the next street to Craig street, and parallel therewith, there was no street whatever in existence on a line with Beaudry street; all the land on that side of Craig street, opposite to Beaudry street, for a considerable distance along Craig street, was the property of the appellant, and was built upon. Notre-Dame street runs along the summit of a ridge 22 feet above the level of, and about 330 feet distant from Craig street; at the base of this ridge upon one side was Craig street and upon the other side, but at a much greater distance from Notre-Dame street than is Craig street, is a street called Commissioners street also parallel with Notre-Dame street or nearly so, and situate close to the water of the harbour of Montreal. From Notre-Dame street leading down to Commissioners street there was a street called Brock street, which was only 25 feet in width. This street was within the lines of Beaudry street, assuming those lines to be drawn across Craig street and so in continuation across Notre-Dame street. In the year 1878 the Corporation of the City of Montreal had conceived the idea of widening at some future time Beaudry street to 42 feet, and of making a street in continuation of it from Craig street to Notre-Dame street of the like width of 42 feet, and also of widening Brock street down to Commissioner street to the like width, but all that contemplated work, if done, and when done, was to be done on the surface of the ground like all the other streets in the city, and a plan was prepared by the city of such contemplated work which plan was duly homologated in 1878, but the work so designed and shewn upon said homologated plan was never, (at least in so far as the space between Craig street and Notre-Dame street is concerned), carried into effect by the corporation, but instead thereof a wholly different

1899

WHITE v. THE CITY OF MONTREAL.

Gwynne J.

work was undertaken by the city under the provisions of sections 139 of an Act of the Province of Quebec passed on the 21st day of March, 1889, 52 Vict. c. 79, intituled "An Act to revise and consolidate the charter of the City of Montreal and the several Acts amending the same." By that 139th section of that Act it was enacted that:

> If at any time the council shall determine to aid in the improvement of the harbour of Montreal either by contributing to works appertaining to the harbour and wharves or by opening or widening streets, ramps or tunnels adjacent or leading thereto, erecting or improving the dyke or otherwise, or in any or all of such methods, the council may, by by-law, declare and describe the nature of the intended aid and the amount to be therein expended, not exceeding in the aggregate one million dollars; and may thereby provide for the issue of bonds or debentures to the required amount, constituting a lien and charge upon the property and revenues of the city,

as in the Act declared.

Upon the 4th day of November, 1889, the corporation of the City of Montreal in virtue of the authority conferred by the above section passed a by-law no. 174 whereby, after reciting that it was deemed expedient in the interest of the City of Montreal, it was enacted that the corporation of the city should effect a loan not exceeding one million dollars for the purpose of preventing inundations and for the amelioration of the harbour of the said city as specified in the following section. Then section 2 enacted that the product of the said loan should be applied in the following manner, that is to say:

1. For constructing a permanent *levée en face de la cité*.....	$670,353 00
2. For widening Commissioners street and *la rue de la Commune*.....	129,647 00
3. For constructing a tunnel under Brock street	163,750 00
4. For aiding in the construction of a *rampe à la rue Gale*	23,000 00
5. Interest and unforeseen expenses.....	13,250 00
Total.....	$1,000,000 00

The whole as shewn on plans annexed to the by-law.

Now by this by-law the whole of the work designated therein and as shown on the plans annexed thereto, (and no one part any more than another), is described as work undertaken in the interest of the whole city and which was therefore to be paid for wholly by the city, and primarily out of the million dollar loan authorised to be effected by section 139 of 52 Vict. ch. 79, and by the by-law of the city passed in pursuance thereof, no part of such work was chargeable to or could be charged against any particular persons who were owners of property supposed to derive some special benefit from such a public work so undertaken, all the cost was chargeable to the fund specially provided by the statute and the by-law for the purpose.

We are only concerned with the work mentioned as the third item in the by-law by which the sum of $163,750 was set apart and appropriated to the construction of a tunnel under Brock street. The land appropriated for this purpose by the plan annexed to the by-law, in so far at least as the space between Craig street and Notre-Dame street, with which we are dealing, is concerned, consisted among other lands of two several pieces of land fronting on Craig street, the property of the appellant, one of which, measuring 42 feet in width on Craig street and directly opposite to Beaudry street, extended in the direction of Notre-Dame street across the property of the appellant, and the other measuring 35 feet in width, and immediately adjoining on the north-east side of the said piece of 42 feet in width, extended in the direction of Notre-Dame street across the property of the appellant. These several pieces of land upon reaching the limit of the appellant's property entered upon the lands of other persons having their frontage on Notre-Dame street.

1899

WHITE v. THE CITY OF MONTREAL.

Gwynne J.

The piece of land 42 feet in width proceeded from Craig street on a descending grade of one foot in 35 feet for the distance of about 238 feet from Craig street and about 80 feet beyond the limit of the appellant's property, and was appropriated, and in the actual construction of the Brock street tunnel, used for the approach thereto, the portal whereof, about 20 feet in height, is situate at said distance of about 238 feet from Craig street, from which point the tunnel is constructed under Notre-Dame street and Brock street down to the waters of the harbour. The piece of land 35 feet in width, on the contrary, proceeded from Craig street on an ascending grade and reached about the level of Notre-Dame street at the top of the arch of the portal of the tunnel, or at the distance of about 90 feet from Notre-Dame street, and continued on to Notre-Dame street where it terminated. These two pieces of land of the width of 42 feet and 35 feet respectively consisted of as separate and distinct roadways as if they were miles apart, for they not only were constructed on wholly different gradients and had each a wholly different terminus from the other, one at the waters of the harbour which were reached by a subterranean route, and the other constructed on an ascending grade from Craig street to Notre-Dame street where, on the surface of the ground there, it terminated, but they were separated from each other at their start from Craig street, and necessarily so separated, by a solid stone wall upwards of five feet in width ascending from Craig street to the height of the portal of the tunnel surmounted by a strong iron railing. The piece of land 35 feet in width would seem to have been designed and adopted as part of the tunnel work for the reason that as the whole of the roadway 42 feet in width which in 1878 the corporation had designed opening from Craig street to Notre-

Dame street on the surface had been wholly diverted from that purpose by the section 139 of 52 Vict. ch. 79, and the by-law, it was but reasonable that surface access from Craig street to Notre-Dame-street should be furnished at the expense of the fund appropriated for the tunnel of which the piece 42 feet in width was a necessary part. However, whatever may have been the reason, it is, I think, clear beyond question that the roadway of 35 feet in width from Craig street to Notre-Dame street was part of the tunnel work as designed by the corporation and covered by the by-law. In the interval between the passing of the by-law and the month of January, 1891, a part of the appellant's buildings situate on Craig street was destroyed by fire and for that reason it seemed to several persons, of whom the appellant was one, that the time was opportune for opening the road from Craig street to Notre-Dame street, and they made a suggestion to that effect in a letter addressed to the chairman of a committee of the council called the road committee. The chairman having submitted the communication to the committee, the latter made a report to the council thereon, wherein they say that

as it is a part of the harbour improvement scheme to have a subway at Brock street they recommend

that Beaudry street be opened from Notre-Dame street to Craig street at a width of 77 feet as shown on a plan annexed to the report and that the land be expropriated, &c., &c. Now the 77 feet shown on this plan consists of no other than the two several pieces of 42 feet and 35 feet in width respectively as aforementioned appropriated and set apart by the by-law for the purposes of the tunnel. The road committee then, in their report, with full knowledge and understanding of the Brock street tunnel scheme, proceed to *recommend* that the cost of the improvement be borne and

1899

WHITE v. THE CITY OF MONTREAL.

Gwynne J.

paid as follows:—the cost of opening the piece 42 feet in width by the parties interested in and to be benefited by the improvement, and the cost of the extra 35 feet required for the high level road to be borne and paid by the city out of the fund for the harbour improvements.

The piece of land 42 feet in width having been as already shown appropriated by the by-law 174 to the purposes of the tunnel for the construction of which that by-law had set apart $163,750, it is difficult to understand upon what principle the road committee proceeded when they recommended that the cost of the improvement, in so far as the piece 42 feet in width was concerned, should be paid by parties interested therein and benefited by the improvement. They were certainly not proceeding in ignorance of the fact that the piece 42 feet in width was required for and was indispensably necessary for the construction of the tunnel, for their report shows that the diversion of that piece of land from the ordinary purposes of a street to the purposes of a tunnel in the construction of which the whole of the city was by the by-law declared to be interested, constituted their reason for recommending that the cost of the construction of the high level roadway should be charged to the fund provided for the construction of the tunnel.

This report, singular as it is in this form in view of the actual circumstances and facts of the case, was adopted by a resolution of the council on the 13th September, 1891, but it must, I think, be admitted as beyond all question that such resolution of the council had not and could not have the effect of charging the cost of the construction of any part of the improvement thereon which consists solely of the tunnel so far as it is on that piece of land, or

1899

WHITE v. THE CITY OF MONTREAL.

Gwynne J.

any part of the land acquired for the purpose of the tunnel to any other fund than that provided therefor by the by-law no. 174.

In the month of May, 1891, commissioners were appointed to value the land required to be taken by the city, and in the document submitting that question to them, the land between Craig street and Notre Dame was described in two several pieces of 42 feet and 35 feet in width respectively precisely as shown on the plan annexed to and adopted by the by-law no. 174, as that upon which the tunnel was to be constructed as part of the harbour improvements in which the whole city was interested.

The commissioners in a report made by them in the month of September, 1891, say that the parties interested in the work for which the land submitted to them to value the price of, was required were the proprietors of all the lots of land situate within the following limits, that is to say:

1. On the north-east by a line following the centre of Parthenais street as opened or projected from Sherbrooke street to Notre-Dame street and continued from thence to the River St. Lawrence.

2. On the south-east by the River St. Lawrence.

3. On the south-west by a line along St. André and Campeau streets from Sherbrooke street to Craig street, thence along Craig street to Lacroix street, thence along the centre of Lacroix street to Notre-Dame street, and continued from thence to the River St. Lawrence, all the lots fronting on St. André and Campeau streets, and on the north-west side of Craig street, between Campeau and Lacroix streets, no further than to the distance of 150 feet in depth.

4. On the north-west by a line following Sherbrooke street, as opened or projected from St. André street to Parthenais street including the lots fronting on the north-west side of Sherbrooke street, but no further than to the depth of 150 feet.

This description of the lands to be benefited by the projected improvement for which the land, the price of which was to be determined by the commissioners, was required, seems to disclose that it was well under-

1899

WHITE v. THE CITY OF MONTREAL.

Gwynne J.

stood that the improvement by which such an extent of land was to be specially benefited, was the whole of the works of harbour improvements as mentioned in the by-law 174, or at least the projected tunnel work thereby provided for; and not by any means so small a work as the opening a street of 330 feet in length from Craig street to Notre-Dame street, and according with such understanding no assessment of the lands within the limits named was ever made under sec. 228 of 52 Vict. ch. 79, but in 1893 the city proceeded not to open a street between Craig street and Notre-Dame street, 77 feet in width, but to construct the tunnel under Notre-Dame street and Brock street from Craig street to the harbour on the piece 42 feet in width, as designed and adopted by the by-law 174, and the plan annexed thereto, and to construct the high level street on the piece 35 feet in width between these streets as also designed by the said by-law and the plan annexed thereto. The construction of the tunnel work proceeded into the year 1895, when, as is said, it was found that the sum of $163,750 set apart for that work was insufficient, but for what reason such insufficiency arose, or at what stage of the work it was discovered, does not appear. It is obvious, however, that the price of the land required and used in the construction of the tunnel work therein is part of the cost of the improvement authorized by the by-law, and constituted in fact the first charge upon and was payable out of the fund appropriated by the by-law to the tunnel work, and that before the work of construction should have been commenced; and there is no suggestion that it was not so paid, and if so paid out of the fund charged therewith there is an end of that matter; but paid or not paid, however much the $163,750 set apart for the improvement designed to be accomplished by the

completion of the tunnel should prove to be insufficient for that purpose, such deficiency could not in any respect affect the rights of the owners of the land required for and used in the construction of the work, to the price of the land so used which was by the by-law charged upon that fund.

Before such deficiency was ascertained the Act 57 Vict. ch. 57 was passed on the 8th day of January, 1894, by which it was enacted that

> notwithstanding any law to the contrary, the cost of widening each of the following streets, namely, Pine Avenue, Bleury street, Milton street, Inspector street, Cathedral street and Lagauchetière street, shall be paid as follows, namely: one-half by the city, and one-half by the proprietors fronting on the lines of the said streets assessed to a depth not exceeding one hundred feet. For the following streets: Ontario street from Frontenac to eastern limits, Beaudry street, Pantaléon street, St. Catherine street from Désery street to the eastern limits, and Viger Square, the *cost* shall be paid as follows: one-half by the city and one-half by the proprietors interested as per existing rolls prepared by the commissioners in each case fixing the limits.

Now the contention of the appellant is that the assessment made upon his property on Craig street in January, 1896, is absolutely void for the reason that the above Act, as is contended, relates solely to the *cost of widening* the streets therein named, of which Beaudry street is one, and that the land taken from the appellant and others between Craig street and Notre-Dame street was not taken for any such purpose but for the construction of the Brock street tunnel and the works in connection therewith to the cost of which or any part thereof the Act has no application.

The Superior Court has held that the Act of 1894 has authorised and made legal the assessment of 1896, the effect of which is to charge the appellant with a liability to reimburse the Corporation of the City of Montreal to the amount of $3,596.74 as part of the purchase money of the two several pieces of land

1899

WHITE v. THE CITY OF MONTREAL.

Gwynne J.

between Craig street and Notre-Dame street, part of which was acquired from himself and used in the construction of the tunnel under the aforementioned by-law 174, and which purchase money was therefore chargeable and charged against the fund appropriated by the by-law to the cost of the tunnel. The Court of Review, Doherty J. dissenting, have affirmed this judgment.

The judgment in effect holds that there is a distinction made by the Act between the streets named in the first part and those named in the latter part of the first section of the Act as above extracted, and that such distinction consists in this, that the word "widening" is to be confined to the streets mentioned in the first sentence of the section, and that as regards the streets mentioned in the second sentence of the same section, it is to be construed as including the *opening* of a *new street* or the *prolongation* of an *existing* one. And the judgment holds that the lands taken from the appellant and others between Craig street and Notre-Dame street, and the work done thereon constituted simply a prolongation of Beaudry street from Craig street to Notre Dame street, as if done under the ordinary powers contained in section 140, and the other sections of the Act relating to the opening of streets, and so within the operation of the Act 57 Vict. ch 57.

The reasoning upon which the construction is based I understand to be that otherwise no effect could be given to the words at the close of the second sentence of the section, viz.:

> as our existing rolls prepared by the commissioners in each case fixing the limits,

but that construction, as was I think well argued by the learned counsel for the appellant, wholly assumes it not only to be an established fact but one which

was present to the mind of the Legislature that there was no existing roll fixing the limits by commissioners of the lands to be assessed for the cost of *widening* any of the streets named in the second sentence of the section, which widening had not yet been completed when the Act 57 Vict. ch. 57 was passed. The words referred to seem to be open to an intelligent construction by reading them thus as relating to the cost of *widening* (which is the only word used in the Act for the purpose of which the Act purports to be passed) any of the streets named, the cost to be by an assessment "as per existing rolls" in each case, if any such there be. This seems a more reasonable construction than to give to the word "widening" as used by the Legislature, the construction contended for by the respondents.

The true construction of the Act appears to me to be that it is in express terms limited to the "widening" of the streets named, that is of any of the streets named in the section, and that like all other Acts, not expressed to be retroactive or in so far as it is not expressed to be retroactive, it must be construed as relating to future undertakings. If the words "as per existing rolls," &c., had not been inserted the statute would relate wholly to future undertakings of the nature and character named in the Act, but the insertion of those words makes it retroactive in so far that it shall apply to undertakings of the nature and character named in the Act if any such there be which have proceeded so far as fixing the limits of lands liable to be but not yet assessed for payment of the cost of such work; but the words under consideration cannot be construed as extending the nature and character of the works in relation to which the Act is expressed upon its face to be passed.

There are moreover many considerations which to my mind render it impossible to construe the Act as

1899

WHITE v. THE CITY OF MONTREAL.

Gwynne J.

having any application to the cost of the work for which the lands in question have been in fact taken and applied by the Corporation of the City of Montreal; or to the cost of any part of such work. There is not a syllable in the Act which justifies the conclusion that the Legislature had any knowledge that the sum of $163,750 set apart by the by-law no. 174 to defray the cost of the undertaking therein described as a tunnel under Brock street would prove insufficient for that purpose, or that they had it in contemplation to charge the cost of that work to any other fund than that provided by the by-law for the purpose, nor to supplement the deficiency of that fund, if such there should prove to be, by charging the price of the land appropriated to the construction of the tunnel to the parties assessed therefor by the assessment now under consideration in appeal. There is not a syllable in the Act which leads to the conclusion that the Legislature had it in contemplation by the Act 57 Vict. ch. 57, to separate the cost of acquiring the property upon which any work contemplated by the Act was to be performed from the residue of the cost of the work to which the Act relates or that they had it in contemplation to make thereby a provision for the cost of any part of the work covered by the by-law. So to construe the language used in the Act is in my judgment wholly unwarranted and irreconcilable with the principles applicable to the construction of statutes.

For all of the above reasons I am of opinion that the appeal must be allowed with costs, and that the assessment against which this appeal is taken must be quashed and declared to be absolutely null and void and not authorised by the statute 57 Vict. ch. 57.

Appeal allowed with costs.

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

Solicitors for the respondent: *Ethier & Archambault.*

HENDERSON BLACK AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

HER MAJESTY THE QUEEN (PLAINTIFF)..... } RESPONDENT.

1899
*May 17, 18.
Oct. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Suretyship—Postmaster's bond—Penal clause—Lex loci contractûs —Negligence—Laches of the Crown officials—Release of sureties—Arts. 1053, 1054, 1131, 1135, 1927, 1929–1965 *C. C.*

In an action by the Crown on the information of the Attorney General for Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the security to be given by the officers of Canada" (31 Vict. ch. 37 ; 35 Vict. ch. 19) and "The Post Office Act" (38 Vict. ch. 7 ;)

Held, Sir Henry Strong C.J. dissenting, that the right of action under the bond was governed by the law of the Province of Quebec.

Held, further, that such a bond was not an obligation with a penal clause within the application of articles 1131 and 1135 of the Civil Code of Lower Canada.

Held, also, that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute.

APPEAL from the judgment of the Exchequer Court of Canada (1) in favour of the Crown in an action on the information of the Attorney General for Canada upon a bond executed by the defendants as security for the due performance of his duties by the postmaster of St. John's, in the Province of Quebec.

A statement of the facts and questions at issue in the case appears in the judgment of His Lordship the Chief Justice.

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

(6) Ex. C. R. 236.

1899

BLACK v. THE QUEEN.

Hogg Q.C. and *Madore* for the appellant. The bond discloses no primary obligation but is for a penal sum only; it is in fact a wagering contract; see Arts. 1131 and 1927 C. C. The bond insures due and faithful performance of the postmaster's duties and in default for even the slightest sum there is liability to pay at least $1,600, or perhaps $3,200, if each surety is liable separately for the penal sum of $1,600 stipulated; see Art. 1933 C. C. The bond is to be construed according to the laws of the Province of Quebec which are binding on the Crown; *The Exchange Bank of Canada* v. *The Queen* (1); see also Arts. 1994 (10), 2032 and 2086 C. C. There is no exception in favour of the Crown under Arts. 1053 and 1054 C. C., and the Crown is liable for torts; *Attorney General of The Straits Settlements* v. *Wemyss* (2). This case is ruled by Arts. 1929-1965 C. C. relating to "Suretyship," and the Crown is bound by the acts of its officers and servants; *Kenney* v. *The Queen* (3). The Crown officers had been for a long time aware of misconduct of the postmaster and shortage in his accounts, but his offences were condoned and he was not discharged from his office. No notice of these circumstances was given to appellants and consequently they were relieved of further liability as sureties; *Phillips* v. *Foxall* (4). The guarantee was founded on the trustworthiness of the servant so far as that was known to both parties. So soon as his dishonesty was discovered the whole foundation of the contract as regards the sureties failed and the Crown should have then dismissed him. By continuing him in office, without the knowledge or assent of the surety, the Crown took the risk of all losses arising from any future dishonesty; see *Sanderson* v.

(1) 11 App. Cas. 157.
(2) 13 App. Cas. 192.
(3) 1 Ex. C. R. 68.
(4) L. R. 7 Q. B. 666.

1899

BLACK v. THE QUEEN.

Aston (1); *Enright* v. *Falvey* (2). This continuance in office after the offences were discovered was equivalent to a re-engagement after each offence so far as the sureties were concerned, and they should not be held liable for defalcations which occurred after each such default where they were left in ignorance of the defalcations. The rule that the Crown cannot be bound by laches or negligence of its officers is not applicable in the present case inasmuch as the rights of the parties are governed by the contract and its implied terms The Crown must be affected by the breach of contract when the breach is caused by the negligent acts of the Crown's servants.

The appellants were discharged by the acts of the Crown which prevented them obtaining subrogation in rights and privileges against the principal or his estate; see Arts. 1956 and 1959 C. C. After the death of the post master the sureties were notified that there were no defalcations, excepting for $40 which was more than covered by a balance of salary, consequently the sureties permitted the widow to obtain the life insurance and balance of salary, amounting in all to $1,480.37, before the investigation which led to the discovery of defalcations amounting to $4,288, too late to allow the sureties the benefit of the insurance money and balance of salary, or to be subrogated in the rights and privileges of the Crown.

The defalcations were in respect of the Savings Bank Branch, while the bond relates only to the duties of the postmaster, as such and not to his acts respecting the Savings Branch; therefore as the breaches were with respect only to the Savings Bank Branch the action does not lie on the bond, which moreover is not made in accordance with the Acts under which it purports to be given, and is con-

(1) L. R. 8 Ex. 73.
(2) L. R. Ir. 4 C. L. 397.

1899

BLACK v. THE QUEEN.

trary to the laws of Quebec respecting suretyship; Arts. 1131, 1132 and 1929 C. C. We also refer to *Société d'Agriculture du Comté de Verchères* v. *Robert* (1); *Attorney General* v. *Black* (2); and *Railton* v. *Mathews* (3).

Fitzpatrick Q.C. (Solicitor-General for Canada), and *Newcombe Q.C.* (Deputy-Minister of Justice) for the Crown. The post-office authorities notified the sureties that the defaults had occurred when they were first discovered, and as they took no steps to terminate their obligation they continued bound; *Shepherd* v. *Beecher* (4). See also *The Queen* v. *Finlayson* (5). We rely also on the authorities cited in the judgment appealed from (6).

The decision in *Phillips* v. *Foxall* (7) has no application to the Crown, which cannot be held liable for laches or negligence of subordinate officials; see *The Queen* v. *Fay* (8); *Jones* v. *United States* (9); *Frownfelter* v. *State of Maryland* (10) at page 85; DeColyar on Guarantee p. 446.

In this case we have to consider not only the *lex loci contractûs* but the *lex loci solutionis* as well; under this light the contract in question is not suretyship as governed by the Civil Code, and there can be no application of the principles decided in *The Exchange Bank* v. *The Queen* (11). Here there is absolute impossibility of the performance of the principal obligation by the sureties; they are merely the *portes forts* for their principal's honesty and not sureties under the Code; 16 Troplong p. 394 "Cautionnent," (ed. Delormier). They are liable for damages only.

(1) 2 Legal News 51.
(2) Stu. K. B. 324.
(3) 10 C. & F. 934.
(4) 2 P. Wm. 288.
(5) 6 Ex. C. R. 202.
(6) 6 Ex. C. R. 236.
(7) L. R. 7 Q. B. 666.
(8) L. R. Ir. 4 C. L. 606.
(9) 18 Wall. 662.
(10) 66 Md. 80.
(11) 11 App. Cas. 157.

They cannot first require discussion of the estate of the principal, but are only entitled to their recourse over after making settlement.

The form of this bond is not known to Quebec law, but it is sufficient under the statutes and it was by these statutes that the parties intended themselves to be bound; see Lafleur on Conflict of Laws, p. 149; *Hamlyn* v. *Talisker Distillery* (1); and *Colonial Bank* v. *Cady & Williams* (2).

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court on an information filed by the Attorney General of the Dominion to enforce a bond executed by Henderson Black, one of the appellants, and by John Black, deceased, (who on this record is represented by his beneficiary heirs, the appellants' Henderson Black and Mary Black), as sureties for the due accounting by one James Macpherson, formerly postmaster at St. John's, in the Province of Quebec, (amongst other things), for all moneys and property which might come into his hands by virtue of his office of postmaster. This bond was a several bond, Macpherson was one of the obligors and he and each of the sureties were severally bound in a penal sum of $1,600. At the time of the appointment of Macpherson to the office in question it was part of the duty of the postmaster to receive moneys on behalf of the Crown for deposit with the Government, in the Post-Office Savings Bank, and such continued to be his duty up to the time of his death which occurred in December, 1896, whilst he was still in office. Some time after the death of Macpherson it was discovered that he was a defaulter in all to the amount of $4,288 for moneys which he had received as postmaster from Savings Bank Depositors and had omitted to remit to

(1) [1894] A. C. 202. (2) 15 App. Cas. 267.

1899

BLACK v. THE QUEEN.

The Chief Justice.

the proper office at Ottawa as his duty required him to do. It appears indisputably that he had applied these moneys to his own use and had attempted to conceal his embezzlement by false returns to the department and by fraudulent alterations made in the depositors' pass books.

It is objected by the appellants that the bond having been executed in the Province of Quebec, its legal validity depends on the law of that province. Speaking for myself only, and in that respect I believe differing from some of my learned brothers, I do not assent to this proposition. I am willing however for the purposes of the present case to assume it to be so and to deal with the case at present as one to be governed exclusively by the Civil Code of Quebec. Then it is said on behalf of the appellants that Article 1131 applies, which says that:

> A penal clause is a secondary obligation by which a person, to assure the performance of the primary obligation, binds himself to a penalty in case of its inexecution.

It is contended that here there was no primary obligation as Macpherson, the principal for whom the Hendersons were mere sureties, was himself only bound by a like penalty and that there was therefore no such primary obligation as Article 1131 requires as a basis for the penalty contracted for by the sureties. The answer to this is plainly that given by the learned judge of the Exchequer Court, that the primary obligation is that which bound Macpherson, the principal, irrespective of the bond altogether, duly to account for moneys received by him for the behoof of the Crown.

Further the bond is given pursuant to the terms of a Dominion statute which Parliament had undoubted power to enact, and even if the law of Quebec as enunciated in Article 1131 would ordinarily apply

here, the liability of the appellant is dependent on the Act of Parliament and not on the Code.

Next it is said that the laches of the Crown officers in not communicating the default of the postmaster to the sureties, by which they were deprived of the benefit of a statute which provides that sureties for Crown officers may obtain their release by giving notice of their wish to be discharged to the Crown, and allowing a certain time to elapse, is a bar to the Crown. To this it is answered that notice was given to the appellant Henderson Black, for himself and on behalf of his brother John Black, of the principal defalcation which had been discovered before Macpherson's death. The evidence on this point is contradicted by Henderson Black, but the learned judge seems to treat the facts of notice as established. There is, however, a much more conclusive answer, namely, that the Crown is never bound by the laches or default of its officers. In one aspect of this doctrine it is applied in cases of tort where the rule *respondeat superior* is held not to apply to the Crown. There is therefore nothing in this point.

Another defence which is set up is that, according to the case of *Philips* v. *Foxall* (1) the Crown was bound to discharge the postmaster so soon as it had notice of his misconduct in office, and that having retained him they cannot call on the sureties to make good his subsequent defaults. This argument is refuted by the same rule of law that the Crown is not liable for the acts of its subordinate officers, their knowledge is not that of the Crown, and the latter is not responsible for their neglect or wrongful acts. Indeed the public business could not be properly transacted if any other rule were to prevail. The Crown has no alternative but to employ inferior officers by whom the duties of

(1) L. R. 7 Q. B. 666.

1899

BLACK v. THE QUEEN.

The Chief Justice.

the public service must be carried on, and if it were the law that the Crown should be bound by their wrongful acts or by their negligence, the interests of the public would be greatly prejudiced.

There is so little in the point that there was an insurance on Black's life, the amount of which the sureties allowed his widow to receive without objection, which they would not have done if they had been informed of his acts of embezzlement, that it scarcely calls for notice It is already answered by what has been said as to the Crown not being affected by the omissions of the post-office inspectors. Moreover, the sureties had no lien on these insurance monies; at most they could only have come in competition with other creditors, for they had no right to be subrogated to the remedies of the Crown even if the Crown had, in the Province of Quebec, priority over other creditors, a question of prerogative law which the Privy Council has determined against the Crown. The learned judge rightly treated this defence also as unavailable to the appellants.

On the whole there is no error in the judgment of the Exchequer Court, and the appeal must be dismissed with costs.

TASCHEREAU J.—I agree that this appeal must be dismissed. The case is ruled entirely by the law of the Province of Quebec. The bond in question was on the part of Black a contract of suretyship. Arts. 1131 and 1135 of the Civil Code have nothing to do with it. This is not an obligation with a penal clause.

Now by this bond Black undertook to make up whatever deficiencies should be found against McPherson up to the amount of $1,600 and no more. In the case of a deficiency in a smaller amount the sureties would be bound to pay that amount, but nothing more. The

1899

BLACK v. THE QUEEN.

Taschereau J.

Crown cannot be taken to have intended to stipulate that $1,600 would be paid by the sureties if the deficiency were say only $200. And on the other hand, however much higher were the deficiency over $1;600, the surety was not to be liable for any sum over $1,600. On the other points in the case, I fully agree with the remarks of the learned judge of the Exchequer Court (1). It is the law of the Province of Quebec, as of the rest of the British Empire, in the absence of an express statutory enactment to the contrary, that the Crown is not liable for the laches or neglect of its officers, and the contentions of the appellants denying it are totally unfounded.

GWYNNE and KING JJ. concurred in the dismissal of the appeal.

GIROUARD J.—I concur with Mr. Justice Taschereau.

Appeal dismissed with costs.

Solicitors for the appellant: *Madore, Guerin & Merrill.*

Solicitor for the respondent: *E. L. Newcombe.*

(1) 6 Ex. C. R. 230.

1899

*May 31.

*Oct. 3.

THE CORPORATION OF THE TOWNSHIP OF McKILLOP (DEFENDANT) ..... APPELLANT;

AND

THE CORPORATION OF THE TOWNSHIP OF LOGAN AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ditches and Watercourses Act, 1894 *(Ont.)—Owner of land—Declaration of ownership—Award—Defects—Validating award—57 V. c. 55—58 V. c. 54 (Ont.)*

A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under The Ditches and Watercourses Act, 1894, of Ontario. *Township of Osgoode* v. *York* (24 Can. S. C. R. 282) followed.

If the initiating party is not really an owner the filing of a declaration of ownership under the Act will not confer jurisdiction.

Section 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceedings where the party initiating the latter is not an owner.

APPEAL from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Armour C. J. at the trial.

This appeal involved the validity of an award by an engineer under The Ditches and Watercourses Act, 1894, of Ontario, the award being attacked on the ground that Kelly, who initiated the proceedings for construction of a ditch on which the award was made

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

(1) 25 Ont. App. R. 498.

1899

THE TOWNSHIP OF McKILLOP v. THE TOWNSHIP OF LOGAN.

was not an "owner" under the Act, being only a lessee of land though holding an option to purchase the fee. The Court of Appeal upheld the award on the ground that an objection to the declaration of ownership could not be taken after the award was filed.

Shepley Q.C. for the appellant.

Garrow Q.C. and *Thompson* for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be allowed.

It may be assumed in the respondent's favour that this was not a proceeding for the reconsideration of the former award made by McKenna, but an original proceeding under section 33. This was the opinion of a majority of the learned judges in the Court of Appeal, and I am willing to accept their view as the correct one, though without any intention of pronouncing decisively on the point.

That Kelly was not an owner within the meaning of that word as used in the Act of 1894, is, I think, established by the authority of *Osgoode* v. *York* (1) in this court. The Act of 1894 contains an interpretation clause which the former Act under which *Osgoode* v. *York* (1) was decided did not contain, but it does not define the meaning of the word "owner" standing alone, and we must therefore attribute to that word the same meaning which was given to it in the previous decision referred to. This interpretation clause however declares that the word "owner" shall mean and include not only an "owner" but any person entitled to sell and convey the land. This expression "the land" clearly would not apply to a mere chattel interest; it can only mean an absolute estate, the fee simple, and was doubtless intended to apply

(1) 24 Can. S. C. R. 282.

1899

THE TOWNSHIP OF MCKILLOP v. THE TOWNSHIP OF LOGAN.

The Chief Justice.

to persons having not an estate but a mere power to convey the whole interest, the fee simple. Then Kelly was neither an owner nor a person having such a power; he was a mere lessee for years having, it is true, an option to purchase the fee, which option, however, he had never elected to exercise, and under which he could only obtain a title upon the condition that he duly performed the covenants of the lease and paid his purchase money.

I have therefore no doubt that Chief Justice Burton was right in holding that Kelly was not an owner, and therefore not a person entitled to put the machinery of the Act in operation. The learned Chief Justice points out a test which may be applied to ascertain if Kelly was an "owner" within the Act; he asks could not the Canada Company, Kelly's lessors, have initiated proceedings such as these, as owners? Beyond all doubt they could, having the fee. Then as there cannot be two owners in severalty of the same land is not this conclusive to show that Kelly was not one? I think this is unanswerable.

I cannot agree that the mere filing of the declaration, whether true or not, was sufficient to attach the jurisdiction conferred by the Act. There are good reasons for saying that no one who has not a substantial interest in the land should be able to take advantage of the provisions of the Act imposing as it does a burden on neighbouring proprietors. If the mere filing of the declaration was a sufficient answer to the objection that Kelly was not an owner, the declaration would be a mere senseless formality. What was intended was that no person other than one having the interest required by the Act should be able to put the proceedings in force. This appears from the Act itself. The provision added by section 1 of the amending Act (58 Vict. ch. 54), that in case of omission to file a decla-

ration of ownership the judge may permit one to be filed at any stage of the proceedings "in case of ownership" (by which is meant if the party actually is the owner), is alone sufficient to show that in order that the Act should apply the fact of ownership is required. The case of *Osgoode* v. *York* (1) is therefore a conclusive authority in favour of the appellant unless section 24 of 57 Vict. ch. 55 applies. That clause is as follows:

> Every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the judge, and after the determination of appeals, if any, by him where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act.

This, in my opinion, is entirely insufficient to cure an objection such as that which has been taken, not to the form or substance of the award but to the acquisition by the engineer of jurisdiction to make an award. The language is too plain to need any interpretation. The proceedings other than the award which are covered by this section are not the proceedings to be taken anterior to it for the purpose of putting in operation the machinery of the Act, but those "relating to the works to be done thereunder." It is, I think, manifest, that this is not conclusive on the appellants.

Mr. Justice Moss has held that the appellants were bound by acquiescence or equitable estoppel. As to this I am of opinion that such a defence is not applicable in statutory proceedings of this kind. Moreover it is not shown that the parties acquiesced with their eyes open after having acquired knowledge of the defect in the initiatory proceedings, an element always essential to the principle of equitable estoppel. But there is not the slightest pretence that as regards

(1) 24 Can. S. C. R. 282.

1899

THE TOWNSHIP OF McKILLOP v. THE TOWNSHIP OF LOGAN.

The Chief Justice.

the defendant municipality, the present appellant, there was in fact anything like acquiescence even if the doctrine could be applied in such a case as the present. The result is that we are bound by the decision in *Osgoode* v. *York* (1) to hold that all the proceedings were void, and consequently that the appellants have come under no such liability as that sought to be enforced against them.

The appeal must be allowed with costs, and the judgment of Chief Justice Armour restored; the appellants must also have their costs in the Court of Appeal.

TASCHEREAU J. concurred.

GWYNNE J.—This is an action in which the Corporation of the Township of Logan as plaintiffs seek to recover from the defendants a sum of money claimed to be due to the plaintiffs as a statutory debt in virtue of the provisions of the Ontario Statute 57 Vict. ch. 55, intituled "An Act respecting Ditches and Watercourses," passed in substitution for a previously existing statute of like title as amended by 51 Vict., ch. 35, and 52 Vict. ch. 49, and 53 Vict. ch. 68, which several statutes were repealed by 57 Vict. ch. 55. In an action of this nature it is, I think, the undoubted right of every person upon whom such a statutory debt is sought to be imposed, to insist that the plaintiff should establish by incontrovertible evidence that the provisions prescribed as necessary to the creation of the debt claimed have been complied with in the minutest particulars, and accordingly the only defence which is offered to this action is that the plaintiffs have failed to establish that such provisions of the statute have been complied with. It appears that prior to the passing of the Act 57 Vict., and sometime in the year 1893, a ditch or watercourse was at the

(1) 24 Can. S. C. R. 282.

instance of one Timothy Kelly commenced to be constructed from lot no. 35, in the 5th concession of the Township of Logan, across the town line between the Townships of McKillop and Logan, and across lots nos. 1, 2, 3, 4 and 5, in the 5th and 6th concessions of the Township of McKillop, under the supervision and direction of one McKenna, a P. L. S., who was then engineer of the said Township of Logan. Sometime prior to the 28th day of August, 1894, but when in particular does not appear, McKenna ceased to fill that office. Upon that day the Corporation of the Township of Logan passed a by-law whereby one John Roger, P.L.S., was appointed "engineer of the said township under the provisions of the Ditches and Watercourses Act." The ditch so commenced to be constructed was proceeded with in pursuance of an award assumed to have been made by McKenna, as engineer of the Township of Logan, under the provisions of the Ditches and Watercourses Act then in existence, but the award was not produced. When the ditch so constructed was completed or what were its dimensions as designed and as constructed does not appear; all that we know upon this subject is that Mr. Roger testifies that he first saw the ditch in July, 1894, and he could not say whether it was then completed or not for that there was no bench mark to go by, but he says that in October of that year after he was appointed engineer of the township he considered that if it had been completed it must have fallen in and for that reason he, of his own motion, caused it to be cleaned out, and when such cleaning out work was done he says that the ditch was put into complete order. The lots nos. 2 and 3 and the east half of lot no. 4, in the 5th concession of McKillop across which the McKenna ditch was constructed was the property of one Timothy T. Coleman who departed this life on

1899

THE TOWNSHIP OF MCKILLOP v. THE TOWNSHIP OF LOGAN.

Gwynne J.

the 29th July, 1893, having first duly made and published his last will in writing by which he devised all his property subject to the payment of his debts unto his wife and his sons T. F. Coleman and E. C. Coleman (whom he also made executrix and executors of his will) in trust to hold the same upon certain trusts in his will stated. The length of the McKenna ditch across lots 2 and 3 and the east half of lot 4, in the 5th concession of McKillop was $201\frac{7}{10}$ rods, and just one-third of the whole length of the ditch, and the cost of its construction across these lots to the Coleman estate apart from the cleaning out work done in October, 1894, under the order of Mr. Roger, was upwards of $230, and the cost of such cleaning out work $40, making in the whole upwards of $270. Now the statute in sections from 7 to 15, both inclusive, prescribes the manner in which alone the powers conferred by the Act for the "construction" of a ditch (which the interpretation clause defines to be "the original opening or making of a ditch by artificial means") shall be brought into operation and who are the persons competent to invoke such provisions, and from these, it plainly appears that, with the exception of municipalities, it is only an *owner* of land who can invoke and bring into action those powers which when exercised under the provisions of the Act have the effect of imposing a burthen upon other lands and the present and future owners of such other lands. Sections 7 and 8 are very precise upon this point, as indeed also are sections 13, 14 and 16. Then sections 16 to 20, inclusive, prescribe the proceedings to be taken by the engineer (when his services are duly called into action by compliance with the previous provisions of the Act in that behalf) for taking into consideration the subject matter of the requisition by which his services are invoked, and for making an

award thereon and for filing the same and for the service thereof upon the parties affected thereby.

Sections 36 enacts that

Any owner, party to the award whose lands are affected by a ditch whether constructed under this Act or any other Act respecting ditches and watercourses may at any time after the expiration of two years from the completion of the construction thereof take proceedings for the reconsideration of the agreement or award under which it was constructed, and in every such case he shall take the same proceedings and in the same form and manner as are hereinbefore provided in the case of the "construction of a ditch."

1899

THE TOWNSHIP OF McKILLOP v. THE TOWNSHIP OF LOGAN.

Gwynne J.

Now, Timothy Kelly, who was a party to the McKenna award and the one at whose instance the proceedings in which it was made were taken, and because as he says, of the McKenna ditch seeming to him not to work satisfactorily in so far as the north half of lot 35 in the 5th concession of Logan was concerned, did upon the 11th of June, 1895, make and file a declaration of ownership wherein he declared that he was the owner in fee simple of the north half of the said lot, and upon the same 11th of June he wrote several notices in the form produced and filed as exhibit three, which notices in the view which I take may be admitted to have been respectively duly addressed to and received by the several persons who were owners or occupants of the several lots mentioned in the McKenna award and across or upon which the McKenna ditch was constructed. These notices so addressed severally commenced as follows:

Sir,—I am, within the meaning of "the Ditches and Watercourses Act, 1894," the owner of the north half of lot no. 35, in the 5th concession of the Township of Logan, and as such I require to reconsider an award drain made under the provisions of the said Act for the draining of my said land.

This requisition was transmitted by the clerk of the Township of Logan to and was received, by Mr. Roger, the engineer of that township, and it consti-

1899

THE TOWNSHIP OF MCKILLOP v. THE TOWNSHIP OF LOGAN.

Gwynne J.

tuted his sole authority, if any he had, to act thereunder, and notwithstanding that this requisition called merely for a reconsideration of the McKenna award, the engineer proceeded, as appears upon the face of his award, as if he was proceeding under the Act for the original construction of a ditch. True it is that the section 36 requires the owner of land who takes proceedings for the reconsideration of an award under which a ditch has been previously constructed to take the same proceedings, and in the same manner and form as prescribed in the Act for the original construction of a ditch, but it by no means says that upon a requisition for reconsideration of an award under which a ditch has been constructed the engineer may make an award as if he was acting under a requisition calling for the "construction" of a ditch where as yet there was none constructed. Now the engineer by his award assumed to direct that Timothy Kelly, the person making the requisition for reconsideration of the previous (McKenna) award under which alone the engineer was acting, "should make, complete and maintain" a ditch upon the north half of lot 35, in the 5th concession of Logan, between certain specified points and should furnish therefor 250 feet of 5 inch tile, the cost of all which the engineer estimated at $10; this work either wholly or in part was within the limits of the McKenna ditch. Then where the McKenna ditch crossed the town line between the townships of Logan and McKillop, from the north half of lot 35 in the 5th concession of Logan to lot no. 1 in the 5th concession of McKillop, the award assumed to direct that the corporations of said townships jointly should "make, complete and maintain" a ditch across the said town line at a cost estimated by the engineer at $8. The award in like manner assumed to direct that one Thomas Levy as

1899

THE TOWNSHIP OF MCKILLOP v. THE TOWNSHIP OF LOGAN.

Gwynne J.

owner of the north half of lot no. 1 in the 5th concession of McKillop should make, complete and maintain a ditch within certain specified points upon that lot at a cost estimated by the engineer at $12; all this work was also within the limits of the McKenna ditch. Then as to lots 2 and 3, and the east half of lot 4, in the 5th concession of McKillop, the award assumed to direct "Coleman Brothers" as owners of these lots to make, complete and maintain a ditch across them within certain specified points, also within the limits of the McKenna ditch, at a cost estimated by the engineer at $30. In like manner across the west of lot no. 4 in the said 5th concession of McKillop, the award assumed to direct one Michael Walsh as owner of such west lot to make, complete and maintain a ditch at a cost estimated by the engineer at $2; and so in like manner the award assumed to direct one Patrick Walsh as owner of lot 5 in the 5th concession of McKillop to make, complete and maintain a ditch on that lot within certain specified limits at a cost estimated by the engineer at $5. The McKenna ditch at this point entered the 6th concession of McKillop on lot no. 1, and continued across that lot and lots 2, 3, 4 and 5, in said 6th concession, and the award in like language as above, assumed to direct the several persons named therein as owners of said respective lots to make, complete and maintain a ditch across the said several lots within specified points therein respectively, at a cost estimated by the engineer as follows: On lot no. 1, at $1; on lot no. 2, at $2; on lot no. 3, at $3; on lot no. 4, at $1.50; and on lot no. 5, at $12. The whole of this work so directed to be done within the township of McKillop was directed to be done within the limits of and upon the McKenna ditch, and the total cost was estimated by the engineer at $89, including the work

1899

THE TOWNSHIP OF MCKILLOP v. THE TOWNSHIP OF LOGAN.

Gwynne J.

directed to be done by Kelly, on lot 35 in the 5th concession of Logan, at the estimated cost of $10. It may be that what the engineer has by his award ordered to be done might have been directed to be done under an award expressed to be made under a requisition for reconsideration of a previous award, and in such case the award might have been amended under the 22nd section of the Act, but the objection relied on upon this point is not that the work ordered to be done by the engineer's award was not of a character which could have been ordered by an award made upon a requisition for reconsideration of a previous award, but that upon a requisition for reconsideration of a previous award no valid award could be made nor could any proceedings be taken for reconsideration of a previous award until after the expiration of two years from the completion of the ditch constructed under the previous award. That the parties in the Township of McKillop named in this award took no steps to comply with the directions in the award appears by the evidence of Kelly and by a letter addressed by him and sent to the engineer, Roger, in October, 1895, which is as follows:

LOGAN, October 10th.

Lot 35, in 5th concession.

SIR,—I hereby give you notice that the parties on the west end of the drain leading from me have done nothing at it yet, and as the time is up I want you to attend to it at once.

Yours truly,
TIMOTHY KELLY.

When Mr. Roger received this notice he had knowledge that the Coleman estate repudiated the validity of the award, and he had received one or more letters from that estate upon that subject, but such letters and all notices and papers which he ever had relating to the proceedings in the matter he says he destroyed

when the time for appealing against his award had expired, with the exception of the requisition under which he acted. Upon receiving from Kelly the above notice of the 10th of October, he says that he went up to the ditch upon the lots 2 and 3, and east half of 4, in the 5th concession of McKillop, and found that no work had been commenced there, nor upon lot no. 1 in the said 5th concession, which was the only lot lying between the Coleman Trust estate and lot 35 in Logan, and he says he made no inspection to ascertain whether anything had been done below the east half of lot no. 4 in McKillop; he proceeded, he says, against the Coleman estate alone, and professing to act under section 28 of the statute he let to one Gaffney, at the sum of $360.38, the work on lots 2 and 3 and the east half of 4 in McKillop, which in his award he had estimated at $30, and subsequently he gave to Gaffney a certificate that he had completed the work so let to him and was entitled to receive from the Township of Logan the said sum of $360.38, together with $18 for engineer's fees, which sum the said township in virtue of that certificate paid to Gaffney, and the township now brings this action to recover from the Township of McKillop the said sums amounting to $378.38 as a statutory debt due to the township of Logan under sections 29 and 30 of the Act. The Township of McKillop authorities not being able to understand how they could collect $378.38 as an assessment upon lands, the whole of which was rented at $200 per annum, and being notified by the Coleman estate trustees that they regarded the award as wholly invalid, and that they would resist any attempt to levy such sum from the estate, took the advice of their solicitor, who advised them not to pay unless compelled by judgment in an action. Accordingly the present action has been brought in the

1899

THE TOWNSHIP OF McKILLOP v. THE TOWNSHIP OF LOGAN.

Gwynne J.

course of which it was urged, as part of the contention of the Coleman trust estate, that the work ordered by the Roger award was absolutely of no benefit whatever to their lands in McKillop, and that in point of fact the sole object and intent of that work was for the benefit of lot 35, in the 5th concession of Logan, and it may be of other lands in that township. That contention would, it may be admitted, have been a good objection to the award upon an appeal under the 22nd section of the statute, and the Coleman trust estate could have obtained adequate and perfect relief in so far as that objection is concerned under the provisions of that section, but no such contention can be entertained as a defence in the present action.

Then again, it was urged as another part of the Coleman trust estate contention that the letting by the engineer at the sum of $360.38, work upon the lots 2 and 3, and the east half of 4, in the 5th concession of McKillop, estimated by him at $30, was an arbitrary, collusive and illegal proceeding, but if any actionable wrong was committed by the engineer by his letting the work as he did, upon which I express no opinion, that was a wrong against the Coleman trust estate and the proper subject of an action at the suit of such estate, but cannot I think be entertained as a defence to the present action.

The action was tried by the learned Chief Justice of the Queen's Bench Division of the High Court of Justice for Ontario, who upon the authority of *Osgoode* v. *York* (1) in this court, held that the whole of the proceedings taken by Timothy Kelly were illegal and void for that he was not the owner of the north half of lot 35, in the 5th concession of Logan, and he was therefore incompetent to initiate proceedings under the statute, and that for such his

(1) 24 Can. S. C. R. 282.

incompetency all the proceedings taken and the award made therein were wholly null and void. That he was not the owner of that lot conclusively appeared by his own title deed produced from his possession for the purpose of establishing the truth of the averment necessarily inserted in the plaintiff's statement of claim that he, *as owner* of the said lot, had instituted the proceedings in which the award was made. This title deed was merely an indenture of lease dated the 1st of February, 1895, for a term of seven years at a certain rent thereby reserved, and executed by the Canada Company, the owners in fee of the said lot by the said indenture of lease demised. This indenture of lease was subject to a proviso for re-entry by the lessors upon breach by the lessee of any of his covenants therein contained which covenants are of such a special character; so unequivocally affirmatory of the fact that the lessors are the owners of the lot so demised, that it is difficult to conceive how Kelly could have supposed himself to be (as in the declaration of ownership filed by him is alleged) owner of the lot. If the statute required a declaration of ownership to be filed by way of some moral assurance and security to the parties to be affected by the proceedings that they should not be troubled by an incompetent person assuming to initiate proceedings under the Act this case shews how inadequate such contemplated security is. The Court of Appeal for Ontario reversed the judgment of the learned trial judge for the reasons, first, that in the opinion of some of the learned judges in appeal clause seven of the Act of 1894, which was first enacted after the decision in *Osgoode* v. *York* (1), dispensed with the necessity of the party initiating proceedings being *an owner* or that the filing of the declaration of ownership required by that section was to be taken as conclusive evidence of the party filing

(1) 24 Can. S. C. R. 282.

1899

THE TOWNSHIP OF McKILLOP v. THE TOWNSHIP OF LOGAN.

Gwynne J.

such declaration being the *owner* of the land as therein alleged; and secondly, that after the expiration of time limited by the Act for appealing against an award all objections are removed by section 24 of the Act. That the filing of a declaration of ownership cannot be held to be substituted for the fact of ownership by a party initiating proceedings under the Act or accepted as conclusive evidence of ownership by such party not only appears from sections 7 to 15 inclusive, in the former of which it is naturally enacted that it is an *owner* alone who can before instituting proceedings file the declaration of ownership therein required, but ch. 54 of 58 Vict. passed for amending sec. 7 of 57 Vict. ch. 55, is conclusive upon the point for this Act enacts as a proviso to the sec. 7, that in case of omission by *an owner through inadvertence or mistake* to file his declaration of ownership before instituting his proceedings under the Act the judge may permit the certificate to be filed at any stage of the proceedings (instituted by the owner) provided that the ownership in fact existed at the time of the commencement of the proceedings. There can therefore, I think, be no doubt that the Act is peremptory that no one but an owner of land is competent to initiate proceedings under the Act, and that no award made in proceedings instituted by a person who was not an owner of land is of any validity whatever. For this reason and for the reason also that the plaintiffs have failed to shew that two years had elapsed subsequently to the completion of the work ordered by the McKenna award before the institution by Kelly of his proceedings for reconsideration of that award, but that the contrary sufficiently appears in the evidence, I am of opinion that the appeal must be allowed with costs and the judgment of Chief Justice Armour dismissing the plaintiff's action, restored.

1899

THE TOWNSHIP OF McKILLOP v. THE TOWNSHIP OF LOGAN.

Gwynne J.

The 24th section of the Act has application only to awards and proceedings taken "under the provisions of the Act" and has no application therefore to awards made in proceedings taken by a person not competent under the provisions of the Act to take such proceedings, or to proceedings taken for a purpose at a time when for such purpose the proceedings are not warranted by the provisions of the Act.

KING and GIROUARD JJ. concurred.

Appeal allowed with costs.

Solicitor for the appellant: *F. Holmested.*

Solicitors for the respondents: *Dent & Thompson.*

1899

*June 1.

*Oct. 3.

THOMAS A. ROWAN (PLAINTIFF).....APPELLANT.

AND

THE TORONTO RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Trial of action—Contributory negligence—Findings of jury—New trial—Evidence.

On the trial of an action against a Street Railway Company for damages in consequence of injuries received through the negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question: "Could Rowan by the exercise of reasonable care and diligence have avoided the accident?" the answer was: "We believe that it could have been possible."

Held, reversing the judgment of the Court of Appeal, that this answer did not amount to a finding of negligence on the part of the plaintiff as a proximate cause of the accident which would disentitle him to a verdict.

Held, further, that as the other findings established negligence in the defendant as the cause of the accident which amounted to a denial of contributory negligence; as there was no evidence of negligence on plaintiff's part in the record; and as the court had before it all the materials for finally determining the questions in dispute, a new trial was not necessary.

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

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of Mr. Justice MacMahon at the trial.

The question for decision and the circumstances under which it arose are sufficiently stated in the above head-note, and fully set out in the judgments on this appeal.

Judgment was given for the defendant, and the action dismissed at the trial on the ground that the jury had found contributory negligence by the plaintiff. The Court of Appeal unanimously affirmed this judgment.

Aylesworth Q.C. and *Ross* for the appellant.

Osler Q.C. for the respondent.

THE CHIEF JUSTICE.—The first question we are called upon to decide in determining this appeal is as to whether the judgment which the learned judge ordered to be entered for the defendant was warranted by the findings of the jury.

The questions left to the jury were the following:

1st. Was the railway company guilty of any negligence in running the motor car?

2nd. If you find that the company was negligent, in what did the negligence consist?

3rd. Was such negligence the cause of the accident?

4th. At what rate of speed was the car running at the time of the accident?

5th. Could Rowan by the exercise of reasonable care and diligence have avoided the accident?

To these questions the jury answered as follows:

To the first they say, yes. To the second they answer, "running too fast." To the third, simply, yes. To the fourth they say sixteen miles an hour. And to the fifth and last question their answer is, "we believe that it could have been possible."

The four first findings by themselves would clearly have required that the judgment should have been entered for the plaintiff (the appellant), but the learned judge, treating the answer to the fifth question as a finding of contributory negligence on the part of the appellant, entered the judgment against him. This construction of the answer to the fifth question seems also to be that adopted by the Court of Appeal, who, however, have not placed the reasons for their judgment on record.

There can be no doubt but that the first four findings are conclusive against the respondents on the question of negligence. The jury find that this neglect of duty on the part of the respondents consists in running their car at an undue rate of speed and that this was the cause of the accident.

The question put to the jury on the subject of contributory negligence was not so framed as to elicit from them any statement of what, in the event of their answer being an affirmative one, the contributory negligence consisted. Then are we to construe the answer to the fifth question as a finding of contributory negligence, that is negligence on the part of the appellant which was a proximate cause of the accident; in other words, negligence but for which the car would not have come in collision with him? I am of opinion that we ought not to follow the courts below in placing such a construction upon the language of the jury. The question called for a direct categorical answer, yes, or no, and had the jury seen their way to an absolute conclusion either one way or the other, the answer would no doubt have been in that form. In order to disentitle the appellant to recover, it must be found distinctly that the accident was attributable to his failure in the duty imposed upon him of taking proper care to avoid the accident. Can it be said that

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

The Chief Justice.

the answer of the jury amounts to this? In the appellant's factum there is contained a very clear and able verbal criticism of this answer to the fifth question, and if any one can have doubts as to the meaning of the jury, the appellant's argument printed in his factum will, I think, be found convincing. It is quite consistent with the wording of this answer that it might have been most improbable that the accident could have been avoided by such reasonable care as the appellant was bound to take. I find in a judgment which I shall have to cite for another purpose upon a point of law, an instance in which the word "possible" is shown to be quite compatible with the expression "improbable" or "extremely unlikely." In this case (which happens to be, like this, an action for negligence, though that is not material, as I do not cite it as authority but merely as showing the meaning of the words) Chief Baron Palles speaking of the accident in the case before him says:

> That it can happen with due care is, according to my experience, no doubt possible, but extremely improbable (1).

In the same way here it may also be said that the avoidance of the accident by due care on the part of the appellant might have been possible but was extremely improbable. We cannot therefore accept the answer as one imputing to the appellant want of due care as a proximate cause of the injury which can alone constitute negligence sufficient to deprive him of his remedy against the respondents for their negligence of which the jury have in no ambiguous terms found them guilty. I regard this verdict as amounting to no more than if the jury had said, "perhaps it might have been possible." Then what must be the effect of this conclusion. The findings of the jury in

(1) *Flannery* v. *Waterford & Limerick Railway Co.* Ir.R. 11 C.L. 30.

the answers to the first four questions establish a conclusive case of actionable negligence amply sufficient to entitle the appellant to judgment. The answer to the third question distinctly finds that this negligence was the cause of the accident. This last answer, meaning as we must take it to mean "sole cause of the accident," would of course be inconsistent with any findings of contributory negligence since that must consist in doing or not doing something which was *the* proximate cause or *a* proximate cause of the collision. Therefore must we not regard the findings taken together as negativing contributory negligence? I am of opinion that that must be the result. Combining the answer to the third and fifth questions, I read them as if the jury had said the defendant's negligence was the cause, though "perhaps" the accident might have been avoided if the plaintiff had taken more care. Upon such an answer in terms there could be no doubt but that the judgment should have been entered for the appellant.

It may, however, be said on behalf of the respondents that there was some evidence of contributory negligence and that question ought therefore to have been passed upon by the jury, and as it has not been there should be at least a new trial. The respondents did not plead contributory negligence as they availed themselves of their right to plead "not guilty by statute" under which they were entitled to raise this defence which they certainly insisted upon at the trial. Therefore when we strike out, as it were, the answer to the fifth question there seems at first sight some reason for saying that there is no finding of the jury on a most material defence set up at the trial, one which the learned judge considered the evidence warranted him in leaving to the jury, and that, therefore, there ought to be a new trial as a necessary conse-

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

The Chief Justice.

quence of the course adopted in treating the answer of the jury as immaterial. No doubt the court may under Con. Rule (Ont.) 615 on a motion to enter judgment, if it thinks the justice of the case requires it as a consequence of their decision that a wrong judgment was entered, grant a new trial although neither party has in the first instance asked for it, and such new trial may be either of the whole case or of some particular issue or question. I have, however, come to the conclusion that this course ought not to be followed here for reasons which I proceed to state. In the first place there has been, as said before, a finding on this question of contributory negligence. The third and fifth answers read together amount to a negation of it. Further the respondents cannot be entitled to a new trial unless they are able to point to some evidence of negligence on the part of the appellant. Then I can find none. The appellant had a perfect right to ride on a bicycle either between the rails on either line, or on the strip between the two lines of rails; this was only that ordinary use of the highway to which the public are entitled of common right, for the railway company is not to be considered as having expropriated so much of the highway as lies between their lines of rails. Then they are bound to make a reasonable use of the privilege they have obtained to run electric cars on their rails laid on the streets and this requires due care as regards other passengers. An undue rate of speed such as they were running at in the present case constitutes negligence and this has been rightly found against them by the jury. Now in what way was the appellant guilty of contributory negligence? Certainly not in riding on the strip between the rails; he had a right so to use the highway. It will be said perhaps that there was evidence that the gong was sounded and that he

ought to have heard it; the answer to this is that the car being run at the rate of sixteen miles an hour which was in itself negligence, the appellant was not bound to look out for it as he was for cars running at the regular and established rate of not more than eight miles, any more than a foot passenger using a common roadway is bound to look out for and avoid vehicles which are being driven along it at racing speed. The sounding of the gong, assuming that evidence to be true, does not therefore relieve the respondents from their liability or make out the appellant's failure to hear it or to be warned by it to be a contributing proximate cause of the accident. Then it will be said that the plaintiff turned the wrong way when he became aware of the proximity of the car. What people ought to do for purposes of self-protection when in a cool and deliberate frame of mind is no standard of what they ought to do when suddenly placed as the appellant was here by the negligence of the defendants in the presence of immediate danger. It does not lie in the mouth of those who by their wrongful conduct placed him in such a dangerous situation to say that he might have avoided the accident if he had kept his presence of mind. I do not refer particularly to the evidence as Mr. Justice Gwynne in the judgment which he has written has done that, and I entirely agree with his observations on it. If it is said these were matters of fact for the consideration of the jury whose duty it is not only to deal with any conflict on the testimony but also to draw inferences from the facts in evidence, the answer is that there is also a preliminary duty for the judge to perform; he must determine whether there is any evidence for the jury. As Lord Blackburn said in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1).

(1) 3 App. Cas. 1155, quoting from *Ryder* v. *Wombwell*, L. R. 4 Ex. 32.

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

The Chief Justice.

There is in every case a preliminary question which is one of law, viz.: whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies; if there is not the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff or direct a verdict for the plaintiff if the onus is on the defendant.

Again in the same case Lord Penzance says:

The proof of the first issue, which is that of the defendant's negligence, is upon the plaintiff, the proof of the second, which is that of contributory negligence, lies upon the defendants. Upon either of these issues it is competent to the judge to say negatively that there is not sufficient evidence to go to the jury.

Then in performing this duty all reasonable inference must be drawn by the judge or court. In the case of *Flannery* v. *The Waterford & Limerick Railway Co.* (1), Palles C.B. having before him a case in which it was sought to apply this rule on a motion to nonsuit on the ground that there was no evidence of negligence, says:

The rule has no application to cases in which a reasonable inference in favour of the plaintiff might be drawn. * * In determining this the judge must avail himself of his knowledge of the ordinary affairs and incidents of life.

There is of course nothing new in these well established principles and I only make the references to authorities for the sake of making my meaning clear. I must then hold that there was in the present case no evidence of contributory negligence for the jury.

But there is still a further ground for allowing this appeal. Supposing that I am wrong in interpreting the findings of the jury as negativing contributory negligence and in holding there was no evidence of it for the jury, and it is therefore said that there ought to be a new trial in order that this question of the plaintiff's negligence may be submitted to another jury, I think that in that view and in the absence

(1) Ir. R. 11 C. L. 30.

of any finding as regards contributory negligence upon which the court can act this would be a proper case for the application of rule 615 (Con. Rules Ont.). By that rule on a motion for judgment or a new trial the court may, if it has all materials before it for finally determining the questions in dispute, give judgment accordingly. Then here the court has before it all the evidence which the parties were able to adduce on this question of fact and they may therefore in the absence of any finding by the jury on the point in question take upon themselves the decision of the question. *Hamilton* v. *Johnson* (1); *Toulmin* v. *Millar* (2). I have therefore no hesitation in saying that having recourse to this rule of practice and dealing with the question of contributory negligence on the evidence as a question of fact just as a jury might do, I should find that there was not sufficient proof of that fact, and that the defence based on it consequently failed.

The appeal must be allowed with costs, the judgment for the respondents vacated and judgment entered for the appellant for $1,500, the damages found by the jury. The appellant must also have his costs in the court below.

TASCHEREAU J. concurred.

GWYNNE J.—The question on this appeal is as to the construction to be put upon the answer of the jury to *one* of several questions submitted to them by the learned trial judge.

The plaintiff in his statement of claim complains of having been run down and severely injured by an electric motor car of the defendants on the night of the 2nd of July, 1896, when he was riding on a

(1) 5 Q. B. D. 263. (2) 12 App. Cas. 746.

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

Gwynne J.

bicycle on Spadina Avenue in the City of Toronto and he charges specifically

that the said accident was occasioned solely by reason of the gross negligence of the defendants and their agents in running their motor car negligently, recklessly and at a dangerous and excessive rate of speed on the said highway at the time of the accident.

To this claim the defendants pleaded the general issue of not guilty per statute. The case came down for trial on the 31st March, 1897, and as presented by the plaintiff was that on the night of the 2nd of July, 1896, he, his wife, and a Mrs. Wright entered on Spadina Avenue coming from the west on a street called Harbord street; that on reaching Spadina Avenue they looked down south on that avenue to a place called Knox College Crescent to see if there was a railway car coming up; that they could see down to the crescent and there was then no car on Spadina Avenue north of the crescent; that thus finding there was no danger to be apprehended they proceeded north at the rate of a little over eight miles an hour on their way to the plaintiff's home close to Bloor street; that while so going north the plaintiff went on the east track, Mrs. Wright to his left on the strip between the up and down tracks called the devil's strip, and the plaintiff's wife to the left of Mrs. Wright; that he, the plaintiff, continued on the east track apprehending no danger until on reaching Sussex street which crosses the avenue at the distance of 531 feet from Harbord street he was suddenly run down by a motor car going north and carried forward by the car for a distance exceeding 200 feet; that the sound of a gong and the flash of a light from the bull's eye on the car was the only notice he had of the car, when on his instantly turning to the right to get off the track and to endeavour to avoid collision he was struck by the car simultaneously with the sound of the

gong and the flash of the light; that in the plaintiff's opinion the car was going fully at the rate of twenty miles an hour. There can be no doubt that the car must have been going at a very excessive rate of speed to have overtaken the plaintiff at the distance of 531 feet from Harbord street if he was travelling even only at six instead of eight miles an hour, and if, as affirmed, there was no car on Spadina Avenue north of Knox College Crescent when he proceeded north from Harbord street, and if, as appearing in evidence the plaintiff was carried over 200 feet from where he was struck while it was proved that a car travelling at the rate of eight or nine miles an hour could be readily stopped within the length of at most two cars or sixty feet. The ladies riding with the plaintiff gave their evidence in support of that of the plaintiff. As to the rate of speed they did not assume to state a rate per hour at which the car was going, but they said that it was travelling at a rate twice as fast or more than the usual rate of speed which they had repeated opportunities of observing and had observed on Spadina Avenue. The plaintiff's evidence was also supported by an independent party who having entered on Spadina Avenue from the east on Classic Avenue, the street next south of Harbord street, also rode up the eastern track of the railway going, as he said, from eight to ten miles an hour and faster than the plaintiff whom he was overtaking and who, when witness reached Morris street, was approaching Sussex street where the collision took place, and the next street north of Morris street. When this witness reached Morris street he went off the track on to the blocked road on the east for the purpose of avoiding being run over by this same car from which he very narrowly escaped. In fine the plaintiff's contention was rested upon the evidence of twelve witnesses

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

Gwynne J.

including himself, and that of the defendants upon the evidence of eighteen witnesses whom they called. The whole of this evidence fills 175 pages of printed matter taken down at the trial which was very protracted having extended over a period exceeding four days during which the jury had the fullest opportunity of estimating the value of the evidence. Having given a short substance of the case as presented by the plaintiff it is meet that I should, for the purpose of this appeal, state what the case of the defendants, as presented at the trial, was. This appears by a reference to a report made to the defendants at the time of the occurrence of the accident by the motorman in charge of the car which struck the plaintiff and by a brief summary of that motorman's evidence at the trial.

The report is as follows:

> Going up Spadina Avenue, July 2nd, 1896, time 10.20 P.M., I saw two ladies and one gentleman on bicycles 500 feet ahead of me. I struck the gong several times. They kept going on at a slow rate of speed north, *on the down track*. When I came almost up to them the gentleman suddenly turned to cross in front of motor. The motor struck him; I just had time to shout and apply the brake. Policeman Young, No. 55, heard me strike the gong, and saw the man try to cross in front of the motor.
>
> (Sgd.) P. O'NEILL,
> *Motorman.*

The policeman here named was called by the plaintiff. O'Neill in his evidence at the trial said that when he came near to Classic Avenue he noticed some people coming out of Harbord street on bicycles; they were separated and strung out on the *west* track, not close together; that the east track upon which his car was travelling, was clear. That shortly afterwards he noticed a man on a wheel wobbling in front of him. Whether or not this man was the one whom he had seen with the ladies on the *west* track he could not

say, but there was a man wobbling in front of him, turning in and out, zigzagging, sometimes on his track, sometimes not; that he rang the gong just in the ordinary way; that he was then pretty well up to Morris street, close to Morris street or somewhere along there; that from that time he kept his eye upon him, just in the ordinary way; that he did not particularly notice them more than other bicyclists going along; then he wobbled off; that shortly afterwards again a man turned in, in front of him; that he could not tell whether this was the man who had got in at Harbord street or not; that the witness struck the gong again, and that the man turned off, clear out off the strip, off the rails altogether, off the east side, off the up track; that then the witness came along so that the three bicycles were under his observation; that he saw the two ladies and one gentleman; that they were wheeling along leisurely, apparently in conversation; that he, witness, was ringing the gong in the usual way; that he had struck the gong different times going along in the usual way; that when he came to Sussex street the two ladies were in front of the gentleman; that they were on the north side, *all three on the west track, or one of the ladies might have been on the block pavement;* that no one was on the devil's strip or the east track; that just as he passed the first or south trolley pole on Sussex Avenue he was looking at them, *and the gentleman then* suddenly turned leisurely across; that witness was ringing his gong before the gentleman came on to his, the east track at all; that before his wheel got on over to the up or east track, that he, witness, had rung the gong and applied the brake, and there was a collision just about the boulevard at the north side. Witness did not say at what rate of speed per mile he was travelling but just said that he was going at

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

Gwynne J.

the usual speed. This was the substance of the defence as relied upon by the defendants at the trial. In short the whole contest at the trial was, whether as contended by the plaintiff the defendant's negligence was the sole cause of the accident, or on the contrary, as insisted upon by the defendants, the rash, negligent and reckless conduct of the plaintiff himself. The plaintiff and his witnesses were subjected to a rigid cross-examination for the purpose of establishing that the testimony of the plaintiff and his witnesses was wholly unreliable, and that of the witnesses for the defence alone reliable, and so that the plaintiff was himself the sole cause of the disaster which befell him and that no negligence whatever was established against the defendants.

The learned trial judge in a charge, of which the defendants have no reason to complain, submitted to the jury the following questions:

1. Was the railway company guilty of any negligence in running the motor car?
2. In what did the negligence, if any, consist?
3. Was such negligence the cause of the accident?
4. At what rate of speed was the car running at the time of the accident?
5. Could Rowan by the exercise of reasonable care and diligence have avoided the accident?
6. If the plaintiff is entitled to recover at what do you assess the damages?

These questions the jury answered as follows:

To the 1st they answered, "yes."

To the 2nd they answered, "running too fast."

To the 3rd they answered, "yes."

To the 4th they answered, "16 miles an hour."

To the 5th they answered, "we believe that it could have been possible."

To the 6th they answered, "$1,500."

It is upon the answer to the 5th question that the principal appeal turns. The courts below have construed that answer as a verdict of the jury that the plaintiff was himself guilty of negligence, which contributed to the disaster, and accordingly the trial judge rendered judgment for the defendants, dismissing the action but without costs. The Court of Appeal at Toronto have affirmed this judgment. Now it is to be observed that there is nothing in the evidence to show that the defendants ever contended that the plaintiff was guilty of contributory negligence. They never rested their defence upon so low a ground. Their contention always was that they were guilty of no negligence whatever, and that the disaster from which the plaintiff suffered was occasioned wholly and solely by what they charge to have been his own rash, reckless, foolish conduct. Contributory negligence was never relied upon nor mentioned by the defendants. If the plaintiff's conduct was such as was said by the witnesses called by the defendants, and upon which they relied, such conduct would have established not what is known as and called contributory negligence of the plaintiff but would have fully established the contention of the defendants that the collision was caused solely by the rash and reckless conduct of the plaintiff himself. Upon this contention they still rely and contend that there was no evidence of negligence upon the part of the defendants to be submitted to the jury, and that the finding that the defendant's car was running too fast was not a finding of negligence, and that there was no evidence to shew, even assuming the car to have been running at sixteen miles an hour, that such speed was dangerous. The only evidence to the effect that the plaintiff had conducted himself as alleged by the defendants, was that given by witnesses who, in the same breath that they described

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

Gwynne J.

the conduct of the plaintiff, testified that the motor car was not running at an excessive rate of speed and that the motor man by every means in his power was endeavouring to avoid the collision which as they said was wholly occasioned by the plaintiff's own rash and reckless conduct. It is in my opinion quite impossible to construe the answer of the jury to the 5th question as a verdict of contributory negligence against the plaintiff. The case must be dealt with as one wherein it is established by the answers of the jury to the first four questions that the accident was caused as charged by the plaintiff by the negligence of the defendants, which negligence consisted in the motor car having been run at a rate of speed which the jury have pronounced to have been excessive. A plaintiff to whom contributory negligence is imputed has as much right to insist that the defendants upon whom the *onus probandi* rests shall specify with as much certainty and prove the act or acts of negligence relied upon, and that the jury should specify what is the act of negligence of the plaintiff, if any they find, which contributed to the disaster, as the defendants have to insist that the plaintiff should specify and prove the act or acts which he relies upon as constituting the negligence of the defendants charged as having caused the disaster; and that the jury should find what negligence of the defendants, if any, was the cause of the accident in the case submitted to them. It may and frequently does happen that the state of alarm in which a person is put upon finding himself exposed to imminent danger to life or limb causes him to take a course which in the exercise of reasonable care and diligence he would not take, and by so doing to increase his risk and in fact bring about the catastrophe which he was endeavouring to avoid; but the taking in such case of a wrong course would

not justify a verdict of contributory negligence. In the present case, however, as already observed, the defendants did not rely upon any act of the plaintiff as constituting contributory negligence, nor did the learned judge in his charge to the jury submit to them any question as to contributory negligence if they should adopt the evidence of the plaintiff and his witnesses as to the cause of the accident having been the excessive speed at which, as charged by the plaintiff, the motor car was being propelled. In such case the evidence did not show any sufficient foundation upon which a verdict of contributory negligence should be supported

The answer of the jury to the 5th question and that question itself must be read in the light of the charge of the learned judge when submitting the question and so read the answer seems to me to have an intelligent meaning very different from a verdict of contributory negligence. The learned judge in his charge to the jury said :

> Now I have explained to you fully the obligation of the company as to sounding the gong so as to give warning to any vehicle or pedestrian or one who was riding as this plaintiff was on a bicycle. If they gave warning in time to enable him to leave the track, *and were not running at an excessive rate of speed at the time*, then if he heard or should have heard the warning given and still remained on the track *you may* reach the conclusion that he was guilty of what is called contributory negligence.

Now the learned judge here in express terms excludes from the question as to contributory negligence, the element or fact of the car having been run at an excessive rate of speed, and for the reason as it appears to me that in case the jury should be of opinion that the accident was caused by the excessive rate of speed at which the car was run they would necessarily be of that opinion by adopting the evidence of the plaintiff, and there appeared nothing in the evidence

1899

ROWAN v. THE TORONTO RAILWAY COMPANY.

Gwynne J.

upon which in such a case a verdict of contributory negligence could be supported.

Further on the learned judge says:

> Of course, gentlemen of the jury, if he (the plaintiff) was on this strip as it is said he was (by the evidence offered by the defendant and relied upon by them) and went in front of the car after warning was given which he should have heard, and could have heard if he had been paying attention to it, if he went off the strip and on to the railway under these circumstances then he has no right to recover from this company.

In this latter clause the case was submitted precisely as the defendants had throughout contended the facts of the case were, and the jury must have so understood the charge, and if they had believed the defendants' witnesses it must, I think, be admitted that the defendants were, as they contended, entitled to a verdict to the effect that the plaintiff's own negligent, rash and reckless conduct was the sole cause of the accident, and that the jury upon the charge of the learned judge would have so found. But the jury's answers to the first four questions are quite in accordance with their rejection of the defendants' evidence and their acceptance and adoption of that of the plaintiff, and having answered those questions as they did they might well have considered they had disposed of the whole case as submitted to them and might have left the fifth question unanswered, but they perhaps thought that courtesy required that they should answer the questions submitted by the judge as best they could which was in the qualified manner that they did. The true meaning of such their answer as it appears to me is that answering the question in the light it was dealt with in the charge of the learned judge, they cannot say with any certainty but they believe that it could have been possible for the plaintiff to have avoided the accident if the conditions sug-

gested by the learned judge in his charge had existed, that is to say

if they gave him warning in time to enable him to leave the track *and were not running at an excessive rate of speed at the time, &c.,*

as put by the learned judge in his charge.

In my opinion the appeal must be allowed with costs and judgment be ordered to be entered in the court below for the plaintiff for fifteen hundred dollars damages and the costs of the action. The evidence is abundantly sufficient to support the express finding of the jury that the accident was occasioned by reason of the excessive rate of speed at which the motor car was propelled as charged by the plaintiff.

KING and GIROUARD JJ. concurred.

Appeal allowed with costs.

Solicitor for the appellant: *James Leith Ross.*

Solicitors for the respondent: *Laidlaw, Kappele & Bicknell.*

1899 NATHAN ALLAN BEACH (PLAINTIFF)..APPELLANT;

*Oct. 12, 13.

AND

THE TOWNSHIP OF STANSTEAD (DEFENDANT)..... } RESPONDENT.

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

Liquor laws—Municipal corporation—Action—Discretion of members of council—Refusal to confirm certificate—Liability of corporation.

In an action against a municipal corporation for damages claimed on account of the council of the municipality having, as alleged, illegally refused to confirm a certificate to enable the plaintiff to obtain a license for the sale of liquors in his hotel;

Held, affirming the judgment appealed from (Q. R. 8 Q. B. 276), that the municipal council had a discretion under the provisions of the "Quebec License Law," R. S. Q. Art. 839, to be exercised in the matter of the confirmation of such certificates, for the exercise of which no action could lie, and, further, that even if the members of the council had acted maliciously in refusing to confirm the certificate there could not on that account be any right of action for damages against the corporation.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (1), reversing with costs the judgment of the Superior Court, District of Saint Francis, maintaining the plaintiff's action.

The plaintiff was proprietor of a hotel at Georgeville, in the Township of Stanstead, where no by-law prohibiting the sale of intoxicating liquors existed, and being desirous of obtaining a license to sell liquors at his bar, made the necessary deposits of money and filed a certificate, as required under the "Quebec

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

(1) Q. R. 8 Q. B. 276.

License Law," with the secretary-treasurer of the municipality. It did not appear that there existed any cause such as set forth in the statute for the refusal of the confirmation of the certificate, but the municipal council, (having received a guarantee from the Quebec Provincial Branch of the Dominion Alliance against damages, etc., which might result from their action in the matter), passed a resolution refusing to confirm the certificate without assigning any cause except that the majority of the members of the council were opposed to the sale of intoxicating liquors under any circumstances whatever. The plaintiff thereupon took an action for mandamus to compel the corporation to confirm the certificate, and by a judgment of the Superior Court, sitting in review, at Montreal (1), it was ordered that a peremptory writ of mandamus should issue enjoining the council to confirm the certificate, which was accordingly done. The plaintiff afterwards brought the present action for damages against the municipal corporation for the loss of business profits, expenses, etc., caused by the wrongful act, as alleged, of the council, as above set forth. The Superior Court of Sherbrooke decided in favour of the plaintiff, but on appeal this judgment was reversed by the judgment of the Court of Queen's Bench from which the present appeal is taken.

H. B. Brown Q.C. for the appellant.

Trenholme Q.C. and *S. P. Leet Q.C.* for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE, (Oral.)—As we are all of opinion that this appeal must be dismissed, we do not call upon the learned counsel for the respondent.

(1) Q. R. 8 S. C. 178.

1899

BEACH v. THE TOWNSHIP OF STANSTEAD.

The Chief Justice.

I am very clear that in deciding this appeal we are not bound by the judgment of the Superior Court in the matter of the mandamus; but, even if we were, there are other grounds, in which we all concur, in holding the action not maintainable.

In order to uphold the judgment of the Superior Court in the present action we should have to determine three points in the appellant's favour: First, that the municipal council could exercise no discretion in the matter of confirming the certificate; secondly, that the council in refusing to confirm acted not in good faith but with the malicious intention of injuring the appellant; and thirdly, that such an action as this is maintainable against the municipal corporation for the alleged acts and conduct of the members of the council. We think the appellant must fail in all these essential points.

The council clearly had a discretion for the exercise of which no action will lie; further, there is no evidence of malice (even if that would have sufficed), and such an action as this would not lie against the municipality, even if the two former essential grounds were established in the appellant's favour.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Brown & Macdonald.*

Solicitor for the respondent: *A. P. Leet.*

LEGGAT *v.* MARSH.

1899

*May 19.

*June 5.

Breach of contract—Evidence—Custom of trade—Local usage—Damages—Practice—Amendment of claim after enquête closed—Arts. 1234, 1235 *C. C.*

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, (appeal side), (1) which reversed the judgment of the Superior Court, District of Montreal, in favour of the plaintiff and dismissed his action with costs.

After hearing counsel on behalf of both parties the court reserved judgment and, on a subsequent day, dismissed the appeal with costs for the reasons given in the court appealed from.

Appeal dismissed with costs.

Atwater Q.C. and *Mackie* for the appellant.

Lafleur and *Buchan* for the respondent.

---

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

(1) Q. R. 8 Q. B. 221.

INDEX.