REPORTS

— OF THE —

SUPREME COURT

— OF —

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JUDGES

OF THE

SUPREME COURT OF CANADA.

DURING THE PERIOD OF THESE REPORTS.

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

" " SAMUEL HENRY STRONG J.

" " TÉLESPHORE FOURNIER J.

" " HENRI ELZÉAR TASCHEREAU J.

" " JOHN WELLINGTON GWYNNE J.

" " CHRISTOPHER SALMON PATTERSON J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honourable SIR JOHN S. D. THOMPSON, K. C. M. G., Q. C.

ERRATA.

Page 209. Transpose notes (2) and (3).

Page 362. After the words "The court held" at the beginning of paragraph 3 add "Strong J. dissenting."

Page 702. Line 7 of head note, strike out the word "out."

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DETERMINED BY THE

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ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

GEORGE EMERSON AND J. H. ASHDOWN (DEFENDANTS)..... } APPELLANTS;

AND

JAMES BANNERMAN (PLAINTIFF)..... RESPONDENT.

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*Jan. 21.

*June 22.

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

Bill of sale—Affidavit of bona fides—Adherence to statutory form—Proof of execution—Attesting witness.

Where an affidavit of *bona fides* to a bill of sale stated that the sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against *the* creditors of the bargainor, while the form given in the statute uses the words "against *any* creditors of the bargainor," such variation did not avoid the bill of sale as against execution creditors, the two expressions being substantially the same. Gwynne J. dissenting.

The statute requires the affidavit to be made by a witness to the execution of the bill of sale but as attestation is not essential to the validity of the instrument its execution can be proved by any competent witness.

APPEAL from a decision of the Supreme Court of

PRESENT: Sir W. J. Ritchie C. J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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the North-West Territories (1) affirming the judgment at the trial of an interpleader issue in favor of the defendants.

The issue was ordered to ascertain the title to a stack of oats The plaintiffs claimed as execution creditors and the defendants as mortgagees under a bill of sale.

The bill of sale was attacked on two grounds. First, that the affidavit of *bona fides* was defective in not following the strict wording of the ordinance, the affidavit stating that the mortgage was not made to defeat or delay the creditors of the mortgagor the ordinance using the words any creditors.

Secondly, that the bill of sale was not properly proved at the trial, it being made, as the ordinance requires, in the presence of an attesting witness who, under the rules of evidence in the territories, was the only person who could prove its execution and who was not called.

The court below held the bill of sale good as against both objections.

Davis for the appellant. The Ontario courts have held, in these cases, that very slight deviations from the statute will invalidate a bill of sale. *Harding* v. *Knowlson* (2); *Boynton* v. *Boyd* (3); *Boulton* v. *Smith* (4). These cases have never been overruled, and are recognized as good law in *Boldrick* v. *Ryan* (5).

The words of the ordinance must be construed in their ordinary grammatical sense, and if there is a deviation which makes it doubtful if the meaning is the same as the statute so construed it is fatal.

In an affimative sentence the expression "the creditors" would include "any creditors," but it is otherwise in a negative sentence.

(1) 1 N.W. T. Rep. No. 2 p. 36.
(2) 17 U.C. Q.B. 564.
(3) 12 U.C.C.P. 334.
(4) 17 U.C. Q.B. 406.
(5) 17 Ont. App. R. 260.

That the bill of sale could not be proved except by the attesting witness, see *Bryan* v. *White* (1); *Roberts* v. *Phillips* (2).

Moss Q.C. for the respondent cited as to the objection to the affidavit, *Mathers* v. *Lynch* (3); *Farlinger* v. *McDonald* (4); *Gemmill* v. *Garland* (5); and that the execution of the mortgage was properly proved, *Armstrong* v. *Ausman* (6).)

The judgment of the majority of the court was delivered by

PATTERSON J.—Mr Davis in his learned and exhaustive argument presented very fully all the grounds that could be urged against the judgment appealed from, but without creating in my mind any doubt of its correctness.

The objection that the affidavit of *bona fides* fails to satisfy the statute because, while it denies any intention to hold the goods against *the creditors* of the bargainor the term used in the revised ordinance ch. 47 section 5 is "against *any* creditors," seems to me to require a construction of the statute which would be unreasonable and unnecessary. I think the evidence furnished by the statute itself by means of the retention of the expression "the creditors," in the two cognate sections (3 and 4) proves that the legislature regarded the two forms of expression as practically synonomous, and I do not think the criticism bestowed upon them, ingenious and thorough as it was, led at all directly to a different interpretation. The bargainee deposes that the instrument is not made for the purpose of holding or enabling him to hold the goods against the bargainor's creditors, or "the creditors of the bargainor,"

(1) 2 Rob. Eccl. 137.
(2) 24 L. J. Q.B. 171.
(3) 28 U.C. Q.B. 354.
(4) 45 U.C. Q.B. 233.
(5) 12 O. R. 142; 14 Can. S. C. R. 321.
(6) 11 U.C. Q.B. 498.

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which is precisely the same thing. It is urged that an assignment of perjury upon this affidavit would not be sustained by proof of intent to hold the goods against any number of creditors short of the whole body of them; in other words, that in case a debtor assigned to one creditor with intent to defraud all the others, or to a stranger with intent to defraud all his creditors but one with whom he had an understanding, he could, without fear of an indictment for perjury, make that affidavit. The proposition is, to my mind, too obviously untenable to require serious argument. If the intent was to defraud any creditors of the bargainor it cannot be truly said that there was no intent to defraud the bargainor's creditors. Thus whether the words are "any creditors" or "the creditors," the meaning is the same.

It was argued that an intent to defraud one single creditor would be covered by the term "any creditors" and not by the other form of expression; but both expressions being in the plural the distinction is too subtle for my perception. It is not made clearer by a reference to the case cited of *The Queen* v. *Rowlands* (1), in which it was decided that an indictment charging a man with having removed his goods with intent to defraud his creditors, contrary to a statute which made it a misdemeanor to do so, was not sustained by proof of removing the goods for the purpose of defrauding one particular creditor, it not being shown that there were other creditors. It is not our duty at present to consider that decision more closely. The importance of clearly apprehending what is really decided by it before applying the decision as an authority in other cases is very obvious, but our present purpose is satisfied by noting that if the decision be taken to establish as a general proposition that a charge

(1) 8 Q. B. D. 530.

based on a plural form of words, *e. g.* "his creditors" will not be sustained by proof of an act touching one creditor alone, which is what must not be hastily assumed, it applies equally to both the plural expressions before us, "the creditors" and "any creditors," and so fails to affect the discussion.

I am not prepared to say that the inquiry whether a charge of perjury assigned upon the affidavit before us could be sustained by proof of intent to defraud any number of creditors, whether one or several, less than the whole body, is a final test of the sufficiency of the affidavit to satisfy the clause of the statute which, in the formula given, uses the words "any creditors." I do not feel driven to pronounce on that point because, in my opinion, the test supports the sufficiency of the affidavit. We have to read the formula in the light of the Interpretation Ordinance, which enacts that slight deviations from forms prescribed by the ordinances, not affecting the substance or calculated to mislead, shall not vitiate them; and we have here an affidavit which deviates slightly from the formula given, the deviation not affecting the substance or calculated to mislead. We have in this particular a different rule of construction to follow from that on which we had lately to act in *Archibald* v. *Hubley* (1), in applying a statute which required a rigid adherence to the forms it prescribed.

The other point made on the appeal related to the proof at the trial of the bill of sale in question.

It was proved by a credible witness who was not an attesting or subscribing witness to the execution of the instrument but who had been present at its execution.

There is no ground whatever for valid objection to the sufficiency of that proof. The objection taken con-

(1) 18 Can. S.C.R. 116.

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founded two things which are quite distinct, the execution of the deed between the parties, which the statute does not interfere with, and the proof by affidavit for the purpose of notice to creditors and subsequent purchasers. That affidavit must be made by a witness to the instrument, and it was made by a subscribing witness. It is not the subject of objection.

Attestation is not essential to the valid execution of the deed between the parties, and that being so the deed may be proved at a trial by one who is not attesting witness to it, whether there happens or does not happen to be an attesting or subscribing witness.

In my opinion the appeal should be dismissed.

GWYNNE J.—The question raised on this interpleader issue is as to the validity of the bill of sale of a stack of oats by one Sparrow to the plaintiff Bannerman.

By an ordinance of the North-West Territories in force at the time of the execution of the bill of sale in question it was enacted that every sale, assignment and transfer of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and that such sale shall be absolutely null and void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith, unless the bill of sale should be accompanied by an affidavit of the bargainee, or one of several bargainees, or of the agent of the bargainee or bargainees duly authorized to take the conveyance, that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against any creditors of the bargainor, which conveyance and affidavit were re-

quired to be registered as in the ordinance directed within fifteen days from the execution thereof. By a bill of sale bearing date and made upon the 24th day of September, 1889, Sparrow, in consideration of the sum of $400.00 therein acknowledged to be paid to him by Bannerman, bargained, sold, assigned, transferred and set over to Bannerman the stack of oats in question, to have and to hold the same unto and to the use of Bannerman, his executors, administrators and assigns, to and for his sole and only use forever, and by the said conveyance Sparrow undertook and agreed to thresh the oats and to deliver the same in Calgary to Bannerman as soon as possible. While the stack of oats still remained unthreshed in Sparrow's possession it was seized by the sheriff upon executions in his hands at the suit of the above defendants as judgment creditors of Sparrow. The affidavit accompanying the bill of sale was made by Bannerman the bargainee, and is in the words following:

I, James Bannerman, of &c., &c., in the foregoing bill of sale named, make oath and say, that the sale therein is *bonâ fide*, and for good consideration, namely, four hundred dollars, and not for the purpose of holding or enabling me this deponent to hold the goods mentioned therein against the creditors of the said bargainor.

It is objected that this affidavit is defective as not being in conformity with the affidavit prescribed in the ordinance, which required the affidavit of the bargainee to contain his declaration upon oath that the sale was not made for the purpose of enabling him to hold the goods "against any creditors of the bargainor." I regret very much feeling constrained to yield to this objection, for I entertain no doubt, as has been found by the learned judge who tried the interpleader issue, that the transaction was an absolute and perfectly honest sale of the oats in question, and that it is not open to any of the other objections taken

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to it. I cannot, however, bring my mind to the conclusion that there is not a marked difference between an affidavit that a sale was not made for the purpose of enabling the bargainee to hold goods "against any creditors of the bargainor;" and that it was not made for the purpose of enabling him to hold them "against the creditors of the bargainor," the former expression is identical with, "any or any one of the bargainor's creditors"—while the latter refers to the general body of his creditors—and although there might be no intention in a given case to hold goods purported to be sold to a bargainee against the general body of the bargainor's creditors there might be an intention to hold them against one particular creditor. Assuming, then, the latter to have been the intention in the present case, and that the deponent should be indicted for perjury, then, if the indictment should be framed assigning the perjury to have been committed in an affidavit stated in the words of the ordinance, the affidavit actually made upon its production would disprove the allegation in the indictment; and assuming the indictment to be framed stating the affidavit in the words in which it was actually made then the prosecution must fail upon its appearing that the intention, in point of fact, was to hold only against one particular creditor, although that is the very case which the ordinance declares shall make the bill of sale absolutely void against the bargainor's creditors. In the present case the bill was perfectly honest and absolute and for good consideration as found by the learned judge and not voidable within the meaning of the ordinance upon any ground except for defect in the affidavit of the bargainee of the *bonâ fides* of the sale; still I can see no way of avoiding the peremptory provision of the ordinance. I cannot concur in holding that an affidavit, the terms of which vary

materially from the terms required by an ordinance, is a sufficient compliance with the ordinance, nor can I concur in the idea that we can for any reason assume that the alteration of the former ordinance upon the same subject by the substitution of the word "any" for the word "the" in the affidavit required to be made was occasioned by error, or carelessness or any inadvertence of the legislative body making the alteration, or that it was occasioned by the mistake of a clerk copying the ordinance as originally framed. The mistake in the frame of the affidavit most probably has been occasioned by the use of a printed form of bill of sale and affidavit endorsed thereon, as the same were in use before the former ordinance was repealed and the altered one substituted therefor, and although in the present case strict adherence to the terms of the amended ordinance will have the effect of defeating a perfectly honest, *bonâ fide*, absolute sale made for good consideration I can see no way, as I have already said, of getting over the peremptory provision of the ordinance. The appeal must, therefore, in my opinion, be allowed.

Appeal dismissed with costs.

Solicitor for appellants : *E. P. Davis.*

Solicitors for respondent : *Smith & West.*

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*Feb. 4.

*June 22.

JOHN A. McRAE (DEFENDANT)..... APPELLANT ;

AND

THOMAS T. MARSHALL (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Master and servant—Agreement for service—Arbitrary right of dismissal Exercise of—Forfeiture of property.

By an agreement under seal between M., the inventor of a certain machine, and McR., proprietor of patents therefor, M. agreed to obtain patents for improvements on said machine and assign the same to McR., who in consideration thereof agreed to employ M. for two years to place the patents on the market, paying him a certain sum for salary and expenses and giving him a percentage on the profits made by the sales. M. agreed to devote his whole time to the business, the employer having the right, if it was not successful, to cancel the agreement at any time after the expiration of six months from its date by paying M. his salary and share of profits, if any, to date of cancellation.

By one clause of the agreement the employer was to be the absolute judge of the manner in which the employed performed his duties, and was given the right to dismiss the employed at any time for incapacity or breach of duty, the latter in such case to have his salary up to the date of dismissal but to have no claim whatever against his employer.

M. was summarily dismissed within three months from the date of the agreement for alleged incapacity and disobedience to orders.

Held, reversing the judgment of the Court of Appeal and of the Divisional Court, that the agreement gave the employer the right at any time to dismiss M. for incapacity or breach of duty without notice, and without specifying any particular act calling for such dismissal.

Held, per Ritchie C.J., Fournier, Taschereau and Patterson JJ., that such right of dismissal did not deprive M. of his claim for a share of the profits of the business.

Per Strong and Gwynne JJ., that the share of M. in the profits was only a part of his remuneration for his services which he lost by being dismissed equally as he did his fixed salary.

PRESENT : Sir. W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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MCRAE v. MARSHALL.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the decision of the Divisional Court (2) by which judgment for the defendant at the hearing was set aside.

Marshall, the respondent, was the inventor of a crimping machine used in the manufacture of boots and shoes which he had patented in England and the United States as well as in Canada. These patents he had assigned to McRae, and having invented an improvement of the machine an agreement was executed between McRae as party of the first part, and Marshall as party of the second part, which after a covenant by Marshall that he would obtain patents for the said improvements and assign the same to McRae, and do the same with all subsequent improvements he might make, contained the following provisions:—

4. In consideration whereof the party of the first part hereby agrees to employ the party of the second part for the term of two years from the date hereof for the purpose of demonstrating and placing the said patents of invention granted or hereafter to be granted, on the market on the following terms, viz.: The said John A. McRae covenants to pay the said Thomas T. Marshall the sum of $100.00 per month during the said term of two years payable monthly, and in addition to said salary the party of the first part covenants and agrees to pay the actual travelling expenses and board of the party of the second part. And it is further agreed between the parties hereto that the said Thomas T. Marshall shall be entitled to and receive twenty per cent. of the actual net profits that are derived in any way whatsoever from the sale or otherwise of the said patents of invention.

6. That the said John A. McRae shall be absolute judge of what are expenses and what are not, and shall have the exclusive control and management of all matters in connection with the said patents, the party of the second part simply being his agent for the purposes aforesaid.

7. That the said John A. McRae shall in the event of said business not proving a success have the right to cancel this agreement at any time after the expiration of six months from the date hereof, if he shall deem it advisable so to do, by paying the party of the second

(1) 17 Ont. App. R. 139. (2) 16 O. R. 495.

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part all salary which may be due him up to the date of such cancellation and his share of the profits, if any, on the basis aforesaid.

8. That the said Thomas T. Marshall shall devote his whole time and attention to the business of the party of the first part and shall neither directly or indirectly engage in any other business, occupation or employment and that he shall be faithful to the said McRae in all his transactions and dealings.

10. It is further agreed that the party of the first part is to be the absolute judge as to the manner in which the party of the second part performs his duties under this agreement, and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal and shall have no claim whatever against the party of the first part.

The provisions of this agreement were carried out between the parties for two or three months when McRae, wishing to test the crimping machine, gave orders to Marshall to have a certain quantity of leather prepared and the test made on a certain day. At the appointed time the leather was not ready and another day was appointed, but the preparations for the test being still incomplete McRae instructed his solicitor to discharge Marshall from his employment. This action was then brought by Marshall claiming damages for wrongful dismissal and his share of the profits under the agreement.

At the hearing before Mr. Justice Rose judgment was given dismissing the plaintiff's action. This judgment was reversed by the Divisional Court and judgment entered for the plaintiff with substantial damages. The decision of the Divisional Court was affirmed by the Court of Appeal, both courts proceeding on the ground that McRae in dismissing the plaintiff under clause 10 of the agreement could only do so after due notice to the plaintiff and hearing what he had to urge against it. The defendant, McRae, appealed to this court.

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Dalton McCarthy Q. C. for the appellant referred to *The Queen* v. *The Bishop of London* (1).

No counsel appeared on behalf of the respondent.

SIR W. J. RITCHIE C. J.—Sections 5 and 10 of the agreement are as follows:

5 That the said party of the first part shall cause to be kept proper books of account and entries shall be made therein of all such matters transactions and things as are usually kept and entered in books of account, and all the costs, charges and expenses in connection with the purchase of the said patents of invention by the said McRae and of the obtaining assignments thereof, and all the costs, charges and expenses in connection with the obtaining of further or other patents of invention and any renewal or renewals thereof, and all the costs, charges and expenses in connection with the demonstrating and placing the said patents of invention on the market, including the said salary of the said Marshall, and all losses arising in any way in connection with the said patents shall be a first charge on the profits that may hereafter be derived from the said patents and shall be first deducted before any division of profits shall take place or be made.

10. It is further agreed that the party of the first part is to be the absolute judge as to the manner in which the party of the second part performs his duties under this agreement, and shall have the right at any time to dismiss him for incapacity or breach of duty, in which event, the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal and shall have no claim whatever against the party of the first part.

I can see no reason why a provision of this kind cannot be so framed as to make the approval of the employer quite arbitrary, if it is exercised in good faith and not for the special purpose of defeating the contract.

I cannot very well see how this stipulation could be more strongly drawn. The employer is to have the right at any time of dismissing the employee for incapacity or breach of duty, and the employer is to be the absolute judge as to the manner in which the employee performs his duties under the agreement.

I think the question turns on the word of the con-

(1) 24 Q. B. D. 213.

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Ritchie C.J.

tract which appear to me too clear and explicit to be misunderstood, and by them we must be governed. The law which I think should govern this case is very clearly stated in *Stadhard* v. *Lee* (1) as follows:—

Cockburn C. J.:

But we are equally clear that where, from the whole tenor of the agreement, it appears that however unreasonable and oppressive a stipulation or condition may be the one party intended to insist upon and the other to submit to it a court of justice cannot do otherwise than give full effect to the terms which have been agreed upon between the parties. It frequently happens in the competition which notoriously exists in the various departments of business that persons anxious to obtain contracts submit to terms which, when they come to be enforced, appear harsh and oppressive. From the stringency of such terms escape is often sought by endeavoring to read the agreement otherwise than according to its plain meaning. But the duty of a court in such cases is to ascertain and give effect to the intention of both parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet, if the terms are clear and unambiguous, the court is bound to give effect to them without stopping to consider how far they may be reasonable or not.

I agree with the trial judge and Chief Justice Hagarty that the defendant was not without apparent reason for availing himself of the power of dismissal, and I also agree with Mr. Justice McLennan who says:

I think the preparation of the tests required by the defendant was within the scope of the plaintiff's duties as defined by the agreement, and that a neglect or refusal by him to prepare those tests would have been a breach of the agreement. It was most important, for the purpose of putting the invention on the market, to be able to show what it could do, and the one hundred pairs of uppers which the defendant desired to have prepared on different kinds of leather would have assisted that object. I think the first thing the parties would have had to do, in endeavoring to demonstrate or sell the invention, would be to show what it could do, and so to have specimens of its work. The defendant had no practical knowledge of the invention, and the inventor was the person he would naturally look to to prepare and supply him with what he required to enable him to display the results of the invention to those engaged in the shoe trade. I think the evidence shows that

(1) 3 B. & S. 364.

plaintiff in reference to this was derelict in his duty and that his dismissal was *bonâ fide*.

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Ritchie C.J.

I agree with Hagarty C. J. that the dismissal from the two years' employment by defendant does not involve or affect the plaintiff in his right to an interest in the property mentioned in the agreement; that the words "shall have no claim," should be read as limited by the context to refer to a claim under that clause. I think the contract of hiring is wholly distinct from the respective rights and interests of the parties in the property existing, or to be acquired.

I therefore think the appeal should be allowed.

STRONG J.—I am of opinion that this appeal should be allowed for the reasons stated in the judgment of Mr. Justice Gwynne in which I concur.

FOURNIER J.—I am also of opinion that the appeal should be allowed.

TASCHEREAU J—I would allow this appeal. I agree with the reasons assigned by Hagarty C. J. in the Court of Appeal.

GWYNNE J.—The judgment which is appealed from appears to have proceeded upon the grounds that the respondent was interested in certain property in partnership with the appellant, and that the dismissal of the respondent by the appellant was not authorized by the agreement of the 2nd February, 1886, in the statement of claim mentioned, or if authorized that it amounted to an exclusion of the respondent from the partnership, and that, therefore, to attain such an end the proceeding to dismiss was in the nature of a judicial proceeding which must be pursued in accordance with the principle governing judicial proceedings,

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namely, by giving notice to the respondent of the appellant's intention to exclude him from the partnership and so giving him an opportunity to explain whatever conduct of his constituted the cause of the appellant's proposed exercise of his power of expulsion from the partnership, and to enable the respondent to show cause, as it were, why the power should not be exercised. Whether the authorities upon which the judgment has been rested apply to the circumstances of the present case is the sole point raised by the appeal; it will be necessary, therefore, to review them.

In *Bagg's Case* (1) the judgment was that a burgess or magistrate of a borough cannot be removed from his office for words of contempt addressed to the chief magistrate or his fellow burgesses, nor for any cause not against his duty as a citizen or burgess and against the public good of the city or borough whereof he is a freeman or burgess and against the oath which he took when he was sworn a freeman of the city or borough; and that where a corporation has power to disfranchise a freeman or burgess for sufficient cause they cannot remove him from his freedom without proceeding in a judicial manner and giving him an opportunity to answer the charge preferred against him and made the ground of his removal. In *Rex* v. *Cambridge* (2) the court of the congregation of the University of Cambridge assumed to deprive a graduate of his academical degrees for a contempt alleged to have been offered to the Vice Chancellor's Court, and it not being shown that there was a visitor to whom the party so deprived could appeal it was held that the court of Queen's Bench could interfere by mandamus to compel his restoration; and it was further held that assuming the university to have had power to deprive a graduate of his degrees they could only do so

(1) 11 Co. 93b. (2) 1 Str. 558.

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for good cause and after summons of the party, and hearing in a judicial manner the charge upon which the right to remove the accused was exercised. *Const* v. *Harris* (1) simply decided that where the majority of the partners in a firm desired to make a material change in the articles of partnership they must give all the partners notice of the proposed change and of the time when it should be taken into consideration; that the act of the majority is only the act of all provided all are consulted, and that the majority are acting *bonâ fide* with reference to the particular facts of that case Lord Eldon giving judgment says (2):—

> For a majority of partners to say, we do not care what one partner may say, we being the majority will do what we please, is, I apprehend, what the court will not allow.

In *Capel* v. *Child* (3) it was held that where a statute gave a bishop power to interfere in a particular manner whenever it should appear to him, either upon affidavit or of his own knowledge, that by reason of the number of churches or chapels belonging to any benefice situate within his diocese, or the distance of such churches from each other, or the distance of the residence of the spiritual person holding the same, that the ecclesiastical duties of such benefice were inadequately performed in consequence of the negligence of the incumbent, that was a judicial power which could only be exercised after giving the incumbent an opportunity of shewing that he was guilty of no negligence, and of trying to satisfy the bishop that his duties were not inadequately performed Lord Lyndhurst there says (4):—

> Here is a new jurisdiction given, powers given to the Bishop to pronounce a judgment, and according to every principle of law and equity such judgment could not be pronounced, or if pronounced could not for a moment be sustained, unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not.

(1) 1 Tur. & Russ 496.
(2) P. 525.
(3) 2 C. & J. 558.
(4) P. 577.

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And Bayley J. says (1) :

> I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having had an opportunity of being heard.

The judgment of the bishop had subjected the vicar of a parish to the payment of £90 per annum to a curate whom the bishop had imposed upon him as a punishment authorized by the statute, to assist in the discharge of the duties of the parish. But in *re Hammersmith rent charge* (2) in the same court differently constituted in 1849, under the Tithe Commutation Act 6 & 7 Wm. 4 c. 71, which enacted that " where the half-yearly payments of rent charge on land shall be in arrear and unpaid for the space of forty days, and there shall be no sufficient distress upon the premises liable to the payment thereof, it shall be lawful for any judge of His Majesty's Courts of record at Westminster, upon an affidavit of the facts, to order a writ to issue to the sheriff requiring him to summon a jury to assess the arrears of rent charge remaining unpaid and to return the inquisition thereupon taken to some one of the Superior Courts," it was held by Pollock C. B. and Alderson and Platt BB. (Parke B. dissenting), that the fact of the writ of the sheriff having issued upon an order made *ex parte* afforded no ground for setting aside the writ and the subsequent proceedings. Parke B. proceeded upon the above language of Bayley J. in *Capel* v. *Child* (3) treating the order for the writ of the sheriff to issue to be equally in the nature of a judgment as was the proceeding in *Capel* v. *Child* (3). Alderson B., however, in his judgment says (4) :

> I look upon the question as one only of form and the reasonable construction of the 81st and 82nd sections of this particular Act of Parliament.

(1) P. 579.
(2) 4 Ex. 87.
(3) 2 C. & J. 558.
(4) P. 92.

He then proceeds to put upon them what appeared to him their proper construction, and he adds (1) :

Certainly, the authorities do shew that when the proceeding is in the nature of a final judgment against a party he must in general be summoned and have the opportunity of being heard before the judgment can be properly pronounced against him. But here I cannot treat the issuing of the writ as a judgment, nor do I think that if it issues *ex parte* the party is punished without the opportunity of being heard, for it is no more like a judgment than a writ of *capias* is which after a judge is satisfied of certain facts by affidavit he is to issue against the defendant, and yet there the proceeding which issues *ex parte* deprives him of his liberty.

And referring to *Capel* v. *Child* (2) he says (3) :

Without saying how far if it was *res integra* I should agree to that decision, and accepting it as an authority in a similar case, although it is difficult to understand why the bishop whom the legislature permitted to act on his own knowledge should be required to summon a party any more than a magistrate who is to present a road on his own view should summon the inhabitants before he does it which no one ever dreamed he ought to do : Yet it is clearly put there that the *ex parte* proceeding of the bishop was a judgment on a definite matter by the bishop against the incumbent and Lord Lyndhurst intimates in his judgment [p. 575], that if there could have been a proceeding to cancel the bishop's requisition it might have been different, but there the only subsequent proceedings were for the purpose of carrying into effect the final *ex parte* judgment.

And Pollock C. B. says (4) :

The case of *Capel* v. *Child* (2), it must be admitted, is to some extent in principle and authority against the order. It was, however, upon a different Act of Parliament. It presented none of the inconveniences which the same course of practice would produce if we were to act on that principle in the present case, and the case of *Capel* v. *Child* (2), whatever it may be deemed now, having once been pronounced as the judgment of this court, and being a binding authority upon us sitting here, I can only say, as far as that Act of Parliament goes I shall feel myself bound by it, but not one degree further. I agree with my brother Alderson that if that case had to be re-argued I for one should be disposed to come to a different conclusion.

Blisset v. *Daniel* (5), was a case of partnership. By

(1) P. 95.
(2) 2 C. & J. 558.
(3) P. 94.
(4) P. 100.
(5) 10 Hare 493 ; 18 Jur. 122.

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the articles it was provided that the partners should meet every year within 60 days after the 30th June, and state, settle and finally adjust all the accounts and make a rest and settlement up and home to 30th June, to which end an inventory estimate and valuation of all the joint stock and property was to be taken, and also of the separate account of the partners, so that the true state and condition of the partnership and of the shares of the partners might clearly appear. There were then clauses providing for a partner wishing to retire from the firm or dying, becoming bankrupt or being expelled, under a power in that behalf vested in two thirds of the partners, and in all such cases there was one provision, namely, that the value of the removed partner's share was to be paid to him or his representatives as it stood on the last preceding 30th June. The plaintiff and his partners carried on business on amicable terms until the 26th August, 1850, when one of the partners, who was the managing partner, proposed that his son should be admitted to a share of the management; the plaintiff objected to this on principle whereupon the managing partner declared to the partners other than the plaintiff that he would not continue in the concern together with the plaintiff, and pointed out to them the clause of expulsion. On the 29th August the plaintiff signed the accounts without being made aware of this declaration or of the clause of expulsion which all parties had forgotten. On the evening of the 29th August the plaintiff received a notice duly signed signifying his expulsion from the firm, and the defendants, the remaining partners, proceeded to pay him out at the rate at which his shares stood in the account as signed. No cause was alleged or assigned in the notice or in the answers to the bill. Evidence was gone into by the plaintiff and not attempted to be met by the defendants to show that

the valuation upon which the estimate of his share rested was purely conventional and did not nearly represent the full market value of the plaintiff's share. Upon a bill to have the notice of expulsion declared void and to have the concern wound up and he plaintiff's real share ascertained by a sale, Sir W. P. Wood V. C. held:

1. That the notice of expulsion need not assign any cause nor be founded on a previous meeting of the company in committee with each other.

2. That the valuation at which the share of a partner expelled without cause assigned and proved should be estimated must be a real valuation and not the conventional valuation in the books; that no means were pointed out for arriving at such a valuation except by sale; that a sale was contrary to the whole scope of the articles of partnership; that there was, therefore, no method of ascertaining the value of the plaintiff's share; and that, therefore, the clause of expulsion could not be acted on.

3. That the power of expulsion was one vested in the two thirds of the partners but to be exercised for the advantage, not of themselves, the expelling partners, still less at the wish or for the benefit of one of their number, but for the benefit of the whole concern, and therefore;

4. That under the circumstances of concealment from the partner intended to be expelled of all intention on the subject until after he had signed the accounts, and Vaughan, the managing partner, having procured the other partners to join in expelling the plaintiff, not upon their own judgment, but under threats of the managing partner to retire from the management and the concern altogether, the power had not been exercised *bonâ fide*.

Sir W. P. Wood, after stating the circumstances

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under which, as appeared in evidence, the notice of expulsion was given, says (1):

It is impossible to uphold that notice. The power was intended for the benefit of all—not that one partner (for in reality all this emanated from Mr. Vaughan), being dissatisfied with the manners and conduct of another should, behind the other's back, suggest and procure—nay, almost by threats, coerce—others of his partners to join him in expelling a partner whom he alone seeks to expel.

And again (2),

Had the defendants made out their case as to uncourteous bearing I could not possibly hold but that this was an act of arbitrary power on the part of the expelling partners at the suggestion of Mr. Vaughan alone—an advantage obtained by him for his own purposes, behind the plaintiff's back, which he cannot be allowed to retain.

This case proceeded upon the clear establishment of a flagrant case of actual *mala fides* in the attempt to exercise a power contained in articles of partnership under circumstances which did not come within the intent with which the power was inserted in the articles, and in two of the partners withholding the exercise of their own judgment as to the propriety of the expulsion of their co-partner, and submitting to the dictation and coercion of a third partner who, for his own private purposes and benefit, and not at all for the benefit of the partnership, conceived the design of getting rid of the plaintiff, against whom he may be said to have entertained a personal grudge, by procuring his expulsion from the firm.

In *Clarke* v. *Hart* (3), it was held that a power in co-adventurers to forfeit the shares of one of their number for non-payment of calls is not necessarily incident to a mining adventure conducted on the cash book principle. This case is an authority that where a power to forfeit the shares of a co-adventurer exists, either by agreement between the parties or by a legally established custom, it is to be treated

(1) 10 Hare 527.
(2) 18 Jur. 127.
(3) 6 H. L. Cas. 633.

as *strictissimi juris* like a power of forfeiture with respect to an estate, and the forms prescribed by the agreement, or established by the custom, to be observed in declaring the forfeiture must be strictly followed.

Lord Chancellor Chelmsford there says (1) :

I am clearly of opinion that supposing the power to have existed it has not been duly exercised and that there has been no proper resolution by which the appellants could declare the shares of the respondent to be forfeited. It is unnecessary to advert to the principle that forfeitures are *strictissimi juris*, and the parties who seek to enforce them must exactly pursue all that is necessary to enable them to exercise this strong power. With regard to this particular case it seems to be admitted, both by the answers and by the evidence on the part of the appellants, that the only proper mode of declaring a forfeiture was by convening a general meeting after the period limited for payment of the calls and the party being in default, that general meeting being necessarily to be preceded by notice to all the adventurers to enable them to attend it, and also, as appears to have been conceded at the bar, by a notice of the intention for which the meeting was convened.

In *Regina* v. *The Archbishop of Canterbury* (2) where a statute gave an appeal to the archbishop from the judgment of a bishop revoking the license of a curate, and the curate appealed from such a judgment of his bishop, it was held that it was not competent for the archbishop to affirm the judgment of the bishop without giving the curate an opportunity of being heard upon his petition of appeal.

Lord Campbell C.J. there (3) says :

The legislature here gives an appeal from the bishop to the archbishop that implies that the appellant is entitled to an opportunity of being heard. The appellant here has not been heard. In his petition he denies almost everything charged against him specifically, and asks the archbishop to appoint a time and place at which he may be heard and adduce evidence on his behalf. Without any communication with him the judge decides against him. That was not a hearing. The

(1) P. 650 (2) 1 El. and El. 545.
(3) P. 548.

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appellant should have had an opportunity of arguing before the archbishop that the bishop's decision was not correct upon the facts.

And Compton J. says :

Where a statute of this kind gives an appeal it gives by implication a right to be heard upon the appeal. Sec. 111 clearly contemplates a judicial inquiry before the archbishop, that is, a further inquiry, not merely one upon the original document set forth in the appeal.

Phillips v. *Foxall* (1) is an authority that on a continuing guarantee for the honesty of a servant if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant chooses to continue him in his employ without the knowledge and consent of the surety express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. What bearing this case has upon the present is not apparent ; wha is relied upon is the language of Blackburn J. who, although he arrived at the same conclusion as the other members of the court, did so upon different grounds from those upon which they proceeded ; still I cannot see any thing in this language of Blackburn J. which can be said to have any bearing upon the present case. At page 680 he says :—

A surety, as soon as his principal makes default, has a right in equity to require the creditor to use for his benefit all his remedies against his debtor, and as a consequence if the creditor has by any act of his deprived the surety of the benefit of any of those remedies the surety is discharged. * * * Now the law gives the master the right to terminate the employment of a servant on the discovery that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects after knowledge of the fraud to continue him in his service he cannot at a subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection. If this right to terminate the employment is one of those remedies which the surety has a right to require to have exercised for

(1) L. R. 7 Q. B. 666.

the surety's protection, it seems to follow that by waiving the forfeiture and continuing the employment without consulting the surety the principal has discharged him.

Wood v. *Woad* (1) was the case of a mutual insurance association one of the rules of which was that a committee of the society should have entire control of the funds and affairs of the society, and that if the committee should at any time deem the conduct of any member suspicious, or that such member was for any other reason unworthy of remaining in the society, they should have full power to exclude such member by directing the secretary to give such member notice in writing that the committee had excluded such member from the society, and after the giving of such notice such member should be excluded and have no claim or be responsible for or in respect of any loss or damage happening after such notice; and it was held that this rule did not empower the committee to expel a member upon the alleged ground that his conduct was suspicious or that he was for some reason unworthy of remaining in the society without giving the plaintiff an opportunity of being heard before them in vindication of his conduct and character against the charge, whatever it might be, which was relied upon as ground of expulsion. Kelly C.B. referring to the power of the committee and their duty under the above rule says (2):

> They are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

Fisher v. *Keane* (3) is an authority that the com-

(1) L. R. 9 Ex. 191. (2) P. 196.
(3) 11 Ch. D. 353

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mittee of a club are a quasi-judicial tribunal and bound in proceeding under the rules of the club against a member of the club for alleged misconduct to act according to the ordinary principles of justice, and are not to convict him of an offence warranting his expulsion from the club without giving him due notice of their intention to proceed against him and affording him an opportunity of defending or palliating his conduct; and the court will, at the instance of any member so proceeded against, declare any resolution passed by the committee without previous notice to him, based upon *ex-parte* evidence, and purporting to expel him from the club, to be null and void and will restrain the committee by injunction from interfering by virtue of such a resolution with his rights of membership. Jessel M.R. before whom the case was heard, giving judgment, says:—

> In the first place I have to consider what the true construction of the rule is and in the second place I have to consider whether the method adopted by the committee of putting that rule in force was such as according to the rules of conducting judicial or quasi-judicial proceedings ought to have been adopted.

Then after reading the rule and commenting on it he came to the conclusion that its clear grammatical construction was:—

> That a member shall not be recommended to resign unless the recommendation is agreed to by two thirds of the committee specially summoned for the purpose.

And as to the second point he says (1):

> As I said before it does behoove the committee, who are a judicial or quasi-judicial tribunal, to be very careful before they expose one of their fellow members to such an ordeal. They ought to gravely consider, when proceeding to enforce such a rule as this, whether he has committed any offence at all, and especially whether he has committed such an offence as will warrant their branding him with the name of an expelled member of their club. In the present instance they did nothing of the kind. At

(1) P. 360.

a meeting without notice a, few members only being present, they allowed two other gentlemen behind the back of the plaintiff to make a statement (upon which they acted,) as what he said and did in the billiard room on the night in question.

And he concludes (1) this :

In my opinion a committee acting under such a rule as this are bound to act, as Lord Hatherley said (2), according to the ordinary principles of justice and are not to convict a man of a grave offence which shall warrant his expulsion from the club without fair adequate and sufficient notice and the opportunity of meeting the accusation brought against him. They ought not according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, to blast a man's reputation for ever—perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.

Steuart v. *Gladstone* (3) was a case where, in articles of co-partnership, there was a provision that if the majority of the partners should at any time desire that any of the partners should retire, and should give him six months notice in writing to that effect, the partnership should as regarded him be dissolved at and from the time mentioned in the notice ; and it was held by Fry J. that the majority had not power to exclude a partner under that provision in the articles without giving him a full opportunity of explaining his conduct but that, upon the evidence in that case, the defendants had given the plaintiff such opportunity. *Labouchere* v. *Earl Wharncliffe* (4) was a case before Jessel, the Master of the Rolls, identical in character with *Fisher* v. *Keane* (5) before the same learned judge, and upon the facts of the case the learned judge held that the committee of the club had acted without full inquiry and without giving the plaintiff notice of any definite charge, that the resolution expelling him was carried without a

(1) P. 362.
(2) In Dean *v.* Bennett 6 Ch. App. 489.
(3) 10 Ch. D. 626.
(4) 13 Ch. D. 346.
(5) 11 Ch. D. 353.

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sufficient majority and that the plaintiff was entitled to the injunction prayed for in his bill. *Dawkins* v. *Antrobus* (1) is a decision of Jessel M.R., affirmed by the Court of Appeal, that where the committee of a club proceeded to expel a member in accordance with the rules of the club the courts have no jurisdiction to interfere with the decision of the members duly assembled, or to inquire whether the decision was reasonable or unreasonable, or to interfere at all unless the decision could be attributed to actual malice and want of good faith.

Gould v. *Webb* (2) was a case in which it was held that, to an action brought by a newspaper correspondent for wrongful dismissal from his employment under a contract with the defendant, pleas averring certain defaults of the plaintiff to fulfil the terms of his contract as justifying the dismissal did not justify a dissolution of the contract. It was a question of pleading arising upon demurrer to pleas in which the right to dismiss the plaintiff from his employment was rested upon the assertion of a legal right founded upon specifically alleged breaches of his contract by the plaintiff, and the judgment which allowed the demurrer simply decided that the acts, default in the fulfilment of which was pleaded as justifying the dismissal, were not acts the performance of which constituted conditions of the contract continuing in existence, that they were mere stipulations the breach of which, although they might give the defendant a cause of action against the plaintiff, did not in point of law justify a dissolution of the contract.

Winstone v. *Linn* (3) was simply a decision that covenants in an indenture of apprenticeship are independent covenants, and consequently that acts of

(1) 17 Ch. D. 615.
(2) 4 E. and B. 933.
(3) 1 B. and C. 460.

misconduct on the part of the apprentice stated in the plea were not an answer to an action brought for breach of covenant by the master to instruct and maintain the apprentice during the term agreed upon by the indenture. Neither of these two last cases, it is obvious, can have any application to the present case.

Russell v. *Russell* (1) is a decision that where partnership articles between A and B provided that, if the business should not be conducted to the satisfaction of B. he should have power to give notice to A. to determine the partnership, this was a power which was exercisable at B's. sole will and pleasure without any previous notice of intention to exercise the power being given to A. The case is particularly valuable as containing a review by Jessel M.R. of *Blisset* v. *Daniel* (2) and *Wood* v. *Woad*, (3) in which that learned judge, while thoroughly approving of the judgments in those cases, points out, with that judicial precision for which he was remarkable, how very different the facts of these cases were from the facts of the case then before him, in language whch seems to me to furnish a perfect guide in the determination of the question: To what state of facts will the judgment in those cases apply and to what will they not apply? As to *Wood* v. *Woad* (3) he says (4):

> Now one must consider what *Wood* v. *Woad* (3) was to show how different it is from this case. *Woad* v. *Wood* (3) was in effect this: there was a rule which allowed a committee of a mutual insurance society to expel a member, and the ground was that if the committee should at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they should have full power to exclude such member. Consequently by excluding him the committee declare to the world, to all his neighbors and friends, and to all the other members of the society in particular, that they "deem" his conduct suspicious, and for some reason

(1) 14 Ch. D. 471.
(2) 10 Hare 493.
(3) L. R. 9 Ex. 191.
(4) P. 478.

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that he is unworthy to remain in the society. By the very act of excluding him they cast a stigma upon him ; then remembering that I have to say a word as to the use of the word " deem." That word has more than one meaning, but one of its meanings is to adjudge or decide. In fact the old word " deemster " or " dempster " was the name for judge—to " deem " at one time meant to decide judicially. Consequently, taking that meaning what they had to do was to " deem " that the member's conduct was suspicious, and such as made him unworthy. That was in fact a decision not merely depending upon opinion but depending on inquiry. No one could suppose it was to be left to the caprice of the members of the committee to stigmatise as dishonorable or dishonest any member of the society. Of course it was not. It was intended that they should be satisfied by something like reasonable evidence that his conduct was unworthy. Therefore, in construing the rule the Court of Exchequer came to the conclusion, and if I may say so I think rightly came to the conclusion, that it was a case in which the committee ought not to have decided until after inquiry. That case therefore has no bearing upon the question as regards the partnership right to give notice to one partner to dissolve. It is a case of a totally different kind.

Then as to *Blisset* v. *Daniel* (1) he says :—

That was a very peculiar case. The case there was this : A majority of the partners consisting of two thirds wished to expel a partner and nothing more, but if they did expel him the other partners had a right to buy up his shares in a particular way by valuation. All the vice chancellor decided was this, that in a case of that kind they had no right to expel merely for the purpose of buying up the shares, and that it was not a fair and *bonâ fide* exercise of the power. He decided that the partners were not to meet together and say, " we should like to have so and so's shares and therefore we will expel him ;" that was a consequence of the expulsion but it was not to be the motive of the expulsion, it was not a *bonâ fide* exercise of the power. Then they alleged that they had grounds of dissatisfaction with the partner, but his reply in effect was, " if you have any ground of dissatisfaction you ought to have given me notice to see if I had anything to answer."

There the vice chancellor was of opinion that even in that limited case, where it was only *inter se* as regards the partners themselves, yet if the reason as far as the other partners were concerned was misconduct they ought to give the partner sought to be expelled an opportunity of explaining his alleged misconduct.

The learned judge then proceeds to compare that case with the one before him and says :—

(1) 10 Hare 493.

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How that case applies to the case of a single partner I do not well understand. In the case of several partners it may well be that it is a thing to be considered, but if it is a single partner it is plain that neither *Blisset* v. *Daniel* (1) nor *Wood* v. *Woad* (2) has any application because the moment you give the power to a single partner in terms which shew that he is to be sole judge for himself, not to acquire a benefit but to dissolve the partnership, then he may exercise that discretion capriciously, and there is no obligation upon him to act as a tribunal or to state the grounds on which he decides for himself.

Then, as to the power vested in the partner in the case before him, he says :

It is plainly a power which puts it entirely within the right of W. A. Russell to say : "I am not satisfied although all the world except myself would be satisfied with such a result." In other words, it is a power which he may exercise at his will and pleasure, capriciously or not capriciously as he thinks fit, and to my mind the cases cited have not any bearing whatever. He need not make any inquiry. He need not call upon the partners for explanation. It is open to him to say "I am not satisfied " and there is an end of it.

Let us now see what are the circumstances of the present case in order to determine whether any, and which, of the above cases apply to and govern it. In the year 1885 the plaintiff, Thomas Fennock Marshall, one George A. Philp and one Alexander W. Thompson were carrying on business together in partnership at Hagersville, in the County of Haldimand, under the name, style and firm of "The Marshall Seamless Boot and Shoe Manufacturing Company," in the carrying on of which business they used a crimping machine for the manufacture of boots and shoes for which, and for certain improvements from time to time made therein by Marshall, letters patent were granted to him by the Dominion of Canada. The three partners were severally possessed of equal shares or interest in the said letters patent. On the 2nd of October, 1885, the defendant met for the first time Marshall and Philp in Winnipeg, in the Province of Manitoba, and was there induced by them to purchase from Philp two-twelfths

(1) 10 Hare 493. (2) L. R. 9 Ex. 191.

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of his share, and from Marshall one-twelfth of his share, in the said patents and patented articles. The deed from Marshall to the defendant, bearing date the 5th of October, 1885, has been produced, and thereby it appears that Marshall assigned and transferred to the defendant, his executors, administrators and assigns a full absolute one-twelfth interest in and share of three several letters patent for the said crimping machine and the improvements made therein (previously recited in the deed of assignment), and all other patents that may have been issued in respect of such improvements, and the inventions and improvements to which the said letters patent refer and in all rights and benefits held and enjoyed by the said Marshall or to which he is or may become entitled under said letters patent or any other or future letters patent that have been or may be issued for improvements in said invention. On the 21 October, 1885, this assignment appears to have been duly registered in the patent office of the Dominion of Canada. On the 30th October the defendant met Marshall by appointment at the city of Hamilton, and then learned that the said partnership so trading as aforesaid under the name, style and firm of "The Marshall seamless boot and shoe manufacturing company," at Hagersville had become insolvent, and that the firm on the 22nd of October had made an assignment of all their estate and effects to one Lamb in trust for the benefit of their creditors. Besides the letters patent for the said crimping machine and the said improvements made therein granted by the Dominion of Canada, the said Marshall had obtained letters patent in the United States for the said crimping machine and the said improvements made therein, and also in Great Britain. The defendant made an offer to the assignee for the whole property and stock in trade of the partnership including the interest and rights of all the partners severally and

respectively held by them in all the letters patent granted for the said crimping machine and the improvements therein. In order, as it would seem, to give effect to this offer, Marshall and Philp and Mary Jane Thompson executrix of the said Alexander W. Thompson, who had died in the month of August previously, executed a deed bearing date the 28th of November, 1885, whereby, after reciting that on the 22nd October, 1885, Marshall and Philp had made an assignment to Lamb for the benefit of the creditors of the firm, and that doubts had arisen as to whether the interest of Marshal and Philp in the several letters patent set out in a schedule annexed to the deed had passed under the said assignment, and that it had been agreed by and between the several parties to the deed now in recital that Marshall, Philp and Mary Jane Thompson, executrix of the said Alexander W. Thompson deceased, should execute an assignment of all their respective interests in said letters patent to the said Lamb, it was witnessed that the said Marshall, Philp and Mary Jane Thompson, as such executrix, did thereby grant, bargain, sell, assign, transfer and set over all their respective interests in the said letters patent particularly enumerated in said annexed schedule unto the said Lamb, in trust for the creditors of the said Marshall, Philp and Thompson deceased, formerly carrying on business in partnership together under the name and style of "the Marshall seamless boot and shoe manufacturing company." The assignee Lamb, under the authority of this deed, sold, assigned and transferred the whole estate and stock in trade of the said partnership firm, together with said absolute interest in the said letters patent so conveyed to Lamb, unto the defendant who thereupon became the absolute owner thereof for his own benefit, for good, full and valuable consideration paid by him therefor. The letters patent enumerated

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in the schedule annexed to the deed were nine in number, all of them being for the said crimping machine or for improvements therein and thereto made by Marshall, one of which letters patent was granted in Great Britain, four by the Dominion of Canada, and four by the United States of America, of which latter one was issued to the said Alexander W. Thompson deceased. Immediately upon the defendant so acquiring the absolute interest in the said letters patent he employed Marshall to carry on the boot and shoe manufacturing business for him until the 2nd of February, 1886, when Marshall having alleged that he had made some further improvements in the said crimping machine an agreement was executed by and under the hands and seals of Marshall and the defendant whereby after reciting among other things that the defendant was the owner of the said letters patent of invention (a list of which was annexed to the deed) under and by virtue of certain assignments thereof which had been duly registered, and that the said Marshall had made certain improvements in the said patents of invention, and that the defendant had agreed to employ the said Marshall for the purpose of demonstrating and placing the said patents of invention granted, and all such as are hereafter granted, upon the market for the purpose of sale in such manner as the defendant should deem most advantageous, he, the said Marshall, covenanted that he would at the request of the defendant apply and petition for, and take such steps as might be necessary for obtaining, letters patent in all such countries as the defendant should deem advisable, and at the cost, charges and expenses of the defendant, and that he should also, as speedily as might be after the date of the said agreement, apply for said petition or take such steps as might be necessary for obtaining letters patent for the said alleged improvements he had made

in the said crimping machine in all such countries as the defendant might deem advisable, all fees, costs, charges and expenses in connection with the obtaining of such letters patent being borne by the defendant; and that upon such letters patent being granted he would assign them to the defendant; and it was expressly provided that the defendant should have exclusive control and management of all matters in connection with the said patents, and that the said Marshall should be simply the defendant's agent for the purposes aforesaid. And the said Marshall covenanted to devote his whole time and attention to the business of the defendant, and that he should not directly or indirectly engage in any other business, occupation or employment, and that he should be faithful to defendant in all his transactions and dealings, and should from time to time consult him in all matters in any way appertaining to the said patents or any of them. And the defendant by the said deed agreed to employ Marshall for the term of two years from the date of the said deed, for the purpose of demonstrating and placing the said patents of invention granted, or to be granted, on the market on the following terms, namely, $100.00 per month to be paid to the said Marshall during the said term and his actual travelling expenses and board and twenty per cent of the actual net profits that should be derived in any way whatsoever from the sale or otherwise of the said patents of invention. And finally it was agreed by and between the said parties to the said deed that the defendant should be the absolute judge as to the manner in which the plaintiff Marshall should perform his duties under the said agreement, and should have the right at any time to dismiss him for incapacity or breach of duty, and that in such event the plaintiff should only be entitled to be paid his salary up to the time of such

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dismissal, and should have no claim whatever against the defendant.

This deed, as it appears to me, is plainly framed upon the assumption that the defendant, as purchaser of the absolute rights of Marshall, Philp and Thompson in the letters patent already issued for the crimping machine, and for improvements made thereto by Marshall, of which the deed recites that the defendant is the owner, was also entitled to the benefit of the further improvement in the machine alleged by Marshall to have been made by him but not yet patented ; and there can, I think, be no doubt that, in point of fact, the defendant was so entitled to this extent and in this sense, that as the improvement was alleged to be in the patented machine, of which the defendant was then the acknowledged owner, the plaintiff adversely to the defendant could have had no enjoyment of letters patent for such improvement. The alleged improvement in the patented machine, of which the defendant was the owner, if patented by Marshall would not have enabled him to make any use of the defendant's patented machine ; and as the alleged improvement was in that machine itself such improvement of itself, apart from the machine, would have been useless ; and the use of it by Marshall in connection with the defendant's patented machine would have been an infringement of the defendant's rights in the patented machine of which he was the acknowledged owner by assignment from Marshall, so that Marshall could have had no beneficial enjoyment of his newly alleged improvement during the currency of the letters patent assigned to the defendant. *Ex parte Fox* (1). Such being the position of the parties Marshall, by the deed of the 2nd February, 1886, agrees to apply for letters patent for his

(1) 1 Ves. and Bea. 67.

alleged improvement, not for himself and his own benefit, but for the defendant and simply as his agent, and at his request, and at his costs, charges and expenses, and only in such countries as he shall direct, and the defendant agrees to employ Marshall to devote his whole time and attention in the business of the defendant for the purpose of demonstrating and placing the said patents of invention upon the market, and agrees to pay Marshall certain specified remuneration for the services to be rendered by him, consisting partly of a determined sum per month besides his actual travelling expenses and board and partly of an undetermined sum of 20 per cent. of net profits, such part being conditional upon there being any such profits, but the whole of such payments, both the determined or fixed sum and the conditional, being by way of remuneration only for the services to be rendered by Marshall during the period for which he was to be employed, namely for two years, subject to express provision that the defendant should be the absolute judge of the manner in which the plaintiff should perform the duties of his said employment, and should have the absolute right to dismiss the plaintiff at any time for what the defendant should consider to be in breach of the plaintiff's duty in the rendering the services required of him. This, as it appears to me, is the manifest construction of the contract, and it gave in plain terms an absolute right to the defendant to determine the employment whenever the plaintiff should fail to give the defendant satisfaction as to the manner in which the plaintiff performed the services required of him, without specifying any particular act or default which failed to give satisfaction. To use the language of Jessel M. R. in *Russell* v. *Russell*, (1) which is the only one of the above cases which appears to me to apply to and govern this case:

(1) 14 Ch. D. 481.

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It is open to the defendant to say to the plaintiff I am not satisfied with the manner in which you discharged the duties required of me, and there is an end of it.

In the event of the defendant exercising such his right to dismissal it was expressly agreed that the plaintiff should have no claim for anything whatever save only payment of his salary under the agreement up to the time of such dismissal, and this, in my opinion, determines the plaintiff's claim as well for that portion of the remuneration agreed to be paid to him which was conditional upon there being net profits, as for the fixed sum agreed to be paid monthly. Turning now to the plaintiff's statement of claim we find that he rests his claim for relief:

1st. Upon the allegation that the agreement does not contain the true agreement between the parties, and he states what he alleges was the true agreement, and prays that the deed may be reformed; but in this contention the plaintiff wholly failed. for he admitted that the agreement had been read to him, that he objected to the clause relating to dismissal, but that the defendant said that if he, the plaintiff, would not sign the agreement as it was, he would have nothing more to do with it. He admitted that, upon this, he signed the agreement with full knowledge of the terms of the clause as to dismissal, and although he thought it a very arbitrary clause and that he thought he was wrong in signing it, and although he made no remonstrance against his dismissal, he thirteen months afterwards brings this action in which, without any averment that he has always been ready and willing since the dismissal to render the services he had agreed to render, he complains:

2. That the defendant dismissed him wrongfully and unlawfully, and without any just or sufficient cause; and he claims a right in law to obtain the whole bene-

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fit of the employment as if he had continued rendering services to the satisfaction of the defendant during the whole term of the two years.

That the agreement is not one in the nature of a co-partnership interest in the letters patent granted for the crimping machine and for the improvements made therein there can be, in my opinion, no doubt. It was simply a contract of employment of the plaintiff by the defendant to render certain services to the defendant in the business of the latter, for which services the defendant agreed to give to the plaintiff a stated remuneration, partly fixed and determined, partly undetermined and conditional upon there proving to be a net profit accruing from the business, and he agreed that the employment should continue for two years, subject to the condition that the defendant might at any time dismiss the plaintiff if he should fail to perform the services required of him to the defendant's satisfaction, and that upon such dismissal the plaintiff's claim upon the defendant for every part of the remuneration agreed to be paid should cease and determine. This may have been, as the plaintiff admits he thought it was when he signed the contract, an arbitrary clause; with that the court has nothing to do; arbitrary or not arbitrary it is the contract of the parties that it should have effect.

But whatever be the true construction of the contract, *Russell* v. *Russell* (1) and the language of the learned Master of the Rolls there commenting upon *Blisset* v. *Daniel* (2) and *Wood* v. *Woad* (3), is conclusive, in my opinion, that the present case was not at all one in which a judge has any right to inquire whether the defendant had or had not sufficient cause for exercising the power of dismissal, which by the contract was submitted to

(1) 14 Ch. D. 471. (2) 10 Hare 493.
(1) L. R. 9. Ex. 191.

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his sole absolute judgment and discretion; and even if *mala fides* could be a matter to be inquired into and passed upon in a case of dismissal under a contract in the terms in which the present is, none was suggested in the statement of claim, or in point of fact, at all; nor did there appear to be any ground upon which such a charge could be rested. The learned judge who tried the case was of opinion that even if the point was open to him to decide there was no evidence to justify his arriving at the conclusion that the defendant acted otherwise than with the most perfect good faith in exercising the power of dismissal vested in him by the contract. The learned Chief Justice of the Court of Appeal has taken the same view of the evidence, in which, also, I must say that I entirely concur. The appeal therefore must, in my opinion, be allowed with costs, and judgment entered for the defendant in the court below dismissing the plaintiffs' action with costs.

PATTERSON J.—I agree with his lordship the Chief Justice of Ontario that the dismissal of the plaintiff under the tenth clause of the agreement did not work a forfeiture of his interest in any profits that might happen to be made by means of the patents, but that it only cut short the two years' engagement, and that his dismissal without previous notice and without any form of judicial trial was justified by the tenth clause Upon the law bearing on the construction of the power given by the clause I have nothing to add to what has now been said by his lordship the Chief Justice and by my brother Gwynne. The divisional court made an order for an account consequent upon their finding that the dismissal was wrongful. That order ought not now to stand. No case is made for it. I concur with Mr. Justice Osler's remarks on that

subject. The fourth clause of the agreement, as I understand it, gives the plaintiff an interest in potential net profits. Reading the whole agreement I am inclined to the view that only the profits made in the first two years are intended. The order for an account is not so limited, but I take it that a demand for an account before the end of two years,—this action being brought within the two years—is premature. The only part of the plaintiff's judgment which he can plausibly expect to retain, after our decision that his dismissal was warranted by his contract, is the abstract declaration that he has an interest in the profits. But we cannot declare that interest without defining it, and I am not prepared to affirm it to the extent affirmed by the divisional court. The plaintiff has not given us the assistance of any argument in support of his contention. The learned judge who tried the action declined, for reasons that seem to me to be good reasons, to entertain the question, and confined his judgment to the charge of wrongful dismissal. The plaintiff now fails, as he failed at the trial, upon that charge which was his main ground of action, and I think our proper course is simply to restore the judgment given at the trial, which dismissed the action with costs, and to allow the appeal with costs.

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Appeal allowed with costs.

Solicitors for appellant : *Walker, Scott & Lees.*

Solicitors for respondent : *Carscallen & Cahill.*

1890 C. F. BLACHFORD (PLAINTIFF).....APPELLANT;

*Nov. 18.

AND

1891 DAME JESSIE McBAIN ET VIR (DEFENDANTS)..... } RESPONDENTS.

*Feb. 26.

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

Appeal—Title to land—Supreme and Exchequer Courts Act, sec. 29 (b.)

In an action brought before the Superior Court with seizure in recaption under arts. 857 and 887 C. C. P. and art. 1624 C. C. the defendant pleaded that he had held the property (valued at over $2,000) since the expiration of his lease under some verbal agreement of sale. The judgment appealed from, reversing the judgment of the Court of Review, held that the action ought to have been instituted in the Circuit Court. On appeal to the Supreme Court,

Held, that as the case was originally instituted in the Superior Court and that upon the face of the proceedings the right to the possession and property of an immoveable property is involved, an appeal lies. Supreme and Exchequer Courts Act, sec. 29 (*b*) and secs. 28 and 24. Strong J. dissenting.

MOTION to quash appeal for want of jurisdiction.

The following is the judgment of the Registrar in Chambers upon the application on behalf of the plaintiff to give security for costs and for leave to appeal from the judgment of the Court of Queen's Bench:—

"This was an application by Mr. Duclos on behalf of the plaintiff Blackford, to have the security required to be given by sec. 46 of the Supreme and Exchequer Courts Act approved and an appeal thereby allowed from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side) rendered on the 22nd of September last, dismissing the plaintiff's action with costs."

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

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"The plaintiff by his declaration, dated the 6th September, 1889, alleges in substance that he leased to the defendants a certain lot of land (describing it) for one year from the 1st May, 1888, at a rental of $138 per annum, payable monthly, in instalments of $11.50 each; that the lease terminated on the 1st May, 1889, but the defendants remained in possession and continued to use and occupy said premises against his will and consent and refused to vacate said premises, although duly notified to do so; that the defendants are indebted to plaintiff in the sum of $46 for the use and occupation of the premises for the months of May, June, July and August then last past. The plaintiff prays that a writ of *saisie gagerie* in ejectment issue, that defendants be condemned to pay to plaintiff the said sum of $46 with interest, that the lease shall be declared to have terminated on the 1st May, 1889, and that the defendants be condemned to give up and forthwith deliver to the plaintiff the said premises, failing which that they may be ejected and plaintiff put in possession—the whole with costs."

"The defendant Dame Jessie McBain pleads to the action, denying that she holds the premises by virtue of the lease but under circumstances after set out; alleging that she had always been willing to pay for the use and occupation of the premises the sum of $46, which she brings into court and is willing the plaintiff should take upon discontinuing his action. She then sets out at considerable length that the plaintiff on or about the 3rd May then last 'agreed to sell and did in fact bargain, sell and convey over' to one Peter McFarlane the premises in question for $2,750 upon the terms she mentions; that it was agreed between the plaintiff and said McFarlane that a regular notarial deed of sale should be drawn, and the said McFarlane thenceforth considered as proprietor of said premises;

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that the plaintiff and McFarlane in the presence of a notary stated the agreement and instructed him to draw a notarial deed of sale; that previous thereto, to wit the latter part of April then last, the defendant had agreed with McFarlane, that if said McFarlane should succeed in purchasing the property for anything under $2,800 she would pay him (McFarlane) for it said sum; that after the arrangement between plaintiff and McFarlane, to wit on the 3rd of May then last, the said McFarlane after mentioning his agreement with the plaintiff, did 'agree to and in fact bargain, sell and transfer and make over to her the said defendant,' the said property upon certain terms she sets forth; that it was agreed between her and McFarlane that a regular deed of sale should be drawn the ensuing week simultaneously with the deed from plaintiff to McFarlane, and that the terms and conditions were to be the same as those between plaintiff and McFarlane save as to price; that she paid said McFarlane $100 on account of the price; that it was agreed between her and McFarlane that she should remain in possession as proprietor; that relying upon McFarlane's promise she remained in possesion; that when the plaintiff demanded possession on the 1st May, 1889, she notified McFarlane, who said he would hold her to her bargain, and also the plaintiff to his bargain; that on the 7th of May McFarlane through a notary put plaintiff *en demeure* to carry out his agreement, and notified him he would hold him responsible for the breach of it, inasmuch as he had entered into negotiations with others for its sale, meaning to refer thereby to defendant; that the said McFarlane has wholly failed to carry out his agreement with her, notwithstanding a notarial protest on her part, and the plaintiff has wholly failed to carry out his agreement with said McFarlane; in fact that they are acting in concert, at the instigation

of enemies of the defendant, to annoy the defendant by refusing to carry out their respective agreements; that the defendant does not hold under the lease, but under the conditions set out, which the plaintiff knew, and that the proceedings taken were only taken to annoy and harass her, for which she reserves a recourse in damages and prays *acte* of her tender of the $46, and the dismissal of the plaintiff's action with costs."

"On the 9th of October, 1889, by consent and under reserve of all plaintiff's rights, the $46 were taken out of the court. The case came before Mr. Justice Belanger of the Superior Court, when the defendants raised the objection that the Superior Court had no jurisdiction, inasmuch as the case came within art. 887 of the C. C. Proc., and the claim of the plaintiff was limited by his declaration to $46, by reason whereof his demand and action came within the jurisdiction of the Circuit Court and the jurisdiction of the Superior Court was ousted. This objection was sustained by the Superior Court but the judgment of that court was reversed by the Court of Review (Gill, Tait and Tellier JJ.) on the grounds that the principal demand of the plaintiff was to obtain possession of his immovable property, not by rescinding the lease, but because the lease had terminated, and the claim for $46 was only an accessory, and that the jurisdiction of the tribunal is determined as well by the annual value of the immovable as by the fact that it was sought to obtain possession of the immovable and that such annual value exceeding $100 the Superior Court had jurisdiction."

"This latter judgment was reversed in appeal, and the plaintiff seeks to appeal to the Supreme Court of Canada."

"*Mr. Archibald* Q. C. showed cause against the application and referred to article 887 of the C.C.P., Revised

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Statutes P.Q., p. 727, vol 2, and contended that the case did not come within section 29 of the Supreme and Exchequer Courts Act, because the question of the title to the property was not really in issue, that the plea of the defendant was clearly demurrable and could not in the form of action taken by the plaintiff be entertained; that the plaintiff ought to have brought his action in the Circuit Court, and if the Superior Court had no jurisdiction to entertain it this court had none, because the action to be appealable must originate legally in a Superior Court. He took no objection to the appeal on the ground that the judgment sought to be appealed from was not a final judgment."

"Mr. Duclos, for appellant, contended that the action was properly brought in the Superior Court, for the reasons given in the Court of Review, and that if not originally properly brought in that court the plea of the defendant gave jurisdiction to that court, and that the title to the property was clearly in question. He filed and read four affidavits to show that the property was of a greater value than $2,000."

"In my opinion the order for the approval of the security should go. The action, rightly or wrongly, has originated in a Superior Court; the question in controversy on the face of the pleadings (as to the validity of the defendants' plea I do not consider it necessary to express an opinion) seems to me to involve the right to the possession and property of the immovable specified in the plaintiff's declaration and the defendants' plea: the value of the property has been shown to be over $2,000, and as to whether the action was properly originated in the Superior Court or not is the question and the only question which has so far been considered by the courts, and this question I consider I should not express an opinion upon but should leave to the Supreme Court to decide. In these circumstances

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I think the security should be allowed. The respondent whose duty it is to move to quash for want of jurisdiction at the earliest opportunity, if he remains of the opinion that no jurisdiction exists, will be able to bring the question before the full court at its approaching session; the delay incurred will be trifling, and in the meantime he will have the benefit of the security offered by the appellant."

The respondent thereupon moved to have the appeal quashed for want of jurisdiction.

Archibald Q.C. for respondent;

Duclos for appellant.

Sir W. J. RITCHIE C. J.—This action was brought in the Superior Court and it is quite clear that a question involving the title to lands is raised by the pleadings and therefore section 29 (*b*) Supreme and Exchequer Court Act applies and the court has jurisdiction.

STRONG J.—There are two distinct questions of jurisdiction involved in this case, but one only of these is raised by the present motion to quash the appeal. All we have to determine at present is whether this court has jurisdiction to entertain the appeal, assuming that the Court of Queen's Bench had jurisdiction, though it is manifest that if the appeal should proceed to a hearing the first question to be decided will be that as to the correctness of the judgment of the Court of Queen's Bench which dismissed the appeal to that court for defective jurisdiction. Our decision of this motion must depend on whether we can hold this to be an action of which under clause 29 (*b*) of the Supreme and Exchequer Courts Act the Supreme Court can take cognizance. In other words whether

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we can say that this action, instituted in the Superior Court for the District of Beauharnois, involved any question "relating to the right to any fee of office, duty, &c., payable to Her Majesty, or any title to land or tenements, annual rents, or such like matters or things where rights in future might be bound."

The action is one of ejectment by which a landlord seeks to expel his tenant, the lease having expired. It is a personal and in no sense a real action. It has for its object to compel the tenant to perform his personal obligation, growing out of the contract of lease, to deliver up the premises to the landlord at the expiration of the term. That being so, no question of title to lands appears upon the record at all. It is true that the tenant has pleaded an exception which on the face of it is absurd and utterly untenable, setting forth some verbal agreement for the sale of the property by the landlord to a third party who has, it is pretended, verbally agreed to re-sell to the appellant, but this for obvious reasons can have no influence in conferring jurisdiction. It is, therefore, impossible to refer the claim of the appellant to have his appeal entertained by this court to any positive enactment of the statute and in default of that the appeal is entirely unwarranted.

The judgment in the court of first instance holding that the original jurisdiction was in the Circuit Court exclusively and quashing the action for that reason was reversed by the Court of Review, but restored by the Court of Appeal; if we allow the appeal to proceed that will be the preliminary question which we shall have to decide on the hearing, but I think that question cannot arise unless the appeal is admitted, and, therefore, I forbear from expressing any opinion on it now as it would be premature to do so. Therefore, exclusively upon the ground that this court has

no jurisdiction, even supposing that the Court of Queen's Bench was wrong in determining that that court had none, I am of opinion that the present appeal must be quashed.

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FOURNIER J.—L'appelant, demandeur en cour inférieure, avait poursuivi les intimés pour se faire rendre la possession d'un immeuble qu'il leur avait loué et qu'ils détenaient après l'expiration du bail. Il réclamait $46, valeur de l'occupation après l'expiration du bail, et il concluait en outre à ce que les intimés fussent évincés de la propriété et à en être mis en possession lui-même.

Une première action prise à la cour de Circuit, dans laquelle ne fut pas soulevée la question de juridiction, fut renvoyée à la forme. Dans la présente action devant la cour Supérieure, il ne fut pas fait objection à la juridiction par les parties, mais la cour se déclara d'elle-même sans juridiction sur le principe que l'action n'était que pour $46. C'est devant la cour de Circuit qu'elle aurait dû être portée. La cour de Revision fut unanime à renverser ce jugement.

En appel, la cour du Banc de la Reine, considérant qu'il n'était réclamé que $46, la cour de Circuit avait seule, et à l'exclusion de la cour Supérieure, juridiction pour entendre et décider cette cause, cassa le jugement de la cour de Revision.

A l'appel de ce jugement devant cette cour les intimés ont fait motion pour faire renvoyer l'appel pour défaut de juridiction.

La première question à décider est de savoir quelle est la nature de la demande. Le but évident du demandeur est de rentrer en possession de son immeuble que les intimés détiennent malgré lui depuis l'expiration du bail. Sa demande de $46 pour la valeur de l'occupation depuis l'expiration du bail est indépendante de

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la demande de possession de la propriété, tellement qu'il pouvait renoncer à cette partie de sa demande, sans que ses contentions au sujet de la possession de la propriété en fussent affectées en aucune manière.

Si la demande avait été seulement pour la possession de la propriété, dont la valeur reconnue dépasse $2,000, elle eût été certainement bien portée devant la cour Supérieure; comment peut-il se faire que parce qu'il demande en outre de la propriété elle-même, la somme de $46, le montant de sa demande puisse être considéré comme diminué et tombé dans la juridiction de la cour de Circuit.

Comme le prouve le plaidoyer des intimés, toute la contestation entre les parties est au sujet de la possession de la propriété, et nullement quant aux $46 qui ont été déposées en cour et retirées par le procureur de l'appelant. La seule question qui reste à juger entre les parties est celle de la propriété de l'immeuble en question en cette cause soulevée par le plaidoyer des intimés. Elle était évidemment de la juridiction de la cour Supérieure. Comme il est admis que la valeur de la propriété est au delà de $2,000, et que la contestation entre les parties est au sujet du titre de cette propriété ; pour ces deux motifs la cause est appelable à cette cour en vertu des sections 24, 28 and 29 de l'acte de la Cour Supreme.

En conséquence je suis d'avis de renvoyer la motion avec dépens.

TASCHEREAU J.—This case comes up on a motion to quash the appeal for want of jurisdiction. That motion must be refused. The jurisdiction of this court on the case is beyond controversy.

The appellant instituted an action with seizure in recaption in the Superior Court, at Beauharnois, under the lessor and lessee articles of the Code of Procedure and Article 1624 of the Civil Code, alleging that he had

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leased a certain property to the defendants, and that though the said lease had expired yet the defendants refused to quit the premises and continued in possession thereof.

The declaration concludes by asking that the defendants be condemned to pay $46 for their use and occupation since the expiration of the lease, and that they be ordered to give up and deliver the said premises to the plaintiff.

The defendants met that action by a plea in which they allege in substance that at the expiration of their lease the plaintiff sold or agreed to sell the premises in question to one McFarlane, who on the same day sold the same to them, the defendants, and that they now occupy and hold the said premises, as full owners thereof.

The Superior Court, at Beauharnois, declared itself incompetent *ratione materiæ* upon grounds with which we have now nothing to do, and dismissed the action. The Court of Review reversed that judgment, but the Court of Appeal restored the Superior Court's judgment and dismissed the plaintiff's action. From this judgment the plaintiff now appeals. Now, to ascertain whether the appeal lies or not, it is not to Articles 887 and 888 of the Code of Procedure that we have to refer; neither have we on this motion, in the least degree, to go into the merit of the question of jurisdiction between the Superior Court and the Circuit Court raised in the case, and upon which the appeal is taken. All we have to do, to ascertain our own jurisdiction, is to refer to section 29 of the Act under which this court sits. Now, that section, coupled with sections 24 and 28, clearly enacts that as to the Province of Quebec, an appeal lies from all final judgments of the Court of Queen's Bench, in actions, suits or causes originally instituted in the Superior Court wherein the matter in contro-

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versy relates to any title to lands or tenements where the rights in future might be bound. Now, this is an appeal from a judgment of the Court of Queen's Bench. It is in an action originally instituted in the Superior Court, and the matter in controversy clearly relates to the title to this land or tenement, and the case is one where the rights of both parties in future might be bound. *Darling* v. *Ryan* (1); *Bank of Toronto* v. *Le Curé, etc.* (2); *Gilman* v. *Gilbert* (3); *Chagnon* v. *Normand* (4). The respondent contends that the action was wrongly taken in the Superior Court, that the Circuit Court only had jurisdiction. That may be or not. We shall decide that when we come to hear the appeal. For the present it is sufficient that it is in fact instituted in the Superior Court to give us jurisdiction; and I do not see how the respondents, who asked by their plea that the appellant's claim to the possession of these premises be dismissed on the ground that the appellant has parted with the title thereto, and that they, the respondents, now are full owners thereof, can contend on their motion to quash this appeal that the matter in controversy does not relate to the title to this property, and is not one where their rights in future and the appellant's rights in future might be bound.

PATTERSON J. concurred with Taschereau J.

Motion dismissed with costs.

Solicitors for appellant: *McCormick, Duclos & Murchison.*

Solicitors for respondents: *Archibald & Foster.*

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(1) Cassels's Dig. p. 254.
(2) 12 Can. S.C.R. 25.
(3) 16 Can. S.C.R. 189.
(4) 16 Can. S.C.R. 661.

THE MERCHANTS BANK OF HALIFAX (PLAINTIFF)..... } APPELLANT ;

AND

CHARLES B. WHIDDEN (DEFENDANT)..RESPONDENT.

1890
*Oct.28,29.

1891
*May 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Bank—Agent of—Excess of authority—Dealing with funds contrary to instructions—Liability to bank—Discounting for his own accommodation—Position of parties on accommodation paper.

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank which he discounted as such agent and, without indorsing the drafts, used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty as creating a debt due to it from his firm, the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment.

Held, affirming the judgment of the court below, Gwynne J. dissenting, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.

Per Ritchie C. J.—K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm and when the firm received that money they became debtors to the bank for the amount.

Per Strong and Patterson JJ.—That the agent being bound to account to the bank for the funds placed at his disposal he became a debtor

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

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to the bank, on his authority being revoked, for the amount of these drafts as money for which he had failed to account. Whether or not the bank had a right to elect to treat the act of the agent as a tort was not important as in any case there was a debt due.

Per Gwynne J.—The evidence does not establish that these drafts were anything else than paper discounted in the ordinary course of banking business, as to which the bank had its recourse against all persons whose names appeared on the face of the paper and were not obliged to look to any other for payment.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment for the defendant at the trial.

The defendant is assignee for a firm called King Bros. & Co. under a deed of trust for the benefit of creditors in which the plaintiff bank is first preferred creditor and the defendant one of the second. The suit was brought to compel the defendant to carry out the trusts created by the deed.

Thomas M. King, a member of the firm of King Bros. & Co., was agent of the plaintiff bank at Antigonish, N.S., at which agency the firm had a line of discount. The said T. M. King obtained from the defendant his indorsement to certain drafts on one Thompson, and without said drafts being indorsed by him or his firm the said King, as agent of the bank, discounted them and applied the proceeds to the use of his firm, although their line of credit at the agency of the bank had for some time prior to this been exceeded. It is in respect to these accommodation drafts that the contest in this case has arisen.

The assets of the estate of King Bros. & Co. were not sufficient to pay the bank as first preferred creditor even if these drafts are not included in the bank's claim. It is contended, therefore, for the plaintiff, that the drafts do not constitute debts due from King Bros. & Co. to the bank, the name of the firm not appearing thereon, and the transaction on its face being an

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ordinary discount for the benefit of the defendant. The contention against this is that King Bros. & Co. having received the money of the bank procured by the discount of the drafts are liable to repay it as a debt due from them. The sole question, therefore, was: Did this transaction create a debt due from King Bros. & Co., or any member of that firm, to the plaintiff bank for the amount represented by these drafts?

The learned judge before whom the case was heard decided this question against the contention of the bank and gave judgment for the defendant. His decision was affirmed by the Supreme Court of Nova Scotia sitting *en banc*. From the decision of the full court the plaintiff brought this appeal.

Henry Q. C. and *Ross* Q.C. for the appellant. There was no contract between King and the bank. *Bank of Upper Canada* v. *Bradshaw* (1).

If King committed a wrong against the bank defendant must prove damages. In such case, also, to compel the bank to treat the transaction as a contract would be to deprive them of the right to treat it as a tort.

The bank never exercised their option of treating it as a debt due from King. *Brewer* v. *Sparrow* (2); Story on Agency (3).

The remedy of a *cestui que trust* against the trustee, or of a principal against his agent, for breach of duty must be by an equitable action for an account.

W. Cassels Q.C. and *W. B. Ritchie* for the respondent. King always treated these drafts as debts due to the bank and the indorsements as collateral.

The deed provides for payment of all debts due the

(1) L. R. 1 P. C. 479. (2) 7 B. & C. 310.
(3) 9 ed. sec. 291.

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bank. As to construction of word "debts" see *Flint* v. *Barnard* (1); *Gwatkin* v. *Campbell* (2).

The bank has dealt with the drafts as King's paper. See *Oriental Financial Corporation* v. *Overend, Gurney & Co.* (3).

The defendant was only a surety for King to the bank. See *Bechervaise* v. *Lewis* (4).

The question of election does not arise in this case *Phillips* v. *Homfray* (5).

The learned counsel also cited *Gray* v. *Seckham* (6); *Ex parte Twogood* (7); *Ex parte Rhodes* (8); *Dudley Bank* v. *Spittle* (9); *Dresser* v. *Norwood* (10); *Ramshire* v. *Bolton* (11); *Holt* v. *Ely* (12); *Bishop* v. *Bayly* (13).

Henry Q.C. in reply. Defendant cannot be treated as a surety. King simply borrowed the money from defendant using the bank funds for the purpose.

As agent of the bank King never assumed to lend money to himself.

The bank had a right to treat the matter as a wrong committed by King of which right they would be deprived by regarding it as a debt.

SIR W. J. RITCHIE C.J.—King being agent of the plaintiff, the Merchants Bank, and also a member of the firm of King Bros. & Co., discounted for the benefit of that firm certain accommodation drafts which he obtained from defendant Whidden for the express purpose of having them discounted at the plaintiff's agency of which he had charge, and on the understanding that he should indorse them, which,

(1) 22 Q.B.D. 90.
(2) 1 Jur. N.S. 131.
(3) 7 Ch. App. 142, affirmed in L.R. 7 H.L. 348.
(4) L.R. 7 C.P. 372.
(5) 44 Ch. D. 694.
(6) 7 Ch. App. 680.
(7) 19 Ves. 231.
(8) 3 Mont. & Ayr 218.
(9) 1 J. & H. 14.
(10) 17 C.B. N.S. 466.
(11) L.R. 8 Eq. 294.
(12) 1 E. & B. 795.
(13) 3 M. & S. 362.

however, he never did; the firm of King Bros. & Co. had a line of discount at the bank which the discounting those notes would exceed and by not endorsing them he wished to make the transaction appear on the books of the bank as a discount, not for King Bros. & Co., as in fact it most certainly was but for Whidden. King Bros. & Co. having failed, and being largely indebted to plaintiff and others, made an assignment to defendant on 31st December, 1883, of certain real estate and personal property to have and hold same

in trust to convert into money all and singular the premises and everything hereby conveyed, and as soon as practicable to collect in all and singular the debts and sums of money aforesaid, and after deducting the costs, charges and disbursements of the trusts before mentioned and of these presents and all matters incidental thereto, to pay and apply the moneys arising therefrom in manner following, that is to say : All debts by the said assignors or either of them due and owing or accruing or becoming due and owing—

1st. To the Merchant's Bank of Halifax.

2nd. To Charles B. Whidden, C. B. Whidden & Sons, and Payzant and King, the last named debt not to exceed in this connection three thousand dollars.

The other provisions do not bear on the question in this case which simply is : Are these drafts so discounted by King the agent for the use of King Bros., and by King Bros., of which King the agent was a partner, applied to and used in their business by that firm, covered by the words

all debts by the said assignors or either of them due and owing or accruing or becoming due and owing to the Merchants Bank of Halifax ?

I am of opinion that when King, the agent of the bank, deposited in the bank this accommodation paper and in lieu thereof took out of the bank the amount thereof, and appropriated that amount to the purposes of the firm of King Bros., it was a loan by the bank through him to his firm secured by the deposit of the accommodation paper, and therefore became a debt due

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by him and his firm to the bank, the liability for which he could not escape by withholding his indorsement. The withholding his indorsement did not alter the transaction which simply was that he obtained this accommodation paper for one purpose, and for that one purpose alone, viz., to enable him through its instrumentality to borrow for his firm from the bank the amount this paper professed to represent, and the moment King Bros. received that money they became debtors to the bank for the amount they so received.

There is not the slightest pretence for saying that the money raised by King on this accommodation paper was money raised by the makers of this paper and by them loaned to King Bros. as was contended before us, the evidence showing that the very reverse was the case. Whidden & Co. had no transaction whatever with the bank; they simply gave King this accommodation paper and he used it in the manner I have indicated. Supposing King Bros. had remained solvent and the parties on this accommodation paper had failed and become utterly and entirely unable to pay, could King be allowed, in order to escape liability, to say, "I discounted this paper *bonâ fide* on the strength of the names on it whom I believed perfectly good, and, therefore, no liability ever attached to me on it?" Surely the answer would be "the transaction was not that of the accommodation drawer or endorser, but unquestionably your own; the accommodation parties having become utterly unable to pay as accommodation parties they could have no claim on you except for indemnity, and if they never paid or never could pay anything they never did and never could lose anything, and therefore never had or could have any claim for indemnity against you. Are you therefore to keep this money you got out of the bank (I say borrowed from the bank) and pay nobody, and so

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the bank lose its money and you retain it on such a flimsy pretext that you did not put your name on the paper as you ought to have done ?" In other words can King say : True, my firm got your money and used it in their business here ; the accommodation parties can't pay, and so can have no claim for indemnity against me or my firm. But because I did not indorse the paper, but simply deposited it as security for the money advanced by you to me, you have no claim against me or my firm, so I am not liable to you or any body else ; I will, therefore, set you at defiance, keep your money and pay nobody ? Could such a contention be tolerated ? I certainly think not. It seems to me too absurd to be mentioned except to be scouted as inconsistent with law, justice and common sense. It is clear the bank has some ulterior object in view. How very different would the contention of the bank be if the parties to this accommodation paper were worthless and the estate of King Bros. fully sufficient (as it is said to be) to meet all debts "due, owing or accruing, or becoming due and owing to the bank," and this claim was resisted by the other creditors on the ground that it was not a debt covered by the trust deed. I have no doubt whatever that this appeal should be dismissed with costs in this and all the courts.

STRONG J.—This appeal depends on a single question, viz. : Whether a debt from King to the appellants was constituted by the application of the funds of the bank by King for his own use, as being the proceeds of discounts of the four drafts on Thompson drawn by the respondent for King's accommodation, and of Cunningham's note endorsed by the respondent also for King's accommodation. If this is to be answered in the negative then so much of the decree made by Mr. Justice James as declares that such a debt did

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arise was wrong and ought to be struck out, otherwise the decree is right and the appeal must fail.

The solution of this question appears to depend on the application of ordinary principles of the law of agency to the undisputed facts disclosed by the evidence.

That King was the agent of the appellant's bank at Antigonish, and that as such agent he was intrusted with the appellant's monies to be used and applied in the business of banking, and that he did, in fact, apply part of these funds, to the extent of the amount now in question, to his own use by purporting to discount the paper before referred to, cannot be disputed. Neither can it be, nor is it, denied that the bills and note in question were all accommodation paper drawn and indorsed by the respondent for the benefit of King and procured to be so drawn and indorsed by King for the sole purpose of enabling him to get into his own hands for his own use or for that of his firm funds of the bank equivalent to the proceeds of the bills on a discount of the same ; nor that the discount of such paper by King for the purposes mentioned was in direct contravention of the express orders and instructions of his principal, the present appellant.

Then upon this state of facts it is manifest that without resorting to the device of waiving a tort in order to be able to sue on contract, a device and fiction of which it may be remarked in passing that however applicable it was in a proper case before forms of action were abolished it can be of but little practical use in the present system of pleading and procedure, the bank could at once without awaiting the maturity of the paper have sued King, had they thought fit to do so, for the recovery of the money he had so, in breach of his duty, appropriated.

The legal proposition upon which this depends is

simply this: An agent entrusted with the funds of his principal with instructions limiting him as to the application of these funds is liable to have his authority revoked at any time, and upon such revocation of authority becomes bound to account for the moneys of which he has had the disposition, and in respect of any amount which he cannot show to have been duly applied in accordance with the instructions he has received he is a debtor in the ordinary sense of the word of his principal. No one can gainsay this as an elementary rule of the law of agency.

Then, to apply it here, King was originally a debtor of the bank in respect of all moneys placed in his hands and so remained, save as regards so much as he had applied in the ordinary course of the business of banking carried on in compliance with the appellant's instructions. If this were not so there would be no such thing as control of the agent's conduct by the principal's instructions. No question of a third party's rights intervening arises in the present case; the question is to be regarded as one purely between principal and agent. It follows that when the business was taken out of King's hands and his agency was revoked he remained a debtor for the amount now in question which had been applied to his own use in defiance of the prohibition of his principal.

I should have thought that the only question open in the case was one which does not seem to have attracted much attention either here or in the court below, namely, whether there had been such an adoption of these discount transactions by the bank as to amount to a confirmation of them as loans upon the paper alone and exclusive of any personal liability of King.

The evidence, however, wholly fails to establish any waiver or discharge of King's original liability, for

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there is no inconsistency in the bank retaining the liability of the parties to the bills and also holding King liable as being, what he most undoubtedly was, the real though fraudulent borrower and debtor. The appeal must be dismissed with costs.

FOURNIER J.—Concurred.

TASCHEREAU J.—I would dismiss this appeal for the reason given by Mr. Justice Weatherbe in the court below.

GWYNNE J.—(His Lordship set out the pleadings in the case, the decree of the court below and a summary of the facts, after which he proceeded as follows): The evidence shows the drafts to have been handed to Thomas M. King to be used by him in such manner as he should think fit or should have occasion to use them. As between him and the parties to the drafts he had the fullest power to deal with them as he should think fit, subject only to his promise that he would retire them as they should become due. As between him and the bank all that the evidence shows is that he would be acting in disobedience of his instructions if he should discount the paper of King Bros. & Co., or of himself. He does not appear to have been forbidden to discount good paper, although it should be accommodation paper, for persons whose names did not appear upon the paper. No evidence to that effect was offered. He himself says in his evidence that it was his practice as agent of the bank to discount paper for parties whose names did not appear on the paper, and he said that it was not for the purpose of preventing the inspector of the bank from knowing that King Bros. & Co. had received the proceeds thereof that he discounted the drafts without

endorsing them; that he did not consider the application of the proceeds was a matter with which the inspector had anything to do. No one but himself knew anything of the application of the proceeds until the 29th December, 1883, when the making of the trust deed and its terms were under consideration. What he says upon this point upon his examination-in-chief as a witness called by the defendant is:

I told Mr. Knight about two days before the execution of the deed, there was reference made to paper drawn by C. B. Whidden & Sons upon A. C. Thompson, about two days previous to the execution of the deed, when I said to the inspector of the bank, Mr. Knight, that that paper was in the interest of King Bros. & Co., and included these four drafts. Mr. Whidden said in this conversation that "it would be some time before we could realize from the estate, it will be inconvenient for me to take up this paper." Mr. Knight replied "we will allow this paper to remain as past due bills until you have an opportunity of realizing from the estate."

And on cross-examination he says:

I had conversation with Mr. Knight in reference to these drafts, at the office of Mr. Bligh, on the 29th December, 1883. Mr. Knight, the defendant, Mr. Bligh and myself were present. I informed Mr. Knight that there was certain paper in the bank drawn by C. B. Whidden & Sons on A. C. Thompson, the proceeds of which were used in the interest of King Bros. & Co. He expressed surprise; the defendant said that he received no part of the proceeds of the said drafts, and Mr. Knight then engaged that when these drafts should become due, they should remain as past due bills till the defendant could have opportunity of realizing from the insolvent estate.

And he says further that Mr. Knight refused to recognize the drafts as being paper upon which King Bros. & Co. were liable to the plaintiff, and insisted that the plaintiff would look to the parties on the paper for the payment thereof, subject only to his promise as above stated that as the drafts should become due they should be held as past due bills till the defendant could have an opportunity of realizing from the insolvent estate, but that they were not, nor should they be deemed to be, liabilities of King Bros. & Co. to

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the bank, or within the provisions of the trust deed in its favor.

Now, without impugning the right of the plaintiff to have disavowed the transaction when brought to its notice, if it was a transaction in excess of the agent's authority, or its right to look to Thos. M. King to make good any loss it might sustain by the paper proving to be bad upon the principle that he had no right to suffer his interests as a member of the firm of King Bros. & Co. to conflict with his duty to the plaintiff as its agent, it cannot be doubted that the bank had the right to treat the drafts when discounted as its property, and that no person whose name appears on the drafts could question the bank's right to hold them as its absolute property, and to recover thereon against all the parties thereto in the character in which their names appear on the paper as debtors of the bank, in respect of the amounts secured thereby. By delivery of the drafts to Thos. M. King in the manner in which, and for the purpose for which, they were made, accepted and endorsed, the parties to the drafts authorized Thos. M. King to make whatever use of them, and of the proceeds thereof when discounted, as he should think fit; whether he should or not have discounted them at his own agency was a matter with which the parties to the drafts were not concerned, that was a matter between the plaintiff and its agent whose act the plaintiff had a perfect right to adopt if it should think fit; it was for the bank to determine how they should deal with the agent's conduct; as matter of fact it has always insisted upon its right as owners of these drafts to recover against the parties thereto as its debtors. There has never been any doubt raised as to the solvency of the parties to the drafts, nor has the bank ever called in question or had occasion to call in question the right of Thomas

M. King to have discounted them as he did. Whether Mr. Knight, as inspector of the bank, had any power by any undertaking of his to alter the position of the bank and to deprive it of the rights it had against the parties to the drafts, and to change the transaction into a debt primarily due to it by persons whose names were not on the paper at all, for the payment of which debt the drafts should be deemed to be collateral security only, we need not inquire, for the evidence utterly fails to establish that any undertaking of the kind had ever been given by Mr. Knight. It would have been very strange for him to have given such an undertaking, and equally strange for the bank to have recognized and affirmed it if given after King Bros. & Co. had become insolvent, and while the parties to the drafts remained solvent. But it is quite clear, I think, that the bank never did agree to regard the monies secured by the drafts as constituting debts due to it by King Bros. & Co. The promise of Mr. Knight, which was a naked promise without any consideration, that the drafts as they should fall due should remain over as past due bills until the defendant should have an opportunity of realizing the trust estate, was quite consistent with the claim of the plaintiff to look to the parties to the drafts as the only persons liable to it, and, indeed, the evidence sufficiently shows that it was made at the request of the defendant, and in case of the liability of the parties to the drafts without any prejudice to the plaintiff's claim against them, as the only persons liable in respect thereof, and to give the defendant an opportunity to protect himself under the provision in his favor contained in the second paragraph of the clause prescribing the order in which the trust funds should be applied. This is the fair construction to put upon the evidence, and that it was so understood by the defend-

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ant as a business man appears, I think, from certain questions submitted by him to the bank before he realized the trust estate and from his conduct upon receiving the answers of the bank to those questions. In the month of January, 1884, the defendant submitted to the bank the questions following :—

1. What paper in the head office and agencies do they (the bank) claim to rank under the first preferential clauses in the assignment?

2. Will they use all legitimate means to collect the paper in said offices as it matures or in the very near future (either as promisor or endorser) other than the paper lying in the Antigonish agency known as the Antigonish paper?

3. Will they allow all such Antigonish paper lying in the Antigonish agency, amounting to some $19,000, to lie as past due bills as per a well understood arrangement with the inspector, Mr. Knight, at the time the assignment was being made, or do they require such portion of said paper as does not bear the name of King Brothers & Co., or either of said firm, to be retired as it matures?

4. If they require such paper to be provided for as it matures, about $8,000 of the same being the paper either of C. B. Whidden or of C. B. Whidden & Sons, are they prepared to give the same like banking facilities as in the past?

5. Are they prepared to say that they will claim for such paper as lies in the head office at Halifax, and some of which has already matured, before I can claim in payment of my own paper as under the 2nd clause of the deed of assignment?

To these questions the cashier of the bank addressed and sent to the defendant, on the 25th January, 1884, the following answer :—

DEAR SIR,—At a meeting of the board of directors of this bank held yesterday your list of questions with regard to the King paper and other business was considered. I am directed to inform you that this bank claims to rank on the King estate under the first preference clause for any paper held at this office or any of the agencies on which advances have been made.

Every means, however, will be used to collect from all promisors on the paper held by the bank, and instructions will be issued at once to its agents to give this matter their best attention.

With regard to your third question, any paper at Antigonish agency bearing the names of King Brothers & Co. will be charged to past due bills as it matures on the understanding and promise of

yourself that funds will be paid in at once and from time to time as you may realize against such paper. In reference to the balance of the paper proceeds of which are said to have been used for the benefit of King Brothers & Company, the directors would have no objections after having received the concurrence of all parties concerned to allow this class of notes to remain on as past due bills provided satisfactory security was given.

Referring to your fourth question, the directors will be prepared at all times to afford yourself and C. B. Whidden & Sons the usual banking facilities. I need hardly mention that any paper offered by you for discount would be subject to approval.

With regard to your fifth question, the directors cannot decide on the legal effect of the clause in the assignment, but think it covers all the notes in the bank. The bank, to preserve its claim on endorsers, must claim on all the notes it holds, and if there is any dispute it must be settled between the assignee and the endorsers. The bank will, in all cases, look to the endorsers of the notes the assignee does not pay.

Upon receipt of these answers the defendant was made fully aware that the bank's claim was, that it covered all paper having upon it the names of King Bros. & Co., or of either of the partners, which paper they agreed to allow to lie over as past due bills, conditional upon the defendant promising to retire that paper as he should realize out of the estate. And as to all paper which, like the drafts in question, had not on them the names of King Bros. & Co., or of either of the partners, but which are said to have been used for the accommodation of King Bros. & Co., they too might lie over as past due bills, provided all the parties on such paper should consent, and that satisfactory security should be given.

Now the defendant, as to the four drafts in question drawn by C. B. Whidden & Sons, upon and accepted by Thompson, says that instead of giving the security thus asked for he preferred himself retiring, and that he did retire, those drafts as they matured.

These drafts, therefore, having been so paid by the defendant in discharge of the liability of C. B. Whidden & Sons, according to the tenor of the

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drafts, the plaintiff had no further claim in respect of them, and what is now asked by the person who, in discharge of his liability upon the drafts, retired them, in effect, is that such payment of the drafts shall be disregarded, and that the plaintiff shall be compelled to disavow against its will the act of its agent in discounting the drafts which hither to they had not disavowed, and that it shall now be compelled to treat the transaction in a light in which it was never entertained by it, namely, as a loan by the bank to Thomas M. King, for which therefore he became the debtor of the bank, either as sole debtor, or as principal or primary debtor for whose debt the parties to the drafts were only sureties to the bank, and that in the taking of the accounts of the trust estate the defendant shall be allowed now to get credit for the monies paid by him in discharge of his liability on the drafts as if they had been paid in discharge of a debt which, at the time of the execution of the trust deed, was due and owing or accruing due by King Bros. & Co., or by Thomas M. King to the bank, and provided for in the first preferential clause in the trust deed in favor of the plaintiff. Thus compelling the bank to accept King Bros. & Co. or Thomas M. King as its debtor for the amount of the drafts in lieu of the parties whose names are on the drafts, and who are the only parties whom, up to the time of the drafts having been paid by one of the parties thereto, the plaintiff has regarded as its debtors in respect of the monies represented by these drafts. The object of the defendant plainly being thus to get for himself and C. B. Whidden & Sons the benefit of the first preferential clause in the trust deed, which is in favor of the plaintiff, to secure payment thereby of so much of its claim against the assignors of the trust deed as is represented by the drafts retired by the defendant,

instead of having recourse to the trust estate under the second preferential clause of the trust deed in their favor.

For such a contention there is, in my opinion, no foundation in law or equity. The plaintiff never entered into any such obligation, nor can any such be forced upon it against its will by a court of justice. None of the cases referred to by the learned counsel for the defendant support any such pretension. In answer to it it is sufficient to say that the plaintiff itself is the only person competent to determine whether it should disavow or adopt an act of its agent, even though it should be an act done in disobedience of the instructions given to him, and that it has always recognized the title vested in it by the act of its agent in discounting the drafts in question, and that it never recognized the transaction in relation to these drafts and to its interest therein in any other light than as the liability and debt of the parties whose names are upon the drafts according to their tenor and effect. No court has any jurisdiction to declare that, under the circumstances attending the discounting of the drafts and the plaintiff acquiring title to them, King Bros. & Co. or Thomas M. King became and were accepted by the bank as its debtors in respect to the amounts of the drafts, or to compel the bank against its will to accept and treat them as the debtors to the bank in respect of such amounts.

The appeal, therefore, in my opinion must be allowed and the decree varied so as,in addition to the declaration therein as to the demand note for $1,350, to declare that at the time of the execution of the trust deed no part of the amount represented by the four drafts in question constituted or was a debt due and owing or accruing due and owing to plaintiff by the assignors of the trust estate in the trust deed mentioned, and

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that upon the taking of the accounts of the trust estate the moneys paid to the plaintiff in retiring those drafts cannot, therefore, be applied and charged as a payment to the plaintiff under the first preferential clause in the trust deed in its favor, and declare further that the promissory notes of King Bros. & Co.in the statement of claim mentioned are payable out of the trust estate under the said first preferential clause in favor of the plaintiff. Reserve further considerations and costs, but the costs of this appeal should be paid by the respondent. Allow appeal with costs to be paid by the respondent as the claim set up by him was in the interest of himself and his firm, and his defence was not merely that of a trustee asking directions of the court in a matter wherein he was indifferent.

PATTERSON J.—On the 31st December, 1883, Thomas M. King and Charles R. King assigned in trust to Charles B. Whidden, the present respondent, their real and personal property. The deed recited, amongst other things, that

the said assignors are, or one of them is, indebted to the said trustee and the other creditors hereinafter made preferential for cash advanced and loaned, moneys held in trust, and liabilities incurred otherwise than for goods sold and delivered in the ordinary course of trade, which advances and loans so made, moneys so held, and liabilities so incurred as aforesaid were appropriated to the payment of the ordinary commercial liabilities of the said assignors.

The trusts were to convert the estate into money, and, after paying costs and disbursements, to pay

All debts by the said assignors or either of them due and owing or accruing or becoming due and owing—

First.—To the Merchants' Bank of Halifax.

Second.—To Charles B. Whidden, C. B. Whidden & Sons, and Payzant and King, the last named debt not to exceed in this connection three thousand dollars.

Third.—To [5 named creditors], and any balance still due or owing

the said Payzant and King over and above the sum of three thousand dollars aforesaid.

Fourth.—To [23 named creditors].

Fifth.—All other private debts of the said Thomas M. King due on promissory notes to parties in the County of Antigonish incurred for the benefit of the said business of King Brothers and Company, and all other debts of the said Charles R. King or King Brothers and Company for cash advanced or for accommodation paper on behalf of said firm, and out of the residue to pay and discharge in equal proportions the respective debts of all the other creditors who shall, within six weeks from the date hereof, execute these presents.

Then followed a release by the creditors of

All and every their and each of their respective debts due and to grow due, and all claims, actions and demands whatsoever against them or either of them which they, the said creditors or any of them, may or can have against the said assignors or either of them from the beginning of the world to the present time, provided always that no surety at law or in equity shall be released or discharged by anything contained in these presents or by the execution thereof by any creditor or creditors.

Thomas M. King was partner of his brother Charles R. King in a mercantile business at Sydney, C. B., which business was conducted by Charles, and he was himself agent at Antigonish for the Merchants' Bank of Halifax, the present appellant. T. M. King or his firm were debtors to the appellant for large sums of money, chiefly upon paper to which they were parties. The dispute upon this appeal is whether the amounts of four drafts discounted at the Antigonish agency of the bank, on which the name of T. M. King or of his partner or firm did not appear, are to be reckoned as debts entitled to rank under the first preference as due by the assignors to the bank.

These drafts were drawn by the respondent's firm of C. B. Whidden & Sons on and accepted by one Thompson for the accommodation of King. They were indorsed by C. B. Whidden & Sons and handed to T. M. King, with the intention that he should indorse them and negotiate them for the benefit of his firm.

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He did negotiate them by discounting them as agent of the bank and applying the proceeds to his own use or that of his firm, but without indorsing them.

By what may at first sight appear like an inversion of interests the struggle on the part of the bank, the first preferred creditor, is to maintain that these four drafts, or more properly speaking the money advanced on them, do not come within the first preference as debts due by King. This arises from the insufficiency of the estate, the bank preferring to look to the parties whose names are on the paper ; and the defendant, whose firm are liable as indorsers and entitled to rank on the estate only after payment of the first preferred debts, having a very direct interest in bringing this debt within that class.

The action is in form for the execution of the trusts of the deed, the plaintiff claiming payment of a number of notes of King Bros. & Co., to which the defendant is not a party. The defendant shows that he has paid to the plaintiff out of the trust moneys received by him upwards of $30,000, which includes the amount of a number of notes indorsed by him or his firm, the four disputed drafts among the rest, as well as a number of debts for which he was not personally liable.

If he can properly charge the amounts of these four drafts against the estate there will not be enough to pay the debts now claimed by the plaintiff.

If he is not entitled so to charge them then he and the other parties to the paper must provide for it. Hence the struggle.

We are not troubled, as I understand the evidence and the pleadings, with any question of subrogation, as we might be if the indorsers had paid the drafts to the bank and were now asserting a right, as sureties for a debt of King to the bank, to take the place of the

bank in the first preference distribution. The defendant who is sued as the trustee happens to be one of the indorsers, but the other parties to the paper are not before us, and the payment which the plaintiff has received was not from the indorsers, but was made by the defendant individually out of the trust funds, or perhaps in anticipation of funds afterwards received. I have no means of knowing how that was, but I find in the evidence that, when the bank authorities required security as a condition of holding the drafts as past due paper until money could be realised from the estate, the defendant says that rather than give security he paid the money. I do not know how the estate accounts stood at the time, but knowing that the paper which it was proposed to hold over included many other notes of King, and finding the amounts of these four drafts and the interest upon them included in the $30,000 statement of payments on account of the estate, I take it that the payments were by the defendant acting or assuming to act as trustee, and not on behalf of the indorsers or the acceptor of the drafts.

It is said that King's motive in omitting to indorse the drafts was to avoid the appearance of their being discounted on behalf of himself or his firm. There seems to have been some irregularity in his method of dealing in such matters. His right to discounts from the Merchants' Bank was limited, according to Mr. Whidden's account of what King told him, to $5,000 at the Sydney agency and $10,000 at Antigonish. Mr. King was asked: "Had the firms of which you were a member limits of credit with the Merchants Bank? And if so, state what these limits were;" and he answered "I was only in connection with one firm, viz., King Brothers & Co.; the limit of the firm's credit at Sydney, Cape Breton, with the Merchants Bank was

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$5,000" saying nothing of any limit or any line of credit at Antigonish. In answer to another cross-interrogatory he states that at the time the drafts were discounted his firm had advances and discounts up to their limit. Then we have this question and answer.

6. If you state that your firm received part of the proceeds of these drafts, give your reasons for discounting them without indorsing them?

To the Sixth Cross-Interrogatory I say the firm of King Brothers & Co. had no account at the Antigonish Agency where these drafts were discounted, the account having been closed more than a year prior by the direction of the head office of the bank, after which, as agent, I refused their indorsement.

This reason would be more satisfactory if we found that the transaction went to the account of C. B. Whidden & Sons. in the books of the bank, but in place of that the proceeds of the notes were received directly by King. Nor is the answer easily reconciled with what appears in a statement prepared by King at the time of making the assignment, setting out the notes held by the bank with Antigonish names. There are seventeen notes amounting in all to over $17,000. Nine of them have the name of King Bros. & Co.; one has the name of T. M. King; four of the others are the drafts now in question; and the dates range from that of the earliest till after that of the latest of the drafts.

But there is no doubt left of the fact that these four drafts represent moneys of the bank applied by King to his own purposes, and that his indorsement, which under ordinary circumstances would have been there, was omitted because, in advancing or appropriating to himself the bank moneys under color of discounting the paper, he was exceeding his authority and acting in violation of his duty as agent.

The essence of the transaction was not altered by the form in which it was put. It was an appropriation by King to his own uses of funds entrusted to him by his

employers. It was argued that it ought to be regarded as a loan from the bank to C. B. Whidden & Sons, and a loan of the same money by that firm to King Bros. & Co. There might be no legal or technical difficulty in so treating the transaction as against the respondent if the interest of justice or the rights of third parties required us to do so, particularly as the respondent put it in the power of T. M. King to negotiate the paper without becoming a party to it. That would, however, be giving more effect to the form in which the thing was done than to the proved intention of the parties, and, after all, the form of a discount on account of C. B. Whidden & Sons was not consistently carried through, because the proceeds of the drafts were not passed to their credit but were directly applied by King to his own purposes. It was well remarked by the learned Chief Justice in the court below, that if King had taken the money without security he would be liable to repay it, and that his wrongful dealing with the security placed in his hands does not do away with his liability. The technical character of his liability would be the same whether he borrowed from the bank or from C. B. Whidden & Sons. It would be for money lent or money had and received. Whose money was lent or was received by him to his own use? That the answer must be the money of the bank seems to me plain from the whole evidence, an important part of which is the explanation given by Mr. Whidden that he had no idea when he indorsed these drafts that King had exhausted the credit allowed him by the bank.

The case of *The Bank of Upper Canada* v. *Bradshaw* (1), which was cited for the appellants rather tells against them. It was sought to charge Bradshaw, who was a local agent of the bank, with moneys which he had

(1) L. R. 1 P. C. 479.

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advanced in alleged excess of his authority, but the moneys had not been advanced in form or effect for his own use and benefit, and he was held on that ground not to be liable in the action. One sum had been advanced to a corporation in which he was a shareholder. The corporation was the customer of the bank, and the fact that Bradshaw as a shareholder was distinct in point of law from the company itself was given as one reason, amongst others mentioned in the judgment delivered by Lord Cairns, which placed that charge on the same footing as the others.

It has been urged on behalf of the appellant that King's unauthorized dealing with the bank moneys was a wrong which did not create a debt unless the bank elected so to treat it, and it is said no such election has been made.

The former of these two propositions assumes, I think without sufficient warrant, that the bank could have proceeded against King in an action *ex delicto*. But even if that were so, there was at the same time a debt created by the receipt of the moneys. Of course only one action could be maintained. If an action of tort were brought it would not be competent to sue in debt for the same cause of action, and *e converso*. That, however, is not the point. The question is: Was there a debt created from King to the Merchants' Bank within the meaning of the first trust of the deed? Conceding for argument's sake that the taking of the money was a tortious act, it would all the same create a debt. Many cases may be cited as express authorities for this. I lately examined several of them in *Molson's Bank* v. *Halter* (1), viz., *Chowne* v. *Baylis* (2); *Emma Silver Mine Company* v. *Grant* (3); *Cooper* v. *Prichard* (4); *Evans* v. *Bear* (5); *Cobham* v. *Dalton* (6); *Ex parte Kelly* (7). Others

(1) 18 Can. S.C.R. 88
(2) 31 Beav. 351; 8 Jur. N. S. 1028.
(3) 17 Ch. D. 122.
(4) 11 Q.B.D. 351.
(5) 10 Ch. App. 76.
(6) 10 Ch. App. 655.
(7) 11 Ch. D. 306.

referred to in the respondent's factum are *Dudley and West Bromwich Bank* v. *Spittle* (1) ; *Ramshire* v. *Bolton* (2) ; *Holt* v. *Ely* (3) ; *Neale* v. *Harding* (4).

Thus the proposition which asserts the necessity for the bank to elect to treat King's liability as a debt is beside the question even if it were sound in law. But if such election were important it is, as I apprehend, sufficiently shown by the release to which the bank is a party. The release plainly covers this liability. In this respect it is consistent with the recital, and if the aid of those parts of the deed were required to give the widest possible comprehension to the word "debts" as used in the trust clauses they would have that effect. I believe, moreover, that the fair result of the evidence (even leaving out that of King through whom the bank acted when he received the money) concerning the negotiations connected with the making of the assignment is to show a recognition on the part of the bank of this debt as a debt of King, though when the state of his affairs began to be understood a different tone may have been adopted. So little depends, however, in my opinion upon the attitude taken on the part of the bank that it would be useless to discuss the evidence at length.

Upon the grounds I have attempted to explain, and for the reasons given in the court below by the Chief Justice and Mr. Justice Weatherbe, I am of opinion that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitor for Appellant : *Thomas Ritchie.*

Solicitor for Respondent : *W. F. Parker.*

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(1) 1 J. & H. 14.
(2) L. R. 8 Eq. 294.
(3) 1 E. & B. 795.
(4) 6 Ex. 349.

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*Oct. 30, 31.
1891
*May 12.

EUPHEMIA G. LAMB AND ANOTHER..APPELLANTS;

AND

BARTHOLEMEW CLEVELAND, ADMINISTRATOR, &C., OF SARAH JANE CLEVELAND, DECEASED..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Statute—Repeal of—Restoration of former law—Distribution of intestate estate—Feme coverte—Husband's right to residuum—Next of kin.

The Legislature of New Brunswick, by 26 Geo. 3 c. 11 ss. 14 and 17, re-enacted the Imperial act 22 & 23 Car. 2 c. 10 (Statute of Distributions) as explained by s. 25 of 29 Car. 2 c. 3 (Statute of Frauds), which provided that nothing in the former act should be construed to extend to estates of *femes covertes* dying intestate but that their husbands should enjoy their personal estates as theretofore.

When the Statutes of New Brunswick were revised in 1854 the act 26 Geo. 3 c. 11 was re-enacted, but sec. 17, corresponding to sec. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme coverte* her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission.

Held, that the personal property passed to the husband and not to the next kin of the wife.

Per Strong J.—That the repeal by the Revised Statutes of 26 Geo. 3 c. 11, which was passed in the affirmance of the Imperial acts, operated to restore sec. 25 of the Statute of Frauds as part of the common law of New Brunswick.

Per Gwynne J.—When a colonial legislature re-enacts an Imperial act it enacts it as interpreted by the Imperial courts, and *a fortiori* by other Imperial acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. 3 c. 11 (N.B), it was not necessary to enact the interpreting section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole act.

PRESENT: Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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Held, per Ritchie C.J., Fournier, Gwynne and Patterson JJ., That the Married Woman's Property Act of New Brunswick (C.S. N. B. c. 72), which exempts the separate property of a married woman from liability for her husband's debts and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the act had never been passed.

The Supreme Court of New Brunswick, while deciding against the next of kin on his claim to the residue of the estate of a *feme coverte*, directed that his costs should be paid out of the estate. On appeal the decree was varied by striking out such direction.

APPEAL from a decision of the Supreme Court of New Brunswick affirming a decree of the Judge of Probate for Westmoreland County in proceedings for administration of the estate of a married woman.

The sole question to be decided in the case is: When a married woman dies, intestate and leaving property, is her husband, or her next of kin, entitled to such property according to the law in force in New Brunswick? The courts below have decided that the property goes to the husband.

The English Statute of Distributions (22 & 23 Car. 2 ch 10) was formerly part of the common law of New Brunswick, as was also sec. 25 of the Statute of Frauds which declared that nothing in the Statute of Distributions should be construed to extend to the estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal property as they might have done theretofore

The New Brunswick act, 26 Geo. 3 ch. 11, re-enacted the English Statute of Distributions and the said section of the Statute of Frauds. The Revised Statutes of New Brunswick, passed in 1854, contain 26 Geo. 3 ch. 11, except section 17, corresponding to section 25 of the Satute of Frauds, which was omitted. The present Statute of Distributions is ch. 78 C.S. N.B., which is in the same form as the Revised Statutes.

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In this state of the statute law the appellants, who are the next of kin to the deceased, and who would be entitled to her personal estate if she had left no husband, claim that the latter's rights are swept away by the legislature; that the husband formerly took his wife's estate, not by virtue of his marital right but simply as administrator; that his exemption from the operation of the Statute of Distributions being taken away, and it being well settled that he is not of any kin to his wife, he is bound to distribute the estate as would be any other administrator.

W. W. Wells for the appellant. The husband cannot claim the benefit of the general scheme of distribution, as he is not of kin to his wife. *Bailey* v. *Wright* (1); *Milne* v. *Gilbert* (2).

Nor is he entitled to the property by virtue of his marital right. Prior to 31 Edw. 3, he had no right whatever in the personalty of his wife, but it was dealt with by the Ordinary in his discretion (3). Under 31 Edw. 3 c. 11 he simply enjoyed the residue of the personal estate as administrator, the law then being that an administrator was not bound to account to any one (4). He took the estate, not by virtue of his marital right but as "the nearest and most lawful friend" of his wife as the statute provides. See *Fortre* v. *Fortre* (5); *Sir George Sand's Case* (6); *Fettiplace* v. *Gorges* (7); *re Lambert's Estate* (8).

Then under the Statute of Distributions, 22 & 23 Car. 2 ch. 10, the husband would be bound to distribute his wife's estate as he would that of a stranger. The Statute of Frauds only preserved his former right which was to take his wife's property as her administrator.

(1) 18 Ves. 54.
(2) 23 L. J. Eq. 828.
(3) 2 Black Comm. 494.
(4) 2 Black Comm. 515.
(5) 1 Shower 351.
(6) 3 Salk. 22.
(7) 1 Ves. 48.
(8) 39 Ch. D. 632.

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At all events, in New Brunswick the legislature, by repealing the section corresponding to section 25 of the Statute of Frauds, has expressly declared that the husband shall be in the same position as other administrators. See *Wood* v. *DeForrest* (1).

Even if the husband's rights should be considered as otherwise existing, they have been taken away by the Married Woman's Property Act, which vests her separate property entirely in the wife.

Skinner Q.C. and *Pugsley* Sol. Gen. of New Brunswick for the respondent. That the husband took the personal property of his wife at her death *jure mariti* see *Squib* v. *Wyn* (2); *Watt* v. *Watt* (3); Tyler on Infancy and Coverture (4).

The Married Woman's Property Act was intended to protect the separate property of a wife from being taken for the husband's debts, but not to interfere with the husband's right to it at her death. The fact that she could not make a will without his consent shows that the husband's rights were not to be completely swept away by this act.

SIR W. J. RITCHIE C. J.—I am content to rest my judgment on the reasons given by the learned Chief Justice in the court below as I entirely concur in the conclusion at which he has arrived, except with reference to the costs; the defendant having gained the suit, and the court having held the property to be his, he should not, in my opinion, have been made to pay the costs, which was the practical result of saying the costs should come out of his estate. As a general rule when costs are awarded out of the estate it is in cases where the testator has so devised his property as to create ambiguities and mistakes as to the

(1) 23 N. B. Rep. 209.
(2) 1 P. Wms. 378.
(3) 3 Ves. 246.
(4) 2 ed. p. 384.

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proper construction of his dispositions. In such a case the testator has himself really rendered an appeal to the court necessary. In this case the unfortunate defendant was in no way to blame, and having gained his suit I can see no good reason why he should be mulcted in costs. If now the costs are to come out of the estate he will have gained but a barren victory; in fact, he might as well have allowed this small estate to be divided among the next of kin as be obliged to divide it amongst the lawyers, more particularly as to the costs in this court, coming here after such a clear exposition of the law in the court below. I can only look upon this appeal as a mere experiment, and I agree with the learned judge in *Elliott* v. *Gurr* (1) that "if parties will try experiments, and call in question rules clearly established by a uniform course of practice, they, and not the parties proceeded against, ought to be liable to the expenses. It is the duty of the court to check such novelties in practice by costs."

STRONG J.—The question presented by this appeal relates to the disposition of the residue of the personal estate of Sarah Jane Cleveland, a married woman who died intestate and without issue, leaving her husband, the respondent, surviving, and also her brother and two sisters; her father and mother having both died before her. The respondent, as the intestate's husband, obtained letters of administration, and having thereunder administered the estate passed his accounts before the judge of the Probate Court of Westmoreland County, whereupon a question arose as to the proper disposition of the surplus assets of the estate remaining after the payment of the debts. The respondent contended that he was entitled to retain the residue for his own use, whilst the appellants (the

(1) 2 Phillimore 22.

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children and personal representatives of the intestate's brother) insisted that the deceased's next of kin, viz., her brother and sisters or their representatives, were entitled to this surplus. The Judge of Probate having decided in favor of the husband the present appellants appealed to the Supreme Court of New Brunswick, which court having affirmed the judgment of the Probate Judge (Mr. Justice Palmer dissenting) the present appeal has been taken to this court.

The English Statute of Distributions (22 & 23 Car. 2nd cap. 10) was originally in force in New Brunswick as well as the subsequent explanatory enactment contained in the 25th section of the Statute of Frauds. The effect of this legislation is well known; the Statute of Distributions not having made any express provision as regards the husband's rights in the surplus assets of his wife to whom he had been appointed administrator, and doubts having arisen as to its applicability to that case, the 25th section of the Statute of Frauds enacts that the Statute of Distributions should not extend to the estates of *femes covertes* dying intestate, and expressly affirmed the husband's common law right to the whole residue for his own benefit. This provision of the Statute of Frauds, which as part of the law of England was applicable in New Brunswick at and from the date of its organization as a Province in 1784, was, by the Provincial Act, 26 Geo. 3, cap. 11, by which statutory provision was made for the distribution of the estates of persons dying intestate, substantially re-enacted. The 17th section of the last mentioned act was as follows:

> Nothing in this Act shall be construed to extend to the estates of *femes covertes* who die intestate, but that their husbands might administer and enjoy them * * * * * as they might have done before.

In 1854 the statutes of New Brunswick were re-

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vised, and the enactment contained in the 17th section of 26 Geo. 3 cap. 11 was not re-enacted, nor was any other provision made for the case for which it had provided. The appellants insist that the effect of this repeal is to entitle them, as next of kin of the intestate Mrs. Cleveland, to have the estate distributed amongst them in the same way as if she had left no husband. This pretension is, in my opinion, wholly unfounded. According to an elementary rule universally applicable in the interpretation of written laws the effect of the simple abrogation without more of a statutory enactment, not itself repealing but made in affirmance of the previous law, is to revive the law as it stood prior to the passing of the repealed statute, and the application of this rule in the present case must be to bring back the law to the state in which it was before the passing of the 26 Geo. 3 c. 11, that is to say, to restore what originally formed part of the common law of New Brunswick, namely, the law of England as contained in 29 Car. 2 c. 3 sec. 25.

The circumstance that the repealed enactment was identical in its terms with the 25th section of the Statute of Frauds, so far from constituting a reason for not applying the principle referred to is, if any argument of the kind can be required, a reason for applying it, since it affords a strong presumption that the revising legislature repealed and dispensed with the 17th section of 26 Geo. 3 as being a superfluous and useless reiteration of the original law.

I do not feel called upon to enter upon any investigation of the history of the law relating to a husband's right to a grant of administration of his deceased wife's goods, nor of his freedom from liability to distribution prior to the Statute of Distributions. It is sufficient to say that under the law of England as administered long prior to the passing of the Statute

of Distributions, and invariably since the Statute of Frauds, it has always been considered that the husband surviving has a right to the administration of the estate of his wife dying intestate, and that as such administrator he has (as had all administrators before the Statute of Distributions) a right to retain the surplus for his own use. This right it is expressly declared by the Statute of Frauds the Statute of Distributions did not interfere with.

How the exclusive right of the husband came to be originally determined is a matter of no practical importance; it is sufficient to say that it has been settled law for the last two hundred years, and has during that period of time been universally recognized and acted upon and has never been called in question by any judicial authority.

Another question discussed at considerable length on the argument of this appeal, viz., that as to the rights of the next of kin of a husband who survives his wife and dies without having taken out letters of administration to the personal estate of the wife, as against the wife's own next of kin who have obtained administration under 21 Henry 8th cap. 5, is so absolutely irrelevant to the question presented for decision that I decline to enter upon the consideration of it.

I am of opinion that the directions that the costs, as well those in the Probate Court as those in the Supreme Court of New Brunswick, should be paid out of the estate (save so far as they related to the mere passing of the administrator's accounts in the Probate Court) were erroneous. The effect of such directions was to make the respondent bear the costs of a litigation in which he was entirely successful.

Therefore the order under appeal must in this respect be varied by striking out the order for payment of the

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costs out of the estate, and by directing that the appellants do pay to the respondent his costs in both courts below with the exception of those relating to the passing of the accounts. Subject to the foregoing variations this appeal must be dismissed with costs.

FOURNIER J.—Concurred.

TASCHEREAU J.—I see with a sense of relief that whatever conclusion I reach in this case will not affect the result, so I will not take part in the judgment. It would be useless for me to delay it.

GWYNNE J.—The question raised in this case is whether by the law of the Province of New Brunswick a husband, administrator of the estate and effects, etc., of his deceased wife who died intestate, is bound to make distribution of the residue of her personal estate among her next of kin or can retain it to his own use and benefit. The contention of the appellants is that he is, by the law of New Brunswick, bound to make distribution among the next of kin of his deceased wife, and Mr. Wells, in his very able argument in support of that contention, opened up the whole question of the origin and nature of the husband's title to the personal property of his wife as it existed before the passing of chapters 111 and 114 of the Revised Statutes of New Brunswick of 1854, as well as the question of the effect of those statutes, and of chs. 72 and 78 of the Consolidated Statutes of New Brunswick of 1876.

In *Graysbrook* v. *Fox* (1), the reason of the passing of the statute 31 Edw. 3, ch. 11, and the mischief to remedy which it was enacted, are stated to have been: Although the ordinary might (as is there stated by common law)

(1) 7th Eliz. Plowd. 277.

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seize and take the goods which the intestate had at the time of his death, yet, for the debts due to the intestate, or for things in action, the ordinary had no remedy, for he could not bring an action of debt or other action for a debt due to the intestate, and by the same reason he could not release the debts due to the intestate, but his interest was only to seize the things which the intestate had in possession, and with them he might do as he pleased, but he could not sue the debtors of the intestate, and thereby the persons to whom the intestate was indebted could not have remedy for the debts due to them by the intestate, but only according to the rate of the value of the goods in possession, * * * and thus he to whom the intestate was indebted was defrauded of his debt, and he that was indebted to the intestate retained the debt in his hands which, by good reason, ought to go to satisfy the creditor of the intestate. And this was taken to be a thing against conscience, and a great mischief, and therefore, to redress it the statute 31 Edw. 3 c. 11 was made, which enacts that, "in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the King's court for to administer and dispend for the soul of the dead, and shall answer also in the King's court to others to whom the said dead person was holden and bound in the same manner as executors shall answer, and they shall be accountable to the ordinaries as executors are in the case of a testament as well of the time past as the time to come. So that this act provides that where a man dies intestate the ordinary shall commit the administration to others who are the next and most faithful friends of the dead, and it gives them an action of debt and does not give it to the ordinary himself, * * * and so it has remedied the said mischief.

And it is there further said that for the redress of the said mischief,

The act enables the administrators to have an action and to recover the debts as executors may, which point is the only purview of the act.

In *Ognell's case* (1) it was held to be undoubted law that a *feme coverte* could not make an executor without the assent of her husband, and that the administration of her goods of right belongs to the husband, and in *Hensloe's case* (2), in Trinity term 42 Eliz., which decides that the ordinaries had no title by the common

(1) 4 Co. 52 a. (2) 9 Co. 39 a.

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law to the personal estate of persons dying intestate, but that their title thereto was derived from the King to whom as *parens patriæ* they belonged it was adjudged:

That no power was given to the ordinary before the statute to sell or give the goods, or to dispose of any of them to his own use or any other, nor had he any authority to release the debt due to the intestate, nor had the ordinaries or their deputies or committees any action to recover any debt, or to take any advantage of any covenant or of any other thing in action. That by the act the ordinary is bound to grant administration to the next and most lawful friends. That is: the next of blood who are not attained of treason, felony, or have other lawful disability, but are lawful friends; and further, that now by the act the administrators of intestates' estates, although appointed by ordinary under the authority of the act, had nevertheless vested in them by the act a more absolute interest in the goods of the intestate than the ordinary ever had, and consequently than he ever could confer; that they had under the act as absolute property in the goods and chattels of the intestate as executors had.

31 Edw. 3 c. 11 is the first and only statute upon which the title of the husband to the debts due to, and choses in action of, his deceased wife depends; the ordinary had never had any interest in or power over such species of property and consequently could never have transferred to another any interest in or power over such property. By the common law the husband had acquired absolute title in right of his marriage in all the personal property in the possession of his wife at the time of the marriage or which came into her possession during the coverture, and also the right to reduce into possession all debts due to her and all her choses in action, or to release and discharge them during the coverture; so that the wife during the life time of her husband could die entitled to no personal property, unless in virtue of some agreement with her husband, other than debts due to her, or choses in action not reduced into possession and not released or discharged during the coverture, and so it was

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adjudged in the third year of Charles the First in the case of *Jones* v. *Rowe* (1), from Sir W. Jones's report of which, as more full than the other, I make the following extract:—

Before the statute (31 Edw. 3 c. 11) the ordinary had nothing to do with the goods or debts of a *feme coverte*, unless she was executrix to another, for her goods in possession belonged to her husband by the inter-marriage and the wife had no property in them, but the husband if he wished could release them during the coverture; but if the wife should die before their recovery the husband could not sue for them, neither had the ordinary had anything to do with them but the debtor shall have the profit of them. The way to prevent this was to make an executor which the wife could do with her husband's assent and she could make her husband her executor and in this manner as her executor he could recover the debts. The statute of 31 Edw. 3 gives power to the ordinary to commit administration to the next and and most lawful friend of the intestate and no one can be the next and most lawful friend of the wife but her husband and upon her death it is he who takes charge of her funeral and other things belonging unto her and so administration ought to be committed to him and such power given to the ordinary must be strictly pursued and cannot be governed by his discretion and the statute 21 H. 8 does not extend to this case for that is where the husband dies intestate the widow, or his next of kin, or both shall be joined together.

Now, the interpretation put upon the statutes has invariably been, that the husband of a woman dying intestate was exclusively and absolutely entitled to have administration of the goods and effects of his deceased wife granted to him; that in the case of a husband dying intestate it was discretionary with the ordinary to grant administration to the widow of the deceased, or to his next of kin, or to the widow and next of kin conjointly, by 21 H. 8; and that in all other cases administration should be granted to the next of kin of the intestate, or to some or one of them in the discretion of the ordinary where the intestate died leaving several his next of kin in equal degree. It becomes important, therefore, to consider why the

(1.) Cro. Car. 106; Sir Wm. Jones 175.

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same words in 31 Edw. 3 ch. 11 were construed by the courts to apply to the next of kin or the nearest of the blood of the intestate in all cases except in the case of a wife dying intestate, leaving her husband her survivor, in which case they apply to the husband alone, who is not next of kin, or of the blood, of his deceased wife at all. We have seen that in such a case the ordinary before the statute had no power whatever over the goods or debts of the *feme coverte* dying intestate; that without the assent of her husband she could die possessed of no personal estate or effects other than debts or goods over which the husband had had during the coverture full and absolute power to dispose of, relinquish, discharge and release. Prior to 31 Edw. 3 ch. 11 the ecclesiastical courts had exercised the jurisdiction of compelling the persons appointed by the ordinary to administer the personal estate of deceased persons, whether the same should die testate or intestate, to account for any surplus of personal estate remaining after payment of debts and legacies in the case of a will, and after payment of debts where the deceased had died intestate, and of distributing such surplus in the discretion of the courts. After the passing of the acts the ecclesiastical courts attempted to assert their right to exercise the jurisdiction they had before exercised of compelling administrators to account, and of distributing whatever personal estate of the intestate should remain in the hands of the administrator after the satisfaction of the debts of the intestate at the discretion of the ecclesiastical courts equally as before, but the common law courts interposed by prohibition and prevented the continuance of the exercise of such jurisdiction.

In *Slawney's case*, in 19 James 1st (1) administration having been granted to the widow of an intestate it

(1) Hobart 83.

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was adjudged that she could not be compelled by the ecclesiastical courts to distribute any part of a surplus remaining in her hands after satisfaction of debts to or among the next of kin of the intestate not being his children, Hobart C.J. saying:

> If a man observe well the statute 21 H. 8 c. 5, he shall perceive by preferring the wife and children to the administration that the statute did imitate the mind of the intestate to prefer them that it is like he would have preferred if he had made a will, which must be by giving the profit of the estate, and not only labor and dolor in suing and being sued, to bring in and defend the estate, and then to give this vast power to the ordinary to give the surplusage where he will.

So in *Levanne's case*, in 6 Car. 1st (1) where administration had been granted to the sister of an intestate, a prohibition was granted at her suit restraining the ecclesiastical court from entertaining a suit instituted there for the purpose of compelling the administration to distribute a surplus in her hands, said to be large, among the next of kin of the intestate; the court saying that prohibition was well grantable

> because the absolute interest in the goods is in the administrator, and administration being granted the ordinary hath nothing to do, and he cannot now, as he might at common law, repeal the administration committed at his pleasure.

In *Tooker* v. *Loane*, in the 15th year of James 1st (2) a prohibition was granted to restrain the ecclesiastical court interfering to make distribution of the surplus of the personal estate of an intestate in the hands of administrators, "because the ordinary hath no power to make distribution of the surplusage," and the court held that by the true meaning of the statute, specially 21 Hen. 8, a benefit was intended to the administrator and not an unprofitable burthen, and the statute gives a preferment to the wife and next of kin. In an anonymous case decided in

(1) Cro. Car. 202. (2) Hobart 191.

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the 21st year of Charles 2, in the Kings' Bench reported in Sid. 489, it was adjudged that administration of the goods of his deceased wife must be granted to the husband and to no one else; and in *Cox* v. *Webb* (1), the same point precisely, and that this was not like the case of two in equal degree, was adjudged in the Kings' Bench, in the 6th year of William and Mary in the time of Holt Chief Justice.

In *Palmer* v. *Allicock* (2), in the 36th year of Charles 2nd, a man died intestate leaving no wife and only one child, a son, who obtained letters of administration to his father and then died intestate, under age, and his next of kin obtained letters of administration *de bonis non* of the father, whereupon the next of kin of the father instituted a suit in the ecclesiastical court to repeal these letters, and the question was whether a prohibition should go at the suit of the next of kin of the child to prevent the ecclesiastical court repealing these letters of administration. In that case Mr. Pollexfen *arguendo* for the prohibition, which after many arguments was granted, said:

> At the common law there was no wife or child that had any right or interest in the intestate's estate, but the ordinary was the master thereof to distribute it *in pios usus*, and perhaps the wife and children might come in under that name but not otherwise. Then the 31 Edw. 3 c. 11 gave only an action to the administrator, and then the statute 21 H. 8 c. 5 left it in the wife and next of kin by virtue of the administration, but notwithstanding all these there were many inconveniences before the act 22 & 23 Car. 2, c. 10 of distribution. The statute of 21 H. 8 c. 5 settled the administration, but left the estate unsettled, only it went with the administration.

Again he argued:

> Then supposing there be an infant who has an interest vested, whether the estate shall go to the next of kin to the infant, or to the next of kin to the father?

Which was the question before the court; he continues:

(1) Comerbach 289.

(2) 2 Shower 408; 3 Mod. 58.

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Wheresoever the whole estate shall go the administration shall go as if a wife die the husband shall have the administration, though this be not mentioned within the statute of 21 H. 8, c. 5, or this law, (22 & 23 Car. 2 c. 10) and the reason is because the marriage gave him a kind of interest in the estate of the wife and the children shall have nothing to do therein.

In support of which he cited *Ognell's case* (1) and *Rowe's case* (2).

Here we see that the right of the husband under 31 Edw. 3 c. 11 to have administration of his deceased intestate wife's estate granted to him is put upon his having " because of his marriage a kind of interest in the estate of his wife," and, although this be but the argument of counsel, still coming from such an eminent counsel who succeeded in his contention it is entitled to the greatest weight, and in *Fortre* v. *Fortre* (3), in the 4th year of William and Mary, it was adjudged by the whole court, Sir John Holt C.J., that the ecclesiastical court may grant administration to the widow or to the next of kin of an intestate, which they please.

But where the wife dies the husband is to have the administration being the only true and lawful next of kin by the statute 31 Edw. 3, c. 11.

By this language the court cannot be construed as having meant that in point of fact the husband was, by 31 Edw. 3, c. 11, made or declared to be next of kin of his wife, but that he and he alone was to have administration granted to him in virtue of his right as husband to be regarded as the next and most lawful friend of his wife under the statute 31 Edw. 3, and as such beneficially entitled to her estate equally as the next of kin of other intestates were entitled under 21 Hen. 8 c. 5, and 22 & 23 Car. 2 c. 10.

In *Petit* v. *Smith* (4), the reason of the passing of 22 & 23 Car. 2 c. 10, is thus stated by Holt C.J.:

(1) 4. Co. 51.
(2) Cro. Car. 106.
(3) 1 Shower 351.
(4) 1 P. Wms. 8.

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At common law, before the statute ordered administration to be granted, the ordinary appointed committees of the personal estate and in those times it was the practice to compel such committes to distribute, but afterwards when the ordinary by virtue of the act of Parliament, 31 Edw. 3, c. 11, granted administration, this administrator had all the power of an executor, and being in nature of an executor it was adjudged that he was not compellable to make distribution, which being thought hard to those of kin to the intestate of equal degree the statute of distribution was made.

In *Blackborough* v. *Davis* (1) Holt C. J. refers to a case of *Duncomb* v. *Mason* (said in Raymond's reports to have been decided in the Common Pleas in the time of Bridgeman C. J. and therefore not later than the 2nd year of Car. 2nd or two years before the passing of the statute of distributions) wherein it was held that of right the husband could repeal administration granted to the next of the blood of his deceased wife,

because the husband has an original right by 31 Edw. 3 c. 11 as the most lawful friend of the wife and was not within 21 H. 8 c. 5 so that the ordinary had no election in the case of the husband.

And in *Squib* v. *Wyn* (2), Lord Chancellor Cowper says :—

The husband's title at law to the personal estate of the wife is favored ; even a term which is as chattel real shall go to the husband surviving his wife, and as to all the personal goods they are his by the intermarriage : though the husband administering to the wife is liable to pay her debts, yet he is entitled to the surplus which will go to his representatives.

In *Edwards* v. *Freeman* (3) Sir Joseph Jekyle, Master of the Rolls, says that the design of the statute of distributions was:

To do what a good and just parent ought for all his children.

Lord C. J. Raymond (4) says that :

It only makes such a will for the intestate as a father free from the partiality of affections would himself make, and this I may call a Parliamentary will.

(1) 1 P. Wms. 44 ; Ld. Raymond 684.
(2) 1 P. Wms. 381.
(3) 2 P. Wms. 439.
(4) P. 443.

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And Lord Chancellor King (1) says :—

The occasion of making this statute was to put an end to the controversy betwixt the temporal and spiritual courts. The ordinary before took bonds from the administrator to make distribution, and those bonds were at law adjudged void, and the administrator entitled to all the personal estate. One died intestate, leaving a considerable personal estate, and a son and daughter ; the son administered and the daughter contended for a share in the spiritual court where it was thought a hardship that the son should have all, yet the daughter was prohibited at law ; however, this statute of distributions takes away the administrator's pretensions, (which before he had made with success) of retaining the whole.

In *Rex* v. *Bettesworth* (2) the husband's right to have administration granted to him of his deceased wife's estate is said to be

in respect of the interest he has in the estate and because no one is *in æquali gradu.*

In *Humphrey* v. *Bullen* (3) where a husband survived his wife and took out letters of administration to her estate, and died before receiving a legacy to which his wife had been entitled, and the administrator of the husband received the legacy, it was held that he was entitled to retain it against an administrator *de bonis non* of the wife, as the absolute property of the husband. Lord Hardwicke there says :

During the coverture they (that is the husband and wife) are but one person, but when that coverture is dissolved by the death of the wife the husband is certainly the next friend and nearest relation, and has a right to administer exclusive of all other persons.

Lord Hardwicke, by these words, "next friend and nearest relation, and has a right to administer exclusive of all persons," must be taken as expressing the undoubted opinion of the Lord Chancellor, that the husband is the person who is indicated in 31 Edw. 3 c. 11 as "the next and most lawful friend of the dead intestate," and as such exclusively entitled to the

(1) P. 448.

(2) 2 Str. 1112.

(3) 1 Atk. 458.

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administration of his deceased wife's estate. The Lord Chancellor in that case states the object of the passing of the Statute of Distributions thus :

> At common law no person at all had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased till the statute 21 H. 8 c. 5 which gave it to the next of kin, and if there were persons of equal kin, whichever took out administration was entitled to the surplus, and for this reason the statute was made in order to prevent this injustice and to oblige the admininistrator to distribute.

In *Elliott* v. *Taylor* (1) it was adjudged by Lord Hardwicke that the husband's right to administration of his wife's estate is transmissible to his representative and shall not go to hers. Lord Hardwicke there says :

> The husband is not mentioned in the Statute of Car. 2 of Distributions ; his surviving his wife is not a provision within that statute. No person but the husband can be entitled to the personal estate of the wife unless by some agreement, so he might have had administration and the whole would have been his own and nobody could have shared it with him.

Lord Thurlow, it is true, in *Fettiplace* v. *Gorges* (2), speaking of a wife dying intestate leaving her husband her surviving, says :

> In that case the husband takes as next of kin and not from his marital rights,

but it is to be observed that this was not the point in judgment in the case, and in *Watt* v. *Watt* (3), it was expressly decided that a husband could not take under the designation "next of kin" to his wife, Lord Ch. Loughborough there saying :

> The description of next of kin of the wife can in no respect apply to the husband. He is entitled to the personal property of his wife *jure mariti* ; her personal property vests in him by the marriage. At the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property the administration

(1) 1 Wils. 168, reported as *Elliott* v. *Collier* in 3 Atk. 526.

(2) 3 Bro. C. C. 8 ; 1 Ves. 46.

(3) 3 Ves. 247.

granted to him is granted to him as husband, and when you look at the statutes, there is no law that gives the husband a right by force of the statute to administer to his wife. The husband's right is supposed in all the statutes. The statute 21 Hen. 8 c. 5, which directs who shall have administration, takes no notice of the husband. They are to grant it to the widow, or the next of kin, or both. That statute, therefore, does not take the widow to be the next of kin. It takes no notice of the widower for the law gives it to him, and where it was necessary for him to have the authority of the Ecclesiastical Court to enable him to obtain her personal property he had a right to it. That right was secured to him absolutely and exclusively, as held by the courts, by 31 Edw. 3 c. 11.

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The proper conclusion to be deduced from these cases is that the husband, in virtue of 31 Edw. 3 c. 11, was held to be exclusively entitled to have administration of his deceased intestate wife's estate granted to him, and such title was founded upon the principles of the common law which had vested in him all her personal estate in possession and absolute power to reduce into possession for his own benefit all her debts and choses in action and to relinquish, release, acquit and discharge them, of which power being deprived by her death, and in recognition of such his right at common law to all her personal estate, and to enable him to reduce into possession and to recover such of her choses in action as had not been reduced into possession, released or discharged during the coverture, and because there was no one else having any claim in equal degree with him, the exclusive right to have administration granted was held to be vested in him by the statute 31 Edw. 3 c. 11, so that it is more correct to say that it was rather in virtue of his recognised right to beneficial interest as husband in his wife's estate that he became entitled to have administration granted to him in order to enable him to reduce such beneficial interest into possession, than to say that he became entitled to the beneficial interest in virtue of the letters of administration, although such

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letters constituted the mode recognised by law as necessary to enable him to reduce such interest into possession after the death of his wife. So, likewise, the widow and next of kin of an intestate under 21 Hen. 8 c. 5, which act had no application whatever to the case of a wife dying intestate leaving a husband her surviving, in virtue of their recognised beneficial interest in the intestate's estate, and as being the person whom the law deemed that the intestate would himself have preferred if he had made a will, were recognised as being and were held to be the persons to whom the administration of the intestate should be granted, upon the principle that where the estate should go there the administration should go; and further, it was because of the imperfection of 21 Hen. 8 c. 5, in not providing for distribution of the surplus of the intestate's estate after payment of his debts among his widow and next of kin, and because of the injustice and mischief which was occasioned by reason of the courts of common law prohibiting the ecclesiastical courts interfering to compel such distribution even among the next of kin of equal degree, while the common law courts were themselves unable to make any distribution, that the statute of distributions 22 & 23 Car. 2 c. 10 was passed; and finally, in the case of a wife dying intestate leaving a husband her surviving, there being no person who was deemed in law to have any claim upon her personal estate in equal degree with him, that case did not at all come within the range of the injustice and mischief to remedy which the statute of distributions was passed.

We have already seen that the case of a husband surviving his intestate wife was held not to be within, or affected by, 21 Hen. 8 c. 5. Indeed the language of this latter act seems to place this beyond all doubt wherein it enacts that:

In case any person dies intestate the ordinary shall grant the administration of the goods of the person deceased to the widow of the same person deceased or to the next of his kin or to both.

This provision seems to have been enacted merely for the purpose of enabling a widow to have an interest in the estate of her intestate husband, which otherwise she would not have had, without in any manner interfering with the right of a husband to administer to the estate of his intestate wife, which the courts held to have been absolutely vested in him by 31 Edw. 3 c. 11. Now, a perusal of 22 & 23 Car. 2 c. 10 discloses a similarity of expression naturally to be expected in an act intended to be passed for the purpose of amending the provisions of 21 Hen. 8 c. 5., and of remedying the injustice and mischief occasioned to the next of kin of the intestate in equal degree with the administrator appointed under that act by reason of the action of the common law courts interfering to prohibit the ecclesiastical courts to compel a distribution of surplus while themselves unable to supply a remedy.

In 21 Hen. 8 c. 5, the provision is:—

In case any person dies intestate, or that the executor named in any testament refuse to prove the said testament, then the ordinary, or other person or persons having authority to take probate of testaments as above is said, shall grant the administration of the goods of the testator or person deceased to the widow of the same person deceased or the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good, taking surety of him or them to whom shall be made such commission for the true administration of the goods, chattels and debts which he or they shall be so authorised to administer, and in case where divers persons claim the administration as next of kin, which be in equal degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where, indeed, divers persons be in equality of kindred, as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making the request where divers do require the administration.

And in 22 & 23 Car. 2 c. 10 the provision is:

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And be it enacted that all ordinaries, and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estates in manner and form following, that is to say, one third of the said surplus to the wife of the intestate, and all the residue by equal portions to and amongst the children of such person dying intestate and such persons as legally represent such children in case any of the said children be then dead other than such child or children, not being heir at law, who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life time by portion or portions equal to the share which by such distribution shall be allotted to the other children to whom such distribution is to be made, * * * and in case there be no children nor any legal representatives of them then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree and those who legally represent them.

Now, bearing in mind that the husband, by administration granted to him of the personal estate of his intestate wife, in effect obtained merely the power to recover and to reduce into possession after the death of his wife the debts and choses in action belonging to his wife over which during the coverture he had had by the common law the absolute right, to recover them for his own benefit, and power to relinquish, release and discharge them, and that the law regarded him absolutely entitled to such administration because of his relationship of husband of the deceased intestate upon, and in recognition of, the principles of the common law, and bearing in mind, also, that in his case the law held that there was not, nor could be, any person who could be said to have any claim in equal degree with him, it must, I think, be admitted that the 22 & 23 Car. 2 c. 10 could not with propriety be held to have any application to the case of a wife dying intestate, leaving a husband her surviving, any more than 21 Hen. 8 c. 5, which, as we have seen, was always held to have had no application to such a case. However, it does appear that about five

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years after the passing of 22 & 23 Car. 2 c. 10 a claim similar to that made in the present case was made in *Wilson* v. *Drake* (1), by the brother of a woman who had died intestate leaving her husband her surviving who had obtained letters of administration to her estate. What judgment was given in that case does not appear. If the judgment had been in accordance with the judgment of the courts in relation to 21 Hen. 8 c. 5, namely, that 22 & 23 Car. 2 c. 10 did not apply to the case of *femes covertes* dying intestate any more than did 21 Hen. 8 c. 5, such judgment would have been, in my opinion, as I have already pointed out, justified by the judgments of the courts as to the right in which the husband was held to be exclusively entitled, under 31 Edw. 3 c. 11, to administration of his deceased intestate wife's estate. That the Parliament which passed the statute of distributions never intended that it should apply to such a case is apparent from the 25th sec. of the statute of Frauds, 29 Car. 2 c. 3, which clause would seem to have been introduced for the purpose of preventing the courts falling into, what Parliament plainly considered would be, the error of holding that the statute of distribution did operate upon a husband administrator of his deceased wife's estate, and did compel him to distribute such estate or any surplus thereof after payment of debts to and among the next of kin of the wife. The clause enacts that:—

> For the explaining an act of this present Parliament entituled "an act for the better settling of intestates' estates" be it declared that neither the said act nor anything therein contained shall be construed to extend to the estates of *Femmes Covertes* that shall die intestate but their husbands may demand and have administration of their rights and credits and other personal estates, and recover and enjoy the same as they might have done before the passing of the said act.

That is to say, entitled to administration under 31

(1) 2 Mod. 20.

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Edw. 3 c. 11 as husband, and to appropriate the property to his own exclusive use independently of any statute in virtue of his common law right, as it is put by Lord Justice Turner in *Milne* v. *Gilbert* (1), and by a right paramount to the statute as put by Lord Cranworth in the same case. It is true that there are expressions in the judgment of Lord Justice Knight Bruce in that case to the effect that the 25th sec. of the Statute of Frauds operated

> to *give* to the husband or *to restore* to him by way of declaratory enactment the right which he would have had if the statute 22 & 23 Car. 2 c. 10 had not been passed

seemingly, thereby, implying that this latter statute did take from the husband the right to his deceased wife's estate which he previously had; but this was not necessary to the determination of the case before him which was not whether the statute had taken anything from the husband but whether it had given anything to him which he could claim under it. Lord Justice Turner in his judgment says:

> The statute of distributions particularly excludes the idea of the husband taking under it.

And referring to the 25th sec. of the Statute of Frauds he expresses his opinion that it was passed to remove any difficulty which might arise upon the question whether that statute had or had not "taken away the common law right of the husband" Lord Cranworth makes use of expressions to the like effect. It is observable, however, that the way in which the Parliament which had passed the act disposed of the suggested difficulty and prevented the possibility of its arising was, not by enacting that something which the statute 22 & 23 Car. 2 c. 10 had taken from the husband should be restored to him, but by enacting and declaring that nothing contained in the act should be con-

(1) 18 Jur. 611.

strued to extend to the estates of *femes covertes* dying intestate.

The act 22 & 23 Car. 2 c. 10, as explained by the 25 sec. of the Statute of Frauds, 29 Car. 2, c. 3, was made perpetual by 1 James 2 c. 17, and that act constituted the law of England upon the subject when the country now constituting the Province of New Brunswick became a British possession, and was consequently the law in force in the Province of New Brunswick when that province was first constituted. The first General Assembly of the Province in 1786, passed the Provincial Statute 26 Geo. 3 c. 11, entituled :

An act relating to wills, legacies, executors and administrators, and for the settlement and distribution of the estates of intestates.

The 14 and 15 sections of this act, which constitute the portion of the act which relates to the distribution of the estates of intestates, are an almost verbatim transcript of sections 5, 6, 7 and 8 of 22 & 23 Car. 2 c. 10. Now it may, I think, be laid down as an invariable course of construction of a Provincial statute, so taken verbatim from an act of the Imperial Parliament, that the Provincial courts should construe the Provincial act in accordance with the construction put upon the Imperial statute, either by the Imperial courts of justice or *a fortiori* by another Imperial statute passed for the purpose of construing and explaining the act under consideration ; hence it will follow as a necessary consequence that if the 14 and 15 sections of the statute 26 Geo. 3 c. 11 of the General Assembly of the Province of New Brunswick had stood alone they must have received the construction which by the 25 sec. of the Statute of Frauds was by the Imperial Parliament declared to be the true intent and meaning of 22 & 23 Car. 2 c. 10. The General Assembly of the province, however, in the 17 sec. of the said act 26 Geo. 3 c. 11, enacted that :

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> Nothing in this act contained shall be construed to extend to the estate of *femes covertes* who shall die intestate, but that their husbands may demand and have administration of their rights, credits and other personal estates, and recover and enjoy the same as they might have done heretofore

thus using the language of the 25th sec. of the Statute of Frauds *ex majore cautelâ*, but quite unnecessarily, in my opinion, for the reason just given; when, therefore, the General Assembly of the Province, in 1854, passed the Act entituled :—"An Act to revise and consolidate the Public Statutes of New Brunswick," and in the 111th ch. of that act re-enacted the provisions of the 14th and 15th secs. of 26 Geo. 3 c. 11, with some trifling immaterial alterations, but omitted wholly the 17th section of that act, no alteration was thereby made in the construction to be put upon the said chapter 111, but that chapter must have received the same construction as had been the true construction of 26 Geo. 3 c. 11, which, as I have said, even without the 17th section thereof, must have been the construction put upon the Imperial statute 22 and 23 Car. 2 c. 10, by the 25th sec. of the Statute of Frauds. Now, the chap. 111 of the statutes of 1854 is consolidated in the Consolidated Statutes of New Brunswick as ch. 78, and the provisions of these chapters, in so far as the present question is concerned, are identical. So, likewise, ch. 114 of the statute of 1854 is now consolidated in the Consolidated Statutes of 1876 as ch. 72, which relates to the property of married women in the Province of New Brunswick, and the sole remaining question is whether the provisions of these chapters, 114 or 72, had or have the effect of divesting the husband of all beneficial interest in the personal property and choses in action whereof his wife died possessed or entitled to and intestate, such personal property in the present case consisting of bonds, mortgages, pro-

missory notes, certificates of shares in joint stock companies, and money in bank, standing in the name of the wife. There is so little difference in the language of ch. 114 of the statute of 1854, and ch. 72 of the Consolidated Statutes of 1876, and in fact none so far as affects the question under consideration, that it will be necessary to refer only to the latter chapter, and to the 1st section thereof, for the subsequent sections relate only to the cases of "desertion or abandonment of any married woman by her husband, or of her living separate and apart from her husband," in which case the married woman's interest in and the power over her real and personal property is different from her interest in and power over such property while she lives with her husband.

Now, the 1st sec. of ch. 72 enacts that:

> The real and personal property belonging to a woman before or accruing after marriage, except such as may be received from her husband while married, shall vest in her and be owned by her as her separate property and shall be exempt from seizure or responsibility in any way for the debts or liabilities of her husband, and shall not be conveyed, encumbered or disposed of during the time she lives with her husband, without her consent, testified, if real property, by her being a party to the instrument conveying, encumbering or disposing of the same duly acknowledged as provided by the laws for regulating the acknowledgments of married women; and after her abandonment or desertion by her husband, or upon her being compelled to support herself or upon her being separate and apart from her husband, unlawfully and of her own accord, although neither deserted nor abandoned by him, then her real and personal property may be disposed of as provided for in this chapter as if she were a *femme sole*, but her separate property shall be liable for her own debts contracted before marriage, and for judgments recovered against her husband for her wrongs.

This section, it will be observed, does not say that a married woman living with her husband shall hold her real and personal property in the same manner and with the same power of disposition over it as if she were a *femme sole*; while dealing solely with her

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right to and interest in her property while living with her husband it declares that she shall hold it as her separate property exempt from all liability for her husband's debts and not capable of being conveyed, encumbered or disposed of without her consent, such consent in the case of realty to be testified by a deed executed by her jointly with her husband, and duly acknowledged by her as provided by law for regulating the acknowledgments of married women, that is to say, apart from her husband, and to have been executed by her freely and without compulsion from her husband, but how her consent is to be testified in the case of personalty the section does not say. By this section she holds her property. while living with her husband, as settled to her sole and separate use, but the section says nothing as to its devolution in case she should die without making a will, which no doubt she might have done of property so settled. Upon her death therefore, intestate, the right of the husband to her personal property, which was suspended only during the coverture, revived; this was decided by Sir John Leach, Master of the Rolls, in 1833 in *Proudley* v. *Fielder* (1). There monies were settled to the sole and separate use of a married woman as if she were sole and unmarried.

This expression "said the Master of the Rolls," has no reference to the devolution of the property after her death; she is to retain the same absolute enjoyment of the monies, and is to have the same power of disposition over them as if she were sole and unmarried; but there is not one word here to vest the property after her death in the next of kin, or to defeat the right which her surviving husband is entitled to acquire as her administrator.

In *Cooper* v. *Macdonald* (2) Sir George Jessel, Master of the Rolls, says in relation to the separate estate of a married woman and the interest of the husband therein upon her dying intestate:

(1) 2 My. & K. 57. (2) 7 Ch. D. 296.

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The separate use is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate, &c.

And again :

Where she (the wife) dies without making any disposition (of her separate estate) the rights of the husband and the rights of the heir are equally unaffected and equity ought to follow the law.

And in *Stanton* v. *Lambert* (1) it was held that the Married Woman's Property Act, 1882, had not altered the devolution of the undisposed of separate property of a married woman; that upon her death without disposing of the separate personalty the quality of separate property ceases and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed. Now this Imperial statute of 1882, 45 & 46 Vic. ch. 75, vested her property in a married woman much more absolutely than does the New Brunswick statute. By the Imperial statute it is enacted that she shall be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property as if she were a *femme sole* without the intervention of a justice; that she shall be capable of entering into any contract and of making herself liable in respect of, and to the extent of, her separate property, and of suing and being sued in contract or tort or otherwise, as if she were a *femme sole*, and her husband need not be joined with her either as plaintiff or defendant. She is enabled to carry on trade in her own behalf separate from her husband, and in respect of her separate property is made subject to the bankrupt laws in the same way as if she were a *femme sole* ; she is declared to be entitled to have and to hold as her separate property, and to dispose of by will or

(1) 39 Ch. D. 626.

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otherwise, all real and personal property which shall belong to her at the time of marriage or shall be acquired by, or devolve upon her, after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband or by the exercise of any literary, artistic or scientific skill; in fact she is almost in every respect invested during the coverture with all the rights and privileges of a *femme sole* and subject to all the liabilities of one to the extent of her separate property, yet if she dies without having made any disposition of her separate personalty the right of her husband upon her death revives and becomes as to such undisposed of personalty as if the separate use had never existed.

If the New Brunswick legislature had intended to divest the husband of the right devolving upon him by his surviving his wife who died intestate we should naturally expect to find language used expressing the intention of the legislature similar to that used in the 25th section of the Imperial statute 20 & 21 Vic. ch. 85 or in the 23rd section of ch. 132 of the Revised Statute of Ontario of 1887. In the absence of the expression by the legislature of any such intention we must hold the respondent in the present case to be entitled beneficially to the personal estate of his intestate wife and the appeal in this case must, therefore, be dismissed.

PATTERSON J.—I cannot say that the argument for the appellant, though learned and ingenious, created any doubt in my mind of the correctness of the decision of the court below. I so fully agree with the views of the general law and the construction of the provincial statutes expressed in the judgment of the Chief Justice

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of New Brunswick, as well as in those of Mr. Justice Tuck and Mr. Justice Fraser, and those judgments deal so exhaustively with the subject of the controversy, that I do not think I can usefully add anything to what those learned judges have said. I should not have considered that the right of a husband to the personal property of his wife who dies intestate, whether property in possession or in action, was open to serious question, even though declared in the terms of the New Brunswick statute C. S. N. B. ch. 72 to be the wife's separate property, were it not that a different view has been taken by the learned judge who dissented in the court below. I do not propose to enter upon a discussion of the opinions which he ably supports in his judgment. To do so would be, in effect, to repeat the arguments on which the majority of the judges founded their opinions and would serve no useful purpose. I could not further elucidate the question on which the argument has turned, and on both sides of which the language of great judges has been appealed to, viz., whether the right of the husband, which is constantly called the *jus mariti*, is a common law consequence of the marriage, or a right flowing from the statute 31 Edw. III under which the courts held the husband entitled to administration of the estate of his wife who died intestate. The latter position is taken and is much relied on by Mr. Justice Palmer in his dissenting judgment. He more than once speaks of the title of the husband to his wife's choses in action as acquired only as her administrator. Doubtless that was so at law. Choses in action, not being assignable at law, vested in the personal representative. But if administration were granted to one who was not the husband of the intestate he held in equity as trustee for the husband or for the personal representative of the husband. This was established

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by such cases as *Humphrey* v. *Bullen* (1), and *Elliot* v. *Collier* (2), and Mr. Justice Stirling in his instructive judgment in *re Lambert's Estate* (3) expressed the opinion that when a married woman made a will dealing with her separate estate, and probate was granted in a general and not limited form, the executor would be trustee for the husband of any separate property not effectually disposed of.

In *Platt* v. *McDougall* (4) a married woman entitled to a fund expectant on the death of her mother died in her mother's lifetime. Her husband survived her and died without having taken administration to her. It was held that his executors, and not the representatives of his wife, were entitled to the fund. The same point was decided in *Proudley* v. *Fielder* (5).

In *Ripley* v. *Woods* (6) the incipient right of the husband was held to pass to his assignees in bankruptcy. So held also in *Harper* v. *Ravenhill* (7).

The principle of these decisions does not seem easily reconcilable with the opinion that the husband's right arises merely or mainly from his appointment as administrator under the statute of Edward III., and reasoning based upon that opinion would therefore be apt to lead to a fallacious conclusion. Another point in which I cannot follow the learned judge is in the distinction he makes between *separate property* of a married woman, which is the expression used in the New Brunswick statute, and property held to her *separate use*. I understand both expressions to mean the same thing. We have instances of the three forms of expression, "separate use," "separate estate" and "separate property," being used interchangeably in

(1) 1 Atk. 458.
(2) 3 Atk. 526 ; 1 Ves. Sen. 15.
(3) 39 Ch. D. 626, 634.
(4) Taml. 390 ; 9 L. J. Ch. 150.
(5) 2 My. and K. 57.
(6) 2 Sim. 165.
(7) Taml. 144.

the language of Mr. Justice Stirling in the case so often referred to in this discussion, *re Lambert's Estate* (1) and in language there quoted from a judgment of Sir G. Jessell in *Cooper* v. *McDonald* (2).

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I am of opinion that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitor for appellants: *W. W. Wells.*

Solicitor for respondent: *Wm. Pugsley.*

(1) 39 Ch. D. 626, 633.

(2) 7 Ch. D. 288, 296.

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*Jan. 25.

*June 22.

JOHN J. McDONALD AND JOHN SHIELDS (DEFENDANTS) ..... } APPELLANTS ;

AND

ALEXANDER MANNING (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Suretyship—Endorsement of note—Right to commission for endorsing—Consideration.

M., by agreement in writing, agreed to become surety for McD. & S. by endorsing their promissory note, and McD. & S. on their part agreed to transfer certain property to M. as security, to do everything necessary to be done to realize such securities, to protect M. against any loss or expense in regard thereto or in connection with the note, to pay him a commission for endorsing, and to retire said note within six months from the date of the agreement. The note was made and endorsed and the securities transferred, but McD. & S. were unable to discount it at the bank where it was made payable, and having afterwards quarrelled with each other the note was never used. In an action by M. for his commission :

Held, affirming the decision of the Court of Appeal, Taschereau and Gwynne JJ. dissenting, that M., having done everything on his part to be done to earn his commission, and having had no control over the note after he endorsed it, and being in no way responsible for the failure to discount it, was entitled to the commission.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the trial judge in favor of the defendants.

The plaintiff and defendants entered into an agreement in writing by which the plaintiff agreed to become surety for the defendants by indorsing a promissory note, for which defendants agreed to pay $1,000.

PRESENT :—Sir W. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

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The recitals of the agreement were, that plaintiff had agreed to endorse the note upon receiving as security certain specified properties and that assignments thereof had been duly executed; and the substance of the operative part was as follows:—

"Now this indenture witnesseth that in pursuance of said agreement, and in consideration of the said Alexander Manning *becoming surety* and endorsing the said promissory note for the said parties of the first part" (the defendants), "they," the defendants, "do transfer, assign," etc.—setting forth the various securities—"And the said parties of the first part (the defendants) in consideration of the said party of the second part *becoming such surety*, hereby covenant and agree to pay" the $1,000 sued for.

The note was drawn as agreed, endorsed by the plaintiff and delivered to the defendants who left it in the hands of Mr. Bain, solicitor for the plaintiff, while they went to the Bank of Montreal where it was made payable and interviewed the manager, who refused to discount the note as he already held a large amount of defendants' paper. This was communicated to plaintiff and his solicitor. Subsequently the defendants, having quarrelled between themselves, respectively notified Mr. Bain not to transfer it to the other defendant. Nothing further was done for some four years, when defendants, having sold certain timber limits assigned to plaintiff as security, applied to him to re-transfer them, which he refused to do unless he was paid the $1,000, and on defendants refusing such payment the present action was brought.

On the trial judgment was given for the defendants on the ground that plaintiff never really became surety for the defendants. This decision was reversed by the Court of Appeal, and the defendants then appealed to the Supreme Court of Canada.

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Hector Cameron Q.C. for the appellants. The sole question is whether or not the plaintiff ever became surety under the agreement. It is submitted that suretyship would not arise until the note was transferred to a third party as holder for value.

The mere delivery of the note is not sufficient. Chitty on Bills (1) ; *Bromage* v. *Lloyd* (2).

The claim is not meritorious and the agreement should be construed strictly.

At all events the judgment of the Court of Appeal was wrong in allowing interest which was never agreed on nor demanded.

Laidlaw Q. C. for the respondent. The plaintiff could legally stipulate for this commission. Evans on Principal and Agent (3).

The plaintiff did all that he was required to do to earn the commission.

SIR W. J. RITCHIE C. J.—The moment plaintiff endorsed the note and it was placed in the hands of Bain with defendants' consent, as trustee for them, the rights of both parties were fixed and established, the plaintiff's liability on the note commenced and he had no further control over it, and could not prevent its being handed over to defendants or used by them, and he thereby became security for defendants to whomsoever they chose to make the holders, and when plaintiff endorsed the note, and it became subject to defendants' disposal, defendants became entitled to the note and to use it as they thought proper, and thus plaintiff had, in my opinion, fulfilled his contract and become entitled to the $1,000, which the agreement specified was to be paid on the execution of these presents not on the discount or the disposal of the note,

(1) 11 ed. p. 168. (2) 1 Ex. 32.
(3) 2 ed. p. 397.

and he cannot be deprived of this by reason of defendants quarrelling between themselves.

If the evidence of Mr. Bain is to be believed he held the note in trust for McDonald and Shields, and his evidence is, in my opinion, entirely confirmed by the action of both McDonald and Shields, and had they not quarrelled it is clear they could have got the note at any time; unfortunately for them neither party would allow the other to have it; McDonald wanted to use the note, but Shields objected and gave Bain an emphatic notice not to give it up to him. This, to my mind, conclusively shows that McDonald and Shields well knew that Bain was holding the note for them, and that both the parties clearly recognised the note as an outstanding security available to both but not controllable by one alone, and thus they prevented the note being discounted or used as both individuals desired, but as neither would trust the other it remained in the hands of Mr. Bain. Had they been of one mind they could have discounted the note or otherwise have used it as served their purposes, and would no doubt have done so could they have trusted one another, but with the subsequent disposal of the note after plaintiff's endorsement, and after it was placed in the hands of Mr. Bain, plaintiff had nothing whatever to do that I can discover.

I think the appeal should be dismissed.

STRONG J.—I see no reason for differing from the Court of Appeal in the conclusion which it has reached, with the unanimous concurrence of all its members, that the respondent had performed the condition precedent which under the terms of the sealed agreement sued upon was to entitle him to receive the $1000 which he seeks to recover in the present action. The words of this covenant are as follows :

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And the said parties of the first part, in consideration of the said party becoming such surety, hereby covenant and agree to pay to the said part of the second part the sum of $1000 upon the execution of these presents being a per centage of 5 per cent. upon the said sum of $20,000.

The recital of the instrument is that

Whereas the said parties of the first part have applied to the said party of the second part, to endorse their promissory note for the sum of $20,000 * * * * and whereas the said party of the second part has agreed to endorse the said note upon receiving by way of security for such endorsement, &c.

Then the operative part begins as follows :

That in pursuance of the said agreement and in consideration of the said Alexander Manning having become surety and endorsing the said promissory note for the said parties of the first part, they, the said parties of the first part, &c.

The evidence shows that the respondent endorsed the note and delivered it to the appellants who endeavored to negotiate it but failed in doing so, and that they then deposited it in the hands of Mr. Bain to keep as a depositee for them.

It appears to me that upon this state of facts the respondent did all that could be required of him to entitle him to the payment of the $1,000. It is to be observed that the $1,000 were to be paid immediately upon the execution of the deed of covenant while no time is fixed for the endorsement of the note, so that it may perhaps admit of some doubt whether the endorsement was a condition precedent at all, but I will assume in favor of the appellants that it was a preliminary condition requiring performance to entitle the respondent to recover his commission.

The note having been endorsed by the respondent, and having gone into the hands of the appellants to be used by them in such way as they might think fit, the respondent had thus become surety for the payment of the $20,000 ; it is true that no liability has ever actually

arisen by reason of the endorsement, but it was in the power of the appellants by their own act, in which they could in no way be controlled by the respondent, to cause such liability to attach at any moment, and for all that appears to the contrary this may even yet be done since the note still remains in the appellants' hands or subject to their control. The risk for which the appellant was to be paid the $1,000 attached so soon as the note left his hands and as he had literally complied with the condition by endorsing and becoming surety there can be no reason why he should not recover his commission which he had thus earned.

From the words of the recital which are that the respondent was to "endorse," and from those at the beginning of the operative part of the deed which are that upon his "becoming surety and endorsing the said promissory note" the security stipulated for was to be given, I think it a reasonable interpretation of the language of the covenant to construe it as meaning that the commission was to be paid in consideration of the respondent becoming "such surety." On the face of the instrument itself it is very clear that the suretyship contemplated was the endorsement of the note by the respondent and its delivery to the appellants to be dealt with by them as they might think fit without regard to its passing into the hands of a *bonâ fide* holder. This construction is considerably strengthened by the surrounding circumstances, and is inevitable when we find that the commission was by the covenant to be paid "upon the execution of these presents" without regard to any postponement until the note should be discounted or otherwise made use of.

I am unable, therefore, to agree with Mr. Justice Falconbridge who considered that the respondent could not recover inasmuch as no liability ever attached as

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there never was any creditor, and that consequently the respondent was never a surety. In my opinion an inchoate or potential liability did attach as soon as the note got into the appellants' hands, and the respondent therefore became, if not a surety according to abstract legal definition, yet just such a surety as the instrument executed by the parties contemplated.

The appeal must be dismissed with costs.

TASCHEREAU J.—I would allow this appeal. I concur with my brother Gwynne.

GWYNNE J.—The question involved in this case is simply one of fact, and the true conclusion to be deduced from the facts in evidence, in my opinion, is that the object of the defendants in applying to the plaintiff to endorse their note, and of the plaintiff in consenting to do so, was to enable the defendants to raise money for which they had immediate occasion to pay for logs which they had contracted for to carry out a purpose in which the plaintiff then had, or had had, an interest under an agreement to which he had been a party with the defendants; and that the intention of both the defendants and the plaintiff was that the note when endorsed by the plaintiff should be discounted in the office of the Bank of Montreal at Toronto, where the note was made payable, in order to raise the money for the purpose aforesaid, and that, in point of fact, the defendants after making the note and leaving it in the hands of the plaintiff's solicitor for the purpose of its being endorsed by the plaintiff never did receive it back, and so never received the consideration which in the instrument sued upon is expressed to be the sole consideration for their undertaking to pay the plaintiff the amount sought to be recovered in the present action. As soon

as the defendants made the note and had left it in the hands of the plaintiff's solicitor they went immediately to Mr. Yarker, the manager of the Bank of Montreal at Toronto, to make arrangements with him for the discount of the note as soon as they should receive back the note with the plaintiff's endorsement thereon, and told him that they were getting the plaintiff's endorsement on their note, and asked him if he would not discount it for them. He refused to do so, alleging for reason that the debt of the firm of Manning, McDonald, McLaren & Co., of which the plaintiff and the defendants were members, to the bank was so heavy that he could not do it, and to the defendants' request that he should apply to the head office of the Bank of Montreal for authority to discount it, he replied that there would be no use in applying to the head office until the debt of the firm should be reduced. Thereupon the defendants went straight back and informed the plaintiff's solicitor of what Mr. Yarker had said, and of his refusal to discount the note. The defendants said that according to their recollection the papers which, in order to perfect the transaction on their part, they had to sign were signed by them before they went down direct, as they say, from the plaintiff's solicitors office to negotiate with Mr. Yarker for the discount of the note; the plaintiff's solicitor's recollection is, that it was immediately upon the defendants' return to his office with the information that Mr. Yarker had refused to discount the note that these papers were signed by the defendants. Adopting this view it is obvious that the transaction remained still incomplete at this time, and that although the defendants had subscribed their names to the instrument now sued upon they had not as yet became liable to pay the $1,000 mentioned in that instrument as payable only on consideration of the

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plaintiff becoming a party to the note as their surety. That liability could only arise upon their receiving back the note endorsed by the plaintiff which, in point of fact, they never did so receive. Before the transaction could be completed some of the papers signed by the defendants had to be sent to Ottawa to Mr. McLaren whose acknowledgment of the receipt of them, and his undertaking to comply with the directions contained in them, was a condition precedent to the plaintiff incurring the responsibility of becoming surety for the defendants on their note. So, likewise, the chattel mortgage signed by the defendants had to be sent to Manitoba for registration and for the purpose of seeing that there was no prior charge on the mortgaged premises This would require some little time. Now the plaintiff's solicitor's own view of the condition in which the transaction was when the defendants came back on the same day they had signed the note, and informed him what Mr. Yarker had said upon refusing to discount the note, is that the note remained in his hands so that when everything was ready and when Mr. Yarker would be prepared to discount the note the defendants could come and get it and discount it after the account should be reduced.

It can only be inferred, I think, that this view was based upon the instructions he had received from his client the plaintiff, namely, not to give up the note to the defendants with the plaintiff's endorsement upon it until he should be satisfied that the papers signed by the defendants were all right, and that the defendants could get the note discounted at the Bank of Montreal. There is not a suggestion in any part of the evidence that the defendants had ever said anything constituting the plaintiff's solicitor as their agent to take charge of the note for them as their property. His statement, therefore, that he held the note until

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everything was ready and Mr. Yarker could be procured to discount the note tends, in my opinion, to confirm the statement of both of the defendants that it was for the purpose of being discounted at the Bank of Montreal as aforesaid that the plaintiff agreed to endorse the note,

The Bank of Montreal still persisting to refuse to discount the note the defendants made arrangements otherwise to raise the money they required to meet the purpose for which they say the plaintiff had agreed to endorse their note ; difficulties arose between the defendants themselves, each appearing to have entertained distrust of the other. In July the defendant, McDonald, seems to have applied to the plaintiff's solicitor for the note, and in so doing explained that the purpose he had in view was to obtain some power over the defendant Shields, in a manner not necessary to set out here, but which showed that his object was to use the note for a purpose different from that for which both of the defendants say the plaintiff consented to endorse the note for them. The plaintiff's solicitor refused to give the note to McDonald. He says that he did so in Shields's interest but he admitted that he had not any instructions from Shields to act on his behalf in the matter, and he added, moreover, that he had never given any notice to the defendants or to either of them that he held the note for them.

Now, if the defendants' right to have the note returned to them with the plaintiff's endorsement upon it was not qualified by any condition to the effect that the Bank of Montreal should first consent to discount for them, surely it was but natural, after the plaintiff's solicitor had received Mr. McLaren's reply to the letter of the 28th May, and after search in the registry office in Manitoba to ascertain whether property covered by the chattel mortgage was subject to any prior incumbrance,

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that the defendants should have been informed that the matter was concluded so as to entitle them to receive back their note with the plaintiff's endorsement upon it, and that therefore the time had arrived which, in the meaning of the defendants' covenant, entitled the plaintiff to demand and receive the $1,000, which sum would not be payable until they should receive the note so endorsed, or at least until they should be notified that it was ready to be delivered to them ; but nothing of the kind was done, no notice given to the defendants that they could receive the note endorsed by the plaintiff, and no demand made for the $1,000. The plaintiff's solicitor, however, informed Shields of McDonald's application for the note, and he says that Shields then gave him notice not to give up the note to McDonald, or to deal with it at all. Shields's explanation of the meaning of this notice, whatever may have been the time of its having been given as to which there was a conflict of opinion, was that he considered the whole matter at an end as they had failed to get the note discounted for the purpose for which it had been, as the defendants allege, made and endorsed.

There does not in this refusal to give the note to McDonald appear to me to be anything inconsistent with the fact that the note still remained in the plaintiff's solicitor's hands as still under the control of the plaintiff, as whose agent it originally came into his hands and as whose agent he must still be regarded as having held it under the instructions given by the plaintiff when he endorsed it and placed it in his hands, which instructions may be fairly inferred to have been to the effect of the view entertained by the solicitor himself as to the purpose for which he held the note, when on the 24th of May as before stated he was informed by the defendants that Mr. Yarker, the manager of the bank of Montreal, refused to discount the paper.

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Then again at a subsequent period, when precisely is not stated but before the note if it had been negotiated would have fallen due, the plaintiff's solicitor admits that, as he thought it probable the note would remain in his hands, he converted the endorsement of the plaintiff which was in blank upon the note into one making the note payable to himself or to his order. It is, I think, inconceivable that he could have done this in virtue of any authority supposed to have been derived from the defendants, or otherwise than as the plaintiff's agent, and the effect of this endorsement so made special, whatever may have been the intent with which it was done, was, I think, to nullify the endorsement, and to put an end to the transaction, if it had not already been determined by reason of the note with the plaintiff's endorsement upon it never having been returned into the power and possession of the defendants; and that it never was so returned, but on the contrary remained always in the possession and under the control of the plaintiff, is, in my opinion, the proper conclusion to be deduced from the evidence. I am of opinion, therefore, that the appeal should be allowed with costs, and the judgment of the learned judge who tried the case, in favor of the defendants, restored.

PATTERSON J.—I do not see any way to interfere with this judgment, although I cannot help feeling that the defendants are made liable to pay without in reality having enjoyed what they have to pay for, and that the plaintiff is being paid for a risk which he cannot in strictness be said to have run. It seems to me that in disallowing the plaintiff's claim we should be enforcing a bargain which it would have been reasonable enough for the parties to have made, and which they perhaps would have made if they had anticipated the difficulties that they encountered when

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Patterson J.

they attempted to negotiate the note, but not the bargain set out in their deed. That bargain was that upon the execution of the deed the defendants would pay $1,000 to the plaintiff, being a percentage on the amount of the note which he was to endorse, and which he did endorse.

I think we cannot properly do otherwise than dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellant McDonald: *Cameron and Spencer.*

Solicitors for appellant Shields: *Mulock, Miller, Crowther and Montgomery.*

Solicitors for respondent: *Bain, Laidlaw & Co.*

THE QUEEN .....APPELLANT. 1889

AND *Oct. 29.

THE ST. JOHN WATER COMMISSIONERS (CLAIMANTS) ..... } RESPONDENTS. 1890 *June 19.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal from report of official referee—Damages to property from works executed on Government railway—Parol undertaking to indemnify owners for costs of repairs by officer of the crown—Effect of.

Held, affirming the judgment of the Exchequer Court, that where by certain work done by the Government Railway authorities in the City of St. John the pipes for the water supply of the City were interfered with, claimants were entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and serviceable condition, under an arrangement made with the Chief Engineer of the Government Railway, and upon his undertaking to indemnify the claimants for the cost of the said work. Strong and Gwynne JJ. dissenting on the ground that the Chief Engineer had no authority to bind the crown to pay damages beyond any injury done.

APPEAL from a judgment of the Exchequer Court of Canada.

The facts of the case are sufficiently stated in the report of the case in the Exchequer Court (1) and in the judgments hereinafter given.

McLeod Q.C., and *Hogg* Q.C., for appellant.

Barker Q.C. for respondent.

SIR W. J. RITCHIE C.J.—This is an appeal from the judgment of the Exchequer Court confirming the report of the official referee in favor of the Water commis-

*PRESENT :—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

(1) 2 Can. Ex. C. R. 78.

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Ritchie C.J.

sioners. The Intercolonial Railway had made certain alterations in the railway works at St John, which necessitated repairs to the water service at the railway station. The case depends upon the arrangement made between Gilbert Murdock, the superintendent of the water supply, and Mr. Archibald, the chief engineer of the Intercolonial Railway, of which the two parties give very different accounts. Mr. Murdock says that he was not aware that the railway contemplated making the changes that they did, and he further says :—

I never received any notice ; it was first reported to me by one of my own men, who told me what was being done to the track ; then I reported the matter to our commissioners.

Q.—Would the lowering of the grade result in exposing your pipe ? A.—Yes. As soon as I heard of what was being done I reported to our commissioners, telling them that our pipes were being exposed. Then a meeting of the commissioners was held and my report was submitted to that meeting, when the commissioners proposed the placing of an injunction upon the work that was done for the reason that they had not been notified.

Q.—In consequence of what the commissioners did, were you not instructed to go and see Mr. Archibald ? A.—Yes. I was then instructed to proceed to Moncton, for the purpose of interviewing Mr. Archibald as to what was being done at the station, and to ascertain from him what were the nature of the changes.

Mr. Murdock then proceeded to state that he went to Moncton and saw Mr. Archibald, and in discussing the price of the work he told Mr. Archibald that he thought it would cost $3,000 or $4,000, at which Mr. Archibald seemed surprised and he then gives this account of what took place :

Mr. Archibald then very fairly said he did not wish to do anything to injure our works and that he would see that nothing was done to injure them. He then asked me if I would look after the matter on his account and do whatever was necessary to be done, and do it fairly as between the Railway Department and our commissioners. I said that as a matter of friendship I would do so.

Mr. Murdock then states that the work was pro-

ceeded with until completed, and on cross-examination he says:

I never saw any engineer. I was left entirely to my own judgment and I acted all through on the strength of the conversation I had with Mr. Archibald. In consequence of this I endeavored to do the work as honestly and fairly between the two bodies as possible, without receiving any remuneration beyond my regular salary.

An again he says:

I proceeded on the directions I received from Mr. Archibald.

Q.—What were the directions? A.—That I was to do the work to the best of my judgment.

Q.—What did you do? A.—Acting on these directions, I did the best I could.

M. Archibald gave a different account of this; but the statement of the engineer and superintendent of the commissioners, Gilbert Murdock, is corroborated by the fact that he reduced the conversation with Archibald to writing and made a memo. of it in his diary, and by the further fact that he sent from Moncton to Mr. Smith, Chief Commissioner in St. John, particulars of the arrangement with Archibald. As to the necessity for the work being done, the following appears in Mr. Murdock's evidence:—

Q.—When this change was made by the commissioners, in Dorchester street, was it not thought that an overhead crossing would be put up? A.—While this work was going on, in consequence of their being no engineer to attend to it and in consequence of Mr. Archibald's absence, no one knew whether Dorchester street was to be closed as Southwark street had been, whether it was to be a level crossing as Mill street had been, or whether it was to be bridged. All these points were up for discussion, and as there was no one to give the necessary information we were left entirely in the dark, so had to come to our own conclusions as to what was to be done to the street after the railway was completed and the pipes were laid.

And further on the following appears:—

Q.—Was it your opinion at the time that these repairs or changes were being made in the railway, that in consequence of the work there a number of stop-cocks should be placed there in order to shut off the water in the way you have mentioned? A.—I considered them

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really essential. I did not put them in for ornament or to increase the cost. I would have done the same had I been doing the work on our own account."

And he afterwards gave the following evidence :—

Q.—You were speaking before adjournment of your experience, and you said, that the alterations which were made at the station rendered it necessary for the water supply of and in consequence of the increased traffic over the road at that point to make the changes which you made ? A.—Yes.

Q.—And under these circumstances you considered these stop-cocks necessary to be put in ? A.—Yes.

Q.—And in consequence of the alterations which were made at the station you considered the placing of the stop-cocks a necessity ? A. Under the changed conditions, I considered it necessary to place stop-cocks there.

Q.—Why did you consider them necessary ? A.—On account of the extra risk and the greater responsibility we had to run in regard to both port and the city. There was also an extra amount of traffic passing over the road at this point, and this required us to take extra precautions to prevent any accident taking place.

Q.—As a matter of prudence and professional skill, was it in your opinion necessary to do what was done by you ? In my judgment it was absolutely necessary—that is, for the protection of the place and for the safety of everybody.

Archibald then allowed the work to go on without plans or rendering any assistance to Murdock, leaving the work entirely to the discretion and judgment of Murdock.

Here we have, then, a professional man, an engineer who had been thirty-eight years in the employment of the water commissioners of St. John, giving this account for the necessity of the work and the agreement entered into with Mr. Archibald; it is shown that he was left without assistance and the whole burden was put upon his shoulders, and upon his alone. Certainly it must be admitted, and I state it without fear of contradiction, that no person could be more competent to do the work than a man who had been in charge of the water service of St. John since the year 1849. He

swears that he acted honestly and faithfully, and there is not a word to indicate that he did not act in good faith. All the work charged for was no doubt actually done and the prices for the materials supplied were paid for at reasonable rates. I think the observations of the referee as to the evidence of the civil engineers who were brought there to make estimates and to cut down the expenditure were very just. After epitomizing the evidence and pointing out the work that was done and the reasons assigned for the changes that were made, he says :—

> The engineer was called on behalf of respondent to say that the change would have been made differently and at much less cost. In my opinion Mr. Murdock was the best judge of the necessities of the case.

And he proceeds to state the contention of the claimants and the inconvenience of having the work done in a different way from what it was done. In another place the referee says :—

> The respondent, taking the view that it was only necessary to lower the pipes on Dorchester street within a certain distance on either side of the railway track, brings forward four civil engineers to testify as to what, in their opinion, is required to place the pipes in as good a position as they were before being stripped ;

then, after stating the work necessary to be done in this respect—the expensive character of the required changes—he proceeds as follows :—

> Who was the person most competent to judge of what was prudent and necessary to be done in view of the altered circumstances ? Certainly, it was Mr. Gilbert Murdock, who has an experience of the requirements and thorough knowledge of the water system of St. John and Portland for a period extending over forty years, and who has all the responsible duties of chief engineer resting upon him, and not persons who naturally must possess but a slight and superficial knowledge of the system and having no responsibilities regarding it. Even Mr. Keating, witness for the respondent, admits this in his evidence, for he says, that Mr. Murdock, with all his knowledge of the water works system, was in a better position and had a better means of knowing what was prudent and advisable to be done.

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I entirely adopt that language as being in entire accordance with my own view of the case; a skilled man has done the work and swears that he did it honestly and faithfully, and made no expenditure not necessary for the purposes of the work to be done. Even Mr. Keating, an intelligent man and a civil engineer, admits this, and it cannot be disputed. Then there was an objection made as to the time taken for the work, delay in getting castings, &c., which was satisfactorily explained by Mr. Murdock.

Then the referee goes on to say:

> The work had been thrown upon them suddenly and Mr. Murdock was left alone in the matter, and had to exercise his own judgment altogether, there being none of the engineering staff of the railway on the ground during the whole time of the work. I cannot conceive that Mr. Murdock would have made the changes he did unless he acted under the firm conviction that he had the concurrence of the railway authorities in what he was doing, and the fact that no objection was made at any time during the process of the work would naturally lead him to believe that the respondent was acting in good faith, that he was fully carrying out what he considered the arrangements with Mr. Archibald and acting in his interest, and doing only what he considered was requisite under the changed condition of things. Mr. Murdock had no special interest in the matter beyond doing what he considered his duty honestly towards both parties, and he swears that no benefit accrued to him pecuniarily or otherwise;

and the conclusion the referee came to was to recommend to the court that the claimants be paid the amount of their claim.

Now, assuming that there was an error of judgment who should bear the loss of it? Should it be the commissioners of St. John or the railway authorities who left everything in the hands of Murdock and offered him no assistance? If he exercised good faith then the railway authorities had no right to complain, and I am satisfied that Mr. Murdock, experienced as he was in matters of this kind and, as I believe him to be, a perfectly honest and intelligent man, should not have the

imputation cast on him now that he went out of his way to benefit the water commissioners which would be a stigma which I think he ought not to bear. The judgment of the referee was affirmed by the Exchequer Court and should not, I think, be disturbed. In my opinion the appeal should be dismissed.

Strong J.

STRONG J.—This is a claim made by the respondents for damage caused to their works in consequence of alterations made in the line and permanent way of the Intercolonial Railway in lowering the pipes and making changes in the water works by the Intercolonial Railway authorities.

The case (originally commenced by Petition of Right in the Exchequer Court) was referred to one of the official referees, who reported in favor of allowing compensation to the respondents amounting to $2,655 62. From this report there was an appeal to the Exchequer Court where the referee's report was confirmed. The learned judge of the Exchequer Court, in the judgment which he pronounced in the appeal from the referee, after referring to the report for a statement of the facts, proceeds as follows :—

> There is no question but that the claimants' property was injuriously affected by the alteration and improvements made in 1884 by the Minister of Railways and Canals in the yard and tracks of the Intercolonial Railway at and near the St. John Station, and that the claimants were entitled to take such steps and to execute such works as were necessary to make their property as good, safe and serviceable as it was before the interference therewith and to recover from the defendant the expense thereby incurred. They were not entitled, however, to improve the water system and service of the City of Portland at the crown's expense. They were entitled to be fully indemnified for any injury done, but to nothing more.

The learned judge then proceeds to point out that the respondents in the works which they executed exceeded the limits indicated

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and that a very considerable proportion of the claim made is for works and materials which have added to the permanent value and utility of the claimants' property, but which cannot be fairly said to have been rendered necessary by anything done by the Minister of Railways or the officers of the Department.

I entirely agree in this portion of the judgment of Judge Burbidge, both as regards the statement made of the result of the evidence showing that more work had been done and allowed for by the referee than was requisite to put the respondents in *statu quo*, and also in the learned judge's view of the law, that beyond mere compensation and indemnity for actual injury the respondents were not *primâ facie* entitled to recover. I cannot, however, bring myself to agree with the learned judge when he goes beyond this and confirms the referee in awarding an amount considerably beyond what would have been requisite to have given the respondents full indemnity and compensation. The excess beyond this amount was awarded because it was considered to have been proved that the Government engineers had acquiesced in the work done by the respondents in excess of what was required to restore their works to their original condition. Although it appears to me that the evidence of such acquiescence is far from conclusive I do not proceed upon the mere insufficiency of the proof, but upon the entire want of any authority in the engineers to bind the crown, assuming that they acquiesced in the fullest manner.

The title to compensation is of course statutory, but as such it is limited to an indemnity, and beyond this compensation to the extent of an indemnity I know of no authority short of Parliament by which the crown can be bound to pay damages in excess of compensation. Even granting that such may have been done by the Governor General in Council or by the direction and sanction of the Minister of Railways, no such order in council, direction or sanction is proved, and in the

absence of any of these authorities I am unable to see to what source the legal liability of the crown to make good the excess beyond an indemnity can be referred.

The amount in question is not, it is true, large, but we must bear in mind that this decision will make a precedent, and I conceive we should thus make a very dangerous precedent were we to determine that the crown might be bound beyond its statutory liability by the agreements and acquiescence of its subordinate officers.

In my opinion the appeal should be allowed and the case referred back to the Exchequer Court to ascertain the proper amount due for compensation, estimated on proof of the expenditure which would have been required to restore the respondents' works to the state they were in before being interfered with for the purposes of the railway.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs.

GWYNNE J.—The learned judge of the Exchequer Court has found as matter of fact, and in this I entirely concur with him, "that a very considerable portion of the claims of the respondents is for work and materials which added to the permanent value and utility of their property, but which cannot be fairly said to have been rendered necessary by anything done by the Minister of Railways, or the officers of his Department." He lays down very accurately, in my opinion, the principle of law applicable to the case in his judgment, as follows :—

There is no question but that the claimants' property was injuriously affected by the alterations and improvements made in 1884, by the Minister of Railways and Canals, in the yards and tracks of the Intercolonial Railway at and near the St. John station, and that the

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claimants were entitled to take such steps, and to execute such works, as were necessary to make their property as safe, good and serviceable as it was before the interference therewith, and to recover from the defendant the expense thereby incurred.

They were not entitled, however, to improve the water system and service of the City of Portland at the crown's expense. They were entitled to be fully indemnified for any injury done, and for nothing more. Now it appears clear to me that the claimants, in the extent and character of the works which they executed and the expense which they incurred, exceeded the limit which I have indicated.

The learned judge then proceeds in the language first above extracted from his judgment, but concludes however, with hesitation it is true, as he says, in affirming the claim of the water commissioners for a reason in which I cannot concur, namely, that under the circumstances which occurred and the conversations which took place between the commissioners and their engineers on the one part, and the engineer of the railway on the other, the engineer of the commissioners is to be regarded as having been employed by the Department of Railways to execute the work in such manner as he thought fit at the expense of the Department. The suppliants' petition of right is not framed as in assertion of a claim that the work done by the suppliants and charged for was necessary for the mere purpose of reinstating their works in as good a condition after the completion of the improvements which were being made on the Intercolonial Railway as they were in before such improvements were undertaken. The suppliants, on the contrary, base their claim on the 6th, 7th, 10th and 11th paragraphs of their petition of right upon a contract alleged to have been entered into between them and the Dominion Government by Her Majesty, substantially to the effect that, if the suppliants would make such changes in their works and water mains and in the situation and level thereof as might be reasonable and necessary to render and keep the same in a service-

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able and efficient state after the alterations on the railway should be completed, Her Majesty would pay to and reimburse the suppliants the costs and value of such changes. And they aver that after they had made the changes in their works they were ratified and adopted by Her Majesty, who afterwards promised the suppliants to pay to them the costs and value thereof.

That considerable changes and improvements in the water works were made for the express purpose of improving the water supply and of giving to the citizens a better supply and greater security than they had before, and which were not necessary for the mere purpose of reinstating the works in as good a condition as they were in before, was not, in my opinion, disputed on the evidence, but it was contended that all that was done and charged to the Minister of Railways was necessary to the changes and improvements made in the water works, which changes and improvements were, as was contended, agreed upon before they were undertaken by and between the Minister, through the medium of Mr. Archibald the engineer of the Intercolonial Railway, and the commissioners of the Water Works and their engineer, Mr. Murdock.

Between Mr. Archibald and Mr. Murdock there is an unfortunate conflict as to what did take place between them ; but the case does not, in my opinion, turn upon a question as to which of their memories is most likely to be in error, for I think that neither the commissioners or their engineer had any right to suppose that the engineer of the railway had a right to bind the Government, if he did affect to do so, by whatever it was which passed between Mr. Archibald and the commissioners or their engineer. They had no right to suppose that Mr. Archibald could bind the Government by anything he should say to any greater

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extent than should be necessary to reinstate the water works in as good a condition as they were in before, and to this extent the claim of the respondents has not been disputed, but as the water works were improved to a much greater extent the Dominion Government cannot, in my opinion, be made answerable for any works done in excess of what was necessary to reinstate the works in as good condition as they were in before—and therefore this appeal should be allowed. As a majority of the court, however, are of a contrary opinion I have not gone into the question as to how much the claim of the respondents was in excess of what in my opinion they had a right to charge for.

PATTERSON J. concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitor for appellant : *E. McLeod.*

Solicitor for respondents : *F. E. Barker.*

THOMAS OWENS *et al*.....APPELLANTS; 1890

AND *Nov. 11.

DAME KATHARINE J. BEDELL.....RESPONDENT. 1891

*June 22.

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

Conventional subrogation—What will effect—Art. 1155 sec. 2—Erroneous noting of deed by registrar.

No formal or express declaration of subrogations is required under art. 1155 sec. 2, C. C. when the debtor borrowing the sum of money declares in his deed of loan that it is for the purpose of paying his debts, and in the acquittance he declares that the payment has been made with the moneys furnished by the new creditor for that purpose.

Where subrogation is given by the terms of a deed the erroneous noting of the deed by the registrar as a discharge, and the granting by him of erroneous certificates, cannot prejudice the party subrogated.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming the judgment of the Superior Court on the contestation by respondent of a report of distribution.

In the case of *Owens et al* v. *Wilson* the defendant's immoveable property was ordered to be sold by the sheriff and a registrar's certificate was furnished to him including *inter alia* the following privileges and hypothecs registered which did not appear by the registrar's books to have been wholly discharged, to wit:

1st. Obligation dated 4th June, 1884, A. G. Isaacson, N. P., from William Wilson to Thomas and William Owens hypothecating official No. 1633, St. Ann Ward,

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

(1) 21 Rev. Leg. 88.

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Montreal, for the payment of $3,000.00 and interest at 7 per cent. and $50.00 for insurance. Registered 7th October, 1884.

2nd. Loan, dated 29th September, 1885, C. Cushing, N. P., from Katharine Jane Bedell, widow of late Eben Guy Hamilton to William Wilson, who hypothecated, official No. 1633, St. Ann Ward, Montreal, for the payment of $2,500.00 and compound interest at 6 per cent. and $250.00 for indemnity, &c. Registered 5th October, 1885.

After the sale the proceeds were returned to the prothonotary for distribution and the respondent filed an opposition claiming the full amount of her mortgage based on

1st. A deed of hypothec for $3,000 and interest at 6 per cent. from William Wilson to Melvin Smith executed before Isaacson, N.P., on the 8th August, 1881, and registered on the 10th of August following, against the property in question in this cause.

2nd. On the deed mentioned in the registrar's certificate as loan of $2,500 dated 29th September, 1885, and

3rd. Another deed of the same date, 29th September, 1885, before Cushing, N. P. by which said Smith acknowledged to have received the amount of his said first hypothec from Wilson, but out of the hands of, and by money furnished for that purpose by, respondent Bedell.

The prothonotary collocated the respondent as being subrogated in the rights of Smith for the full amount of her claim.

The terms of the collocation are as follows ;—

" 13. To opposant, Katharine Jane Bedell, as sub-
" rogated to the rights of Melvin Smith by the effect
" of a certain deed of loan by her the said opposant to
" to defendant, executed before C. Cushing, Notary, on
" the 29th September, 1885, and registered on the 5th
" October, 1885, the said defendant (the debtor) declar-

" ing in said deed that he borrows the sum of $2,500,
" for the purpose of paying his debt to said Melvin
" Smith, and of an act of release and discharge from
" said Melvin Smith to defendant, executed before the
" same notary, on the said 29th September, 1885, in
" which said act of release and discharge the said Melvin
" Smith, the creditor, declares that the payment has
" been made with the moneys furnished by the said
" Katharine Jane Bedell, amount in capital claimed
" under obligation from defendant to said Melvin
" Smith, executed before Isaacson, notary, on the 8th
" August, 1881, registered on the 10th August, 1881,
" $2,500, interest from 29th September, 1886, to the
" 3rd December, 1887, $176.71, costs of opposition to
" Messrs. Morris & Holt, $18.50."

There remained of the monies a balance of $386.03 which was collocated to the appellant Owens as part payment of his second hypothec.

Appellant drew this balance and did not contest the collocation in his favor for the $386.03, but contested that part of the collocation which awarded $2,500 and interest to respondent.

Appellants' ground of contestation was that the subrogation, created in favor of respondent Bedell by the two deeds of the 29th September, 1885, was not express.

Respondent replied that no express subrogation was necessary.

Both the Superior Court and the Court of Queen's Bench for Lower Canada confirmed the collocation in favor of respondent.

Butler Q.C. and *Geoffrion* Q.C. for appellants ;

Morris Q.C. for respondent.

In addition to the points of argument and cases cited in the Court of Queen's Bench, and which are given in the report of the case in 21 Revue Legale, pages 95,

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96, 97, the learned counsel for appellants cited and relied on Pothier, Coutume d'Orleans, Introduction au Titre XX des Arrêts Executions (1); Domat (2); Rev. Statutes Que., Art 5840; *Morrin* v. *Daly et al* (3); *Chinic* v. *Canada Steel Co.* (4); *Filmer* v. *Bell* (5); and Arts. 1176, 2148 and 2152 C.C.; and the learned counsel for the respondent cited and relied on *Desrosiers* v. *Lamb* (6).

SIR W. J. RITCHIE C.J.—The only question submitted in this case is whether the respondent has been subrogated to the hypothecary rights of Melvin Smith to recover the amount of the obligation for which she has been collocated. The respondent claims this right of subrogation under Art. 1155 C.C., sec. 2, which declares that when the debtor borrows a sum for the purpose of paying his debt, and of subrogating the lender in the rights of the creditor, it is necessary to the validity of the subrogation in such case that the act of loan and the acquittance be notarial (or be executed before two subscribing witnesses); that in the act of loan it be declared that the sum has been borrowed for the purpose of paying the debt, and that in the acquittance it be declared that the payment has been made with the moneys furnished by the new creditor for that purpose. This subrogation takes effect without the consent of the creditor.

The requirements of this article have been fully complied with. The deed of loan by the said opposant to defendant dated 29th September, 1885, and the deed of release and discharge by Melvin Smith to defendant of same date, respectively contained a declaration required by the second part of the art. 1155 C. C., namely, that the act of loan declared that the money

(1) Nos. 78, 80, 81, 82.
(2) l. 4 t. 1 s. 1.
(3) 7 L. C. R. 119.
(4) 3 Q. L. R. 1.
(5) 2 L. C. R. 130.
(6) M. L. R. 4 Q. B. 45.

had been borrowed for the purpose of paying the debt and the acquittance declared that the payment had been made with the money furnished by the said creditor for that purpose. I can see no reason why full force and effect should not be given to that article, or why its provisions should be ignored, and therefore I am of opinion that the respondent was rightly collocated. I think the declaration of Melvin Smith, that he released and discharged the land from the mortgage thereon, had reference only so far as he was concerned, and I do not think the respondent's rights to subrogation were in any way affected by any acts of omission or commission in reference to the registration or non-registration or certificate granted by the registrar for which the respondent was in no way responsible.

I therefore think the appeal should be dismissed.

STRONG J. was of opinion that the appeal should be dismissed with costs.

FOURNIER J.—La contestation en cette cause repose sur la légalité de la subrogation opérée en faveur de l'intimé par les actes suivants :—

1. Hypothèque de $3,000 avec intérêt à 6 pour cent, constituée par William Wilson en faveur de Melvin Smith, par acte passé par devant Isaacson, notaire, le 8 avril 1881, et enregistrée le 10 avril suivant, sur la propriété en question en cette cause.

2. Une deuxième hypothèque de $3,000 à 7 pour cent d'intérêt par Wilson en faveur de l'appelant, exécutée par devant Isaacson, notaire, le 4 juin 1884, trois ans après celle de Smith, et enregistrée le 7 novembre 1884.

3. Une autre hypothèque de $2,500, par acte passé devant Cushing, notaire, le 29 septembre 1885, consentie par Wilson en faveur de Dame Katherine Bedell,

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pour prêt de pareille somme fait à Wilson, dans le but exprès de payer la première hypothèque de Melvin Smith et d'effectuer une subrogation de ses droits en faveur de l'intimeé.

4. Un autre acte de la même date, 29 septembre 1885, par devant Cushing, notaire, par lequel Smith reconnut avoir reçu le montant de sa première hypothèque, de Wilson, mais des deniers fournis spécialement pour cet objet par l'intimée Bedell.

La propriété ainsi hypothèquée a été vendue par le shérif et les deniers provenant de la vente rapportés en cour pour être distribués.

Le rapport de distribution préparé par le protonotaire a colloqué l'intimée qui s'était portée opposante pour le montant de son hypothèque, de la manière suivante :

13. To opposant, Katharine Jane Bedell, as subrogated to the rights of Melvin Smith by the effect of a certain deed of loan by her the said opposant to defendant, executed before C. Cushing, Notary, on the 29th September, 1885, and registered on the 5th October 1885, the said defendant (the debtor) declaring in said deed that he borrows the sum of $2,500, for the purpose of paying his debt to said Melvin Smith, and of an Act of Release and Discharge from said Melvin Smith to defendant, executed before the same Notary, on the said 29th September, 1885, in which said Act of Release and Discharge the said Melvin Smith, the creditor, declares that the payment has been made with the moneys furnished by the said Katharine Jane Bedell, amount in capital claimed under obligation from defendant to said Melvin Smith, executed before Isaacson, Notary, on the 8th August, 1881, registered on the 10th August, 1881, $2,500, interest from 29th September, 1886, to the 3rd December, 1887, $176.71, costs of opposition to Messrs. Morris & Holt, $18.50.

Le seul moyen de contestation opposé à cette collocation par l'appelant est que la subrogation opérée par les deux actes du 29 septembre 1885 n'est pas expresse. L'intimée lui a répondu que cela n'était pas nécessaire. Le jugement de la Cour Supérieure lui donnant gain de cause, a été confirmé par celui de la Cour du Banc de la Reine dont il y a maintenant appel.

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La subrogation en question a eu lieu en vertu du paragraphe 2 de l'article 1155 du Code Civil, qui dit: —

Lorsque le débiteur emprunte une somme à l'effet de payer sa dette et de subroger le prêteur dans les droits du créancier, il faut, pour que la subrogation en ce cas soit valable, que l'acte d'emprunt et la quittance soient notariés (ou faits en présence de deux témoins qui signent); que dans l'acte d'emprunt il soit déclaré que la somme est empruntée pour payer la dette, et que, dans la quittance, il soit dèclaré que le paiement est fait avec des deniers fournis à cet effet par le nouveau créancier.

Cette subrogation s'opère sans le consentement du créancier.

C'est en conformité des dispositions du paragraphe deux qu'a été faite la subrogation dont il s'agit c'est-à-dire en faisant dans l'acte d'emprunt et la quittance les déclarations exigées.

Il y a une autre manière d'obtenir la subrogation, c'est celle dont il est question dans le premier paragraphe du même article.

Celle-ci tient plus de la nature d'une cession que le créancier fait de sa créance et de ses droits contre le débiteur, lorsqu'il reçoit son paiment d'une tierce personne. Alors cette subrogation doit être expresse et faite en même temps que le paiement. Delà la différence dans la manière de procéder pour obtenir la subrogation d'après ces deux paragraphes de l'acte 1155.

Dans le cas présent, toutes les prescriptions du 2e paragraphe ont été accomplies, l'acte contient, ainsi que le veut l'article 1155 la déclaration que la somme a été empruntée dans le but de payer la dette; on y lit la déclaration suivante: "l'emprunteur déclare qu'il a fait le présent emprunt dans le but de payer une hypothèque de $3,000 avec intérêt par lui due, à Melvin Smith de la dite cité de Montréal, et garantie sur la dite propriété en vertu d'une obligation portant hypothèque, passée devant A. G. Isaacson, notaire public, le 8 août 1881, enregistrée le 10 août 1881."

Cet article exige de plus que dans la quittance il soit

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déclaré que le paiement a été fait avec les deniers fournis à cet effet par le nouveau créancier.

Cette deuxième condition a été également exécutée dans l'acte de quittance de la manière suivante :

Appeared Melvin Smith of the said City of Montreal, Gentleman, who acknowledged and confessed to have had and received at the execution hereof of and from William Wilson of the said City of Montreal, Wood Merchant, *out of the hands of and by money furnished for that purpose by Dame Katharine Jane Bedell,*" &c., describing her "the sum of $3,000 currency due under and by virtue of a certain Deed of Obligation," &c., &c.

Voilà les seules conditions exigées par l'article 1155 pour obtenir la subrogation qui s'opère immédiatement et sans le consentement du créancier.

La prétention de l'appelant que cela ne suffit pas, qu'il aurait fallu en outre une déclaration expresse de subrogation a été repoussée par les deux cours. Dans la Cour Supérieure l'honorable juge Tait l'a décidé de la manière suivante :

That the deed of loan by said opposant to defendant, dated twenty-ninth September, eighteen hundred and eighty-five, and the deed of release and discharge by Melvin Smith to Defendant of same date, respectively contain the declaration required by the second part of Article 1155 of the Civil Code; that from such declarations the law presumes an intention to subrogate, and that by said deeds said opposant became and was and is subrogated in all the rights and privileges and mortgages of said Melvin Smith in and upon the property in question and in the proceeds thereof, and this without any express mention of subrogation in said deeds, which is not necessary ;

Considering that intention to subrogate on the part of the debtor, being clear, and that such subrogation can by law take place without the consent of the creditor, the declaration of Melvin Smith in the latter part of the deed of release and discharge to the effect that he released and discharged the said lot of land from the mortgage thereon created only meant that so far as he was concerned he granted such discharge, and such declaration ought not and cannot deprive said opposant of the subrogation created in her favor by said deeds.

Dans la Cour du Banc de la Reine où le jugement a été rendu à l'unanimité confirmant celui de la Cour

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Supérieure, Sir A. A. Dorion juge en chef a prononcé le jugement de la Cour dans les termes suivants :—

The only question submitted in this case is whether the respondent has been subrogated to the hypothecary rights of Melvin Smith to recover the amount of the obligation for which she has been collocated.

To effect a subrogation in favor of a party lending money to pay a mortgage Art. 1155, C. C. s. 2 requires that it be declared in the act of loan that the money has been borrowed for the purpose of paying the debt, and that in the acquittance it be declared that the payment has been made with the moneys furnished by the new creditor for that purpose. No formal declaration of subrogation is required, and this has been repeatedly held under Art. 1250 of the French Code which is in the same terms as our article. These declarations are contained in the deed of loan and the discharge, and we are of opinion that the respondent was rightly collocated.

Comme on le voit par ces deux jugements les conditions requises par l'article 1155 pour opérer la subrogation suivant le paragraphe 2 ont été exactement remplies. L'appelant n'a pas le droit d'en exiger d'autres ; mais comme il a cité des autorités et des jugements pour établir sa prétention que, pour qu'il y ait subrogation il faut qu'il y ait une déclaration expresse à cet effet, il ne sera pas sans utilité de faire voir qu'elle est condamnée par les auteurs et n'est pas justifiée par les jugements qu'il a cités pour la supporter.

Si une déclaration expresse était nécessaire l'intimée pourrait prétendre qu'elle est contenue dans l'acte d'emprunt où se trouve la déclaration suivante :—

The borrower declares that the said property belongs to him absolutely, and is free and clear of all imcumbrances save the ground rent and commutation money, which latter the borrower binds himself to pay off within six months and the balance due to T. & W. Owens (the appellants) which ranks subsequent to the present loan.

Voilà une déclaration bien explicite que l'hypothèque donnée à l'appelant est une seconde hypothèque et que la balance qui lui est due prendra rang après l'emprunt fait pour payer Smith. Mais une telle déclaration n'était pas exigée par la loi.

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Je n'invoque pas ce moyen au soutien de mon opinion ; au contraire, je partage celle des honorables juge Tait et Sir A. A. Dorion, exprimée dans leurs jugements respectifs, qu'une telle déclaration n'est pas nécessaire et je suis d'avis que l'intimée s'étant conformée aux conditions du paragraphe 2, article 1155, a droit à la subrogation.

Cette doctrine, qui d'ailleurs est celle du code, dont l'article 1115 n'est que la reproduction de l'article 1250 du code français, est supportée par tous les commentateurs ci-après cités.

Laurent (1).

Faut-il une déclaration expresse de subrogation ? La négative est certaine. L'article 1250 n'exige pas de subrogation expresse, et le silence de la loi décide la question puisqu'il n'appartient pas à l'interprète d'ajouter à la loi en exigeant une condition que le législateur n'a pas prescrite

Demolombe (2).

Ces deux déclarations : de la destination de deniers dans l'acte d'emprunt, et de l'emploi dans la quittance, sont d'ailleurs, suffisantes. Le texte n'exige en outre ni dans l'un ni dans l'autre de ces actes, une déclaration expresse de subrogation. L'arrêté de 1690 voulait, il est vrai, que cette déclaration y fût faite, mais le législateur nouveau a justement considéré que la volonté des parties d'opérer la subrogation résulte d'une manière suffisamment expresse de l'accomplissement même qu'elles font des conditions requises par la loi pour l'obtenir. Aussi, n'est-ce en effet, que pour le premier cas de subrogation conventionnelle que l'article 1250, 1o. exige que la subrogation soit expresse, et son silence pour le second cas témoigne qu'il ne le soumet pas à cette condition. (Comp. Merlin Répert, Vo. Privilège, sec. IV, § 11 ; Toullier, t. IV, No. 129 ; Duranton, t. XII, No. 133 ; Mourlon p. 260, 268 ; Zachariae, Aubry et Rau, t. IV, p. 179 ; Larombière t. III, art. 1250, No. 66.)

Aubry et Rau (3).

En dehors des deux conditions exigées par le No. 2, de l'article 1250, aucune autre n'est requise pour la validité et l'efficacité de la subrogation dont il s'agit. Ainsi *elle s'opère indépendamment de toute*

(1) Vol. 18, No. 52. (2) 27 vol. No. 413.
(3) Vol. 4, sec. 321 p. 179.

déclaration expresse de subrogation, soit dans l'acte d'emprunt soit dans la quittance.

Larombière (1).

Le second paragraphe de l'article 1250 n'est que la reproduction résumée des dispositions de cet arrêt de règlement (arrêt du 6 juillet, 1690). Il faut, dit-il, pour que cette subrogation soit valable que l'acte d'emprunt et la quittance soient passés devant notaires, que dans l'acte d'emprunt, il soit déclaré que la somme a été empruntée pour faire paiement et que dans la quittance, il soit déclaré que le paiement a été fait des deniers fournis à cet effet par le nouveau créancier. Comme lui, il veut que l'acte d'emprunt et la quittance soient passés devant notaires, comme lui, il exige la double mention de la destination et de l'emploi des deniers prêtés. *Mais il y a cette différence que l'arrêt voulait une stipulation de subrogation tandis que l'article* 1250 *la fait ressortir implicitement de la mention de destination et de l'emploi.*

Rolland de Villargues (2).

Il n'est pas nécessaire au reste pour que le prêteur succède à l'hypothèque du créancier payé s'il s'agit d'une créance hypothécaire *que l'acte d'emprunt stipule formellement que le prêteur sera subrogé à cette hypothèque*, ainsi que le voulaient les lois Romaines.

Il n'est pas de rigueur que dans la quittance, *il soit expressément déclaré que le débiteur subroge le prêteur.* L'article 1250, 2e paragraphe ne l'exige point, comme il l'exige dans la première disposition pour la subrogation du créancier.

Pothier et tous les autres auteurs cités par l'appelant à l'exception de Troplong et de Toullier, ont écrit avant le Code et sous l'empire de l'arrêt du 6 juillet 1690, qui voulait une stipulation de subrogation, tandis que l'article 1250, comme notre article 1155, le fait ressortir implicitement de la mention de destination et de l'emploi. Demolombe explique très bien qne la déclaration expresse de subrogation n'est requise que pour le premier cas de subrogation conventionnelle mentionée en l'article 1250, comme dans le paragraphe premier de l'article 1155, et que le silence du Code pour le second témoigne qu'il ne le soumet pas à cette condition.

(1) Vol. 3, No. 66, art. 1250.

(2) Verbo Subrogation para. 2 Nos. 28, 32.

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La quittance donnée par Melvin à Wilson comporte non seulement la déclaration qu'il a reçu le montant de ce qui lui était dû en vertu de son obligation et de l'hypothèque qui en assurait le paiement, mais il décharge en outre la propriété de l'hypothèque donnée pour assurer son remboursement. Cet acte a été duement déposé chez le régistrateur qui ne l'a enregistré que comme une simple quittance, sans faire l'entrée dans ses livres ni dans son certificat, que l'effet des deux actes qui se rapportent l'un à l'autre était d'opérer une subrogation en faveur de l'intimée, le témoin même de l'appelant, le député régistrateur, reconnaît que l'acte a été déposé pour enregistrement.

Lorsque le régistrateur reçoit une quittance pure et simple d'une hypothèque, il se borne à faire l'entrée en marge de l'acte établissant la créance, d'une déclaration que l'hypothèque est radiée et il fait le dépôt de la quittance dans les records de son bureau. Sans faire l'examen des deux actes qui lui furent déposés pour enregistrement, afin de s'assurer s'il y avait extinction complète de l'hypothèque, il prit pour admis que l'hypothèque devait être radiée et la nota comme telle. Si au lieu de cela il eut enregistré cette quittance comme c'était son devoir, il se fut aperçu de suite que Smith reconnaissait avoir reçu son paiement avec des deniers fournis par l'intimée qui, par là, se trouvait subrogée à l'hypothèque de Smith en vertu de cette déclaration et de celle contenue dans l'acte d'obligation.

L'intimée peut-elle être tenue responsable de l'erreur commise par le régistrateur ? Elle s'est conformée en tous points à ce qu'elle devait faire pour obtenir la subrogation ; elle a accompli les formalités du paragraphe 2 de l'article 1155, et régulièrement déposé ses actes au bureau d'enregistrement. C'est là tout ce qu'elle devait faire pour acquérir la subrogation. L'erreur du régistrateur ne peut lui en enlever le bénéfice, ainsi

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qu'il a déjà été jugé par la Cour du Banc de la Reine, dans les mêmes circonstances, dans la cause de *Desrosiers* v. *Lamb* (1).

As to the error in the registration this cannot be invoked against Lamb. He is not responsible for the registrar's mistake. It may be noticed that Desrosiers was not prejudiced at all by the wrong entry in the registrar's books and the registrar's erroneous certificate. His hypothec was taken as a second one to rank after that of Madame Amos. However, even had he been prejudiced he could not deprive Lamb of his rights under the deed giving subrogation.

Les faits de cette cause sont tout à fait analogues à ceux de la présente et les raisonnements qui ont fait obtenir gain de cause à Lamb doivent faire triompher l'intimée. Dans ce cas, comme dans celui de Lamb, l'appelant n'a été nullement préjudicié par l'entrée erronée du régistrateur; son hypothèque ne devait prendre rang qu'après celle de Smith. Les précédents invoqués par l'appelant ne s'appliquent pas à la question sous considération. Dans la cause de *Morrin* v. *Daly* (2), il s'agissait de la cession d'une moitié de créance enregistrée, par Joseph à Derousselle, qui en avait accepté le transport, mais n'avait pas fait enregistré son transport. Plus tard, Joseph en recevant son paiement de la moitié qui lui était due donna une décharge complète de l'hypothèque. Il avait ce pouvoir parce que le transport n'étant pas enregistré, il était resté ouvertement le seul créancier de l'hypothèque et pouvait valablement en donner la décharge. Dans l'autre cause, *Chinic* v. *Canada Steel Co.* (3), il s'agissait d'une subrogation réclamée en vertu de l'article 1156. Cette subrogation ne peut avoir lieu à moins que celui qui la réclame ne prouve avoir payé la créance à laquelle il demande à être subrogé. Dans ce cas, la subrogation était réclamée par le Canada Steel

(1) M.L.R. 4 Q. B. p. 4, 5. (2) 7 L. C. R. 119.
(3) 3 Q. L. R. 1.

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Co. qui allégeait avoir payé les montants pour lesquels elle s'était portée opposante. Le considérant du jugement est que la dite opposante " n'avait pas prouvé les alléguées essentiels de son opposition, et nommément le paiement par elle des sommes de deniers qu'elle réclame dans et par sa dite opposition." L'honorable juge Meredith dit à ce sujet :—

As to the larger of the two sums claimed by the Steel Company, viz :— $2,016.64, it is impossible to doubt the correctness of the judgment so rendered ; for that sum appears, by the discharge of the creditor, to have been paid by the honourable Eugene Chinic, and not by the Canada Steel Company who allege they paid it and claim the subrogation.

L'autre somme de $483.36 dit, l'honorable juge, n'a pas été payée par la compagnie, ni par ses agents, ni par d'autres personnes dont les droits avaient été transportés à la compagnie ; dans ce cas la compagnie ne peut être considérée comme subrogée en vertu de l'article 1156, quant à la somme de $483.36 comme elle le prétend ; et c'est principalement sur ces motifs que l'honorable juge Dorion s'est appuyé pour maintenir la contestation de Madame Lloyd.

Dans cette dernière cause, le jugement décide seulement que l'opposante Canada Steel Company n'ayant pas prouvée qu'elle avait payé les deniers, elle ne pouvait obtenir la subrogation qu'elle réclamait en vertu de l'article 1156.

Le jugement n'a nullement décidé que la subrogation n'avait pas eu lieu parce que l'hypothèque était déchargée dans le bureau d'enregistrement. Dans le *holding* du jugement on voit seulement que le rapporteur soulève un doute sur la question de savoir si la subrogation tacite peut avoir lieu en vertu d'un acte qui comporte la décharge des privilèges au sujet desquels la subrogation est demandée, cette hypothèque apparaissant déchargée par le bureau d'enregistrement.

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Ce doute ainsi soulevé n'est nullement résolu et aucune partie du jugement de l'honorable juge Meredith ne tranche cette question. Tout au contraire il dit que la cour était unanime à confirmer le jugement de la Cour Supérieure pour les raisons données par l'honorable juge de cette cour, savoir que les argents n'avaient pas été payés par, ou pour, la partie qui réclamait la subrogation, et il n'était pas nécessaire pour la cour de se prononcer sur la question de l'effet de la décharge de l'hypothèque de la Couronne. Les observations de l'honorable juge sur ce sujet ne sont qu'un *obiter dictum* contre lequel la Cour du Banc de la Reine s'est depuis prononcé deux fois dans la présente cause et dans celle de *Desrosiers* v. *Lamb* (1).

La question dans le cas actuel n'est nullement affectée par les décisions citées. En conséquence le principe soutenu par les deux cours que l'intimée ne peut pas être tenue responsable de l'erreur du régistrateur doit être maintenu. Comme on l'a vu plus haut il suffit pour que la subrogation ait lieu que les deux conditions du 2ème paragraphe, de l'article 1155, ait été accomplies, 1° que dans l'acte d'emprunt il soit déclaré que la somme a été empruntée pour payer la dette ; 2° que dans la quittance il soit déclaré que le paiement est fait des deniers fournis à cet effet par le nouveau créancier, et elle a lieu de plein droit, et sans le consentement du créancier. Elles s'opèrent indépendamment de toute déclaration expresse de subrogation soit dans l'acte d'emprunt, soit dans la quittance comme le disent Aubry et Rau, et sans déclaration que le porteur sera subrogé à l'hypothèque payée de ses deniers. Elle ressort, comme le dit Larombière, implicitement de l'article 1250, (1155 c. c.) de la mention de destination et de l'emploi.

(1) M. L R. 4 Q. B. 45.

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Gwynne J.

GWYNNE J. was of opinion that the appeal should be dismissed with costs.

PATTERSON J. concurred.

Appeal dismissed with costs

Solicitor for appellants: *T. P. Butler.*

Solicitors for respondent: *Morris & Holt.*

H. B. BAILEY AND COMPANY (PLAINTIFFS)..... } APPELLANTS ; 1890 *Oct. 29, 30.

AND

THE OCEAN MUTUAL MARINE INSURANCE COMPANY (DEFENDANTS)..... } RESPONDENTS. 1891 *May 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Application—Promissory representation.

An application for insurance on a vessel in a foreign port, in answer to the questions : Where is the vessel ? When to sail ? contained the following : Was at " Buenos Ayres or near port 3rd February bound up river ; would tow up and back." The vessel was damaged in coming down the river not in tow. On the trial of an action on the policy it was admitted that towing up and down the river was a matter material to the risk.

Held, affirming the judgment of the court below, that the words " would tow up and back " in the application did not express a mere expectation or belief on the part of the assured but amounted to a promissory representation that the vessel would be towed up and down, and this representation not having been carried out the policy was void.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the defendants at the trial.

The action was on a policy of marine insurance. In the printed form of application for the policy there were two questions as follows :—

" Where is the vessel ? "

" When to sail ? "

And opposite these the applicant wrote :

" Was at Buenos Ayres or near port 3rd February, bound up river ; would tow up and back."

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

(1) 22 N. S. Rep. 5.

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The damage to the vessel for which the action was brought occurred when she was coming down the river not in tow.

The policy insured the vessel for a year.

The only question decided in the court below, and the sole issue raised in the appellants' factum, is whether the above statement in the application was a promissory representation by the assured failure to carry out which would forfeit the policy, or was merely intended to afford information to the company of the movements of the vessel at the time. The judgment at the trial, which was affirmed by the full court, was for the defendants and was founded on the ground that the statement was a promissory representation. The plaintiffs appealed.

Henry Q.C. for the appellants. The words " would tow up and back " do not amount to a promissory representation. Arnould on Marine Insurance (1). If they do the policy is not void. *Brine* v. *Featherstone* (2).

W. B. Ritchie for the respondents cited *Harrower* v. *Hutchinson* (3); *Ex parte Dawes. In re Moon* (4); *Cleveland* v. *Fettyplace* (5).

Sir W. J. RITCHIE C.J.—In the application for insurance for appellant is asked " where is the vessel ?" and the answer was " at Buenos Ayres or near port;" and to the question " when to sail ?" the answer was " 3rd February, bound up the river, would tow up and back." It is admitted that towing between Buenos Ayres and Corrientes, 750 miles up the river where the ship was to load, is a matter material to the risk of a voyage between these ports, and would materially decrease the perils to which a vessel would be exposed on such a

(1) 6 ed. vol. 1, p. 524.
(2) 4 Taun. 869.
(3) L. R. 5 Q. B. 584.
(4) 17 Q. B. D. 275.
(5) 3 Mass. 392.

voyage. If such is the case it is very clear that, in view of that voyage at any rate, the amount of premium would be materially affected, for it is clear this towing decreased the risk for that portion of the year during which this voyage up and down the river lasted, though the defendants would, no doubt, be liable for any voyage after the one contemplated in the application during the year.

The ship did tow up but did not tow down the river. The damage now sought to be recovered for was sustained by the ship on her voyage down when not in tow. I am of opinion the representation was not a mere matter of expectation or belief, but a representation or affirmation of a positive fact that the ship would tow up and down, and I think all the surrounding circumstances show that the assured intended that assurers should so understand it.

The plaintiffs at the time of this application, in a letter to their brokers 21st March, 1885, say the "vessel was at Punta Lava near Buenos Ayres February 3rd, and was to leave the following day up the river to load and was to tow up and down." [His Lordship here referred to the evidence showing that the insured knew when the application was made that by the charter party the vessel was to tow up and down the river.]

I think we must take these words in their plain and obvious meaning, in that sense in which it is most reasonable to conclude they were understood by the underwriter.

It was a positive representation of an existing or future fact material to the risk; there was no representation of belief or expectation, but a positive engagement that she should or would be towed up and down the river. It would have been very easy in this case for the assured to have said it is expected she will be towed up

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and down, but this would not have answered his purpose. He had positive evidence that she was intended to be towed up and down, and, therefore, naturally wished to influence the underwriter by the positive statement that she would be. I think the nice distinction which has been attempted to be drawn between "would" and "will," is too fine for the practical purposes of life in this connection. Suppose the assured had warranted in time of war that the ship would sail with convoy, would her not doing so be a breach of such a warranty? I can really see no distinction between a promissory representation and a warranty.

I think this was not matter of expectation but the promissory representation of a material fact; therefore I think the appeal should be dismissed.

STRONG J.—For the reasons given by the court below I am of opinion that this appeal should be dismissed.

FOURNIER J. concurred.

TASCHEREAU J.—This is a clear case for dismissal. I would call it a frivolous appeal and it should have been disposed of without calling on the respondents.

GWYNNE J.—The appeal in this case must, in my opinion, be dismissed with costs. It is admitted that whether the vessel proposed to be insured should or should not have been towed up the river La Plata and back was material to the risk. It is apparent from the letter written by the plaintiffs to their agent directing him to effect an insurance for them that they intended that their agent should, in order to effect the insurance, make the representation on their behalf that the vessel was to be towed up and down. In view of what might naturally have been supposed to

have been the state of things at the time when the policy was effected, the statement of the plaintiffs' agent to the defendants appears to me to read plainly enough that the vessel was to have left Buenos Ayres on the 3rd of February on a voyage up the river in tow up and back, and it was upon this representation that the defendants were asked to enter into the policy which was effected. The language so used is capable of being construed, and reasonably so, as a positive representation of the plaintiffs made for the purpose of effecting the insurance through their agents; and the insurance company had reasonably a right so to understand the language, and as that representation was not fulfilled the policy is avoided.

PATTERSON J.—I am of opinion that this appeal ought to be dismissed. The verbal criticism of the phrase "would tow up and back," in the application for the insurance seems to me to be beside the question, having regard to the fact that the statement related to something that had happened or was understood to have happened six weeks or more before the date of the application. It is argued by counsel for the appellants that a material difference would have been made by using the words, "will tow up, &c.," or "is to tow up, &c.," or "towing up and down." The first two of these forms of expression would have been inappropriate to the circumstances, and the third has, as I apprehend, its precise equivalent in the expression actually used.

The statement, expanded without altering its effect, may, I think, be put in this shape: "The vessel was, on the 5th of February, about to proceed up the river Parana, but with the precaution against the dangers of the river navigation of being towed up and down"; or in this form: "The vessel was about to be towed

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up and down the river"; or to bring in one of the forms of the phrase suggested by counsel: "The vessel was to sail up the river, towing up and back."

The representation naturally conveyed to the underwriter was that the vessel, though a sailing ship, would have or was to have for the trip up and down the river the security of being towed, and that representation was clearly a material one.

Its materiality can scarcely be more satisfactorily shown than by the letter of the 21st of March from the plaintiffs to their agent asking for rates for the insurance, in which they make a point of the towing. "This vessel was at Punta Lava near Buenos Ayres, February 3rd, and was to leave the following day up the river to load; was to tow up and down."

Appeal dismissed with costs.

Solicitor for appellants: *B. A. Weston.*

Solicitor for respondents: *N. F. Parker.*

EDWARD WILLIAMS AND ALICE S. WILLIAMS, HIS WIFE (PLAINTIFFS)..... } APPELLANTS ;

AND

THE CITY OF PORTLAND (DEFENDANTS)..... } RESPONDENTS.

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*Oct. 31.

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*May 12.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal corporation—Statutory powers—Control over streets—Alteration of grade—Negligence—Contributory negligence—34 V. c. 11 (N.B.)—45 V. c. 61 (N.B.)

The act of incorporation of the town of Portland, 34 V. c. 11 (N.B.), which remained in force when the town was incorporated as a city by 45 V. c. 61 (N.B.), empowered the corporation to open, lay out, regulate, repair, amend and clean the roads, streets, etc.

Held, that the corporation had authority, under this act, to alter the level of a street if the public convenience required it.

W. was owner and occupant of a house in Portland situate several feet back from the street with steps in front. The corporation caused the street in front of the house to be cut down, in doing which the steps were removed and the house left some six feet above the road. To get down to the street W. placed two small planks from a platform in front of the house and his wife in going down these planks in the necessary course of her daily avocations slipped and fell receiving severe injuries. She had used the planks before and knew that it was dangerous to walk up or down them. In an action against the city in consequence of the injuries so received:

Held, affirming the judgment of the court below, that the corporation having authority to do the work, and it not being shown that it was negligently or improperly done, the city was not liable.

Held also, that the wife of W. was guilty of contributory negligence in using the planks as she did knowing that such use was dangerous.

APPEAL from a decision of the Supreme Court of

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

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New Brunswick setting aside a verdict for the plaintiffs and ordering a non-suit.

The action was brought against the city of Portland for injuries to the plaintiff Alice S. Williams incurred under the following circumstances. Plaintiffs' house had a platform in front and steps leading down to the street. The city authories altered the grade of the street in front of this house, and in doing so removed the steps leaving a perpendicular fall of some six feet from the platform to the street as altered. These steps were the usual means of ingress to and egress from the house, and after they were removed the plaintiff Edward Williams placed two deals about ten feet long where the steps had been. The plaintiff Alice S. Williams in going down these deals to cross the street and feed her hens on the other side sustained the injuries for which the action was brought.

On the trial the plaintiffs obtained a verdict for $625 damages. On motion to the Supreme Court of New Brunswick this verdict was set aside and a non-suit ordered, the court being of opinion that the cutting down of the street being for the convenience of the public defendants were not liable, and, also, that there was contributory negligence on the part of the plaintiffs. From this judgment of non-suit the plaintiffs appealed.

Pugsley, Sol. Gen. for New Brunswick, for the appellants. Under its charter the city of Portland had power to open, lay out, regulate, repair, amend and clean the streets. This gives no authority to alter the grade. *Nutter* v. *Accrington Board of Health* (1).

If the defendants could cut down the street they were guilty of negligence in encroaching upon plaintiffs' property and removing the steps.

The plaintiffs having been deprived of their means

(1) 4 Q. B. D. 375.

of access to the street adopted a reasonable mode of securing it, and cannot be prevented from recovering from the fact of the plaintiff Alice S. Williams having used it. See *Clayards* v. *Dethick* (1).

Currie for the respondents referred to *Boulton* v. *Crowther* (2); *Smith* v. *Corporation of Washington* (3); as to the power to alter the grade; and on the question of liability for negligence to *Adams* v. *Lancashire & Yorkshire Railway Co.* (4); *Wakelin* v. *London & South Western Railway Co.* (5).

Sir W. J. RITCHIE C.J.—I think the town of Portland, under the authority given to it by 34 Vic. cap. 11 s. 83 to open, lay out, regulate, repair, mend and clean the roads, bye roads, highways, streets, sidewalks, had full power to alter if need be the levels of the streets. This principle we recognized and acted on in this court in *Pattison* v. *The Mayor of St. John* (6). There is no evidence that defendant went beyond the line of the street; there is evidence that the cutting was all within the line of the street. There was no evidence whatever that the work was done negligently or improperly; though the jury found such to be the case there was no evidence whatever to establish this. There was clear evidence of contributory negligence. I think the injury the plaintiff sustained was brought about entirely by the manner in which the planks were placed and which plaintiff admits it was dangerous to go up and down. It is abundantly clear that it was because the planks were so placed that it was not reasonably safe for plaintiff's wife to pass over them in the manner she did that caused the accident.

STRONG J.—For the reasons given by the court below I am of opinion that this appeal should be dismissed.

(1) 12 Q. B. 439.
(2) 2 B. & C. 703.
(3) 20 How. 135.
(4) L. R. 4 C. P. 739.
(5) 12 App. Cas. 41.
(6) Cassels's Dig. 96.

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FOURNIER J.—Concurred.

TASCHEREAU J.—I think that the judgment ordering a non-suit was right. I have come to this conclusion upon the ground that it is clear, by the evidence adduced at the trial, that the accident to the plaintiff Alice S. Williams was entirely due to her want of proper care and caution in the use of the planks to get from the house to the street, placed there by her husband in such a position that it was dangerous to pass over them. I would dismiss the appeal.

GWYNNE J.—The declaration filed by the plaintiffs in this action proceeds wholly upon the allegation that the defendants wrongfully cut down a certain street or highway in the city of Portland in the Province of New Brunswick in front of dwelling house of the plaintiff, Edward Williams, so as to make the said street and highway considerably lower than it had previously been, and also wrongfully, illegally and improperly removed certain steps which the plaintiff, Edward, used for affording access from his dwelling house to the street, so as to make it dangerous getting from the said dwelling house and premises to and upon the said street and highway, and that the defendants frequently promised to replace the said steps, so as to continue them down to the said street so lowered, but did not do so.

Upon this foundation is erected the superstructure which constitutes the gist of the action, namely:

That the said Edward Williams, relying upon the said promise, in order to get access to said street and as a temporary means of getting such access was obliged to and did, prudently, carefully, and in a reasonable manner, place boards leading in a slanting direction from the said premises to the said highway as a temporary means of getting from said dwelling house upon said highway until the said defendants should place said steps there as they had agreed and were law-

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fully bound to do, the said plaintiff, Edward Williams, using all proper and reasonable care in that behalf, and the said Alice S. Williams, then being the wife of the said Edward Williams, while seeking to pass from said dwelling house to said street by the way which she had theretofore been accustomed to, and had a right to go, was stepping down the said boards when, without any fault of her own, she slipped and fell, and was very severely bruised, wounded, maimed and injured, and became and was sick and disabled for a long time and suffered great pain of body and mind.

And the plaintiffs claimed for the said injury to the said Alice S. Williams the sum of $2,000, and the said Edward Williams for the loss of the comfort of the services of his said wife and for expenses of nursing her and for medical attendance claimed the further sum of $500.

To this declaration the defendants pleaded in their second plea that they did the several acts complained of under, and by virtue of, the authority in them vested by the act of the general assembly of the province of New Brunswick, 34 Vic. ch. 11, passed to incorporate the town of Portland, and acts in amendment thereof, and without any negligence or improper conduct on the part of the defendants, and not otherwise. And as to the removal of the steps leading from the plaintiffs' dwelling house to the said street the defendants in a fifth plea pleaded, that such steps were upon, and wrongfully encumbering, said highway or street, and the defendants as they lawfully might took away and removed such steps from off said highway or street. The defendants in other pleas denied that they had ever promised to replace said steps and continue the same down to the street as lowered, but the whole case is involved in the sufficiency of the defence as pleaded in their second plea that what the defendants' did in lowering the street as set out in the plaintiffs' declaration was authorized by the acts of the legislature of

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the province of New Brunswick in that plea mentioned and under which the defendants justified.

A protracted inquiry into much irrelevant matter seems to have taken place at the trial, for in view of the fact that the whole foundation of the action as laid in the declaration was the allegation that the act of the defendants in lowering the street, as they undoubtedly did, was illegal and so wrongful to the plaintiffs, the whole question was reduced to one of law, namely, whether the acts under and in virtue of which the defendants justified authorized them so to lower the grade of the street. As to the removal of the steps in the declaration mentioned as formerly leading from the plaintiffs' dwelling house to the street the evidence showed what was done to have been an act incidental to, and necessarily consequential upon, the lowering of the street as lowered. These steps rested upon the street or highway, and the lower ones consisted merely of rough boards laid across a channel in the highway used for drainage purposes, and after the lowering of the street or highway the plaintiffs' dwelling house was left standing several feet nearly perpendicularly above the line of the street or highway as lowered, and so the access from the dwelling house to the street which had before existed was undoubtedly cut off as a consequence necessarily resulting from such lowering of the street. There was no evidence offered at the trial for the purpose of shewing that, nor indeed did the declaration contain any complaint that, the defendants in lowering the street had crossed the limit of the street, and had entered upon and had cut down any part of the plaintiffs' land; they were granted leave at the trial to amend their declaration by inserting a count to that effect, if they desired to do so, but they declined availing themselves of the privilege thus granted to them. If such a case had

been made it would have been necessary to inquire whether such a trespass on land of the plaintiff, Edward Williams, would have rendered the defendants liable for the injury sustained by the wife of Edward Williams occasioned by her using the mode of descent provided by the husband for procuring access from his dwelling house to the street, which, if it was legally lowered, the plaintiffs have not shewn any right so to encumber. Several questions were submitted to the jury by the learned judge who tried the case, all of which the jury answered unfavorably to the defendants. It is, however, unimportant now to consider these questions, or to inquire whether the answers to them are supported by the evidence, for it was agreed at the trial that the verdict should be taken in accordance with the answers of the jury to the questions submitted to them, subject to the opinion of the court whether a non-suit should not be entered upon points taken and moved at the trial and reserved for the consideration of the court. A non-suit has been ordered to be entered by the Supreme Court of New Brunswick pursuant to the leave so reserved, and from that judgment this appeal is taken.

The only points of non-suit so taken which are at all necessary to be considered are that the defendants are not liable to the plaintiffs by reason of their having lowered the grade of the street, that having been a lawful act done by them in the service of their jurisdiction as a municipal corporation, and done for the benefit and convenience of the public ; and that there was no evidence of any negligence committed by the defendants in the lowering of the street, or of any duty owed by the defendants to the plaintiffs a breach of which had been committed, so as to entitle the plaintiffs to recover in the action.

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By the Provincial statute, 34 Vic. ch. 11, the town of Portland was incorporated and by the fourth section of the act it was enacted that the fiscal, prudential and municipal affairs, "and the whole local government of the town" should be vested in a town council consisting of a chairman and twelve other persons to be elected annually by the ratepayers as in the act directed, "and in no other power or authority whatever." By the 57th section it was enacted that such town council should have the sole power and authority to make by-laws for the good rule and government of the town, and for the better carrying out of the provisions of the act, and from time to time to revise, repeal, alter or amend any by-laws, ordinances, rules or regulations whatsoever by them made under the authority of the act, and by the 83rd section it was enacted that the town council should have the sole and exclusive management and control of all roads, bye roads, highways, streets, sidewalks, wharves, docks, slips, ways, lanes and alleys within the said town, and power to open, lay out, regulate, repair, amend and clean the same, and to put and build drains, culverts and bridges therein, and should control the expenditure of all legislative grants for bye roads within the said town, and of all moneys assessed and collected or expended from the general revenues of the said town, for and on account of the making, repairing and improvement of any such roads, bye roads, highways, streets, sidewalks, wharves, docks, slips, ways, lanes and alleys.

By the 84th section the town council was invested with all the powers as to the expenditure and commutation of statute labor which were vested in the General Sessions of the Peace, and in the Commissioners and Surveyors of roads, under the Provincial statute, 25 Vic. ch. 16, to be exercised in such manner and through such officers, agents and persons, as the town council

should prescribe. By this act, 25 Vic. ch. 16, the commissioners of roads were empowered to expend the statute labor and the monies arising from the commutation thereof in making or "improving the roads and bridges in the best manner," the places where and the manner in which such improvements should be made being left to the discretion of the commissioners.

By 45 Vic. ch. 61 the town of Portland was erected into a city, and it was thereby enacted that the act of incorporation of the town of Portland, 34 Vic. ch. 11, should apply to the city of Portland, and that the words "Town of Portland," "Town," "Town Council," "Chairman," whenever occuring in said act of incorporation, 34 Vic. ch. 11, should thenceforth be read as "City of Portland," "City," "City Council," "Mayor."

These are the acts under which the defendants have justified the lowering the street, the legality of which the plaintiffs dispute. There can be no doubt, in my opinion, that the statutes under which the defendants have justified do authorize the defendants to lower the grade of the streets wherever necessary within the limits of the city in such manner and to such extent as shall appear to the town council to be the best manner for serving the interests of the municipality and the convenience of the public. The powers vested in the local municipal corporations throughout the Dominion are vested in them as part of the system of local self-government authorized by sec. 92, item 8, of the British North America Act, whereby the local legislatures are exclusively empowered to make laws in relation to municipal institutions in the province, the policy being to place all matters of a purely local nature, which the regulating the grade of the streets in a municipality eminently is, under the absolute management and control of the municipal corporation, as a power essentially necessary to the interest of the pub-

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lic, and the good rule and government and prosperity of the municipality. If deprived of this power the municipalities throughout the Dominion would be stripped of a power which seems to be essentially necessary to the success of these institutions as local self-governing bodies. It is well established that if the lowering of the street in question was an act which was authorized no action lies at the suit of the proprietor of adjacent lands for any injury thereby occasioned to his property, unless it be for injury arising from negligence in the manner in which the work was executed, nor can he claim any compensation for such injury unless under a special legislative provision to that effect, and in the manner directed in such legislative provision if any special mode be directed, if not then by action. The present action, however, is not brought for any injury alleged to have been done to the property of the plaintiff, Edward Williams, abutting on the street which has been lowered in front of his dwelling house. The action and the claim made in it are of a totally different nature, namely, that the total absence as is alleged of any right in the defendant corporation to lower the street, and by so doing to cut off the access which he had had from his dwelling house to the street as it was before being lowered, entitled the plaintiff, Edward Williams, to provide himself with access from his dwelling house to the street as lowered, and that the defendants, by reason of their act being unauthorized, are responsible for the injury sustained by the wife of Edward Williams in using the mode of access provided by him. If the act of the defendants was a lawful act, if they were authorized to lower the street so as to deprive the plaintiff Edward Williams and his family of access to the street as lowered, there is no foundation laid for the action which has been brought and no

action does lie at the suit of the plaintiffs, or of either of them; and it is unnecessary to inquire whether any action would lie under the circumstances appearing in evidence, as to the immediate cause of the injury complained of having been the defect in the mode of access constructed by the plaintiff Edward Williams himself, even if the defendants had not had, as is alleged, any authority to lower the street. The case of *Nutter* v. *Accrington Local Board of Health* (1) and certain questions put to counsel by Bramwell and Brett L.JJ. in the course of the argument were relied upon by the learned counsel for the appellants in support of their contention, but that case carefully examined and thoroughly understood seems rather to support the contention of the respondents, namely, that they had authority to lower the street in question here.

The action was to enforce an award made in favor of the plaintiff, giving to her compensation for injury done to her property by reason of the grade of a highway near her house having been raised, and the question was whether she was entitled to compensation under the Public Health Act of 1848, 11 & 12 Vic. ch. 63, for such alteration made in the road upon which her house abutted.

By section 2 of the act it was enacted that the word "street" in the act should apply to and include any highway (not being a turnpike road) any road, public bridge (not being a county bridge), lane, footway, square, canal, alley or passage within the limits of any district.

By section 68 it was enacted that all present and future "streets" being, or which at any time should become, highways within any district of a local board should vest in and be under the management and control of the local board of health, and that the said local

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board should cause all such streets to be levelled, paved, flagged, channelled, altered and repaired as occasion might require.

Section 144 provided for compensation being granted to all persons sustaining any damage by reason of the exercise of any of the powers of the act. In the town of Accrington there was a road called the Whalley road in respect of which a turnpike road had been established by 29 Geo. 3, ch. 107; part of this road was within the district of the Accrington local board, and it was on such part that the plaintiffs' property was situate. In 1858 the Local Government Act, 21 & 22 Vic. ch. 98, was passed (in amendment of the Public Health Act 11 & 12 Vic. ch. 63,) by the 41st section of which act it was enacted that it should be lawful for any local board by agreement with the trustees of any turnpike road, or with any corporation or person liable to repair any street or road, or any part thereof, to take upon themselves the maintenance, repair, cleansing, or watering of any such street or road, or any part thereof, on such terms as the local board and the trustees, or corporation, or person, or surveyor aforesaid might agree upon between themselves. Prior to 1871 an agreement was entered into between the Accrington local board and the trustees of the turnpike road, whereby amongst other things the trustees undertook to raise the carriage way at a part of the road immediately opposite the house and land of the plaintiff, and the local board on their part undertook to raise the footpath along the plaintiff's land to a corresponding height. It was for this work that the plaintiff claimed compensation, and had procured an award in her favor to enforce which the action was brought.

The contention of the defendants was that the road in question being a turnpike road was, by the second

section of 11 & 12 Vic. ch. 63, excepted from their jurisdiction, and that the work done was not done under the authority of that act, but under the agreement entered into with the trustees under 21 & 22 Vic. ch. 98, and that therefore the compensation clause of 11 & 12 Vic. ch. 63 did not apply, and that the plaintiff was not entitled to compensation. The Court of Queen's Bench concurring in this contention gave judgment for the defendants from which the plaintiff appealed. Upon the appeal counsel for the plaintiff contended :

1st. That the road was a "street" within 11 & 12 Vic. ch. 63, and under the control and management of the local board, notwithstanding that the piece of road in question was part of the turnpike road; and

2nd. That even if not a " street " within the above statute the local board had power under 21 & 22 Vic. ch. 98, s. 41, by agreement with the turnpike trustees, to take upon themselves the maintenance, repair, cleaning and watering of it.

It was with reference to this contention that Bramwell L.J. put the question to counsel : " What power had the trustees to raise the road ?" And that Brett L. J. said : " Maintenance must mean keeping it up as it is; could they level a hilly road ?" to which questions counsel immediately gave answer :—

By 9 Geo. 4 ch. 77, sec. 9, the trustees of any turnpike road are empowered to make, divert, shorten, vary, alter and improve the course or path of any of the several and respective roads under their care and management.

And he argued that under this clause the trustees of the turnpike road had power to make the alteration complained of, and although they could do so without paying compensation, still they could authorize the local board to make the alteration under sec. 41 of 21 & 22 Vic. ch. 98, and that sec. 4 of that act made the provisions of the Public Health Act of 1848 apply

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and so that the plaintiff was entitled to compensation under sec. 144 of 11 & 12 Vic. ch. 63.

This 4th sec. of 21 & 22 Vic. ch. 98, as thus applied and relied upon, enacts that:

This act shall be construed together with, and deemed to form part of, the Public Health Act of 1848; words used in this act shall be interpreted in the sense assigned to them in said Public Health Act; and the provisions of each of the said acts shall, so far as may be consistent with the provisions of this act, be respectively applicable to all matters and things arising under the other act.

The argument for counsel for the defendants was that the turnpike road was not a "street" within 11 & 12 Vic. ch. 63, and so was not by that act placed under the control and management of the local board, and that section 144 did not apply—that what the local board had done was by authority of the trustees who could have done it themselves without rendering compensation, and that the local board could justify under the trustees of the turnpike road and so were not liable to render compensation to the plaintiff. The majority of the Court of Appeal, consisting of Lord Justices Cotton and Brett, were of opinion that the road in question was a "street" within 11 & 12 Vic. ch. 63, and was therefore under the control of the local board, notwithstanding that it was also a turnpike road, and that therefore the plaintiff was entitled to compensation under section 144 of 11 & 12 Vic. ch. 63. Bramwell L.J. dissented and was of opinion that a turnpike road was not a "street," or under the control of the local board within 11 & 12 Vic. ch. 63, and that therefore the judgment of the Queen's Bench Division should be affirmed. In the observations made by him in his judgment, however, he gives a most complete answer to the above questions put by himself and Brett L.J. to counsel for the plaintiff during the argument. He there says:—

If the acts were done, as indeed they were, and the alteration was

made under the powers of the turnpike trustees, I cannot see that any action would be maintainable against the turnpike trustees or those who acted in their behalf. The trustees are empowered under their act of parliament to raise and alter the levels of the road, and it has been held in a case in the reports of Barnwell and Cresswell. Boulton is Crowther, 2 B. & C. 703, that no action lies against the trustees of a turnpike road for acts done *bonâ fide* and within their jurisdiction.

But, he adds:—

I am inclined to look upon it as a principle that no action ought to be maintainable. * * * * * Supposing that the owner of property adjoining a highway is not the owner of the soil in the highway, I do not think he has any right by the law of the land to have the road continued at a particular level. It may be a great inconvenience to him, no doubt to have the road altered, if he has built with reference to the level of the road, but it may be an inconvenience to the public not to have the level altered, and I do not know that he has any vested right in the road remaining at that level to the inconvenience of all mankind. If this view is right then there is no ground for saying that the defendants are continuing and maintaining a wrong which they have committed. If the act was rightly done by the turnpike trustees the defendants are justified in maintaining it.

Now the right which Lord Justice Bramwell in these observations says the trustees had "to raise and alter the levels of the road," was contained in the statute 9 Geo. 4 ch. 77, sec. 9, cited by counsel for the plaintiff in answer to the question put to him by the Lord Justices, in which statute the power granted is stated to be "to make, divert, shorten, vary, alter and improve" the course of the road under the "care and management of the trustees." We have then the opinion of Lord Justice Bramwell himself in answer to the questions put by himself and Lord Justice Brett that those words were sufficient to confer authority upon the trustees of the turnpike road to cut down hills, to raise hollows, and to raise or lower the level of the road under their care, but whether these words would or would not be sufficient to authorize the local board

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of health, or turnpike trustees, in England to alter the levels of roads under their care, we cannot, in my opinion, permit a doubt to be entertained that the nature and contstitution of local municipalities in this Dominion is such that when, as in the statute incorporating the defendants, and in like statutes, the highways in the municipalties are placed under the sole and exclusive management and control of the councils of the municipalities with power to regulate, repair, amend and improve the same the municipal corporations have most ample power to cut down hills, to raise hollows, and from time to time to alter the levels of all such highways in such manner as shall seem to them to serve best the interests and convenience of the public. The case is, in fact, concluded by *Pattison* v. *The Mayor of St. John* (1) in this court. There can then be no doubt that the corporation of the City of Portland had ample power to lower the level of the street in question, and as the allegation that they had no such power is made the sole foundation of the action as laid in the declaration in this cause the nonsuit was rightly ordered, and it is unnecessary to refer to the other matters discussed at the trial. The appeal must, therefore, be dismissed with costs.

PATTERSON J.—This action is brought by husband and wife to recover damages for injuries received by the wife. The act of the defendants which is complained of is the lowering of the street in front of the house and premises of the husband, but he does not base his claim upon any asserted injury to or depreciation of his property. He asserts that the defendants cut down the street and removed some steps by which he used to descend from his house to the street at its former level, and promised to replace them but did not

(1) Cassels's Dig. 96.

fulfil that promise, and he says that, relying on that promise, he was obliged, in order to get access to the street, and did prudently, carefully and in a reasonable manner, place boards leading in a slanting direction from his premises to the highway as a temporary means of getting from his house to the highway until the defendants should replace the steps as they had agreed and were lawfully bound to do; and it is then averred that the wife slipped when going down the boards and was hurt. There is no allegation that the lowering of the street was unlawful or improper. The removal of the steps is charged to have been wrongful, illegal and improper, but no right to have the steps there is shewn. They are not even alleged to have been on the plaintiffs' property. The allegation is that—

> There were and had been for a long time wooden steps leading from the said dwelling house and premises to the said street and highway;

evidently meaning that the steps led from the higher elevation down to the then level of the street,

> which steps were then, and had been for a long time prior to the grievances hereinafter mentioned, rightfully and lawfully there.

All of which would be true of steps used by permission of the corporation within the line of the highway. In fact the statement of complaint relies upon the alleged promise to replace the steps, though it does not allege any consideration for the promise.

The inquiry naturally suggested is: What cause of action in the female plaintiff is intended? No duty to her on the part of the defendants is averred, the idea conveyed by the pleading being that she is suing because she had received an injury which she might have escaped if the defendants had fulfilled their promise to her husband. And, as far as the husband is concerned, he appears to put forward his wife's in-

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juries as special damage from the same breach of contract.

It is too late, however, to criticise the pleading, and the plaintiffs, both or one of them, must succeed if the verdict they have obtained can be supported on the law and evidence.

I do not think it can possibly be supported

The alleged contract may be put aside at once. There is no pretence that it can be maintained.

Consider the case in the first place as if the cutting down of the street and the removal of the steps were unlawful acts, and, if you please, trespasses on the property of the husband. As already remarked the action is not for damages in respect of the property. Had it been so the measure of the damage would probably have been the price of a new set of steps. The position is that the platform of the house is left with a drop of six feet down to the level of the roadway.

Now, assuming in his favor that there was no other way to get down, though there is evidence that there was another way, would the plaintiff be justified in saying:—

I have been accustomed to walk straight from my door to the street and I shall continue to do so. If I fall town the six feet where I used to have steps to go down, and am hurt, the corporation must pay me damages.

No one would contend for such a proposition. *Clayards* v. *Dethick* (1) whatever it decides, is not an authority that a man may run into obvious danger and then look to the person who caused the danger to make good any harm that follows. In *Lax* v. *Darlington* (2), Bramwell L.J. made some remarks upon expressions used in *Clayards* v. *Dethick* (1) which may usefully be referred to when that decision is appealed to. One of his illustrations is not inapposite here.

(1) 12 Q. B. 439. (2) 5 Ex. D. 28, 35.

Suppose, he said, a man is shut up in the top room of a house unlawfully, is he bound to stay there? He is not bound to do anything of the kind; he may jump out if he likes to run the risk of breaking his neck or his limbs; he may let himself down by a rope or a ladder, but if he runs the risk of getting out and breaks his neck, the person who shuts him up is not guilty of manslaughter; and if he breaks his leg, he ought not to have any right of action against that person although he was not bound to stay there.

Here the plaintiffs did not jump down from the platform, they constructed a gangway and took the risk of getting down by it. It was a very unsafe and impracticable gangway, made by laying from the platform to the street two small planks 7 and 9 inches wide and 9½ and 10½ feet long. The platform being six feet high the planks must have rested on the ground about 8 feet off, forming a steep incline that would require some acrobatic skill to walk on at any time, but making it no matter of surprise that when the planks were wet the plaintiff Alice slipped off them. There would have been greater reason for surprise if she had not fallen.

It seems therefore clear that, irrespective altogether of the right of the defendants to do the acts complained of, the evidence fails to support the charges that those acts occasioned the injuries to the plaintiff Alice. The question of contributory negligence does not arise as a separate issue. The plaintiffs had to establish that the injuries complained of were occasioned by the acts charged against the defendants, and they have shown clearly what it was that caused the accident, and that it was the attempt to use the unsafe gangway which they had themselves constructed and which they knew to be dangerous (1).

There was under these circumstances nothing to leave

(1) See *Davey* v. *London & S.W. Ry. Co.* 11 Q. B. D. 213; 12 Q. B. D. 70; *Wright* v. *Midland Ry. Co.* 51 L. T. 539; *Bridges* v. *N. London Ry. Co.* L. R. 6 Q. B. 377, 394; L. R. 7 H. L. 213.

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to the jury, and I do not understand any of the questions on which the jury pronounced to have referred to the aspect of the case which I have been discussing. Several questions were asked relating to other means of access to the highway and as to the possibility of using, and the prudence of not resorting to, such other means in place of the planks, but the other access referred to was a route by another part of the platform. The question most directly relating to the planks was this:—

> Was it reasonably necessary for the plaintiff in order to get from his premises to the street to put the planks in the position they were placed?

the learned judge explaining that by "reasonable," he meant reasonably necessary considering the other means the plaintiff had of getting to the street. This question did not, any more than the others, touch the subject of the dangerous character of the gangway.

The point decided in *Adams* v. *Lancashire & Yorkshire Ry. Co.* (1) is very like that on which this case might turn on the assumption that the defendants were to blame for removing the steps. The company there had been negligent. but the plaintiff had brought the injury on himself by his own act. He was non-suited by the court in *banc*. Brett L. J., who had tried the action, agreed in the judgment, though apparently with some hesitation. I shall read from his observations a passage which was quoted with approval in the recent case of *Lee* v. *Nixey* (2), and which is apposite to the case in hand:

> I think the jury were justified in finding that the defendants were negligent; but the immediate result of their negligence was not any peril to the plaintiff, but only considerable inconvenience. It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person incurring danger in an attempt to get rid of it. I confess I am not prepared to go that length. I think if the incon-

(1) L. R. 4 C. P. 739. (2) 63 L. T. 285.

venience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience.

Here the method adopted by the plaintiffs for reaching the street was obviously dangerous.

But there cannot be any serious dispute as to the authority of the defendants to change the level of any portion of the street under their statutory power to " open, lay out, regulate, repair, amend and clean " the roads, &c. within the town (1). The same section gives the town council the control of the expenditure of moneys for the " making, repair and improvement " of the roads. The word " improvement " is evidently used as the synonym of " amend," and these terms include something beyond merely repairing, being in each instance used in addition to the word " repair." This subject has been fully discussed in the judgments delivered in the court below. I shall content myself with saying that I agree with the views expressed by Mr. Justice Tuck and Mr. Justice King.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants : *Wm. Pugsley.*

Solicitor for respondents : *I. Allen Jack.*

(1) 34 Vic. c. 11 s. 83 (N.B.)

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*June 22.

HONORABLE THOMAS McGREEVY....APPELLANT;

AND

THE QUEEN.....RESPONDENT.

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

Petition of Right—Submission—Mediators—Award—Finality of—Art. 1346 *C.P.C.*

T. McG. who claimed a large sum of money from the Government of the Province of Quebec under a contract he had for the construction of a portion of the North Shore Railway, agreed to submit to three mediators or *amiables compositeurs* all controversies and difficulties existing between the Government and himself, and the submission stated that these mediators should enquire into, *inter alia*, the extent of the obligation of the contract passed between the Government of Quebec and the said T. McG.; the alterations and modifications made in the plans, particulars and specifications mentioned in the said contract; what influence the said alterations and modifications may have had on the obligations of the said T. McG. and on those of the Government; the delays caused by reasons irrelevant to the action of the contractor; the pecuniary value, whether for more or for less, of the alterations or any increase in the works; and finally, all things connected with the matter and the execution of the said contract, and with regard to the charges and obligations of both the Government and the said contractor, according to the terms of the said contract.

The submission also provided that the award was to be executed as a final and conclusive judgment of the highest court of justice.

The mediators by their award, after reciting the matters in controversy between the parties, found that the Government of the Province of Quebec was indebted to T. McG. in the sum of $147,473, and annexed thereto an affidavit stating they had inquired into all matters and difficulties submitted to them as appeared in the deed of submission. This amount being much less that the amount claimed by T. McG. he filed a petition of right, asking that the

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

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award be set aside on the ground that it did not cover the matters referred to the arbitrators in the submission. The Superior Court for the district of Quebec set aside the award, and on appeal to the Court of Queen's Bench for Lower Canada (appeal side) that court reversed the judgment of the Superior Court and dismissed the petition of right. On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side) that the object of the submission was to ascertain what amount the contractor T. McG. was to receive from the Government, and the specification of the several matters referred to in the submission was merely to secure that in determining the amount the mediators should fully consider all these matters, and that all matters having been so considered the award was valid. Strong and Taschereau JJ. dissenting.

Per Fournier J. Mediators (*amiables compositeurs*) are not subject to the provisions of art. 1346 C.P.C. and their award can only be set aside by reason of fraud or collusion if given on the matters referred to them.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing a judgment of the Superior Court in the District of Quebec (1).

The appellant had, under a contract with the Government of the Province of Quebec, built the eastern section of the North Shore Railway between Montreal and Quebec.

He had claimed as a balance due him considerable sums of money which the government refused to pay, and the difficulties between the parties had been referred to arbitrators and mediators (*amiables compositeurs*), who by their award declared that the government owed the sum of $147,473 as the total balance.

The appellant applied to the Superior Court by petition of right to have the award set aside. The following are the materials parts of the submission to, and affidavit and award of, the mediators:—

" Before Louis N. Dumouchel, the undersigned notary public for the Province of Quebec, in the Dominion of

(1) See 14 Can. S. C. R. 735 where a motion was made to quash this appeal for want of jurisdiction.

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Canada, residing and practising in the city and district of Montreal, came and appeared:

The Honorable Joseph Adolphe Chapleau, of the city of Montreal, acting hereto for and in behalf of the Executive Government of the Province of Quebec, in his capacity of Commissioner of Railways for the said province, and as such having the control and management of the "Quebec, Montreal, Ottawa and Occidental Railway," under an act of the Quebec Legislature, 43 & 44 Vic. ch. 3, and being also specially authorized to all and every the effects of these presents, under and by virtue of the authority of an order in council in that behalf, duly passed and adopted by the said Executive Council on the second day of May last (1881), and whereof a copy is hereto attched—party of the first part;

And the Honorable Thomas McGreevy, of the city and district of Quebec, contractor, party of the second part: Which said parties, for the better intelligence and understanding of the present deed of submission and arbitration bond (compromise), did previously say and declare as follows:—

Whereas, &c., &c., &c.

Now therefore, these presents and I, the said notary, witness:—

That the said respective parties hereto, in order to settle definitely all the controversies and difficulties existing between themselves in the premises, do hereby mutually covenant and agree to and with each other to submit such controversies and difficulties, with all questions connected therewith, to the final decision of Walter Shanly, of the city of Montreal, Esquire, civil engineer, arbitrator and mediator (*amiable compositeur*) named by the said party of the first part, and Chas. Odell, of the city of Quebec, Esquire, civil engineer, arbitrator and mediator (*amiable compositeur*) named by

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the said Thomas McGreevy, who (both hereto present and accepting such charges) shall act and proceed under the authority of the law and in conformity with these presents with Sandford Fleming, of the city of Ottawa, Esquire, civil engineer, also present and accepting, the third arbitrator and mediator, or umpire, (*tiers arbitre et amiable compositeur*,) hereby named and appointed by them the said Messrs. Shanly and Odell.

And it has been specially understood :

1. That the three above named persons shall act at experts, arbitrators and mediators (*amiables compositeurs*), in the examination of the matter in litigation, and they shall inquire into and determine the extent of the obligations of the contract passed between the Government of Quebec and the said Thomas McGreevy ; the alterations and modifications made in the plans, particulars and specifications mentioned in the said contract; what influence the said alterations and modifications may have had on the obligations of the said Thomas McGreevy and on those of the government ; the delays caused by reasons irrelevant to the action of the contractor; the pecuniary value, whether for more or for less, of the alterations or any increase in the works ; and finally, all things connected with the matter and the execution of the said contract, and with regard to the charges and obligations of both the Government and the said contractor, according to the terms of the said contract.

2. That the powers conferred upon these persons shall be those above enumerated, and that before proceeding in their work they shall subscribe the oath provided by law.

3. That the said arbitrators shall have the authority to call for all such vouchers as they may deem requisite ; to question witnesses and the interested parties

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upon oath according to law, and to render their award at Quebec within four months from the date hereof, in the form and manner specified in article 1352 of the Code of Civil Procedure of Lower Canada. The time for rendering the award to be extended until the 31st December (1881) next.

4. That all costs incurred for fees, travelling and other expenses of the said experts, arbitrators and (*amiables compositeurs*) shall be borne in equal proportion by the Government and the said Thomas McGreevy ; and with regard to the costs of evidence, fees and other lawyers perquisites, they shall be paid by the party incurring the same.

5. That the said parties hereto shall execute and perform, in every respect, the said award so to be rendered by the said arbitrators and (*amiables compositeurs*), or by the majority of them, as a final and conclusive judgment of the highest court of justice, without any appeal or recourse whatever, under a penalty of twenty-five thousand dollars ($25,000) which the party accepting said award shall have the right to exact from the party refusing to comply with the same, in the event of the latter adopting any proceedings to cause the said award to be annulled and set aside under any pretence or reason whatever.

THUS DONE AND PASSED, &c.

AFFIDAVIT OF ARBITRATORS.

"A"

DOMINION OF CANADA }
Province of Quebec }

Walter Shanly, Esquire, civil engineer of the city of Montreal, in the district of Montreal, Charles Odell, Esquire, civil engineer, of the city of Quebec, in the district of Quebec, and Sandford Fleming, Esquire, civil engineer, of the city of Ottawa, in the county of Carleton, province of Ontario, all three duly appointed

experts, arbitrators and mediators (*amiables compositeurs*), by and in virtue of an act passed in the said city of Quebec, before and in the presence of L. N. Dumouchel, public notary, on the thirtieth day of July of last year (1881) being a deed of submission and arbitration bond (*compromis*) between Hon. Joseph Adolphe Chapleau, in his capacity of Railway Commissioner of the Province of Quebec, and the Hon. Thomas McGreevy, member of the House of Commons, railway contractor, of the said city of Quebec, by which act we, the said Walter Shanly, Charles Odell and Sandford Fleming, were especially charged with examining into the matter in litigation and inquiring into and determining the extent of the obligations of the contract passed between the Government and the said Thomas McGreevy, the alterations and modifications made in the plan, particulars and specifications mentioned in the said contract, what influence the said alterations and modifications may have had on the obligations of the said Thomas McGreevy and on those of the government, the delays caused by the reasons irrelevant to the action of the contractor, the pecuniary value, whether for more or for less, of the alterations or in any increase in the works, and finally all things connected with the matter and execution of the said contract and with regard to the charges and obligations of both the government and the said contractor, according to the terms of the said contract, as the whole appears more fully in a copy of the said deed of submission and compromise hereunto annexed, having been duly sworn on the Holy Evangelists do make oath and swear that we will faithfully proceed as experts, arbitrators and mediators (*amiables compositeurs*) to the view, the examination, the inquiry, the investigation, and report into and upon all the matters, and difficulties submitted to us by and in virtue of the said act of submission and

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compromise hereunto annexed; and that we will truly report our opinion in the premises without favor or partiality towards the said parties; so may God help us.

(Signed,) "W. SHANLY,"
" "CHAS. ODELL,"
" "SANDFORD FLEMING."

SWORN, &c.

AWARD.

DOMINION OF CANADA,
PROVINCE OF QUEBEC,
City of Hull.

TO ALL TO WHOM THESE PRESENTS SHALL COME:

We, the undersigned, Walter Shanly, of the city and district of Montreal, Civil Engineer; Charles Odell, of the same place, Civil Engineer; and Sandford Fleming, of the City of Ottawa, in the Province of Ontario, also Civil Engineer;

Send greeting:—

Whereas matters in controversy between the Government of the Province of Quebec, and the Honorable Thomas McGreevy, of the city and district of of Quebec, contractor, were by them submitted to us, the undersigned, as experts, arbitrators and mediators, (*amiables compositeurs*) as set forth and more fully appears in a certain deed of submission and arbitration bond (*compromis*), executed by the said parties respectively before Louis N. Dumouchel, notary public, of the City of Montreal, and bearing date the thirtieth day of July last past, (1881) the time fixed and determined to render our award on said *compromis* having been extended and enlarged by the mutual consent of said parties to the fifteenth day of June instant (1882) inclusive, under and by virtue of four different deeds to that effect executed before the same notary, and bearing date respectively as follows: twenty-eighth

December last (1881), twenty-fifth February last (1882), twenty-seventh April last (1882), and thirtieth May last (1882) : Now therefore, we, the said experts, arbitrators and mediators (*amiables compositeurs*), having been first duly sworn as appears by the document hereto annexed, bearing date the twenty-fifth day of January last past (1882), and marked A ; heard the allegations of the said parties and their respective witnesses under oath, and having carefully examined the matters in controversy by them submitted, to wit :—

" The extent of the obligations of the contract passed " between the Government of Quebec and the said " Thomas McGreevy ; the alterations and modifications " made in the plans, particulars and specifications " mentioned in the said contract ; what influence the " said alterations and modifications may have had on " the obligations of the said Thomas McGreevy and " on those of the Government ; the delays caused by " reasons irrelevant to the action of the contractor, the " pecuniary value, whether for more or for less, of the " alterations or any increase in the works ; and finally, " all things connected with the matter and the execu- " tion of the said contract, and with regard to the " charges and obligations of both the Government and " the said contractor, according to the terms of the said contract ;"

Do unanimously make and render our award in writing, under and in execution of the said deed of submission and arbitration bond (*compromis*), in the following manner to wit :—

That we find that the Government of the Province of Quebec is indebted to the Honourable Thomas McGreevy in the sum of one hundred and forty-seven thousand, four hundred and seventy-three dollars.

In witness whereof, we have signed these presents at

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the city of Hull, in the Province of Quebec, this fourteenth day of June, eighteen hundred and eighty-two.

(Signed,) "W. SHANLY,"
" "CHAS. ODELL,"
" "SANDFORD FLEMING."

The Superior Court set aside the award on the ground that it did not cover the matters referred to the arbitrators in the submission, but on appeal to the Court of Queen's Bench for Lower Canada that court reversed the judgment of the Superior Court and dismissed the Petition of Right.

Irvine Q.C. for appellant ;

Langlier Q.C. for respondent.

The grounds upon which the award was discussed by counsel and authorities relied on are referred to in the judgments hereinafter given.

Sir W. J. RITCHIE C.J.—It is abundantly clear from the recitals in the submission that the contractor was claiming from the government large sums of money for the execution of the works, and that the Minister in the capacity of Commissioner of Railways did not feel justified in taking upon himself the task of determining the value of the claims of the contractor ; that the contractors and Railway Commissioner did agree to refer and submit all such claims and demands to the decision of a board of arbitrators. "Now, therefore," as the submission expresses it, "the respective parties in order to settle definitely all the controversies and difficulties existing in the premises did mutually agree to submit the same with all questions connected therewith to the final decision of the arbitrators." This makes it to my mind very clear that the sole object of the arbitration was to ascertain what amount the contractor was entitled to receive from the

government, and the specification of the several matters referred to in the submission was merely to secure that in determining the amount the assessors should fully consider all these matters.

It is clear from the award that the arbitrators did take into consideration and did fully consider and decide on all the matters referred to them. There is nothing whatever to show or from which it can be inferred that they did not do so, and the result was the finding that the Government of the Province of Quebec was indebted to the suppliant in the sum of $147,473, and this was a final determination of the claims and demands of the contractor, and of all things connected with the matter and execution of the said contract, and with regard to the charges and obligations both of the government and the said contractor, according to the terms of the said contract, and I think there is no ground whatever for disturbing this award, and that the appeal should be dismissed.

STRONG J.—The appeal should be allowed and judgment of Superior Court restored, with costs in this court and in the courts below.

FOURNIER J.—Le 24 septembre 1875, l'appelant contracta avec le gouvernement de la province de Québec, pour la construction de la partie est du chemin de fer de la Rive Nord. Les travaux furent complétés et le chemin remis en la possession du gouvernement en 1880. Durant la construction il fut fait des changements dans la location de la ligne. A la fin des travaux un estimé du coût total du chemin, comprenant les extra fut préparé par Mr. Light, l'ingénieur du gouvernement. Mais des difficultés étant survenues entre les parties intéressées, elles convinrent par un acte de compromis passé en juillet 1881, de s'en rap-

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porter à la décision de Mr. Walter Shanly, nommé par le gouvernement, et Mr. Charles O'Dell nommé par l'appelant pour agir comme arbitres et amiables compositeurs, et Mr. Sandford Fleming comme tiers-arbitre et amiable compositeur choisis par les deux derniers.

Les arbitres et amiables compositeurs ayant procédé à l'examen de l'affaire qui leur avait été référée rendirent leur sentence déclarant que le gouvernement devait à l'appelant une balance totale de $147,473.00.

McGreevy s'adressa par pétition de droit à la cour Supérieure pour faire annuler la sentence, et obtint jugement; mais ce jugement fut infirmé par la cour du Banc de la Reine. L'appel est de ce jugement.

Le compromis donne aux arbitres et amiables compositeurs les pouvoirs les plus amples pour la décision des matières en dispute qui sont énumérés comme suit dans l'acte de compromis :—

1. That the three above named persons shall act as experts, arbitrators and mediators (*amiables compositeurs,*) in the examination of the matter in litigation, and they shall enquire into and determine the extent of the obligations of the contract passed between the Government of Quebec and the said Thomas McGreevy ; the alterations and modifications made in the plans, particulars and specifications mentioned in the said contract ; what influence the said alterations and modifications may have had on the obligations of the said Thomas McGreevy and on those of the Government ; the delays caused by reasons irrelevant to the action of the contractor ; the pecuniary value, whether for more or for less, of the alterations or any increase in the works ; and finally, all things connected with the matter and the execution of the said contract, and with regard to the charges and obligations of both the Government and the said contractor, according to the terms of the said contract.

Les procédés pour arriver à cette sentence ont eu lieu à Ottawa, du consentement des parties intéressées, bienqu'il n'y en ait pas d'écrit, et en leur présence, et leurs témoins et conseils ont été entendus en dehors de la province de Québec.

Le 14 juin 1882, avant l'expiration du délai fixé pour prononcer la sentence, les arbitres et amiables compositeurs se rendirent à Hull, dans la province de Quebec, et y signèrent leur sentence qui fut ensuite déposée chez un notaire. La sentence déclare en ces termes :

That we find that the Government of the Province of Quebec is indebted to the Hon. Thomas McGreevy in the sum of $147,473.00.

L'appelant dit dans son factum :

This amount being very much less than the amount claimed by the contractor, and being advised that the award of the arbitrators was, for various reasons, null and void, he presented a petition of right, &c., &c.

Voilà une admission bien formelle de la part de l'appelant que sa principale raison d'attaquer la sentence, c'est quelle ne lui accorde pas un montant assez élevé.

Il allègue aussi que les arbitres n'avaient aucun pouvoir de décider d'autres questions que celles énoncées dans le compromis, et qu'ils étaient obligés de décider tous les points qui leur étaient soumis.

Il se plaint encore que la seule question décidée par eux est que dans leur opinion le gouvernement est endetté envers l'appelant en la somme de $147,473.00. Il prétend que cette question ne leur était pas référée. D'après lui les amiables compositeurs auraient dû se borner à définir, 1° l'étendue des obligations du contrat ; 2° les changements et modifications faits aux plans et specifications ; 3° l'effet de ces changements ont pu avoir sur les obligations respectives des parties ; 4° les délais causés au contracteur ; 5° la valeur en plus ou en moins des changements faits, et enfin, 6° toutes matières ayant rapport à l'exécution, en prenant en considération les obligations respectives des parties.

Les amiables compositeurs n'ont sans doute pas procédé comme une cour ordinaire, et ne sont pas entrés dans les détails des procédés et des motifs sur lesquels

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ils ont fondé leur sentence arbitrale. Leur qualité d'amiables compositeurs les en dispensait. Il en eût été autrement s'ils eussent été seulement nommés arbitres.

Notre code de procédure, article 1346, dit :—

Les arbitres doivent entendre les parties et leur preuve respective, ou les constituer en défaut, et juger suivant les règles de droit, à moins qu'ils n'en soient dispensés par le compromis, ou qu'ils ne soient établis amiables compositeurs.

Le code n'a fait aucun changement à l'ancien droit au sujet des amiables compositeurs. Ils sont encore aujourd'hui comme auparavant, dispensés d'observer les règles de droit et les formes de la procédure, ils décident suivant l'équité et la bonne conscience. Leur sentence, pourvu qu'elle soit dans les limites de leurs attributions ne peut être mise de côté que pour fraude ou collusion.

Dalloz Vo. *Arbitrage*, (1) :—

Les amiables compositeurs sont les arbitres qu'on nommait autrefois arbitrateurs. Ce sont ceux qui ont pouvoir de juger sans formalité judiciaire ; ils peuvent tempérer la rigueur de la loi, écouter l'équité naturelle que l'orateur romain appelle *laxamentum legis* et prononcer *non pro ut lex, sed pro ut humanitas aut misericordia impellit regerer.*

Les arbitres au contraire doivent juger suivant la loi et observer les règles de la procédure.

Les amiables compositeurs sont affranchis en outre des règles du droit. C'est là ce qui les distingue des arbitres volontaires (2).

Bioche, (3) :—

Cependant, lorsque les parties leur ont donné, par le compromis, la faculté de prononcer comme amiables compositeurs, ils peuvent se départir des règles du droit et suivre l'équité naturelle.

D'après ces autorités, il est évident que les amiables compositeurs avaient le droit de rendre leur sentence dans la forme qu'ils ont adoptée, c'est-à-dire d'une

(1) Vol. 5, p. 67, No. 1019, ch. 10, art. 3.
(2) Id. No. 1020.
(3) Vol. 1, Vo. Arbitrage p. 525, No. 463.

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manière générale et sans entrer dans des détails. Mais leur sentence n'en est pas moins complète et porte sur toutes les matières référées comme on le voit par l'extrait suivant de la sentence :—

Now therefore, we, the said experts, arbitrators and mediators (*amiables compositeurs*), having been first duly sworn as appears by the document hereto annexed, bearing date the twenty-fifth day of January last past, (1882), and marked A ; heard the allegations of the said parties and their respective witnesses under oath, and having carefully examined the matters in controversy by them submitted to wit :— the extent of the obligations of the contract passed between the Government of Quebec and the said Thomas McGreevy ; the alterations and modifications made in the plans, particulars and specifications mentioned in the said contract ; what influence the said alterations and modifications may have had on the obligations of the said Thomas McGreevy and on those of the Government ; the delays caused by reasons irrelevant to the action of the contractor, the pecuniary value, whether for more or for less, of the alterations or any increase in the works ; and finally, all things connected with the matter and the execution of the said contract, and with regard to the charges and obligations of both the Government and the said contractor, according to the terms of the said contract.

Comme ils le déclarent, les amiables compositeurs ont entendu les parties et leurs témoins, et examiné soigneusement toutes les matières en contestation qui leur ont été soumises, qu'ils énumèrent, en citant textuellement la partie du compromis qui les définit. Ainsi il ne peut pas y avoir eu d'omissions, toutes les matières référées ont été examinées et décidées. Et c'est après cela qu'ils ont fixé le montant dû par le gouvernement à l'appelant.

Il suffit de lire le compromis pour comprendre que la proposition de l'appelant que la fixation de la somme due n'était pas référée aux arbitres, n'est pas soutenable. C'est l'unique but que les parties avaient en vue, celui d'arriver à un règlement final et de mettre un terme aux incessantes réclamations que faisait l'appelant pour de grandes sommes d'argent lui revenant pour l'exécution des travaux de son contrat. D'ailleurs la chose

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est clairement dite dans la clause du compromis que l'on trouve à la page 20 du dossier, comme le fait voir l'extrait suivant :—

And whereas, ever since the Government has taken possession of the said road, the contractor has never ceased to claim from the party of the first part the payment of large sums of money for the execution of the said works.

And whereas the said party of the first part does not feel justified in taking upon himself, not even with the assistance of the ordinary officers of his Department, the task of determining the value of the claims of the said contractor, nor does he believe himself qualified to make a just appreciation of the definitive estimates of the Chief Engineer Mr. Light.

Now therefore, these presents and I, the said notary witness :—

That the said respective parties hereto, in order to settle definitively all the controversies and difficulties existing between themselves in the premises, do hereby mutually covenant and agree to and with each other, to submit such controversies and difficulties, with all questions connected therewith, to the final decision of Walter Shanly, of the City of Montreal, Esquire, Civil Engineer, arbitrator and mediator (*amiable compositeur*) named by the said party of the first part, and Chas. Odell, of the City of Quebec, Esquire, Civil Engineer, arbitrator and mediator (*amiable compositeur*) named by the said Thomas McGreevy, who (both hereto present and accepting).

Comme on le voit par cet extrait la nécessité de fixer le montant des réclamations de l'appelant a été la raison déterminante du compromis, les autres questions mentionnées dans la référence ne sont que des sujets d'examen pour en arriver à la solution principale, la fixation du montant dû par le gouvernement à l'appelant. Si les amiables compositeurs n'eussent fait rapport d'une somme déterminée, ils auraient totalement failli à leur devoir, et leurs procédés auraient été sans valeur. Non seulement il n'y a pas eu en cela excès de pouvoir, mais en supposant même que le compromis eut été silencieux sur cette question, les amiables compositeurs avaient d'après la loi et la jurisprudence le pouvoir de statuer sur le montant dû à l'une des deux

parties sans excéder leur juridiction suivant l'autorité de Dalloz (1) :

4° Que chargés de prononcer sur tous les différends élevés entre les parties, ils peuvent s'il a lieu, ordonner des compensations entre elles sans excéder leur mandat ; ils peuvent en pareil cas, a dit la cour Royale, prescrire aux parties tout ce que, par voie de transaction, celles-ci auraient pu faire (Angers 1er juin 1822, même espèce) ; c'est là, on le voit, donner la plus grande latitude au pouvoir des amiables compositeurs ; et certes quand on examine, et la nature des débats qui divisent les parties et l'intention manifestée dans le compromis, on reste convaincu que le pouvoir des arbitres avait pu aller jusque-là (2).

L'appelant s'est aussi plaint que la sentence arbitrale est nulle parce que les amiables compositeurs n'ont pas donné les motifs de leur décision. C'est méconnaître complètement la loi qui régit leurs fonctions que de les assimiler en cela aux cours ordinaires, en les prétendant soumis à l'obligation que la loi ne leur impose nullement de donner les motifs de leurs décision.

Bioche, (3).

Toutefois, le défaut de motifs n'entraîne pas la nullité, si les arbitres sont amiables compositeurs.

Dans la cause de *Allien* v. *Allien*, (4) la cour de Bordeaux a décidé, le 28 novembre 1835, que les amiables compositeurs n'étaient pas obligés de motiver leur sentence.

L'appelant a invoqué un autre moyen pour attaquer la sentence en prétendant que les amiables compositeurs et les témoins n'avaient pas prêté serment. C'est une évidente erreur de faits. La sentence contient la formule du serment prêté par les amiables compositeurs et la minute de leurs procédés contient la formule de l'assermentation des témoins.

Un dernier moyen de l'appelant, encore moins fondé que le précedant, c'est que la sentence a été rendue à

(1) Vo. Arbitrage, ch. 10, art. 3, No. 1025, p. 69.

(2) Voir la note 1 ; voir aussi No. 1026, note 2, 3 et 4.

(3) Vo. Arbitrage No. 474.

(4) Dalloz Vo. Arbitage, No. 10 26, p. 71, note 4.

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Hull, au lieu de l'être dans la cité de Québec. Il est vrai que dans le compromis, il est dit que les amiables compositeurs rendront leur sentence à Québec, dans les quatre mois de sa date. Il était nécessaire de fixer le délai dans lequel devait être rendue la sentence. Cette formalité est établie par l'article 1344, code de procédure :

> L'acte de compromis extra-judiciaire doit désigner les noms et qualités des parties et des arbitres, les objets en litige et le temps dans lequel la sentence arbitrale doit être rendue.

Il n'est nullement question de la fixation du lieu où la sentence doit être prononcée, ni dans cet article, ni dans aucune autre loi. Le fait que la sentence a été rendue à Hull, au lieu de Québec, n'a aucune importance quelconque et n'affecte nullement les pouvoirs des amiables compositeurs. L'appelant est le dernier qui devait offrir une telle objection, puisque c'est à sa demande que les amiables compositeurs ont procédé à Ottawa, comme le prouve le témoignage de Mr. Walter Shanly, l'un des amiables compositeurs. Il a acquiescé à tous les procédés en y assistant en personne, en s'y faisant aussi représenter par son frère Robert McGreevy et par son conseil, Mr. Irvine. Si cette objection avait quelque valeur, le défendeur a, par sa conduite, formellement acquiescé à la procédure des amiables compositeurs et renoncé au droit, s'il en avait eu, de s'en prévaloir. L'appel doit être débouté avec dépens.

TASCHEREAU J.—The judgment appealed from in this case was rendered by the Court of Queen's Bench for the Province of Quebec, reversing a judgment of the Superior Court, in the district of Quebec. The circumstances which have given rise to the present proceedings are as follows:—

Thomas McGreevy, the present appellant, entered into a contract with the government of the Province of Quebec on the 24th September, 1875, for the con-

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struction of the eastern portion of the North Shore Railway. This railway was finally completed and handed over to the government in the month of January, 1880. During the course of the construction of the road various changes were made in the location of the line, causing extra expense and delay to the contractor, and at the period of the completion of the work and the delivery of it to the government, an estimate of the total cost of the road including allowance for extra work was made by Mr. Light, the government engineer. Thereupon various questions and difficulties arose between the government and the appellant, he claiming more than the amount allowed by the government, and the government offering him a less amount, and in the month of June, 1881, an agreement was made between the government and McGreevy that the matters in dispute between them should be referred to the arbitration of Mr. Walter Shanly, appointed by the government, Mr. Charles O'Dell appointed by the contractor, and Mr. Sandford Fleming agreed upon as umpire by the first named gentlemen. The submission to the arbitrators recites the agreement between the parties, the variations in the location of the road and certain of the extra work which the appellant had been called upon to do, and the delays which various circumstances had caused in the construction of the work, and that the parties had agreed to refer the matter to arbitration in the way already mentioned. The matters referred to these arbitrators were :—

That they should inquire into and determine the extent of the obligations of the contract passed between the government of Quebec and the said Thomas McGreevy ; the alterations and modifications made in the plans, particulars and specifications mentioned in the said contract ; what influence the said alterations and modifications may have had on the obligations of the said Thomas McGreevy and on those of the government ; the delays caused by reasons irrelevant to the action of the contractor ; the pecuniary value whether for more or for

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less of the alterations or any increase in the works ; and finally all things connected with the matter and execution of the said contract, and with regard to the charges and obligations of both the government and the said contractor, according to the terms of the said contract.

The submission then goes on to specify the manner in which the proceedings are to be carried on, the time within which the award is to be made and other particulars of minor importance.

The proceedings under this submission were held in the City of Ottawa.

On the 14th June, 1882, the arbitrators signed a document which was afterwards deposited with a notary as their award. The document, after reciting a portion of the submission, contains the following finding:—"That we find that the government of the Province of Quebec is indebted to the Honorable Thomas McGreevy in the sum of $147,473." This amount being very much less than the amount claimed by the appellant he is now asking, for the reasons given in the petition, that this award should be held to be null and void. The Lieutenant-Governor having granted his fiat on the petition of right, proceedings were then taken in the usual way before the Superior Court, and on the 2nd March, 1885, Mr. Justice Caron rendered a judgment in which he granted the conclusion of the petition of right and declared the award to be null and void and of no effect whatever, mentioning as his reason that the award did not cover the matters referred to the arbitrators in the submission. The Court of Appeals reversed the judgment of the Superior Court and dismissed the petition of right. The judges have not given their reasons for this judgment, and the only *considérant* given in the judgment was a general one that the arbitrators had determined all the questions submitted to them, and that whatever irregularities

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there might have been in the proceedings of the arbitrators had been waived by the appellant.

I am of opinion that we should restore the judgment of the Superior Court. The arbitrators were bound to dispose of all the points submitted to them, the adjudication which they had undertaken. The only matter decided of by them was the simple fact that in their opinion the government owed the appellant the sum of $147,473. Now, in order to reach that final result, the submission provided that they should decide these several points:

1st. The extent of the obligations of the contract passed between the Government of Quebec and the said Thomas McGreevy.

2nd. The alterations and modifications made in the plans, particulars and specifications, mentioned in the said contract.

3rd. What influence the said alterations and modifications may have had on the obligations of the said Thomas McGreevy and on those of the government.

4th. The delays caused by reasons irrelevant to the action of the contractor.

5th. The pecuniary value whatever for more or for less of the alterations or any increase in the works; and finally,

6th. All things connected with the matter and the execution of the said contract and with regard to the charges and obligations of both the government and the said McGreevy according to the terms of the said contract.

Not one of these points (the only matters referred to the arbitrators) was decided by them. They have simply struck a balance of account and stated the amount to which they considered the appellant entitled. The appellant, it seems to me, had the right to a decision on the various details mentioned in paragraph one of the matters submitted to the arbitrators. It was

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not sufficent, in my opinion, for the arbitrators to state that they had examined all the points referred to them. The submission obliged them to pass and determine on each of them which they have not done. On this ground alone I would allow the appeal.

GWYNNE J.—The whole contention upon this appeal, as argued before us, was that the award which the appellant seeks to set aside as null and void purports to decide a point which, as is contended, never was at all submitted to the arbitrators, namely, the amount in which the government of the Province of Quebec are justly indebted to him upon his contract for the construction of a portion of the North Shore Railway; and that it does not determine certain points which, as is contended, were the only points submitted to the arbitrators to be determined.

The construction of the submission deed appears to me to be that the sole object of the reference to the *amiables compositeurs* was to obtain their final determination of the true and just amount (under the particular circumstances recited in the deed and having due regard to those circumstances) of the appellant's claims and demands against the government of the province of Quebec under his contract, which circumstances, "in the examination of the matter in litigation," between the parties to the reference, that is, in the examination of the amount due to the contractor by the government, the *amiables compositeurs* were required to inquire into, and to be governed by, in making their award as to the amount of the contractor's claim against the Government which was "the matter in litigation."

The deed recites the various circumstances which the appellant relied upon as increasing the amount of his claims, viz:—the alterations in the route and plans of the railway from those originally designed when the

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contract was entered into; the delays alleged to have been caused to the contractor proceeding with the work which operated to his prejudice; the facts that, "with the view of determining and settling as quick as possible the claims of the contractor," it was agreed between him and the provincial government, that final estimates should be prepared by the Chief Engineer of the provincial government, and that so soon as these estimates should be approved the government should pay all moneys which should appear to be due and owing to the contractor; that those estimates were prepared by the chief engineer, and that the contractor (the now appellant) never ceased to claim from the provincial government large sums of money for the execution of the said work, and that the minister, representing in that matter the provincial government, not feeling himself justified in taking upon himself the task of determining the value of the claims of the contractor, or of appreciating the definitive estimates of the chief engineer, it was agreed between the contractor and the minister acting on behalf of and representing the provincial government to refer and submit all such claims and demands of the contractor to the decision of a board of arbitration. And in order to settle definitively all the controversies and difficulties existing in the premises, the appellant and the minister mutually covenanted and agreed to submit such controversies and difficulties with all questions connected therewith to the final decision of three *amiables compositeurs* named in the deed.

Now, from these recitals and the submission thereupon made, it is abundantly clear that the whole matter in controversy between the parties to the submission was as to the amount of the just claims and demands which the appellant under the special cir-

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cumstances recited in the deed had against the provincial government, an inquiry into which matter involved, of course, an inquiry into the correctness of the estimate of such amount as made by the chief engineer. The object of the reference plainly was that the persons named as arbitrators in the submission deed should, as competent experts and as *amiables compositeurs*, finally determine the amount of the contractor's just claims which the minister, feeling himself not qualified to make a just appreciation of the definitive estimates of the chief engineer, declared himself to be incompetent to determine. It was "the claims and demands" of the contractor for the amount contended by him to be due to him by the Provincial Government which constituted the special matter expressly agreed to be referred to the decision of the experts (*amiables compositeurs*) and the parties to the reference covenanted, that they should respectively execute and perform in every respect the award to be made by them, or by a majority of them, as a final and conclusive judgment of the highest court of justice. Now, from the terms of the deed of submission, there does not appear to have been anything which can be suggested, nor has there been anything suggested, which the provincial government could be called upon to execute and perform, or which they could execute and perform in obedience to an award made in pursuance of the submission, unless it be to pay the amount which should be awarded as due by the provincial government to the appellant in respect of the contract in the deed of submission mentioned.

The award instead of being made defective by professing to determine such amount would have been, in my opinion, wholly defective, barren and useless, if it had not done so finally and conclusively, so that it should operate, as it was expressed by the deed of sub-

mission and intended that it should operate, as a final and conclusive judgment of the highest court of justice. The award upon its face declares (and the truth of what is stated in it is not disputed) that the *amiables compositeurs*, in their examination of the matter in litigation which as I have already said was, in my opinion, the true amount of the appellants' just claim against the government of the province of Quebec, did carefully inquire into and take into their consideration the several matters which the appellant relied upon as increasing the amount of his claim, stating them *seriatim* as they are set out in the deed of submission, and that having done so they unanimously found the true amount in which the government of the province of Quebec were indebted to the appellant to be the sum of $147,473. They have thus, in my opinion, complied with the object and intent of the deed of submission, and we should defeat the intention of the parties as expressed in that deed if we should pronounce the award to be null and void upon the ground urged, and as this was the only ground which was relied upon, the other points of objection stated in the petition of right not having been pressed, I am of opinion that the appeal should be dismissed with costs.

PATTERSON J.—I am also of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *Irvine, Q. C.*

Solicitor for respendent: *Taillon, Q. C.*

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*Jan. 20, 21, 23.

*June 22.

MARTIN LYNCH (PLAINTIFF).....APPELLANT;

AND

THE CANADA NORTH-WEST LAND COMPANY (DEFENDANTS)..... } RESPONDENTS;

THE RURAL MUNICIPALITY OF SOUTH DUFFERIN (DEFENDANTS). } APPELLANTS;

AND

WILMOT F. MORDEN (PLAINTIFF).....RESPONDENT;

WILLIAM T. GIBBINS (DEFENDANT).....APPELLANT;

AND

BARBARA L. BARBER (PLAINTIFF).....RESPONDENT.

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

Constitutional law—B.N.A. Act, ss. 91 & 92—Interest—Legislative authority over—Municipal Act—49 V. c. 52 s. 626; 50 V. c. 10 s. 43 (Man.)—Taxation—Penalty for not paying taxes—Additional rate.

The Municipal Act of Manitoba provides that persons paying taxes before Dec. 1st in cities and Dec. 31st in rural municipalities shall be allowed 10 per cent. discount; that from that date until March 1st the taxes shall be payable at par; and after March 1st 10 per cent. on the original amount of the tax shall be added.

Held, reversing the judgment of the court below, Gwynne J. dissenting, that the 10 per cent. added on March 1st is only an additional rate or tax imposed as a penalty for non-payment which the local legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of sec. 91 of the B.N.A. Act. *Ross* v. *Torrance* (2 Legal News 186) overruled.

APPEALS from decisions of the Court of Queen's Bench (Man.) (1).

PRESENT.—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

(1) *Morden* v. *South Dufferin* 6 M. L. R. 515.

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The question raised on the three appeals is the same, namely, as to the power of the legislature of Manitoba to pass an act authorising municipalities to impose an addition of ten per cent. on taxes unpaid after a certain time from the assessment being made.

The act in question is sec. 626 of the act known as The Municipal Act of 1886, 49 Vic. ch. 52, as amended by 50 Vic. ch. 10 sec. 43. It provides that persons paying taxes before the first day of December in cities and the thirty-first day of December in rural municipalities shall be entitled to a reduction of ten per cent. ; taxes unpaid on those dates shall be payable at par until the first day of March following ; and if not then paid ten per cent. shall be added to the original amount.

The suit in Lynch's case was for specific performance of a contract for the sale of land by which the plaintiff agreed to pay the taxes assessed on the land and the balance of the purchase money in cash. In paying the taxes plaintiff paid the ten per cent. added on the amount on March 1st of each year and compounded in subsequent years and tendered to the defendant as the purchase money of the land the amount agreed less such taxes and interest. The defendant refused to accept this amount claiming that the addition of the ten per cent. was illegal. The appellant refused to pay more and brought his suit for specific performance.

The bill was dismissed without argument either on the hearing or before the full court, it being held that the case fell within the decision in *Morden* v. *South Dufferin* (1), which followed *Schultz* v. *City of Winnipeg* (2). The defendant appealed.

In *South Dufferin* v. *Morden* the taxes imposed on respondent's land were subject to the addition of 10 per cent., and respondent paid the addition under pro-

(1) 6 Man. L. R. 515. (2) 6 Man. L. R. 35.

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test having tendered to the appellants: first, the original amount of the tax imposed; and secondly, such amount with six per cent. added, both of which were refused. The action was brought to recover the amount added to the assessment and judgment was given against the municipality, the act being held *ultra vires* so far as the addition to the tax was concerned. The municipality appealed.

In *Gibbins* v. *Barber* land was sold by the respondent to the appellant, the latter agreeing to pay taxes and deduct the same from the purchase money. The same question arises on a refusal by respondent to allow the 10 per cent. addition to be so deducted.

The three appeals were argued together.

Kennedy for the appellants in *Lynch* v. *Canada North-West Land Co.* The interest mentioned in the B. N. A. Act, as to which the Dominion Parliament only can legislate, is interest on commercial matters and means merely the rate of interest.

Valin v. *Langlois* (1) and *Parsons* v. *Citizens Ins. Co.* (2) settle the mode by which the B. N. A. Act is to be construed. The whole scope and object of the act is to be considered, and so construing it the word "interest" in the 92 section cannot be held to apply to municipalities dealing with taxes.

The addition to the taxes provided for by the Manitoba act is not interest but merely a penalty.

Christopher Robinson Q.C., and *Tupper* Q.C., for the respondent. Interest is compensation for delay in the payment of money due. Tested by this definition the provision in this case clearly relates to interest and is *ultra vires* the provincial legislature.

The legislature in this same act twice calls the addition to the taxes interest, which is some evidence of their intention in passing it.

(1) 3 Can. S. C. R. 1. (2) 4 Can. S.C.R. 215; 7 App.Cas. 96.

The cases of *Ross* v. *Torrance* (1) and *City of Montreal* v. *Perkins* (2) settle the law as we contend here.

In *South Dufferin* v. *Morden Martin*, Atty. Gen. of Manitoba, appeared for the appellants and *MacTavish* for the respondent.

In *Gibbins* v. *Barber* Tupper Q. C. for the respondent stated that the counsel had agreed to submit the case on the factums the facts being substantially the same as in the other cases.

The three cases were decided together and the following judgments were delivered.

Sir W. J. RITCHIE C.J.—It is obvious that the matter of interest which was intended to be dealt with by the Dominion Parliament was in connection with debts originating in contract, and that it was never intended in any way to conflict with the right of the local legislature to deal with municipal institutions in the matter of assessments or taxation, either in the manner or extent to which the local legislature should authorizes such assessments to be made, but the intention was to prevent individuals under certain circumstances from contracting for more than a certain rate of interest, and fixing a certain rate when interest was payable by law without a rate having been named.

R. S. C. ch. 127. s. 1 provides :—

1. Except as otherwise provided by this or by any other act of the Parliament of Canada any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.

2. Whenever interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be 6 per centum per annum.

The statute then deals with the question of interest on monies secured on mortgage in sections from three to

(1) 2 Legal News 186. (2) 2 Legal News 371.

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eight inclusive. The three next sections apply to Ontario and Quebec, the next six to the Province of Nova Scotia, and the next six to the Province of New Brunswick, then four to British Columbia, and three to Prince Edward Island.

It is abundantly clear that taxes are not contracts between party and party either express or implied, but they are the positive acts of the government through its various agents binding upon the inhabitants, and to the making or enforcing of which their personal consent, individually, is not required.

Dillon on Muncipal Corporations (1) has the following note:—

> Denying that taxes are debts, for which, without statute authority, actions may be maintained, see *Pierce* v. *Boston* (2) and numerous other cases ***. In an important case in the Supreme Court of the United States Justice Field states with clearness the distinction between "taxes" and "debts." "Taxes are not debts. It was so held by this court in the case of *Lane County* v. *Oregon* (3). Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some states * * * an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *Augusta* v. *North* (4); *Camden* v. *Allen* (5); *Perry* v. *Washburn* (6). Nor are they different when levied under writs of mandamus for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other." *Meriwether* v. *Garrett* (7). In *Dubuque* v. *Ill. Cent. Ry. Co.* (8) the text, section 815 (653) is quoted with approval and numerous cases are cited by the learned judge including *The Dollar Sav. Bank* v. *United States* (9).

Meriwether v. *Garrett* (7).

(1) 4 ed. vol. 2 p. 995.
(2) 3 Met. 520.
(3) 7 Wall. 71.
(4) 57 Me. 392.
(5) 26 N. J. L. 398.
(6) 20 Cal. 318.
(7) 102 U. S. 472, 513.
(8) 39 Iowa 56, 74.
(9) 19 Wall. 227.

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Field J:

Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers.

The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenue for the support and due administration of the government throughout the state and in all its subdivisions. Having the sole power to authorize the tax it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.

City of Augusta v. *North* (1).

Appleton C. J.:

But a tax duly assessed is not a debt. It is an impost levied by the authority of the state upon the citizens. There is no promise on their part to pay. The proceedings throughout are *in invitum*. A debt is a sum due by express or implied agreement. It was held in *Pierce* v. *Boston* (2), that taxes being neither judgments nor contracts, were not the subject of set-off.

Nor are taxes [observes Shaw C.J.] contracts between party and party either express or implied, but they are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent, individually, is not required.

In *Shaw* v. *Peckett* (3) it was held that the assessment of taxes did not create a debt that could be enforced by suit, or upon which a promise to pay interest could be implied. In *Lane County* v. *Oregon* (4) it was decided that the clauses in the several acts of congress of 1862 and 1863, making United States notes a legal tender for debts, had no reference to taxes imposed by state authority, the court holding that congress had in

(1) 57 Me. 39.
(2) 26 Verm. 482.
(3) 3 Met. 520.
(4) 7 Wall. 71.

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contemplation " debts originating in contracts or demands carried into judgment, and only debts of this character."

Chase C.J. says in *Lane County* v. *Oregon* (1) :—

> The next case was that of the *City of Camden* v. *Allen* (2). That was an action of debt brought to recover a tax by the municipality to which "it was due. The language of the Supreme Court of New Jersey was still more explicit: "A tax, in its essential characteristics," said the court "is not a debt nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens, or subjects, for the support of the state. It is not founded on contract or agreement. It operates *in invitum*. A debt is a sum of money due by certain and express agreement. It originates in and is founded upon contracts express or implied."

We cannot attribute to the legislature an intent to include taxes under the term debts without something more than appears in the acts to show that intention.

The Supreme Court of California, in 1862, had the construction of these acts under consideration in the case of *Perry* v. *Washburn* (3). The decisions which we have cited were referred to by Chief Justice Field, now holding a seat on this bench, and the very question we are now considering, " what did Congress intend by the act "? was answered in these words:—

> Upon this question we are clear that it only intended by the terms debts, public and private, such obligations for the payment of money as are founded upon contract.

In the local legislature is vested the power to create municipal corporations and deal generally with municipal institutions, and to confer the right to impose or levy local rates, taxes and assessments upon the inhabitants and upon all property within the limits of the designated taxing district and to regulate the levying and collecting of such taxes in any manner it may deem most efficient. I care not by what name this 10

(1) 7 Wall. 80.

(2) 2 Dutcher 398.

(3) 20 Cal. 350.

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per cent. may be called ; it was to all intents and purposes, in the case before us, an additional tax as the words of the act appear to me most unquestionably to indicate :

All taxes remaining due and unpaid on the 1st or 31st day of December (as the case may be) shall be payable at par until the 1st day of March following at which time a list of all the taxes then remaining unpaid and due shall be prepared by the treasurer or collector (as the case may be) and the sum of 10 per cent. on the original amount shall be added on all taxes then remaining unpaid.

What is this but an addition to the tax originally imposed ? But we are asked to read this as not an additional tax but as interest for an indefinite period without the slightest indication of any such intention except the fact that 10 per cent. is to be added to the tax, and thus producing the most unreasonable result that if the tax was paid the next day (say the 2nd day of March) the interest imposed would be 10 per cent. for the forbearance of payment for one day, a proposition to my mind too unreasonable to suppose the legislature ever could have contemplated such a consequence. But treating it as an increased assessment, imposed to stimulate the ratepayers to pay promptly, and if they do not then approximately to equalize the assessment rendered necessary by reason of the delinquency of the ratepayers, no such difficulty arises. It may be too large or it may be too small for the accomplishment of either of these purposes, but with this we have nothing to do. The legislature has vested in the municipality the power to impose taxes, and if they have acted within the power confided to them no court has a right to say that the amount imposed is too large or too small. But had it been specifically named as interest I am of opinion that it was an incident to the right of taxation vested in the municipal authority and, though more than the rate allowed by the Dominion statute in matters of contract, in no way in con-

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flict with the authority secured to the Dominion Parliament over interest by the British North America Act, but must be read, consistently with that, as within the power given to the local legislature under its power to deal with municipal institutions.

As I said in *The City of Fredericton* v. *The Queen* (1) approved by the Privy Council in *Russell* v. *The Queen* (2) in reference to the Dominion Parliament, so with reference to the Local Legislature:—

> The general, absolute, uncontrolled authority to legislate in its discretion in all matters over which it has power to deal subject only to such restrictions, if any, as are contained in the British North America Act and subject of course to the sovereign authority of the British Parliament.

In this case I can see no limitation with respect to municipal matters, which necessarily embraces the levying of taxes for municipal purposes and therefore falls within one of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the Provinces. Does not the collocation of number 19 "interest" with the classes of subjects as numbered 18 "Bills of Exchange," and 20 "legal tender" afford a strong indication that the interest referred to was connected in the mind of the legislature with regulations as to the rate of interest in mercantile transactions and other dealings and contracts between individuals, and not with taxation under municipal institutions and matters incident thereto? The present case does not deal directly or indirectly with matters of contract. The Dominion Act expressly deals with interest on contracts and agreements as the first section conclusively shows. The Chief Justice quotes, apparently with approval, the language of Mr. Justice Johnson in *Ross* v. *Torrance* (3) as follows:

(1) 3 Can. S.C.R. 505. (2) 7 App. Cas. 829.
(1) 2 Cartwright 352.

If they can give the corporation of Montreal, by thus merely changing the name of the thing, a legal right of 10 per cent. in the absence of an agreement between the parties, they can give it to the Bank of Montreal or any other creditor they choose to designate and the plain provisions of the constitution would become a dead letter.

In my opinion this is a *non sequitur* entirely unwarranted; limited as I have suggested no such result could possibly arise.

But it is alleged, as I have said, that it conflicts with the subject of interest secured by section 91 to the Dominion Parliament. But as was said in *Parsons* v. *The Citizens Ins Co.* (1):—

Sections 91 and 92 must be read together and the language of one interpreted, and where necessary modified, by that of the other.

And again:—

The true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subjects to which it really belongs.

In the present case the legislature was not dealing or professing to deal with the question of interest but was dealing exclusively with taxation under municipal institutions, and the extra tax which the court below has chosen to call interest the legislature has not so denominated, but which the legislature imposed, no doubt, as I said before, as a means of securing payment, and also of approximately equalizing the rate between defaulters and those paying promptly. How can this be considered in any other light than as incidental to the power to levy the assessment as authorized by law, the principal matter of this act being municipal taxation and not interest, and so prevent the defaulter from gaining an undue advantage over the ratepayer who pays promptly? And who more competent to apportion this than the local legislature, and who more incompetent to

(1) 4 Can. S. C. R. 215.

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deal with this purely municipal matter than the Dominion Parliament charged with the affairs affecting the peace, order and good government of the Dominion?

The British North America Act having given the power of legislation over direct taxation within the Provinces in order to the raising of a revenue for provincial purposes, and over municipal institutions in the Provinces, exclusively to the Provincial Legislatures why should those bodies be restricted or limited as to the manner or extent to which those powers should be exercised? Why should they not be allowed to provide for the contingency of a failure to pay the taxes on the days and times fixed, and to make provision in such an event for an additional rate or tax, so that those failing to pay should be placed as nearly as may be on a footing with those who have paid promptly, equality being the rule dictated by justice and inherent in the very idea of a tax.

For these reasons I think the appeal should be allowed with costs in this court and in the court below.

STRONG and FOURNIER JJ. concurred.

TASCHEREAU J.—I am of opinion that section 626 of the Municipal Act imposes an addition of ten per cent. on unpaid taxes once for all and as a penalty. I would allow these appeals.

GWYNNE J.—These cases all depend upon the construction of section 626 of the Manitoba Municipal Act, 49 Vic. ch. 52, as amended by 50 Vic. ch. 10, and they raise the question whether that section is, or is not, *ultra vires* of the Provincial legislature. By sections 602 and 603 of 49 Vic. ch. 52 it was enacted that every municipality shall in each year after the final

revision of the assessment roll pass a by-law for levying a rate on all the property on the said roll liable to taxation, such rate to be levied equally on all the taxable property in the proportion of its value as determined by the assessment roll in force. Section 625 of 49 Vic. ch 52 as amended by section 42 of 50 Vic. ch. 10 enacts that:—

The Council of any municipality may by by-law make the taxes payable by instalments at such times as they may think proper and fix and allow a discount for prompt payment of such instalments.

By section 634 of 49 Vic. ch. 52:—

The taxes or rates imposed or levied for any year shall be considered to have been imposed and to be due on and from the first day of January of the then current year, and end with the thirty-first day of December thereof, unless otherwise expressly provided for by the enactment or by-law under which the same are directed to be levied.

The words "and end with the 31st day of December thereof" do not seem to have been inserted very aptly or grammatically, but what the section means, I apprehend, is that in whatever period of a year the taxes are in point of fact imposed they shall, for the purposes of the act, be considered to have been imposed and due on the first day of January of that year, but cannot be levied by process of law until after the 31st day of December of that same year.

Then the 626 section of 49 Vic. ch. 52, as amended by the 43 section of 50 Vic. ch. 10, enacts that:—

In cities and towns all parties paying taxes to the Treasurer or Collector before the first day of December, and in rural muncipalities before the thirty-first day of December, in the year they are levied shall be entitled to a reduction of ten per cent. on the same, and all taxes remaining due and unpaid on the first or thirty-first day of December, (as the case may be) shall be payable at par until the first day of March following, at which time a list of all the taxes then remaining unpaid and due shall be prepared by the Treasurer or Collector (as the case may be), and the sum of ten per cent. on the original amount shall be added on all taxes then remaining unpaid, and in cities a rate of $\frac{3}{4}$ per cent. at the end of each month shall added be

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upon overdue taxes, the same to commence on the first day of January from and after the year in which the rate shall have been levied and accrued due, whether the said taxes are due upon the ordinary collector's roll or upon any special tax of any nature whatever, such as frontage tax for street improvements or any other tax collectable by cities.

Then section 647 of 49 Vic. ch. 52 enacts that:—

When interest is due and payable on taxes in arrear such interest may be added to the taxes and shall be considered to form part of the taxes so in arrear.

Now what the municipal authorities did in *Lynch* v. *N. W. Land Co.* and in *The Municipality of South Dufferin* v. *Morden*, the lands there referred to being in rural municipalities, was this:—To the tax imposed for the year 1886, and which, as we have seen by the act, was declared to have been due on and from the first day of January in that year, they upon the first day of March, 1887, added 10 per cent., and upon the amount ascertained by the addition of these two sums with the tax imposed in 1887 they on the first March, 1888, added other 10 per cent., and so likewise on the first of March, 1889, upon the sum total of all the previous sums added together they added further 10 per cent.

In the case of *Gibbins* v. *Barber*, the land rated being in the city of Winnipeg, what was done was that to the rate imposed in 1889 they on the first day of January, 1890, and on the first day of each month until and including the month of June, 1890, added $\frac{3}{4}$ of one per cent. And the question is whether the imposition of these additional sums to the rates imposed by the municipalities was legal; that is to say, whether the sections of the acts purporting to authorize such additions to the imposed rates are *intra vires* of the Provincial legislature.

It becomes necessary, therefore, to inquire under what item of section 92 of the B. N. A. Act the sections objected to are to be ranked. The learned At-

torney General of the Province of Manitoba, who was the counsel for the appellant in the *Municipality of South Dufferin* v. *Morden* repudiated all idea of the sections being attributed to, and of their having been passed under the authority of, any item other than that which enables the legislature of the Province to make laws in relation to municipal institutions in the Province. Upon the part of all the appellants it was insisted that the additional sums objected to were not and could not be regarded as being interest upon the rates imposed. Concurring with the learned judge, now Chief Justice, of the Superior Court of the Province of Quebec in *Ross* v. *Torrance* (1) I am of opinion that whatever name may be given to the charges they can be regarded in no other light than as sums charged by way of interest at the rate in rural municipalities of ten per cent. per annum for default in payment of the rates imposed within two months after the expiration of the year in which the tax is imposed, and so on at the same rate upon the whole sum from time to time remaining due on the first of March in each year until the land shall be sold for all arrears, thus charging ten per cent. compound interest per annum which is claimed as authorized by the above section 647, and in cities at the rate $\frac{3}{4}$ of one per cent. per month commencing on the first day of January in the year next following that in which the tax was imposed and fell due, that is to say, by the express terms of the act, on the first day of January of the year in which it was imposed. That this $\frac{3}{4}$ of one per cent. per month is charged by way of interest upon the rate imposed there can, I apprehend, be no doubt, and I can see nothing in the section to justify the construction that the ten per cent. added once in each year in rural municipalities should be regarded as different in any respect

(1) 2 Legal News 186.

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in character from the monthly charge of ¾ of one per cent. in cities, which would seem to have been considered about equivalent to ten per cent. per annum paid in one sum in each year until the land should be sold for the arrears. But that the sums so charged must be regarded as interest is, to my mind, clear from several sections of the original act and of that passed in amendment of it. Upon the completion of the tax roll the rate imposed in each year became a debt due to the municipalities, and by section 623 a notice is required to be immediately served upon each person rated whose residence is known demanding payment of the rate imposed, which notice—

> shall mention the time when such taxes are required to be paid and when the percentages herein mentioned will be allowed and charged.

The rate imposed by the municipality is the only sum recoverable as tax; the "percentage" spoken of in the section is something deducted from or added to the tax as the case may be. Now the section 647 already quoted provides that:—

> When interest is due and payable on taxes in arrear such interest may be added to the taxes and shall be considered to form part of the taxes so in arrear.

There does not appear to be anything in the act which can come under the term "interest" as used in this section unless it be the percentages added as above. Then section 655 of 49 Vic. ch. 52 as amended by section 48 of 50 Vic. ch. 10 enacts that:—

> If the land when put up for sale will not sell for the full amount of arrears of taxes due and charges the said Treasurer may then and there sell for any sum he can realize, and shall in such case accept such sum as full payment of such arrears of taxes; but the owner of any land so sold shall not be at liberty to redeem the same except upon payment to the Treasurer of the full amount of taxes due together with the expense of sale with a sum equal to ten per centum thereof, and the Treasurer shall account for the amount realized in such cases over and above all charges and the cost of publication, and in the

event of redemption as aforesaid to the purchaser for the amount of his purchase money with twenty per centum thereon.

The ten per centum which upon redemption is thus added to the sum total of arrears of taxes calculated as directed by section 647, and the costs attending the sale is provided in identical language with that used as to the ten per centum added to the amount of tax imposed in each year, and section 652 clearly shows that this ten per centum added on redemption is interest upon the amount composed of taxes in arrear added to the cost of sale and nothing else, for it enacts that:—

> When two or more lots or parcels of land have been assessed together the same may be advertised and sold together, but the owner of any such lot or parcel may redeem the same within the time hereinafter provided upon payment of a proportionate part of the taxes and charges for which the said lots or parcels were sold together with a proportionate part of the interest required to be paid on the redemption of same.

Then in connection with this section 652 the 667th section provides for redemption of lands sold for non-payment of arrears of taxes, namely, that the owner, his heirs, &c., may at any time within two years from the date of sale redeem the estate sold by paying or tendering to the treasurer for the use and benefit of the purchaser or his legal representative the sum paid by him, and all sums, if any, paid by the purchaser for taxes thereon since the sale, together with a sum amounting to ten per centum thereof if reedemed at any time within one year, and if not so redeemed within one year then with the addition of a further and additional sum equal to ten per centum thereof, &c. Now these sums of ten per centum so added on redemption, and which are provided for in language similar to the ten per centum added to the rate imposed in each year, if not paid before the first of March in each succeeding year, are what is spoken of in sec-

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tion 652, under the words "a proportionate part of the interest required to be paid in the redemption of same." Then section 672 of 49 Vic. ch. 52 enacts that no deed executed upon a sale for arrears for taxes shall be invalid for any error or miscalculation in the amount of taxes or interest thereon in arrear. There is nothing in the act to which the word "interest" as here used can apply unless it be to the said percentages added for default in payment of the taxes imposed at the time paid by the act for that purpose in each year.

Then sec. 53 of 50 Vic. ch. 10 enacts that all patented lands subject to taxation in any rural municipality shall be liable to be disposed of for "taxes, interest and charges" unpaid thereon up to the time of making up the list of lands so in arrears for the then current year which list the treasurer of every rural municipality is required to make as directed in the act. The word "interest" as here used can apply only to the percentage added for default in payment of the rate imposed in each year within the time specified in the act for that purpose as aforesaid. Then there are the sub-sections of this section which authorize the Government of the Province of Manitoba to become speculator general in the acquisition of all lands in rural municipalities liable to be sold for arrears of taxes.

Sub-sec. 2 requires the list required to be prepared by the Treasurer to be advertised in a prescribed manner once a week for three consecutive weeks within two months preceding a day to be named in the advertisement, which advertisement, sub-sec. 3 provides, shall contain a notification that unless the arrears of taxes and costs are sooner paid the treasurer will proceed to the disposal of the said lands on a day named in the advertisement. Then sub-sec. 4 enacts that when interest is due and payable on taxes

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in arrear such interest may be added to the taxes and shall be considered as part of the taxes in arrear. Then sub-section 6 enacts that on the day appointed in such notice the treasurer shall transmit a copy of such list authenticated by the seal of the municipality attested by the signature of the reeve, the clerk and treasurer thereof to the Provincial Treasurer with a statutory declaration as to the correct amount of arrears of taxes, interest and costs then remaining due upon each lot or parcel of land mentioned in the list, to which shall be annexed a certificate under the seal of the municipality to the effect, among other things, that the taxes, interest and costs therein mentioned are still due, wherefore the reeve and treasurer of the municipality did grant, bargain and surrender unto Her Majesty, her heirs and successors, to and for the uses of the Province of Manitoba, all these certain parcels of land mentioned in the schedule thereunto annexed, and the sections then declare that such certificate shall have the effect of vesting absolutely all the lands in such schedule in Her Majesty to and for the uses of the Province of Manitoba. Then sub-section 7 enacts that upon the receipt by the Provincial Treasurer of such list, declaration and certificate the municipality shall be entitled to be paid the whole amount of arrears, interest and costs shown therein as still due, owing and unpaid out of the consolidated revenue fund of the province. Then the 54th section provides for the redemption of the several lands mentioned in the list by payment at any time within two years to the Provincial Treasurer of the sum paid by him to the municipality as taxes, interest and costs on such lands respectively, and all sums, if any, paid by the Provincial Treasurer under the act since then, together with a sum amounting to ten per cent. thereof if redeemed within one year, and if not so redeemed then with the

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addition of a further and additional sum equal to ten per centum thereof. Then the 57 section enacts that:

In each year during the two years in which redemption of such lands may be effected as above provided, the Provincial Treasurer may pay out of the consolidated revenue fund of the province to the municipality in which such lands are situate, on the 1st day of May of each year, a sum equivalent to what the taxes, without interest, on said lands would have amounted to had they been held as private property and subject to taxation, and any amount so paid shall be included in the amount payable for the redemption of such lands and interest thereon as hereinbefore provided.

Now the amount which would have been due on the first of May in each year if the land had been held as private property would have been the tax imposed in the previous year with the ten per centum thereon added on the 1st of March following; this ten per centum is the only sum which can supply the word "interest" as there used, without which the municipality is compelled to accept payment from the Provincial Treasurer under this section, and the word "interest" as used in the last sentence of the section in connection with the words "thereon as hereinbefore provided" can mean nothing else than the sums of ten per centum by the 54th section required to be paid in each of the two years within which the lands may be redeemed. In fine it is, I think, quite clear from the manner in which the word "interest" is used in all of the above sections of the act that the percentages which the act purports to authorize to be added to the original tax imposed in each year if not paid at or before the time specified in the act for that purpose can be regarded in no other light than as interest charged for default in payment at the appointed time of the debt incurred by the imposition of the tax in each year. There is nothing in the clause of the British North America Act empowering Provincial legislatures exclusively to make laws relating to municipal

institutions which requires the construction that the power assumed is authorized by that section. Municipal institutions as to taxes in arrear are creditors of the ratepayer by whom the tax is due, and if the power assumed exists in the case of municipal institutions in respect of a tax in arrear I can see no reason why it must not exist in the case of all creditors. The courts of the Province of Manitoba have, therefore, in my opinion, rightly held that the attempt to regulate the rate of interest which should be chargeable and recoverable by a particular creditor or a particular class of creditors against a particular debtor or particular class of debtors, for that and nothing else is what the section assailed, in my opinion, professes to do, is a usurpation of a power vested in the Dominion Parliament under the clause of the British North America Act which empowers that parliament to exercise exclusive legislative authority over the subject of interest.

I am of opinion, therefore, that the appeals in all three of the above cases should be dismissed with costs. The Provincial Legislatures can undoubtedly pass an act authorizing the issue by the Provincial Government of debentures payable with any rate of interest that may be agreed upon between the Government and its creditors or persons advancing money to the Government upon the security of such debentures, for such an act would be in the nature of a contract or legislative affirmation of a contract, and any rate of interest may be made payable by contract *inter partes*. But that is a case wholly different from the present.

PATTERSON J.—The respondents in these appeals maintain that a certain provision of a statute of Manitoba is *ultra vires* of the Provincial Legislature. The statute is 49 Vic. ch. 52. The 626th section of that statute, as amended by 50 Vic. ch. 10, sec. 43, holds

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out by way of inducement to the taxpayer to pay his taxes promptly the advantage of a reduction of the assessed amount if paid before a named day, and imposes, for the same reason, an increase on the assessed amount if not paid by another day which is mentioned.

If paid before the first day of December in cities and towns, or before the last day of December in rural municipalities, a deduction of ten per cent. is allowed. Between those dates and the first day of the following March the taxes are payable "at par," which means at the assessed amount. At the first of March a list of all the taxes then remaining unpaid and due is prepared by the treasurer or collector, and ten per cent. is added to the original amount of all taxes remaining unpaid. It is this addendum of ten per cent. that has been held to be unauthorised because it is considered to be interest on the assessed tax, and because "interest" is the designation given by section 91 of the British North America Act, 1867, to one of the classes of subjects assigned to the exclusive legislative authority of the parliament of Canada. The deduction of ten per cent. is not treated as objectionable. The offence against the constitutional act is discovered only in the added ten per cent., yet it is not at once apparent why one is not as much an encroachment as the other. The Manitoba act regulates the amount payable by each tax payer, according to the time he pays his taxes, in the ratio of 90, 100 and 110. If the computation which raises the 100 to 110 is to be classed with "interest," as that word is used in article 19 of section 91, I do not see why the computation which raises the 90 to 100, or reduces the 100 to 90, escapes from the same class. It is pretty much the same thing whether you add a percentage and call it interest or deduct a percentage and call it discount.

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I have no idea that either process, as employed in the adjustment of the amount to be exacted under the enactment in question, is a subject of the class denoted by the word "interest" in article 19.

We find that article associated with others numbered from 14 to 21 (1), all of which relate to the regulation of the general commercial and financial system of the country at large. No. 19 is *ejusdem generis* with the others and does not, in my judgment, include the matter of merely provincial concern with which we are now dealing. This is a phase of the subject which it does not appear to me that we are required to consider exhaustively at present. Nor need we definitely decide whether the imposition in question, which is not a percentage accruing *de die in diem*, but is the same on the second day of March as a year later, or any length of time later, is properly called interest. It is not so called in the section by which it is imposed though it is referred to in some other sections by the name of interest. The use of the word in the Manitoba act as a convenient name for the added percentage, or even as an appropriate name, is, of course, by no means conclusive of the thing so designated being interest within the meaning of that word as used in article 19 of section 91 of the B. N. A. Act. We must see what the thing really is. It is clearly something which the Manitoba taxpayer who does not pay his taxes when due is made liable to pay as an addition to the amount originally assessed against him or his property. It is a direct tax within the province in order to the raising of a revenue for provincial purposes, and as such is indisputably with-

(1) 14, Currency and Coinage; 15, Banking, Incorporation of Banks, and the Issue of Paper Money; 16, Savings Banks; 17, Weights and Measures; 18, Bills of Exchange and Promissory Notes; 19, Interest; 20, Legal Tender; 21, Bankruptcy and Insolvency.

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in the legislative authority of the Province. B. N. A. Act, 1867, sec. 92, art. 2.

I agree with the members of the court who have expressed that view and I do not attempt to elaborate it. But the imposition may, not improperly, be regarded as a penalty for enforcing the law relating to municipal taxation, and in that character it comes directly under article 15 of section 92.

I am of opinion that the appeal should be allowed.

Appeal allowed with costs.

Lynch v. *North West Land Co.*

Solicitor for appellant: *T S Kennedy.*

Solicitors for respondents: *McDonald, Tupper, Phippen & Tupper.*

South Dufferin v. *Morden.*

Solicitor for appellants: *C. P. Wilson.*

Solicitor for respondent: *J. B. McLaren.*

Gibbins v. *Barber.*

Solicitors for appellant: *Elliott & McCreary.*

Solicitors for respondents: *McDonald, Tupper, Phippen & Tupper.*

THOMAS ROSS, (PLAINTIFF).....APPELLANT; 1890

AND *Nov. 20, 21.

MATTHEW HANNAN, (DEFENDANT)....RESPONDENT. 1891

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.) *June 22.

Sale of goods by weight—Contract when perfect—Damage to goods before weighing—Possession retained by vendor, effect of—Depositary—Arts 1063, 1064, 1235, 1474, 1710, 1802 *C. C.*

Held, Per Ritchie C.J., Strong and Fournier JJ., affirming the judgment of the court below, that where goods and merchandise are sold by weight the contract of sale is not perfect and the property of the goods remains in the vendor and they are at his risk until they are weighed, or until the buyer is in default to have them weighed; and this is so, even where the buyer has made an examination of the goods and rejected such as were not to his satisfaction.

Held, also, Per Ritchie C. J., Fournier and Taschereau JJ., that where goods are sold by weight and the property remains in the possession of the vendor the vendor becomes in law a depositary, and if the goods while in his possession are damaged through his fault and negligence he cannot bring action for their value.

Per Patterson J., *dubitante*, whether there was sufficient evidence of acceptance in this case to dispense with the writing necessary under art. 1235 C.C. to effect a perfect contract of sale.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court for Lower Canada, sitting in and for the District of Montreal (2).

This was an action brought by the appellant to recover from the respondent the sum of $2955.49 which he alleged to be the loss resulting to him on the resale of a certain quantity of cheese damaged after the cheese was at the purchaser's risk.

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

(1) M. L. R. 6 Q. B. 222. (2) M. L. R. 2 S. C. 395.

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ROSS
v.
HANNAN.

The plaintiff, present appellant, by his declaration alleged that on the 9th of April 1886, he through William Fuller, sold the defendants 1642 boxes of cheese, then stored on Fuller's premises, at 10½ cents a pound, cash on delivery; that defendant selected, examined and set apart the cheeses, ordered a large number to be removed from the second floor to the ground floor and coopered a large number of boxes; that it was agreed that the weights should be tested according to mercantile usage; that the price of cheese immediately afterwards fell, and the defendant offered to re-sell the cheese; that the defendant refused to remove or pay for the cheese and was protested on the 25th April, to have the weights tested on the 27th, and to remove the cheese before the 29th, on pain of the sale of the cheese at his risk; that he disregarded the protest and the cheese was tested on the 27th by the City weigher, the sale was advertised and held, and the cheese sold; that after the purchase of the cheese, the portion of it which defendant had caused to be removed to the ground floor of Fuller's warehouse was wet by reason of the flood on the 17th April, the cause being beyond the plaintiff's control, and it became necessary to dry it, and to purchase new boxes; that the plaintiff paid for the handling and re-boxing of the cheese the sum set forth in the declaration, the total claim for depreciation in price and money laid out and expended amounting to $2946. 45.

To this, the defendant pleaded, besides a general denial, a special plea that there was never any contract but only a proposition to sell the cheese to defendant, he to take delivery at his own time, but the proposition was never carried out, and the property never passed; that the cheese was never tested in accordance with mercantile usage, and he was never called upon to test it until after it had become damaged; that the

defendant never had any control over the cheese; that whatever agreement there was between the parties did not constitute a complete contract of sale, but a mere agreement to buy; that by law and the universal custom of trade existing between and recognised by all merchants carrying on trade and business in the City of Montreal and elsewhere such agreement to buy could not and did not produce the effect of a complete sale, and could not and did not pass the property in the said cheese to the defendant, but the same, until the completion of the said contract by the doing of all the things above mentioned, remained and was the property of the plaintiff.

The plea further says that, consequent on the damage by the flood, the defendant was not bound to carry out the agreement, and denies expressly that he caused the removal of any part of it from the second flat to the ground floor, or caused any part to be coopered, or did an act of ownership.

The case was tried in the Superior Court before Torrance J. who gave judgment in favor of the plaintiff. In the Court of Queen's Bench this judgment was reversed, and the plaintiff's action dismissed, Tessier & Bossé JJ. dissenting.

Abbott Q.C. and *Campbell* for appellant.

The intention of the parties was to pass the property, and by law the sale of the cheese was perfect, and if so the risk of loss was on the respondent. Art. 1474 C. C. and arts. 1585 and 1586. C. N., compared. Delamarre and Lepoitevin (1); *Gilmour* v. *Supple* (2); *Logan* v. *Lemesurier* (3); Campbell on Sales (4); and authorities cited by Torrance J. in his judgment in the Superior Court in *Ross* v. *Hannan* (5). As to

(1) 4 Vol. Nos. 118, 128.
(2) 11 Moo. P. C. 570.
(3) 6 Moo. P. C. 134.
(4) P. 229.
(5) M.L.R. 2 S. C. 397.

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whether the sale had been sufficiently proved the verbal proof which was tendered was sufficient. *Munn* v. *Berger* (1).

Doherty Q.C. for respondent.

There is in the record no legal evidence whatever of the alleged sale from appellant to respondent.

Appellant's evidence consists entirely of parol testimony—that of his agent, Mr. Fuller, being the principal, indeed, almost the sole, evidence relied on as proving the sale.

Neither is there legal evidence of any such delivery or acceptance as would suffice to take the alleged contract out of the operation of the provision of the Statute of Frauds as embodied in the civil code of Lower Canada by article 1235 of that code.

Even if parol evidence of the contract were admissible, that adduced in this cause does not establish the existence of any completed or *perfect* sale, such as would transfer ownership or place the object sold at the risk of the respondent.

That such a sale leaves the goods up to the time of the weighing or testing at the risk of the vendor clearly results from the term of article 1474 C. C. above cited. The sale is not perfect; the property remains in the vendor; the purchaser has no recourse, failing recovery, but his action in damages.

That this is both the French and the English law a brief examination of the authors who have written under both systems will clearly demonstrate.

That such was the law in France previous to the code Napoléon is undoubted. Pothier, Vente, (2) makes this perfectly clear, and shows, moreover, that the sale now in question is in its nature a sale by weight, and governed by the rule above stated.

(1) 10 Can. S. C. R. 512. (2) Pp. 308 and 309.

The commentators on the code Napoléon, respondent submits, equally support his position. Troplong, Vente (1) and following, under article 1585, of the code Napoléon, has a very full exposition of the doctrine of the French law upon the subject, which bears out perfectly respondent's contention. Marcadé, on the same article (1585) of the code Napoléon (2) also sustains the pretension of respondent, as does Mourlon (3).

It is true there exists a divergence of opinion among the authors who have commented on the French code, resulting from the apparently limited terms of article 1585 of that code, as to whether or not in such a sale the property does or does not pass to the purchaser before weighing. All, however, are agreed that at all events the goods are up to the time of weighing at the risk of the vendor.

A third ground which respondent would submit as entitling him to a dismissal of appellant's action is the gross negligence of appellant's agent who had possession of the cheese, and to which is directly attributable the loss resulting from the flood. It is proven that the approach of the flood was known in time to give ample opportunity to put the cheese upstairs in a place of safety. The evidence of Fuller on this subject shows that he knew in time of the approaching flood, but took no precaution whatsoever to protect the cheese. Had he but had it removed upstairs there would have been no damage. Whether the cheese belonged to respondent or appellant, whether it had been brought down by respondent's orders—at a time when no flood was anticipated —or not, it was clearly the duty of the vendor, as whose agent Fuller held the cheese, to use ordinary prudence in keeping it safe—and the fact that being on the spot

(1) P. 81
(2) Vol. 6 pp. 154 et seq.
(3) Vol. 3 pp. 473 et seq. under arts. 1085-86, C. N.

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and able to prevent it, he willfully neglected to do so, and stood by inactive and saw the damage done, is alone sufficient to justify respondent's refusal to accept and pay for the damaged goods. Appellant in his declaration recognized his obligation to prevent the damage if he could, and alleges that "he could not prevent it." The testimony of his agent in the transaction shows that he could have prevented, but would not.

Campbell in reply—referred to Aubry et Rau (1); and *Frigon* v. *Busselle* (2).

Sir W. J. RITCHIE C.J.—The article agreed to be sold in this case was uncertain and indeterminate until the weight of the cheese was determined, and the objectionable cheese separated, and I cannot think that the intention was that the property should pass until the amount secured by the warehouse receipt and the balance of the cash was paid. At any rate, even if the property had passed it was in the possession of the seller as depositary and he was bound to take reasonable care for its preservation, which I think the evidence clearly shows he did not do. In fact he admits that he did nothing towards preserving the property which might have been done had the proper steps been taken. I therefore think the appeal should be dismissed.

STRONG J.—Was of opinion that the judgment of the Court of Queen's Bench should be affirmed.

FOURNIER J.—L'appelant demandeur en cour Supérieur, réclamait par son action $2,955.49 de dommages, lui résultant de l'inexécution par l'intimé d'un contrat pour l'achat de 1643 boîtes de fromage, à 10½ centins la livre. Il alléguait que la vente avait été faite par

(1) 2 Vol. p. 341. (2) 5 Rev. Lég. 559.

l'intermédiaire de W. M. Fuller, chez qui elles étaient en entrepôt, que l'intimé les avait choisies et mises à part, et ensuite transportées du deuxième au premier étage où il les avait fait *coopered*, réparer,—qu'elles devaient être pesées pour s'assurer de leur exacte pesanteur.

Il alléguait encore que par protêt notarié, en date du 25 avril, il avait notifié l'intimé d'avoir à faire peser le fromage, le requérant en même temps d'en payer le prix et de l'enlever de l'entrepôt de Fuller, avant le 29 avril, à défaut de quoi il le ferait vendre à l'encan public et réclamerait la différence entre le montant que rapporterait cette vente et celui de la vente faite à l'intimé ; que l'intimé ayant refusé de se conformer à cette notification, la vente avait eu lieu à une perte de $2,995.45, qui'l réclamait par son action.

L'intimé plaida à cette action qu'il n'y avait pas eu vente du fromage en question, mais de simples pourparlers, que la propriété en était toujours restée à l'appelant ; que le fromage n'avait été ni pesé ni délivré à l'intimé ; que celui-ci n'avait été mis en demeure de peser le fromage qu'après l'inondation mentionnée dans la déclaration de l'appelant, pendant laquelle le fromage avait été considérablement endommagé et détérioré ; que s'il y avait eu promesse d'acheter le dit fromage, cette promesse ne constituait pas un contrat de vente,—mais tout au plus ;

At most an agreement requiring for its completion the doing of certain things.

et spécialement la vérification de la quantité et la livraison du fromage ; que le fromage étant demeuré la propriété de l'appelant et ayant été endommagé par l'inondation, l'intimé n'était pas obligé d'en payer le prix.

Il y a eu une défense en droit partielle dont l'examen n'est pas important pour la décision de la cause.

La contestation étant liée et la preuve faite, la cour

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Supérieure rendit jugement en faveur de l'appelant, mais ce jugement fut plus tard infirmé par la cour du Banc de la Reine. C'est ce dernier jugement qui est maintenant soumis à la revision de cette cour.

La première objection de l'intimé est à la légalité de la preuve. Le contrat allégué par l'appelant est sans doute d'une nature commerciale et la preuve en doit être faite conformément aux articles du code civil et spécialement aux articles 1233 et 1235. Il n'y a eu aucun écrit ou mémorandum de ce contrat entre les parties. Toute la preuve a été faite par les témoins et plus particulièrement par Fuller, l'agent de l'appelant. Il n'y a pas eu non plus de commencement de preuve par écrit, bien que l'intimé ait été interrogé comme témoin de l'appelant. Les seules questions qui lui ont été faites ont rapport à l'agence de William Hannan avec qui Fuller a négocié cette vente. L'intimé a admis cette agence. Mais en prenant la preuve qui a été faite comme étant légale, cette preuve établit-elle une vente parfaite transférant la propriété de la chose vendue à l'intimé et la mettant à ses risques et périls? Telle est la seule question que présente cette cause.

La preuve de l'appelant consiste dans le témoignage de Fuller qui déclare que William Hannan, agissant pour l'intimé, convint d'acheter 1643 boîtes de fromage de l'intimé à raison de 10½ cts la livre, le fromage devant être pesé et le montant du prix établi avant la livraison. C'est une vente de choses mobilières faite au poids suivant l'article 1474 du code civil qui dit :—

> Lorsque des choses mobilières sont vendues au poids, au compte ou à la mesure, et non en bloc, la vente n'est parfaite que lorsqu'elles ont éte pesées, comptées ou mesurées.

En prenant la version de la convention donnée par Fuller, il s'agirait de la vente d'une certaine quantité de fromage avec la condition que le poids en serait vérifié (*tested*). Une telle vente ne peut être parfaite

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qu'après que les choses vendues ont été pesées et le montant de la vente établi; la propriété demeure au vendeur, et à défaut de livraison, l'acheteur n'a que son recours en dommages. Notre article 1474 déclare qu'une telle vente n'est pas parfaite, adoptant la doctrine de Pothier, de Marcadé et Troplong, qui sont les auteurs cités par les codificateurs sur cet article.

La règle est la même dans le droit anglais. Lord Blackburn dans son traité du contrat de vente la formule ainsi (1):

> The second [rule] is that where anything remains to be done to the goods for the purpose of ascertaining the price as by weighing, measuring or testing the goods where the price is to depend on the quantity or quality of the goods, the performance of these things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted. (After discussing this rule he declares it to be firmly established as English law as having been adopted directly from the civil law.)

Il cite nombre de causes au soutien de cette doctrine et entre autres, celle de *Logan* v. *Lemesurier* (2), de Québec, décidée au conseil privé, comme directement applicable. Benjamin (3), approuve la règle définie par Lord Blackburn et cite nombre de décisions qui l'ont confirmée.

Ainsi la vente, telle qu'alléguée n'a pas eu l'effet de transférer la propriété de la chose vendue à l'intimé, ni de la mettre à ses risques et périls jusqu'à ce qu'elle eût été pesée. Avant que cela n'eût été fait et avant même aucune démarche de l'appelant pour mettre l'intimé en demeure de le faire, l'inondation envahit l'entrepôt où était déposé le fromage et l'endommagea.

L'appelant prétend que l'intimé était alors en défaut de ne pas avoir pris livraison du fromage. C'est sur ce fait que le jugement de la cour Supérieur est

(1) 2nd edition, p. 127. (2) On sales, parag. 319.
(3) 6 Moo. P. C. 134.

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fondé, mais la cour du Banc de la Reine déclare que c'est évidemment une erreur de fait. Fuller admet dans son témoignage que l'intimé avait jusqu'au 26 d'avril pour enlever le fromage. L'autre partie à la négociation dit que Hannan avait deux semaines à compter du 9 avril. L'inondation qui a causé le dommage a eu lieu le 17 avril, et ce n'est que le 24 du même mois que l'appelant a sommé l'intimé de prendre le fromage et même une plus grande quantité que celle vendue.

L'appelant prétend faire ressortir la responsabilité de l'intimé des faits que quelques-uns de ses employés ont aidé à *cooper*, réparer les boîtes de fromage, et à les descendre dans le premier étage du magasin. L'appelant prétend au contraire qu'il a été *coopered* par les employés de l'appelant, mais que Wilson, ami intime de Fuller qui était alors malade, a surveillé l'ouvrage pour ce dernier, et lui épargner du trouble.

La circonstance que le fromage a été descendu du premier étage n'a aucune importance; il est prouvé que le fromage était entassé de telle manière qu'il n'était pas possible de l'examiner, ni de réparer les caisses. La chose a été faite sous l'ordre de Wilson qui représentait l'intimé.

L'intimé avait aussi plaidé que c'était un usage bien établi dans le commerce de fromage que la vente n'en était pas complète, et ne transférait pas la propriété avant la vérification de la quantité et la réparation des boîtes; quoique la défense en droit faite à cette partie du plaidoyer ait été renvoyée,—l'enquête ayant eu lieu devant un autre juge,—la permission d'en faire la preuve en a été refusée à l'intimé. Cependant cette question se trouve sans importance maintenant, attendu qu'il n'y a pas eu vente.

Un autre moyen que l'intimé peut invoquer contre l'action de l'appelant c'est la négligence grossière de

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son agent qui était en possession du fromage. Il est prouvé que l'inondation n'est pas venue subitement et qu'il a eu amplement le temps de mettre le fromage en sûreté. Fuller lui-même dit qu'il a eu connaissance du progrès de l'inondation. S'il eût seulement fait remonter le fromage en haut, il eût évité tout dommage. Dans tous les cas, que le fromage appartienne à l'intimé ou à l'appelant, qu'il ait été descendu ou non, par l'ordre de l'intimé à un temps où il n'y avait pas encore apparence d'inondation, il était indubitablement du devoir du vendeur, dont Fuller était l'agent, d'user de la prudence ordinaire pour la conservation du fromage, et le fait qu'étant sur les lieux et à portée de le sauver, il a volontairement refusé de le faire et est demeuré tranquille spectateur du dommage, est suffisant pour justifier l'intimé de refuser d'accepter le fromage endommagé. L'appelant a reconnu dans son action qu'il était obligé de prévenir le dommage s'il était en son pouvoir de le faire. Le témoignage de son agent fait voir qu'il aurait pu l'empêcher, mais qu'il ne l'a pas voulu.

L'appel doit être renvoyé avec dépens.

TASCHEREAU J.—[His Lordship after stating the effect of the pleadings as hereinbefore given proceeds as follows :]

Assuming as the appellant contended that the sale was perfect to the fullest extent, and that the ownership had passed to the defendant, yet I do not see how he can maintain his action. The vendor who agrees to retain the possession of moveable goods till the vendee is ready to take them is a depositary and as such bound to apply in the keeping of the thing deposited the care of a prudent administrator. 1802 C. C. Pardessus (1) ; Bedarride, Achats & Ventes, (2) ;

(1) Droit Com. 1 vol. 351. (2) P. 158 et seq.

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Troplong, Vente (1) ; Que le vendeur jusqu'a livraison doit conserver comme depositaire. Art. 1063 C. C., 1136 C. N.; 1064 C C. 1137 C. N.

Now it is proved clearly here that, if Fuller for the plaintiff had acted as a prudent administrator, to use the terms of the code, this cheese would not have been damaged by the flood. Fuller admits it,

Q. On what day was it that the water rose in your store?

A. It was on Saturday I think.

Q. For a day or two previous this water had been rising towards your store?

A. Of course, it was setting back, some water was coming into the street.

Q. You were aware of that ?

A. I could not be otherwise, sir.

Q. And you took no steps to remove the cheese ?

A. I had nothing to do with it, I had no right to lay a hand on it.

Q. You took no precautions whatever ?

A. I had nothing to do with it, as I said before, Mr. Hannan knew where the cheeses were.

Q. You were in the store, on that flat, on that Saturday?

A. I was, until I had to get a Grand Trunk team to take me out.

He never notified Hannan that the cheese was in danger.

Oliver, in his examination, says :—

Q. Do you recollect the circumstance of that flood occurring?

A. I do, sir.

Q. Did the water rise, or give indication of rising a sufficient time previous to its actually coming into Mr. Fuller's store, to enable him if he had used prudence to remove any goods that were on the lower floor?

A. I think there would have been time for a man to put the pile of cheese up higher, to raise it up to the next flat.

Q. You consider that an ordinarily prudent man would have done that?

A. Well, I think so, yes.

Vaillancourt.

Q. Mr. Vaillancourt, vous êtes marchand de fromage en la cité de Montréal?

(3) 1 vol. 361.

R. Oui, monsieur.

Q. Votre place d'affaire se trouve à coté de celle de Mr. Fuller, je crois?

R. Oui.

Q. Elle se trouvait là le printemps dernier, au mois d'avril, lors de l'inondation qui a eu lieu ?

R. Oui.

Q. Voulez-vous dire si les indications de cette inondation n'était pas telles le Samedi qu'un homme usant de la prudence ordinaire aurait enlevé des marchandises qui se seraient trouvées au premier étage?

R. Pas avant le Samedi.

Q. Mais le Samedi?

R. Oui.

Q. Croyez-vous que si Mr. Fuller avait employé la diligence ordinaire il aurait pu transporté le fromage en question du bas en haut, et le placer de manière à éviter l'inondation ?

(Objecté à cette question comme illégale. Objection maintenue.)

A rather extraordinary ruling.

It does not make the least difference that this cheese was in Fuller's actual possesion and not in appellant's. The case must be determined as if Fuller was out of the question—as if that store where the cheese was had been appellant's own store. So that even if the sale is to be considered perfect on the 16th, the appellant having agreed to keep these goods for the respondent, in law he became a depositary.

Nothing turns on the fact that Hannan or appellant brought them down to the lower flat. It is evident that it was done by both parties, It had to be done for the cooperage and taking of weights, but even if it was Hannan who had brought them down, yet, they remained in appellant's possession, who would not allow Hannan to take possession and remove them till payment.

I am of opinion that this appeal should be dismissed.

PATTERSON J.—I have given to this case a full and careful consideration without being able to feel as

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clear as I should desire upon all the questions that have been raised. This does not arise so much from the uncertainty in which some questions of law which have been debated would seem to be involved as from the difficulty of forming a sufficiently distinct opinion upon the facts. In the result I am unable to say that the judgment of the Court of Appeal is in my opinion erroneous.

The acts done on the part of the purchaser in handling the goods, inspecting them, rejecting some and approving of others, are in themselves strong evidence of acceptance of the goods; but on the other hand there are the facts that there was no delivery to him, and no intention of giving him control of any part of the goods until the price was ascertained and paid, or at least enough paid to recoup the advance for which the goods were held under a warehouse receipt. On this account I hesitate to say that the writing which is required by article 1235 C.C., unless the buyer has accepted or received part of the goods, or given something in earnest to bind the bargain, was dispensed with.

The acts done in the warehouse of Mr. Fuller in the examination of the cheese, whether the removal of the boxes from the upper floor to the lower for the convenience of handling them were done by the servants of the purchaser with the consent of the vendor, or by the vendor for the convenience of the purchaser, do not strike me, having regard to all the circumstances, as proving delivery or acceptance, or as necessarily amounting to more than steps which might reasonably be taken as preliminary to the delivery and acceptance that would change the property from the one man to the other.

The discussion respecting the nature of the sale, whether a sale by weight, number, or measure, or a

sale in the lump, within the meaning of those terms as used in article 1474, is in this view of the question of delivery and acceptance, somewhat irrelevant, or at all events the subject of the necessity for finally ascertaining the price by settling the exact number of pounds of cheese, is not reached. The authority of Pothier (1) and other writers referred to by the respondent would certainly put a sale of an entire lot at so much a pound on the same footing as a sale at so much a pound of so many pounds out of a larger bulk, as opposed to a sale *per aversionem* or *en bloc*. I do not find it easy to grasp the principle on which that doctrine rests, and there may be good ground for the appellant's contention against its being accepted as being now the law, but the present case scarcely calls for a determination of the question.

It has been argued that even if the property passed, yet it remained until the final delivery, which was postponed to a day that had not arrived when the flood occurred, at the risk of the vendor. In the Superior Court where the judgment was in favor of the vendor it was considered that from the 15th, which was before the flood, and which was the day on which, as at first arranged, the goods were to have been paid for and removed, the goods remained in the warehouse at the request and for the convenience of the purchaser, and that the vendor was for that reason relieved from responsibility for the damage caused by the water. I am not able to take that view. I think that the completion which was to have been effected on the 15th was deferred, at the request, no doubt, of the purchaser, but still it was the completion of the sale that was deferred. I notice this topic because I do not assent to the proposition that, assuming the property to have passed, the negligence of the vendor, who had

(1) Vente Nos. 308, 309.

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thus become bailee for the purchaser, would afford an answer to the action. His liability as bailee would be limited to the damage actually sustained by the cheese, which was very trifling, *plus* the cost of drying and re-boxing those that had been wet. The incident would not have justified the purchaser (who *ex hypothesi* had become the owner,) in refusing to take his property. The authorities referred to on the subject, including the passages cited from Pothier, which are found under the heading "*Aux risques de qui est la chose vendue*," are more applicable when the thing sold has been wholly destroyed or lost than when it has only been damaged.

It is manifest that the question on which the case must turn is: Was there a change of property from the vendor to the purchaser? If there was such a change it must have been effected by a delivery and acceptance. If there was not a delivery and acceptance then, inasmuch as there was no payment in earnest, and no writing, there was no contract to support an action for refusing to accept and pay for the goods.

I agree in dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Abbotts, Campbell & Meredith*

Solicitors for respondent: *Doherty & Doherty.*

DORON SCHWERSENSKI (PLAINTIFF)..APPELLANT ; 1890

AND *Nov. 26.

MOSES VINEBERG (DEFENDANT).....RESPONDENT. 1891

*June 22.

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

Receipt—Error—Parol evidence—Arts. 14, 1234 *C.C.*

S. brought an action to compel V. to render an account of the sum of $2,500, which S. alleged had been paid on the 6th October, 1885, to be applied to S.'s first promissory notes maturing and in acknowledgment of which V.'s book-keeper gave the following receipt : "Montreal, October 6th, 1885. Received from Mr. D. S. the sum of two thousand five hundred dollars to be applied to his first notes maturing. M.V., per F.L." and which V. failed and neglected to apply. V. pleaded that he never got the $2,500 and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, dismissed S.'s action.

On appeal to the Supreme Court of Canada :

Held, 1. That the finding of the two courts on the question of fact as to whether the receipt had been given through error should not be interfered with.

2, That the prohibition of Art. 1234 C. C. against the admission of parol evidence to contradict or vary a written instrument, is not *d'ordre public*, and that if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a court of appeal.

3, That parol evidence in commercial matters is admissible against a written document to prove error. *Ætna Insurance Company* v. *Brodie*, (5 Can. S.C.R. 1), followed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), (1), confirm-

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

(1) M.L.R. 7 Q.B. 137.

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ing the judgment of the Superior Court by which the action of the appellant was dismissed with costs.

The action was brought by the appellant to compel the respondent to render an account of the sum of two thousand five hundred dollars, which appellant alleged he paid to the respondent, and in default of rendering the said account that the respondent be condemned to pay this sum of money to appellant with interest.

The receipt upon which the action was based reads as follows:

"MONTREAL, October 6th, 1885.

"Received from Mr. D. Schwersenski the sum of two thousand five hundred dollars ($2,500), to be applied to his first notes maturing.

"$2,500.00. "M. VINEBERG,
"Per F. L."

At the trial the appellant's books of account were produced as well as a judicial abandonment made by the plaintiff in January 1886, and by such abandonment it appeared that the respondent was entered as his creditor for the sum of $5,300, and after hearing the witnesses the Superior Court found as a matter of fact that the sum of $2,500 for which the receipt had been given had not been paid to respondent and dismissed the plaintiff's action. The Court of Queen's Bench confirmed the judgment of the Superior Court.

J. P. Cooke for appellant contended that the evidence did not support the finding of the courts below, and that the parol evidence admitted to contradict the receipt was illegal; art. 1234 C. C.; *Bell* v. *Arnton* (1); and also cited and relied on the following authorities: *Chamberlain* v. *Ball* (2); *West* v. *Fleck* (3); *Lemontais* v. *Amos* (4); *Dominion Oil Cloth*

(1) 20 L. C. Jur. 281.
(2) 11 L. C. R. 50.
(3) 15 L. C. R. 422.
(4) 5 R. L. 353.

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Co. v. *Martin* (1); *Ulster Spinning Co.* v. *Foster* (2); *Anderson* v. *Battis* (3); *Lynn* v. *Cochrane & Nivin* (4); *Leduc* v. *Prevost* (5); *Rousseau* v. *Evans* (6); *Decelles* v. *Samoisette* (7); *Gilchrist* v. *Lachaud* (8); *Rowell* v. *Newton* (9). Ordinance of 1667, table 20, art. 2; article 1341 C. N.; Taylor on Evidence (10).

Hutchinson for respondent contended that the parol evidence was admissible: *Brodie* v. *Ætna Insurance Co.* (11); *Whitney* v. *Clark* (12); *Grenier* v. *Pothier* (13). If so the courts below having found as a fact that the receipt had been given in error the appeal should be dismissed.

Sir W. J. RITCHIE C.J.—For the reasons assigned in the *considérants* of the judge of the Superior Court I think this appeal should be dismissed, and the judgment of the Superior Court affirmed with costs in all the courts.

STRONG and FOURNIER JJ. concurred.

TASCHEREAU J.—The plaintiff, appellant, claims from the respondent a sum of $2,500 upon a receipt for that amount dated October 6, 1885, which sum, as the appellant alleges, the respondent failed to apply as agreed upon. The respondent pleads that this receipt was given through error, and that he never received the $2,500 from the appellant. The judge of the Superior Court who heard the witnesses *vivâ voce* held that the respondent had clearly proved his plea and dismissed the action. The Court of Appeal confirmed that judg-

(1) 6 Legal News 344.
(2) M. L. R. 3 Q. B. 396.
(3) 15 Q. L. R. 196.
(4) 23 L. C. Jur. 235.
(5) 28 L. C. Jur. 276.
(6) 6 Legal News 204.
(7) M. L. R. 4 S. C. 361.
(8) 14 Q. L. R. 278.
(9) 10 L. C. R. 437.
(10) Secs. 1137, 1142, 1144 and 1152.
(11) 5 Can. S. C. R. 1.
(12) 3 L. C. Jur. 318.
(13) 3 Q. L. R. 377.

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ment. Now, the appellant asks us to reverse on that question of fact. We intimated at the hearing that not only could we not see in this case anything to take it out of the well settled rule of this court on appeals on questions of fact, but that the evidence that this receipt had been given through error seemed to us overwhelming. The appellant then contended for the first time that parol evidence against this receipt had been illegally admitted. He never objected to the evidence at the trial, and never even mentioned the point in the Court of Appeal. Now, in France, an objection of this nature cannot be taken for the first time in the Cour de Cassation (1). And why? Because the objection is not based on a law of public order. The weight of authority seems to be now that the prohibition of article 1234 C. C. against the admission of parol evidence to contradict or vary a valid written instrument is not *d'ordre public*, and that, consequently, if such evidence is admitted without objection the party to whom it is opposed cannot subsequently impeach its legality. Article 14 C. C. which enacts that prohibition laws import nullity does not alter the question, or rather is nothing but the same question, whether it is a *nullité d'ordre public*, or a *nullité relative* only, or one which can be waived or not (2). The authorities *pro* and *con* are collected in *Sirey's Codes annotés*, under art. 1341, Nos. 4 & 5, and an *arrêt* of the Cour de Cassation (3). However, independently of this consideration the appellant's contention is untenable. According to the case of *Ætna Life* v. *Brodie* (4), and in this court (5) it is settled law that the evidence now objected to here by the appellant was perfectly

(1) S. V. 51, 1, 54; S. V. 79, 1, 213; S. V. 83, 1, 214.
(2) Laurent, Vol. 1, No. 58 *et seq.*
(3) S. V. 83 1 214.
(4) 20 L. C. Jur. 286.
(5) 5 Can. S. C. R. 1.

legal and rightly admitted, and that in commercial matters parol evidence can be adduced to prove error in a written instrument. How far this rule as to proof of error in writing can be extended to non-commercial matters, as falling within the cases in which the party claiming could not procure proof in writing, we have not here to consider.

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PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *J. P. Cooke.*

Solicitors for respondent: *Hutchinson & Oughtred.*

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*Nov. 11, 12, 13.

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*June 22.

SAMUEL NORDHEIMER (DEFENDANT) APPELLANT;

AND

CHARLES ALEXANDER (PLAINTIFF)...RESPONDENT.

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

Responsibility—Vis major—Fall of wall after fire—Negligence—Damages —Arts. 17, *sub-sec.* 24, 1053, 1055, 1071 *C. C.*

Where a fire destroyed the defendant's house, leaving one of the walls standing in a dangerous condition, and the defendant, knowing the fact, neglected to secure or support the wall or take it down, and some days after the fire it was blown down by a high wind and damaged the plaintiff's house:

Held, affirming the judgments of the courts below, that the defendant could not shield himself under the plea of *vis major*, and was liable for the damages caused.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), confirming a judgment of the Superior Court (2), which condemned the appellant to pay respondent a sum of $2,638.57 as damages.

The facts are fully stated in the judgment of Mr. Justice Fournier hereinafter given:—

Laflamme Q.C. and *Hector Cameron* Q.C. for appellant contended that the accident was caused by *vis major*, and that the appellant was not responsible—citing Larombière (3); Laurent (4); Demolombe (5); Sourdat de la Responsabilité (6); Smith Law of Damages (7); Pollock on Torts (8); *Dixon* v. *Metropolitan*

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

(1) M. L. R. 6 Q. B. 402.
(2) M. L. R. 3 S. C. 283.
(3) 5 vol. art. 1386.
(4) 16 vol. no. 257.
(5) 3 vol. no. 656.
(6) 2 vol. ch. 4 art. 17, 24, 1200 C.C.
(7) P. 198.
(8) P. 414.

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Board of Works (1); the learned counsel also contended that the amount of damages awarded was excessive.

Duhamel Q. C. and *Marceau* for respondent relied on art 1053, 1055 C.C.; Troplong Louage (2); Cooley on Torts (3); Aubry & Rau (4); Sourdat de la Responsabilité (5); Laurent (6); *Rapin* v. *McKinnon* (7); *Bélanger* v. *McCarthy* (8); *Séminaire de Québec* v. *Poitras* (9).

Sir W. J. RITCHIE C.J.—I think this appeal must be dismissed. There was, in my opinion, ample evidence to show that after the fire the defendant's wall was in a dangerous condition, and that the defendant, though notified of the fact, neglected to take any reasonable precautions, or in fact any precautions at all, to secure or support the wall or to take it down so as to prevent it falling and injuring his neighbors, but on the contrary allowed his wall to remain in this dangerous state (though there was ample time to have it made safe by adopting one or other of the courses suggested) until it was blown down and fell on the house of the plaintiff, whereby he sustained large damages. In my opinion the decision of the judge of first instance, confirmed as it has been by the unanimous judgment of the Court of Queen's Bench, should not be disturbed but should be confirmed, and the appeal dismissed with costs in all the courts.

STRONG J.—I am also of opinion that the appeal should be dismissed with costs.

FOURNIER J.—Le présent appel est interjeté d'un juge-

(1) 7 Q. B. D. 418.
(2) 226.
(3) P. 640.
(4) 4 vol. p. 44.
(5) 2 vol. c. 4 no. 1175.
(6) 20 vol. no. 454 & arts. 1629, 1631 C.C.
(7) 17 L. C. Jur. 54.
(8) 19 L. C. Jur. 181.
(9) 1 Q. L. R. 185.

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ment de la cour du Banc de la Reine, siégeant à Montréal, confirmant un jugement de la cour Supérieure qui avait condamné l'appelant à payer à l'intimé, la somme de $2,638.57 de dommages, causés dans les circonstances suivantes :—

La propriété de l'appelant connue sous le nom de Nordheimer Hall, située, rue Saint-Jacques, à Montréal, fut incendiée le 18 décembre 1886.

La propriété du côté ouest, adjoignant le "Nordheimer Hall," appartenait à Mde. Campbell, (Dame Margaret Hutchison), et était occupée depuis plusieurs années par l'intimé comme restaurant et boutique de confiserie. Cette bâtisse avait une trentaine de pieds de hauteur, l'autre en avait soixante. Le mur de division des deux bâtisses était mitoyen jusqu'à la hauteur de la maison de l'intimé. Sur ce mur mitoyen l'appelant avait construit un mur d'environ trente pieds qui était sa propriété exclusive.

Le 24 décembre 1886, environ une semaine après l'incendie, une partie de ce dernier mur s'écroula et tomba sur cette partie de la bâtisse occupée par l'intimé comme restaurant et salle à dîner. Les meubles, la vaisselle, ustensiles de cuisine et autres effets, aussi bien que le fond de commerce de l'intimé, en biscuits, confiseries, etc, furent ou complètement détruits ou considérablement endommagés par la chute du mur. En conséquence l'établissement fut fermé depuis le 24 décembre jusque vers la fin de janvier suivant. L'intimé a souffert en outre des dommages considérables par la suspension de son commerce, et par la perte d'un grand nombre de ses habitués.

Madame Campbell avait aussi été poursuivie, sous l'impression qu'elle était propriétaire conjointe de la partie du mur écroulé, mais la preuve ayant établi que cette partie du mur était la propriété exclusive de l'appelant, l'action fut renvoyée quant à elle. Il n'y

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a pas d'appel quant à elle ; la contestation est maintenant limitée entre l'appelant et l'intimé.

L'appelant a plaidé que l'accident avait été causé par la force majeure sur laquelle il n'avait aucun contrôle, que le mur avait été bien construit et que même après le feu il était en bon état et nullement en danger de tomber, mais que dans la nuit du 24 décembre, un changement subit de température était survenu et une tempête s'étant élevée tout à coup fit tomber une partie du mur. Il allègue aussi qu'il n'a pas été notifié que le mur était dans un état dangereux, ni requis de le démolir, que l'avis qu'il a reçu de l'inspecteur de la cité n'avait rapport qu'à d'autres murs de la bâtisse.

L'intimé a nié que l'accident avait été causé par force majeure et cas fortuit ; que les faits allégués ne constituaient pas un cas de force majeure ; que lors même que l'appelant n'avait pas été notifié, il n'en serait pas moins responsable du dommage causé par son fait de sa négligence.

Les questions soulevées par la contestation se résument ainsi :—1° Le mur était-il dans un état dangereux après le feu ; 2° l'appelant a-t-il reçu avis et a-t-il été mis en demeure de le démolir, et un tel avis était-il nécessaire ; 3° l'accident a-t-il été causé par force majeure ?

Le mur de division des propriétés n'avait que vingt pouces à sa base, seize au centre et douze au haut. C'était à peine suffisant, mais tant que les différents murs étaient reliés ensemble pour former le corps de la bâtisse, il n'y avait pas alors grand danger à redouter. Mais il n'en était plus de même après le feu. Les trente pieds construits au-dessus de la partie mitoyenne du mur furent laissés sans aucun appui, tous les poutres et liens qui servaient à le retenir avaient été détruits par le feu ; il penchait du haut et avait été

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considérablement endommagé par la chaleur, et on y voyait de grandes fissures.

La preuve établit que le mur était dans un état dangereux et aurait dû être démoli, ou au moins étançonné afin d'éviter l'accident.

L'inspecteur de la cité, M. L. Lacroix décrit ainsi l'état du mur.

R. Tout le mur n'est pas tombé. Il y a une certaine hauteur qui est tombée, à peu près quinze ou dix-huit pieds de hauteur, sans mesure précise. Le mur me paraît avoir plié au centre, et le pied du mur est tombé d'un côté, et la partie supérieure de l'autre côté, et c'est la base de la partie qui est tombée qui a effondré la bâtisse Hutchison.

Q. A quelle hauteur au-dessus de la maison Hutchison le mur est-il tombé ?

R. A une vingtaine de pieds.

Q. De sorte qu'il est tombé un excédant d'une vingtaine de pieds au-dessus ?

R. Une vingtaine de pieds au-dessus de la maison. La partie du mur qui est tombée était bien plus mince que la partie qui est restée, et c'est cette partie-là que je demandais de faire démolir. Je craignais dans cette ligne-là.

* * * * * * * *

Q. Jusqu'à l'instant où le mur est tombé, il y avait urgence de démolir ce mur-là, ou de l'étançonner, ou de prendre les précautions nécessaires pour l'empêcher de tomber, n'est-ce pas ?

R. Certainement.

R. Et à votre connaissance on n'a pris aucune précaution pour l'empêcher de tomber, n'est-ce pas ?

R. On n'a rien fait.

* * * * * * * *

R. Lorsque le feu a eu lieu, il faisait un froid très sévère, une quantité énorme d'eau avait été jetée sur ces murs et les avait plus ou moins congelés. Les bois de liaison dans le mur étaient brûlés, ce qui laissait une bien moindre épaisseur de brique pour soutenir ce mur. Cela réuni à la crainte d'un dégel possible, chose qui est arrivée le vingt-quatre, me faisait craindre certainement pour ce mur-là, dans n'importe quelle condition de temps ou de température où on pouvait se trouver.

Q. Il y avait donc dans les murs de cette maison-là des bois de liaison ?

R. Oui, il y avait des bois de liaison de 4 pouces d'épaisseur sur toute la longueur du mur.

Q. Etait-il tout brûlé ?

R. Il était tout plus ou moins calciné.

Q. En sorte qu'il n'y avait aucune solidité dans le mur ?

R. Il n'y avait rien pour le retenir dans un cas fortuit, par exemple, dans un coup de vent.

Par le juge :—

Q. Il n'y avait rien pour retenir le mur ?

R. Non, le mur avait une profondeur d'une centaine de pieds, et il n'y avait plus rien pour le retenir.

[Mr. Fowler, an architect, a witness for the appellant, says as to the condition of that wall :]

Q. Mr. Fowler, would the mere height of the wall be in any way dangerous ?

A. No doubt it would.

Q. Do you mean to say that it would be likely to fall without any extraordinary reason, or would it merely be that the height of the wall would make it more dangerous in case of a high wind ?

A. In case of a high wind, the height of the wall would make it more dangerous.

* * * * * * * *

Q. And you made up your mind, the three of you together (viz.:— The three experts appointed by the Insurances and Nordheimer) that the wall required to be demolished ?

A. Yes, it required to be demolished.

Q. On account of the damage caused to it by the fire ?

A. Yes, by the fire.

Q. And still, you said just now that you did not see any immediate danger ?

A. No.

Q. But you saw apparent danger on account of this crack in this twelve-inch wall ?

A. The wall stood alone, without any support.

Q. On either side ?

A. On either side. Of course, it was in danger of falling in case of a high wind.

* * * * * * * *

A. The portion of that wall which we measured and the thickness of which I have given had to be taken down.

Q. In order to rebuild ?

A. Yes, in order to rebuild.

Q. But not because it was in danger ?

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A. Yes, in the course of time there would be danger.

* * * * * * * *

Q. Do you think that it would have been a wise precaution to have braced this wall, to stop it from falling after the fire?

A. If it had been under my care, I think I would have done so.

Q. It would only have been the ordinary precaution to be taken for such a high wall?

A. Yes.

And in re-examination he says further:—

Q. Now, you say that if you had had charge of that wall, you would have ordered it to be taken down?

A. I would have braced it, or done something to prevent such an accident.

Le témoin Roberts dit:—

Q. By the Court—Was it possible, from the time of the fire to the time of the falling of the wall, assuming that it had been in a dangerous position, to put it in a safe condition?

A. It was possible to put it in a safer condition, I mean, because I consider that it was safe.

Q. You speak after the time of the fire?

A. From the time of the fire on the eighteenth.

Ces extraits de la preuve suffisent à faire voir que le feu avait mis le mur dans un état extrêmement dangereux. L'appelant n'ignorait pas le danger, et c'était une grossière négligence de sa part de laisser ce mur dans un tel état de ruine sans prendre aucune des précautions nécessaires pour prévenir un accident. Cela suffit pour rendre l'appelant responsable des conséquences de l'accident d'après l'article 1053 du code civil.

Une trop grande importance a été donnée à la question de savoir si avis de démolir avait été donné à l'appelant, car cet avis n'était pas nécessaire dans le cas actuel pour le rendre responsable. Mais il n'est pas inutile toutefois d'établir la vérité à ce sujet.

L'intimé ayant écrit à l'inspecteur de la cité pour savoir si les murs incendiés étaient dans un état dangereux, celui-ci en fit la visite et donna à l'agent de

l'appelant avis, le 20 décembre 1886, quatre jours avant l'écroulement du mur, l'avis par écrit que l'on trouve à la page au dossier, d'avoir à démolir immédiatement le mur de division (celui qui s'est écroulé) et une partie de celui de Fortification Lane.

M. Saffrey, l'agent de l'appelant, a prétendu que Lacroix dans sa visite, le matin du 20, lui a indiqué comme étant dangereux et devant être démoli, le mur de derrière sur la Fortification Lane et le mur du centre de la bâtisse, parallèle à la rue Saint-Jacques. Ce dernier mur étant à 50 pieds en arrière du front de la rue, il est évident qu'il se trompe et qu'il n'a pas compris Lacroix qui, au contraire, jure positivement que les murs dont il a ordonné la démolition sont les murs de division entre les propriétés des parties et celui de Fortification Lane. Il ajoute que ce sont les seuls qu'il avait le pouvoir de faire démolir pour la protection du public. Il dit aussi avoir conseillé la démolition du mur central dans l'intérêt de la sûreté des ouvriers, mais qu'il ne pouvait donner d'ordre officiel quant à ce mur.

De ces deux versions, il est clair que celle de Lacroix, qui est tout à fait désintéressé et n'apparaît dans cette affaire qu'en qualité d'officier public, doit être acceptée. D'ailleurs elle est conforme à l'avis par écrit qui indique positivement le mur de division et celui de Fortification Lane comme les deux qui doivent être démolis. Il est évident que l'avis n'a pas rapport au mur du centre qui ne pouvait pas être décrit comme le mur de division à partir de la rue Saint-Jacques. Saffrey reconnaît que l'avis se rapporte au mur en question, mais qu'il ne s'accorde pas avec les instructions verbales de Lacroix. Il est évident qu'il se trompe, et il ne peut pas y avoir de doute que l'appelant a reçu avis de démolir, non seulement verbalement, mais aussi par

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écrit et dans un temps suffisant pour prévenir l'accident s'il se fut conformé à l'avis.

D'ailleurs cette différence entre l'avis par écrit et les instructions verbales, même, si elle existait, ne pourrait aucunement exonérer l'appelant de sa responsabilité. Indépendamment de tout avis, l'appelant était obligé de maintenir son mur en bon état, et aucune mise en demeure n'était nécessaire pour le rendre responsable des conséquences de sa négligence. Les obligations de l'appelant résultent du droit civil, voir Sourdat de la Responsabilité (1).

Le voisin menacé de la chute du bâtiment peut se borner à faire, par acte extra judiciaire, sommation au propriétaire d'avoir à réparer ou démolir.

Cet avertisement n'est point nécessaire, sans doute, pour engager la responsabilité du propriétaire. Si sa maison s'écroule, l'article 1386 l'oblige sans distinction à indemniser les tiers du dommage qui en résulte pour eux. C'était à lui de veiller à la conservation de sa chose. Mais un pareil acte peut produire d'utiles effets et lever plusieurs difficultés. Il met le propriétaire en demeure et rend sa faute inexcusable. Il l'empêche de prétexter cause d'ignorance ; il donne lieu de présumer fortement que les dégradations de l'édifice sont la véritable cause de sa ruine, puisque ces dégradations étaient déjà telles que les voisins s'en étaient aperçus.

La prétention est que la chute du mur a été causée par force majeure, résultant de l'incendie, d'un changement subit de température, accompagné d'un vent violent.

Les faits de la cause ont contredit ce moyen de défense.

Sans doute que l'accident est le résultat de l'incendie, du changement de température et du vent de tempête, mais ces trois faits n'ont pas eu lieu en même temps. L'incendie a eu lieu le 18, et le changement de température et le vent le 24, jour de l'écroulement. Il y avait du temps du 18 au 24 pour prendre les précausions nécessaires pour prévenir l'accident. Ce ne peut

(1) 2 vol. p. 420, no. 1175.

être un cas fortuit, le code civil, article 17, s. 24 le définit :— 1891

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Le cas fortuit est un évènement imprévu causé par une force majeure à laquelle il était impossible de résister.

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D'après le dangereux état dans lequel les murs ont été laissés après l'incendie, il était facile de prévenir un accident, et rien n'était plus facile que d'éviter un accident, soit en démolisant ou en étançonnant le mur.

L'article 1072 déclare que le débiteur n'est pas tenu de payer les dommages-intérêts, lorsque l'inexécution de l'obligation est causé par cas fortuit ou force majeure, sans aucune faute de sa part, à moins qu'il ne s'y soit spécialement obligé par le contrat. Ces dispositions font voir que pour se prévaloir de la défense du cas fortuit ou de la force majeure il faut que ce soit un évènement qu'il ait été impossible de prévoir et d'empêcher. Il faut aussi qu'il origine de ce qu'aucuns soins ni prévisions humaines n'ont pu l'empêcher et qu'il n'ait été précédé, accompagné ou suivi d'aucune faute qui puisse être imputée au débiteur.

Troplong, du louage, (1) mentionne comme cas fortuits, les tremblements de terre, chaleur excessive, des chutes de neige extraordinaire, les gelées, la grêle, les tempêtes sur mer et sur terre, les éclairs, le feu, etc. Mais au n° 207 il ajoute que ce serait une erreur de mettre au rang des cas fortuits des événements qui ne sont que le résultat ordinaire du cours naturel des choses.

Ainsi, dit-il, la pluie, les vents, la neige, le chaud ne sont pas des cas fortuits ; ce sont là des accidents nécessaires de l'ordre des saisons, des alternatives inévitables d'une température normale. On ne les élève au rang de cas fortuit qu'autant que par leur intensité et leur force excessive ils sortent de la marche accoutumée de la nature.....

En un mot, les saisons ont leur ordre et leur dérangement : le dérangement seul dégénère en cas fortuit.

Dans notre pays les tempêtes et les changements subits de températures sont des événements très ordi-

(1) No. 206.

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naires. Pour donner au vent qu'il faisait le 24 décembre le caractère de cas fortuit ou de force majeure, il faudrait que le vent eût été d'une violence au delà du cours ordinaire et d'une intensité telle que si le mur eût été appuyé, il se fut écroulé tout de même. La preuve n'a pas établi ce fait ; le témoin Ball dit que la plus grande vitesse du vent a été ce jour là 37 milles à l'heure et qu'il atteint souvent une plus grande vélocité. Pour que ce soit un vent de tempête, le témoin Hamilton dit qu'il faut que ce soit un vent qui ait au moins 40 milles à l'heure.

Il faut en conséquence en arriver à la conclusion des témoins que le mur n'est tombé que parce qu'il n'était pas supporté. Le vent peut avoir été la cause immédiate de la chute du mur, mais la négligence de l'appelant à prendre les précautions nécessaires pour le protéger est certainement la cause médiate de l'accident. C'est cette négligence qui constitue l'appelant en faute et le rend responsable de tous les dommages soufferts par l'intimé.

Aubry et Rau, (1) après avoir dit qu'en règle générale le débiteur n'est responsable des cas fortuits ou de la force majeure, ajoute :—

Ainsi, lorsque cette exécution (de l'obligation) n'a pu avoir lieu par suite, soit d'un accident de la nature, soit du fait d'une personne ou d'une chose dont le débiteur n'a pas à répondre, et qu'il n'a pu empêcher, celui-ci se trouve déchargé de toute responsabilité, pourvu que cet accident ou ce fait n'ai pas été précédé ou accompagné de quelque faute qu'il lui soit imputable.

Et il dit de plus, (2) :—

Toutes les fois que le débiteur aurait pu, en donnant à l'accomplissement de l'obligation les soins qu'il devait y apporter, empêcher le cas fortuit ou du moins en atténuer les effets, l'inexécution régulière de l'obligation se trouve entravée, moins par le cas fortuit que par une faute dont le débiteur doit nécessairement répondre.

Demolombe, des contrats, (3) :—

(1) Vol. 4, p. 103. (2) P. 104, note 35.
(3) Vol. 1, No. 560.

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Il est bien entendu d'ailleurs que le débiteur ne se trouve déchargé de toute responsabilité, à raison de la force majeure ou du cas fortuit, qu'autant que l'événement n'a pas été précédé, accompagné ou suivi de quelque faute qui lui soit imputable.

Car il serait au contraire passible de dommages-intérêts s'il avait pu, en apportant à l'accomplissement de son obligation le soin qu'il devait y apporter, avant, pendant ou après l'accident, soit prévenir l'accident lui-même, soit en prévenir ou atténuer les effets dommageables. A plus forte raison, le débiteur serait-il responsable si, au lieu de prévenir le cas fortuit ou de force majeure, il l'avait lui-même provoqué.

Laurent, (1) :—

Quand le cas fortuit a été amené par une faute, il devient imputable sous le droit commun : une pluie d'orage est généralement un accident dont personne ne répond, mais si ceux qui exécutent les travaux laissent le terrain sans défense contre l'action des eaux, les éboulements qui en résultent leur sont imputables.

Proudhon, droit d'usufruit, (2) :—

On entend, en général, par cas fortuit dont personne n'est responsable, tout accident qu'on a pu prévoir et dont on n'a pu arrêter le coup.

Et l'auteur ajoute, (3) :—

Mais il est possible que le cas fortuit qui entraîne immédiatement la perte de la chose ait été précédé ou accompagné d'une faute de la part de celui aux soins duquel elle était confiée, et que pour cette raison il ne cesse pas d'être responsable de la perte dont sa faute est médiate de la cause, comme, par exemple, si un incendie a consumé une maison parce qu'on n'avait pas eu la précaution de faire ramoner la cheminée où il a pris naissance, et même dans le cas où un incendie a été allumé par le feu du ciel, si l'on a pu en arrêter le progrès et qu'on ait négligé d'y mettre obstacle. Dans tous ces cas et autres semblables, chaque fois qu'il y a faute jugée suffisante pour servir de fondement à une juste garantie, son auteur doit être condamné aux dommages-intérêts soufferts par la partie lésée.

L'auteur alors se demande s'il suffit au débiteur de prouver la force majeure, ou s'il ne doit pas de plus faire voir que cet évènement n'est compliqué d'aucune faute ou négligence de sa part ; il est d'opinion que

(1) Vol. 20, No. 454.

(2) Vol. 3, p. 503, No. 1538.

(3) Au No. 1539.

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lorsque le débiteur a établi le cas fortuit, sa tâche est accomplie et qu'il n'est tenu à prouver rien de plus.

Cette opinion, cependant, est condamnée par la majorité des commentateurs.

Troplong, de la vente (1), dit :—

L'obligation du vendeur est de prouver le cas fortuit qu'il allègue ; mais y a-t-il preuve de cas fortuit ou d'accident, tant qu'il n'est pas établi que c'est le hazard pur ou une force irrésistible qui a amené la perte de la chose ? La preuve est-elle faite quand on peut tout aussi bien penser que la faute de l'homme a concouru avec le fait étranger ? Puisque la force majeure est celle à laquelle on n'a pu résister par aucune prévision, n'est-il pas nécessaire de prouver qu'on a résister par de sages prévisions, et qu'on a été vaincu ?

Donc en remettant la chose, le débiteur doit prouver que si elle est détériorée, ce n'est pas par sa faute. Eh ! bien, je demande s'il satisfait à cette obligation en prétextant d'un fait qui n'exclut pas nécessairement la faute ; d'un fait qui n'est fortuit qu'autant qu'il est démontré que la négligence de l'homme ne l'a pas amené ?

Demolombe, des contrats (2), dit aussi :—

C'est le débiteur évidemment qui doit prouver le cas fortuit qu'il allègue ; car il affirme, et c'est à celui qui affirme qu'est imposé le fardeau de la preuve, et puisqu'il dit qu'il est libéré de son obligation, il faut qu'il prouve l'évènement qui a produit cette libération.

Le même principe a lieu en matière de bail et oblige l'occupant, en cas d'incendie, à prouver qu'il n'y a ni faute ni négligence de sa part.

Voir aussi C. C., Arts. 1629 and 1631 :—

Et les articles correspondants du Code Napoléon qui sont les articles 1733 et 1734.

Art. 1733 dit que le locataire est responsable de l'incendie à moins qu'il ne prouve qu'il est arrivé par cas fortuit ou force majeure, ou par vice de construction, ou que le feu a été communiqué par une maison voisine.

L'article 1734 dit :—

S'il y a plusieurs locataires, tous sont solidairement responsables de l'incendie, à moins qu'ils ne prouvent que l'incendie a commencé dans l'habitation de l'un d'eux, auquel cas ceux-là n'en sont pas tenus.

Toullier, (3) :—

(1) Nos. 405 et seq.

(2) Vol. 1, No. 561.

(3) Vol. 2, p. 220.

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Si dans le reste de la France coutumière on ne trouve pas de loi générale qui établisse la présomption légale de culpabilité contre les habitants de la maison incendiée, elle n'en était pas moins presque universellement reçue et observée, comme le prouve la jurisprudence des arrêts attestée par les auteurs français les plus recommandables.

Aubry et Rau, (1):—

L'article 1733 C. N. ne contient point une dérogation au droit commun, en ce qu'il met à la charge du preneur l'obligation de prouver les faits tendants à faire cesser sa responsabilité. Les incendies en effet ne sont point par eux-mêmes, et nécessairement, des cas fortuits ou de force majeure. Ils sont plus fréquemment le résultat d'une imprudence ou d'un défaut de surveillance que d'un cas fortuit proprement dit. Il en résulte que le preneur, tenu de veiller à la conservation de la chose louée, et de justifier, le cas échéant, de l'accomplissement de cette obligation, ne peut décliner la responsabilité d'un incendie qu'en prouvant que cet évènement provient d'une cause qui ne saurait lui être imputée à faute. La condition du locataire est, sous ce rapport, absolument la même que celle de toute autre personne obligée, en vertu de la loi ou d'une convention, à veiller à la conservation de la chose d'autrui. Mais si cet article ne renferme pas, à ce point de vue, une dérogation au droit commun, il s'en écarte réellement en ce que, pour donner au bailleur une garantie plus efficace, il restreint le cercle des moyens de justification du preneur. Et sous ce rapport, la disposition qu'il contient ne doit être appliquée qu'en matière de bail.

L'intimé a aussi cité les causes suivantes:—

Rapin v. *McKinnon* (2); *Bélanger* v. *McCarthy* (3); *Séminaire de Quebec* v. *Poitras* (4).

Notre article 1071 correspondant à l'article 1147 du code Napoléon résume comme suit la doctrine.

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.

L'appelant ne pouvait éviter les conséquences de la responsabilité envers l'intimé qu'en établissant que

(1) Vol. 4, p. 484. note 21.
(2) 17 L. C. Jur. 54.
(3) 19 L. C. Jur. 181.
(4) 1 Q. L. R. 185.

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l'accident était le résultat, 1° d'un cas fortuit ou de force majeure, 2° qu'il n'y avait aucune faute ou négligence de sa part. Mais loin de là, la preuve a établi qu'il n'y avait pas eu de force majeure et que l'accident n'était arrivé que six jours après l'incendie et par la faute et négligence de l'appelant.

Quant au montant des dommages évalués par les deux cours à la somme de $2,638.57, il est suffisamment établi par la preuve. L'appel doit être rejeté avec dépens.

GWYNNE J. concured.

PATTERSON J.—I do not see any sufficient reason for disturbing the judgment in which the Superior Court and the Court of Queen's Bench concurred.

The facts of this case do not enable the appellants to derive much aid from the doctrine of *vis major* which has been so much relied on, and the citations made from writers of authority, illustrating the application of the doctrine when a person has suffered injury from the fall of his neighbor's house, support the judgment of the court below.

The fire that burnt the appellant's house may be admitted, but without so deciding, to have been a fortuitous event or an irresistible force which, under article 1072 of the Civil Code, would have saved the appellant from responsibility for damage caused by the fall of the wall if the fire had caused it to fall, assuming of course, as demanded by article 1072, that the fire occurred "without any fault on his part." But the fire occurred on the 18th December and there remained, not a house but an unsupported wall which stood until the 24th, when it was blown down and injured the respondent's property. The breeze that blew down the wall cannot be treated as *vis major* within the doctrines

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relied on unless it appears that the accident could not have been foreseen or prevented. In that particular all the authorities agree.

The term "fortuitous event" is defined by the Civil Code (1) as "one which is unforeseen and caused by superior force which it was impossible to resist."

The article of the Code Napoleon which corresponds with article 1072 is No. 1148. Laurent, commenting on that article, asks in one of the passages cited to us:

Quand y a-t-il cas fortuit ou force majeure (2)?

And, after mentioning tempest, lightning and earthquake, he adds:

La loi les qualifie de force majeure pour marquer que l'homme y est soumis fatalement, en ce sens qu'il ne peut les prévoir ni y resister.

A similar definition of the equivalent phrase "act of God" was given, in terms almost as concise, by Lord Justice James in an English case (3) where the liability of a common carrier was in question:

A common carrier, he said, is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him.

No doubt it was the wind that blew down the wall; and the defendant may not have supposed that the wind would be so high just at that time, if he thought at all about danger from the wind. Perhaps the fire had weakened the wall more than he was aware of, though a new wall left unsupported as this was, has been known to fall before a good breeze. The danger existed and the defendant took the risk of it; whether he was led to do so by miscalculation of the danger, or from erroneous information, or simply from want of care and forethought, matters very little to the plaintiff.

(1) Art. 17 s. 24 C. C. (2) Vol. 16, No. 257.
(3) *Nugent* v. *Smith*, 1 C.P.D. 423, 444.

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Article 1053 of the code declares that 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. This covers, to my mind, the omission to take proper steps during the six days following the date of the fire to avert the danger caused by the unsupported wall.

We cannot, as I have already remarked, regard this wall as a building, so as to make the authorities appealed to on the subject of *vis major* fit the facts. If we could so regard the wall we should bring it within article 1055 where it is said that the owner of a building is responsible for the damage caused by its ruin where it has happened from want of repairs or from an original defect in its construction. It is beyond dispute that something might have been done, and doubtless something would have been done, during the 6 days, either by supporting the wall or taking part of it down, to put it in a state to withstand the gale which, though violent, was not of unusual violence, if danger of the kind had been thought of. The wall required repairs and fell for want of them.

This topic is treated of in another passage cited to us from Demolombe's Comments (1) on article 1386 of the Code Napoleon which is followed by article 1055 of the Quebec Code. Referring to the two defects, neglect to repair and faulty construction, for which the proprietor is responsible, he says : "Mais de ceux-là il est responsable de plein droit, sans qu'il puisse être admis à prouver qu'il n'a pas pu empêcher la ruine qui est résulté de l'une ou de l'autre de ces causes, parce qu'il aurait été trompé ou qu'il les ignorait."

Another citation is from Sourdat (2) where the effect

(1) Cours du C.C. liv. III tit. IV ch. II No. 657.

(2) 2 Vol. De la Responsabilité No. 1175.

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is discussed of a notice given by a neighbor who is in danger from a building, calling on the proprietor to repair it, of which the author remarks, among other things, that the giving of the notice makes it more easy, in case of the destruction of the building by a hurricane, for the neighbours to prove that the storm only hastened the fall of the building, which was not strong enough to withstand it, though it might have done so if it had been kept in repair. So in the remaining passage, cited from Larombière (1), the author shows that freedom from responsibility for the fall of a building can be claimed, on the ground of *force majeure*, only:—

Si le proprietaire n'avait point négligé de l'entretenir et qu'il l'eut construite suivant les règles de l'art.

Thus the authorities relied on for the appellant tell against the appeal.

The damages awarded to the respondent have, no doubt, been assessed on a liberal scale. The evidence has been shewn, on the part of the appellant, to be capable of justifying an estimate of considerably smaller amount, but unless we can say that the larger award is not justifiable we ought not to interfere with the decision of the trial judge, sustained as it has been by the Court of Appeal.

I may refer to *Phillips* v. *Martin* (2) as a recent case in which the Judicial Committee followed *Metropolitan Railway Co.* v. *Wright* (3) in holding that a verdict ought not to be disturbed as being against evidence, unless it is one which a jury, viewing the whole of the evidence reasonably, could not properly find.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *T. P. Butler.*

Solicitors for respondent: *Duhamel, Rainville & Marceau.*

(1) Obligations Vol. 5 art. 1386. (2) 15 App. Cas. 193.
(3) 11 App. Cas. 152.

1890 THOMAS MOODIE, (DEFENDANT).....APPELLANT,

*Nov. 26.

AND

1891 JOSIAH P. JONES, (PLAINTIFF).....RESPONDENT.

*June 22.

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

Moneys entrusted for investment—Condition precedent—Prescription—Art. 2262. *Transfer—Prête-nom.*

H. having funds belonging to one T. J. C. for investment, agreed to invest them with M. of Winnipeg in a certain land speculation, and after correspondence accepted and paid M's draft for $2,375, mentioning in the letter notifying M. of the acceptance of the draft, the understanding H. had as to the share he was to get and adding: "I also assume that the lands are properly conveyed, and the full conditions of the prospectus carried out, and if not, that money will be at once refunded." The lands were never properly conveyed and the conditions of the prospectus never carried out. T. C. J. transferred *sous seing privé* this claim to the plaintiff who brought an action against M. for the amount of the draft.

Held, affirming the judgment of the courts below,

1. That the action being for the recovery of a sum of money entrusted to the defendant for a special purpose, the prescription of two years did not apply.—Art. 2262 C.C.
2. That the conditions upon which the money had been advanced were conditions precedent and not having been fulfilled, M. was bound to refund the money.
3. That the transfer *sous seing privé* of the claim to plaintiff had been admitted by M., and the plaintiff, even if considered as a *prête-nom*, had a sufficient legal interest to bring the present action.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side), at Montreal (1), affirming a judgment rendered by the Superior Court

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

(1) M. L. R. 6 Q. B. 354.

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at Montreal (Mathieu J.), which maintained respondent's action and condemned appellant to pay him $2,945.78 with interest and costs.

The facts and pleadings sufficiently appear in the following formal judgment of the Superior Court.

"La Cour, après avoir entendu les parties par leurs avocats sur le mérite de la présente demande et action, examiné la procédure, les pièces au dossier et la preuve faite, et délibéré;

"Attendu que le demandeur allègue dans sa déclaration que vers le mois de mars mil huit cent quatre-vingt-deux, le défendeur et J. S. C. Coolican, Thomas Coolican, W. W. Proud and Robert Holmes, tous de la cité de Winnipeg, dans la province de Manitoba, et ci-après appelés la première compagnie, achetèrent de l'honorable Joseph A. Cauchon un certain terrain, situé dans la paroisse de St Boniface, dans la dite province de Manitoba; qu'ensuite le défendeur et d'autres entreprirent de former une autre compagnie ou syndicat, ci-après appelée la seconde compagnie, dans le but d'acheter le dit terrain de la première compagnie; qu'à cette fin un prospectus fut préparé; que vers le dix mars mil huit cent quatre-vingt-deux le défendeur envoya le *prospectus* à J. C. Hamilton, avocat de Toronto, qui était alors à la connaissance du défendeur l'agent et procureur de Thomas C. Jones, teneur de livres, alors de la cité de Montréal, et qui avait dans le temps certains argents entre ses mains à placer sur des immeubles pour le dit Thomas C. Jones, accompagnant ce prospectus d'une lettre en réponse à une lettre écrite par le dit Hamilton au défendeur datée le six mars mil huit cent quatre-vingt-deux; que le défendeur par cette lettre et le prospectus représentait à Hamilton que la seconde compagnie avait l'intention, aussitôt que possible, d'acheter le terrain de la première compagnie et de le diviser en vingt parts et qu'aussitôt que

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les dites vingt parts seraient prises ou souscrites, le terrain serait transporté à la dite seconde compagnie et possédé en fidéicommis par un ou deux syndics qui seraient choisis par une majorité des actionnaires, et qu'aussitôt que toutes les actions seraient souscrites, une assemblée des actionnaires aurait lieu pour élire un secrétaire-trésorier qui serait le dépositaire de tous les argents pour la dite seconde compagnie, et qui ouvrirait un compte spécial dans une banque pour ces argents ; qu'à la date où la dite lettre et le dit prospectus furent transmis au dit Hamilton, onze parts avaient été souscrites dans la dite seconde compagnie, le defendeur en ayant souscrit une ; que dans la dite lettre, le défendeur indiquait que les dites parts allaient être promptement souscrites et la dite seconde compagnie organisée et que l'argent nécessaire pour faire le premier paiement serait bientôt requis, et le défendeur offrait au dit Hamilton la moitié de sa part, ayant déjà tiré sur lui pour le montant de deux mille trois cent soixante-quinze piastres, que le dit Hamilton agissant pour le dit Thomas C. Jones paya, mais à la condition expresse qu'à moins que le dit terrain ne fut régulièrement transporté à la seconde compagnie dûment organisée et toutes les promesses et engagements contenus dans la dite lettre et le dit prospectus remplis et exécutés, la dite somme lui serait immédiatement remise ; que la dite seconde compagnie ne fut jamais organisée ni les dites vingt parts souscrites, et que le dit terrain en question ne fut jamais vendu et transporté à la dite compagnie, et qu'aucune des promesses et aucun des engagements contenus dans la dite lettre et le dit prospectus ne fut exécuté, et que l'argent ainsi payé au défendeur fut par lui employé pour d'autres fins que celles pour lesquelles il fut payé et ne fut jamais remis au dit Hamilton ; que subséquemment, le dit Thomas C. Jones, sur les représentations à lui faites par le dé-

fendeur, que son argent avait servi à payer le dit terrain, poursuivit les personnes alors en possession du dit terrain devant la Cour du Banc de la Reine, à Manitoba, pour recouvrer son argent, ou le terrain pour lequel il avait été payé, mais que lors du procès, il fut constaté que cet argent n'avait jamais été employé pour les fins pour lesquelles il avait été envoyé, et sur l'avis d'hommes de loi, le dit Thomas C Jones retira son action et paya les frais qui s'élevèrent à quatre cent douze piastres et cinquante centins, lesquels frais et le montant de la traite susdite, avec intérêts, s'élevaient, le trente janvier mil huit cent quatre-vingt-six, à trois mille trois cent cinquante-sept piastres et cinquante centins que le défendeur devait alors au dit Thomas C. Jones; que par acte sous seing privé, daté du trente janvier mil hit cent quatre-vingt-six, le dit Thomas C. Jones transporta au demandeur, pour valeur reçue, la dite somme de trois mille trois cent cinquante-sept piastres et cinquante centins, lequel transport fut signifié au défendeur le trente mars mil huit cent quatre-vingt-six, et conclut à ce que le défendeur soit condamné à lui payer la dite somme de trois mille trois cent cinquante-sept piastres et cinquante centins, avec intérêt du trente janvier mil huit cent quatre-vingt-six, et les depens;

"Attendu que le défendeur a plaidé que le transport fait au demandeur est irrégulier et qu'il n'y a pas de lien de droit entre lui et le défendeur; que les transactions alléguées par le demandeur ont eu lieu plus de deux ans avant l'institution de son action et que cette action est prescrite; qu'avant février mil huit cent quatre-vingt-deux les dits Thomas C. Jones et J. C. Hamilton demandèrent plusieurs fois au défendeur de leur trouver un placement par l'achat d'immeubles comme spéculation à Winnipeg ou de les admettre

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dans un syndicat qui pourrait être formé et dont le défendeur ferait partie, qu'en février et mars mil huit cent quatre-vingt-deux une occasion se présenta dans une proposition faite par James S. Coolican et autres de former un syndicat de vingt membres ou vingt parts sur une base de trois cent trente-deux mille deux cent cinquante piastres pour les membres du syndicat généralement et de deux cent quatre-vingt-cinq mille piastres pour le dit Hamilton et certains autres membres du syndicat pour acheter la propriété Cauchon, dix parts ayant déjà été prises ; que le défendeur informa le dit J.C. Hamilton de la formation du syndicat proposé et prit une part avec lui, c'est-à-dire un onzième chacun pour moitié ; que le vingt-sept mars mil huit cent quatre-vingt-deux le dit J. C. Hamilton paya au dit James S. Coolican deux mille trois cent soixante et quinze piastres, lequel montant fut employé au paiement du premier instatement du prix de la dite propriété ainsi que le dit Thomas C. Jones l'a reconnu dans la poursuite mentionnée dans sa déclaration ; que le défendeur n'eut rien à faire avec la disposition de la dite somme de deux mille trois cent soixante et quinze piastres, et que si le dit Hamilton a perdu, c'est dû à une grande dépréciation dans la dite propriété qui eut lieu peu de temps après le paiement de cet argent, ce qui empêcha de compléter le dit syndicat ; que le dit J. C. Hamilton a, à plusieurs reprises, reçu sur paiement de la balance de la somme qu'il s'était engagé à payer l'offre d'une partie de la propriété, représentant plus qu'un quarantième du tout, ce qu'il a refusé de faire préférant perdre le montant et se retirer de la spéculation ;

" Attendu qu'il appert au dossier que le six mars mil huit cent quatre-vingt-deux, le dit J. C. Hamilton écrivit au défendeur lui demandant de l'admettre avec lui et quelques amis dans une spéculation quelconque,

sur les terrains, dans laquelle il offrait de mettre deux mille piastres;

"Attendu que le dix du même mois le défendeur lui répondit par la lettre et le prospectus ci-dessus mentionnés, et que le même jour il tira sur lui pour la dite somme de deux mille trois cent soixante et quinze piastres qui fut payée par le dit J. C. Hamilton comme susdit;

"Attendu que le vingt du même mois, le dit J. C. Hamilton, répondit au défendeur qu'il avait accepté la dite traite et qu'il la paierait, mais avec l'entente qu'il aurait la moitié d'une part dans la propriété Cauchon, c'est-à-dire un quarantième sur un base de deux cent quatre-vingt-cinq mille piastres, le dit J. C. Hamilton déclarant aussi dans cette lettre qu'il présumait que le terrain avait été régulièrement transporté et toutes les conditions du dit prospectus remplies, et qu'au cas contraire, son argent devait lui être remis sans délai;

Considérant que les promesses faites par le défendeur et contenues dans sa lettre du dix mars mil huit cent quatre-vingt-deux et dans le dit prospectus n'ont jamais été remplies; que le syndicat composé de vingt membres n'a jamais été formé et que la dite propriété Cauchon n'a jamais été transportée à aucun syndicat ou à aucune personne pour le dit J. C. Hamilton ou le dit Thomas C. Jones et d'autres personnes intéressées avec eux;

"Considérant que par les conventions susdites le défendeur était tenu de voir à ce que l'argent payé par le dit J. C. Hamilton ne fut employé qu'en paiement de partie du prix de cette propriété sur tel paiement d'obtenir un titre constatant l'intérêt du dit J. C. Hamilton ou du dit Thomas C. Jones dans la propriété;

"Considérait que le défendeur, par les conventions susdites, ne devait pas se dessaisir de la somme payée

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par le dit J. C. Hamilton ou en abandonner le contrôle avant que le dit syndicat proposé ne fût complètement formé et que le fait que la traite payée par le défendeur aurait été faite à l'ordre de T. Coolican, ne peut soustraire le défendeur à ses obligations;

" Considérant que le dit J. C. Hamilton agissant pour Thomas C. Jones n'ayant consenti qu'à faire partie d'un syndicat qui n'a jamais été formé, il s'en suit qu'il n'a pas contracté d'obligation au sujet du dit terrain et que d'ailleurs son obligation ne peut exister qu'en autant qu'on lui fournit considération, c'est-à-dire une part dans le terrain ;

" Considérant que la propriété en question a été vendue à William W. Proud pour le bénéfice du défendeur et d'autres personnes dont les dits J. C. Hamilton et Thomas C. Jones ne faisaient point parties, et que si le montant payé par le dit J. C. Hamilton a été employé à payer partie du prix de la vente à Proud, il a été employé pour le bénéfice personnel du défendeur et de ses associés, et non pour le bénéfice du dit J. C. Hamilton ou du dit Thomas C. Jones ;

" Considérant que le transport fait au demandeur est suffisant et qu'en supposant que le demandeur ne serait qu'un prête-nom vis-à-vis de son frère, Thomas C. Jones, il n'en est pas moins le créancier légal du défendeur, et comme tel il y a un intérêt suffisant pour poursuivre la présente action ;

" Considérant qu'il n'y a pas lieu d'appliquer à cette cause la prescription invoquée par le défendeur ;

" Considérant que l'offre que le défendeur prétend avoir faite au dit J. C. Hamilton d'une portion du dit terrain équivalant à la part de ce dernier, après la dépréciation de sa valeur, ne peut empêcher le demandeur de recouvrer de lui le montant de la dite traite, vu qu'il était du devoir du défendeur de ne pas employer

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ce montant pour d'autres fins que celle pour laquelle le dit Hamilton avait consenti ;

"Considérant que si le défendeur avait gardé sous son contrôle, comme il était tenu, l'argent payé par le dit J. C. Hamilton jusqu'à la formation du dit syndicat et le transport de cette propriété à ce syndicat, il en serait encore le dépositaire, vu que le syndicat en question n'a jamais été fait et que le défendeur ne peut aujourd-hui changer sa position et celle du demandeur en le forçant à entrer dans une transaction à laquelle il n'a pas consenti quand même il établirait, comme il le prétend, que la transaction à laquelle le dit J. C. Hamilton a consenti était plus mauvaise que celle que le défendeur lui propose aujourd'hui ;

"Considérant qu'il n'est pas prouvé que l'action intentée par le dit Thomas C. Jones, à Winnipeg, l'ait été sur les représentations et les suggestions du défendeur, et que ce dernier ne peut être tenu responsable des frais d'une action mal fondée lorsqu'aucune obligation de sa part n'est prouvée quant à cette action ;

"Considérant que les défenses du défendeur quant aux dits frais sont bien fondées mais qu'elles sont mal fondées quant au montant de la traite et des intérêts, et que l'action du demandeur est bien fondée quant à ce dernier montant ;

"A maintenu et maintient les défenses du défendeur quant à la dite somme de quatre cent onze piastres et soixante-douze centins, montant des dits frais réclamés, et les renvoie pour le surplus, et a maintenu et maintient l'action du demandeur pour le montant de la dite traite et des intérêts et a condamné et condamne le dit défendeur à payer au demandeur la somme de deux mille neuf cent quarante-cinq piastres et soixante et dix-huit centins, avec intérêt sur cette somme à compter du trente janvier mil huit cent quatre-vingt-six, et les dépens y compris les frais

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d'enquête ; et vu que le défendeur réussit dans sa défense de quatre cent onze piastres et soixante et onze centins, a condamné et condamne le demandeur à payer au dit défendeur les frais d'une contestation comme dans une cause de quatre cent onze piastres, sans frais d'enquête, distraits à messieurs Beïque, McGoun & Emard, lesquels dépens sont compensés jusqu'à due concurrence et distraction pour le surplus est accordé à Mtres MacLaren, Leet & Smith, avocats du demandeur."

Béique Q.C. for appellant.

The pretended transfer by T. C. Jones to respondent was made under private signature and was never proved as having been executed by the said T. C. Jones.

Civil Code, article 1222; Demolombe (1) on Art. 1322 C. N.

Pothier, Obligations (2).

Dalloz Rép. de Jur. (3).

Respondent's action is based on the assumption that the words " I also assume that the lands are properly conveyed and the full conditions of the prospectus carried out, and if not that my money will be at once refunded," contained in Hamilton's letter of the 20th March made it incumbent upon appellant not to use the amount of the draft unless, (1) the twenty shares had all been subscribed for, (2) the property had been properly conveyed to trustees for the second syndicate and (3) a secretary-treasurer had been elected and had opened an account for said syndicate for the deposit of all moneys, which was not the case and is not borne out by the correspondence and the facts as proved on record.

Such an interpretation of the words above quoted

(1) Vol. 29 No. 268. (2) No. 742.
(3) Vo. Obl. No. 3852 *et seq.*

would be incompatible with the facts that the draft itself was made payable to Coolican ; that it was drawn and paid at a time when Hamilton knew that the whole of the shares had not yet been taken up ; and that a secretary-treasurer was intended to be elected only after all the shares had been subscribed, as expressly mentioned both in letter of the 10th of March and in the accompanying prospectus.

The letter of the 20th of March should be read with that of the 10th, and as conveying Hamilton's consent to buy one-fortieth of the Cauchon property at the price of $7,125 and to pay immediately one-third thereof, in cash, on the assumption that the lands were properly conveyed and that the facts were as represented in the prospectus.

In his suit in Winnipeg T. C. Jones did expressly allege that "the property was bought by appellant and others at the price of $285,000, divided into shares of $14,250 each, one-third of which was to be paid in cash ; that Hamilton accepted appellant's offer of his share for $7,125, payable upon the said terms as those expressed in the said agreement from the said Cauchon; and that he paid, at appellant's request, to James S. Coolican the sum of $2,375, being one-third of the purchase money of the said share."

If the words "and the full condition of the prospectus carried out," were to be taken as making it incumbent upon appellant to see that the twenty shares were subscribed for it might as well be said that it likewise applied to the statement, as contained in the prospectus, that the property would sell at the prices therein mentioned.

In any case the respondent is estopped from complaining as he adopted what was done by the institution of T. C. Jones's actions in Winnipeg. Art. 1720, C.C. Story on Agency (1) ; Dalloz Jur. Gén. (2).

(1) 9 Ed. § 243.
(2) 53, 1, 293.

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MacLaren Q.C. for respondent. As to the transfer it was admitted and if there is any irregularity about it it should have been specially set up. Art. 144 C. P C. *County of Pontiac* v. *Ross* (1).

On the question of ratification it is quite clear that all the facts were not known to the respondent, and therefore the authorities cited by appellant do not apply. See Troplong, Mandat, (2). Moreover it was at the special request of the appellant that the action in Winnipeg was taken. The respondent's agreement was not to purchase any particular portion of said land, but to join with others in purchasing the whole on certain conditions which were never fulfilled.

Sir W. J. RITCHIE C.J.—For the reasons assigned in the *considérants* of the judge of the Superior Court I think this appeal should be dismissed and the judgment of the Superior Court affirmed, with costs in all the courts.

STRONG and FOURNIER JJ. concurred in the opinion that the appeal should be dismissed.

TASCHEREAU J.—This appeal must be dismissed. There is only one point which was not disposed of at the argument. That is the objection taken by the appellant that the transfer *sous seing privé* by T. C. Jones to the respondent had not been proved. A close scrutiny of the record has convinced me that the appellant must fail on this point as on the others. The appellant pleaded the general issue, it is true, but at the same time he pleaded that the transfer alleged in the declaration is irregular, insufficient and null, and that there is no privity of contract between himself

(1) 17 Can. S. C. R. 406. (2) Nos. 613, 616.

and the respondent. This is of itself an admission of the existence of the transfer. Then, the appellant himself was called as a witness by the respondent, and admitted that he was, before the institution of this action, served with a duplicate of the transfer, and he filed it with his deposition as respondent's Exhibit Z. The fact that it was a duplicate that he was served with, and not a copy, is not without importance; he knew T C. Jones' signature so well, as results from the voluminous correspondence they had had together, that his not making any objection or remarks whatever as to his signature on that transfer is a clear, though only implied, admission by him of the genuineness of that signature. Then, later on in the case, the appellant puts the respondent in the witness box and examines him to prove that he, the respondent, has given no consideration for that transfer and that he is only a *prête-nom*. Now that is, it seems to me, another clear admission of the existence of that transfer.

GWYNNE J.—It appears to me to be free from doubt that the judgment of the learned judge of the Superior Court rendered in this case is well founded, and that therefore this appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for respondent: *MacLaren, Leet, Smith & Smith.*

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THE EXCHANGE BANK OF CANADA (DEFENDANT)..... } APPELLANT;

AND

JAMES FLETCHER (PLAINTIFF).....RESPONDENT.

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

Bank stock given to another bank as collateral security—Banking Act—34 Vic. ch. 5 s. 40—42 Vic. ch. 45 s. 2—35 Vic. ch. 51 (D)—43 Vic. ch. 22 s. 8—46 Vic. ch. 20 ss. 9, 10—Arts. 14, 1970, 1973, 1975 C.C.

The Exchange Bank in advancing money to F. on the security of Merchants' Bank shares caused the shares to be assigned to their managing director and an entry to be made in their books that the managing director held the shares in question on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Later on the managing director pledged these shares to another bank for his own personal debt and absconded.

Held, affirming the judgment of the court below, that upon re-payment by F. of the loan made to him the Exchange Bank was bound to return the shares or pay their value. The prohibition to advance upon security of shares of another bank contained in the amendment to the general banking act applies to the bank and not to the borrower,

Per Patterson J.—Assuming that the subsequent amendment of the general banking act forbade the taking of such security by any bank, the amendment did not alter the charter of the Exchange Bank, 35 Vic. ch. 51 (D), under which the Exchange Bank had power to take the shares in question in its corporate name as collateral security. To take such security may have become an offence against the banking law, punishable from the beginning as a misdemeanor and subject to a pecuniary penalty, but it was not *ultra vires*. Art. 14 C. C. which declares that prohibitive laws import nullity has no application to such a case.

APPEAL from a judgment of the Court of Queen's

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

Bench for Lower Canada (appeal side) (1), by which the appellants were condemned to re-convey to the respondent one hundred shares of the capital stock of the Merchants Bank of Canada, and in default of doing so within fifteen days to pay him the sum of $11,000, with interest and costs.

The facts of the case are sufficiently stated in the above head-note and in the judgment of Mr. Justice Patterson hereinafter given. See also report of the case in M. L. R. 7 Q. B. 11.

The questions which arose on this appeal were:

First:—Were the one hundred shares of Merchants Bank stock really placed under the control of the Exchange Bank as collateral security for an advance made by it? and

Secondly:—Was this transfer so affected with nullity in law as to prevent Fletcher from recovering the shares?

Macmaster Q.C. for appellant contended that as to the first question the evidence showed:—

First, that Craig, the managing director, did not act as agent of the bank in the transfer of the shares made by Fletcher; and Fletcher, having knowledge that the transaction was illegal and beyond the power of the bank, dealt with Craig personally, and his recourse was against him, and not against the bank.

Secondly, that the bank never had possession or control of the shares.

The bank could not take or hold these shares as collateral security. The agent could not by a *moyen détourné*, in which he was aided by the borrower, increase the bank's powers. Art. 1704 C.C.; Smith's Mercantile Law (2); *Booth* v. *The Bank of England* (3); *Bishop* v. *The Countess of Jersey* (4);

(1) M. L. R. 7 Q. B. 11.
(2) 10 ed. 1 vol. pp. 136 & 158.
(3) 7 C. & F. 309.
(4) 23 L. J. N S. (Ch.) 483.

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Poulton v. *The London & South Western Railway Co.* (1) ; *McGowan* v. *Dyer* (2) ; *Bank of Montreal* v. *Rankin* (3) ; *The British Mutual Banking Co.* v. *Charnwood Forest Co.* (4) ; *Johansen* v. *Chaplin* (5).

Upon the second proposition, viz., that this transaction was so affected with nullity by law as to prevent Fletcher from recovering his stock,—the counsel cited the following authorities :

Morse on Banking (6) ; *Radford* v. *The Merchants' Bank* (7) ; *Ashbury Railway Co.* v. *Riche* (8) ; *Co. de Villas du Cap Gibraltar* v. *Hughes* (9) ; 34 Vic. ch. 5 (D).

As to the effect of prohibitive laws see art. 14 C. C. ; Aubry et Rau (10) ; Merlin Répertoire (11).

F. X. Archambault Q.C. and *Lacoste* Q.C. for respondent, contended that the manager had acted within the scope of his authority when requesting and accepting, in his discretion, the shares as security for the moneys he advanced in the name of the bank. Pardessus Droit Commercial (12) ; Brice Ultra Vires (13) ; *Ferrie* v. *Thompson* (14) ; *Banque du Peuple* v. *Banque d'Exchange* (15) ; Jones on Pledges (16) ; *Geddes* v. *La Banque Jacques Cartier* (17) ; Morse on Banking (18) ; *Banque Nationale* v. *City Bank* (19) ; Pardessus Droit Commercial (20).

The 100 shares of the Merchants Bank were used to help in supporting the appellants' credit and standing

(1) L. R. 2 Q. B. 534.
(2) L. R. 8 Q. B. 141.
(3) 4 Legal News 302.
(4) 18 Q. B. D. 714.
(5) M. L. R. 6 Q. B. 111.
(6) 2 ed. p. 11.
(7) 3 O. R. 529.
(8) L. R. 7 H. L. 653.
(9) 11 Can. S. C. R. 537.
(10) 4 ed. 1 vol. 118.
(11) Vo. Nullité 8 par. 1 p. 392.
(12) 4 vol. Nos. 1014, 561.
(13) P. 618.
(14) 2 Rev. de Lég. 303.
(15) M. L. R. 1 S. C. 231.
(16) Sec. 76.
(17) 24 L. C. Jur. 135.
(18) 2 ed. p. 38.
(19) 17 L. C. Jur. 197.
(20) 2 vol. No. 562.

before the public. The bank got the dividends and the transfer was made for its benefit.

If the directors were aware of these facts they were all the more guilty. If they ignored such a state of things it was due to their neglect to inspect the books regularly.

Jones on Pledges (1); Morawetz on Corporations (2); Sedgwick on Statutory and Constitutional Law (3).

Even if this transaction is to be held illegal for the bank by the statute, the bank alone which infringes the prohibition is liable to penalty, and not the party entering into the prohibited transaction with the bank; the nullity and penalty consequently only refer to the bank, which therefore could not hold or demand securities of the description prohibited. But the nullity is not absolute and a *nullité d'ordre public*, and to deny the respondent the right of claiming his shares back is not a sound interpretation of the law, which only prohibits the transfer and not the redeeming of bank stocks which might have been so transferred. Besides the general principle *nul ne peut s'enrichir aux dépens d'autrui* finds an application here.

Macmaster Q. C. in reply. There was no express knowledge in the directors of this being a loan made for the benefit of the bank.

Sir W. J. RITCHIE C. J.—I have entertained some doubts in this case but not sufficiently strong to dissent from the judgment, which I understand all my brothers entertain, that the appeal should be dismissed.

STRONG and FOURNIER JJ. concured in the opinion that the judgment of the court below should be affirmed and this appeal dismissed.

(1) Secs. 414, 417, 474. (2) No. 658.
(3) P. 73.

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Taschereau J.

TASCHEREAU J.—This appeal must be dismissed. I entirely adopt the reasoning of Mr. Justice Jetté in the Superior Court. and of Mr. Justice Tessier in the Court of Appeal. The judgment condemning the bank, appellant, to return to respondent the one hundred shares of the Merchants bank, or to pay him the value thereof, $11,000, is the only one that could be rendered in the case. The single fact that the bank, appellant, received the dividends accruing upon these one hundred shares, paid them by its cheques to the respondent and credited the respondent for the same in the bank books and in the respondent's pass book is, in my opinion, conclusive against the appellant. I cannot see that the illegality of the transaction can affect the respondent's claim. How can the bank be justified in contending that it will keep these shares because it got them illegally? If it had not failed and if Craig had not absconded would the illegality of the transaction have authorized it to keep these shares? Is it not quite the converse? If the transaction was illegal the shares must be returned to Fletcher for that reason alone. It is to my mind an additional reason why they should return them. The simple question is one of fact: Did the bank get these shares or not? Upon the evidence there seems to me no room to doubt that he did. What Craig loaned to Fletcher was the appellants' monies. The hundred shares of Merchants bank stock he got from Fletcher were transferred as security for the appellants' monies so lent. The fact that the transfer was to him personally is not material. He held the shares for the bank, appellant. When Craig received the dividends on these shares he received them for the appellant, not for himself, and he duly entered them in the bank's books to the credit of the respondent as received by the bank for the respondent. The reasoning on the

part of the appellant, in this court as well as in the court below, seems to be based on the illegality of the transaction and amounts to the contention that the bank did not get these shares because it was illegal to take them as collaterals. The fallacy of this argument seems to me apparent. In fact, I can see no argument in it at all.

PATTERSON J.—Thomas Craig was, in January, 1880, cashier or managing director of the Exchange Bank. Fletcher applied to him for a loan of $20,000 on his promissory notes indorsed by his father. Craig required further security and Fletcher offered one hundred shares of the stock of the Merchants' Bank. Craig explained to him that the bank could not legally advance money on the security of bank stock, but suggested that the stock should be transferred to George W. Craig, a brother of Thomas not connected with the Exchange Bank. Fletcher accordingly transferred the stock to George and Thomas, acting for the bank, advanced him the money. The transfer was made on the 28th of January, 1880. Fletcher does not appear to have known anything more of the stock, except that the dividends on it found their way in regular course to his credit in his account with the Exchange Bank, until after the bank had gone into liquidation and Thomas Craig had absconded, when having paid off the loan and desiring to have the stock re-transferred to him he learned that the Craigs had fraudulently made away with it.

This action is brought to recover the value of the stock from the Exchange Bank.

The details of the dealing with the stock are unimportant. The result was what I have stated. George transferred it to Thomas on the same day of the transfer from Fletcher. They were dealing honestly then.

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Nemo repente fuit turpissimus. A week or so later Thomas noted in one of the books of the bank that he held 100 shares of Merchants' Bank stock as security for the loan to Fletcher; but in April 1883 he transferred the shares, acting by his brother George as his attorney, to George and a Mr. Greene who forthwith transferred them to the City and District Savings Bank as security for a debt of Thomas Craig, for which they were afterwards sold.

The question of the liability of the Exchange Bank to account to Fletcher for the shares has given rise to difference of opinion in the court below, and it is certainly one of some difficulty.

Much of the discussion has turned on the circumstance that the Bank Act forbids, and did in January 1880 forbid, the bank to lend money directly or indirectly upon the security of bank stock. The law was contained in the Bank Act 34 Vic. ch. 5, s. 40. Under the 51st section of that act the bank might have taken the shares of another bank as collateral security, but that privilege was cancelled in 1879 by the amending act 42 Vic. ch. 45, s. 2, which was in force in January 1880. No alteration material to the questions in dispute has been since made in the law. A subsequent statute (1) attaches a pecuniary penalty to the violation of section 40 or other specified sections, preserving at the same time the liability of any bank to be punished as for a misdemeanor for any contravention of the Bank Act.

When I speak of section 40 forbidding the bank to lend money on the security of bank stock, I adopt, for the purpose of this argument, the construction which both parties have put upon the statute. I should not myself have understood section 40 to refer to any stock but that of the bank lending the money. "The bank shall not

(1) 46 V. c. 20, ss. 9, 10.

* * * lend money * * * upon the security or pledge of any share or shares of the capital stock of the bank." That is the language of the section. Section 51, which declares that nothing in the act contained shall prevent the bank from acquiring and holding certain securities, including the capital stock of any other bank. as collateral security, implies an idea that the act might be construed to prohibit the taking of such securities, but there is no such direct prohibition unless it is contained in section 40. The striking out, in 1879, from section 51 of the words "the shares of the capital stock of any other bank" was a further indication of the understanding of the legislature that the power to take security on that class of personal property depended on that section. That idea was made more clear by section 51 (1) as redrawn and re-enacted in 1880, where, among the securities which nothing in the act contained was to prevent the bank from taking, we find "the stock, bonds or debentures of municipal or other corporations, except banks." But there is still no direct or express prohibitory enactment except what is found in section 40.

When the Exchange Bank was incorporated in 1872 (2) its charter providing that the act of 34 Vic. ch. 5 and all the provisions thereof should apply to the new bank in the same manner as if it were expressly incorporated with that charter, there can be no doubt that its corporate powers included the right to take the stock of another bank as collateral security for an advance of money

Sections 40 and 51 of the Bank Act as they originally stood are to be read as if inserted in the act of incorporation of the Exchange Bank. When they are appealed to as indicating some limitation of the corporate powers of the bank, they must be read as thus

(1) 43 Vic. c. 22 s. 8. (2) 35 Vic. c. 51 (D).

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forming so much of the terms of the bank charter. Doubtless they made it a transgression of duty for the bank to lend money on certain classes of property—"'mortgage or hypothecation of any lands or tenements, or of any ships or other vessels, nor upon the security or pledge of any share or shares of the capital stock of the bank, or of any goods, wares or merchandise, except as authorised in this act"—but nothing in the act contained, or, reading section 51 as part of the bank charter, nothing in the charter contained, was to prevent the taking of securities of the classes mentioned in section 51. Thus it is clear that, testing the powers of the bank by the terms of the charter, it was not *ultra vires* to take bank stock as collateral security for money lent. When, several years after the incorporation of the bank, the general Banking Act was amended so as to forbid the taking of such security by any bank—conceding that to be the effect of the amendment—I do not understand the amendment to have altered the charter of 1872. To take such security may have become an offence against the banking law, punishable from the beginning as a misdemeanor and subject by later legislation to a pecuniary penalty, but it was not *ultra vires*. A contract made in contravention of the act would be one which, as pointed out by Mr. Justice Tessier in the court below, the courts would not enforce at the instance of the bank, just as they would refuse to enforce at the instance of an individual a contract founded on an illegal consideration, but that is a different question from the capacity of the individual or of the corporation to make the contract.

It is scarcely necessary to cite authority for these opinions, but I may refer to Brice on *Ultra Vires* (1), where the author lays it down as the result of the

(1) P. 59 of 2nd ed.

English authorities that corporations—certainly those for commercial purposes—have by implication all capacities and powers which, being reasonably incidental to their enterprise or operations, are not forbidden them either expressly by their constating instruments or by necessary inference therefrom.

The cases leading to this result are examined by the learned author. I shall not refer to them beyond quoting the language of Blackburn J. in *Taylor* v. *Chichester and Midhurst Railway Company* (1), which is said to be now established as the true mode of expressing the doctrine. It is this: —

> I think, therefore, we are entitled to consider the question to be, not whether the present defendants had, by virtue of the acts of incorporation, authority to make the contract, but whether they are by those statutes forbidden to make it.

The emphasis is on the prohibition being to be looked for in the act of incorporation or constating instrument. So it was in *Riche* v. *Ashbury Railway Company* (2), where the same distinguished judge gave a judgment in the Exchequer Chamber which was adopted in the House of Lords and is quoted from by my brother Gwynne in *Bank of Toronto* v. *Perkins* (3), in which case also the prohibition in question was contained in the charter of the bank

The constating instrument of the Exchange bank did not forbid, but expressly permitted, the taking of bank stock as collateral security. But if we concede, though only for argument's sake, that not only did the amending act of 1879 forbid all banks taking such securities, but that the Banking Act as thus amended became part of the Exchange Bank's Act of incorporation, we should have a prohibition similar to one which was pronounced upon by the judicial committee

(1) L.R. 2 Ex. 356, 384. (2) L.R. 9 Ex. 254; 7 H. L. 653.
(3) 8 Can. S.C. R. 603, 626.

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of the Privy Council in *Ayers* v. *South Australian Banking Company* (1). A clause in the charter of that company said it should not be lawful for the bank to make advances on merchandise. The judicial committee held that, whatever other effect that prohibition might have, it did not prevent the property in merchandise on which the bank had made advances from passing to the bank, and the bank was accordingly held entitled to recover in trover for the merchandise. There is nothing inconsistent with that decision in the case of *National Bank of Australasia* v. *Cherry* (2), which is cited in *The Bank of Toronto* v. *Perkins* (3).

A point has been made by reference to article 14 of the Civil Code which declares that "prohibitive laws import nullity, although such nullity be not therein expressed.

The point made is irrespective of any question peculiar to corporations, and irrespective also of the doctrine of *ultra vires*. It would apply to the act of an individual as well as to the act of a corporation.

For several reasons, and leaving out of sight for the moment the doubt as to the existence of the asserted prohibition, I do not think the article applies in the case. The Banking Act must receive the same construction in all parts of the Dominion. What it allows or prohibits in Quebec it must allow or prohibit in all the other provinces. If the article enunciates a rule of law peculiar to one province which is to govern in that province the operation of this statute, each province may also establish a rule of interpretation to prevail within its borders, and the uniformity of the law on this important branch of trade and commerce, which was to be secured by confiding it to the exclusive legislative jurisdiction of the Dominion Parliament, will be in peril.

(1) L.R. 3 P. C. 548, 558. (2) L.R. 3 P.C. 299.
(3) 8 Can. S. C. R. 603.

The Provincial Legislature has no power to modify the operation of a Dominion statute by formulating a new canon of construction. It happens, however, that the article enunciates a rule which is also a well established rule of English law. It will be found stated, and illustrated by reference to decisions, in Maxwell on Statutes, chapter 13. It is unnecessary to enter on a discussion of the effect of the rule, because the reasoning on which it was held in *Ayers* v. *South Australian Banking Company* (9) that the prohibitive words of the bank charter did not prevent the property from passing, as well as the decision of that case, make it clear that it does not affect the present discussion.

Now, what is the present transaction?

The bank, acting by its competent agent, advances money to Fletcher on the security of the two names of himself and his father, and takes as collateral security an assignment of bank stock. The stock, if it had been transferred to the bank by its corporate name, would have passed to the bank. It was not, in my view of the statutes, *ultra vires* of the bank to take it, but even if the transaction had been a violation of the terms of its charter the property would nevertheless have passed. It did pass to the person named on the part of the bank to hold the pledge on its behalf, viz., the managing director of the bank who took it on behalf of the bank, and who, when he noted in the book that he held the shares as security for the loan, merely put on record a fact which might have been proved by other evidence. The bank was bound to restore the property when the debt was paid. Fletcher's contract was with the bank, not with either of the Craigs. Article 1973 of the Civil Code lays it down that the creditor is liable for the loss or deterioration of the thing pledged, according to the rules established in the title "Of Obligations." Article

(1) L. R. 3 P. C. 548.

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1970 recognises the validity of a pledge placed in other hands than those of the creditor himself. By article 1063 an obligation to give involves the obligation to deliver the thing and to keep it safe until delivery. The delivery in this case was the restitution of the thing pledged, which, as mentioned in article 1975, Fletcher was entitled to claim when he paid his debt. In respect of that obligation to deliver or restore the stock Fletcher became the creditor and the bank the debtor, and by article 1065 every obligation renders the debtor liable in damages in case of a breach of it on his part.

I do not attach so much importance to the inquiry whether the bank can be said to have had control of the stock as was done in the court below by the dissenting judges. I think the bank had control of it. Whether this director or that director knew about it or not the corporation knew of it, for it had the knowledge of its manager and agent who took the property as security for the loan. But having in fact made the loan on the security of the pledge it incurred the obligation to restore the property when the money was repaid. That was the contract of the bank with Fletcher. It matters little whether the restitution could be effected by a direct corporate act of the bank itself, or whether the act of restitution had to be performed by Thomas Craig. "A person.....may contract in his own name that another shall perform an obligation, and in this case he is liable for damages if such obligation be not performed by the person indicated." (1)

I have merely to add that I do not adopt the theory, which was relied on to some extent by the appellants, that the bank did not benefit by what was done. The

(1) Art. 1028 C. C.

bank is not, in my opinion, entitled to say that it had not security for its money by the pledge of the stock.

I think the judgment should be affirmed and the appeal dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Macmaster & McGibbon.*

Solicitors for respondent: *Archambault & St. Louis.*

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THE CANADIAN PACIFIC RAILWAY CO'Y (DEFENDANTS) ..... } APPELLANTS:

AND

DAME AGNES ROBINSON (PLAINTIFF) RESPONDENT.

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

Injury resulting in death—Claim of widow—Prescription—Arts. 1056, 2261, 2262, 2267, 2188 C.C.—*Arts.* 431, 433 C.P.C.

The husband of respondent was injured while engaged in his duties as appellants' employee and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the lifetime of the husband the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death.

Held, reversing the judgment of the courts below, (Fournier J. dissenting): 1. That the respondent's right of action under art. 1056 C.C. depends not only upon the character of the act from which death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the article of the code does not give a right of action, and creates no liability whatever on the person inflicting the injury.

2. That as it appeared on the record that the plaintiff had no right of action the court would grant the defendant's motion for judgment *non obstante veredicto*. Art. 433 C. P. C.

3. That at the time of the death of the respondent's husband all right of action was prescribed under art. 2262 C.C. and that this prescription is one which the tribunals are bound to give effect to although not pleaded. Arts. 2267 and 2188 C.C.

APPEAL from the judgment of the Court of Queen's Bench Bench for Lower Canada (appeal side) (1) which confirmed the judgment of the Court of Review (2), dismissing three motions of the appellants, (1st)

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

(1) M. L. R. 6 Q. B. 118. (2) M. L. R. 5 S. C. 225.

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for judgment *non obstante veredicto;* (2nd) in arrest of judgment; and (3rd) for a new trial; and granting the respondent's motion for judgment upon the findings of the jury upon a second trial in this cause.

The action was instituted on the 17th day of May, 1884, by the respondent, acting as well for herself as in her capacity of tutrix to her minor daughter, then a child of about eight years of age, to recover damages consequent on the death of Patrick Flynn, the husband of the respondent, and father of her minor child, which death had been caused by the fault and negligence of the appellants.

The facts and pleadings are fully given in the report of the case (in Review) (1).

A. Lacoste Q.C. and *H. Abbott* Q.C. for appellants.

The questions which arise upon this appeal are:—

First, whether the plaintiff has any right of action, it appearing from the allegations of her declaration that more than a year elapsed between the date of the accident and the death of her husband without any action having been taken, it being contended by the appellants that all liability and all rights of action resulting from the bodily injuries received by the deceased were prescribed and extinguished by the lapse of one year, under article 2262 of the code; and if so whether it was necessary to plead prescription;

Secondly, whether the defendants are entitled to a new trial.

Under article 1056 the right of action is given to the consort and relations only in the case when the person dies "without having obtained indemnity or satisfaction." It follows from this that if the deceased had obtained indemnity or satisfaction from the appellants during his lifetime neither the widow nor his rela-

(1) M. L. R. 5 S. C. 225. See also 14 Can. S. C. R. 105.

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tions would have had any right of action, thus showing that the right of action is the same in favor of the deceased and of his consort and relations, though the measure of damages is different; the deceased in the one case being entitled to damages for the suffering and injuries personal to himself, and his consort and relations being entitled to damages for the pecuniary loss suffered by his death. But the foundation of the right of action is the same—viz., the bodily injuries which are alleged to have caused his death. It follows from the article that if that right of action and the liability of the appellants were extinguished before the death of the deceased, it cannot be revived in favour of his consort or relations. The principle has been upheld in England in the interpretation of Lord Campbell's Act, from which act our article is drawn: *Read* v. *Great Eastern Railway Co.* (1); *Pulling* v. *Great Eastern Railway Co.* (2); *Pym* v. *Great Northern Ry. Co.* (3); *Senior* v. *Ward* (4); *Haigh* v. *Royal Mail S S. Packet Co.* (5); Merlin Rep. Vo. *Injures* (6). And this Court has held in this very case (7), following the Privy Council in *Trimble* v *Hill* (8) and the House of Lords in *City Bank* v. *Barrow* (9), that the construction by the courts in England upon the English statute should be adopted by the courts of this country. See also *Dibble* v. *New York & Erie Railway Co.* (10). It is, therefore, submitted with confidence, that the appellants have the right to urge under art. 1056, any matter, such as prescription, which extinguished their liability before the death of the injured person.

It may be urged that the plaintiff has a right of

(1) L. R. 3 Q. B. 555.
(2) 9 Q. B. D. 110.
(3) 2 B. & S. 759.
(4) 28 L. J. Q. B. 139.
(5) 52 L. J. Q. B. 640.
(6) 14 Vol. p. 343.
(7) 14 Can. S. C. R. 105.
(8) 5 App. Cas. 342.
(9) 5 App. Cas. 664.
(10) 25 Barb. 183.

action independently of the statute, which the code practically is; but this has already been authoritatively decided by this court in this case, holding that the enactments of our code leave clearly, for an injury caused by death, nothing but the action given by art. 1056, and that the statutory action only now lies. But it is objected by Mr. Justice Davidson that the prescription of the right of action is not equivalent to indemnity or satisfaction, because the prescription is not founded upon a presumption of payment but on the higher reason of public policy. The learned Judge has evidently misunderstood the contention of the appellants. They did not contend that this prescription created a presumption of indemnity or satisfaction, but that it was evident, from the terms of the article 1056, that if the liability were extinguished in any way, whether by payment, prescription or otherwise, there was no new liability and no new right of action in favor of the widow created by the decease of the husband.

That the widow's right of action depends upon the existence of a valid right of action in the husband at the time of his death, is clear not only from the language of the code making her right dependent upon the question as to whether he had received indemnity in his lifetime, but also from the undoubted principle that the negligence of the deceased would be a good answer to her action.

It is submitted that if the right of action can be extinguished by payment to the injured person during his lifetime, it can also be extinguished by lapse of time, provided that the law has fixed such lapse of time as a limitation to the right to recover damages resulting from the injuries received. The lapse of time establishes a presumption *juris et de jure* of the extinction of the obligation or cause of

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action. *Fuchs* vs. *Legaré*, (1); *Caron* v. *Cloutier*, (2). The question, therefore, now arises whether it is the prescription of twoye ars established by article 2261, or of one year by article 2262, which should govern in an action for damages arising from bodily injuries. Two of the Judges of the Court of Review (Davidson and Wurtele, JJ.), after careful consideration, came to the conclusion that the prescription was that of one year established by article 2262. On the other hand Mr. Justice Taschereau held that it was evident from the French version, which speaks of "*injures corporelles*," that this prescription could only apply to injuries resulting from an assault, or wrongful overt act; in other words, that the word "*injures*" means only "injuries inflicted with malice: to wit, an offence," to use the language of Judge Davidson, and that, as the hurt was done without malice, to wit, a quasi-offence, the prescription established by 2261 should govern. Article 2261 speaks of damages resulting from offences or quasi-offences where other provisions do not apply. It may be true that in common parlance the word "*injure*" has the signification attached to it by the learned judge, but reference to the dictionaries will show that it has also the same meaning as the English word "injuries," as applied to the effects of storms, convulsions of nature, etc., and we frequently hear the expression "*injures corporelles*" applied by French-speaking members of the bar to the ordinary action for damages resulting from injuries to the person. Moreover, it would seem extraordinary that the codifiers could have so mistranslated the expression "*injures corporelles*" as to make it read "bodily injuries," if the interpretation of the French version by the learned judge is correct. It is submitted that the use of the word "*corporelles*" in con-

(1) 3 Q.L.R. 11. (2) 3 Q.L.R. 230.

junction with the word "*injures*" is sufficient to show that the meaning of the codifiers is correctly expressed in the English version, for it is doubted if the expression "*injures corporelles*" can be found in the work of any legal writer as applied to injuries to the person. It is contended that the codifiers used these words in order to express as clearly as possible the idea of bodily injuries. Article 2261 covers all damage resulting from offences or quasi-offences, *whenever other provisions do not apply*. Immediately following, we have provided a shorter prescription for damages resulting from bodily injuries, saving the cases regulated by special laws, and the special provisions contained in article 1056. Now it is clear that article 1056 applies to both offences and quasi-offences; and it is contended that this saving clause can have only one meaning, namely, that while actions for such damages are prescribed by one year, should the injured person die within that period the widow and surviving relatives should have another year within which to bring their action. But surely it could not be held to mean that if the injured person lived for say ten years, they would still have a right of action for another year. This would be a *reductio ad absurdum*; for if the liability of the person causing the injury is extinguished by prescription it is extinguished towards all the world; and it cannot be contended that it can be revived by the subsequent death of the person injured. As to the cases regulated by special laws there are none except those regulating prescription of just such actions as this one—viz., actions for damages resulting from quasi-offences. Such are the provisions of the Railway Act, of ch. 85 of the Consolidated Statutes of Canada, and of the charters of many of our cities and towns establishing prescriptions of six and three months in such cases. But a reference

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to the language of the codifiers themselves, in their third report, book 3, title of prescriptions, makes it incontestable that the codifiers intended to establish a separate prescription for all bodily injuries, whether resulting from offences or quasi-offences. It will be seen that they give as one of their reasons that there was already is existence, by statute, a short prescription in such cases in favor of commercial corporations. This language could only refer to such special enactments as have already been mentioned. At the time the report was written there was in existence, by the then Railway Act, a prescription of six months in favor of railway companies, and there were also short prescriptions established in favor of certain commercial corporations. The prescriptions so established could not possibly have been confined to actions resulting from offences only. In fact, it would be only in very rare and exceptional cases that a corporation could be held to be guilty of an offence (*délit*) occasioning injury to the person.

It only remains to consider the point raised by the Court of Queen's Bench, that the prescription of actions for damages resulting from torts causing injuries to the person only begins to run from the date of the cessation of the injury. This is a new contention, never raised by the respondent, and, it is submitted, entirely contrary to principle, and to the formerly existing jurisprudence of the courts of the province (1). Were this doctrine once admitted, there would be no end to litigation arising from injuries to the person, and the object of the law in establishing a limitation of such actions would be defeated; so long as the injured person lived and suffered from the consequences of the injuries received, he would be entitled

(1) See cases cited supra, and *Corporation of Quebec* v. *Howe*, 13 Q.L. R. 315.

to continue taking actions against the party liable. Many bodily injuries result in permanent disablement, and a consequent continuous damage during life. Can it be seriously contended that it is the policy of the law to continue the right of action so long as the damage continues? The contrary is confidently contended for by the appellants. The liability attaches from the instant the tort is committed, and is extinguished by the lapse of time, from that moment within which is fixed by law the limit of the right to take action. If the tortious acts were continuous the limitation would only begin to run from their cessation. As for instance in cases of damage to property caused, for example, by the deprivation of access to a street, where the cause of damage is continued, the courts have always held that the right of action is not prescribed till the cause is removed, *Grenier* v. *City of Montreal* (1); *Corporation of Tingwick* v. *G. T. Ry. Co.* (2). But in a case of bodily injuries such as this, though the resulting damage may continue through life, there is but one act which caused it and the prescription must run from the date of its commission. Such has always been the interpretation of the laws of limitations in England and America. Wood's Limitations of Actions (3); *Fetter* v. *Beale* (4); *Whitehouse* v. *Fellowes* (5); Addison on Torts (6). In France it is the rule adopted by the code in matters of *délit* (7), and was the rule of the law before the codé, Jousse Idée Génerale de la Justice Criminelle (8).

No jurisprudence can be cited to sustain the holding of the Court of Queen's Bench on this point.

It is, therefore, submitted that the motion for judg-

(1) 3 Legal News 51.
(2) 3 Q. L. R. 111.
(3) §§ 179, 184.
(4) 1 Salk. 11.
(5) 10 C. B. N. S. 765.
(6) 5 ed. pp. 70-71.
(7) Sourdat, vol. 1, Nos. 383, 742; S.V. 18-32-1-61.
(8) P. 30.

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ment *non obstante veredicto* should have been granted by the courts below, or at least judgment arrested, because it was apparent, on the face of the plaintiff's declaration, that her husband having died more than a year after the bodily injuries were received without having taken suit, the liability of the appellants resulting from such injuries was extinguished under article 2262 by prescription, and that consequently the plaintiff had no right of action under article 1056 to recover the damages caused to her by his death resulting from such injuries.

As to the absence of any plea of prescription we contend that prescription may be relied on at any stage of the case, even in appeal, and is not presumed to be renounced by pleading to the merits. Arts. 2188, 2267 C.C. *Grenier* v. *City of Montreal* (1); *Pigeon* v. *City of Montreal* (2); *Breakey* v. *Carter* (3); *Dorion* v. *Crowley* (4); *Leduc* v. *Desmarchais* (5); *Corporation of Sherbrooke* v. *Dufort* (6).

The learned counsel also argued that, at all events, there should be a new trial on the ground of excessive damages, citing the previous report of this case (7), and *Corner* v. *Byrd* (8).

Geoffrion Q.C., and *Halton* Q.C. for respondent.

The respondent's right of action only arose on the death of her husband and did not cease to exist until a year after his death even if his rights of action had become prescribed before his death, which is denied. Arts. 1056 and 2262, s. 2, C.C., Laurent (9).

Article 2262 of the Civil Code only refers to injuries inflicted with malice, as prescribed by one year, those inflicted without malice being quasi-offen-

(1) 21 L. C. Jur. 215.
(2) 9 L. C. R. 334.
(3) Cassels's Dig. 258.
(4) Cassels's Dig. 420.
(5) 23 L. C. Jur. 11.
(6) M. L. R. 5 Q. B. 266.
(7) 14 Can. S.C.R. 105.
(8) M. L. R. 2 Q. B. 262.
(9) 32 vol. p. 7, No. 3.

ces, like the injury in question, coming under the provision of article 2261 which are prescribed by a lapse of two years. The French version of the code refers to "*injures corporelles*," and the word "*injures*" means injuries inflicted with malice, not as in the present instance. See also Lord Mackenzie's Roman Law (1).

Even if the respondent's rights were prescribed as alleged, prescription should have been specially pleaded. Art. 2188 C. C.

The respondent's right of action only arose on the death of her husband. Prior to his death she had no right of action. How then could a right be prescribed before it came into existence? Yet this is the pretension of the appellants. The respondent is not claiming any successive rights. She had a right of action quite different from any right which her husband might have had, provided he did not during his lifetime obtain indemnity or satisfaction from the appellants. It is not a successive right as representing her husband, but a right given to her by special legislation. There is no pretension that respondent's husband did obtain indemnity, but the appellants now pretend that prescription against his rights having been acquired it must be assumed to be equivalent to payment.

In the recent case of *Marcheterre* v. *The Ontario and Quebec Railway Company* for damages, although the defendants had not pleaded prescription, Mr. Justice Johnson, in the Superior Court (2) dismissed the plaintiff's action holding that under the Consolidated Railway act, 42 Vic., cap. 9, sec. 27, and Consolidated Statutes of Canada, cap. 109, sec. 27, the action was prescribed by the lapse of six months inasmuch as that section provides that it is sufficient to plead the general issue.

(1) 6 ed. p. 261.

(2) M. L. R. 4 S. C. 397.

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The case was taken to the Court of Review, composed of Justices Gill, Mathieu and Davidson, and the judgment reversed on the ground that the defendants had renounced prescription through having paid for medical attendance upon the injured person.

As to the application for a new trial for excessive damages, the learned counsel cited and relied on *Cannon* v. *Huot* (1), *Levi* v. *Reed* (2), *Lambkin* v. *South Eastern Railway Co.* (3), and *Stephens* v. *Chaussé* (4).

Sir W. J. RITCHIE C.J.—I am of opinion that this appeal should be allowed. I rely upon the judgment of Mr. Justice Taschereau and concur in his reasons for my decision.

STRONG J.—When this cause was before this court on a former occasion on an appeal from the judgment of the Court of Queen's Bench dismissing the appeal from the judgment refusing a new trial, I expressed the opinion that the action founded on article 1056 of the Civil Code of Quebec was the same action as that authorized by chapter 78 of the Consolidated Statutes of Canada, which was itself a re-enactment of the Imperial statute known as Lord Campbell's Act. I adhere to that opinion and I must therefore hold that the present action is subject to the same conditions as a similar action would be under the Imperial statute referred to, except in so far as express provision to the contrary may have been made by the code. It has been determined in England that the action under Lord Campbell's Act is not the same action as that which the deceased person would have himself had at common law, if he had survived, but a new action

(1) 1 Q.L.R. 139.
(2) 6 Can. S.C.R. 482.
(3) 5 App. Cas. 352.
(4) 15 Can. S.C.R. 379.

given by the statute. *Seward* v. *Vera Cruz* (1). *Pym* v. *Great Northern Ry. Co.* (2). It has, however, been decided, as the language of the statute plainly requires, that the right to maintain an action under the statute is subject to the condition that the deceased person himself should have been at the time of his death entitled to maintain an action for the injury. This principle is clearly established by many authorities and it applies as well to cases in which, there having been originally a good cause of action, it has been extinguished by release, acceptance of satisfaction or in any other manner as to cases in which there was originally no cause of action. The application of this principle is shown by the following cases. In *Haigh* v. *Royal Mail Steam Packet Co.* (3), a ticket was sold by the defendants to a passenger subject to a condition that the company would not be responsible for injury arising from perils of the sea though the negligence of the defendants' servants might have contributed to it. The passenger having been drowned in consequence of a collision caused by neglect of the officers and crew of the ship, it was held that as the company would not have been liable to the passenger himself they were consequently not liable in an action on Lord Campbell's Act brought by his executors. In *Senior* v. *Ward* (4) it was held that contributory negligence by the deceased was a defence to an action under the statute brought by his widow. In *Griffiths* v. *Earl of Dudley* (5), the deceased was a workman in the employ of the defendant who had expressly contracted that the defendant should not be liable in the case of an injury such as that which caused his death, and it was held that no action could be maintained under the statute. In *Read* v. *Great Eastern Ry. Co.* (6), Blackburn J. treats

(1) 10 App. Cas. 59.
(2) 4 B. & S. 396.
(3) 52 L. J. Q. B. 640.
(4) 1 E. & E. 385.
(5) 9 Q. B. D. 357.
(6) 9 B. & S. 714.

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a bar of the right of action by the deceased by the operation of the Statute of Limitations, six years having elapsed in the interval between the injury and the death without any action having been brought, as equivalent to a bar by satisfaction or release, saying

Mr. Codd was driven to argue that the present right of action did not arise till the death of the deceased, and that although six years elapsed before the party died from the effects of the wrongful act, neglect or default, and although he in his lifetime received compensation, his executors might bring another action after his death but that would be straining the words of the statute.

It is to be remarked that this case of *Read* v. *Great Eastern Ry. Co.* is also reported in Law Reports 3 Queen's Bench 555, but that the passage just quoted is not to be found in that report. Best and Smith however appear to have been the authorised reporters to the Court of Queen's Bench at the time of the decision, and their report is therefore to be regarded as the more authentic.

Now, the question we have to determine in the present case, which in this aspect of it comes before us on an appeal from the judgment of the court below on the motion in arrest of judgment, or for judgment *non obstante* made by the defendants in the Court of Review, is: whether the deceased husband and father of the plaintiffs retained up to the time of his death a good right of action against the defendants in respect of the injury he had received, or whether the right to maintain such an action had not been extinguished by the prescription of the article 2262.

The procedure on a motion for judgment *non obstante* is provided for by article 433 of the Code of Procedure and article 431 regulates the proceedings on a motion in arrest of judgment. As I understood the argument it was not disputed by the learned counsel for the respondents, that it did appear upon the record both from the

pleadings and the evidence (all of which are open for consideration on motions of this kind,) that more than a year had elapsed in the interval between the injury received by the deceased and the time of his death, and that any objection founded on this was open on these motions. It was, however, strenuously contended on the part of the respondents that the action of the present plaintiffs was in no way dependent on the subsistence of a right of action in the deceased up to the date of his death (inasmuch as their action was an entirely new and independent one,) and further that even if it were, the respondents (plaintiffs) had notwithstanding, under the express provision of article 1056, the right to maintain an action begun at any time within a year after the death of the deceased, and lastly, that at all events the defence, that the action of the deceased had been extinguished by prescription, could not be set up inasmuch as it had not been pleaded.

As I have before said, I am of opinion that the action being of the same nature, and indeed the same action in all respects, as that conferred by Lord Campbell's Act, it must, as an action on that statute is considered in England, be deemed to be a new action, but still a new action dependent on the condition that the action of the deceased had not at the time of his death been barred or extinguished.

It therefore only remains to consider the other propositions advanced by the respondents. That the provisions of article 1056 do not entitle the consort and relations mentioned in the article to sue in a case where the original action of the party deceased was extinguished before his death by satisfaction or release is, I think, abundantly clear from the English authorities decided under Lord Campbell's Act. No case appears to have arisen in England in which the right of action

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of the deceased had been barred by the Statute of Limitations, but in the passage which I have before quoted from Mr. Justice Blackburn's judgment in *Read* v. *Great Eastern Railway Co.* (1), he puts the case of the action having been barred by the statute as one in which it would be "straining the words of the statute" to admit the action. Then it is to be observed that whilst the English Statute of Limitations only bars the remedy, leaving the right still subsisting, here the article 2262 is not merely a bar to the remedy but an actual extinguishment of the obligation arising from the delict, for the article 2267 expressly provides that in "all the cases mentioned in articles 2250, 2260, 2261 and "2262 the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired." If, therefore, the bar of the remedy by the Statute of Limitations would constitute a defence in England *a fortiori* must be the prescription of the article 2262, which not merely bars the remedy but is extinctive of the obligation, so operate in the Province of Quebec.

There is, however, contained in the article 2262 a saving of the special provision contained in article 1056. This unquestionably refers to the proviso in article 1056 that the consort or designated relations of the deceased shall have "but only within a year after his death" a right to bring an action. These words are, in my opinion, quite immaterial in the present case. It could not be pretended that they would apply so as to give a right to sue in a case in which the deceased had accepted satisfaction or released the action, and if so there is no more reason why they should apply in a case where his action had been before his death extinguished by prescription. Moreover, if the contrary interpretation were adopted and they should be held to

(1) 9 B. & S. p. 714.

apply in a case where the death had been but a short time after the expiration of a year from the injury they would equally apply to save an action to the representatives when the death had occurred twenty years after the wrongful act. It never can be supposed that the legislature intended to leave such an action uncovered by some prescription which would, however, be the result of attributing to the article the interpretation contended for by the respondents. The meaning of the article is, however, apparent; it applies to enlarge the period of prescription and to give the consort and relations a full year from the date of the death within which to bring their action, without joining as against them the time which may have elapsed in the lifetime of the deceased, in a case in which the death of the deceased occurs before it has been barred by prescription.

As regards the question of pleading the defence that the action of the deceased had been prescribed I am of opinion that we are bound to take notice of that defence as fully as if it had been formally pleaded. We are told by the authors that it was always a question under the old law whether the court was bound to notice extinctive prescriptions when the parties had not pleaded them, the basis of the controversy having been the debated question whether prescription was founded on presumption of satisfaction or was a law of public order. The authorities, it seemed, differed upon this question (1). In order to settle the dispute it was enacted by the French Code that the prescription must be set up by the party, art. 2223, but by article 2188 of the Quebec Code the question was solved the other way, and it was provided that: "The court cannot of its own motion supply the defence resulting from prescription except in cases where the right

(1) 1 LeRoux, Presc. No. 26; Troplong, Presc. No. 87.

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of action is denied." Then by the conjoint operation of the articles 2262and 2267 this right of action is most undoubtedly denied, the denial of the right of action thus referred to being intended to distinguish such cases of prescription as these to which the articles last mentioned apply from those in which the prescription amounts to no more than a mere presumption of payment.

This point as to the right of the court to act on a defence of prescription not pleaded has arisen in several cases both here and in the courts of the Province of Quebec, and it has been decided more than once that the court must notice extinctive prescription though not pleaded. My brother Taschereau will refer particularly to this point and to the authorities which support his view.

If then the court may, without plea, take *ex officio* notice of the prescription in a case where it is set up directly, as extinguishing the action before the court, I see no reason why it should not be equally noticed without requiring it to be pleaded in a case like the present where it is relied on as shewing the extinction of the right of action, the continued existence of which to the death of the deceased is by the law made an indispensable condition to the maintenance of an action like that under appeal. I can see no distinction between the two cases. The same reason applies to both. Extinctive prescription does not require to be pleaded because it is a law of public order, a reason which applies at least as strongly to a case like the present where it is used to show that no cause of action ever arose as to a case where it is admittted there was originally a cause of action, but one which has been extinguished by lapse of time.

This appeal also included the judgment refusing a new trial, and it was very strenuously insisted by

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Mr. Abbott, for the appellants, that the evidence was insufficient to warrant the amount of damages given by the jury. It is to me very manifest that this objection is well founded, but I do not enter upon a consideration of it for the reason that I think we must allow the appeal and order judgment to be entered for the appellants upon the other grounds before mentioned.

Appeal allowed with costs to appellants in all the courts and judgment to be entered for defendants in the Superior Court *non obstante veredicto*.

FOURNIER J.—Le présent appel est d'un jugement rendu à l'unanimité, par la Cour du Banc de le Reine, le 19 janvier 1890, confirmant le jugement de la Cour de Revision siégeant à Montréal, lequel avait renvoyé les trois motions de l'appelante, 1° pour jugement *non obstante veredicto*; 2° en arrêt de jugement, et 3° pour un nouveau procès, et accordé la motion de l'intimée pour jugement conformément au verdict rendu par le juré sur un second procès de cette cause.

L'action a été instituée le 17 mai 1884, par l'intimée, tant pour elle-même qu'en sa qualité de tutrice à son enfant mineur, pour recouvrer les dommages leur résultant de la mort de Patrick Flynn, mari de l'intimée et père de son enfant mineur. Cette mort avait été la suite d'un accident arrivé à Flynn par la faute et négligence de l'appelante. L'intimée concluait à $10,000 de dommages et intérêts.

L'appelante a plaidé que l'accident en question n'avait été causé par aucune faute ou négligence de sa part, ni de la part d'aucun de ses employés, mais qu'au contraire,—il n'avait été causé que par la faute et négligence du dit Patrick Flynn. Sur la contestation ainsi liée, le procès eut lieu sous la présidence de l'hon. juge Doherty, et un verdict fut rendu en faveur de l'intimée pour $2,000 et de $1,000 en faveur de son

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enfant mineur. Jugement fut rendu par la majorité de la Cour de Revision renvoyant la motion de l'intimée pour jugement et accordait la motion de l'appelante pour un nouveau procès. Sur appel à la Cour du Banc de la Reine ce jugement fut renservé à l'unanimité des juges de cette Cour par un jugement accordant à l'intimée le montant de son verdict.

Le jugement de la Cour du Banc de la Reine ayant été soumis à la revision de cette cour, il intervint le 20 janvier 1887 en faveur de l'appelante, un jugement lui accordant un nouveau procès, sur le principe que le juge avait erré en disant aux jurés "qu'ils avaient le droit et pouvaient prendre en considération dans l'évaluation des dommages les angoisses et les peines d'esprit de la mère et de l'orpheline."

La cause étant revenue devant la Cour Supérieure pour faire fixer un jour pour le procès, l'appelante après plus de trois ans de contestation, fit motion pour amender son plaidoyer et obtint la permission de plaider de nouveau. Une nouvelle énonciation de faits fut préparée pour être soumise au juge. Le procès eut lieu les 28 et 29 novembre, et le juré rendit un verdict de $4,500 en faveur de l'intimée et de $2,000 en faveur de son enfant mineur.

L'appelante fit alors à l'encontre de ce verdict les trois motions mentionnées plus haut. L'intimée de son côté fit motion pour jugement en sa faveur conformément au verdict.

Les deux premières motions, celle pour jugement nonobstant le verdict et celle en arrêt du jugement sont en réalité fondées sur les mêmes raisons, savoir: que le droit de l'intimée était éteint et prescrit dès avant l'institution de son action, parce que Patrick Flynn, son mari, ayant été victime de l'accident le 22 août 1882, n'était mort que le 13 novembre 1883, plus d'un

an et trois mois après, c'est-à-dire à une époque où l'action de Flynn, s'il eût vécu, eût été prescrite.

Cette prétention de l'appelante est toute nouvelle et est formulée pour la première fois sur le débats de ces motions. Il n'en a été fait aucune mention dans les défenses à l'action ni dans les plaidoiries orales. Les défenses ont été même amendées sans qu'on ait soulevé cette prétention. Les raisons invoquées au soutien de la motion pour un nouveau procès, étaient que la prépondérance de la preuve est en faveur de l'appelante; que Flynn ne fut pas blessé pendant qu'il était au service et sous les ordres de l'appelante, mais par sa propre faute et négligence; que le verdict est irrégulier et défectueux, parce que les réponses sont vagues, incertaines et contradictoires et que le montant accordé est excessif.

Devant la Cour de Revision on a fort savamment débattu la question de savoir laquelle des deux prescriptions, de celle d'un an, en vertu de l'article 2262 ou de celle de deux ans, en vertu de l'article 2261 doit s'appliquer au cas du quasi-délit dont le mari de la demanderesse a été victime. Mais avant de rechercher la solution de cette question, il faudrait d'abord établir qu'il s'agit dans cette cause du droit d'action du mari. Tel n'est pas le cas, il n'est nullement question ici de la réclamation que le mari aurait eu s'il eût vécu. Il s'agit uniquement de l'action donnée à l'intimée par l'article 1056, action qui ne peut exister qu'après la mort du mari sans avoir reçu de compensation pour ses dommages.

L'action donnée à l'intimée dans les circonstances de cette cause est de date assez récente. Elle a d'abord été introduite par le statut C.S.C. ch. 78 qui lui même n'était pour ainsi dire que la copie du statut impéria 19-10 Vic., ch. 93, communément appelé le Lord Campbell's Act. Ces dispositions législatives font maintenant

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partie du code civil dans lequel elles sont résumées sous l'article 1056. C'est dans cet article seul que l'on doit trouver la source du droit de l'action de l'intimée. Il lui est accordé de la manière suivante :

1056. Dans tous les cas où la partie contre qui le délit ou quasi-délit a été commis, décède en conséquence, sans avoir obtenu indemnité ou satisfaction, son conjoint, ses père, mère et enfants ont pendant l'année seulement à compter du décès, droit de poursuivre celui qui en est l'auteur ou ses représentants pour les dommages-intérêts résultant de tel décès.

L'action dont il s'agit n'est pas celle qu'aurait eu Flynn pour dommages lui résultant de ses blessures et des souffrances qu'il avait eu à supporter ; c'est l'action spéciale accordée à sa veuve pour les dommages-interêts lui résultant de la mort de son mari. Elle lui est accordée personnellement et non en aucune qualité de représentante de son mari. Elle ne réclame pas du chef de son mari, comme étant à ses droits, soit comme légataire ou autrement, l'indemnité qu'il aurait eu droit d'avoir. Non, elle exerce l'action qui lui est donnée par l'article 1056, indépendamment de tous droits pouvant appartenir à son mari, elle ne dérive son droit d'action que du statut, c'est-à-dire du code, et nullement de son mari. Son action n'existe même pas du vivant de son mari ; comment peut-on dire qu'elle dépend de l'existence du droit d'action de son mari, et que s'il a laissé éteindre ou prescrire son droit autrement que par l'acceptation d'une indemnité, la perte de son droit entraîne aussi celle du droit de sa femme qui n'est pas son héritière ou représentante légale, et qui ne réclame pas de son chef, mais quelle possède en vertu d'une disposition toute spéciale et personnelle en sa faveur. Une telle prétention est si évidemment fausse qu'elle se réfute d'elle-même.

Ce droit d'action reconnu à la femme est un droit conditionnel. Pour qu'il existe il faut d'abord que son mari n'ait pas accepté de compensation pour les consé-

quences du délit ou quasi délit dont il a été victime. Ce n'est qu'après le décès de son mari que le droit de poursuivre celui qui en est l'auteur, pour les dommages intérêts résultant de tel décès, prend naissance par l'existence de la condition.

Son mari étant décédé le 13 novembre 1883, sans avoir accepté ni reçu aucune compensation pour ses dommages, ce n'est qu'à compter du moment de son décès que le droit d'action de l'intimée a commencé à exister. Mais d'après l'étrange proposition de l'appelante que le droit d'action du mari était prescrit, celui de la femme doit également l'être, et même avant d'avoir existé, puisqu'au moment du décès de son mari le droit de ce dernier était déjà prescrit. Que fait-on de la disposition qui accorde à la femme son droit d'action pendant l'année, seulement à compter du décès? On l'ignore tout simplement, ou mieux encore on a recours à une subtilité aussi ingénieuse que peu honnête, pour détruire son droit d'action en prétendant qu'il n'était que le même droit que celui de son mari, ayant pour origine le même quasi-délit et que le mari ayant laissé prescrire son action, celle de la femme l'a été également. D'abord, il n'est pas vrai que l'action du mari soit la même que celle de la femme. Elles ne naissent pas en même temps, et la nature en est différente. Celle du mari prend naissance immédiatement après l'accident, et tant qu'elle existe la femme n'a elle-même aucun droit d'action. L'action du mari a pour objet de réclamer ses dommages lui résultant de ses blessures, perte de temps, etc., etc. Celle de la femme est limitée aux dommages et intérêts résultant du décès de son mari.

Comment peut-on appliquer la même prescription, que ce soit celle d'un an ou de deux ans, et les faire courir de la date de l'accident contre les actions respectives du mari et de la femme? Si c'est celle d'un

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an, dans le cas actuel, le mari étant mort plus de quinze mois après l'accident, l'action de la femme était prescrite avant la naissance de son droit d'action, que la loi ne lui accorde qu'à compter du décès C'est détruire en entier l'effet de l'article. La vraie date de la prescription de l'action de la femme est si clairement et positivement déterminée par le code, qu'il me paraît absurde de chercher à en établir une autre ; c'est, dit l'article 1056, pendant l'année seulement, à compter du décès, que la femme aura droit de poursuivre l'auteur du délit ou quasi-délit pour les dommages-intérêts résultant de tel décès. Tant qu'il ne s'est pas écoulé un an depuis le décès du mari, la femme a droit d'exercer son action, comme dans le cas actuel, et il est tout à fait indifférent pour ce qui la regarde que la prescription, soit d'un an ou de deux ans, quant à l'action qu'aurait eue son mari. Son action à elle qui naît au décès de son mari ne peut pas durer plus d'un an, et n'est nullement liée au sort du droit d'action de son mari. Les tribunaux n'ont pas le droit d'étendre ni de diminuer la durée de son action ; elle a droit de l'exercer pendant toute l'année après le décès de son mari. Puisque tant que son mari n'est pas mort, la femme ne peut exercer aucun droit d'action, son action ne peut donc être prescrite conformément à la maxime *contra non valentem agere nulla currit prescriptio.*

Cette action de la femme me paraît assez solidement appuyée sur l'article 1056, pour qu'il ne soit pas nécessaire de discuter les questions de savoir si ce n'est pas plutôt la prescription de deux ans de l'article 2261, que l'on doit appliquer au cas actuel. En effet l'accident dont il s'agit n'est qu'un pur quasi-délit, dans lequel l'élément de la malice n'entre nullement

L'hon. juge en chef, Sir A. A. Dorion, après avoir exprimé l'opinion que la prescription de l'action du

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mari dans le cas actuel, ne devait commencer à courir qu'après l'expiration des quinze mois pendant lesquels il a survécu à l'accident, s'exprime ainsi, dans son jugement sur cette cause au sujet de la prescription de l'action de la femme.

This is not an action by the injured person, but a different action. The civil code, article 1056, gives to the widow and children of one who dies from injuries received from the negligence of another, an action against the guilty party. This action is not given to them in any representative quality, and the article expressly provides that it may be brought within a year from the decease of the injured party. The prescription against the action of the decease did not therefore apply to the action of the wife and children. This was the opinion of the majority of the Court of Review, and it will be unanimously affirmed by this court.

En conséquence je suis avis que l'appel doit être renvoyé avec dépens.

TASCHEREAU J.—By section 1 of ch. 78, C. S. C., it is enacted that :—

Whenever the death of a person has been caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony.

Since this case was before this court in 1887, as reported in 14 Can. S. C. R. 105, that statute has been expressly repealed by the Revised Statutes of Quebec, appendix A; but under 50 Vic. ch. 5, ss. 5, 6 and 7, such repeal, could it otherwise do so, does not affect the present case. Then, I do not see that it adds anything to the repeal enacted by article 2613 C. C. of all previous laws on matters upon which express provision is made in the code. So that, for our determination of the controversy as it is now presented, the law is precisely the same as it was when the case first came to us.

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Now, I take it to be concluded by the judgment of this court, upon that first appeal, that this action, avowedly brought under article 1056 of the code, is nothing else but the statutory action given in England by Lord Campbell's act, and consequently that, in expounding the law as to its nature and the principles upon which it rests, we must be guided by the same consideration and governed by the same rules, that have been authoritatively adopted and recognized in the construction of that act. And one of these rules, I would say to-day an uncontroverted one, is that, under the act, the widow or other relatives therein mentioned have no action if, at the time of his death, the deceased had none.

The leading case on the question is *Read* v. *Great Eastern Railway Co.* (1), where it was determined, upon that principle, that if the deceased has accepted any compensation in satisfaction of his claim against the defendant, his personal representatives are debarred from bringing any action under the statute. The statute does not give any new right of action, or a fresh cause of action, said the court, and if the deceased has received compensation he could "not have maintained an action and recovered damages in respect thereof in the very words of the statute, so this plaintiff has herself no action." And as Lush J. said in the same case, as reported in 9 B. & S.:—

> The statute gives a right of action when there was at the time of the death a subsisting cause of action.

In *Haigh* v. *Royal Mail Steam Packet Co.* (2), Brett M. R. speaking of the same statute said:—

> Under which, it is clear, the executors can only recover if the deceased man could have recovered, supposing that everything did happen to him which, had he not been killed, would have entitled him to bring an action.

(1) L. R. 3 Q. B. 555. (2) 52 L. J. Q. B. 640.

I refer also to *Armsworth* v. *South Eastern R R. Co.* (1), *Tucker* v. *Chaplin* (2), *Boulter* v. *Webster* (3), *Griffiths* v. *The Earl of Dudley* (4), on the same principle. Again it was held that, if the deceased, being a workman, had contracted for himself or his representatives with his employer not to claim compensation for personal injury, whether resulting in death or not, his widow had no action under Lord Campbell's act for the damages resulting to her from his death. The plaintiff had argued that the act gives a separate and independent right to the widow and children of a person killed, a right wholly separate from any right existing in the decedent's legal representatives, to recover for injuries to his personal estate. But said Field J. :—

Read v. *Great Eastern* (5) is a clear decision that Lord Campbell's act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived.

And Cave J. added :

It was argued that whether or not the deceased could have bargained away his own right to recover damages, he could not bargain away the right of his family under Lord Campbell's act. That act was passed because it was thought a hardship that, where a man sustained personal injuries, and died without having himself recovered compensation leaving behind him persons in certain degrees of relationship, those persons should not be entitled to bring an action. *Read* v. *Great Eastern* (5) has decided that the act gives no new cause of action to the relatives, but only a right in substitution for the right of action which the deceased would have had if he had survived.

And in *Senior* v. *Ward* (6), Lord Campbell C.J. said :

We conceive that the legislature in passing the statute upon which this action is brought intended to give an action to the representatives of a person killed by negligence only where, had he survived, he himself, at the common law, could have maintained an action against the person guilty of the alleged negligence.

(1) 11 Jur. 758.
(2) 2 C. & K. 730.
(3) 11 L. J. N. S. 598.
(4) 9 Q. B. D. 357.
(5) L. R. 3 Q. B. 555.
(6) 1 El. & El. 385.

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It is true that, in *Pym* v. *Great Northern Railway Co.* (1), in the Exchequer Chamber, Erle C.J. said :

> The statute, as appears to me, gives to the personal representative a cause of action beyond that which the deceased would have had if he had survived, and based on different principles.

but that sentence is used merely in reference to the extent of the damages that can be recovered on an action under the act ; and the words " cause of action," as the context of the judgment clearly shows, simply refer to those damages. The same remark applies to *Blake* v. *Midland* (2), where it was said that :

> The statute does not transfer this right of action to the representative but gives him a totally new right of action.

In that case also the only question under consideration was the nature and extent of the damages recoverable on an action under the act.

In *Seward* v. *The Vera Cruz* (3), in the House of Lords, where the point under consideration was, whether the Admiralty Court had jurisdiction on an action under the act, though Lord Selborne said that the act gives a new cause of action, and Lord Blackburn (who in *Read* v. *Great Eastern* (4) had said, " the statute does not give a new right of action ") added " an action new in its species, new in its quality, new in its principle, and in every way new," there was not a single expression thrown out that could be interpreted as questioning this decision in *Read* v. *Great Eastern* (1), or as casting the least doubt on the doctrine that, to maintain an action under the act, there must have been, at the time of the death for which damages are claimed a subsisting cause of action, and that when the deceased, either voluntarily or involuntarily, had placed himself in a position that, had he survived, he could not, at the time of his death, have brought an

(1) 4 B. & S. 396.
(2) 18 Q. B. 93.
(3) 10 App. Cas. 59.
(4) L. R. 3 Q. B. 555.

action for his personal injury, no new right of action had been conferred to replace that which, through his own conduct, had never arisen or had been extinguished. Beven on Negligence (1).

In the United States a similar statute has received the same construction in the following cases: In *Dibble* v. *New York* (2), the defendants had settled with the deceased his claim for his injuries. The judge at the trial had charged the jury that this settlement could not affect the widow's action which was given to her by the statute for the damages she had sustained by reason of her husband's death. But the court held that such was not the law, and that "the right to such an action depends not only upon the character of the act from which death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the statute gives the executors no right of action and creates no liability whatever on the part of the person inflicting the injury."

Johnson J., for the court, said:

When death ensued, therefore, the deceased had no subsisting cause of action; nor could he have maintained any action and recovered any damages, in respect of the act or the injury, if death had not ensued.

The right of action which he might have enforced had he survived the injury, upon his death accrues to the personal representative. And it is given for the same wrongful act or neglect. That is the essential foundation of the action in either case. The wrong to be redressed is the same in both cases, but the injury flowing from the wrong to be compensated is different. The person injured is compensated for the injury to his person, the others for the injury they sustained from the death of the injured person. If the person injured obtained satisfaction by action or by voluntary settlement and payment before death ensues, the wrongful act which caused the injury, and all the consequences past and future, are included, and the whole

(1) P. 185. (2) 25 Barb. 183.

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cancelled together, and the liability of the person inflicting the injury ended.....The object of the statute was to continue the cause of action.....for the benefit of the widow and next of kin, to enable them to obtain their damages resulting from the same primary cause, and not create an entirely new and additional right of action.

And Comstock C.J., in the same case, in appeal, reported in *Whitford* v. *The Panama Ry. Co.* (1), said:

No new cause of action is created by the legislature, but the cause which, by the rules of the common law, has become lapsed or lost by the death of the person to whom it belonged, is continued and devolved upon his administrator. The opposing argument is founded wholly on the idea that the cause of suit by the administrator is the death of the party, and not the wrongful assault or negligent conduct by which it is occasioned.....In the view of the statute, therefore, the right to be enforced is not an original one, springing into existence from the death of the intestate, but is one having a previous existence, with the incident of survivorship derived from the statute itself. The true point of inquiry is whether a wrong of this nature, resulting in death, affords more than a single cause of action. Now to affirm that, in cases of this nature, two causes of suit arise, one in favor of the decedent in his lifetime, the other founded on his death, is to depart from the plainest legal analogies.

In *Littlewood* v. *The Mayor, &c.*, of New York (2) also, where the deceased had recovered before his death for his damages, an action by his widow was held not to be maintainable.

Rapallo J., for the court, said:

It seems to me very evident that the only defence of which the wrong-doer was intended to be deprived was that afforded him by the death of the party injured, and that it is, to say the least, assumed throughout the act that, at the time of such death, the defendant was liable. The statute may well be construed as meaning that the party who, at the time of the bringing of the action, would have been liable if death had not ensued shall be liable to an action notwithstanding the death.

In *Fowlks* v. *The N. & D. Ry. Co.* (3), the statute governing the case decreed, in one of its sections, that the right of action which a person who dies from in-

(1) 23 N.Y. 484.
(2) 89 N.Y. 24.
(3) 5 Baxter 663.

juries received from another, or where death is caused by the wrongful act or omission of another, would have had against a wrongdoer, in case death had not ensued, would not abate or be extinguished by his death, but was to pass to his personal reprepresentative for the benefit of his widow and next of kin. There was no statute of limitation expressly applicable to that class of cases. But by another section of the statute it was provided that action for personal injuries should be commenced within one year after the cause of action accrued. The court held that, under this last section, the cause of the survivors' action accrued when the injury was received, or at the time of the wrongful act or omission, and that consequently, as to their action, the statutory limitation of one year began to run from that time, as it would have for the decedent's action itself had he survived his injuries.

Their action, say the court, is brought for the same cause as if the injured party had himself brought the action, and it is not the death of the injured party that is the cause of the survivors' action. The argument that the action allowed by the statute is a new action given to the personal representative, an action that the injured party could not have maintained, and that the action is given on account of the death, though plausible, is not sound.

Now, applying these considerations to the present case, I am of opinion that the respondent's argument here in answer to the appellants' motion, that her action is not an action transmitted to her by the deceased, but that it is a new action entirely different from that which the deceased had in his lifetime for his injuries is, as against the motion, unfounded in law and cannot support her claim. Of course her action was not transmitted to her by the deceased. He never had an action for damages resulting from his own death. And her action is different in this, that she claims the damages resulting from his death, whilst he would have claimed the damages resulting from the

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injury to himself; in other words, he would have claimed his damages, whilst she claims her own damages. *Pym* v. *Great Northern* (1). But what is the cause of action in both cases? Where did it originate? What gave birth to any right of action at all against the appellants? Is it not their negligent act from which the deceased suffered an injury? Is not the respondent's action for her damages based, as it could not but be, on that negligent act, as an action by the deceased for his own damages must itself have been? There is unquestionably only one article of the code under which the appellants' liability as tort feasors attaches; that is, art. 1053, which enacts that every person is responsible for the damage caused by his fault to another. On that article only did an action by the deceased lie, and on that article only does the basis of the respondent's action rest. The action is a new action in one sense, as to her. It is the creature of the statute, or of art. 1056, and is new, entirely new, in that respect. It originated for her at her husband's death, and is for damages that, for him, did not exist. But the measure of her right to have the appellants declared responsible towards her is to be ascertained by the rights the deceased himself had against them; and there is attached to her right of action the implied statutory condition that, at the time of his death, her husband himself had a right of action. If his right was then gone, if the appellants were freed from any liability towards him, she has no claim. The statute and the article of the code extend the remedy to her but do not revive the appellants' liability if it had been extinguished. They simply give her the right to avail herself of the right to the action the deceased had at his death, enlarging its scope so as to embrace the actual pecuniary damages resulting to her from the death.

(1) 2 B. & S. 759.

The article of the code may not be so clear on this as the statute was, but in construing it, as it is not given as a new law, it has to be taken as a purely declaratory enactment, (1) and as such conferring no new or additional rights, apart from the damages, upon the widow and other surviving relatives therein mentioned. And the fact that it was not in the code, as presented to the legislature, but was subsequently inserted by the commissioners as an omission in their report of a subsisting law, is confirmatory of that view. They cannot be presumed to have intended to make in that law a change they had no power to make, and before coming to the conclusion that they have inadvertently done so we must carefully ascertain that there is no room whatever for a different construction. Moreover, when by an express enactment, given as pre-existing law two years before the decision in *Read* v. *Great Eastern* (2), the code decreed that payment and satisfaction to the deceased for his damages bars the survivors' action for their damages, it clearly recognized that their action is not the so totally separate and independent one that the respondent would have us declare it to be.

Now, in the present case, could Flynn, the respondent's husband, at the time he died, but for his death have maintained an action against the appellants for the damages resulting to him from the accident in question under art. 1053 C. C., that is to say, after the expiration of one year from the time of the accident? I am of opinion that he could not.

By art. 1138 C. C. "all obligations become extinct by prescription," and by art. 2183 "prescription is a means of being discharged by lapse of time. Extinctive prescription is a bar to, in some cases precludes,

(1) *Wardle* v. *Bethune* in the Privy Council 8 Moo. N. S. 223.

(2) L. R. 3 Q. B. 555.

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any action for the fulfilment of an obligation or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law." By art. 2262 actions for bodily injuries are prescribed by one year after the right of action accrued; and by art. 2267 after the lapse of one year the liability of the wrong doer is absolutely extinguished, and no action lies for the damages resulting from his offence or quasi-offence; or, in other words, no action lies for bodily injuries but during one year after the act of commission or omission by which they were caused, except in cases of continuous torts, *délits*, or *quasi-délits successifs*, the doctrine as to which has no application in the present case. By art. 2188 the courts are bound, of their own motion, to dismiss any action brought after the expiration of one year if limitation is not specially pleaded.

The respondent's contention that the only prescription that could have been opposed to an action by her husband, at the time he died, would have been that of two years under art. 2261 is unfounded. That article, in express terms, covers only offences and quasi offences where other provisions of the code do not apply.

Now, when art. 2262 decrees that actions for bodily injuries are prescribed by one year, it means all actions for bodily injuries under art. 1053 with, of course, the limitative words of the article itself, "saving the special provisions contained in art. 1056 and cases regulated by special laws." The respondent, to support this contention that the prescription of two years under art. 2261 would have been the only one applicable to an action by Flynn, has based an argument on the French version of art. 2262. The words "*injures corporelles*" therein, she said, do not apply to a *quasi-offence*, but merely to an *offence*. There is no doubt that the word "*injures*" in this connection, is generally

taken to mean an *injure par voie de fait* or an offence, *délit;* yet, Dareau (1), under the title "*Injures par action*," treats of the damages caused by the negligence of a carriage driver, or by an unskilful surgical operation, and a case in our own courts, *Wood* v. *McCallum* (2), used the terms an "*action d'injures*" for malicious arrest of a person. Another case of *Smith* v. *Binet* (3), says: "The contents of a confidential letter are not the subject of an *action d'injures.*" Even in the Roman law "*Quelquefois, le mot injure signifie dommage*," says Thevenot-Dessaules (4).

But, however this may be, I do not attach any importance to it, because the code itself gives an unmistakeable clue to the interpretation of the words as used in this article. When the English version says "bodily injuries," there is no room left for controversy. I take it that whether the article was first written in French or in English is immaterial, if there is no absolute contradiction between the two versions. In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other. The English version cannot be read out of the law (5). It was submitted to the legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is. Here, the words bodily injuries leave no room for doubt, and we must conclude that *injures corporelles* mean bodily injuries, and that bodily injuries mean *injures corporelles.* In fact that is what the two versions of the code, read together or by the light of one another, say in express terms.

Moreover, in this article 2262 itself, there is, intrinsically, and without reference to the English version, a

(1) *Des Injures*, 55.
(2) 3 Rev. de Leg. 360.
(3) 1 Rev. de Leg. 504.
(4) Dict. du Digeste, vo. injures.
(5) Art. 2615 C.C.

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clear interpretation of the term *injures corporelles* adverse to the respondent's contention on this point. The words therein "saving the special provisions contained in art. 1056" evidently and necessarily imply that the offences and quasi-offences mentioned in that article 1056 are both such as can be the cause of bodily injuries, or *injures corporelles*, for which art. 1053 gives an action, and which that article itself (2262) decrees shall be prescribed by one year. Were the respondent's views to prevail it would follow that, as to offences, *délits*, causing death under art. 1056, the prescription of one year of art. 2262 would be the one to apply, but that as to quasi-offences, *quasi délits*, causing death under the same article 1056, the only prescription applicable would be that of two years under art. 2261. I do not see anything in these articles that would justify such a distinction. I hold then that the majority of the Court of Review rightly came to the conclusion that, at the time of his death, Flynn's right of action was gone. Now, it must be conceded that, had he lived, and instituted an action against the company at any time after the expiration of a year, his action must have been dismissed even if the company had not contested it at all, or if they had pleaded to the merits without invoking the prescription by the court itself of its own motion, as I remarked before (1); and this even in a Court of Appeal, if it had escaped notice in the court of first instance. Such is the established jurisprudence of the province, and one which has received the direct sanction of this court in the two cases of *Breakey* v. *Carter*, and *Dorion* v. *Crowley* (2). In the recent case of *Corporation of Sherbrooke* v. *Dufort* (3), the Court of Queen's Bench has given anew full application to this doctrine.

(1) Arts. 2188, 2267 C.C. (2) Cassels's Dig. 256, 420.
(3) M.L.R. 5 Q.B. 266.

Now, as to that saving clause itself of art. 2262, "saving the special provisions contained in art. 1056" it is susceptible of only one construction, that is, that as to offences and quasi-offences followed by the death of the person injured thereby the widow and other relatives therein named are given a year after the death to bring their action, though at the time of the bringing of their action more than a year had elapsed since the offence or quasi-offence which caused the death, provided the deceased had not allowed his own action, given to him by art. 1053, to be extinguished by prescription. This construction is the only possible one if, as I take it to be concluded by authority, it is in an essential condition of the survivor's right of action that the deceased, at his death, himself had a right of action. In the present case when Flynn died the company were freed from any liability for the consequence of their quasi-offence. It had been absolutely extinguished, and I do not see on what principle it could be contended that it was revived by his death in favor of his widow and child. That would be extending the right of the survivors under the act to an unlimited number of years, and as long as the injured party survives his injury, with one year additional, provided doctors could be found to swear, and a jury to find, that the quasi-offence was the immediate cause of the death. Now is that not against the very terms of art. 2267, which decrees that the liability of the wrongdoer is absolutely extinguished by effluxion of time, and of art. 2183, under which extinctive prescription precludes the action when it is not brought within the year? This saving clause of art. 2262 was undoubtedly inserted to obviate what would, otherwise, have evidently been a contradiction between the article itself and article 1056. Without it the widow would have had one year after the death, to bring her action

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only when the husband would have died on the very day of the accident, and if he died, say ten months after the accident, she would have had only two months. With it, she has one year after his death, if he dies at any time within the twelve months and, perhaps though unnecessary to decide here, if he dies after the twelve months but the prescription as against him has been interrupted by an action or otherwise. It was not in the article as passed by the legislature, and was inserted therein subsequently, as pre-existing law, by the commissioners, as was art. 1056 itself. The commissioners had not the power to make any amendments to the code as passed by the legislature, and therefore, in the construction of the two articles read together, as I previously remarked as to article 1056, we are bound to declare, as nothing directly to the contrary appears therein, that the law is precisely the same as it was before the code (except as for the time required for the prescription of actions for bodily injuries which was specially enacted as new law), and consequently that under the code, as it was previously under the statute, any objection which would have been fatal to an action by the decedent, at the time when he died, must be fatal to an action by the survivors.

Now, as to the contention that the prescription should have been pleaded by the company. On this point also I think the respondent fails. The argument that her action is based on art. 1056, and that, consequently, prescription should have been pleaded as art. 2262 and art. 2267 do not apply to the said art. 1056, is based on a confusion of the matters in controversy. The basis of her action is art. 1053, not art. 1056, and the appellants do not at all contend that her action is prescribed. But they say that as Flynn's action, given to him by art. 1053,

was by article 2262 prescribed when he died, and as by art. 2267, coupled with art. 2188, their liability was absolutely extinguished and he had then in law no right of action, consequently as art. 1056 only extends to her the right of action he had when he died she, in law, has no action. The maxim *contra non valentem agere nulla currit prescriptio*, cited by the respondent, has no application whatever. It is not a new fact, but one resulting from the respondent's own declaration upon which the appellants rely in support of their motion; and they simply contend that upon the findings of the jury, assuming their absolute correctness, she has no claim against them. Troplong (1). They have pleaded a general denegation, besides a plea, in an exception, that they were not indebted towards the respondent in any sum of money whatever. That was, as unequivocally as could be, putting the respondent's right of action in issue. It has been argued that, had the appellants specially pleaded that the action had been prescribed before Flynn's death, the respondent might in reply have alleged facts to show that the prescription had been interrupted or renounced to. But that is precisely the ground of one of the allegations of her declaration, as follows:—

That since the occurrence of the said accident and since the death of the said Patrick Flynn the said plaintiff, acting for herself and her child, has been in continuous communication with the said defendants who have from time to time promised and agreed to compensate her for her great loss and damage, by reason of which the present action has been delayed, the said plaintiff believing in the good faith of the said defendants, but they failed and neglected, notwithstanding, to comcomply with their undertakings all of which the said plaintiff is ready and willing to establish.

Now, of that allegation not only has the respondent made no proof whatever and is there no finding by the jury, but she obviously abandoned it altogether by

(1) Prescript. No. 87.

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assenting to an assignment of facts in which there is not a word of it. Then apart from this, such a contention, assuming *Walker* v. *Sweet* (1) to be correctly decided, if it were to prevail here, would put an end to the so-well established right of invoking these short prescriptions in *ex parte* actions, or without a special plea, at any stage of the proceedings and this even in appeal, for the first time. In every such case the plaintiff might also urge that, had prescription been pleaded, he would have been able to reply and prove that it had been interrupted. And is it quite sure that a plaintiff would be allowed by a replication such a departure from his original demand? Would not this be a new ground of action? If a plaintiff declares upon facts which in law do not show a right of action, he has no *locus standi*; and if he base his demand on a right *prima facie* absolutely prescribed, and on which the law says he cannot maintain an action, but relies upon other facts to rebut the prescription, he must allege these other facts in his declaration, and if he alleges them, but does not prove them, he must also fail, whether the prescription was pleaded or not. It seems to me here, upon this motion, that if by the respondent's declaration, aside from the allegation of promise to pay which she has abandoned as I said, it appears that, at his death, her husband had no action, as I think it clear it does, the question is at an end. It was not necessary for the appellants to plead by *exception péremptoire* a point of law which arises from the respondent's own allegation of facts. Or to put the question in another shape, would not this action, but for that allegation of promise to pay, have been demurrable? Compare *Lavoie* v. *Gregoire* (2) and *Filiatrault* v. *Grand Trunk* (3). If a debt extin-

(1) 21 L. C. Jur. 29.
(2) 9 L. C. R. 255.
(3) 2 L. C. Jur. 97.

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guished by peremptory prescription be transferred, could it be contended on an action by the transferree that prescription must be specially pleaded by the debtor? Unquestionably not, and the transferree plaintiff could not ask the court not to give effect to the prescription, on the ground that had it been pleaded he might in reply have alleged interruption by the defendant in his dealings with the transferrer. Now I think I am justified by the cases I have cited at the opening of my remarks to assimilate, in this respect, the action conferred on the survivors, by the statute, to an action by a transferree. By the statute, construed as I think it must be, the wrongdoer has the same right to oppose to an action by the survivors the grounds of defence that he would have had against an action by the deceased that a debtor has to oppose to a transferree all the grounds of defence he would have had against the transferrer. That must be so, if it is law, as *Read* v. *Great Eastern* (1), and *Griffiths* v. *The Earl of Dudley* (2) held it to be, that no action lies under the statute if at the death there was not a subsisting cause of action.

By art. 431 C.P.C., the defendant has the right to move in arrest of judgment upon the verdict, whenever it appears on the face of the record that, notwithstanding the verdict, the plaintiff has no right to recover any sum. And by article 433, the court may *non obstante veredicto*, render judgment in favor of the other party, if the allegations of the party who got the verdict are not sufficient in law to sustain his pretensions. These enactments, it seems to me, expressly recognize that it is not necessary for a defendant to plead questions of law which appear on the face of the record. There is no ambiguity in their terms that I can see, and if they do not entitle

(1) L. R. 3 Q. B. 555. (2) 9 Q. B. D. 357.

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the appellants here to the right to these motions I am at a loss to understand what they mean. As to the contention of the respondent, that she is entitled to invoke the appellants' pleading and subsequent proceedings in the case as a waiver of their right to these motions, there is nothing in it. It is also evidently based on a mis-conception of the ground taken by the appellants, as if they were relying on the prescription of the present action. Now, I repeat it, that it is not at all the ground they take. They simply deny that, upon the findings of the jury, she ever had a right of action. And I cannot conceive that their pleas or other proceedings could give her a right to an action which, as appears on the face of the record, they, *ab initio*, put in issue, and which she never had and never can have.

There is one point upon which it is unnecessary to pass upon, yet which I must mention least my silence might be construed as an acquiescence to the propositions of law that were enunciated thereon in the course of the argument. Both parties seem to have taken it for granted that the prescription of art. 2262 was not based on a presumption of payment, but only on grounds of public policy. I would have thought it based on both. However, as the question was not argued I refer to it merely to remark, without coming to any determination whatever on the point, that all that the commissioners say about it in their report, could it affect the law, is that it is grounded upon the higher reason of public policy rather than on the presumption of payment. And it would seem to me that, in any liberating or extinctive prescription, even those falling under art 2267, the element of presumption of payment is not to be considered as entirely eliminated. Domat says :

Toutes ces sortes de prescriptions qui font perdre des droits sont fondées sur cette presomption que celui qui a demeuré si longtemps

sans exiger sa dette en a été payé ou a reconnu qu'il ne lui était rien dû.

I refer also to Pothier (1); Marcadé (2); Boileux (3); Bigot-Préameneu (4); Troplong (5); and authorities in Sirey (6), which is held by the commentators, and the jurisprudence, to be grounded, as our art. 2262 is, less on a presumption of payment than on reasons of public policy. Compare also *Fuchs* v. *Legaré* (7), *Caron* v. *Cloutier* (8), and *Giard* v. *Giard* (9).

In the view I take of the case, it would be also unnecessary for me to refer to the evidence given at the trial. I will say a word, however, as to the contention argued at some length before us, on the part of the respondent, that the company had, by its conduct acknowledged its liability for this accident, and had thereby interrupted the prescription of Flynn's action, though in law it has no bearing on the case as it is presented to us, and is even not now open to the respondent, as by the assignment of facts no issue on this fact, by consent, was submitted to the jury. It is in evidence, it is true, that Dr. Girdwood did make some offers to the deceased on the part of the company, but he distinctly swears that these offers were merely made as a gratuity and to relieve his immediate wants, without acknowledging any obligation whatever. Mr. Armine Nicholls likewise testifies that offers made to him as acting for Flynn by Mr. Drinkwater for the company were made without any acknowledgment of liability. Under these circumstances the following cases are entirely applicable here:

(1) Oblig. pp. 677, 718, 723, 727.
(2) Prescr. p. 233.
(3) 7 Vol., p. 871.
(4) Exposé des motifs, in 15 Fenet, p. 598, under arts. 2275, 2277.
(5) Prescript. Nos. 943, 987, 994 1003, 1035.
(6) Codes annotés, under art. 2277 of the French code.
(7) 3 Q.L.R. 11.
(8) 3 Q. L. R. 230.
(9) 15 L.C.R. 494.

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L'ouvrier opposerait vainement comme ayant eu pour effet d'interrompre la prescription, le fait de la reception de secours donnés par le patron, ces secours n'impliquant pas nécessairement que le patron ait entendu reconnaître la rêsponsabilité qu'on prétend faire déclarer à sa charge.

Qu'à supposer même que la compagnie ait donné quelques secours à Billebault, on ne saurait y voir une reconnaissance du droit de cet ouvrier, mais un acte de bien faisance fort naturel, et que ce serait arrêter les louables èlans de la charité que leur donner une portée qu'ils n'ont pas par eux-mêmes *Billebault* v. *Comp. de mines de Blanzy* (1).

L'action en résponsibilité dirgée devant un tribunal civil contre un patron à raison d'un accident servenu à l'un de ses ouvriers dans la cours de son travail.

En pareil cas la prescription n'est ni suspendu par la minorité de l'ouvrier, ni interompu par un secours donné par le patron, accordé a titre de commisération et ne pouvant impliquer la reconnaisance d'une dette. *In re Androit c. Schneider et Comp.* (2).

I refer also to Dalloz (3).

The formal judgment of the Court of Review, Wurtele J. dissenting, is based upon the ground that the prescription of Flynn's right of action should have been pleaded, and that by their pleas and subsequent proceedings in the cause the appellants had waived their right to now invoke such prescription. By the formal judgment of the Court of Appeal it does not appear that this judgment was confirmed upon other grounds; and I would have assumed that, when the court merely says "considering there is no error, doth affirm," they had come to the same conclusion as the court below upon the same grounds. In the printed case submitted to us there are unfortunately no notes from any of the learned judges in the Court of Appeal. We have been referred, however, to what purports to be the opinion of the learned Chief Justice Dorion, speaking for the court in M. L. R. 6 Q. B. 118, by which it would appear that their *ratio decidendi*, taking a different ground from that of the first court, was that the

(1) Dalloz 69-2-223. (2) Dalloz 88-1-411.
(3) 82-1-454.

prescription against Flynn's action did not at all apply to the action of his wife and children, the court thereby holding, if I do not misunderstand them, that assuming that the appellants were freed from all liability towards Flynn before his death, and even if they had specially pleaded the prescription of Flynn's action, yet that the respondent was entitled to her action.

I have come to the conclusion, after the best consideration I have been able to give to the case, for the reasons I have above given, that this judgment cannot be supported, and that the motion of the respondent for judgment on the verdict should be dismissed, and the motion of the appellants for judgment in arrest of judgment, or *non obstante veredicto*, should be allowed.

At the settling of the minutes it will be determined, after having heard the parties, if necessary, upon which of these motions judgment should be entered.

GWYNNE and PATTERSON JJ. concurred with TASCHEREAU J.

*Appeal allowed with costs. The motion for judgment non obstante veredicto granted with costs.**

Solicitors for appellants: *Abbotts, Campbell & Meredith.*

Solicitors for respondents: *Hatton & McLennan.*

* Leave to appeal to the Judicial Committee of the Privy Council was granted in this case on the 8th Sept., 1891.

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*Jan. 30,
*Feb. 2.
*June 22.

THE BRANTFORD, WATERLOO & LAKE ERIE RAILWAY CO. (PLAINTIFFS) ..... } APPELLANTS;

AND

PAUL HUFFMAN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Construction of railway—Bond—Condition—Mutuality.

H. tendered for the construction of a line of railway pursuant to an advertisement for tenders, and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender and conditioned, within four days, to provide two acceptable sureties and deposit 5 per cent of the amount of his tender in the Bank of Montreal, and also to execute all necessary agreements for the commencement and completion of the work by specified dates, and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons. In an action against H. on the bond:

Held, affirming the judgment of the Court of Appeal, that the agreement made by the bond was unilateral; that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts, and as no such agreement was entered into H. was not liable on the bond.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour C.J. at the trial.

The defendant submitted a tender for the construction of plaintiffs' line of railway and his tender was accepted. Then a bond was prepared and signed by the defendant which, after reciting the fact of defendant having so tendered, contained the following condition:

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

(1) 18 Ont. App. R. 415.

"Now the condition of the above written bond or obligation is such that if the said bounden Paul Huffman, to secure the completion of the said railway, shall, within four days from the date hereof, furnish two acceptable sureties to the said company, and deposit to the credit of the said company in Bank of Montreal at Brantford five per cent of the amount of his tender, and shall execute and complete all proper and necessary agreements for the construction and completion of the said railway by the fifteenth day of September now next, and the commencement of the construction of the said road by the fourth day of February now next, and the continuous prosecution thereof thereafter until completion, then the above obligation shall be null and void; otherwise shall remain in full force and virtue."

The defendant did not give the said security or make the deposit within four days, nor did he execute any agreement for the construction of the road, but he notified the company that he abandoned the contract. The contract was afterwards given to other parties and an action was brought against defendant on the said bond.

The action was tried before Armour C.J., who held it not maintainable, there having been no tender to defendant of the agreement to be signed. This judgment was affirmed by the Court of Appeal. The plaintiff then appealed to this court.

Lash Q.C. and *Wilson* Q.C. for the appellants. In a suit for specific performance the defendant could have been compelled to execute the agreement. *Sanderson* v. *Cockermouth Railway Co.* (1); *Hart* v. *Hart* (2); *Robertson* v. *Patterson* (3).

(1) 11 Beav. 497; affirmed on appeal 2 H. & Tw. 327.

(2) 18 Ch. D. 670.

(3) 10 O. R. 267.

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The obligation to prepare the agreement was on the defendant. *Parker* v. *Watt* (1).

On the defence set up that defendant did not know his position when he signed the bond there was an issue for the jury. *Ashby* v. *Day* (2); *Hunter* v. *Walters* (3); *Tamplin* v. *James* (4).

At all events, the court had no power to order plaintiffs, who obtained a verdict for nominal damages, to pay defendant's costs. *Wills* v. *Carman* (5). That would not make the appeal one for costs merely, but deals with a matter of principle.

Osler Q.C. and *Harley* for the respondents. As to the question of costs it cannot be urged successfully, as the court will never interfere on such ground. *Beatty* v. *Oille* (6).

The defendant was induced to execute the bond without understanding its nature and scope. *Vivers* v. *Tuck* (7); *Duke of St. Albans* v. *Shore* (8).

The company had made no financial arrangements for building the road when the bond was signed and was not in a position to assign the performance of the work by contract.

The following cases were referred to: *Mackay* v. *Dick* (9); *Budgett* v. *Binnington* (10); *Marshall* v. *Berridge* (11); *Pearce* v. *Watts* (12); *Brundage* v. *Howard* (13).

SIR W. RITCHIE C. J.—I am of the opinion that the bond in this case was of a most unqualified, unilateral character. There was no acceptance by the plaintiffs of the defendant's tender, nor was there any binding contract on the part of the plaintiffs to give the defendant

(1) 25 U. C. Q. B. 115.
(2) 54 L. T. N. S. 409.
(3) 7 Ch. App. 82.
(4) 15 Ch. D. 215.
(5) 14 Ont. App. R. 656.
(6) 12 Can. S. C. R. 706.
(7) 1 Moo. P. C. N. S. 516.
(8) 1 H. Bl. 271.
(9) 6 App. Cas. 263.
(10) 25 Q. B. D. 320.
(11) 19 Ch. D. 233.
(12) L. R. 20 Eq. 492.
(13) 13 Ont. App. R. 337.

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the contract. The company could give the contract to anyone they pleased until "all proper and necessary agreements for the construction and completion of the railway" had been entered into. And as the resolution of the board of directors says "a proper agreement satisfactory to the board" had not been entered into, I cannot see how the defendant could furnish two acceptable sureties to secure the fulfilment of a contract which never had an existence, and which might never have an existence, and which the plaintiffs never prepared or tendered, as it seems to me they should have done. The terms of the contract were never settled and agreed on. It is true the commencement of the construction of the railway was to be on the 4th of February, and its completion by the 15th of September. To this day it does not appear that the terms of those proper and necessary agreements had been fixed, ascertained or agreed upon, and until the tender was accepted and these terms had been mutually aranged, surely the defendant was not to deposit 5 per cent. of the amount of his unaccepted tender, or to furnish two accepted sureties to secure the completion of the railway for the construction of which no contract had been agreed on.

For these reasons and for those given by the judges in the court below I think this appeal should be dismissed.

STRONG and FOURNIER JJ. concurred.

TASCHEREAU J.—I would dismiss this appeal. I agree with Mr Justice Osler's reasoning in the court below.

GWYNNE J.—I am of opinion that this appeal should be dismissed. The bond which the plaintiffs procured

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the defendant to sign appears to me to have been a clumsy mode adopted by the plaintiffs to extend the time for the defendant putting his tender into such a shape that it should be entertained by the plaintiffs. This the respondent, I have no doubt, understood, and I think he had good reason to understand, to have been the object and intent of the plaintiff in procuring him to execute the bond. The plaintiffs certainly had not entered into any obligation to give the defendant a contract to build their road; they not only reserved to themselves the right at their pleasure or caprice of rejecting the sureties the defendant might offer upon the pretence that they were not acceptable to the plaintiffs, but the terms of the contract were to be matters of subsequent negotiation, which might lead to nothing as the plaintiffs had not bound themselves to anything, as has been ably pointed out in the judgments of the chief justice of the Appeal Court for Ontario and Mr. Justice Osler, to which I can add nothing and in which I entirely concur.

Appeal dismissed with costs.

Solicitors for appellants: *Wilson & Watts.*

Solicitors for respondent: *Harley & Sweet.*

EDMUND HOLYOKE HEWARD AND OTHERS (PLAINTIFFS) ... } APPELLANTS;

AND

JOHN O'DONOHOE.....DEFENDANT;

AND

MICHAEL O'DONOHOE, *Administrator ad litem* ..... } RESPONDENT.

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*Feb. 2, 3, 4.

*June 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Possession—Nature of—Statute of Limitations—Evidence.

In an action against O. to recover possession of land it was shown that O. had been in possession for over twenty years; that he was originally in as caretaker for one of the owners; that afterwards the property was severed by judicial decree and such owner was ordered to convey certain portions to the others; that after the severance O. performed acts showing that he was still acting for the owners; and that he also exercised acts of ownership by enclosing the land with a fence and in other ways.

Held, reversing the judgment of the Court of Appeal and restoring that of Rose J. at the trial, that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker and he had acquired no title by possession. *Ryan* v. *Ryan* (5 Can. S.C.R. 487) followed.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment in favor of the plaintiff at the trial.

The facts of this case, which are stated at length in the report of the Court of Appeal are briefly as follows:—

The action was one to recover possession of land

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

(1) 18 Ont. App. R. 529.

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claimed by defendant under title by prescription. The land had belonged to the father of plaintiffs, and the plaintiff Francis Heward had for several years been in possession of it exercising various acts of ownership, when in 1866 a suit was brought against him by the other heirs of his father resulting in a decree by which the land was declared to belong to the plaintiffs as tenants in common, and the said Francis was ordered to convey to the others their proportions.

The defendant was first put in possession of the land in 1853 by one Munro, who had purchased timber from F. Heward, to look after such timber and prevent its being stolen. The evidence showed that he remained in possession ever since, and that in several acts which he performed he professed to be acting under instructions from Heward. Nothing was proved as indicating an assertion of ownership in himself until about 1884 when he fenced a large portion of the land.

The Court of Appeal held that the decree made in the suit in 1866 effected a severance of the property, and that from that time the possession of the defendant ceased to be that of the plaintiffs, who could not, thereafter, contend that he was in as their caretaker. Accordingly, they reversed the judgment of the trial judge and held that the defendant had acquired title by possession. The plaintiffs appealed.

McCarthy Q.C. and *MacMurchy* for the appellants. O'Donohoe originally took possession of the property as caretaker, and never having disclaimed that position he must be supposed to retain it. *Lyell* v. *Kennedy* (1).

The leading case in Ontario is *Harris* v. *Mudie* (2); *Ryan* v. *Ryan* (3) is decisive in our favor.

Trustees and Agency Co. v. *Short* (4) and *Wall* v. *Stanwick* (5) were also cited.

(1) 14 App. Cas. 437.
(2) 7 Ont. App. R. 414.
(3) 5 Can. S. C. R. 387.
(4) 13 App. Cas. 793.
(5) 34 Ch. D. 763.

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Reeve Q.C. for the respondent referred to *Sands* v. *Thompson* (1); Lewin on Trusts (2); and *Beckford* v. *Wade* (3) to show that O'Donohoe could not be considered a trustee for the owners of the land; and *Coyne* v. *Broddy* (4) as reviewing all the cases on the subject of title by possession.

Sir W. J. RITCHIE C.J., FOURNIER and TASCHEREAU JJ. concurred in the judgment of Mr. Justice GWYNNE.

GWYNNE J.—For the purposes of this case it is quite unnecessary to inquire into the title or condition of the land which is the subject of this action prior to the suit in Chancery of *Heward* v. *Heward* mentioned in the case, which was a suit instituted in the court of chancery at Toronto by the brothers of the late Mr. Francis Heward, of one of whom, since deceased, the present plaintiffs are the children and heirs at law, against the said Francis Heward, to have him declared to be seized of the legal estate in fee of certain land mentioned in the pleadings in the Township of Scarboro, in the County of York and Province of Canada, in trust to divide and convey the lot to and among his brothers and himself in certain proportions. In that suit a decree was made on the 5th October, 1866, whereby it was in short substance and effect declared and adjudged that the said Francis Heward was seized of the legal estate in fee in the said land in trust as to one-eighth part thereof to the use of each of his brothers named respectively William B. Heward, John D. Heward, Stephen Heward and Augustus Heward, and as to the balance or four-eighths to his own use, and he was by the said decree ordered to convey the several one-eighth parts to his said respective brothers, free from

(1) 22 Ch. D. 617.
(2) 8 Ed. p. 63.
(3) 17 Ves. 96.
(4) 13 O. R. 173.

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all incumbrances done or suffered by him, and it was referred to the master to divide the said lot of land into the several parcels aforesaid, and it was ordered that each of the parties to the suit should execute mutual conveyances of their respective portions to each other, and the master was further directed to inquire as to incumbrances, and if there should be any the said Francis was directed to indemnify the other parties in respect thereof, and to account for rents and profits. Now that the defendant, at the time of the above decree having been made, was in the occupation of an old log house and of about half an acre of land around it, situate upon that portion of the said lot which is the subject of the present suit, solely by the mere license and permission of the said Francis Heward whose servant he was, to look after and protect the whole lot from trespassers, and that he had no possession otherwise than as such servant and caretaker of the said Francis Heward, has been found as a fact by the learned judge who tried the present case, the correctness of which finding is moreover, I think, established by the most undoubted evidence. In fact the defence of Francis Heward to the suit in chancery was that he had acquired title to his own absolute use by reason of his possession of the lot by the defendant as his servant and caretaker, and the defendant who was called by him in that case as a witness in support of that contention himself gave evidence that he was on the land solely by the permission of the said Francis Heward without any other claim to possession.

Besides this evidence of the defendant himself in that suit there was most ample evidence given in the present action, altogether unimpeachable, which I think most conclusively establishes that both before and long subsequently to the making of the above decree,

and during the lifetime of the said Francis Heward, the defendant continued to act and claimed the right to act in the same manner after the decree as before against persons whom he considered to be trespassing on the lot, and in the character of caretaker of and for the said Francis Heward or, as he in 1874-5 and 6 described himself and his occupation on the lot, as caretaker of the Heward "property" or "estate."

At the time then of the above decree having been made it must be taken as conclusively established that the defendant's connection with the said land and his occupation of the old log house and the half-acre or thereabouts enclosed round it was solely as the servant of the said Francis Heward and caretaker of the property for him. Now as the said Francis Heward was by the decree declared to be a trustee for his four brothers as to their respective one-eighth shares and was bound by the decree to convey, and to give possession of, those several one-eighth parts, when ascertained, to his said brothers respectively and their heirs, his servant could never set up any title by possession in himself as against any of those to whom the said Francis Heward, his master, was bound to convey their respective shares so long as he contested the decree or failed to fulfil the requirements thereof by conveying their respective shares to the parties declared by the decree entitled to have the legal estate therein vested in them. From the above decree Francis Heward appealed to the Court of Appeal, and in the meantime Augustus Heward, one of the brothers of Francis, having died an order of revivor was made on the 23rd of October, 1867, whereby the above plaintiffs, other than Frances Marie Heward, together with another brother of theirs, also named Augustus but since deceased, being the children and heirs at law of Augustus Heward then deceased, were made parties to the said

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suit in his stead; and thereupon and pending the said appeal of Francis Heward proceedings were instituted in the master's office under the references and inquiries directed by the decree. Upon the 30th June, 1868, the master reported among other things that he had divided the lands in the decree mentioned and that he had set apart four-eighth parts by metes and bounds for Francis Heward and the remaining four-eighths parts by metes and bounds for Francis Heward's three brothers William B. Heward, John D. Heward and Stephen Heward, and the children of the deceased Augustus Heward, who had been made parties to the suit by order of revivor. During the progress of the inquiries before the master it appeared that Francis Heward had mortgaged the property to one Col. Atcherley, which mortgage remained in full force unpaid and unsatisfied. By the decree Francis had been adjudged and directed to indemnify the other parties to the suit from all incumbrances done and suffered by him. He was, therefore, bound to have all the land, except so much as had been set apart for his own use, released from the operation of this mortgage. The master in his said report further reported that he found that there was due from Francis in respect of monies received for the piece of a portion of the land sold and conveyed by him, to the Grand Trunk Railway Company, and for timber growing on the land and sold by him, the sum of $3,004.87 over and above the amount payable by him upon the security of the said mortgage. When this report was made the appeal of Francis was still proceeding and continued so pending until the 22nd of January, 1869, when an order was made therein by the Court of Appeal, whereby the said cause was remitted back to the Court of Chancery to inquire whether the said defendant Francis Heward had, since the death of his father, had a continuous

unbroken possession for twenty years of the land and premises in question in the said cause; and the court did further order that in case the evidence of such continuous and unbroken possession of the said Francis should be satisfactory to the said court the bill should be dismissed with costs, but that in case the said evidence should not be satisfactory as to such continuous and unbroken possession then the said appeal should be dismissed with costs.

This order was made an order of the Court of Chancery on the 22nd February, 1869, and thereupon the case was again tried upon the issue by the said order in appeal directed to be tried. At this trial the defendant was again examined as a witness on the part of Francis Heward, and gave his evidence to the like effect as that given by him upon his examination at the previous trial of the case. This trial resulted in an order being made in the said Court of Chancery whereby it was adjudged and declared that the said Francis Heward had not had such continuous and unbroken possession of the said land and premises. The case subsequently appears to have been again remitted to the master's office for the purpose of procuring effect to be given to the decree, for by a report made by the master dated the 23rd September, 1873, he reported that he had divided by metes and bounds the west half of the said lands and premises in the decree mentioned among the then parties to the suit other than the defendant Francis Heward according to their respective rights and interests therein as declared by the said decree, and that he had allotted the parcel of land described and set out in a schedule annexed to his report as parcel No. 2 to the children of Augustus Heward deceased, who had been made parties defendants by the order of revivor, as tenants in common. This last piece of land is that which is in question in the present ac-

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tion, and it contains ten acres of land. One of the parties to whom it was allotted, who was also named Augustus, died at the city of Montreal on the day before that on which the above report bears date. The others are plaintiffs in the present action.

In what condition the mortgage to Col. Atcherley was at this time does not appear in the appeal case as laid before us, otherwise than it is said in the judgment of one of the learned judges of the Court of Apppeal at Toronto that the mortgagee executed the statutory certificate of discharge of the mortgage so far as it effected the premises other than those allotted to Francis himself shortly after the date of the master's report, which report is not said but it would seem to be that dated the 23rd Sept., 1873, which is meant, for it is not likely that Francis should have procured to be executed, or that the mortgagee would have executed, a certificate of the discharge of the mortgage as to the part of the premises mentioned while Francis was insisting upon his own absolute title to the whole, and was contesting the claim of his brothers to have any interest whatever therein. But whenever the certificate of discharge was executed it only operated, when registered, as a conveyance or release to the mortgagor himself of the original estate which he had when he executed the mortgage; and that estate the decree in the original suit, and in that upon the inquiry directed by the Court of Appeal, has conclusively established to have been as to three several one-eighth parts in trust for three of his brothers, and as to another one-eighth part in trust for the children of his deceased brother Augustus, who had been made parties to the suit by the order of the court.

A certificate of discharge of a mortgage when registered operates as a release of the mortgage and a conveyance of the original estate of the mortgagor to the mort-

gagor, his heirs or assigns, or any person lawfully claiming by, through or under him or them; but neither the brothers of Francis Heward, the mortgagor, nor the plaintiffs, children of his deceased brother Augustus, with whom alone we are concerned in the present action, were ever in the position of persons claiming as the assignees of Francis, the mortgagor, nor by, through or under him. Their claim was of quite a different nature, and wholly independent of Francis, quite hostile in fact to him, and adverse to the claim asserted by him. Their claim was founded upon the decree made in the chancery suit against him and which he resisted to the utmost, and during his life never obeyed by executing conveyances of the portions of which the decree adjudged him to hold as a trustee upon the trust to convey to the plaintiffs the children of Augustus, with whom alone we are concerned, and to the others the several shares to which they were by the decree declared to be entitled, when the same should be ascertained and set apart by metes and bounds in the manner directed by the decree. No estate passed or was conveyed to the plaintiffs, children of Augustus, by force of Col. Atcherly signing the certificate of discharge mentioned in the judgment of Mr. Justice Burton, the plaintiffs, the said children, not having been persons claiming as assignees of the mortgagor or by, through or under him. The effect of the certificate of discharge was simply to revest in Francis, the mortgagor, the original estate which he had in that portion of the lands mortgaged which was mentioned in the certificate; which estate, the decree of the Court of Chancery conclusively adjudged to be, so far as the plaintiffs, the children of Augustus, are concerned, as trustee upon trust to convey to them the share which the decree adjudged them to be entitled to. It has been objected that the decree inaccurately declared Francis to hold the lands

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as *trustee* for *himself* and his brothers, whereas as was contended no one could be a *trustee for himself*, but refined criticisms of this nature cannot prejudice the rights of the plaintiffs in the present action for the obvious substantial meaning and effect of the decree is to declare that although the legal estate in possession was in Francis he held such estate as a trustee only, and upon trust to divide the property with his brothers and himself in certain stated proportions and upon trust to convey to his brothers respectively and their heirs their several portions when ascertained by metes and bounds in the manner directed in the decree. Upon the execution of the certificate of discharge of the mortgage by Francis's mortgagee Francis remained as much affected and bound by the decree as if the mortgage had never been executed by him, and he continued so to be until his death in 1880 in so far as the plaintiffs, the children of his deceased brother Augustus, were concerned, a trustee for them of their share, for he never during his life fulfilled the requirements of the decree by conveying to them the portion assigned to them by the master's report of the 23rd September, 1873, and as the defendant occupied the old log house only by permission of Francis, and as his servant, he could not, without showing clearly that relationship to have ceased, of which no evidence whatever was given, convert, at his pleasure, that possession into one which during the life of Francis, the trustee, could mature into a statutory title good against the *cestuis que trustent* of Francis. But there was, I think, abundant evidence that in point of fact the defendant had not, and that he did not claim to have, at any time between the making of the decree in the suit in which he had given his evidence and the death of Francis in 1880, nor for some years after his death, any possession whatever of any part of

the ten acres in question in this suit other than the old log house and the patch of garden ground around it, which was enclosed with an old brush fence; all the rest had grown up into a wild waste piece of ground covered with scrubby bush of second growth, unenclosed; and that he still claimed to occupy the old log house by no other title than as caretaker of the property by permission of Francis, and for him or the Heward estate, as he sometimes spoke of his position in connection with the property, of the condition of which he seems to have been well aware. In conversation he spoke of the old log house as being on the piece of the land allotted to the children of a brother of Francis who had died in Montreal, and whose children still resided in Montreal, and that their portion could not be sold until the youngest should come of age. This referred to the plaintiffs, children of Augustus, three of whom at the time of the conversation referred to taking place were under age. He seems also to have been well aware that Mr. John Heward was looking after the interests of these children, so far as the taxes upon the land set apart for them were concerned, and there was evidence also that the defendant claimed to be acting by the authority of Mr. John Heward, equally as of Francis, as caretaker of the property and to protect it from trespass and injury for all parties interested in the "Heward estate" or "property" as he called it.

Mr. John Heward paid all the taxes assessed on the ten acres from 1876 to 1884 inclusive, but the defendant appears to have been taxed and to have had himself assessed for the old log house independently of the ten acres under the circumstances following.

In 1877 the defendant was assessed for the old log house and garden as one-tenth of an acre, and the ten acres were assessed as wild unoccupied land. In 1878

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the defendant was assessed in like manner for the one-tenth of an acre, and by his direction Mr John Heward was entered upon the assessment as the owner of the piece so assessed, and the ten acres were assessed as wild unoccupied land. In 1879 John O'Donohoe, jr., was the name entered on the roll for the log house and garden, one-tenth of an acre, and John Heward as owner, as in 1878. Both the defendant and his son John directed the assessor to enter John Heward as owner. The ten acres were again assessed this year as wild unoccupied land. In 1880 the defendant was assessed for the house and garden one-tenth of an acre, and John Heward as owner, and the ten acres were assessed as in the year previous as wild unoccupied land; the same precisely was the assessment in 1881 and 1882. In each year the assessor always asked the defendant whether there was any alteration to be made in the mode of assessment from that in which it was made when he was directed to enter John Heward on the roll as owner, and being informed that there was not he entered the assessment on the roll accordingly. In 1883 a change was made the origin of which it will be convenient to state here. In that year the defendant had a conversation with one Melbourne who had purchased some land adjoining to the ten acres, part of the land allotted to Francis Heward; and the defendant, (apparently afraid that Melbourne would buy the ten acres upon which the log house in which he lived was situate, which possibly he himself contemplated buying when the youngest of the plaintiffs should come of age,) said to Melbourne, "you wont buy this place over my head," to which Melbourne replied that he would not, that he was going no further than he already had. In another conversation with Melbourne the defendant suggested that he thought he could make a claim to the ten acres; Melbourne replied that

he did not think the defendant could make any claim to the place. "Why can't I?" said the defendant; to which Melbourne replied: "Did you not go to the court and swear that you were in charge of it for Heward?" Melbourne then advised him that if he wanted to get the place he must get himself assessed for it and pay the taxes some years and that he should fence in the place. Melbourne also said to the son John that unless they put a fence round the place they never could do any good, that is as to getting a title to the place—that the only way was by fencing the place round and getting assessed for it; and he advised the defendant and his wife and his son John, all together, that they should have the land assessed in the son John's name, so that in case a title should be got for it he, who was a support to the father and mother in their old age, should have it. In accordance with this advice the defendant and his son John set about fencing the ten acres, which then for the first time was enclosed during the time that Melbourne knew it, namely, from 1872. This fencing was done some time in 1884. Now, in 1883 a change was made in the assessment and that change in perfect accordance with Melbourne's advice, namely, the son John O'Donohoe, jr., was entered upon the roll and assessed for the ten acres; no separate assessment this year for the log house and garden. This change was made at the request of the son with the consent of his father; both were present when the assessment was entered on the roll, and both of them were consulted by the assessor as to its correctness as soon as it was made. In the following years down to 1888 the assessment was made in the same manner. Mr. John Heward in May, 1886, without any knowledge of the above mode of assessment, paid at the treasurer's office the taxes for 1883 and 1884. He did not

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pay for 1885 or subsequent years, because for those years the defendant or his son paid the taxes.

Now, the plain conclusion, in my opinion, to be deduced from the evidence is:—

1st. That the plaintiffs never had the legal estate in the ten acres in question vested in them until the vesting order in their favor was issued by the Court of Chancery in the suit of *Heward* v. *Heward* in 1888.

2ndly. That until 1884, when the defendant first enclosed the ten acres, he was not, in point of fact, in possession or occupation of any part of the ten acres other than the old log house and garden attached, which he had assessed to himself in 1877 and subsequent years as one-tenth of an acre; and

3rdly. That during the lifetime of Francis Heward, at any rate, as whose servant the defendant was in occupation as caretaker in 1869, he had not, in point of fact, nor did he claim to have, any possession of the log house otherwise than as such caretaker by the permission of Francis Heward for him and the parties for whom he was by the decree in the suit of *Heward* v. *Heward* adjudged to be a trustee, and that during the life of Francis the possession which the defendant had of the log house was the possession of Francis Heward as trustee for the plaintiffs, his *cestuis que trustent* under and by force of the decree in the chancery suit, and therefore the appeal must be allowed with costs and the judgment of the learned judge who tried the case, in favor of the plaintiffs, restored.

PATTERSON J.—I concur in allowing this appeal. I do not propose to add anything to what has been said respecting the facts and the law as applied to those facts. I think the decision of *Ryan* v. *Ryan* (1) in this court covers the ground as far as the law is concerned.

(1) 5 Can. S.C.R. 387.

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Patterson J.

That decision reversed the judgment of the Court of Appeal for Ontario, of which I was then a member. I delivered a dissenting judgment in the Court of Appeal (1), and I refer to the report of it as containing a pretty full exposition of views upon some of the provisions of the Ontario statute of limitations to which I adhere, and which I believe to be substantially those acted upon by this court in allowing the appeal in that case.

Appeal allowed with costs.

Solicitors for appellants: *Wells & McMurchy.*

Solicitors for respondent: *Reeve & Woodworth.*

(1) 4 Ont. App. R. 563, 574.

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*Feby. 6.
*June 22.

THE HONORABLE JOHN O'DONOHOE, A SOLICITOR..... APPELLANT;

AND

CHARLES BEATTY AND JAMES WILSON..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Solicitor—Bill of costs—Reference to taxing master—Procedure—Appeal.

The executors of an estate having taken proceedings to obtain an account from the solicitor the latter produced his account for costs and disbursements, which were referred to a taxing officer to be taxed and to have an account taken of all monies received by the solicitor for the estate. In proceeding under this order the officer took evidence of an alleged agreement for settlement of the solitor's bill and reported a balance due from the solicitor who was ordered to pay the costs of the application.

Held, affirming the judgment of the Court of Appeal, that the officer not only had authority, but was obliged, to proceed and report as he did and his report should be affirmed.

It is doubtful if a matter of this kind, which relates wholly to the practice and procedure of the High Court of Justice for Ontario, and of an officer of that court in construing its rules and executing an order of reference made to him, is a proper subject of appeal to the Supreme Court.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court and the report of the taxing officer on the solicitor's accounts in the case.

O'Donohoe was solicitor of the estate of James Wilson and the executors were desirous of having his account settled. Proceedings for that purpose were taken in the Divisional Court by the executors and O'Donohoe having produced his account for solicitor's fees and disbursements it was referred to a taxing

PRESENT:—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

masters for taxation, the other directing the master to take an account of all sums received by the solicitor on account of the estate. In proceeding under this order the taxing officer took evidence of an alleged settlement between O'Donohoe and the executors, and founded his report of a considerable sum being due the estate from the solicitor on such evidence. On appeal from the master's report O'Donohoe contended that his bills having, with one exception, been rendered for more than a year the master could not tax them but was bound to allow them as rendered, and that at all events the master had no authority to take evidence as he did.

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The report having been affirmed by the Divisional Court and the Court of Appeal the solicitor appealed to this court.

O'Donohoe appellant in person cited *Heaslop* v. *Heaslop* (1); *In re Winterbottom* (2); *In re Moss* (3).

PATTERSON J. raised the question of jurisdiction to hear the appeal.

GWYNNE J.—I think that sitting as a court of appeal we should not interfere with the judgment of the Divisional Court on a question of this kind.

STRONG J.—I do not think it was ever intended that this court should hear appeals of this kind. We look to the practice laid down by the Privy Council as a guide for us in such cases.

McCarthy Q.C., and *Wilson* Q.C. for the respondents.

The judgment of the court was delivered by :—

GWYNNE J.—The only question involved in this ap-

(1) 14 P. R. (Ont.) 21. (2) 15 Beav. 80.
(3) 17 Beav. 59.

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Gwynne J.

peal is whether the master of the High Court of Justice in Ontario, the rules of which court govern the proceeding in question and regulate the duties of the master, has proceeded in conformity with the order of reference made to him by the court, and has made a proper report upon it, and for the reasons given by the learned judges of the Divisional Court of the High Court, and by Mr. Justice Osler and Mr. Justice McLennan in the Court of Appeal at Toronto, I entertain no doubt that it was not only competent, but under the circumstances necessary, for the master to have made the inquiry which is objected to, and to have made the report thereon which he has made, and which is abundantly established by the evidence; but I have entertained and still entertain great doubt whether an appeal should be entertained by this court in a matter of this description which relates wholly to the practice and procedure of the High Court of Justice, and of an officer of that court in construing the rules of the court, and in executing an order of reference made to him by the court.

Appeal dismissed with costs.

Solicitor for appellant: *J. O'Donohoe.*

Solicitors for respondents: *McCarthy, Osler, Hoskin and Creelman.*

THE GRAND TRUNK RAILWAY COMPANY *v.* FITZGERALD.

1891
Jan. 26.
June 22.

Railway Co.—Injury to property by—Question of fact—By whom work complained of was done.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court in favor of the plaintiff (respondent).

The action in this case was brought in consequence of an embankment being built on the highway in front of plaintiff's property by which, the plaintiff alleged, he was deprived of access from his property to the street. The only question raised on the appeal was whether or not the defendants were the proper parties to indemnify the plaintiff. The defendants claimed that the work was done by the Peterborough & Chemong Lake Railway Co. who were the parties, if any, liable to the plaintiff.

The evidence at the trial showed that the Grand Trunk Railway Co. had, by agreement, the use of the railway line in connection with which this embankment was built; that its president and other officers owned the greater part of the stock of the Peterborough & Chemong Lake Railway Co. under whose charter the line was built; that the building of the embankment was authorized by a resolution of the directors of, and paid for by, the Grand Trunk Co; that the engineer in charge of the work received his instructions from the president of the Grand Trunk Co. of which he was an officer; and that the road master and foreman were men in the employ of the Grand Trunk Co.

Under this evidence the courts below held that the

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THE GRAND TRUNK RAILWAY COMPANY v. FITZGERALD.

defendants were liable to the plaintiff as wrongdoers. The Supreme Court held that this decision was justified and affirmed it on appeal

Appeal dismissed with costs.

W. Cassels Q.C. for appellants.

Edwards for respondents.

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ROSS v. BARRY.

Jan. 28, 29.
June 22.

Contract—Evidence—Quality of work—Conversation between parties—Claim for increased price.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment in favor of the plaintiffs (respondents).

The plaintiffs, Barry & Smeaton, were sub-contractors for the mason work on a portion of the line of the Grand Trunk Railway Co. for constructing which Ross & McRae, the defendants, had the contract. In a conversation between the plaintiff, Smeaton, and the defendant, McRae, before the work was begun Smeaton was given to understand that the standard of the second class masonry to be built by plaintiffs was to be equal to that on the "Loop Line" another part of the Grand Trunk system, and shortly after McRae wrote to plaintiff instructing them to go on with the work "according to the plans and specifications furnished by the company."

The plaintiffs had completed a portion of their work when they were informed by the engineer in charge that the quality of second class masonry was to be of a higher standard than they had supposed, which would increase the cost of construction from twenty-five to thirty per cent, whereupon they refused to pro-

ceed until Smeaton, who was present at the time, told them to go on and finish it as directed by the engineer and they would be paid. They then pulled down what they had built and proceeded as directed. When the work was nearly done Smeaton tried to back out of his agreement to pay the increased price, but renewed it on plaintiffs again threatening to stop the work. He refused to pay it, however, when the work was completed and an action was brought to recover it, in which the plaintiff obtained a verdict which was affirmed by the Divisional Court and the Court of Appeal.

The Supreme Court held that on the evidence plaintiffs were justified in assuming, from the conversation between McRae & Smeaton, that the standard of quality for the second class masonry was to be that of the Loop Line; that their claim against the defendants was a *bonâ fide* one and the decision in their favor should be affirmed.

Appeal dismissed with costs.

Bain Q.C. and *Laidlaw* Q.C. for the appellants.

Osler Q.C. for the respondents.

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Feb. 6

June 22.

BICKFORD v. HAWKINS.

Appeal—Question of fact—Finding of trial judge—Interference with on appeal.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favor of the plaintiff (respondent).

The action was for services performed by the plaintiff on the alleged retainer by the defendant to procure a subsidy from parliament and bonuses from the municipalities of Sarnia and Sombra for defendant's railway.

The court held that the appeal should be dismissed the questions raised being entirely matters of fact, as to which the decision of the trial judge who saw and heard the witnesses, confirmed as it was by the Court of Appeal, should not be interfered with.

Appeal dismissed with costs.

Lash Q.C. for the appellant.

McCarthy Q.C. and *Wilson* Q.C. for the respondent.

JAMES MOIR (PETITIONER).....APPELLANT; 1891

AND *Nov. 10,11.

THE CORPORATION OF THE VILLAGE OF HUNTINGDON (RESPONDENT), AND THE HON. J. E. ROBIDOUX, *es qual*..... .... } RESPONDENTS.

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

By-law—Appeal as to costs—Jurisdiction—Supreme and Exchequer Courts Act, sec. 24.

Since the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada :—

Held, that the only matter in dispute between the parties being a mere question of costs, the court would not entertain the appeal. Supreme and Exchequer Courts Act, sec. 24.

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

The appellant James Moir, on May 8th, 1890, petitioned the Circuit Court for the county of Huntingdon to quash the by-law No. 105 which had been enacted on April 8th, preceding, by the Municipal Council of Huntingdon. The petition set forth eight alleged reasons for quashing the by-law, but the argument resolved itself into one question only, viz: whether Art. 561 of the Municipal Code is within the power of the legislature. The Attorney General intervened under Art. 5856 of the Revised Statutes of Quebec. The judgment of the Circuit Court (Belanger J.) rendered the 26th May, 1890, granted the petition, declared

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

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art. 561 *ultra vires* of the legislature, and quashed the by-law.

Both the corporation and the Attorney General appealed from this judgment, with the result that the judgment was uninamously reversed, and art 561 of the Municipal Code was declared *intra vires*. From this judgment of the Court of Queen's Bench the petitioner Moir now appeals.

Smith counsel for the respondent's moved to quash the appeal on the ground that the case had not originated in the Superior Court.

D. C. Robertson and A. E. Mitchell, *contra*.

In reply Smith stated to the court that since the rendering of the judgment by the Court of Queen's Bench the by-law in question had been repealed, therefore the matter now in controversy was a mere question of costs.

Mr. *Laurendeau* appeared for the Attorney-General.

Per Curiam. The court will not entertain an appeal from any judgment for the purpose of deciding a mere question of costs. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Mitchell and Robertson.*

Solicitors for respondent: *MacLaren, Leet, Smith & Smith.*

Solicitors for Attorney General: *Seers & Laurendeau.*

THE CORPORATION OF THE COUNTY OF VERCHERES..... } APPELLANT;

AND

THE CORPORATION OF THE VILLAGE OF VARENNES..... } RESPONDENT;

1891
*May 5.
*Nov. 17,

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

Jurisdiction—Action to set aside a procès verbal or by-law—Appeal—Sec. 24 (g) and Sec. 29 of the Supreme and Exchequer Courts Acts.

The Municipality of the County of Vercheres passed a by-law or *procès verbal* defining who were to be liable for the rebuilding and maintenance of a certain bridge. The Municipality of Varennes by their action prayed to have the by-law or *procès verbal* in question set aside on the ground of certain irregularities. The above was maintained and the by-law set aside.

On appeal to the Supreme Court of Canada,

Held,—that the case was not appealable and did come within sec. 29 or sec. 24, "g" of the Supreme and Exchequer Courts Act no future rights within the meaning of the former section being in question and the appeal not being from a rule or order of a court quashing or refusing to quash a by-law of a municipal corporation.

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

In 1866 the municipal council of the Corporation of Vercherès adopted a *procès verbal* defining who were to be liable for the building and maintenance of a certain bridge over a small stream separating the municipality of the Village of Varennes and the municipality of the County Verchères.

In 1888 the appellant municipality homologated a

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procès verbal made by one Joseph Geoffrion, otherwise defining who were to be liable for the building and maintenance of the said bridge. Thereupon the respondent municipality instituted before the Superior Court for Lower Canada, a common law action to have the *procès verbal* homologated by the appellant municipality, set aside and quashed.

The Superior Court dismissed the respondent's action but the Court of Review reversed the decision of the Superior Court, and set aside the *procès verbal*, and on appeal to the Court of Queen's Bench for Lower Canada (appeal side) that court affirmed the judgment of the Court of Review.

On appeal to the Supreme Court of Canada.

Archambault Q.C. for respondent moved to quash the appeal on the ground that the judgment appealed from was in an action to set aside a *procès verbal* and not a by-law, from which no appeal lay, and that there was no question of future rights within the meaning of sec. 29 of the Supreme and Exchequer Courts Act, and cited and relied on *Bank of Toronto* v. *LeCuré, etc., de la paroisse de la Nativité de la Ste. Vierge* (1); and *Gilbert* v. *Gilman* (2).

Allan for appellant relied on sec. 30 and sec. 24 "g" of the Supreme and Exchequer Courts Act.

The judgment of the court was deliverd by :—

TASCHEREAU J.—This case comes up on a motion to quash the appeal. This motion must clearly be allowed. The appellant claims the right of appeal, and obtained leave before one of the judges in the Court of Queen's Bench, on the ground that rights in future may be bound by the judgment against him. This is again what happens so often unfortunately for the liti-

(1) 12 Can. S. C. R. 25. (2) 16 Can. S. C. R. 189.

gants notwithstanding the numerous decisions of this court on the subject, reading the words "where the rights in future might be bound" in sec. 29 of the Supreme Court Act without reference to the preceding words "such like matters or things." *Gilbert* v. *Gilman* (1). Now here there is no controversy as to rent or revenue payable to Her Majesty or as to any title to land, or annual rent, or such like matter or things. The municipality of the County of Verchères passed a by-law, or *procès verbal*, defining who were to be liable for the rebuilding and maintenance of a certain bridge. The municipality of Varennes, by their action in this case, demand the setting aside of that by-law or *procès verbal* on the ground of certain illegalities therein. The judgment appealed from maintains their action and sets aside the by-law or *procès verbal*. That judgment is not appealable either under sec. 29 or sec. 24 subsec. *g* of the Act. *McManamy* v. *Sherbrooke* (2). This is not a case of a rule or order to quash. It may be analogous, or have the same consequences. But we cannot extend our jurisdiction by interpretation to cases not clearly and unmistakeably provided for by the statute. In Parliament, not in this court, lies the power to remedy the act if an omission appears therein. We cannot add anything to its enactment. No right of appeal can be given by implication, *Langevin* v. *Les Commisaires etc., de St. Marc* (3); and "the courts are not to fish out what may possibly have been the intention of the legislature;" per Lord Brougham, *Crawford* v. *Spooner* (4); or extend the language of a statute beyond its natural meaning for the purpose of including cases simply because no good reason can be assigned for their exclusion; *Denn* v.

(1) 16 Can. S. C. R. 189.
(2) 18 Can. S. C. R. 594.
(3) 18 Can. S. C. R. 599.
(4) 6 Moo. P. C. 1.

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Taschereau J.

Reid (1); and unless by words written, or words necessarily implied and therefore virtually written, the intention has been declared, we cannot give effect to it. Coleridge J. in *Gwynne* v. *Burnell* (2), or as Lord Eldon said in *Crawford* v. *Spooner* (3), "we cannot add and mend and by construction make up deficiencies which are left there."

Appeal quashed with costs.

Solicitor for appellant: *Archambault*, Q.C.

Solicitor for respondent: *Allan*.

(1) 10 Peters 524.
(2) 7 Cl. & Fin. 607.
(3) 6 Moo. P. C. 1.

DAME SOPHIE WINEBERG *et vir* (DEFENDANTS)..... } APPELLANTS ;

AND

ROBERT HAMPSON (PLAINTIFF).....RESPONDENT.

1891
*June 1.
*Nov. 17.

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

Jurisdiction—Appeal—Future rights—Title to lands—Servitude—Supreme and Exchequer Courts Act, sec. 29 (b).

By a judgment of the Court of Queen's Bench for Lower Canada (appeal side) the defendants in the action were condemned to build and complete certain works and drains within a certain delay, in a lane separating the defendants' and plaintiff's properties on the west side of Peel street, Montreal, to prevent water from entering plaintiff's house which was on the slope below. The question of damages was reserved. On appeal to the Supreme Court of Canada.

Held, that the case was not appealable, there being no controversy as to $2,000 or over, and no title to lands or future rights in question within the meaning of sec. 29, sub-sec. (b) of the Supreme Court Act.

The words title to lands in this sub-section are only applicable in a case where a title to the property or a right to the title may be in question. The fact that a question of the right of servitude arises would not give jurisdiction.

Wheeler v. *Black* (14 Can. S.C.R. 242) referred to.

Gilbert v. *Gilman* (16 Can. S. C. R. 189) approved.

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

The facts of the case are stated in the judgment of Mr. Justice Taschereau hereinafter given.

The appeal to this court was taken after the following order had been obtained by the appellant from a judge of the Court of Queen's Bench :

PRESENT :—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau and Patterson JJ.

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"Seeing that the judgment from which an appeal is sought disposes as a finality of real rights, and also that the rights in future of the parties may be bound by it, and seeing that the said appellants, Dame Sophie Wineberg *et vir*, have given security to the extent of five hundred dollars as required by the 46th section of chapter 135 of the Revised Statutes of Canada, (The Supreme and Exchequer Courts Act, 1886) that they will effectually prosecute their appeal and pay such costs and damages as may be awarded against them by the Supreme Court.

"The appeal to the Supreme Court is hereby allowed reserving to the respondent the right to urge before the said court his objection to said appeal by motion or otherwise."

Bethune Q.C. moved to quash the appeal for want of jurisdiction, the case not being appealable under section 29, of the Supreme and Exchequer Courts Act.

Robertson Q.C. *contra.*

The judgment of the court was delivered by:—

TASCHEREAU J.—The respondent moves to quash this appeal on the ground that the judgment is not appealable. I am of opinion that this motion should be allowed.

The parties own adjoining properties on the west side of Peel street. This street is at right angles to Sherbrooke street and has a general direction of north and south, the ground rising as you go northward. The properties are separated by a lane of ten feet in width which belongs to Wineberg. Hampson's property is to the south of Wineberg's and therefore on a lower level. The ground here is rock with a very slight covering of soil. The surface descends with a considerable inclination towards Sherbrooke street. It

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also declines but with less angle towards Peel street, Wineberg's house was built before that of Hampson. It is the southern one of a block of four houses built originally by the same proprietor, and being on a higher level than Hampson's the natural flow of the surface water would be from Wineberg's to Hampson's. To drain the flow of water from the four houses there was constructed what is called a French drain of loose stones passing through the yards of these houses southward until it reached the lane between the two properties; it then turned eastward through the land until it reached the main corporation sewer in Peel street, at a depth of 4 to 6 feet underground in the lane.

Hampson, who built after Wineberg's houses were constructed and who excavated his foundations to a depth of from 4 to 5 feet below the level of the drain, found that his basement was inundated by a heavy flow of water proceeding, as he conceived, from the French drain. He consequently instituted the present action against the present appellants claiming that they should cease to use the French drain in such manner as to be a source of danger or damage to his, Hampson's, adjoining property, and should pay him $10,000 for his damages. The appellants by their plea contended that the drain was made for the protection of the properties from the natural descent of the water from the upper properties; that no part of it entering the French drain escaped into Hampson's house; and if any water came into his cellar it was from the natural flow from the higher to the lower ground escaping through fissures in the rocks, a servitude to which all like situate properties were liable, and to which Hampson especially exposed his property by digging his foundations so deep.

The Superior Court after various procedures and

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judgments finally appointed three scientific experts, Hannaford, Shanly and Brown. The last two reported adversely to the appellant in separate reports, and that he should make certain works to prevent the flow of water in the respondent's cellar. The Superior Court adopted this report, and ordered the appellant to make certain works and drains within fifteen days from the judgment, the court, however, reserving judgment as to the damages claimed. This judgment was confirmed in appeal. Now, there is no condemnation in that judgment to any damages; there is, consequently, no controversy on this appeal as to $2,000 or over; *Ontario* v. *Marcheterre* (1). And the controversy does not relate to any title to land, annual rent or such like matters or things, where the rights in future might be bound. We have often held that the words "where the rights in future might be bound" are governed by the preceding words "such like matters or things;" *Gilbert* v. *Gilman* (2). That is the difference between the right of appeal to the Privy Council and the right to appeal to this court, as art. 1178 of the code of procedure says "other matters" not "such like matters."

The appellant, in order to sustain his appeal, contended that a question of "real rights" arose in this suit. I cannot find such an expression in the Supreme Court Act. The fact that in this case a question of a right of servitude arose would not give us jurisdiction. In *Wheeler* v. *Black* (3) the objection to the jurisdiction of this court was not taken by the respondent and was not noticed by the court. The words "title to lands" are only applicable in a case where a title to the property or a right to the title are in question. Hypothec as well as a servitude can more or less affect a title. Nevertheless the jurisprudence has not recognized ap-

(1) 17 Can. S. C. R. 141. (2) 16 Can. S. C. R. 189.
(3) 14 Can. S. C. R. 242.

peals in a case in which the mortgage alone is in controversy, the amount of the mortgage being under $2,000. See *Bank of Toronto* v. *Le Curé, &c., de la paroisse de la Nativité* (1).

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I could also add that I doubt whether the judgment is final. It appears however that it was executed.

Appeal quashed with costs.

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

Solicitors for respondent: *Bethune & Bethune.*

(1) 12 Can. S. C. R. 25.

1891

*May 27, 29.

*Oct. 28.

JOHN KELLY BARRETT.....APPELLANT;

AND

THE CITY OF WINNIPEG.....RESPONDENT.

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

Constitutional law—Education—Authority to legislate with respect to—Denominational schools—53 Vic. c. 38 (Man.)—33 Vic. c. 3 (D).

The exclusive right to make laws with respect to education in the Province of Manitoba is assigned to the Provincial Legislature by the constitution of the province as a part of the Dominion (33 Vic. ch. 3) with the restriction that nothing in any such law "shall prejudicially affect the rights or privileges with respect to denominational schools which any class of persons had by law *or practice* in the province at the union." The words "or practice" are an addition to, and the only deviation from, the terms of section 92 sub-sec. 1 of the B. N. A. Act, under which the New Brunswick Public Schools Act was upheld.

Prior to the union the Roman Catholics of Manitoba had no schools established by law, but there were schools under the control of the church for the education of Catholic children.

In 1890 the legislature of Manitoba passed an act relating to schools (53 Vic. ch. 38), by which the control of all matters relating to education and schools was vested in a department of education consisting of a committee of the Executive Council and advisory boards established as provided by the act; the schools of the province were to be free and non-sectarian and no religious exercises were to be had except as prescribed by the advisory boards; and the ratepayers of each municipality were to be indiscriminately taxed for their support.

A Catholic ratepayer moved to quash a by-law of the city of Winnipeg for collecting these school rates showing by affidavit the position of Catholic schools before the union, the practice of the church to control and regulate the education of Catholics and to have the doctrines of their church taught in the schools, and

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that Catholic children would not be allowed to attend the public schools.

Held, reversing the judgment of the court below, that this act 53 Vic. ch. 38, by depriving Catholics of the right to have their children taught according to the rules of their church, and by compelling them to contribute to the support of schools to which they could not conscientiously send their children, prejudicially affected rights and privileges with respect to their schools which they had *by practice* in the province at the union, and was *ultra vires* of the legislature of the province. *Ex parte Renaud* [1 Pugs. (N.B.) 273] distinguished.

APPEAL from a decision of the Court of Queen's Bench Man. (1) holding the Public Schools Act (2) of the Province to be *intra vires*.

This was an application by the appellant, a ratepayer of the city of Winnipeg and a Roman Catholic, to quash by-laws numbers 480 and 483 of the city council passed to levy an assessment upon the real and personal property in the city for the year 1890 for municipal purposes and for the city schools. The ground of the application was stated to be "because by the said by-laws the amounts to be levied for school purposes for the Protestant and Roman Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum."

1. The question at issue is whether the Manitoba Public School Act, 53 Vic. cap 38, is void, as offending against the following provision in the constitutional act of Manitoba, 33 Vic. ch. 3 (D.) which assigns to the provincial legislature the exclusive right to make laws with respect to education: "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union."

There is a similar provision in the B. N. A. Act, sec.

(1) 7 Man. L. R. 273. (2) 53 Vic. ch. 38.

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92 subsec. 1, under which the Public Schools Act of New Brunswick was held *intra vires; Ex parte Renaud*, (1); but that provision does not contain the words "or practice" which are found in the Manitoba Act.

In support of the application to quash the by-laws an affidavit made by the Archbishop of St. Boniface was read as showing the position of Catholics in regard to education prior to the union and the doctrines of the church in respect thereto. The affidavit contained the following clauses:

"Prior to the passage of the act of the Dominion of Canada passed in the thirty-third year of the reign of Her Majesty Queen Victoria, ch. 3, known as The Manitoba Act, and prior to the order in council issued in pursuance thereof, there existed in the territory now constituting the Province of Manitoba a number of effective schools for children. These schools were denominational schools, some of them regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations."

"The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the church contributed by its members."

"During the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no public schools in the sense of state schools. The members of the Roman Catholic Church supported the schools of their own church for the benefit of the Roman Catholic children, and were not under obligation to, and did not, contribute to the support of any other schools."

(1) 1 Pugs. (N. B.) 273.

"In the matter of education, therefore, during the period referred to Roman Catholics were, as a matter of custom and practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth."

"Roman Catholic schools have always formed an integral part of the work of the Roman Catholic Church. That church has always considered the education of the children of Roman Catholic parents as coming peculiarly within its jurisdiction. The school, in the view of the Roman Catholics, is in a large measure the 'Children's Church,' and wholly incomplete and largely abortive if religious exercises be excluded from it. The church has always insisted upon its children receiving their education in schools conducted under the supervision of the church, and upon their being trained in the doctrines and faith of the church. In education the Roman Catholic Church attaches very great importance to the spiritual culture of the child, and regards all education unaccompanied by instruction in its religious aspect as possibly detrimental and not beneficial to children. With this regard the church requires that all teachers of children shall not only be members of the church but shall be thoroughly imbued with its principles and faith; shall recognize its spiritual authority and conform to its directions. It also requires that such books be used in the schools with regard to certain subjects as shall combine religious instruction with those subjects, and this applies peculiarly to all history and philosophy."

"The church regards the schools provided for by 'The Public Schools Act' being chapter 38 of the statutes passed in the reign of Her Majesty Queen Victoria, in the fifty-third year of her reign, as unfit for the purpose of educating their children, and the

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children of Roman Catholic parents will not attend such schools. Rather than countenance such schools, Roman Catholics will revert to the system in operation previous to the Manitoba Act, and will establish, support and maintain schools in accordance with their principles and faith as aforementioned."

The first legislation in Manitoba for the establishment of a public school system was passed in 1871 (34 Vic. ch. 12), whereby a board of education, composed of not less than ten nor more than fourteen persons, was established, one-half of whom were Protestants and one-half Catholics. Each section of the board had a separate superintendent and, amongst other powers, had under its control and management the "discipline" of the schools of the section and the prescribing of such books as had reference to religion or morals. The moneys appropriated by the legislature for common school education were, after deducting the expenses of the board and superintendent's salaries, to be appropriated to the support and maintenance of common schools, one moiety thereof to the support of the Protestant schools and the other moiety to the support of the Catholic schools.

By subsequent legislation, enacted at various times up to the passage of the Public Schools Act (53 Vic. ch. 38), the powers of the Protestant and Catholic sections of the board of education were enlarged, whereby the entire control and management of the schools, their general government and discipline, were delegated to the section of the board to which the school belonged. Each section had power to select all the books, maps and globes to be used in the schools under its control, and to approve of the plans for the construction of school houses, "provided, however, that in the case of books having reference to religion and morals such selection by the Catholic section of the board shall be

subject to the approval of the competent religious authority." See Man. Stat., 34 Vic. ch. 12; 36 Vic. ch. 22; 39 Vic. ch. 1; 42 Vic. ch. 2; 44 Vic. ch. 4.

By the act respecting the Department of Education (53 Vic. ch. 37), and by the Public Schools Act (53 Vic. ch. 38), all prior legislation as to schools and education in Manitoba was repealed and a Department of Education created, to consist of the Executive Council, or a committee thereof, which, with an advisory board to be elected in the manner prescribed by the act, practically replaced the old board of education. It was further provided that all public schools in the province were to be free schools (sec. 5), that all religious exercises in the public schools should be conducted according to the regulations of the advisory board (sec. 6), and that, except as above, no religious exercises would be allowed in the schools which were declared to be "entirely non-sectarian" (sec. 8).

It is contended that this latter act is *ultra vires* of the Provincial legislature as prejudicially affecting the rights and privileges with respect to their schools which Roman Catholics had in the province at the union.

The Court of Queen's Bench (Man.) Dubuc J. dissenting, held the act *intra vires*. From that decision an appeal was taken to the Supreme Court of Canada.

S. H. Blake Q.C. and *Ewart* Q.C. (*Brophy* with them) for the appellant.

It is admitted that prior to the admission of Manitoba into the union Roman Catholics had entire control of the education of their children without any statutory enactment providing therefor, and had enjoyed such privilege for more than forty years. It is also admitted that the act passed in 1871, after the union, did not take away such right of control and was not objectionable to Catholics.

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The act of 1871 did not interfere with the system by which the Roman Catholics had the entire control over their own schools, and it is admitted that the present act does away with such control. Under it the schools in Manitoba are to be entirely non-sectarian, and the Roman Catholics will be obliged to support their own schools and to contribute to the support of Protestant schools, schools which they conscientiously believe to be not only negatively but positively injurious to the public good, or, as Lord Thesiger has said in reference to schools in which religious instruction has no place, that "the system means educating the people to be skilled villains instead of christians."

The position of the Roman Catholic Church in respect to education is presented to the court in this case by Archbishop Taché in his affidavit. He says "Roman Catholic schools have always formed an integral part of the work of the Roman Catholic Church. * * * The school, in the view of the Roman Catholics, is in a large measure the 'Children's Church,' and wholly incomplete and largely abortive if religious exercises could be excluded from it. * * * In education, the Roman Catholic Church attaches great importance to the spiritual culture of the child, and regards all education unaccompanied by instruction in its religious aspect as possibly detrimental and not beneficial to children."

The affidavit also shows that Catholics, owing to the rules and doctrines of their church, cannot conscientiously send their children to the public schools established under the act in question in this case.

When Manitoba became a part of the Dominion of Canada it was a part of the arrangement of union that Roman Catholics should be protected in the rights above outlined, which they claim have been swept away by this act. The sections of the constitutional

act (33 Vic. ch. 3), relating to education, are not precisely similar to the corresponding action of the British North America Act. The latter act only protects rights and privileges which any class of persons had by law, the Manitoba Act protects such rights as were had by law or practice. In New Brunswick it was held that Roman Catholics having had no schools established by law at confederation there were no rights to be affected. It might be argued that the word law should not be construed narrowly as meaning statutory law, but in the wide sense of usage, habit, custom, &c. Be that as it may we have in our act the words " or practice " so that we are not driven to this construction of the other word " law."

The wishes of parents are entitled to the first consideration. This is the opinion of the Royal Commission on education appointed in England in 1886.

It is argued that Catholics will still have a right to their own schools and are not obliged to send their children to the public schools. But the act does not protect them against the abolition of their rights. If they have their own schools they will be taxed for the support of the public schools and will thus be " prejudicially affected " in their rights which the law does not allow.

This is an act which prejudicially affects this class of persons, as to their conscientious convictions, as to their pockets, in their relation to their church, in the most important matter of secular and religious education of their young. It is in most marked contradiction to the spirit of conciliation displayed in the act which dealt with these rights and to the wise spirit of toleration which is displayed in the enactment that was in force for 20 years, and offends against the spirit and the letter of the act which defends the rights of these persons and

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therefore will be held unconstitutional by this court.

The following cases were cited by the learned counsel: *Bailey* v. *The Great Western Railway Company* (1); *Musgrave* v. *Inclosure Commissioners* (2); *Barlow* v. *Ross* (3); *Attorney General of Canada* v. *Attorney General of Ontario* (4).

Gormully Q.C. and *Martin* for the respondents. The words "by law or practice" as used in the act can only mean some binding rule or obligation to which the inhabitants of the province were committed at the time of the union; *Ex parte Renaud* (5). There was no such rule or obligation here.

As to the meaning of the word "rights" in a statute see Austin on Jurisprudence (6), and of "privileges" (7). And see *Fearon* v. *Mitchell* (8).

According to Archbishop Taché the right or privilege enjoyed by Catholics at the union was to have denominational schools supported by fees from parents or by the funds of the church. With this the Public Schools Act in no way interferes.

If the contention against this act is to prevail it follows that the legislature of Manitoba cannot pass any effective act relating to education.

Sinclair v. *Mulligan* (9), and *The Duke of Newcastle* v. *Morris* (10) were cited.

Sir W. J. RITCHIE C.J.—This is an application to quash two by-laws of the municipal corporation of the city of Winnipeg, which were passed for levying a rate for municipal and school purposes in that city for the year 1890, and they assess all real and personal property in the city for such purpose. It is asked that

(1) 26 Ch. D. 434.
(2) L. R. 9 Q. B. 162.
(3) 24 Q. B. D. 381.
(4) 20 O. R. 222.
(5) 1 Pugs. (N.B.) 273.
(6) 4 Ed. vol. 1 p. 406.
(7) Vol. 2 p. 233.
(8) L. R. 7 Q. B. 690.
(9) 3 Man. L. R. 481.
(10) L. R. 4 H. L. 661.

these by-laws be quashed for illegality on the following among other grounds: That because by the said by-laws the amount to be levied for school purposes for the Protestant and Roman Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum.

It must be assumed that in legislating with reference to a constitution for Manitoba the Dominion Parliament was well acquainted with the conditions of the country to which it was about to give a constitution, and they must have known full well that at that time there were no schools established by law, religious or secular, public or sectarian. In such a state of affairs, and having reference to the condition of the population, and the deep interest felt and strong opinions entertained on the subject of separate schools, it cannot be supposed that the legislature had not its attention more particularly directed to the educational institutions of Manitoba, and more especially to the schools then in practical operation, their constitution, mode of support and peculiar character in matters of religious instruction. To have overlooked considerations of this kind is to impute to parliament a degree of short-sightedness and indifference which, in view of the discussions relating to separate schools which had taken place in the older provinces, or some of them, and to the extreme vigilance with which educational questions are scanned and the importance attached to them, more particularly by the Catholic Church as testified to by Monseigneur Taché, cannot to my mind be for a moment entertained. Read in the light of considerations such as these must we not conclude that the legislature well weighed its language and intended that every word it used should have force and effect?

The British North America Act confers on the local

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legislature the exclusive power to make laws in relation to education, provided nothing in such laws shall prejudicially affect any right or privilege, with respect to denominational schools, which any class of persons had by law in the province at the union, but the Manitoba Act goes much further and declares that nothing in such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union. We are now practically asked to reject the words " or practice " and construe the statute as if they had not been used, and to read this restrictive clause out of the statute as being inapplicable to the existing state of things in Manitoba at the union, whereas on the contrary, I think, by the insertion of the words " or practice " it was made practically applicable to the condition at the time of the educational institutions, which were, unquestionably and solely as the evidence shows, of a denominational character. It is clear that at the time of the passing of the Manitoba Act no class of persons had by law any rights or privileges secured to them; so if we reject the words " or practice " as meaningless or inoperative we shall be practically expunging the whole of the restrictive clause from the statute. I know of no rule of construction to justify such a proceeding unless the clause is wholly unintelligible or incapable of any reasonable construction. The words used, in my opinion, are of no doubtful import, but are, on the contrary, plain, certain and unambiguous, and must be read in their ordinary grammatical sense. Effect should be given to all the words in the statute, nothing adding thereto, nothing diminishing therefrom, as was said by Tindall C.J. in *Everett* v. *Wells* (1).

The legislature must be understood to mean what it

(1) 2 Scott (N.R.) 531.

has plainly expressed, and this excludes construction. See *Rex* v. *Banbury* (1).

It is a settled canon of construction that no clause, sentence or word, shall be construed superfluous, void or insignificant if it can be prevented. See *The Queen* v. *The Bishop of Oxford* (2).

While it is quite clear that at the time of the passing of this act there were no denominational or other schools established and recognized by law, it is equally clear that there were at that time in actual operation or practice a system of denominational schools in Manitoba well established and the *de facto* rights and privileges of which were enjoyed by a large class of persons. What then was there more reasonable than that the legislature should protect and preserve to such class of persons those rights and privileges they enjoyed in practice, though not theretofore secured to them by law, but which the Dominion Parliament appears to have deemed it just should not, after the coming into operation of the new provincial constitution, be prejudicially affected by the action of the local legislature ?

I quite agree with the cases cited by the learned Chief Justice of Manitoba as to the rules by which the act should be construed. I agree that the court must look not only at the words of the statute but at the cause of making it to ascertain the intent. When we find the parliament of Canada altering and adding to the language of the British North America Act by inserting a limitation not in the British North America Act, must we not conclude that it was done advisedly ? What absurdity, inconsistency, injustice, or contradiction is there in giving the words "or practice" a literal construction, more especially, as I have endeavoured to show, as the literal meaning is the only meaning the words are capable of and is entirely con-

(1) 1 A. & E. 142.
(2) 4 Q. B. D. 261.

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sistent with the manifest intention of the legislature, namely, to meet the exigencies of the country, and cover denominational schools of the class practically in use and operation? If the literal meaning is not to prevail I have yet to hear what other meaning is to be attached to the words "or practice." If the legislature intended to protect the classes of persons who had founded and were carrying on denominational schools of the character of those which existed at the time of the passing of the act I am at a loss to know what other words they could more aptly have used. They might, it is true, have said "which any class of persons has by law or usage," but the words "practice" and "usage" are synonymous. I agree, also, that we should ascertain what the language of the legislature means, in other words, to suppose that parliament meant what parliament has clearly said.

It cannot be said that the words used do not harmonize with the subject of the enactment and the object which I think the legislature had in view. If the legislature intended to recognize denominational schools how could they have used more expressive words to indicate their intention since the words used, read in their ordinary grammatical sense, admit of but one meaning and therefore one construction? And we should not speculate on the intention of the legislature that intention being clearly indicated by the language used in view of the condition of, and the state of education in, that country. The object the legislature must have had in view in using them was clearly to protect the rights and privileges with respect to denominational schools which any class or persons had by law or practice, that is to say, had by usage, at the time of the union. I cannot read the language of the act in any other sense.

The decision of the court of New Brunswick in

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the case of *Ex parte Renaud* (1) referred to in the court below has no application in this case. That case turned entirely on the fact that The Parish School Act of New Brunswick, 21 Vic. ch. 9, conferred no legal rights on any class of persons with respect to denominational schools. It was there simply determined that there were no legal rights with respect to denominational schools, and therefore no rights protected by the British North America Act, a very different case from that we are now called on to determine. It may very well be that in view of the wording of the British North America Act and the peculiar state of educational matters in Manitoba the Dominion Parliament determined to enlarge the scope of the British North America Act, and protect not only denominational schools established by law but those existing in practice, for as I am reported to have said and no doubt did say, in *Ex parte Renaud* (1) that in that case: "We must look to the law as it was at the time of the union and by that and that alone be governed."

Now on the other hand, in this case, we must look to the practice with reference to the denominational schools as it existed at the time of the passing of the Manitoba Act.

That this was the view taken by the legislature of Manitoba would seem to be indicated by the legislation of that province up to the passing of the Public Schools Act which very clearly recognized denominational schools and made provision for their maintenance and support, providing that support for Protestant schools should be taxed on Protestants and for Catholic schools should be taxed on Catholics, and conferring the management and control of Protestant schools on Protestants and the like management and control of Catholic

(1) 1 Pugs. (N.B.) 273.

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schools on Catholics. This denominational system was most effectually wiped out by the Public Schools Act and not a vestige of the denominational character left in the school system of Manitoba. Mr. Justice Dubuc gives an accurate synopsis of the legislation prior to the passing of the Public Schools Act.

The only question, it strikes me, we are now called upon to consider is: Does this Public School Act prejudicially affect the class of persons who in practice enjoyed the rights and privileges of denominational schools at the time of the union? Now, what were the provisions of the Public Schools Act? Mr. Justice Dubuc likewise gives a synopsis of the Public Schools Act as follows:

[His Lordship here read that portion of the judgment of Dubuc J. and proceeded:]

But it is said that the Catholics as a class are not prejudicially affected by this act. Does it not prejudicially, that is to say injuriously, disadvantageously, which is the meaning of the word "prejudicially," affect them when they are taxed to support schools of the benefit of which, by their religious belief and the rules and principles of their church, they cannot conscientiously avail themselves, and at the same time by compelling them to find means to support schools to which they can conscientiously send their children, or in the event of their not being able to find sufficient means to do both to be compelled to allow their children to go without either religious or secular instruction? In other words, I think the Catholics were directly prejudicially affected by such legislation, but whether directly or indirectly the local legislature was powerless to affect them prejudicially in the matter of denominational schools, which they certainly did by practically depriving them of their denominational

schools and compelling them to support schools the benefit of which Protestants alone can enjoy.

In my opinion the Public Schools Act is *ultra vires* and the by-laws of the city of Winnipeg, Nos. 480 and 483, should be quashed and this appeal allowed with costs.

STRONG J.—I have read the judgment prepared by the Chief Justice, and entirely concur in the conclusion at which he has arrived as well as in the reasons he has given therefor. I have nothing to add to what he has said.

FOURNIER J.—C'est au moyen d'une demande pour faire annuler les règlements Nos. 480 et 483 adoptés par le Conseil Municipal de Winnipeg que l'appelant a soulevé dans cette cause l'importante question de la légalité de l'acte 53 Vic., ch. 38, concernant les écoles publiques de Manitoba.

Par les deux règlements adoptés en vertu du nouvel acte d'école et des dispositions de l'acte municipal une taxe de deux centins par dollar est imposée sur la valeur de la propriété mobilière et immobilière dans la cité de Winnipeg. La proportion de cette taxe appropriée aux écoles est fixée à 4 et un $\frac{1}{5}$ de mille dans le dollar.

Le moyen de nullité invoqué est que par les règlements une seule taxe est prélevée uniformément sur les catholiques et les protestants pour le soutien des écoles.

Ce moyen est énoncé en ces termes:

Because by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic shools are united and one rate levied upon Protestants and Catholics alike for the whole sum.

Cette question a été soumise à l'honorable juge Killam, qui a décidé en faveur de la constitutionnalité de l'acte et de la légalité des *by-laws* en question. Son

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jugement a été confirmé par la majorité de la Cour Suprême de Manitoba. C'est ce dernier jugement qui est maintenant soumis à la considération de cette cour.

Par cet acte, 53 Vic., ch. 38, le système des écoles séparées, catholiques et protestantes, qui avait été établi conformément à l'acte constitutionnel de Manitoba, 33 Vic., ch. 3, a été complètement aboli après avoir été en force pendant dix-neuf ans.

Il est important pour la décision de cette question de se reporter aux circonstances qui ont amené l'entrée de cette province dans la confédération canadienne. On se souvient que c'est à la suite d'une rébellion qui avait jeté la population dans une profonde et violente agitation, soulevé les passions religieuses et nationales, et causé de grands désordres qui avaient rendu nécessaire l'intervention du gouvernement fédéral. C'est dans le but d'y rétablir la paix publique et de concilier cette population que le gouvernement fédéral leur accorda la constitution dont ils ont joui jusqu'à présent.

Le principe des écoles séparées introduit dans l'acte de l'Amérique Britannique du Nord par la section 93 fut aussi introduit dans la constitution de Manitoba, et déclaré s'appliquer aux écoles séparées qui existaient de fait dans ce territoire avant son organisation en province. La population était alors divisée à peu près également entre catholiques et protestants.

Tout en donnant à la province le pouvoir de légiférer concernant l'éducation la sec. 22 ss. 1 ajoute à la restriction de la section 93 de l'acte de l'Amérique Britannique du Nord de ne préjudicier aucunement au droit et au privilège conféré par la loi relativement aux écoles séparées, celle de ne préjudicier non plus aux écoles séparées existantes par la coutume du pays (*by practice*).

C'est sur cette extension de la prohibition de la section 93 qui protégeait les écoles séparées, établies par

la coutume que la législature de Manitoba s'est fondée pour introduire le principe des écoles séparées protestantes et catholiques dans le premier acte des écoles qu'elle a passé après son organisation. Dans ce but, il fut décidé par cet acte que le lieutenant gouverneur en conseil aurait le pouvoir de nommer un bureau d'éducation composé de pas moins de dix et pas plus de quatorze personnes dont une moitié serait catholiques et l'autre protestants et deux surintendants l'un pour les écoles protestantes et l'autre pour les écoles catholiques qui seraient les secrétaires conjoints du bureau.

Les devoirs des bureaux sont définis comme suit :— 1° de faire de temps en temps les règlements qu'ils jugeront convenables pour l'organisation des écoles communes; 2° de choisir les livres, mappes, globes pour l'usage des écoles communes, en ayant le soin de choisir les livres anglais, mappes et globes pour les écoles anglaises et des livres français pour les écoles françaises mais ce pouvoir ne devait pas s'étendre au choix des livres concernant la religion et la morale, ce choix étant réglé par une clause subséquente; 3° de changer et de subdiviser avec la sanction du lieutenant gouverneur tout district d'école établie en vertu de cet acte. La sous-sec. 12 donne au bureau le pouvoir de prescrire pour l'usage des écoles les livres concernant la religion et la morale; par la sous-sec. 13, les argents appropriés par la législature pour l'éducation doivent être divisés également une moitié pour le support des écoles protestantes et l'autre pour celui des écoles catholiques.

Le premier bureau nommé par le lieutenant gouverneur en conseil était composé de l'Archevêque de St. Boniface de l'Evêque de la terre de Rupert, de plusieurs prêtres catholiques et de ministres protestants de diverses dénominations et d'une couple de laïques pour chaque section.

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Ce statut a été amendé de temps en temps pour satisfaire à de nouveaux besoins à mesure que les établissements se développaient et que la population augmentait, mais toujours en conservant le même système d'avoir des écoles séparées pour les catholiques et les protestants. Les seuls changements importants furent par l'acte de 1875 viz: l'augmentation du nombre des membres du bureau à 21, douze protestants et neuf catholiques, et la division des argents votés par la législature entre les protestants et les catholiques en proportion du nombre d'enfants en âge de fréquenter les écoles dans chaque district catholique ou protestant.

A part de ces changements le système des écoles séparées et l'action indépendante des deux sections du bureau furent de plus en plus confirmés par les statuts subséquents. La sec. 27 de l'acte de 1875 c. 27 dit que l'établissement dans un district d'une école d'une dénomination n'empêchera pas l'établissement d'une école d'une autre dénomination dans le même district. Ce principe reçoit une certaine extension et est mis en pratique par les secs. 39, 40 et 41 de l'acte de 1876 c. 1.

Tel est l'état de choses qui a existé sous le rapport de l'éducation depuis l'entrée de la province de Manitoba dans la confédération. C'est en vertu des dispositions de l'acte constitutionnel, confirmé par un acte du Parlement impérial, que tous les actes de la province établissant le système des écoles séparées a été introduit et regularisé.

Bien qu'avant cette époque il n'y eût pas à proprement parler de système d'éducation publique, les protestants et les catholiques étaient depuis longtemps dans l'habitude de soutenir respectivement chacun pour son compte et à ses frais et dépens, des écoles qui, dans le fait étaient des écoles séparées où l'enseignement se faisait suivant les principes de chaque dénomination. Dans son affidavit à cet effet, produit au sou-

tien des prétensions de l'appelant et dont les faits ne sont pas contestés par la partie adverse, l'Archevêque Taché définit l'état de chose existant alors comme suit:

Avant l'acte de la Puissance du Canada passé dans la 33m. année du règne de Sa Majesté la Reine Victoria, ch. 3, connu sous le nom de l'Acte de Manitoba, et avant l'ordre en conseil émis en vertu de cet acte il existait dans le territoire formant maintenant la Province de Manitoba un nombre d'écoles effectives pour l'instruction des enfants. 3. Ces écoles étaient des écoles séparées (denominational) dont les unes étaient réglées et contrôlées par l'église catholique et les autres par les diverses dénominations protestantes. 4. Les moyens nécessaires pour le soutien des écoles catholiques étaient fournis en partie par des honoraires d'école, payés par les parents des enfants qui fréquentaient les écoles, et le reste était payé par l'église au moyen des contributions de ses membres. 5. Durant cette période, les catholiques n'avaient aucun intérêt ni contrôle dans les écoles protestantes et les protestants n'avaient non plus aucun intérêt ni contrôle dans les écoles catholiques. Il n'y avait pas d'écoles publiques dans le sens d'écoles soutenues par l'Etat. Les catholiques soutenaient les écoles de leur église pour l'avantage des enfants catholiques, et n'étaient pas obligés de contribuer au soutien d'aucune autre école. En ce qui concerne l'éducation, pendant cette période les catholiques étaient par la coutume et la pratique séparés du reste de la population et leurs écoles étaient conduites suivant les principes et les croyances de l'église catholique."

Dans le même affidavit l'Archevêque déclare que l'Eglise considère les écoles établies en vertu du "Public School Act" comme impropres à l'éducation des enfants catholiques et que les enfants ne les fréquenteront pas: que plutôt que d'encourager ces écoles, les catholiques préfèreront retourner au système existant avant l'acte de Manitoba et qu'ils établiront et maintiendront des écoles conformément aux principes de leur foi; que les protestants sont satisfaits du système d'éducation établi par le "Public School Act" parce que ces écoles sont tout-à-fait semblables à celles qu'ils maintenaient avant la révocation des actes antérieurs admettant le système des écoles séparées dont ils avaient le contrôle absolu.

Les affidavits en opposition à la motion établissent

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que les écoles existantes avant l'entrée du Manitoba dans la Confédération n'étaient que des écoles privées, soumises à aucun contrôle de la part du public et n'en recevant aucun subside. Il n'y avait pas de taxes perçues par l'autorité pour cet objet et il n'y avait aucun moyen legal de forcer le public à contribuer au soutien de ces écoles privées.

Les affidavits donnés de part et d'autre ne se contredisent nullement et donnent une idée correcte de la situation des écoles existantes dans le territoire qui a depuis formé la province de Manitoba. Il en résulte qu'il est clairement prouvé que les écoles alors existantes, quoique non établies par aucune loi, étaient de fait, et dans la pratique des écoles séparées (*denominational schools*). C'est cet état de choses qui a été consacré par la 22, sec. de l'acte constitutionnel de Manitoba, par la déclaration que rien dans les lois qui seraient passées par la législature ne devra préjudicier à aucun droit ou privilège conféré, lors de l'union par la loi ou par la coutume à aucune classe particulière de personnes dans la province, relativement aux écoles séparées (*denominational schools.*)

Cette disposition est la source du pouvoir exercé par la législature du Manitoba en vertu de l'acte 34 Vic., ch. 12, confirmant et approuvant le système des écoles séparées existant auparavant. On a vu par ses principales dispositions citées plus haut que le contrôle exercé par les protestants et les catholiques, sur leur écoles respectives, leur avait été conservé par cette loi et par les suivantes adoptées, jusqu'à l'acte 53 Vic., ch. 38.

A la session de 1890, la législature a passé deux actes au sujet de l'instruction, le premier, ch. 37, abolit le bureau d'éducation ci-devant existant ainsi que la charge de surintendant de l'éducation et crée un département de l'éducation, formé de l'exécutif ou d'un comité

pris dans son sein, nommé par le lieutenant-gouverneur en conseil et d'un bureau d'aviseurs composé de sept membres, dont quatre nommés par le département de l'éducation, deux par les instituteurs de la province et un par le conseil de l'université. Entre autres devoirs le bureau des aviseurs a le pouvoir d'examiner et autoriser les livres de texte et de référence pour l'usage des écoles et des bibliothèque d'écoles ; de définir les qualifications des instituteurs et des inspecteurs des écoles ; de nommer les personnes chargées de préparer les programmes d'examen ; de prescrire la forme des exercices religieux qui seront pratiqués dans les écoles.

L'autre acte est le " Public School Act " ch. 38, dont la constitutionnalité est attaquée. Il révoque tous les statuts en force concernant l'éducation et déclare par la section 3 que tous les districts scolaires protestants et catholiques, ainsi que les élections et nominations à aucun office, contrats, cotisations, faits ci devant au sujet des écoles catholiques et protestantes et en existence lors de sa mise en force seront soumis aux dispositions de cet acte ; la section 4 continue en office les syndics existants lors de sa mise en force comme s'ils avaient été élus en vertu des dispositions de cet acte ; section 5, toutes les écoles publiques seront libres et tous les enfants de l'âge de 5 à 16 ans dans les municipalités rurales, et de 6 à 16 ans dans les villes auront le droit de les fréquenter. Section 6. Les exercices religieux dans les écoles publiques seront conduits conformément aux règlements du bureau des aviseurs. Le temps pour ces exercices est fixé, et, si les parents ne désirent pas que leurs enfants y assistent alors ces derniers seront renvoyés avant ces exercices. Par la sec. 7 les exercices religieux sont à l'option des syndics d'écoles pour le district et sur réception d'une autorisation écrite des syndics, les instituteurs seront obligés de faire ces exercices religieux. Les

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écoles publiques ne seront pas des écoles de sectaires et aucun exercice religieux n'y sera permis excepté qu'en la manière ci-dessus prescrite.

L'acte pourvoit à l'établissement de districts scolaires dans les municipalités rurales et dans les villes et villages, à l'élection des syndics d'écoles et à l'imposition de taxes pour les fins scolaires.

La sec. 92 déclare que

> Le conseil municipal de toute cité, ville et village prélèvera et collectera sur la propriété imposable dans les limites de la municipalité et en la manière prescrite par cet acte et par l'acte municipal et de cotisation telles sommes qui seront requises par les syndics pour les fins scolaires.

Sec. 108 contient au sujet de l'octroi législatif pour les écoles la disposition suivante :

> Toute école qui ne sera pas conduite conformément aux dispositions de cet acte, ou de tout autre acte alors en force ou conformément aux règlements du département de l'éducation ou du bureau des aviseurs, ne sera pas considéré une école publique suivant la loi et n'aura aucune part de l'octroi législatif.

La sec. 143 statue que les instituteurs n'emploieront pas d'autres livres d'écoles que ceux autorisés par le bureau des aviseurs et aucune partie de l'octroi législatif ne sera payé aux écoles employant les livres non autorisés. Par la sec. 179 :

> Dans les cas où avant la mise en force de cet acte, des districts d'écoles catholiques ont été établis tel que mentionné dans la section précédente (c.à.d.) couvrant le même territoire qu'un district protestant, tel district d'école catholique, lors de la mise en force de cet acte cessera d'exister et tout l'avoir de tel district avec son passif appartiendront au district d'école publique.

L'ensemble de ces dispositions a produit un changement complet dans le système d'éducation ; le statut a fait disparaître non seulement les clauses de la loi antérieure établissant les écoles séparées mais a même proscrit jusqu'à l'usage des termes " dénominations catholiques et protestantes." La sec. 179 dans les cas où un district catholique d'école couvre le même terri-

toire qu'un district protestant, va jusqu'à la confiscation des biens du district catholique et transporte la propriété au district protestant désigné sous le nom d'école publique.

Par cette analyse des principales dispositions de l'acte 53 Vic., ch. 38, on voit que la législature du Manitoba, après avoir établi conformément au pouvoir que lui en donnait sa constitution, un système d'écoles séparées, a complètement aboli ce système et en a organisé un autre directement en opposition au premier, dans lequel elle fait disparaître le droit aux écoles séparées tel qu'il avait existé jusqu'alors pour lui en substituer un autre, fondé sur le principe *non sectarian*, excluant l'enseignement religieux des écoles et laissant aux syndics d'écoles le choix des livres concernant la religion et la morale qui seront en usage dans ces écoles

Le système ainsi établi est tout-à-fait contraire aux idées religieuses des catholiques et à la doctrine de l'église catholique romaine, et leur enlève le droit reconnu par l'acte du Manitoba, d'avoir des écoles séparées.

Cette législation n'excède-t-elle pas le pouvoir de la législature? N'est-elle pas directement en opposition à la section 22 de l'acte du Manitoba et partant *ultra vires?*

La section 93 de l'acte de l'Amérique Britannique du Nord, donnant aux législatures des provinces le pouvoir de légiférer au sujet de l'éducation y met la restriction suivante:—

> Rien dans ces lois ne devra préjudicier à aucun droit ou privilège conféré lors de l'union par la loi à aucune classe particulière de personnes dans la province relativement aux écoles séparées (denomination schools.)

Cette disposition a été introduite dans la 1re s. s. de la section 22 de l'acte du Manitoba, avec la seule

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différence de l'addition des mots "or practice" ou par la coutume à la suite des mots "par la loi," de sorte que cette section s'y lit maintenant comme suit:—

Rien dans ces lois ne devra préjudicier à aucun droit ou privilège conféré lors de l'Union par la loi ou par la coutume à aucune classe particulière de personnes dans la province relativement aux écoles séparées (denominational schools.)

La solution de la question repose donc entièrement dans l'interprétation à donner aux mots "ou par la coutume" introduits dans la section 22, et qui ne se trouve pas dans la section 93 de l'Acte de l'Amérique Britannique du Nord. Evidemment cette addition n'a pas été faite sans motifs, et l'on doit en trouver la signification par l'application des règles concernant l'interprétation des statuts données par les autorités.

Une des premières règles est que lorsque les termes d'un statut ne sont susceptibles que d'une seule signification la cour n'a pas le pouvoir de rechercher l'intention de la législature pour interpréter un acte suivant ses propes notions de ce qu'il aurait dû statuer. Maxwell on Statutes (1). *York & Midland Railway Company* v *The Queen* (2.)

Lorsque le langage est précis et sans ambiguité, mais en même temps incapable d'une signification raisonnable et qu'en conséquence l'acte n'est pas susceptible d'exécution, une cour n'a pas le droit de donner aux mots sur de simples conjectures, une signification qui ne leur appartient pas. Maxwell on Statutes (3). Cette règle ne s'applique qu'aux cas où le langage est précis et susceptible que d'une seule signification.

Les mots "ou par la coutume" "or practice" insérés dans la section 22 de l'acte du Manitoba n'ont pas à la vérité une signification technique, quoique dans le langage ordinaire ils en aient une bien claire et peu

(1) 2 Ed. p. 6.
(2) 1. E. & B. 858.
(3) 2 Ed. p. 23.

susceptible d'ambiguité. On prétend cependant qu'ils signifient que les catholiques romains, quoique forcés de contribuer au soutien des écoles publiques, ont la permission de maintenir des écoles séparées comme écoles privées. C'est une interprétation très étroite et en contradiction avec les termes de la sec. 22. On prétend aussi qu'ils assurent l'exemption de l'obligation d'assister aux écoles publiques ; mais l'interprétation la plus libérale et la plus sensée est sans doute que les écoles séparées existant de fait lors de l'Union, ces mots ont été introduits dans l'acte du Manitoba pour leur donner une existence légale de façon à empêcher la législature locale de légiférer à leur détriment.

Si les mots "par la coutume" ou "by practice" étaient susceptibles d'interprétations différentes on pourrait leur appliquer une ancienne règle d'interprétation qui déclare qu'une chose comprise dans la lettre du statut n'est cependant pas dans les limites du statut, si elle n'est pas conforme à l'intention de la législature (1). C'est donc l'intention de la législature qu'il faut rechercher pour se faire une idée juste de la signification des mots "*by practice.*"

Maxwell dit en outre (2) :

> To arrive at the real meaning, it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope and object. Is is necessary according to Lord Coke, to consider: 1. What was the law before the act was passed. 2. What was the mischief or defect for which the law had not provided. 3. What remedy Parliament has appointed ; and 4. The reason of the remedy.

Cette règle a été énoncée dans la cause de *Heydon* (3), décidée sous le règne d'Elizabeth et a toujours été suivie depuis.

Il faut souvent, pour trouver la véritable signification des mots employés dans un statut, remonter à l'histoire

(1) Maxwell p. 24 ; Bacon's Abrid. statute (1) E.
(2) A la page 27.
(3) 3 Rep. 7 b.

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du sujet et examiner les circonstances particulières qui ont porté la législature à adopter la disposition.

Dans la cause de *River Wear Commissioners* v. *Adamson*, (1), Lord Blackburn dit à la page 763 :

I shall state as precisely as I can what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing, and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But from the interpretation of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and that was the object appearing from the circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used.

Dans l'interprétation des statuts dit Maxwell (2) au sujet de la cause de *Gorham* v. *The Bishop of Exeter* (3) :

The interpreter in order to understand the subject matter, and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief or defect for which the law had not provided, that is, he must call to his aid all those external or historical facts which are necessary for the purpose, and which led to the enactment, and for those he may consult temporary or other authentic works and writings.

In *Atty. Gen.* v. *Sillem* (4) Lord Bramwell dit :

It may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it, and so, perhaps, history may be referred to to show what facts existed bringing about a statute, and what matters influenced men's minds when it was made.

Lord Turner dans la cause de *Hawkins* v. *Gathercole* (5) :

In construing acts of Parliament the words which are used are not alone to be regarded. Regard must also be had to the intent and meaning of the legislature. The rule upon the subject is well expressed in the case of *Stradling* v. *Morgan* (6), and also in *Eyston* v. *Studd* (7). In determining the question before us, we have therefore to consider

(1) 2 App. Cas 743.
(2) P. 30.
(3) Rapportée par Moore 462.
(4) 2 H. et C. 531.
(5) 6 DeG. M. & G. 1, pp. 20-21.
(6) Plowd 204.
(7) Plowd 467.

not merely the words of the Act of Parliament, but the intent of the legislature to be collected from the cause and necessity of the Act being made from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject.

In *Holme* v. *Guy* (1), Jessel M. R. dit :

The court is not oblivious of the history of law and legislation. Although the court is not at liberty to construe an Act of Parliament by the motives which influenced the legislature, yet when the history of law and legislation tells the court what the object of the legislature was, the court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view of extending it to something that was not intended.

Pour établir la véritable signification des mots "ou par la coutume" "*by practice*" ces autorités nous justifient d'examiner les circonstances et les motifs qui les ont fait introduire dans le statut.

La 93e section de l'acte de l'A. B. N. donne à la législature de chaque province le pouvoir exclusif de faire les lois concernant l'éducation sujet toutefois à certaines restrictions dont la première est que rien dans ces lois ne portera préjudice au droit ou privilège qu'aucune classe de personnes possède en vertu de la loi. La 1re s.s. de la 22e section de l'acte du Manitoba ajoute à cette prohibition celle de préjudicier aux droits conférés par la coutume à aucune classe de personnes aussi bien qu'à ceux conférés par la loi.

Quelle a été la raison de l'introduction de cette restriction dans la sec. 93 et pour quels motifs a-t-elle été étendue au droit qui ne reposait que sur la coutume dans Manitoba lors de la passation de l'Acte 33 Vic., ch. 3 ?

Lorsque les provinces d'Ontario, Québec, la Nouvelle-Ecosse et le Nouveau-Brunswick formèrent la confédération chacune avait un système complet d'écoles

(1) 5 Ch. D. 905.

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publiques établies par la loi. Dans Ontario et Québec la loi reconnaissait aux minorités d'une croyance différente de celle de la majorité le droit d'avoir des écoles séparées. En établissant ces écoles les minorités étaient exemptes de contribution au soutien des écoles publiques et avaient droit à une proportion de l'octroi législatif.

Dans le Haut-Canada (Ontario) la question des écoles séparées avait formé le sujet de luttes vives et passionnées entre protestants et catholiques, mais avait été enfin réglée par l'acte des écoles de 1863, qui avait rétabli la paix et l'harmonie dans la province.

Dans la Nouvelle-Ecosse et le Nouveau-Brunswick il en était autrement bien que de fait les catholiques y avaient leurs propres écoles en vertu de la loi des écoles communes ou écoles de paroisses, mais ces écoles n'étaient pas reconnues comme écoles séparées et les catholiques n'y avaient aucun droit ou privilège à ce sujet par la loi.

Les auteurs de la confédération afin d'éviter le renouvellement de l'agitation qui avait existé à ce sujet dans l'ancienne province du Canada entre les catholiques et les protestants, tout en reconnaissant aux provinces le droit de légiférer au sujet de l'éducation adoptèrent sagement des dispositions pour la protection des droits et privilèges des minorités, en prohibant toute législation qui porterait atteinte aux droits et privilèges existant sur le sujet.

Cette restriction devait s'appliquer à toute nouvelle province qui entreraient plus tard dans la confédération aussi bien qu'à celles qui en firent partie originairement.

Une question concernant l'étendue de cette restriction fut soulevée dans le Nouveau-Brunswick. La loi en force à ce sujet lors de la confédération était l'acte des écoles de paroisses de 1858. En 1871 la législa-

ture passa un acte concernant les écoles communes auquel les catholiques romains firent beaucoup d'objections. Des pétitions furent adressées au parlement du Canada pour en empêcher la mise en force. Enfin la question fut portée devant la Cour Suprême du Nouveau-Brunswick et la cour dans un jugement très élaboré prononcé par Sir W. J. Ritchie, alors juge en chef de la Cour Suprême du Nouveau-Brunswick, décida que les catholiques du Nouveau-Brunswick n'avaient par la loi (*by law*) au temps de la confédération aucun droit ou privilège concernant les écoles séparées. Dans le cours de ses observations l'honorable juge en chef s'exprime ainsi :

Where is there anything that can, with propriety, be termed a legal right? Surely the legislature must have intended to deal with legal rights and privileges. How is it to be defined? How enforced?

Et plus loin :

If the Roman Catholics had no legal rights, as a class, to claim any control over, or to insist that the doctrines of their church should be taught in all or any schools under the Parish Schools Act, how can it be said (though as a matter of fact such doctrines may have been taught in numbers of such schools) that, as a class of persons they have been affected in any legal right or privilege with respect to "Denominational Schools" construing those words in their ordinary meaning, because under the Common Schools Act, 1871, it is provided that the schools shall be non-sectarian?

Cette décision fut plus tard confirmée au Conseil Privé. Il est facile de voir par les raisonnements donnés à l'appui de cette décision et par l'importance donnée à l'expression "legal rights" que si les droits que les catholiques avaient par la coutume, eussent été spécialement mentionnés, comme ceux existant par la loi, que la décision eût été différente.

M. Ewart, conseil de l'appelant, ayant fait la remarque que les mots "par la coutume" avaient été introduits dans l'Acte du Manitoba pour prévenir les difficultés qui avaient eu lieu au Nouveau-Brunswick,

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le procureur général, conseil de l'intimée, fit remarquer que l'acte des écoles avait été passé en 1871, un an après l'acte du Manitoba ; mais il aurait dû ajouter que ce projet de loi était depuis longtemps devant la législature et le public, et faisait le sujet de discussions très animées. L'honorable Geo. A. King avait introduit cette mesure en 1869 pour la première fois, et encore une seconde fois le 24 février 1870, lorsqu'elle fut référée à un comité de toute la chambre et discutée les 17, 22, 31 mars et le 1er avril. Cette loi ne devait venir en force qu'un an après son adoption.

L'acte du Manitoba passé par le Parlement de la Puissance n'est devenu loi que le 12 mai 1870, plus d'un mois après la discussion de l'acte des écoles du Nouveau-Brunswick et plus d'un an après sa première introduction dans la législature.

Y a-t-il rien d'étonnant à ce que les discussions qui ont eu lieu sur le sujet à différentes époques aient été rapportées et commentées par le public, comme c'est ordinairement le cas, et soient parvenues à la connaissance des membres du Gouvernement fédéral et de la Chambre des Communes ? C'est un fait que l'agitation causée par ce bill était connue de toute la Chambre des Communes, et nul doute que c'est pour prévenir le retour de semblable agitation que les mots " par la coutume " ont été ajoutés dans la 22e section de l'Acte du Manitoba.

L'existence d'écoles séparées dans le territoire du Manitoba avant l'organisation de la province était connue, ainsi que le fait qu'il n'existait aucune loi pour protéger les minorités catholiques ou protestantes qui auraient voulu conserver leurs écoles séparées. Ces faits, on doit le présumer, étaient connus des législateurs. Comme il n'y avait alors aucune loi concernant les écoles séparées ni aucune autre espèce d'école, la 1ère s.s. de la section 93, ou son introduction dans l'acte du

Manitoba n'eut produit aucun effet. Les catholiques de cette province s'y fussent trouvés dans une situation pire qu'au Nouveau-Brunswick, car là au moins ainsi qu'il est constaté par le jugement dans l'affaire Renaud, les catholiques sans y avoir droit par la loi, faisait, cependant, enseigner leurs doctrines dans les écoles existantes.

Les auteurs de l'acte du Manitoba ont dû être frappés de cet état de choses et c'est sans doute pour y remédier qu'ils ont inséré dans la section 22 les mots par la coutume "*by practice*," qui ne se trouvent pas dans la section 93, dans le but d'assurer plus tard aux minorités catholiques ou protestantes le droit aux écoles séparées dont elles jouissaient alors par la coutume "*by practice.*" Aussi la législature du Manitoba a-t-elle si bien compris l'intention qu'avait le parlement fédéral en introduisant les mots "*by practice*" dans l'acte du Manitoba, que par son premier acte concernant les écoles, elle a établi un système complet d'écoles séparées catholiques et protestantes, qui a existé pendant dix-neuf ans. Son interprétation des mots "par la coutume" a été conforme à l'esprit de la législation et aux règles d'interprétation.

Si la clause 22 n'eût contenue que les termes de la 1ère s.s. de la section 93, elle n'eût pas protégé les droits des minorités parce que les termes "*rights and privileges by law*" n'auraient pu s'appliquer à l'état de choses au Manitoba où les écoles séparées n'avaient pas d'existence légale, mais étaient établies depuis longtemps par la pratique et la coutume du pays.

L'addition des termes par la coutume "*by practice*" était indispensable pour rencontrer le cas auquel il s'agissait de pourvoir.

S'il est vrai que ces termes n'ont point une signification technique, il n'en est pas moins vrai que dans les circonstances où ils ont été employés ils ont une signi-

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fication claire et précise et rendent exactement l'idée qu'on a voulu exprimer d'une chose qui, sans consécration légale, existait de fait par l'usage et les habitudes du pays. C'est une expression de langage ordinaire et qui doit être interprétée dans sa signification ordinaire et populaire. Les termes "*by law*" et "*by practice*" signifient évidement des choses différentes et l'addition des mots "*by practice*" fait clairement voir que la législature avait l'intention d'étendre la prohibition afin de l'appliquer au cas particulier de la province. Ces mots n'ont pas été mis là accidentellement et sans but. La position des écoles séparées existantes de fait était connue des auteurs de l'acte au moins par les délégués qui avaient été envoyés pour régler les conditions de l'entrée de la province dans la confédération. On a sans doute discuté complètement la question et c'est pour la régler définitivement qu'on a ajouté dans la sec. 22 les mots "*by practice*" de manière à interdire toute législation à leur préjudice.

Il serait absurde de prétendre que le privilège garanti aux catholiques par les mots "*by practice*" doit s'entendre de celui d'avoir des écoles séparées comme écoles privées supportées par eux-mêmes. Ce privilège existant de droit commun ne requérait aucune législation et les expressions "*by practice*" seraient alors tout à fait inutiles et sans aucun signification. Tandis que le parlement fédéral, connaissant l'existence dans le territoire d'écoles séparées, et le fait qu'il n'y avait aucune loi les autorisant, a voulu en assurer l'existence légale après l'union, il comprenait que les dispositions seules de l'Acte de l'Amérique Britannique du Nord ne suffiraient pas pour cet objet. C'est sans doute pour ce motif que la section 93 a été modifiée par l'addition des mots "*by practice.*" C'est alors une disposition qui au lieu de n'avoir aucune signification comble

sagement une lacune importante qui avait existé dans l'organisation de la province.

C'est ici d'appliquer la règle qui veut que lorsque le langage de la loi est susceptible de deux interprétations dont l'une serait absurde et l'autre raisonnable et d'un effet salutaire on doit adopter la dernière comme conforme à l'intention du législateur.

Dans la cause de la *Reine* v. *Monk* (1), Brett L. J. dit:

When a statute is capable of two constructions, one of which will work a manifest injustice, and the other will work no injustice, you are to assume that the legislature intended that which would work no injustice.

Lord Blackburn exprime la même opinion dans la cause de *Rothes* v. *Kirkcaldy Water Works Commissioners* (2) lorsqu'il dit:

I quite agree that no court is entitled to depart from the intention of the legislature as appearing from the words of the Act because it is thought unreasonable, but when two constructions are open, the court may adopt the more reasonable of the two.

Il n'est pas difficile de voir laquelle de ces deux interprétations est la plus raisonnable et la plus juste. Si l'interprétation des mots "*by practice*" n'était pas suffisante pour leur donner droit de maintenir leurs écoles séparées, les catholiques seraient taxés pour des écoles qu'ils ne pourraient fréquenter et dont les protestants auraient seuls le bénéfice. Tandis qu'au contraire si l'on donne aux mots "*by practice*" leur véritable interprétation, les écoles des catholiques seront reconnues par la loi. Ces mots "*by practice*" n'ont sans doute été introduits dans l'acte du Manitoba que pour assurer à ceux qui le désiraient le droit de maintenir leurs écoles séparées et pour en consacrer l'existence légale.

Ces raisons me paraissent suffisantes pour démontrer que la loi dont il s'agit constitue une infraction évidente à la disposition de la section 22, s. s. 1ère de

(1) 2 Q. B. D. 555. (2) 7 App. Cas. 702.

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l'acte du Manitoba qui prohibe toute législation de nature à porter préjudice aux écoles séparées.

C'est encore une règle d'interprétation qui veut que pour correctement interpréter une loi, nous devions la considérer dans son ensemble et en comparer ses diverses dispositions entre elles afin d'en saisir le véritable esprit. L'acte du Manitoba ne comprend pas seulement la section 22 au sujet des écoles séparées. Il y a encore plusieurs autres dispositions à ce sujet en partie prise dans la section 93 de l'Acte de l'Amérique Britannique du Nord, dont le but évident est de protéger l'exercice du droit aux écoles séparées accordé par la section 1ère.

La 2ième sous-section de la section 22 accorde un appel au gouverneur général en conseil de tout acte ou décision d'aucune autorité provinciale affectant aucun des droits ou privilèges de la minorité protestante ou catholique romaine des sujets de Sa Majesté relativement à l'éducation.

Par la sous-section 3 :

Dans le cas où il ne serait pas décrété telle loi provinciale que, de temps à autre, le gouverneur général en conseil jugera nécessaire pour donner suite et exécution aux dispositions de la présente section ou dans le cas où quelque décision du gouverneur général en conseil, sur appel interjeté en vertu de cette section ne serait pas mise à exécution par l'autorité provinciale compétente,—alors et en tout tel cas, et en tant seulement que les circonstances de chaque cas l'exigeront le parlement du Canada pourra décréter des lois propres à y remédier pour donner suite et exécution aux dispositions de la présente section, ainsi qu'à toute décision rendue par le gouverneur général en conseil sous l'autorité de cette même section.

La 1ère sous-section en parlant des écoles séparées dit qu'il ne sera porté aucun préjudice au droit ou privilège existant par la loi ou la coutume, au sujet de ces écoles ; la deuxième donne un droit d'appel de tout acte ou décision de la législature ou de toute autre autorité provinciale de nature à affecter les droits ou privilèges des minorités catholiques ou protestantes au sujet

de l'éducation. Si ces minorités ont des droits ou privilèges au sujet de l'éducation c'est sans doute ceux qui concernent leurs écoles séparées. C'est donc qu'ils ont des droits et privilèges à ce sujet puisque la loi leur accorde un droit d'appel pour les protéger contre toute atteinte qui leur porterait préjudice. Pourquoi un appel leur aurait-il été accordé s'ils n'avaient aucun droit aux écoles séparées? N'est-ce pas au contraire parce qu'ils étaient déjà en possession de ce droit, dans la pratique que le parlement en a consacré l'existence légale par cette disposition, de manière à les protéger contre toute atteinte de la législature ou de toute autre autorité provinciale?

L'interprétation donnée aux mots "*by practice*" se trouve ainsi confirmée par les autres dispositions de la section 22 de manière à ne laisser aucun doute sur leur signification.

En conséquence je suis d'avis que l'acte 58 Vic. ch. 38 (Man.) concernant les écoles publiques est *ultra vires* et que les deux règlements adoptés en vertu de cet acte sont illégaux et doivent être mis de côte et l'appel accordé avec dépens.

TASCHEREAU J.—L'appelant dans la présente instance attaque la constitutionnalité de l'Acte des Ecoles passé par la législature de la province de Manitoba en 1890. Les procédures devant les cours provinciales et la forme sous laquelle la question nous est présentée ont été au long décrites par mes savants collègues préopinants, et il serait oiseux de les redire. La question de droit elle-même qui nous est soumise est restreinte à un cadre assez étroit, car, tant par l'intimée et le procureur général de la province dans leur factum et leur plaidoirie à l'audience, que par les savants juges de la cour dont est appel dans leurs jugements, il est admis que les catholiques de la province ne sont pas, et n'auraient

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pu être, par le statut en question, privés du droit dont ils ont toujours joui, d'avoir leurs écoles séparées sans être nullement obligés d'envoyer leurs enfants aux écoles libres. C'est uniquement sur les dispositions de ce statut qui soumettent les catholiques à l'impôt pour l'entretien des écoles libres qu'il y a litige.

La section 22 de l'acte organique de Manitoba de 1870 se lit comme suit dans la version française, qui, il ne faut pas l'oublier, fait loi tout comme la version anglaise :—

Dans la province, la législature pourra exclusivement décréter des lois relatives à l'éducation, sujettes et conformes aux dispositions suivantes: Rien dans ces lois ne pourra préjudicier à aucun droit ou privilège conféré, lors de l'Union, par la loi *ou par la coutume* (or practice) à aucune classe particulière de personnes dans la province, relativement aux écoles séparées, (denominational schools)."

C'est textuellement la reproduction de la sec. 93 de l'acte de l'Amérique Britannique du Nord, avec la simple addition des mots " ou par la coutume." Ce sont donc les droits et les privilèges dont jouissaient par la coutume les catholiques de cette région, lors de l'Union, relativement aux écoles séparées (car de loi sur la matière il n'en existait pas) auxquels la législature ne peut porter préjudice, et le pouvoir de légiférer sur l'éducation ne lui est conféré qu'avec cette restriction. Ceci ne pouvait être contesté, et le savant procureur général de la province n'est en lice que pour soutenir avec l'intimée que l'acte de la législature, tout en obligeant l'appelant, et avec lui toute la population catholique de Manitoba, à contribuer au fonds des écoles libres, ne préjudicie pas par là à aucun droit au privilège que la coutume leur conférait. Il nous faut donc en premier lieu rechercher au dossier la preuve de la coutume en matière d'éducation dans cette partie du territoire avant l'Union. Sa Grandeur Monseigneur l'Archevêque de St. Boniface, dans un affidavit produit par l'appelant la décrit dans les termes suivants : —

Prior to the passage of the Act of the Dominion of Canada passed in the thirty-third year of Her Majesty Queen Victoria, Chapter 3, known as The Manitoba Act, and prior to the order in council issued in pursuance thereof, there existed in the Territory now constituting the Province of Manitoba a number of effective schools for children. These schools were denominational schools, some of them regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations.

The means necessary for the support of the Roman Catholic Schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the Church, contributed by its members.

During the period referred to, Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no Public Schools in the sense of State Schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of the Roman Catholic children, and were not under obligation to, and did not, contribute to the support of any other schools.

In the matter of education, therefore, during the period referred to, Roman Catholics were as a matter of custom and practice separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman Catholics as herein set forth.

Roman Catholic Schools have always formed an integral part of the work of the Roman Catholic Church. That Church has always considered the education of the children of Roman Catholic parents as coming peculiarly within its jurisdiction. The School, in the view of the Roman Catholics, is in a large measure the "Children's Church," and wholly incomplete and largely abortive if religious exercises be excluded from it. The Church has always insisted upon its children receiving their education in schools conducted under the supervision of the Church, and upon them being trained in the doctrines and faith of the Church. In education, the Roman Catholic Church attaches very great importance to the spiritual culture of the child, and regards all education unaccompanied by instruction in its religious aspect as possibly detrimental and not beneficial to children. With this regard the Church requires that all teachers of children shall not only be members of the Church, but shall be thoroughly imbued with its principles and faith; shall recognise its spiritual authority and conform to its directions. It also requires that such books be used in the schools with regard to certain subjects as shall combine religious instruction

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with those subjects, and this applies peculiarly to all history and philosophy.

Sa Grâce, plus loin, jure que :—

The Church regards the schools provided for by "The Public Schools Act" and being chapter 38 of the Statutes passed in the reign of Her Majesty Queen Victoria, in the fifty-third year of Her reign, as unfit for the purpose of educating their children, and the children of Roman Catholic parents will not attend such schools. Rather than countenance such schools, Roman Catholics will revert to the system of operation previous to the Manitoba Act, and will establish, support and maintain schools in accordance with their principles and faith as aforementioned.

Protestants are satisfied with the system of education provided for by the said Act, "The Public Schools Act," and are perfectly willing to send their children to the schools established and provided for by the said Act. Such schools are in fact similar in all respects to the schools maintained by the Protestants under the legislation in force immediately prior to the passage of the said Act. The main and fundamental difference between Protestants and Catholics, with reference to education, is that while many Protestants would like education to be of a more distinctly religious character than that provided for by the said Act, yet they are content with that which is so provided and have no conscientious scruples against such a system, the Catholics on the other hand insist and have always insisted upon education being thoroughly permeated with religion and religious aspects. That causes and effects in science, history, philosophy and aught else should be constantly attributed to the Deity and not taught merely as causes and effects.

The effect of "The Public Schools Act" will be to establish public schools in every part of Manitoba where the population is sufficient for the purpose of a school and to supply in this manner education to children free of charge to them or their parents further than their share, in common with other members of the community, of the amounts levied under and by virtue of the provisions contained in the Act.

In case Roman Catholics revert to the system in operation previous to the Manitoba Act, they will be brought in direct competition with the said public schools; owing to the fact that the public schools will be maintained at public expense, and the Roman Catholic schools by school fees and private subscription the latter will labor under serious disadvantage. They will be unable to afford inducements and benefits to children to attend such schools equal to those afforded by public

schools, although they would be perfectly able to compete with any or all schools unaided by law-enforced support.

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John Sutherland et Alexander Polson, dans deux affidavits produits par l'intimée sur son opposition produite en réponse à la requête de l'appelant disent aussi, sur l'état des écoles dans la province avant l'Union :—

That school which existed prior to the Province of Manitoba entering Confederation were purely private schools and were not in any way subject to public control nor did they in any way receive public support.

No school taxes were collected by any authority prior to the Province of Manitoba entering Confederation and there were no means by which any person could be forced by law to support any of said private schools. I think the only public revenue of any kind then collected was the customs duty, usually four per cent.

Il ressort clairement, comme fait, de ces affidavits, qui constituent l'unique preuve au dossier, que, avant l'Union, par la coutume, les catholiques de ce territoire jouissaient non seulement du privilège d'avoir leurs écoles, mais aussi négativement, comme corollaire et partie essentielle de ce privilège, de celui de ne pas contribuer à aucun autre système d'éducation. De fait, c'était de ne pas être obligés de contribuer à d'autres écoles que les leurs, qui véritablement constituait pour eux un privilège. Le privilège seul d'avoir leurs propres écoles aurait été illusoire, ou plutôt, n'aurait pu être appelé un privilège ; avoir des écoles volontaires, c'est de droit commun ; ce n'est pas un privilège : et une coutume, qui leur eût fait soutenir et les leurs et celles des autres, aurait été pour eux un singulier privilège. Le privilège en somme aurait été celui des autres. C'est bien là cependant, il me semble, le seul que l'intimée dans l'instance voudrait concéder maintenant à la minorité catholique dans la province.

La loi de 1891, dit l'intimée, oblige bien, il est vrai, les catholiques de contribuer aux écoles libres, mais

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elle ne les oblige pas d'y envoyer leurs enfants. Elle ne leur défend pas non plus d'avoir leurs écoles séparées, donc elle ne préjudicie en rien à aucun des droits et privilèges que leur conférait la coutume avant l'union, donc, elle est *intra vires*. Je crois ce raisonnement tout à fait erroné. De fait, j'aurais été porté à ne pas le croire sérieux, s'il n'avait pas reçu la sanction du tribunal provincial. A quoi, en effet, se résume-t-il ? A faire dire par la majorité non-catholique à la minorité catholique : " Vous avez le privilège d'avoir vos écoles ; nous vous le laissons, pourvu que vous nous aidiez à maintenir les nôtres Vous ne pouvez envoyer vos enfants à nos écoles ; mais nous ne vous y obligeons pas, tout ce que nous vous demandons, c'est de payer pour instruire les nôtres." Je cherche en vain au dossier la preuve que c'était là la coutume avant l'Union. J'y trouve tout le contraire.

Et peut-on d'ailleurs, imaginer un système semblable à celui que l'intimée voudrait faire prévaloir dans Manitoba, et en même temps reconnaître à la minorité le droit à ses écoles séparées, droit que l'intimée ne pouvait nier en face de la section 22 de l'acte organique de 1870. Il est patent que le législateur, par cette section, prévoyant que, nécessairement, dans l'avenir, l'une ou l'autre des deux classes, protestante ou catholique, devra dominer par le nombre dans la province projetée, décrète pour l'un et l'autre de ces cas. Elles étaient alors à peu près également divisées, si l'on en juge par la première législation de la nouvelle province sur la matière, en 1871, où il apparaît que le bureau d'éducation fut également composé de catholiques et de protestants, avec un surintendant pour chacune de ces deux classes et partage égal entre elles de la subvention nationale. Dans cet état de choses, le parlement, par cette section 22 de l'acte, pourvoit à l'une et à l'autre de ces éventualités. La sous-section première, que j'ai

citée au long, assure à la minorité, soit catholique, soit protestante, les droits que la coutume lui avait conférés jusqu'alors, et la sous-section seconde lui donne le droit d'appel au Gouverneur général en conseil de toute législation affectant aucun de ses droits sur la matière. S'il était arrivé que la population protestante fût en minorité, elle n'aurait pu être contrainte de contribuer au maintien des écoles catholiques. Elle aurait réclamé l'exercice de son droit à ses écoles, tel que ses co-religionnaires en jouissent dans la province de Québec, dans toute sa plénitude et sans entraves, c'est-à-dire avec exemption de taxes pour les écoles catholiques. Aujourd'hui, les catholiques qui composent la minorité ne réclament que le même droit, et le libre exercice de ce droit. Je suis d'opinion que leur réclamation est bien fondée. Ils ont droit à leur système d'écoles, tel que leurs co-religionnaires en jouissent dans Ontario, ou sur le même principe. C'est dans ce but, et dans ce but seul, du moins je n'en puis voir d'autre, qu'a été insérée dans l'acte organique de 1870 cette disposition spéciale relative aux écoles séparées, reproduite de l'Acte de l'Amérique Britannique du Nord, en y ajoutant les mots " ou par la coutume," mots rendus nécessaires, je l'ai dit, pour compléter la pensée du législateur et assurer l'exécution de ses volontés par le fait bien connu qu'il n'existait alors sur la matière, dans ces régions, aucune loi, et que le tout y était régi par la coutume, et par la coutume seule.

La corporation intimée et le procureur général tout en reconnaissant à la minorité le droit abstrait d'avoir ses écoles, voudraient en gêner le libre exercice. Par le statut en question, en effet, toute la subvention de l'Etat pour l'éducation est appropriée aux écoles publiques, ou écoles libres ; toute allocation aux écoles de la minorité est refusée ; sec. 108. Cette subvention, cependant, est prise sur le revenu public auquel la

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minorité a dûment contribué sa quote-part. Et c'est là, tout ce dont sa Grandeur Monseigneur l'Archevêque de St.-Boniface se plaint dans le par. 11 de son affidavit, qu'on a quelque part mal interprété. Sa Grandeur ne craint pas pour les écoles catholiques la compétition des écoles publiques si la législature veut bien mettre les deux sur le même pied devant la loi. Ce que Sa Grandeur dit, c'est qu'en maintenant les écoles publiques aux frais de l'Etat, tout en laissant les écoles catholiques à la merci de contributions volontaires, celles-ci se trouveront dans une position des plus défavorables. Et il n'est pas nécessaire, il me semble, d'arguments pour le démontrer. Mais non-seulement, je le répète, le statut en question donne aux écoles publiques seules le total de la subvention provinciale, mais il soumet les catholiques à la taxe directe pour leur maintien. Et plus encore: non-seulement la propriété privée de chaque contribuable catholique, mais *chaque maison même d'école catholique*, et toutes propriétés affectées pour les fins de l'éducation de leurs enfants, par les catholiques, sont imposables pour le maintien des écoles libres.

Le statut va même par la section 179 jusqu'à la confiscation au profit des écoles libres, en certain cas, de la propriété scolaire de la minorité catholique.

Je suis d'opinion que cette législation est préjudiciable aux droits et privilèges dont jouissait cette minorité avant l'Union, et par conséquent *ultra vires*.

L'intimée a cru trouver une réponse à la requête de l'appelant dans l'argument suivant: "Il est possible, dit-elle, que cette législation puisse préjudicier aux droits de la minorité, et que malgré cela, elle entre parfaitement dans le cadre des attributions de la législature de Manitoba, comme par exemple, une taxe municipale ou autre peut bien indirectement, plus ou moins, priver les catholiques des fonds nécessaires pour

le maintien de leurs écoles, et, cependant, il leur faut bien s'y soumettre." Ce raisonnement, il me semble, porte à faux. D'abord c'est dans ses lois sur l'éducation que la législature ne peut, d'après la section 22 de l'acte fédéral de 1870, préjudicier aux droits de la minorité. Il ne s'agit pas de lois sur aucune autre matière. Puis, dans le cas d'une taxe municipale, la minorité est sur un pied de parfaite égalité avec la majorité et reçoit, comme elle, l'équivalent de ce qu'elle contribue en participant, comme elle, aux bénéfices de cette taxe. Tandis qu'ici, l'appelant se dit lésé parce qu'il est contraint à payer pour les autres, à contribuer au soutien d'écoles dont il ne bénéficiera jamais. C'est là tout ce dont il se plaint. On lui laisse bien, en théorie, son système d'écoles, mais on met des entraves à l'exercice de son droit. On ne lui en laisse qu'un simulacre. Si l'Etat prélève sur cette minorité soit $20,000, ou aucun montant quelconque pour le soutien des écoles libres, c'est bien, il me paraît évident, autant de ressource dont elle est privée pour le soutien de ses propres écoles. Or, mettre des entraves à l'exercice d'un droit, l'obstruer ou lui nuire, c'est bien, il me semble, porter préjudice à ce droit. Et c'est là, ce qu'en termes non équivoques, la législature de Manitoba, par l'acte d'où elle puise exclusivement ses pouvoirs, n'a pu faire.

Je suis d'avis d'allouer l'appel.

PATTERSON J.—The statute of Canada which gave its constitution to the Province of Manitoba (1), declares, in section 22, that in and for the Province of Manitoba the legislature "may exclusively make laws in relation to education subject and according to the following provision:—

"Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational

(1) 33 Vic. ch. 3.

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schools which any class of persons have by law or practice at the union."

"Law" here evidently means statute law. The basis of the constitution given to the new province (1) was the British North America Act, 1867. It is declared that the act shall apply to the province excepting, amongst other things, such provisions as are varied by the Manitoba Act.

Section 93 of the British North America Act, which dealt with the subject of provincial legislation respecting education, was not intended to be applied to Manitoba without some variations. It was therefore re-written to form section 22 of the Manitoba Act, the original language being adhered to wherever no variation of the provisions was intended. In this way I suppose it was that section 22 happens to refer to rights and privileges with respect to denominational schools which any class of persons had in the province by law, when there was no statute touching such schools that affected Manitoba. The reference in section 93 was to statutory rights and privileges existing in some of the provinces entering into confederation. In sec. 22 it meant nothing. If that section, which is a transcript of section 93 with the interpolation of the words "or practice," had not introduced those words it would have been inoperative for want of something to operate on. It is not an example of very precise or accurate drafting. The first question for us to decide is what the added words "or practice" mean, or whether they also mean nothing.

"Which any class of persons have by law or practice"—in grammatical effect "have by law or by practice."

What is meant by having by practice?

To have by law here means to have under some

(1) 33 Vic. ch. 3 s. 2.

statutory provision, the preposition "by" pointing to the law or statute as the means or instrument by which the right or privilege was acquired. Are we obliged to understand the term "by practice" as intended to signify acquired by practice or user, involving some idea of prescription? It is arguable, and has in effect been argued, that that is the proper understanding of the term; that the word "by" must have the same force when understood in the one place as when expressed in the other; leading to the conclusion that, inasmuch as no rights or privileges in respect of denominational schools had been acquired in the territory in that manner, the clause in question is wholly inoperative.

The construction thus contended for may be capable of being supported by strict reasoning from rules of grammar or rhetoric, but it is not, in my judgment, appropriate to this clause. We have seen that precision and accuracy are not characteristics of the clause as a whole, and we cannot properly single out these particular words "by practice" for very critical and pedantic treatment.

We must credit the legislature with having intended that these words, which were added to those taken from section 93, should have some effect. I take the meaning of the clause to be that rights and privileges in respect of denominational schools existing by statute, if any such there had been, and rights actually exercised in practice at the time of the union, were not to be prejudicially affected by provincial legislation.

There were denominational schools maintained by different classes of persons, some by the Roman Catholic church others by Protestants. The right to establish and maintain such schools was not derived from statutory law. It was incident to the freedom of British subjects, and was independent of and anterior

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to legislation. The Manitoba Act did not assume to preserve that right merely as an abstract and theoretical right, but it did so in favour of such classes of persons as at the union were practically exercising it.

If this construction seems to do any violence to the language of the clause it is only by treating the word "by" where it is understood before the word "practice," as not having precisely the same force as when expressed before the word "law." But, as once remarked by one of the most eminent English judges, Lord Stowell, when Sir W. Scott—

> "Courts are not bound to a strictness at once harsh and pedantic in application of the statutes." (1)

Dicta to the same effect, as well as examples of their application, abound in the books. Thus in a recent case, *Salmon* v. *Duncombe* (2) we find it laid down in the judgment of the judicial committee that when the main object and intention of the statute are clear it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.

> The more literal construction of a statute, said Lord Selbourne in *Caledonian Railway Co.* v. *North British Railway Co.* (3), ought not to prevail if it is opposed to the intentions of the legislature as apparent by the statute and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

In my opinion the Roman Catholics are a class of persons who had, within the meaning of the statute, rights and privileges with respect to denominational schools in the Province of Manitoba at the union.

The rights and privileges preserved by the statute were only those peculiar to schools as denominational schools, or which gave the schools that character. Chiefly they were the education of their children under

(1) The Reward, 2 Dods. Adm. Rep. 269.

(2) 11 App. Cas. 627.

(3) 6 App. Cas. 114.

the control and direction of the church and the maintenance of their schools for that purpose.

A point is made in the affidavit on which these proceedings are founded upon the fact that the schools of the Roman Catholic church were maintained by the Catholics by contributions in some form, as fees for tuition or as contributions to the general funds of the church, or possibly, though we are not told that it was so, as subscriptions for school purposes, and the schools of the Protestants were maintained by Protestants, neither body contributing or being liable to contribute to maintain the schools of the other. The fact is not without importance from a point of view which I shall presently notice, but I am not prepared to hold that the immunity enjoyed from liability to support schools of another denomination, at a time when taxation for school purposes was unknown in the territory, was a privilege in respect of denominational schools.

The provincial statute of 1890 which is attacked as *ultra vires* renders every taxpayer liable to assessment for the support of the public schools. These schools are not denominational, and they are objectionable to the Roman Catholic church which insists upon the supervision of the education of the children of its members. The effect of the new statute and the grounds of objection to it are explained in the affidavit of Archbishop Taché. I refer particularly to paragraphs 8, 10 and 11. Rather than countenance the public schools, he tells us in the 8th paragraph, Roman Catholics will revert to the system in operation previous to the Manitoba Act, and will establish, support and maintain schools in accordance with their principles and faith. In other words they will assert and act upon the privilege or right in respect of denominational schools which, as I construe section 22, they had as a class at the union.

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It is thus in effect asserted on the part of the applicant that the right or privilege has not been destroyed by the Public Schools Act of 1890. The same assertion is made on the part of the respondents who make it one of their grounds in support of the by-laws which are attacked, or rather in support of the provincial statute.

But the right or privilege may continue to exist and yet be injuriously affected. It is not the cancelling or annulling of the right that is forbidden. The question is: Does the statute of 1890 injuriously affect the right? That it does so appears to me free from serious doubt. In one form or another the members of the church supported the schools of the church. As a class of people they bore the burden. We are not concerned to inquire how the burden was distributed among the individual members, or whether each one bore some part of it. The privilege in question appertained to the class of people and the burden was borne by the class. The bearing of the burden was essential to the enjoyment of the privilege. It is the maintenance of a school that is of value to the community or class, rather than the abstract or theoretical right to maintain it. In other words the value of the right depends upon the practical use that can be made of it. Whatever throws an obstacle in the way of that practical use prejudicially affects the right. It is not conceivable that in any community, and notably among the settlers in a region like Manitoba, a burden of taxation for the support of public schools can be imposed on the people of any religious denomination without rendering it less easy for the same people to maintain denominational schools. The degree of interference is immaterial. If it occurs to any extent the right to maintain the denominational school is injuriously affected.

It has been objected that the argument against the public school tax on the ground of its making the

people less able to support their denominational schools involves the denial of the right to impose ordinary municipal taxes, because those taxes also absorb their share of the means of the taxpayers. The objection is aside from the issue. The provision of the statute relates only to legislation respecting education, and the restriction is upon the power to make laws on that subject. It is not, however, merely a question of pecuniary ability to do one's share in supporting a denominational school in addition to paying the public school tax. Assuming the ability in the case of every individual belonging to the denomination, which is an extravagant assumption, we must remember that one payment is compulsory and the other voluntary. When a man has under compulsion paid his money for the support of the public school it is natural that he should be less willing to avail himself of the privilege of paying for the support of the other, though his right to pay as well as his ability remain. The contest is over the right or privilege not of the individual but of the class of persons.

We are familiar with the expression "injuriously affected" as used in the compensation clauses of the railway acts and in the English Lands Clauses Act. It would be labour lost to cite cases turning upon the application of the provisions for compensating persons whose lands are injuriously affected by works done under sanction of law. They are very numerous, and the English cases will be found collected in Cripps on Compensation (1) and several other treatises. The claim to compensation failed in many of the cases in which lands were injuriously affected for reasons arising on the statutes under which the claim was made, as e. g. because the injury was caused by an act that would not have given a right of action at common law, or

(1) 2 ed. ch. 9.

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because it was caused by the operation only and not by the construction of the work; but all the cases agree in recognising as something that injuriously affects a man's property whatever interferes with his convenience in the enjoyment of it or of any right in respect of it, or prevents him from enjoying it to the best advantage, and whether the injury happens to be permanent or only temporary. The same principle makes it imperative to hold that the right of a class of persons with respect to denominational schools is injuriously affected if the effect of a law passed on the subject of education is to render it more difficult or less convenient to exercise the right to the best advantage. I mean the direct effect of the law, and I regard the prejudice to the denominational schools which is worked by making those to whom it looks for support pay the school tax as a direct effect of the statute. There may be indirect results by which the denominational school may suffer in its prestige or prosperity yet which cannot be taken to bring the statute under censure of section 22. One of these, viz., the competition of the public schools, is alluded to in the eleventh paragraph of His Grace the Archbishop's affidavit. I am not quite sure that I fully understand that paragraph. I am not sure whether the objection it indicates extends to the establishment of any schools at the public expense, or only to the assessment of Roman Catholics for the support of public schools. I shall therefore merely say that, according to my present opinion, a public school may, by reason of superior equipment or of other advantages, compete with a denominational school to the disadvantage of the latter without thereby affording just cause for complaint.

Upon the grounds which I have thus discussed I am of opinion that the act of 1890 transgresses the limits of the power given by the 22nd section of the

Manitoba Act, and that the assessment which the appellant is resisting is illegal.

It may not be out of place to remark, though it is scarcely necessary to do so, that there is no general prohibition of legislation which shall affect denominational schools. The prohibition relates only to the rights and privileges of classes of persons, and to legislation which injuriously affects such rights. There is, therefore, room for legislative regulation on many subjects, as, for example, compulsory attendance of scholars, the sanatory condition of school houses, the imposition and collection of rates for the support of denominational schools, and sundry other matters which may be dealt with without interfering with the denominational characteristics of the school, and which, I suppose, were dealt with in the statutes of the province that were repealed in 1890 to make way for the system now complained of.

I am of the opinion that the appeal should be allowed and the by-laws of the city of Winnipeg, Nos. 480 and 483, quashed, the appellant having his costs of the appeal and also of all proceedings in the courts below.

Appeal allowed with costs.

Solicitors for appellant : *Ewart and Brophy.*

Solicitors for respondent : *Hough and Campbell.*

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*May 13.
*Nov. 17.

THE QUEBEC, MONTMORENCY AND CHARLEVOIX RAILWAY COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

PIERRE MATHIEU (DEFENDANT).....RESPONDENT.

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

Expropriation—R. S. Q. art. 5164 *ss.* 12, 16, 17, 18, 24—*Award—Arbitrators—Jurisdiction of—Lands injuriously affected—*43 *&* 44 *V. c.* 43 *(P.Q.)—Appeal—Amount in controversy—Costs.*

In a railway expropriation case the respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of $1,974.25 damages and costs for land expropriated was made under art. 5164 R. S. Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award :

Held, affirming the judgment of the courts below, that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track the arbitrators had not exceeded their jurisdiction.

Strong and Taschereau JJ. doubted if the amount in controversy was sufficient to give the court jurisdiction to hear the appeal.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), confirming a judgment of the Superior Court in favour of respondent (1).

The following are the material facts of the case :—

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

(1) Following *Mathieu* v. *The Quebec, &c., Ry. Co.* 15 Q. L. R. 300.

The railway built by the appellants traverses lands belonging to the respondent, in the parish of l'Ange-Gardien, county of Montmorency, and known as lots Nos. 20, 29, 36, 59 and 66 of the cadastre for said parish.

In order to obtain their right of way through said lots, on the 10th of November, 1887, appellants served on respondent a notice of expropriation informing the latter that for the building of their railway they required across the said lots a strip of land 62 feet (French measure) wide, by 651 feet long, forming a total area of 124½ perches, or 1 arpent 24½ perches.

By the same notice respondent was offered the sum of $125 as an indemnity for the said expropriation, and notified that should said indemnity not be accepted the appellants named as their arbitrator Louis Giroux, farmer, of Beauport.

The offer of the appellants was refused but on the 17th of November, 1887, an agreement was entered into by which appellants, on depositing double the amount of the indemnity offered, would have the right to take immediate possession of the land required by them from the respondent, reserving to respondent the right that if, later on, the parties should be unable to come to an amicable settlement, the respondent would be allowed to name his arbitrator, in the same manner as though the delay for him so to do had not expired.

In virtue of that agreement, on the 28th of November, 1887, appellants made a money deposit at the rate of $200 per superficial arpent, and took possession of their right of way through the lots of the respondent.

Subsequently, it being impossible for the parties to determine amicably the indemnity, the appellants, on the 7th of March, 1888, served the respondent with a notice calling upon him to name his arbitrator, so as to proceed with the arbitration.

On the following day, the respondent replied to the

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appellants' notice as follows: "The said Pierre Mathieu, of l'Ange-Gardien, farmer, without waiving any of his rights, and without binding himself in any way by the present procedure, but with the sole object of watching and having a watch on the arbitrator of the company, does hereby inform you that he has named and by these presents names Charles Toussaint Coté, of the municipality of St. Roch North, manufacturer, as his arbitrator."

On the 15th of the same month of March Louis Giroux, the arbitrator of the appellants, and the said C. T. Coté, acting as arbitrator for the respondent, named F. X. Berlinguet, of Quebec, architect, as third arbitrator, and the three arbitrators were sworn.

Two days later, the three arbitrators appeared before Angers, notary public, and there two of them, Giroux and Coté, declared that they had examined the plans and documents filed, heard the sayings of the parties, taken cognizance of the incidental facts, and after mature deliberation, allowed to Pierre Mathieu, the proprietor, "a sum of $474.25 for the land expropriated, as well as for three feet outside the fences, on each side of the railway line, lost to him for cultivation; and that after having taken into consideration the increase of value resulting to the said lots from the building of a railway, they further allowed for damage and inconveniences resulting from the severing of lands which ought not to be divided, for the loss of time in the cultivation thereof on account of the passing of trains and of the crossing and recrossing cattle over the said railway for grazing purposes, a sum of $90 yearly, representing a capital of $1,500 at six per cent, which is the amount fixed and allowed to the said Pierre Mathieu for all indemnity for said damages, after deducting said increase of value as aforesaid, in all $1,974.25 and costs."

The third arbitrator, Berlinguet, finding the valuation exaggerated, declined to concur in that award.

By notarial protest dated the 23rd of said month of March the respondent had said award served upon the appellants, informed them that he was ready to give them a title, and requested from them the payment of the amount allowed by said award, with the costs of the arbitration, under pain of being sued therefor. Thereupon the appellants brought their action, to have said award set aside for the following reasons :—

1. The naming of an arbitrator by the respondent is null,—and as a consequence, the naming of the third arbitrator is null, and the tribunal which gave the award had no existence in law.

2. The award was not given faithfully and impartially, nor with the essential formalities ; but it is manifestly the result of a fraudulent agreement between Giroux and Coté and the respondent to rob the appellants.

3. The award is null as bearing on matters not submitted to arbitrators and thus *ultra vires* in giving the company more land than wanted.

The respondent pleaded the general issue.

The questions raised by this action having been examined in another cause under exactly similar circumstances between the appellants and one Joseph Mathieu, and having been decided by the Court of Queen's Bench for Lower Canada (appeal side) (1), in favour of Joseph Mathieu, the courts below in this case followed the same ruling as in the case of Joseph Mathieu.

On appeal to the Supreme Court of Canada the principal grounds relied upon by counsel were that the award was void because the arbitrators had no

(1) 15 Q. L. R. 300.

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authority to value the indemnity for the two strips of land three feet wide on each side of the right of way, and that the appointment by respondent of his arbitrator with restrictions and reservations was null.

Mr. Justice Strong and Mr. Justice Taschereau expressed a doubt as to the jurisdiction of the court to hear the appeal, the amount of the award being under $2,000, and to make up the appealable amount either interest accrued after date of the award or the costs taxed on the arbitration proceedings would have to be added. The case, however, was allowed to be heard on the merits.

Irvine Q.C. and *Bédard* for appellants relied on Mr. Justice Andrews's judgment in the case of *The Quebec, Montmorency, &c., Ry. Co.* v. *Mathieu* (1).

Casgrain Q.C. for respondent contended that by their award the arbitrators allowed so much for the inconvenience caused, so much for the loss of land and so much for damage to the balance of the land not taken but rendered useless for the purposes of cultivation, and as the award states clearly the sum awarded, and the lands or other property, right or thing for which the sum is to be the compensation, the requirements of the law have been complied with.

Sir W. J. RITCHIE C.J.—The moment, in reply to appellants' notice, the respondent named his arbitrator he named an arbitrator under the statute and could not limit in any way the authority of an arbitrator conferred by the statute. The moment he named such arbitrator the person so named become clothed with all the power and authority vested in the arbitrators by the statute, and the respondent had no right to limit this power or authority, and could not appoint an arbitra-

(1) 15 Q. L. R. 300.

tor "only to watch over the arbitrator of the company," and if the award had been unsatisfactory to the respondent I do not think it would have been in his mouth to say that he was not bound by it on the ground that an arbitrator was not named by him; on the other hand the appellants having accepted the respondent's arbitrator as duly qualified, and the two arbitrators with the knowledge and express consent of the company having appointed an umpire and the appellants having furnished the arbitrators with all the information they required to enable them to discharge properly their duties, I do not see how it is possible for the appellants now to repudiate the action of the arbitrators on the ground that the respondent's arbitrator was not duly appointed.

The only point of the case that can raise any doubt, or that has raised any doubt in my mind, is as to the excess of jurisdiction by the arbitrators in reference to the three feet which it is alleged has been expropriated beyond the land required by the appellants. But the land expropriated is described in the award as the land described in appellants' notice. I think that the arbitrators having found that the three feet outside of and beyond and on each side of the land expropriated was lost to respondent as for the purpose of cultivation, and it not appearing that it can be used for any other purpose, I cannot say that the arbitrators were wrong in estimating by way of damage the full value of the land if they were of opinion the land, by reason of the railway, had become valueless to respondent. The estimate of the value of the damages appears to be sustained by the evidence of several witnesses, though in the absence of fraud, I do not place reliance on this evidence because the statute (1) declares that—

(1) R. S. Q. art. 5164.

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The arbitrators.....being sworn.....shall proceed to ascertain the compensation which the company must pay in such a way as they or a majority of them deem best, and the award of such arbitrators, or any two of them or of the sole arbitrator shall be final and conclusive.

27. No award shall be invalidated for want of form or other technical objection.....

One of the arbitrators after pointing out how they arrived at the valuation, explained that they first established the value of the land, then how the damage was established, and he goes on to explain that all these inconveniences or damage were assessed at $90 a year, representing a capital at six per cent of $1,500, which with $474.25 for land taken and land injuriously affected, amounted to $1,974.25.

Under all these circumstances, I think no ground has been established for setting aside this award, and therefore the appeal must be dismissed.

STRONG J.—I am of the same opinion. I had come to that conclusion at the end of the argument. Assuming that we have jurisdiction, a point which I assume in deference to the opinion of the majority of the court, though I have doubts on the point myself, I am of opinion that upon the merits of the case, there is no ground for allowing the appeal.

FOURNIER J.—I am also of opinion on the merits that the appeal should be dismissed.

TASCHEREAU J.—This appeal must be dismissed, assuming, without deciding, that we have jurisdiction to entertain it. On the ground of fraud, the two courts below have found that there was no evidence of it, and we cannot interfere with that finding of fact, which is fully supported by the evidence.

As to the objections to the award as being irregular or excessive they have, in my opinion, been each and

all of them rightly dismissed by the two courts below. This appeal, in fact, should not have been taken. There was no reasonable ground for it.

PATTERSON J. agrees that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Bedard, Dechène & Dorion.*

Solicitors for respondent: *Casgrain, Angers & Lavery.*

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Taschereau J.

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*Mar. 16.

*Nov. 17.

THE RURAL MUNICIPALITY OF MORRIS (DEFENDANTS)..... APPELLANTS;

AND

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY LIMITED (PLAINTIFFS)..... RESPONDENTS.

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

Appeal—Final judgment—Practice—Specially indorsed writ—Order for signing judgment.

An appeal does not lie from a decision of the Court of Queen's Bench (Man.) affirming the order of a judge, made on the return of a summons to show cause, allowing judgment to be entered by the plaintiffs on a specially indorsed writ, which is not a "final judgment" within the meaning of the Supreme Court Act.

Per Patterson J.—Such decision is a "final judgment," but the order which it affirmed was one made in the exercise of judicial discretion as to which s. 27 of the act does not allow an appeal.

MOTION to quash for want of jurisdiction an appeal from a decision of the Court of Queen's Bench (Man.) (1), affirming an order made by Killam J. in chambers, allowing plaintiffs to sign judgment summarily upon a specially indorsed writ.

The facts of the case are fully set out in the report of the proceedings in the court below, and may be briefly stated as follows :—

On the 9th of July, 1890, the plaintiffs brought an action upon twelve debentures of the municipality of Morris, together with coupons upon the said debentures, and upon other debentures of said municipality, all of the said debentures and coupons having been

PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

(1) 7 Man. L. R. 128.

issued under by-law No. 5 of the said municipality, and being part of the debentures and coupons referred to in an act of the legislature of the province of Manitoba 46 & 47 Vic. ch. 70.

The action was commenced by a writ of summons specially endorsed, a copy of which was served upon the defendants, and upon their appearing thereto the plaintiffs took out a summons, in pursuance of sec. 34 of the Court of Queen's Bench Act, 1885 (ch. 15 of 48 Vic. Manitoba), for liberty to sign final judgment for the amount so specially indorsed upon the said writ of summons.

This summons was heard before Mr. Justice Killam, a judge of the Court of Queen's Bench for Manitoba, who, upon the 4th of August, 1890, made an order allowing the plaintiffs to sign final judgment for the amount specially endorsed upon the said writ, together with interest and costs.

The defendants appealed to the full Court of Queen's Bench for Manitoba from the said order of Mr. Justice Killam, and upon the 19th December, 1890, the said Court of Queen's Bench delivered judgment unanimously dismissing the said appeal and confirming the said order.

The rule of the Court of Queen's Bench dismissing the appeal from the said order of Mr. Justice Killam was issued and is dated the 14th day of February, 1891.

The defendants sought to appeal to the Supreme Court of Canada from the rule dismissing said appeal, and the security on appeal was approved of by the Chief Justice of the Court of Queen's Bench for Manitoba on the 14th of February, 1891. The plaintiffs moved to quash the appeal for want of jurisdiction, on the ground that the judgment appealed from is not a final judgment within the meaning of the Supreme

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and Exchequer Courts Act, or if it was that the order of Mr. Justice Killam was one made in the exercise of judicial discretion.

Chrysler Q.C. for the motion. In *Standard Discount Co.* v. *La Grange* (1) a similar order to that made by Mr. Justice Killam was held to be an interlocutory order and not a final disposition of the cause.

See also *Collins* v. *Vestry of Paddington* (2); *Nelson* v. *Thorner* (3); and *Collins* v. *Hickok* (4).

Hogg Q.C. and *Crawford* opposed the motion citing *Bank of Minnesota* v. *Page* (5); *Chevalier* v. *Cuvillier* (6); Annual Practice 1890-91 (7).

SIR W. J. RITCHIE C.J.—I have no doubt that we should quash this appeal. The following cases, which deal with orders similar to the one in question here, establish that the judgment appealed from is not a "final judgment" from which an appeal will lie to this court.

Standard Discount Company v. *La Grange* (1). Bramwell L.J. says:—

> I am of opinion that this preliminary objection must prevail. There cannot be an order which is neither final nor interlocutory; and therefore if the order before us is not final it must be interlocutory. Is it a final order? It is, like every other order, in one sense final so long as it is not appealed against, but it is not the final order of the court in the cause, because in order to entitle the plaintiffs to levy execution there must be a subsequent direction by the court. Therefore I think it is an interlocutory order.
>
> I only put these cases as possible. I may give another illustration: suppose judgment to be signed and an appeal brought on the judgment—it is unnecessary to consider whether it would be successful or not—it clearly must be brought from the time when judgment was assigned and not from the date of the order. Now, if there is a year within which to appeal from the order, and afterwards a like

(1) 3 C.P.D. 67.
(2) 5 Q.B.D. 368.
(3) 11 Ont. App. R. 616.
(4) 11 Ont. App. R. 620.
(5) 14 Ont. App. R. 347.
(6) 4 Can. S.C.R. 605.
(7) P. 895.

period to appeal from the judgment, that would give rise to a state of things which I think the legislature never intended.

Brett L. J. :—

I agree that the order obtained by the plaintiffs is interlocutory. My reason for so holding is, that the order is not the last step which must be taken in order to fix the status of the parties with respect to the matter in dispute; it is in itself ineffectual, and until a further proceeding has been taken the plaintiffs cannot recover the debt sued for. Another step must be taken before the status of the parties can be fixed, and that step is the entry of the judgment. The order was not the final step in the action, and therefore it is interlocutory.

I think that our decision may perhaps be founded upon another ground, namely, that no order, judgment, or other proceeding can be final which does not at once affect the status of the parties for whichever side the decision may be given : so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff ; whereas if the application for leave to enter final judgment had failed the matter in dispute would not have been determined. If leave to defend had been given the action would have been carried on with the ordinary incidents of pleading and trial, and the matter would have been left in doubt until judgment. I cannot help thinking that no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute.

Cotton L.J. :—

I am of opinion that this is an interlocutory order, and that the time for appealing against it is the shorter period of 21 days. The decision in *White* v. *Witt* (1) may not be our sole guide in determining this case ; but at least it shows this, that an order may be interlocutory and subject to appeal only within the shorter period, although it really decides that on which the judgment of the court, admittedly final, is ultimately given.

Now, it is no doubt the fact that if the order obtained by the plaintiffs be not set aside they will be able to sign judgment against the defendant ; but *White* v. *Witt* (1), certainly shows that, although the effect of a final judgment will result from making an order unless it be set aside, still this circumstance does not prevent the order from being interlocutory, and subject to appeal only during the shorter period. Without using an exhaustive definition, it may be laid down that an order is interlocutory which directs how an action is to proceed ; and

(1) 5 Ch. D. 589.

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the order before us is exactly of that kind. The rules of the Supreme Court, order 14, rule 1, allow a plaintiff, so soon as the defendant has appeared to a specially indorsed writ, to apply to a master or a judge, and to obtain an order which will prevent the action from going through its ordinary course, and will give the plaintiff liberty at once to sign judgment without taking the usual steps; the order, however, relates to the procedure, and therefore is only interlocutory.

This case was acted on in *Salaman* v. *Warner* (1). The court, Lord Esher M.R., Fry L.J. and Lopes L.J. thought that the true definition of a final order was that suggested by Lord Esher in *Standard Discount Company* v. *La Grange* (2).

In *Collins* v. *Vestry of Paddington* (3):

D. Seymour Q.C. and *Bompas* Q.C. (*Croome* with them) were called upon to argue for the plaintiff. First, the special case is completely disposed of by the decision of the Queen's Bench Division; the judgment of that court was final upon the rights of the parties as to the question submitted for its consideration; the reasoning of the Lords Justices in *Standard Discount Company* v. *La Grange* (2), shows that the judgment was not interlocutory.

Bagallay L.J.:—

That case shows that where any further step is necessary to perfect an order or judgment, it is not final but interlocutory; its principle applies here: the case must go back to the arbitrator that he may make his award; the judgment of the Queen's Bench Division is not the final step in the cause.

STRONG J.—I am of opinion that the appeal should be quashed. It is quite clear that such an order as was made in this case cannot be called a final judgment.

FOURNIER and GWYNNE JJ.—Concurred in quashing the appeal.

PATTERSON J.—The 34th section of the Manitoba Statute, 48 Vic. ch. 13, resembles rule 739 of the

(1) [1891] 1 Q.B. 734. (2) 3 C.P.D. 67.
(3) 5 Q. B. D. 370.

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Ontario Consolidated Rules of Practice, which follows rule 80 under the original Judicature Act of Ontario, that rule having itself followed one of the English Supreme Court rules of 1875, viz., order XIV, rule 1, as amended by a rule of May, 1877. When a defendant appears to a specially indorsed writ the plaintiff may, on an affidavit verifying his cause of action and stating his belief that there is no defence, call on the defendant to show cause why the plaintiff should not be at liberty to sign final judgment. Thereupon, unless the defendant satisfies the court or a judge that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend the action, an order may be made empowering the plaintiff to sign judgment accordingly. Such an order having been made in this case the defendant appeals, and his right to do so is contested on the ground that the judgment is not a final judgment within the meaning of that term in section 28 of the Supreme and Exchequer Courts Act. Without for the moment considering whether our jurisdiction depends entirely on the question, let us inquire whether this is or is not a final judgment.

That question must be decided upon the definition of the term "final judgment" given in the interpretation clause of the act, which declares that in that act, unless the context otherwise requires, the expression "final judgment" means any judgment, rule, order or decision, whereby the action, suit, cause, matter, or other judicial proceeding is finally determined and concluded. Decisions upon the English rules of the Supreme Court are as likely to mislead as to assist in the construction of this definition unless careful attention is paid to the difference between the legislation in the one case and the other. Most of those decisions in which the character of a judgment, as being

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final or interlocutory, is discussed, are under order LVIII, Rule 15, the numbers being the same in the rules of 1875 and those of 1883, which limits the time for appealing. The great point of difference is that the English rule does not define either "interlocutory judgment" or "final judgment," and the effort has been in each case to hit upon a definition that will carry out the object of the rule, while we have an exhaustive definition of "final judgment," and have to say whether or not the particular case comes within it. The rule of 1875 happens not to contain the term "final judgment" at all. Its words were "no appeal from any interlocutory order shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year."

The rule of 1883 introduced, after the words "interlocutory order," the words "or from any order whether final or interlocutory in any matter not being an action." The leading word is "interlocutory," which does not occur in the clauses relating to the jurisdiction of this court. It is a technical word, and in reference to actions or suits denotes proceedings taken before the formal final judgment is reached. It is a convenient word to express the idea that a judgment is not a final judgment within the meaning of section 28, but we must guard against the fallacy of first adopting a term which is not in our statute as a convenient short name for a judgment that is not final, and then reasoning from its technical use in another situation as to what is a final judgment, in place of testing every judgment by the definition our statute gives. In the English cases the terms "final" and "interlocutory" are not treated as terms of precision to be rigidly applied without regard to modifying considerations.

This is clear from several cases cited on the argument as well as from others, and chiefly from *Salaman* v. *Warner* (1), which was decided by the Court of Appeal since the argument in this case. The court there unanimously adopted the definition given fourteen years before by Lord Esher in *Standard Discount Co.* v. *La Grange* (2), as the right test for determining whether an order, for the purpose of giving notice of appeal under the rules, is final or not, holding that a decision, though it finally disposed of the matter in dispute, was not to be considered a final order for the purpose of the rules unless it would have finally disposed of the matter if it had been given the other way. Lord Esher M.R., and Fry and Lopes L.JJ., gave judgments to the same effect. I shall quote only a few words of Fry L.J., who remarked concerning the 3rd and 15th rules of order LVIII, that they—

> Have raised considerable difficulties because they use the term "interlocutory order" of which no definition is to be found in the rules themselves, or, so far as I know, by reference to the earlier practice either of the common law or chancery courts. These difficulties have been well illustrated by various cases that have been decided. We must have regard to the object of the distinction drawn in the rules between interlocutory and final orders as to the time for appealing. The intention appears to be to give a longer time for appealing against decisions which in any event are final, a shorter time in the case of decisions where the litigation may proceed further. I think the true definition is this: I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined.

The rule thus adopted for the construction of the words "final" and "interlocutory" with reference to the limitation of time for appealing will, no doubt, be regarded as now definitely settled in the English courts, but it is obvious that a construction which

(1) [1891] 1 Q. B. 734. (2) 3 C. P. D. 67–71.

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classes under the head of interlocutory orders an order by which the question in controversy is finally decided against one of the parties is one which, though it carries out the object of the English rule, would not give effect to the intention of our statute, and could not be made to fit in with the definition of "final judgment" given in the interpretation clause.

In the case of *Whiting* v. *Hovey* (1) the right to appeal to the Court of Appeal of Ontario was contested, under certain provisions of the Judicature Act, on the ground that an interpleader issue, the decision of which finally disposed of the dispute between the parties to the issue, was only an interlocutory proceeding. There was an equal division of opinion in the Court of Appeal in consequence of which the appeal went on. The case ultimately came to this court on its merits, and the question of the right to appeal being again raised the right was sustained. In that case I expressed, in the Court of Appeal, the opinion which has, I think, been confirmed by the late case of *Salaman* v. *Warner* (2), and a still later case which I am about to cite, that the word "interlocutory" in our statutes is not necessarily to be construed in the same way as under the English order LVIII, rule 15.

The discussion in *Whiting* v. *Hovey* (1) turned mainly upon a case of *McAndrew* v. *Barker* (3) in which an interpleader issue was held to be an interlocutory proceeding, and an order under it to be appealable, under the rules of 1875, only within twenty-one days. In the very late case of *McNair* v. *Audenshaw Paint and Colour Co.* (4), the Court of Appeal held that it was the same under the rules of 1883, Bowen and Kay L.JJ. expressly pointing out that although the judge who tries the issue is clothed with the power of finally adjust-

(1) 12 Ont. App. R. 119.
(2) [1891] 1 Q. B. 734.
(3) 7 Ch. D. 701.
(4) [1891] 2 Q. B. 502.

ing the rights of the parties and disposing of the whole matter, it does not follow that his decision on the interpleader issue is not an interlocutory order so far as regards the time for appealing.

Then is this a final judgment as defined in the statute? I think it is. It is an order whereby the action is finally determined and concluded, and so is literally within the definition. The point so much insisted on by Bramwell L.J., in *Standard Discount Co.* v. *La Grange* (1), that the order, though finally adjudicating against the defendant's right to defend the action, was not a final order, because it merely gave the plaintiff leave to sign final judgment and was not itself a judgment on which, without something more being done, execution could be issued, might be made in this case also, but we must remember that the discussion in that case was that which I have already dealt with, not being whether the order did not finally dispose of the matter in controversy, but whether it was one which, under the policy of the rule of court, must be appealed from within the shorter period. In the case *In re Riddell* (2) the question was whether the dismissal of an action for want of prosecution, with award of costs to the defendant, was a "final judgment" which entitled the defendant to serve the plaintiff with a bankrutcy notice under the Bankruptcy Act, 1883. It was held by Cave J. and afterwards by the Court of Appeal that not being an adjudication of the merits between the parties, but only like a non-suit which left the parties at liberty to renew the litigation, it was not a final judgment as contemplated by the Bankruptcy Act. The order before us, besides coming literally within the statutory definition of a final judgment, has in its operation the attribute of finality that

(1) 3 C. P. D. 67.

(2) 20 Q. B. D. 318, 512.

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does not belong to a non-suit, because the defendant cannot renew the contest.

Therefore if the right to appeal followed from the finding that this was a final judgment I should hold the right to be established. But the 27th section of the statute has to be taken into account. It declares that, with exceptions which do not apply here:

> No appeal shall lie from any order made in any action, suit, cause, matter, or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same.

I think this order is of that class, and that the case affords a good example of the beneficial character of section 27.

The object of the Manitoba statute evidently is to prevent a plaintiff to whose cause of action there is no real defence from being delayed by the setting up of a defence which is frivolous or pleaded merely to gain time.

Speaking of the corresponding provision in the rules of the Supreme Court, in *Wallingford* v. *Mutual Society* (1), Lord Selborne said:—

> It is a very valuable and important part of the new procedure introduced under the Judicature Act, that the means should exist of coming by a short road to a final judgment when there is no real *bonâ fide* defence to an action. But it is at least of equal importance that parties should not in any such way, by a summary proceeding in chambers, be shut out from their defence when they ought to be admitted to defend.

In two cases *Nelson* v. *Thorner* (2) and *Collins* v. *Hickok* (3), the Ontario Court of Appeal had to deal with orders like the one now in question. The appeals were from county courts whose procedure is regulated by the Judicature Act. The judgments of the court, delivered in both cases by Mr. Justice Osler, recognise the orders as being made in the judicial discretion of

(1) 5 App. Cas. 685, 694. (2) 11 Ont. App. R. 616.
(3) 11 Ont. App. R. 620.

the judge, one of them expressly recognising, as did also the judgments in the House of Lords in *Walling-ford* v. *Mutual Society* (1), the power of the judge to impose terms as a condition of allowing a defence to be pleaded, a power which is incident only to a discretionary jurisdiction.

It is worth while to notice that the jurisdiction of the Court of Appeal to hear those cases depended on the decision or order of the county court judge being " in its nature final and not merely interlocutory " (2).

The power given to a judge in chambers, and which in England is exercised in the first instance by a master of one of the divisions of the High Court, and in Ontario by the master in chambers, of shutting out, by a summary order, a defence that appears not to be genuine or in good faith, is undoubtedly a useful and important power, but one in the exercise of which great caution is required, lest the examination of the genuineness and good faith of the proposed defence become in reality a trial of the merits, and the defendant be deprived of a trial by the ordinary methods and a resort to an ultimate court of appeal. There should be an effective means of reviewing the decision in chambers, but that may be found in the provincial courts without the necessity of protracting the litigation and adding to the costs by coming to this court. The exclusion of our jurisdiction by section 27 is therefore a salutary provision.

In my opinion the appeal should be quashed.

Appeal quashed with costs.

Solicitors for appellants: *Campbell & Crawford.*

Solicitors for respondents: *Perdue & Robinson.*

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(1) 5 App. Cas. 685.

(2) R.S.O. 1887, c. 44, s. 42.

1891 G. F. STEPHENS (PLAINTIFF) .....APPELLANT;

*Jan. 23,26.

*Nov. 16.

AND

COLIN McARTHUR AND JAMES WORTHINGTON (DEFENDANTS) } RESPONDENTS

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

Construction of statute—Transfer of personal property—Preference by —Pressure—Intent—49 V. c. 45 s. 2 (Man.)

By the Manitoba Act 49 V. c. 45 s. 2, "Every gift, conveyance, etc., of goods, chattels or effects * * * made by a person at a time when he is in insolvent circumstances * * * with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void."

Held, Patterson J. dissenting, that the word "preference" in this act imports a voluntary preference and does not apply to a case where the transfer has been induced by the pressure of the creditor.

Held, further, that a mere demand by the creditor without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference.

The words "or which has such effect" in the act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. *Molsons Bank* v. *Halter* (18 Can. S.C.R. 88) approved and followed.

Held, per Patterson J., that any transfer by an insolvent debtor which has the effect of giving one creditor a priority over the others in payment of his debt, or which is given with the intent that it shall so operate, is void under the statute whether or not it is the voluntary act of the debtor or given as the result of pressure.

PRESENT:—Sir W. J. Ritchie C. J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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APPEAL from a decision of the Court of Queen's Bench (Man.) (1), affirming the judgment at the trial of an interpleader issue in favour of the defendants.

The plaintiff Stephens, who carried on business as a wholesale dealer in paints and oils in the city of Winnipeg under the firm name of G. F. Stephens & Co., held a chattel mortgage on the stock in trade of Madell & Robinson, a retail firm of painters and paper hangers in the same city, and the goods so mortgaged had been seized under execution issued on a judgment of the defendants against the said firm. The interpleader issue was to try the right to the possession of these goods.

The mortgage to the plaintiff was given on 8th December, 1888, under the following circumstances: He had had considerable dealings with Madell & Robinson and at this date he found that their account was getting too large to carry without security. A few days before 8th December he went to see Madell & Robinson about getting security, and on their stating that if they could get time to pay their debts until the spring trade opened they would be able to satisfy all their creditors, the plaintiff agreed to give them time and make further advances if they would give a chattel mortgage, which they agreed to do. At the trial there was conflicting evidence as to whether or not the plaintiff threatened at that time to sue if security was not given, but it was shown that he had been dunning them occasionally before that, and that he told them at the time the mortgage was given, or shortly after, that he would have issued a writ if the security had been refused.

On the 17th December the firm of Madell & Robinson was dissolved, Madell retiring and transferring his interest in the business to Mrs. Robinson, who carried

(1) 6 Man. L. R. 496.

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it on until 5th February, 1889, when she made an assignment for the general benefit of her creditors. Prior to this assignment the respondents had obtained judgment against Madell & Robinson, and an execution was placed in the sheriff's hands on 26th January, 1889. The goods in the store of the judgment debtors having been seized under the execution this interpleader issue was ordered between Stephens as plaintiff, claiming under his chattel mortgage, and the respondents as execution creditors.

On this state of facts it is objected on behalf of the respondents, the execution creditors, that the chattel mortgage is void under "The Act respecting Assignments for the benefit of Creditors," (1), as creating a fraudulent preference. That section provides as follows :—

"2. Every gift, conveyance, assignment or transfer, delivery over, or payment of goods, chattels or effects, or of bills, bonds, notes, securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall as against them be utterly void."

The trial judge held that the chattel mortgage was not given by the debtors with intent to defeat, delay or prejudice their creditors, or to create a preference; he held, however, that it had the effect of creating a preference, and was, therefore, void under the act.

(1) 49 Vic. c. 45 s. 2 (Man.)

This decision was affirmed by the Court of Queen's Bench. The plaintiff appealed to this court.

Moss Q.C. and *Wade* for the appellant.

The Manitoba statute clearly is an act relating to bankruptcy or insolvency and is void. *Clarkson* v. *Ontario Bank* (1); *Reg.* v. *Chandler* (2).

By sec. 7 of the act only the assignee can sue. If he refuses, or if there is no assignment, a creditor may sue by leave of the court.

The appellant is within the saving clause. The evidence shows that he intended to make advances to Robinson and he gave him time to pay his debt which is equivalent to an advance. *Rae* v. *McDonald* (3).

This court has decided in *Molsons Bank* v. *Halter* (4) that the intent to delay or give a preference must still be shown in spite of the words "or which has such effect" in the statute. That being so there was clearly no such intent in this case. The matter of preference is very fully discussed in *Slater* v. *Oliver* (5). See also *Ex parte Ellis* (6), *Ex parte Sheen* (7).

Morris Q.C. and *Elliott* for the respondents referred to *Murtha* v. *McKenna* (8).

SIR W. J. RITCHIE C.J.—I entirely concur in the judgment of my brother Strong in this case, and for the reasons which he has advanced I would allow the appeal.

STRONG J.—The question raised by this appeal is one involving the validity as against creditors of a chattel mortgage given to the appellant by a firm of Madell & Robinson who were debtors of both the appel-

(1) 15 Ont. App. R. 166.
(2) 1 Han. (N.B.) 556.
(3) 13 O. R. 366.
(4) 18 Can. S.C.R. 88.
(5) 7 O. R. 158.
(6) 2 Ch. D. 797.
(7) 1 Ch. D. 560.
(8) 14 Gr. 59.

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lant and respondents, and it is worthy of remark at the outset that the result of the judgment appealed against is not to avoid this mortgage in favour of the general body of creditors, but merely to substitute the respondents, who are execution creditors, as creditors having priority, so far as regards the property comprised in the mortgage, over the appellant. The debtors having made an assignment for the benefit of creditors generally the assignee, Mr. Wade, who was originally made a party to the interpleader proceedings, submitted to be barred, and this interpleader issue was then directed to be tried between the appellant claiming under his chattel mortgage as plaintiff, and the respondents, the execution creditors, as defendants. On the trial of this issue before Mr. Justice Bain (without a jury) the learned judge found for the respondents, and upon an appeal being taken to the full Court of Queen's Bench the judgment of Mr. Justice Bain was sustained.

The specific ground upon which the security is impeached is that it was a preference, or had the effect of a preference, within the meaning of the Manitoba act 49 Vic. ch. 45 sec. 2. This enactment is as follows:

> Every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, securities or of shares, dividends, premiums or bonds in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances or unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void.

One of the appellant's contentions is that this clause is void as being legislation on the subject of insolvency and therefore beyond the powers of a provincial legislature. I am of opinion, however, that the appeal may be decided on other grounds, apart altogether from the question of the constitutional validity of the statute,

and that we are therefore relieved from considering and pronouncing upon this latter point.

That the appellant was a perfectly honest creditor, whose debt had arisen in every respect in good faith, was in no way disputed.

Whether there was or not notice to the appellant of the insolvency of the debtors is a point which, in the view I take of the meaning and construction of the statute, is not material to the decision of the present appeal.

It is clear, however, that notice has not been established. The trial judge found, and the court in banc sustained the finding, that the appellant had not notice of the insolvency of the execution debtors at the time he took his security. In appeal Mr. Justice Killam expressly says that there was evidence to support this finding and that there is no weight of evidence against it. In this court we may therefore well treat this question of fact as concluded by the concurrent findings of the two courts below.

The substantial ground upon which I am prepared to rest my judgment is the construction of the language of the statute in relation to the meaning of the words "preference" and "effect of preference."

That by the second section of the statute before set forth it was intended in any way to attribute to the word "preference" a wider scope than previous decisions had given it, or to alter or interfere with the signification which had in accordance with its etymological meaning been affixed to the expression when used in bankruptcy and insolvency statutes by courts of the highest authority, in no way appears either from the section itself or from any context to be found in other parts of the statute. It is for the respondents to establish that the word is to receive some secondary meaning, differ-

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ing from that which has always been placed upon it, before they can ask us to refuse to follow the authorities which, from the time of Lord Mansfield down to the decision of the case of *Butcher* v. *Stead* (1), have held that the word imports a voluntary preference and that an act of the debtor which is induced by the pressure of the creditor is in no sense to be deemed a preference.

In *Butcher* v. *Stead* (1) Lord Cairns thus decisively expresses the view that the word " preference " *per se* imports a voluntary preference, and that when there is pressure on the part of a creditor seeking payment or security for a debt honestly due there can be no fraudulent preference. The passage I refer to is that to be found at p. 846 of the report, where the Lord Chancellor says :—

> The act appears to have left the question of preference as it stood under the old law, and indeed the use of the word " preference " implying an act of free will would of itself make it necessary to consider whether pressure had or had not been used, and this appears to have been the opinion of the Lords Justices in the case of *Ex parte Topham* (2).

Can then anything in the way of statutory enactment be pointed to, displacing this positive and authoritative declaration of the law delivered by the Lord Chancellor of England so recently as the year 1875 ? Nothing to which we have been referred shows that there has been any change, and if the result would be, as in the present case, to bring about a mere interversion of the priorities of two rival creditors it is perhaps not to be regretted that no change has been made. It is not, however, to be supposed that this case of *Butcher* v. *Stead* (1) stands alone as an authority upon the effect of pressure as rebutting a presumption of fraudulent preference. In the recent case of *Long* v. *Hancock* (3)

(1) L. R. 7 H. L. 839. (2) 8 Ch. App. 614.
(3) 12 Can.S.C.R. 539.

Mr. Justice Gwynne in this court laid down the same doctrine, and the cases cited in the appellant's factum, of *Kennedy* v. *Freeman* (1), *Slater* v. *Oliver* (2), and *re Boyd* (3), are all to the same effect.

As I have said the doctrine had its origin as far back as the time of Lord Mansfield (see *Harman* v. *Fishar* (4) and *Thompson* v. *Freeman*) (5) and the books are full of cases down to recent times all recognizing the doctrine and treating it as one necessarily arising from the primary and natural import of the word "preference" as meaning a voluntary act on the part of the debtor and therefore as a term which is not applicable to an act brought about by the active influence of the creditor. Two decisions of the Privy Council, both referred to in the appellant's factum, are so precisely in point that they seem to me conclusive. In the first *The Bank of Australasia* v. *Harris* (6) the words of a statute in the nature of an insolvency act which avoided acts "having the effect of preferring" were identical with those in the present statute and it was held that this referred to fraudulent preferences only. The Jamaica case of *Nunes* v. *Carter* (7) is to the same effect. Both these cases recognize that the word "preference," or "preferring" referred to a voluntary and therefore fraudulent preference. In the notes to *Harman* v. *Fishar* 4), in Tudor's L. Cases on Mercantile Law (8), a long list of authorities which it would be useless to quote more particularly is to be found.

Then as to what acts are sufficient to constitute pressure the decided cases are equally explicit. The cases on this head are also all collected in the book last referred to (9) and from them it appears that a mere

(1) 15 Ont. App. R. 230.
(2) 7 O. R. 158.
(3) 15 L. R. (Ir.) 521.
(4) Cowp. 117.
(5) 1 T. R. 155.
(6) 15 Moore P. C. C. 116.
(7) L. R. 1 P. C. 342.
(8) See p. 818 ed. 1884.
(9) Tudor's L. C. on Mercantile Law, p. 818.

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demand by the creditor without even a threat of, much less a resort to, legal proceedings is sufficient pressure to rebut the presumption of a preference. We need not, however, dwell longer on this part of the case, inasmuch as both Mr. Justice Bain at the trial and the court on appeal were of opinion that if pressure was in law sufficient to rebut any inference of fraudulent preference it was, in point of fact, sufficiently established. Mr. Justice Killam delivering judgment in appeal says:

> I understand the learned judge intended to find that there was such pressure as to rebut any presumption of an intent to prefer. The evidence fully warrants such a finding. This effect of pressure has been so frequently accepted in this court as not to require to be now discussed.

Then, and this perhaps is the main argument relied on by the respondents, it is said that even if there was no intent to prefer yet the security given had "the effect of a preference" within the meaning of those words as used in the statute. In the case of *Molsons Bank* v. *Halter* (1) I have already stated my own opinion as to the meaning which ought to be placed on this expression. I there said that I interpreted them as applying to a case in which that had been done indirectly which if it had been done directly would have been a preference within the statute. To this opinion I still adhere, and if I am correct in this, which is the literal construction, it is conclusive in the present case.

It has, however, been forcibly argued on this appeal, both in the appellant's factum and by his counsel at the bar, that if it is once demonstrated that the word preference means *ex vi termini* a voluntary preference then the class of contracts, deeds, instruments or acts which are to be avoided as having the effect of a pre-

(1) 18 Can. S. C. R. 88.

ference must also be restricted to such as are spontaneous acts or deeds of the debtor. This argument appears to me irresistible, and even were it unsupported by authority I should deem it conclusive of the case. But in the case of *The Bank of Australasia* v. *Harris* (1), before the Privy Council, the very same point arose; the difference between the words of the statute, the construction of which was in question there, and the present statute are immaterial. It will be remembered that the words of the statute in that case (which I have already quoted) were "having the effect of preferring," here they are "or which has such effect," the relative word "such" referring to the giving any one or more of his creditors a "preference" over his other creditors. No reasonable or even sensible distinction can be made between the language of the two statutes, and it therefore follows that we have in this case of *The Bank of Australasia* v. *Harris* (1), a direct authority on this point of construction which we cannot refuse to follow without repudiating the authority of our own supreme court of appeal. And this same construction we have again substantially repeated in the case of *Nunes* v. *Carter* (2).

Therefore it appears that both upon authority and principle the construction of the statute contended for by the appellant is that which ought to be adopted.

Had it been the intention of the legislature to make such an alteration of the law as to avoid all transactions which might result in giving precedence to active and diligent creditors who should by pressing their claims obtain priority over others, it can hardly be supposed, in view of the well-established state of the then existing law to the contrary, that such a change w old not have been enunciated in clear and explicit terms.

(1) 15 Moo. P C. C. 116. (2) L. R. 1 P. C. 342.

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As I have already pointed out it is found by both the courts below that the appellant had no notice of the insolvency of the debtor; but even if it had been otherwise I should have considered that inasmuch as the law as it had been settled in England did not make securities obtained by a creditor in priority to others a fraudulent preference, provided it was the result of pressure, even although the creditor had notice of the debtor's insolvency, and as this state of the law had not been altered by the statute, notice was immaterial.

As I have arrived at this conclusion it is unnecessary to notice two other points made by the appellant, one impeaching the *locus standi* of the respondents to attack the mortgage, a right which it is contended is given exclusively to the assignee, the other that there was a further advance by the appellant at the time of taking his security. Both of these objections seem to be of weight, but I express no opinion as regards either of them.

The appeal should, in my opinion, be allowed and judgment entered on the interpleader issue for the appellant with costs in this court and also in the court below.

FOURNIER and TASCHEREAU JJ.—Concurred in the judgment of Mr. Justice Strong for allowing the appeal.

GWYNNE J.—I cannot pronounce the judgment of the learned judge who tried the case upon the question of fact as to the perfect honesty of the transaction assailed and the *bona fides* of the parties to it to be clearly errroneous, and if I cannot, the established rule of the court is that I should not. In other respects also I entirely concur in the judgment of my brother Strong, to which I merely desire to add that in my judgment

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the case is concluded by the judgment of this court in *Molsons Bank* v. *Halter* (1).

PATTERSON J.—(After reviewing the evidence at some length his Lordship proceeded as follows): The result of all the evidence seems to me very plain.

The debtors being unable to pay their debts, but having hopes that if they could keep their creditors from interfering with their business they might be able to provide in the long run for paying them, transfer to one creditor all their assets, some by way of mortgage; some, viz., the book debts, by absolute assignment; and some, viz., the horse, both ways, the absolute sale being before the mortgage; having an understanding, vague enough and not amounting to an agreement, that he would assist them to keep their business going. He would not have engaged as far as he did, as he tells us, if they had not given him the security—in other words made him better off than the other creditors. The most effective assistance looked for was evidently the keeping off the other creditors, or as Robinson phrased it when speaking of the book debts, "to keep other people from jumping on to them, and to give me the same chance that I wanted in the first place,"—which is pretty much to the same effect as a statement of the plaintiff which I have already read when he said: "Giving me a chattel mortgage would secure me and prevent any other creditors coming and seizing every thing, and give them time also to pay them all off. The understanding was that I was to take the security and give them all the time necessary to pay off the other creditors."

The respondents obtained judgment against Madell and Robinson on or before the 26th of January, 1889, and on that day seized the goods under a *fi. fa.* and they

(1) 18 Can. S.C.R. 88.

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were, as already mentioned, sold under the interpleader order.

The mortgage is attacked under the following provision of the statute of Manitoba, 49 Vic. ch. 45 sec. 2:

2. Every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes, securities, or of shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall as against them be utterly void.

It has been held to be invalid by the unanimous judgment of the Court of Queen's Bench in that province as having the effect of giving a preference to the appellant over the other creditors of Madell and Robinson.

There were two objections taken to the mortgage under the act respecting chattel mortgages, both of which were, I think properly, overruled in the court below. One was to the description of the goods; but the description satisfies the statute, as already decided in this court. The other was based upon the circumstance that the mortgage was given in part to secure the amount of current promissory notes, the contention being that the consideration ought, so far as that amount is concerned, to have been differently stated; and, consequent upon that, that there ought to have been a different affidavit of *bona fides*. But the security was not taken against the liability of the mortgagee as indorser of the notes. The amount of those notes was a debt directly due to the mortgagee as much as the amount of the overdue notes or of that part of the amount which had never been covered by a note. A promise to pay a debt at a future day does not alter the nature of the debt.

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We have therefore to consider only the statute of 49 Vic. ch. 45, and the questions under it are: Was the mortgage made with intent to give the mortgagee a preference over other creditors, or had it such effect?

In the first place what is a preference?

In investigating the meaning and force of that word as used in this Manitoba statute it is said that we are not at liberty to look beyond the construction applied by this court to the same word in a statute of the province of Ontario in the recent case of *Molsons Bank* v. *Halter* (1). If that position is correct we must understand the preference dealt with by the statute as being the voluntary and spontaneous act of the debtor uninfluenced by pressure, even to the extent of a request, on the part of the creditor. As expressed in that case by one of my learned brothers:

> To constitute a preference it [*i. e.* the transfer of property] must have been given by the insolvent of his own mere motion, and as a favour or bounty proceeding voluntarily from himself.

With great respect for the opinions of my learned brothers who formed the majority of the court at the hearing of *Molsons Bank* v. *Halter* (1), I venture to think a reconsideration of the question desirable, nor do I perceive any sufficient reason for treating the judgment in that case, even if the views alluded to had been those of the whole court, as making it our duty to apply the same construction to this Manitoba statute. The two statutes are, no doubt, very much alike, but in *Molsons Bank* v. *Halter* (1) there were several questions that do not arise in the case before us. One of them turned on the relation of the mortgagor in the impeached mortgage towards his mortgagee. It was held, upon the facts of the case, that those persons were not debtor and creditor, and it was further held that the statute avoided preferential transfers

(1) 18 Can. S.C.R. 88.

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only when made by a debtor to his creditor. That decision took the case altogether out of the statute and made the discussion of the word "preference" unnecessary for the disposal of the appeal.

But I take it to be indisputable that, as a matter of principle, the reasons given by the court for its judgment in any case may properly be reconsidered and, if found to be erroneous, corrected when a similar question arises in another case. Whether that can be done by an ultimate court of appeal, such as the House of Lords, may perhaps not be free from question. We have the opinion of Lord Campbell expressed in *Bright* v. *Hutton* (1), and in *Beamish* v. *Beamish* (2), in one direction, and that of Lord St. Leonards in *Wilson* v. *Wilson* (3), taking the opposite view, while in the last named case Lord Brougham spoke of the question as *questio vexata*. The reasons on which the opinion of Lord Campbell is founded apply only to the court of last resort, and the power of every other judicial tribunal to correct an error (if it has fallen into one) in subsequently applying the law to other cases is recognised in express terms, particularly by Lord St. Leonards. I had occasion to consider the doctrine in *re Hall* (4), where I referred to the cases I have now cited with other authorities. Instances illustrating the point are often met with. One of them is afforded by the case *Ex parte Griffith* (5), in which the Court of Appeal departed from the rule of decision which had obtained in a series of cases beginning with *Ex parte Tempest* (6) I shall have to notice those cases more fully by and by, as I proceed with the consideration of the question: What is a preference within the meaning of the Manitoba statute?

(1) 3 H. L. Cas. 341.
(2) 9 H. L. Cas. 274.
(3) 5 H. L. Cas. 49.
(4) 8 Ont. App. R. 135.
(5) 23 Ch. D. 69.
(6) 6 Ch. App. 70.

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To one reading the statute the word does not seem hard to understand, yet it is urged that under the apparent simplicity of the expression there lurks a hidden qualification. A man whose mind is unwarped by legal subtleties, and who reads the statute in order to learn and be governed by its provisions, will instinctively act on the golden rule of construction and give to the language its ordinary grammatical meaning. The word "preference" will not be to him an unfamiliar term in the vocabulary of business life. Preference shares in railway and other companies, and preferred creditors in insolvency or winding-up proceedings, he will probably know as subjects of legislation, if not in a more practical way. The clause of the Manitoba statute now before us is a reproduction, with some recent variations, of one enacted in the province of Canada over thirty years ago (1) and adopted in Manitoba where it was more than once re-enacted. It contained the word preference in the same sense as in the present clause (2), and had also a proviso excepting from its operations assignments made by debtors "for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of such debtor their just debts." "Preference and priority" mean in these instances pretty much the same thing. One man gets paid in priority to another, or the other may get nothing at all. That is the sense in which the word is employed in this statute, and it is the ordinary force of the word as used in our legislation, as for example in the Ontario assessment laws which make the taxes a special lien on land, "having preference over any claim," &c. (3).

(1) 22 Vic. c. 96 s. 19; C. S. U. C. c. 26 s. 18; R. S. O. 1877 c. 118 s. 2.

(2) 38 Vic. c. 5 s. 59 (Man.); C. S. M. c. 37 s. 96; 48 Vic. c. 17 s. 123 (Man.)

(3) R. S. O. 1887, c. 193, s. 137.

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But we are told that in this Manitoba statute it does not mean that. It is argued that to give one creditor an advantage over the others, in respect of the assets of his debtor, is not within the meaning of the statute to give him a preference unless it is done by the voluntary and spontaneous act of the debtor. This is a different thing from the "intent," which under this law has usually been construed as the same word is construed in the statute 13 Eliz. ch. 5, and which, from the date of *Wood* v *Dixie* (1) through nearly all of the last half century, has given rise to so many contests. The contention is that the word "preference" by its own proper force involves, and in this statute expresses, the idea of spontaneity on the part of the debtor who gives the preference. I entirely dissent from this suggestion. I regard it as unwarranted by anything necessarily conveyed by the word itself; as palpably opposed to the purpose of the statute; and as unsupported by the correct understanding of any English authority.

The term "fraudulent preference" as used in connection with the administration of English bankruptcy law, was not found in any statute. It was a term adopted by the courts to designate an act by which one creditor obtained an advantage over the others when two things concurred: first, that the act was voluntary on the part of the debtor; and secondly, that it was done in contemplation of bankruptcy. The word "preference" in this compound term was used in the sense which I attribute to it in the Manitoba statute, and it was held to be *fraudulent* when the two things I have mentioned concurred. Then came the Bankruptcy Act, 1869, and afterwards the Bankruptcy Act, 1883. Each of those acts contained a

(1) 7 Q. B. 892.

clause, which was section 92 of the former and section 48 of the latter act, that—

> Every conveyance, &c., by any person unable to pay his debts as they become due from his own money in favour of any creditor..... with a view of giving such creditor a preference over the other creditors, shall, if the person making.....the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making.....the same, be deemed fraudulent and void as against the trustee in bankruptcy.

This enactment encountered the inertia that is induced in the judicial mind by long following a particular line of thought. It was at first held that it left the law unaltered, and that the preference forbidden by it was merely the old fraudulent preference of the judicial decisions which, as I have said, was never defined by statute, and which included as one of its ingredients the voluntary and spontaneous action of the debtor. It was so laid down in *Ex parte Tempest* (1), in 1870. James L.J., speaking in that case of the old law, said:

> The principle is that in order to constitute a fraudulent preference the act must be the *spontaneous* act of the debtor, not originating in a demand or some other step of the creditor.

And again:

> The motive of giving a security is always to make the second creditor safe and better off than other creditors. The question is: What is the motive of that motive?

And further on:

> It is said, however, that the Bankruptcy Act, 1869, sec. 92, alters the law and makes an application by the creditor immaterial. It appears to me that, to make that section apply, the transaction must be one which would have been an act of fraudulent preference under the old law.

In *Ex parte Topham* (2), in 1873, the Court of Appeal considered that the Chief Judge had given a perfectly accurate description of the state of the law when he said that—

(1) 6 Ch. App. 70. (2) 8 Ch. App. 614.

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Unless it can be made clearly apparent, and to the satisfaction of the court which has to decide, that *the debtor's sole motive* was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even though it be obviously in favour of a creditor.

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In the case of *Butcher* v. *Stead* (1) which was before the House of Lords in 1875, the question decided was that a provision of section 92 saving the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration, extended to protect a person who received payment as a creditor, Lord Selborne disapproving of the construction thus put upon the statute, and expressing a fear that the decision opened a wide door to frauds upon the bankrupt law. The decision does not bear upon the present discussion, but Lord Cairns in the course of his judgment used language which may seem to do so. He said :

> The act appears to have left the question of pressure as it stood under the old law, and indeed the word "preference," implying an act of free will, would of itself make it necessary to consider whether pressure had or had not been used, and this appears to have been the opinion of the Lords Justices in the case of *Ex parte Topham* (2).

It may be presumptuous to question the dictum of so eminent a jurist as Lord Cairns, even as to the meaning of an English word, but I humbly submit that the word "preference" does not, *ex vi termini*, imply an act of free will, and that if the free will or voluntary act of the debtor is to be understood as an ingredient of the preference dealt with by these statutes that understanding must be derived elsewhere than from the word "preference" itself. The word "prefer" is no doubt appropriate to denote an act of the mind, or the state of one's affections or choice, and possibly that may be the sense in which it is most frequently used in every-day conversation ; but that is only one application of its meaning which is, literally, to bear or carry before, or to give the object of the

(1) L.R. 7 H.L. 839. (2) 8 Ch. App. 614.

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preference a place before some other. We may safely appeal to the authorised version of the scriptures as a standard of accuracy as well as of elegance in the use of our language. We there find the word sometimes expressive of choice (1), as when Timothy is charged to do certain things "without preferring one before another, doing nothing by partiality." But it is more usual to find the word denoting only relative position, as in the Baptist's announcement "After me cometh a man who is preferred before me" (2), and when it is said that "This Daniel was preferred before the presidents and princes" (3). In other versions the same meaning is conveyed by a different word. In Beza's latin translation of the passage from St. John, we have "*antepono*,"—*Pone me venit vir qui antepositus est mihi.* In the vulgate we find "*ante*" with "*facio*."—*Qui post me venturus est ante me factus est.* The revised version has it "After me cometh a man which *is become* before me." In the passage from Daniel the vulgate uses the verb "*supero*."—*Igitur Daniel superabat omnes principes et satrapas.* And in the revised version it is "This Daniel *was distinguished* above the presidents and satraps."

In this sense, it seems plain to my understanding, the word prefer is used in these statutes; and in every place where it occurs in the judgments cited it conveys the idea of giving one creditor a position more advanced than the others, or precedence, in relation to the payment of his debt. In short, as before remarked, the words "preference" and "priority" are almost if not altogether interchangeable.

When the English courts read into the new clause of the Bankruptcy Acts the old doctrines touching fraudulent preference they pursued a course of reason-

(1) 1 Tim. V. 21.

(2) John I. 15,30.

(3) Dan. VI. 3.

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ing inapplicable to our statutes and to our conditions. We are not dealing with a bankrupt law; but if we were we should still remember that the English bankruptcy system under which, independently of statute law, the old doctrines and formulæ had been established was not part of our jurisprudence. We may say of their rule of interpretation as applied to our statute, adopting language used by Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1), that it would "run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature." But the construction given to the clause of the Bankruptcy Acts of 1869 and 1883 in *Ex parte Tempest* (2) and other cases was, after a while, challenged, and, as far as it dealt with the force of the word "preference," was abandoned.

The judicial inertia was at length overcome.

Ex parte Griffith (3) was decided in the Court of Appeal in February, 1883, by judges all of whom had gone on the bench after the act of 1869 had come into force. They were Jessel M.R. and Lindley and Bowen L.JJ. The principles settled by their decision are thus concisely stated in the head note of the report:—

In determining whether a transaction amounts to a fraudulent preference the court ought now to have regard simply to the statutory definition contained in section 92 of the Bankruptcy Act, 1869.

The decisions on the subject before the act may be useful as guides, but the standards laid down in them must not be substituted for that which is laid down in the act.

It was thus no longer held to be essential to the invalidity of a transaction that it was the spontaneous act of the debtor, or that his sole motive must be the intent to prefer the particular creditor.

It will be useful to quote one or two observations made by the judges in delivering their opinions. It

(1) 12 App. Cas. 575, 582. (2) 6 Ch. App. 70.
(3) 23 Ch. D. 69.

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would be instructive to read the whole of what was said by the Master of the Rolls, but I shall confine myself to one passage:—

I think it far better that we should in all these cases look to the intention of the clause in the act, and not entangle ourselves in an enquiry as to the precise views and intentions of the parties, in order to see what was the motive of the transaction and what the law was before the statute.

Lindley L.J. said:—

What we have to consider is the true construction of section 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the legislature has laid down is equivalent to the standard of the old law.

Some remarks of Bowen L.J. are particularly worthy of note:—

I should like to pause, he said, in the current of judicial decisions for the last fifteen years on the subject of fraudulent preference, and to take note, so to say, of the position in which the court finds itself in relation to this subject. Everybody knows that originally there was no express statutory enactment in regard to fraudulent preference. But from the time of Lord Mansfield down to 1869 the courts considered that certain transfers of property were frauds upon the bankrupt law, though there was no statutory enactment on the subject. Then came the Bankruptcy Act of 1869, and in that act it was for the first time explained what was meant by fraudulent preference, and the act uses very definite language. Now what is the method that has been pursued by judicial decisions since? I think it is very unfortunate. I do not say that it has led to any wrong decision, but I think that it has had a tendency to draw one's mind away from the true question. The first thing which the courts did was to discuss the question whether the act had altered the old law and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began what I may call the old metaphysical exploration of the motives of people. The courts first adopted a supposed verbal equivalent for the words of the statute, and then pursued the old enquiries as to what were the deductions that followed from the adoption of this verbal equivalent; and so we have been drawn into questions of pressure and volition, and at length in the present case have got into a discussion as to what is the motive of a motive, whatever that may mean. I think it is a wiser policy to go back, as I do, in a humble spirit to the words of the statute, and, without discuss-

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ing motives of motives, enquire whether the transaction was entered into with a view to give one creditor a preference over the other.

I referred to this case of *Ex parte Griffith* (1) in a case of *Brayley* v. *Ellis* (2), in which I took part in the Ontario Court of Appeal in 1884, and cited also *Ex parte Hill re Bird* (3) which was decided shortly after the Griffith case, and I then expressed the opinion, which I still hold, that with those decisions before us we were at liberty to give effect to the plain language of a similar statute to the one before us without fear of coming into conflict with rules or supposed rules of decision in the English courts. Some of my colleagues in the Court of Appeal did not take quite the same view as I did of the effect of *Ex parte Griffith* (1), which had been decided after the argument of the case of *Brayley* v. *Ellis* (2); but I find the decision, together with that in *Ex parte Hill* (3), spoken of in the third edition of the Messrs. Williams Treatise on Bankruptcy (4), published in 1884, as having considerably shaken the rules laid down in former cases as applicable to fraudulent preferences. The authors also remark that for some time prior even to the decision in *Ex parte Griffith* (1) there had been a tendency to depart from the old notion that a *bonâ fide* demand negatived preference, and to disregard pressure and demands unless the position of the debtor was such that the demand or pressure might really influence him, citing two or three cases on the point.

The sensible and practical rule laid down in *Ex parte Griffith* (1) for administering the clause of the Bankruptcy Act I understand to have ever since been recognised as the proper rule. In *Ex parte Taylor* (5), in 1886, an attempt was made to carry it too far. It was argued that if a creditor was in fact preferred the

(1) 23 Ch. D. 69.
(2) 9 Ont. App. R. 565, 590.
(3) 23 Ch. D. 695.
(4) P. 236.
(5) 18 Q. B. D. 295.

motives of the debtor in giving him the preference were not to be enquired into; but that, as it was pointed out by the Court of Appeal, would be to strike out of the section the words referring to the intent. Lord Esher M.R. in the course of his observations remarked that:

It has been said that the court must be satisfied that the preferring of the creditor was the predominant view of the debtor—that if he acted from mixed motives the court must find out which was the predominant view in his mind. That no doubt is so, though I should have been content to say that the payment must have been made with a view of preferring the creditor. What is meant by "with a view?" It is the same thing as with an "intent." * * * It is impossible to lay down any exhaustive rule; the court must judge from the particular facts of each case whether the debtor did make the payment with a view or intent of preferring the creditor."

Lindley L.J. said:

Regard must be had to the "view" with which the payment was made. * * * It is impossible to infer the debtor's view from the mere fact that the creditor was preferred.

And Lopes L.J.:

The mere fact of making a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor the payment is a fraudulent preference. If the substantial motive is reformation for a wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference.

The rule seems to be settled that in order to save a preferential payment or transfer under section 48 of the Bankruptcy Act of 1883 something more must be done than merely to show that the transaction was not the spontaneous act of the debtor. A creditor cannot come, as Jessel M.R. described the creditors as coming in *Ex parte Griffith* (1), and as it seems to me the creditor came in this case, saying: "Can't you give me a preference," and asking the debtor to assign property to him to secure his debt. What more has to be shown must depend on the circumstances of the

(1) 23 Ch. D. 69.

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case. In *Ex parte Taylor* (1) the payment was held to have been made without any view of preferring the creditors, but with the sole intent of averting a threatened exposure of the debtor. But a motive of that sort will not be found by inference or suggestion. For example, it will not do to show that you have done something for which you are liable to prosecution unless you go further and prove that you were threatened with proceedings. That was decided in 1889, in *Ex parte Boyd* (2). A son had received £1,000 on behalf of a company of which his father was promoter and principal shareholder and had not accounted for the money. He transferred shares in the company to his father who paid off the £1,000. It was held by a divisional court that there being no evidence of any criminal proceedings having been contemplated against the debtor in respect of his alleged defalcations, and the father being aware of the debtor's insolvent condition, the transaction was rightly set aside.

The English courts have thus receded from the notion that the term "fraudulent preference" as defined by the bankruptcy decisions is the equivalent of the word "preference" in section 48, used as it is used there without the qualifying adjective; but I repeat that we are not dealing with a bankrupt law, and that the English bankruptcy system never was the law of Ontario or Manitoba. There is nothing in the Manitoba statute to require or justify the qualification which we are asked to apply to the word "preference," as in the case of the *Bank of Australasia* v. *Harris* (3), where the word was held to be qualified by the effect of other parts of the statute in which it occurred. Our duty is to interpret our statute by giving to the language in which the legislative will is expressed its natural force. "Preference" so understood means an advantage given

(1) 18 Q.B.D. 295. (2) 6 Morrell's Bky. Cases 209.
(3) 15 Moore P. C. 97.

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to or obtained by one creditor over others. It is not uncommon to find these words "preference" and "advantage" used one for the other. Thus James L.J. in *Ex parte Tempest* (1) speaks of one creditor getting an advantage over the others or being better off than the others; and in a very recent case, *In re Skegg* (2), Lord Justice Bowen paraphrases "undue preference" by "undue advantage."

The plaintiff Stephens obtained by his mortgage an advantage over the other creditors. He was made better off than any of them, for he got everything and left nothing for the rest. The mortgage had the effect of giving him a preference and, therefore, by the plain words of the statute, it is void as against the other creditors.

I am further of opinion that the mortgage was made with intent to give the mortgagee a preference, although as it had "such effect" the statute dispenses with the necessity for enquiring into the intent.

Let us realise what the transaction was as shown by the account given by the plaintiff and by T. B. Robinson, and with the additional light afforded by the dealing with the book debts.

The plaintiff Stephens, the largest creditor, had given orders not to renew any more of the paper of the firm, so that if other creditors seemed inclined to push matters he might save himself. No one should get a preference over him. Then he tells the debtors that something must be done. Three courses are talked of, viz.: the plaintiff may sue for his claim, a large part of which was, however, not ripe for suit; or the debtors may make an assignment for all their creditors alike; or they may give the plaintiff a preference by mortgaging all their assets to him.

The three courses are practically only two, because

(1) 6 Ch. App. 70. (2) 25 Q. B. D. 505, 510.

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under this Manitoba statute a debtor who is sued can, by making an assignment, place all his creditors on an equal footing. The choice offered was, therefore, to assign for the equal benefit of all, or to give a preference to the plaintiff over all the others. When Mr. Robinson says that on an assignment the creditors would not have realised over ten or fifteen cents in the dollar he differs widely from the plaintiff who paid 55 cents, and was prepared to bid 75, at the sheriff's sale. He doubtless bases his estimate on the idea of the stock being brought at once to the hammer, but that is not a necessary consequence of an assignment. See *Slater* v. *Badenach* (1) in this court. If an assignment had been made the creditors might be trusted to look after their own interests. The choice was made, and it was to make the mortgage, or in other words, to give the preference to the plaintiff. It would be childish to argue, and I do not think it has been argued, that a man who conveys everything that he has to one creditor does not do so with intent that that creditor shall be better off than the rest. We must not confound intent with wish or desire, and there is less danger of our doing so than when the doctrine of spontaneity obtained.

But while the object and design of giving the security was that the one creditor should be secured and that the others should run all the risks, was there not some other motive that predominated and to which the making of the mortgage ought to be ascribed?

It is the same question put by Lord Justice James in *Ex parte Tempest* (2), in 1870, and dealt with in the vigorous judgment of Lord Justice Bowen in *Ex parte Griffith* (3), in 1883—the question of the motive of a motive.

A person who conveys all his property to one of his creditors leaving nothing within the reach of the

(1) 10 Can. S. C. R. 296. (2) 6 Ch. App. 70.
(3) 23 Ch. D. 69.

others will be apt to find it more difficult to assign a plausible motive for his act, if he desires it to appear to have been done with an intent other than the intent to give the preference which he has given, than if one piece of property were transferred or charged leaving other property free, or a payment made which took only a part of his means.

This question of motives necessarily envolves an enquiry into the action of certain influences on somebody's mind. Whose mind have we to discuss in this case? The debtors and mortgagors were Madell and Eliza Robinson; but Eliza had no mind of her own in connection with the business—her own deposition proves that—and Madell, the partner who was the tradesman and attended to the out-door work, was leaving the concern and taking $100 with him. T. B. Robinson who is spoken of as carrying on the business in the name of his wife, under whose power of attorney he acted, tells us that, as the sole member of the new firm of T. B. Robinson & Co., the wife carried on the business in his name. It seems that he is the only person whose motives we can discuss. He may have been sanguine enough to believe that, with time to work out the problem, the fortunes of the business could be retrieved, the creditors all paid, and something left. That hope must have been seen to have been unfounded when the affairs were analysed in connection with the trial; but assuming it to have existed when he decided on giving the mortgage in place of making an assignment its influence must have been due to the prospect of something remaining after paying the debts, rather than to solicitude for the creditors. The assignment would have suited the creditors better. But Robinson's plans required that the creditors should be kept off, and the mortgage was the only way to do that. It left the book debts

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exposed, and they were accordingly assigned to the plaintiff under the circumstances already detailed, the explanations given being, as we have seen, not entirely free from confusion and discrepancy. It was necessary also that some help should be given to keep any life in the business. Stephens agreed it may be said, though there was no definite agreement, to help them, but how? He would sell them such goods as they required, and as he had, provided they paid him promptly on the usual terms of thirty days' credit. He advanced $200 or thereabouts, and he took an absolute assignment of $400 or $500 worth of good accounts. The precise relation between that assignment and the advances of money is involved in some confusion, but it is impossible to read what the plaintiff and Robinson say about the book debts without plainly perceiving that the main object—we may even say the avowed object—was to keep those accounts out of the reach of the other creditors. That design governed the whole transaction for it was one scheme throughout. It is not difficult to gather it from what is said about the mortgage, though not so plainly put as when the accounts are spoken of. We should, in my opinion, fail to give its due effect to the statute if we should affirm the good faith of this transaction and hold the motive to keep the creditors at bay while the debtors made the speculative, and not very hopeful, attempt to bring up their lee way sufficient to sustain this pledge and conveyance of the whole of their property to the one creditor. Were there, after all, two motives, a dominant and a secondary one? It seems to me that we describe the same motive whether we say it was to prefer the one to the others, or to postpone all the others to the one.

It was urged on behalf of the respondents in

connection with a branch of the case which I have not yet touched, viz.: the legislative authority of the province to pass the act in question, that if the act was *ultra vires* the rights of the parties would have to be tested under a provision of an act passed in 1885 (1), which declared that every conveyance, &c., made by an insolvent person, or one unable to pay his debts in full, with intent to defeat or delay his creditors or any of them, or to give any one of them a preference over the others, should be void as against creditors, saving, as already noticed, assignments for the benefit of all the creditors. This follows the law of Upper Canada and Ontario which last appeared in the Revised Statutes of 1877 (2), but with a difference. As far as they dealt with preferential transfers the statutes were alike, and what I have said about the intent to prefer in this case, apart from the effect, applies under the act of 1885 as well as under that of 1886. But the difference between the Manitoba act of 1885 and the Ontario or Upper Canada law was in the other particular of defeating or delaying creditors. The Upper Canada and Ontario law was held to be in this respect like the statute of 13 Eliz. ch. 5, and not to avoid a conveyance to a creditor even though it defeated or delayed other creditors and was made with intent so to do. The Manitoba reproductions of the statute (3) seem designed to avoid that construction by introducing the words "or any of them"—making the intent to defeat or delay any of the creditors as fatal as the intent to defeat or delay all of them. These words "or any of them" do not appear in the act of 1886 in connection with the defeating or delaying or prejudicing the creditors, wherefore under that act we have to discuss only the question of the

(1) 48 V. c. 17, s. 123.
(2) R. S. O. 1877, c. 118, s. 2.
(3) 38 V. c. 5, s. 59; C.S.M. c. 37, s. 96; 48 V. c. 17, s. 123.

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preference. But if the validity of the mortgage had to be tested under the act of 1885 I should without hesitation hold it to have been made with intent to delay the creditors other than the mortgagee, as well as with intent to give a preference.

Regarding the authority of the provincial legislature to pass the act in question I have merely to say that I retain the views I expressed respecting the cognate act of the Ontario Legislature in *Edgar* v. *Central Bank* (1).

In my opinion the appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellant: *F. C. Wade.*

Solicitor for respondents: *G. A. Elliott.*

(1) 15 Ont. App. R. 202.

PIERRE PAUL HUS (PLAINTIFF).....APPELLANT; 1890

AND *Nov. 25.

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THE SCHOOL COMMISSIONERS FOR THE MUNICIPALITY OF THE PARISH OF STE. VICTOIRE (DEFENDANTS)..... } RESPONDENTS. *Nov. 16.

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

Mandamus—Establishment of new school district—Superintendent of Education, jurisdiction of upon appeal—Approval of three visitors—40 *Vic. ch.* 22 *s.* 11 (*P.Q.*)—*R. S. Q. art.* 2055.

Upon an application by appellant for a writ of *mandamus* to compel the respondents to establish a new school district in the Parish of Ste. Victoire in accordance with the terms of a sentence rendered on appeal by the Superintendent of Education under 40 Vic. ch. 22 s. 11 (P.Q.), the respondents pleaded *inter alia* that the superintendent had no jurisdiction to make the order, the petition in appeal not having been approved of by three qualified school visitors. The decree of the superintendent alleged that the petition was approved of by one L., inspector of schools, as well as by three visitors.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the petition in appeal must have the approval of three visitors qualified for the municipality where the appeal to the superintendent originated, and as one of the three visitors who had signed the petition in appeal was parish priest of an adjoining parish, and not a qualified school visitor for the municipality of Ste. Victoire, the sentence rendered by the superintendent was null and void. Taschereau J. dissenting on the ground that as the decree of the superintendent stated that L., the inspector of schools, was a visitor, it was *primâ facie* evidence that the formalities required to give the superintendent jurisdiction had been complied with. C.S.L.C. ch. 15 s. 25 ; arts. 1863, 1864, R. S. Q.

APPEAL from a judgment of the Court of Queen's

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

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Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court.

In October, 1888, the appellant, with other interested parties, having been refused by the respondents the establishment of a new school district in a certain part of the municipality of the parish of Ste. Victoire, appealed to the Superintendent of Education for the province of Quebec, mentioning the refusal of the respondents and asking redress; their petition to the superintendent was approved by three school visitors, viz.: The Reverends J. Noiseux and O. Desorcy, both priests of the Roman Catholic church, and the Honourable J. A. Dorion, ex-member of the legislative council, residing in the parish of St. Ours.

On the 20th October, 1888, the superintendent rendered a sentence, by which he allowed the demand of appellant and others, and ordered the respondents to form the new district demanded, to be know as "District No. 7"; to erect a school house in the same; and awaiting the erection of such school house to open the school in a temporary building to be furnished by the interested parties.

The sentence of the superintendent alleged that the petition in appeal was approved of by one B. Lippens, inspector of schools.

The sentence was served upon the respondents, and a convenient place offered by the interested school ratepayers for the temporary school.

The respondents formally refused to obey the order of the superintendent.

The appellant then applied for a *mandamus* to force the respondents to obey and execute the sentence.

The respondents pleaded in substance that the sentence of the 20th October, 1888, was illegal, informal, null and void in law for the following reasons :—

1st. Because the respondents had not been summoned

to appear before the superintendent to oppose the appeal, and because the appeal had been heard and decided *ex parte*, without proof.

2nd. Because such appeal had not been approved of by three qualified school visitors of the municipality of Ste. Victoire, it being falsely alleged in the sentence, that the Reverend O. Desorcy (one of the three approvers) resided in Ste. Victoire, whereas in fact, he was a resident of St. Ours.

3rd. Because the resolution of the respondents of the 1st of October, 1888, was not subject to appeal to the superintendent; that the superintendent was not invested by law with the authority of hearing and determining such appeal, and of establishing the new school district No. 7; and had no authority to order the respondents to establish a school in such proposed district.

The appellant replied that the superintendent had acted within the limits of his powers; that his sentence was conclusive and final to all intents and purposes, and had to be obeyed without discussion by his subordinates, the respondents.

By a written admission filed of record the respondents confessed the truth of all the allegations of facts contained in the petition for *mandamus*, and upon which the appellant based his demand.

The respondents examined as their witnesses, to prove the allegations of their plea, one A. P. Bouchard, who deposed to the following facts, viz.: 1. that the respondents had never been notified of the appeal to the superintendent; 2. that they got knowledge of it only by the reception of the sentence; 3. that the Rev. O. Desorcy (one of the approvers), had never resided in Ste. Victoire, but had always been and still was the parish priest of St. Ours, and had always resided

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there; 4. that there was no model school in Ste. Victoire.

The Superior Court granted a peremptory *mandamus*, and ordered the respondents to obey the sentence of the 20th October, 1888, and in default thereof condemned them to pay appellant a fine of $2,000.00, and costs of suit, according to art. 1025 of the Code of Civil Procedure; but on appeal to the Court of Queen's Bench for Lower Canada that judgment was reversed.

On appeal to the Supreme Court of Canada the principal question which arose was: Whether an appeal to the superintendent has any legal value unless approved of in writing by three qualified school visitors for the municipality where it has originated.

Lacoste Q.C. and *Germain* for appellant cited and relied on 40 Vic. ch. 22 s. 11 (P.Q.); arts. 1943, 1945, 1947, 1951, 1952, 1976, 2118, 2119; 1863, 1864, R. S. Q.; arts. 1211, 1244 C. C., and *Tremblay* v. *The School Commissioners of St. Valentin* (1).

Geoffrion Q.C. cited and relied on arts. 2055, 1951, 5775, s. 16, R. S. Q.; *Trudelle* v. *The School Commissioners of Charlesbourg* (2) and arts. 1022, 1025, C. P. C.

Sir W. J. RITCHIE C. J.—Article 2055 Revised Statutes of Quebec, 1888, provides for approbation of three visitors, and art. 1951 of the same statute, s. 2, provides that the priests are visitors of the schools of the municipality only where they reside. It appears from the evidence that the Rev. O. Desorcy, one of the signers of the act of approbation at the bottom of the petition of the plaintiff to the Superintendent of Public Instruction, has never resided in the parish of Ste. Victoire, and therefore was not, and could not be, a visitor. Consequently any approbation given by him

(1) 12 Can. S. C. R. 546. (2) 13 Q. L. R. 243.

was invalid and of no effect, and the appeal made by the plaintiff to the superintendent was not according to the formalities prescribed by law; the judgment of the Court of Queen's Bench reversing the judgment of the Superior Court for the district of Richelieu the 4th of April, 1889, was correct therefore, and should be affirmed, and this appeal dismissed with costs.

STRONG J.—I have read the judgment which will be delivered by brother Fournier, and I entirely concur in the reasons he will state for dismissing this appeal.

FOURNIER J.—L'appelant et quelques autres contribuables de la municipalité de Ste-Victoire, s'étant adressés par requête aux commissaires d'écoles pour en obtenir la création d'un nouvel arrondissement d'école, ces derniers, par une résolution, adoptée le 1er octobre 1888, refusèrent la demande de l'appelant et de ceux qui s'étaient joints à lui.

L'appelant en appela au Surintendant de l'Education, de la décision rejetant sa demande.

L'appel était alors accordé par 40 Vict. ch. 22, sec. 11, en ces termes :

11. La 8e sous-section de la 64e section du chapitre 15 des Statuts Refondus pour le Bas-Canada, est retranchée, et la suivante lui est substituée :

" 8. Lorsque l'emplacement d'une maison d'école est choisi par les commissaires ou syndics d'écoles, ou qu'un changement est fait dans les limites d'un arrondissement d'école, ou qu'un nouvel arrondissement est établi dans une municipalité scolaire, ou qu'un ou plusieurs arrondissements établis sont changés ou subdivisés, ou lorsque les commissaires ou syndics d'écoles refusent ou négligent d'exercer ou remplir quelqu'une des attributions ou devoirs que leur confère cette section, les contribuables intéressés pourront en appeler en tout temps, au surintendant, par requête sommaire ; mais cet appel n'aura lieu qu'avec l'approbation par écrit de trois visiteurs autres que les commissaires ou syndics d'écoles de la dite municipalité ; la sentence

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rendue par le surintendant sera finale, et il pourra ordonner par cette sentence, que les commissaires ou syndics d'écoles fassent ce qui leur a été demandé ou ce qu'il leur ordonne de faire, ou s'abstiennent de le faire, ou ne le fassent qu'en tout ou en partie et aux conditions exigées par la sentence."

Depuis, cette section a été amendée et remplacée par l'article 2055 Statuts Revisés (P.Q.), qui en est la répétition textuelle avec la déclaration qu'il y aura aussi appel pour refus ou négligence d'exercer les fonctions et devoirs imposés par les articles 2032, 2049, 2050, 2051, 2052, 2053, 2054. Aucun de ces articles n'affectent la question soulevée en cette cause. Toutefois, il est important de faire observer que les Statuts Revisés n'étaient pas en force lors de la sentence du surintendant et que cet art. 2055 n'est devenu loi que le 1er janvier 1889, tandis que la dite sentence avait été rendue le 20 octobre 1888. C'est donc sur la sec. 11 de la 40 Vict. ch. 22, qu'il faut s'appuyer pour la décision de cette cause.

Cet appel, quoique sommaire, ne peut cependant être obtenu à moins que l'appelant ne se soit conformé à une formalité indispensable pour donner juridiction au surintendant, c'est celle de faire approuver sa requête d'appel par trois visiteurs d'école. La loi s'exprime ainsi, " les contribuables intéressés pourront en appeler en tout temps, au surintendant par requête sommaire ; *mais cet appel n'aura lieu qu'avec l'approbation par écrit de trois visiteurs autres que les commissaires ou syndics d'écoles de la dite municipalité.*"

La sentence ayant été signifiée aux commissaires d'école, et ceux-ci s'étant refusés de s'y conformer, l'appelant a demandé et obtenu un bref de *mandamus* pour les faire contraindre à la mettre à exécution. Devant la Cour Supérieure, l'appelant a eu gain de cause, mais en appel à la cour du Banc de la Reine le jugement qu'il avait obtenu a été cassé. C'est de ce dernier jugement qu'il y a appel à cette cour.

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Les moyens opposés par les intimés à la demande du *mandamus* et donnés au soutien du jugement de la Cour du Banc de la Reine, sont les suivants :

1o. Défaut des formalités essentielles à l'exercice de l'appel, qui a donné lieu à la sentence de l'honorable surintendant de l'éducation.

2o. Défaut de juridiction de l'honorable surintendant dans la matière.

3o. Affectation illégale au demandeur-requérant de la pénalité imposée ($2,000.00) par le jugement de première instance.

La loi qui établit cet appel (1) *prescrit formellement que cet appel n'a lieu qu'avec l'approbation, par écrit, de trois visiteurs.*

La requête sur laquelle a été rendue la sentence attaquée, a été approuvée et signée par MM. Jos. Noiseux, Ptre Curé, O. Desorcy, Ptre Curé, et J. A. Dorion, M. C. L., comme visiteurs d'écoles. Les deux premiers sont qualifiés prêtres, tous deux résidant à Ste-Victoire, et l'honorable J. A. Dorion, comme conseiller législatif. Il est aussi fait mention de l'approbation de M. B. Lippens, inspecteur d'écoles, tous déclarés visiteurs d'écoles et approuvant la dite requête.

D'après l'article 1951, S. R. (P.Q.) ss. 2, les prêtres catholiques sont visiteurs des écoles de la municipalité où ils résident seulement. Il est en preuve que l'un de ceux qui ont signé et approuvé la requête, le Rév. M. Desorcy, déclaré dans la sentence comme étant de Ste-Victoire, n'y a jamais résidé ; qu'il est depuis plusieurs années curé de St-Ours, paroisse voisine. Evidemment, il n'avait pas la qualité de visiteur pour Ste-Victoire. C'est par erreur que cette qualité lui a été donnée, et le surintendant a sans doute été trompé sur ce fait de toute importance, par la partie qui y avait intérêt.

La requête ne portant l'approbation que de deux visiteurs, le Révérend M. Noiseux et l'honorable Con-

(1) S. C. (B.C.), 1861, ch. 15, Vict. ch. 22, sec. 11, et S. R. sec. 64, ss. 8, amendée par 40 (P.Q.) 1888, art. 20 55.

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seiller législatif, J. A. Dorion, se trouvait illégale et ne pouvait conférer aucune juridiction au surintendant, parce que la loi dit positivement que cet appel n'aura lieu qu'avec l'approbation par écrit de trois visiteurs, etc., etc. Sans l'accomplissement de cette condition, il ne peut pas y avoir d'appel,—il est positivement dénié.

Est-ce pour remédier au défaut de qualification du révérend M. Desorcy que la sentence fait aussi mention de l'approbation de M. B. Lippens, inspecteur d'écoles, qui y est déclaré aussi comme visiteur d'écoles. Le nom de M. Lippens n'était pas apposé à la requête et rien ne prouve dans le dossier pourquoi et de quelle manière il a été ajouté dans la sentence. Si ce M. Lippens était qualifié visiteur d'écoles, son approbation aurait pu remplacer celle du révérend Desorcy qui ne l'était pas, et alors la requête serait en règle. En vertu de l'article 1953 des Statuts Refondus, P.Q., les inspecteurs d'écoles sont *ex officio* visiteurs d'académies et d'écoles modèles sous le contrôle des commissaires d'écoles dans leur district d'inspection. Mais il est prouvé qu'il n'y en a pas dans la paroisse de Ste-Victoire. Les pouvoirs des inspecteurs sont limités à ces institutions. Il ne sont pas visiteurs des écoles élémentaires sous le contrôle des commissaires et, par conséquent, M. Lippens n'avait pas la qualité de visiteur pour donner l'approbation voulue. Si cette approbation a été donnée elle l'a été verbalement, tandis que la loi exige qu'elle soit par écrit. Il n'est pas non plus prouvé que Ste-Victoire est dans son district d'inspection. La sentence en le qualifiant de visiteur, ne peut lui en donner la qualité ni en faire preuve contre l'article 1953, qui ne donne aux inspecteurs d'écoles, la qualité de visiteurs d'académies et d'écoles modèles que dans les limites de leur district d'inspection et nullement dans les écoles communes.

Son approbation est en conséquence nulle et d'aucun effet. Comme il ne reste que deux visiteurs qualifiés pour approuver la requête, au lieu de trois que la loi exige, cette requête était insuffisante pour donner juridiction au surintendant. Sa sentence, pour ce seul motif, doit être considérée nulle. En conséquence, il est inutile de s'occuper des deux autres moyens invoqués par les intimés.

La cause de *Tremblay* v. *Les Commissaires, etc., de St-Valentin* (1), invoquée par l'appelant, ne s'applique aucunement à la cause actuelle. La prétention des commissaires d'écoles dans cette cause était que, s'étant soumis à la sentence du surintendant en décrétant l'arrondissement qu'il avait ordonné d'établir, ils avaient ensuite le pouvoir d'en annuler les effets en réunissant de nouveau les arrondissements séparés. Il ne s'agissait là d'aucune informalité ni de défaut de juridiction du surintendant apparaissant à la face de sa sentence. Il en est tout autrement dans le cas actuel, les requérants n'ayant pas accompli la formalité qui donnait juridiction au surintendant, il ne pouvait légalement agir.

En conséquence l'appel doit être renvoyé.

TASCHEREAU J.—The appellant with other interested parties applied by petition to the respondents for the establishment of a new school. Upon the rejection of that petition, the appellant then appealed to the Superintendent of Education, who granted it, and rendered a decree ordering the respondents to establish the new school demanded. The respondents refusing to submit to the decree of the superintendent the appellant asked for a writ of *mandamus* to force them to do so. The Superior Court granted the appellant's conclusion, but the Court of Appeal, Church and Bossé

(1) 12 Can. S. C. R. 546.

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JJ. dissenting, reversed that judgment and dismissed the petition. Hence the present appeal. Three objections are urged by the respondents against the decree of the superintendent: 1st. That no notice of the application to him, and of his proceedings, was given to the respondents. 2nd. That under the statute, the superintendent had no power to order the establishment of a new school district. 3rd. That the petition in appeal to the superintendent was not accompanied with the approbation in writing of three school visitors, as required by the statute, as Mr. Désorcy, one of those who gave the approbation to the appellant's petition, was not a school visitor for the locality. The two first points were dismissed at the hearing, and we reserved judgment only upon the third one. This reduces the case to a narrow compass. The proceedings in question originated before the Revised Statutes came into force, so that the contestation has to be determined under ch. 15, C. S. L. C., as amended and in force in October, 1888.

At the foot of the petition to the superintendent, the following approbation of three school visitors appears:—

Nous approuvons cette requête

(Signé) Jos. NOISEUX, ptre curé, } Visiteurs.
" O. DÉSORCY, ptre curé, }
" J. A. DORION, M. C. L.

And the decree of the superintendent begins with the following recital:—

Vu le certificat des Révérends Joseph Noiseux et O. Désorcy, prêtres, tous deux résidants à Ste-Victoire, de l'Honorable J. A. Dorion, Conseiller Législatif, et aussi l'approbation de B. Lippens, inspecteur d'écoles, tous visiteurs d'écoles et approuvant la dite requête.

The respondents have proved that Rev. Mr. Désorcy was not a resident of the parish of Ste. Victoire, the municipality within which this new school was to be

erected, and contend that consequently, under sec. 21, ch. 36, 51-52 Vic., he was not a visitor duly qualified to sign the approbation of the appellant's petition, and it is upon this contention that they obtained the quashing of the *mandamus* in the Court of Appeal. The appellant contends, however, that, even if the Rev. Mr. Désorcy was not qualified to give the required approbation to this petition, yet he had the approbation of three visitors, because it appears by the decree of the superintendent that Lippens, a school inspector, and also a school visitor, as stated in the decree, gave his approbation to it. I think that contention well founded. By sec. 25 of ch. 15, C.S.L.C. :

> Every document or copy of a document, signed or certified by the Superintendent of Education, shall be *primâ facie* evidence of the truth of what is therein stated.

Now, the superintendent having stated in his decree that Lippens was a school visitor, and there being no plea or evidence to the contrary, we must take that fact as conclusively established. The respondent's contention that a school inspector is not a school visitor, whether founded in law or not, cannot affect this conclusion, as it is clear that Lippens may have been a school visitor independently of his position as inspector, under sec. 21, ch. 36, 51-52 Vic.

The respondent is in error when he says that the decree states that Lippens is a visitor because he is an inspector. The decree merely states that he is both. The respondent further contends that Lippens's approbation should have been in writing. But, assuming this to be required (the English version of sec. 11, 40 Vic. ch. 22 does not require it,) there is no issue on that point between the parties. If the respondents had pleaded that Lippens's approbation was not in writing the appellant would have been called upon to bring evidence of the fact. As the record stands

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they had not to do so. There is nothing in the decree by which it could be inferred that it was merely a parol approbation. Why should we presume it to have been so? The presumption is all the other way, and in favour of the regularity of the superintendent's proceedings.

I would allow the appeal with costs in all the courts against the respondent and restore the judgment of the Superior Court, less the condemnation to $2,000 which it is admitted was illegal.

PATTERSON J. concurred with Fournier J. that the appeal should be dismissed

Appeal dismissed with costs.

Solicitors for appellant: *Germain & Germain.*

Solicitor for respondents: *J. B. Brosseau.*

GEORGE McKEAN (DEFENDANT).....APPELLANT; 1890

AND *Nov. 3, 4.

THOMAS R. JONES (PLAINTIFF).....RESPONDENT. 1891

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. *Nov. 16.

Practice—Parties to suit—Assignment of chose in action—Demurrer—Res judicata.

C. by instrument under seal assigned to defendant, as security for moneys due, his interest in certain policies of insurance on which he had actions pending. C. afterwards gave to B. & Co. an order on defendant for the balance of the insurance money that would remain after paying his debt to defendant. B. & Co. endorsed the order and delivered it to plaintiff by whom it was presented to defendant, who wrote his name across its face. B. & Co. afterwards delivered to plaintiff a document signed by them, stating that, having been informed that the endorsed order was not negotiable by endorsement, to perfect plaintiff's title and enable him to obtain the money in defendant's hands, they assigned and transferred their interest therein and appointed plaintiff their attorney, in their name, but for his own use and benefit, to collect the same.

The defendant having received the amounts due C. on the insurance policies informed plaintiff, on his demanding an account, that there were prior claims that would absorb it all. Plaintiff then filed a bill in equity for an account and payment of the amount found due him to which defendant demurred for want of parties, alleging that the order, though absolute on its face, was, in fact, only given as security, and that an account between B. & Co. and C. being necessary to protect C.'s rights C. was a necessary party to the suit. The demurrer was overruled and the judgment overruling it not appealed from, and the same defence of want of parties was set up in the answer to the bill.

Held, affirming the judgment of the court below, Strong and Patterson JJ. dissenting, that the question of want of parties was *res judicata* by the judgment on the demurrer and could not be raised again by the answer. Even if it could the judgment was right as C. was

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

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not a necessary party. As between plaintiff and defendant the order was an absolute transfer of the fund to be received by defendant, and was treated by all the parties as a negotiable instrument. Defendant had nothing to do with the equities between C. and B. & Co., or between B. & Co. and plaintiff, but was bound to account to plaintiff in accordance with his undertaking as indicated by the acceptance of the order.

APPEAL from a decision of the Supreme Court of New Brunswick affirming a decree made by Mr. Justice Fraser sitting as a judge in equity.

One Chapman, by instrument under seal dated February 28, 1880, assigned to the appellant, as security for moneys due, his interest in certain policies of insurance on which actions were then pending in Chapman's name. Subsequently Chapman gave an order on defendant in favour of Belyea & Co. to whom he was indebted, in the following words:—

"LIVERPOOL, April 23, 1882.

"Please hold to the order of Messrs. Belyea & Co., to whom I have assigned it, any balance that remains of insurance money per 'Pretty Jemima' over and above the amount I owe, or may owe you, or to your firm of Carvill, McKean & Co., or Francis Carvill & Son, without making any further advances to me or on my account.

"J. H. CHAPMAN."

Belyea & Co., being indebted to the plaintiff Jones, endorsed this order and forwarded it to him, and in May, 1882, it was presented by Jones to defendant who wrote his name across the face of it. Belyea & Co. in October, 1882, delivered to the plaintiff the following document:—

"29 RED CROSS STREET,

"LIVERPOOL, 3rd October, 1882.

"Hon. Thomas R. Jones:

"Dear Sir,—Having endorsed to you the order drawn by J. H. Chapman upon George McKean, Esq., for

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any balance of insurance moneys in his hands when collected in our favour, we are informed the instrument is not negotiable by endorsement, not being a bill of exchange, and, therefore, in order to perfect your title, and to enable you to obtain the amount that may be in Mr. McKean's hands, we hereby assign and transfer our interest therein, both legal and equitable, and appoint you our attorney, in our names, but for your own use and benefit, to collect the same.

"We are, dear sir,

"Yours truly,

"BELYEA & Co."

The actions on the policies of insurance were determined in favour of Chapman in 1885 and plaintiff then applied to defendant for an account of the moneys received therefor, and of amount due defendant under the assigment from Chapman. No statement was rendered, but plaintiff was informed that there were prior claims that would absorb all the money. Plaintiff then filed a bill for an account and payment of the amount found due him.

The defendant demurred to this bill alleging that C. and also B. & Co. were necessary parties. The demurrer was overruled and the defendant did not appeal from the judgment overruling it, but raised the same defence by his answer. At the hearing a decree was made as prayed in plaintiff's bill, which was affirmed by the full court from whose judgment the defendant appealed to the Supreme Court of Canada.

The only question raised by defendant in this appeal is that Chapman is a necessary party to the suit, alleging that the order in favour of Belyea & Co., though absolute on its face, was, in fact, only given as security and an account between Belyea & Co. and Chapman was necessary to protect the rights of Chap-

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man. This involved the subsidiary question: Was the action of McKean, in writing his name across the face of the order to Belyea & Co., such an acceptance of the order as to constitute a binding legal agreement between him and Jones to pay the money due thereunder?

Blair, Attorney-General for New Brunswick, and *Hazen* for the appellant. To treat the act of McKean as an acceptance would be to give the order the character of a bill of exchange. The order being a non-negotiable instrument the court can only treat the act of McKean as an acknowledgment that he has received notice of it.

Jones is only in the position of Belyea & Co., and is subject to all the equities which would attach to the order if still in Belyea & Co.'s hands.

McKean is not precluded by the judgment on the demurrer from raising this question of want of parties. Though the parties to the suit might be precluded the court is bound, before making a decree, to see that all necessary parties are before it, and could raise the question of its own motion.

The following authorities were cited:

Malcolm v. *Scott* (1); *Liversidge* v. *Broadbent* (2); *Burn* v. *Carvalho* (3)

Weldon Q.C. for the respondent referred to *In re Central Bank; Morton and Block's claim* (4); *Richer* v. *Voyer* (5); *Griffin* v. *Weatherby* (6).

SIR W. J. RITCHIE C.J.—There was a demurrer to the bill in this case on the express ground that Chapman was a necessary party. The learned judge decided this question and adjudged that it was not

(1) 5 Ex. 610.
(2) 4 H. & N. 603.
(3) 4 My. & C. 702.
(4) 17 O.R 574.
(5) L.R 5 P.C. 461.
(6) L.R. 3 Q.B. 758.

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necessary that Chapman should be made a party. This judgment was not appealed from and therefore became, in my opinion, *res judicata*, and it is not now open to the defendant again to raise the same objection, but if it is I think Chapman was not a necessary party and the court was right in so holding on the demurrer. It may be that the court might, on appeal, raise the question of the necessity of Chapman being a party, but I cannot think this is a case in which the court would, of its own motion, declare Chapman to be a necessary party because the defendant went into evidence as to the state of accounts between Chapman and Belyea & Co. Counsel for defendant cross-examined Belyea and examined their own witness Chapman. They went into the accounts as if Chapman had been a party to the suit, and the judge found that there was a large balance due from Chapman to Belyea & Co. So that, as affecting the result of this suit, it matters not even if the defendant's main contention is correct, that Jones took the assignment subject to the equities, the evidence shows and the judge finds that Chapman is largely indebted to Belyea & Co., and therefore there are no equities in his favour, although he had been party to the suit.

No one who reads the evidence could properly come to any other conclusion.

But independently of all this, however the transaction may have been between Chapman and Belyea, as between Belyea, or Jones representing Belyea, and McKean it was an absolute transfer of the fund in McKean's hands or to be received by him.

Though not a bill of exchange it is obvious that Chapman, Belyea & Co., Jones and McKean all understood it to be so and so treated it; this is evident from the form of Chapman's order, viz.: "hold" not to

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Belyea & Co., but "to the order of Belyea & Co. to whom I have assigned it," showing very clearly, it appears to me, that Chapman intended that Belyea & Co. could use it as a negotiable instrument; and, with reference to Belyea & Co. from the assigment and transfer of the 3rd of October, 1882, in which Belyea & Co. say in reference to the order, "we are informed the instrument is not negotiable by endorsement not being a bill of exchange, and, therefore, to perfect your title and to enable you to obtain the amount that may be in McKean's hands we hereby assign," etc. And I think there can be no reasonable doubt that McKean likewise so understood it; that is, to my mind, apparent when on presentation, as he says in his answer, he accepted the order.

In answer to the third paragraph of the plaintiff's bill of complaint I say that somewhere about the month of May, A.D. 1882, said order or writing was presented to me and I thereupon accepted the same and wrote my name across the face of the said order,

thereby treating it as a bill of exchange, by which acceptance I think he clearly intended to intimate to the holder that he recognized his rights and would comply with the terms of the order and pay over to him the balance coming or to come to him, that is, after payment of his own claim and that of the estate of S. R. Thomson, which it was agreed by Jones should have priority over his.

I think, therefore, that Jones, as holder of this order and as assignee of the money in the hands of McKean, was clearly entitled to an account of the moneys which came into his hands; and whatever the equities existing between Chapman and Belyea, or between Belyea and Jones, may be, with these McKean had nothing to do, but was bound to account in accordance with his undertaking as indicated by his acceptance of the order on presentation, leaving Chapman and Belyea &

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Co., or Belyea & Co. and Jones, to settle, or if need be litigate, any such matter between themselves; and in the meantime I can see no reason why McKean should refuse to account to Jones or retain the money in his hands.

As between Jones and McKean a complete decree can be made. The only account sought to be taken is the account between Jones and McKean. By accepting this order, absolute on its face, McKean undertook to account to the holder, and I cannot see why he should seek to encumber this simple suit against himself by requiring the taking of, possibly long and complicated, accounts of transactions between Chapman and Belyea & Co. and Belyea & Co. and Jones, with which he has nothing whatever to do. Should McKean account to Jones and afterwards be troubled by either Chapman or Belyea & Co., his answer is, to my mind, very simple. "I have accounted to the party to whom you absolutely assigned and transferred the fund at my disposal, and you must look to him and not to me."

In re Agra and Masterman's Bank; *Ex parte Asiatic Banking Corporation* (1).

Sir H. M. Cairns L.J.—

Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.

In re Northern Assam Tea Company; *Ex parte Universal Life Assurance Company* (2).

Lord Romilly M.R.—

This is a chose in action, and the assignment of a chose in action is taken subject to the equities; but any person may release those equities who is entitled to the benefit of them, and he may do so either positively, by words, or by writing, or by the whole course of

(1) 2 Ch. App. 397. (2) L.R. 10 Eq. 463.

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his conduct ; and the real question in this case is, whether the company have or not released these equities. Upon the whole I have come to the conclusion that the company have released them, and by the course of conduct they have pursued have determined that the holders of these debentures should not take them subject to any of the equities which they had against Higgs.

In re Blakely Ordnance Company ; Ex parte New Zealand Banking Corporation (1).

Sir John Rolt L.J.—

In *In re Agra and Masterman's Bank ; Ex parte Asiatic Banking Corporation* (2) it was held that the rule which makes assignments of choses in action subject to the equities existing between the original parties to the contract, must yield when a contrary intention appears from the nature or terms of the contract. I adopt that decision. I think it applicable, as above explained, to the facts of this case.

And I think it is equally applicable to the case we are now considering.—

So again, in *Walker* v. *Rostron* (3).

Lord Abinger C.B.—

This is a case of a party engaging himself to appropriate the proceeds of the goods according to certain directions of the owner, and appears to us to fall within that class of cases where, when an order has been given to a person who holds goods to appropriate them in a particular manner, and he has engaged to do so, none of the parties are at liberty, without the consent of all, to alter that arrangement.

And in *Griffin* v. *Weatherby* (4).

Blackburn J.—

The first question is, whether the circumstances are such as to entitle the plaintiffs to maintain an action against him for money had and received. Ever since the case of *Walker* v. *Rostron* (3) it has been considered as settled law, that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay to the transferee, then

(1) 3 Ch. App. 160.
(2) 2 Ch. App. 391.
(3) 9 M. & W. 421.
(4) L.R. 3 Q.B. 758.

that which was merely an equitable right becomes a legal right in the transferee, founded on the promise ; and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder.

If Chapman or Belyea & Co. have any equities as against Jones I do not think they should be enforced in this suit, but in proceedings to be taken by those parties or either of them against Jones; and this defendant cannot set up claims which, if the finding of the learned judge is correct, so far at any rate as Chapman is concerned, are wholly imaginary as a bar to accounting for the money in or coming into his hands, as his acceptance of Chapman's order clearly indicated he would do. If he accounts to Jones and pays over the balance in his hands as the order directed him to do, and either Chapman or Belyea & Co. think they have an equitable claim against Jones, on proceedings properly taken by one or the other, or both, of those parties against Jones their respective rights will be duly investigated and determined, but with the investigation and determination of those rights I cannot discover that McKean has anything to do. He has nothing to do with the drawer of the order, all he has to do is to transfer the fund he holds in obedience to the directions of the order and assignment of it.

This is not the case of McKean having any equities as against the assignor which he seeks to set up against the assignee. As was said in *Phipps* v. *Lovegrove* (1) by Sir W. M. James L.J.:

It is a rule and principle of this court and of every court, I believe, that where there is a chose in action, whether it is a debt or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor.

(1) L. R. 16 Eq. 88.

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Ritchie C.J.

But this is not that case. McKean does not claim to have any equities against Jones or any other person but is attempting to set up an equity in Chapman with which I cannot see that he has anything to do. Under all these circumstances I think the judgment of the court below right and the appeal should be dismissed.

STRONG J.—This is a suit in equity instituted in the Supreme Court of New Brunswick by the respondent against the appellant, and the present appeal is from the order of the Supreme Court in banc pronounced on an appeal from the decree of the primary judge, Mr. Justice Fraser, whereby that decree was affirmed. The judgments of the two courts below are impugned principally on the ground that the suit is defective for want of parties, and this objection must be decided according to the established rules of equity pleading. The facts disclosed by the pleadings and evidence are as follows:

Joseph H. Chapman being interested in the proceeds of two policies of insurance effected on his shares in the barque "Pretty Jemima," which vessel had been lost, and being indebted to the appellant, on the 28th of February, 1880, by instrument under seal of that date assigned his interest in the policies mentioned by way of mortgage to the appellant as security for his debt.

On the 28th of April, 1882, Chapman being then indebted to Belyea & Co. made a further and second mortgage of the same fund to that firm as security for the debt then due as well as for what might thereafter become due to them. This security to Belyea & Co. was effected by an order addressed to the appellant, and on its presentation the appellant wrote his name across the face of the document in the manner usual in accepting a bill of exchange.

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On the 3rd of October, 1882, Belyea & Co., being indebted to the respondent, made a derivative or sub-mortgage of their security to him by an order or assignment bearing the last mentioned date. The respondent filed his bill to enforce his rights under the assigment to him and made the appellant the sole party defendant to the suit.

It was objected in the court below that both Chapman and the assignees of Belyea & Co. (who have since the assigment to the respondent become bankrupt) were necessary parties to the suit.

I am of opinion that these objections are insurmountable and ought to have prevailed. There can be no doubt or question that all the assignments were merely by way of security and were none of them intended to be absolute. This appears beyond dispute from the evidence in the cause. The right of the respondent is, therefore, to be paid out of the residue of the fund remaining after the satisfaction of the debt due by Chapman to the appellant so much of the debt which may be found due by Chapman to Belyea & Co. as may be requisite to satisfy the debt due to the respondent himself from Belyea & Co. as security for which the sub-mortgage to the respondent was created by Belyea & Co. The respondent's rights must, beyond question, be restricted to this, for upon the facts in evidence it is impossible that in a court of equity either the respondent or Belyea & Co. can be regarded as absolute assignees of the fund or otherwise than as mere mortgagees; and the respondent's rights being merely derivative from and subordinate to those of Belyea & Co. any ultimate residue which may remain after satisfying the debt due to the latter firm by Chapman belongs to Chapman and must be paid to him, even though the debt due to the respondent by

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Belyea & Co. should exceed the amount of such residue.

It is obvious that the decree to be made upon such a state of facts must be framed upon the same principles, although it may differ in some details, as that which a court of equity would make in the case of two successive mortgages of land where the suit was instituted for foreclosure and sale by a sub-mortgagee deriving his security from the second mortgagee. Any differences between the two cases arise merely from the accident that in the latter case the fund would have to be realised by a sale of the security, whereas in the present case the subject of the successive mortgages is money, a fund already realised.

Then it is obvious that the decree must of necessity involve the taking of three accounts. First an account of what is due to the first mortgagee, the appellant; secondly an account of what is due to the second mortgagee, Belyea & Co.; and thirdly an acccount of which is due to the respondent, the sub-mortgagee of Belyea & Co., by the latter. It is true that this latter account in no way concerns Chapman the mortgagor, and may be waived by the assignees of Belyea & Co. if they should admit that their debt to the respondent exceeds the residue of the insurance money remaining after satisfying the debt of the appellant. Then the indispensable parties to the taking of the first account, that between the mortgagor and the first mortgagees, are first Chapman the mortgagor, and the appellant the first mortgagee, next the assignees in bankruptcy, representing the second mortgagees, Belyea & Co., who are of course entitled to be present to see that the claim of the first mortgagee is kept within proper limits, and lastly the respondent. If Belyea & Co.'s representatives were parties and were to make the admission before mentioned, namely,

that the amount due to the respondent by Belyea & Co. was in excess of any amount which he could receive from the fund, their presence might be dispensed with, but they are not parties and have made no such admission. Therefore, for the purpose of taking this first account, both Chapman and Belyea & Co. are necessary and indispensable parties.

Then for the purposes of taking the second account, that of the amount due by Chapman the mortgagor to Belyea & Co. the second mortgagees, the former and the assignees of the latter are clearly necessary parties and on no principle that can be suggested can their presence be dispensed with.

It therefore appears plain that the suit is defective for want of parties, and that in order to remedy the imperfection in its constitution an order should have been pronounced at the hearing directing an amendment for the purpose of bringing the absent parties before the court.

It was contended on the argument of the appeal that inasmuch as the assignment by Chapman to Belyea & Co. was absolute in form, and as the appellant had accepted the order by which that assignment was effected, the suit might be regarded as one for enforcing an absolute equitable assignment of a debt. But it appears that there are two insurmountable objections to this. First, it would be impossible, in the face of the evidence which clearly establishes that the assignment to Belyea & Co. was by way of security merely, for a court of equity to give effect to the transaction according to its form disregarding the substance, and to derogate from the rights of Chapman to have the assignment to Belyea & Co. treated as, what in reality it was, a mere mortgage. This would clearly be the right of Chapman as against Belyea & Co. and the respondent, as assignee of a chose in action, can

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have no larger measure of right than his assignors Belyea & Co.

Next, if the assignment to Belyea & Co. was to be treated as an absolute equitable assignment, which the respondent in turn claiming under an absolute assignment from them was entitled to enforce, there would be no ground for suing in equity; the remedy would, in that case, be at law by an action in the names of Belyea & Co. or their assignees, for it is well established that the assignee of a chose in action can thus sue, and that he cannot maintain a bill in equity in his own name merely by reason of the assignment. The doctrine of Mr. Justice Story to the contrary (1), referred to in the judgments delivered in the court below, is not a correct statement of the law upon this head as appears from the case of *Hammond* v. *Messenger* (2), where this point arose and was decided by Vice Chancellor Shadwell, who held that the assignee of a chose in action had no right, by reason merely of his title being equitable, to sue in his own name in equity, and that in order to enable him to do so it was essential that it should appear that the assignor refused to allow his name to be used in an action at law, or that some other difficulty to his suing at law had been interposed. And in a recent case in Massachusetts, *Walker* v. *Brooks* (3), in which all the authorities are reviewed, the decision in *Hammond* v. *Messenger* (2) was followed as "being amply sustained by earlier authorities in England and in this country" and the position of Mr. Justice Story was denied to be law (4). Therefore it would be impossible to give relief on the principle contended for inasmuch as it would unjustly prejudice the rights of absent parties, or at least of an absent party (Chapman

(1) Eq. Jur. s. 1057*a* & Eq. Pl. s. 153.
(2) 9 Sim. 332.
(3) 125 Mass. 241.
(4) See also Heard on Eq. Pldg. p. 13.

the mortgagor), and also because so to treat the case would be to make the bill open to demurrer for want of equity.

If there was any procedure in New Brunswick which entitled a plaintiff in a suit in equity to bring parties who were interested in the account merely, and not in any other matters embraced in the suit, into the master's office without making them parties to the bill, a practice which prevails in some jurisdictions where law and equity are still kept separate, the defect in the suit as regards the assignees of Belyea & Co. might possibly be remedied by adopting such a course, but we have not been referred to any authority for such a mode of proceeding. As regards Chapman the mortgagor, however, he is an indispensable party to the bill.

The appeal must be allowed with costs and the decree pronounced in the court below discharged, and for it there should be substituted an order that the cause stand over with liberty to the plaintiff to amend by adding parties, and as the pleadings are very diffuse, and are otherwise not in a very satisfactory state, liberty to amend generally may well be added to this. The respondent must pay the costs of the appeal to the Supreme Court of New Brunswick, and also the costs of the day (*i. e.* the costs of the hearing only, not the general costs of the cause) before the primary judge in equity.

FOURNIER J.—I concur in the reasons advanced by the Chief Justice for dismissing this appeal.

TASCHEREAU J.—I would dismiss this appeal for the reasons given in the court appealed from. It would seem that, practically, this is an appeal only for costs.

PATTERSON J.—Chapman having a claim on some

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policies of marine insurance which was in litigation in 1880, and which was not recovered until 1885, assigned the claim in 1880 to the appellant McKean as security for certain debts and liabilities. McKean received the insurance money in 1885, and after satisfying all his claims upon it a considerable sum remained in his hands. That sum would, of course, revert to Chapman, but Chapman had, in 1882, given to Belyea & Co. the following order which referred to the money in question :—

LIVERPOOL, 28th April, 1882.

Please hold to the order of Messrs. Belyea & Co., to whom I have assigned it, any balance that remains of insurance money pro "Pretty Jemima," over and above the amount I owe or may owe to you or to your firm of Carvill, McKean & Co. or Francis Carvill & Son, without making any further advances to me, or on my account.

(Sgd.) J. H. CHAPMAN.

To GEORGE McKEAN, Esq., Saint John.

That order was, about May, 1882, presented to the appellant who wrote his name across it by way of accepting the order. Later in the year 1882 Belyea & Co., by writing, assigned the order so accepted to the respondent on account of money which they owed him. It was not taken as payment of any specified sum but as thus explained by himself at the trial:

This was taken by you as a security for an indebtedness ?

For an indebtedness. I was to place it to his credit when collected. We had a running account between us and I was to credit whatever I got out of it when paid. It was passed over to me as an asset.

Chapman had given the order to Belyea & Co. as collateral security for transactions on which they held other securities, and Chapman alleges that they have been fully paid and that they have no right to any part of the fund in the hands of the appellant. He gave notice to that effect to the appellant, forbidding him to pay over any of the money on the Belyea order. The appellant accordingly refused to pay the

money to the respondent, who thereupon brought this suit in equity against the appellant praying that

An account may be taken of said claims and charges on the said fund prior to the said plaintiff's. And that the said defendant George McKean may be restrained by the injunction and order of this honourable court from applying or paying out, or causing to be received or paid out, any part of the said fund contrary to the terms of the said assignment and orders, and that such amount as may be found in the hands of the said defendant after payment of such prior claims may be ordered to be paid to the plaintiff, and also that the plaintiff may have such other relief in the premises as to this honourable court may seem meet.

The dispute is really between Chapman and the respondent, each claiming the fund from the appellant who is merely stake-holder and who has no direct interest in the quarrel. But Chapman is not a party to the action and the main question is whether or not it is necessary to make him a party.

That question was raised by demurrer in the court below and was decided against the appellant. That decision was, however, on pleadings which did not disclose the fact that the order given by Chapman to Belyea & Co. was not an absolute assignment of the fund. That fact and Chapman's contention that his debt to Belyea & Co. had been satisfied appeared by the answer and the evidence, entered into the contest at the trial, and were dealt with in the judgments now in review; they come properly before us in this appeal notwithstanding that the appellant did not appeal from the judgment on the demurrer, even if that judgment, which was not a final judgment in the action, could have been made the subject of appeal to this court.

Chapman's claim for the insurance money was a chose in action assignable only in equity and not at law. Therefore under the well established and familiar rule of equity Belyea & Co. took the order on

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the appellant subject to Chapman's right to recall it in case the debt as security for which he gave the order was otherwise satisfied. The rule will be found stated and illustrated by decisions, to which we have been referred on the argument, in Pollock on Contracts (1), and in Lewin on Trusts (2).

Belyea & Co. could not transfer to the respondent any better right than they had themselves unless that effect followed from the direction to the appellant to pay the money *to the order* of Belyea & Co., which apparently indicated an intention that the document should be negotiable, and might, in case the other incidents essential to the creation of an estoppel concurred, estop Chapman from disputing its negotiability.

The order could not be treated as equivalent to a bill of exchange, like the deposit receipts discussed by the Chancellor of Ontario in the case *Re Central Bank* (3) to which one of the learned judges in the court below refers, or like the order in question in *Griffin* v. *Weatherby* (3). The uncertainty of the amount is an insuperable obstacle to that view. Nor does the principle on which *Walker* v. *Rostron* (4) was decided, and which is affirmed in *Griffin* v. *Weatherby* (5), apply to the case. Those cases, on which some stress was laid in the court below, decide that an order to pay money, either money on hand or money yet to be received, constitutes, when accepted, an appropriation of the money which is binding on the giver and the acceptor of the order, and that an action at law for money received to the use of the payee of the order will lie against the acceptor of it.

They do not decide that either the giving of the order

(1) 5 ed. at page 212.
(2) 9 ed. at page 781.
(3) 17 O. R. 574.
(4) 9 M. & W. 411.
(5) L. R. 3 Q. B. 753.

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or the acceptance of it precludes the giver from resisting the payment of the money on any valid ground of law or equity, though it is true that such an order, absolute on its face and accepted without expressed qualification, might be difficult to resist in the hands of one who took it for value and without notice of any equities affecting it. That is the position which the present respondent asserts for himself. He says, and he has given evidence to prove, that he took the accepted order from Belyea & Co. without notice that it was not absolute as between them and Chapman. They did not assume to transfer it to him as a negotiable instrument. They understood that it was not so, and they correctly informed the respondent by their letter of the third of October, 1882, which formally authorised him to collect the money in their names but for his own use.

29 RED CROSS STREET,
Liverpool, 3rd Oct., 1882.

Hon. THOMAS R. JONES :

DEAR SIR,—Having endorsed to you the order drawn by J. H. Chapman upon George McKean, Esq., for any balance of insurance moneys in his hands when collected in our favour, we are informed the instrument is not negotiable by endorsement, not being a bill of exchange, and therefore in order to perfect your title, and to enable you to obtain the amount that may be in Mr. McKean's hands, we hereby assign and transfer our interest therein both legal and equitable, and appoint you our attorney in our names but for your own use and benefit to collect the same.

We are, dear sir,
Yours truly,
(Sgd.) BELYEA & Co.

But when the respondent insists that he occupies a stronger position than his immediate assignors his case is, in my opinion, fatally weak in the fundamental requisite of his being a holder for value. I have already quoted a question and answer from his cross-examination. He was re-examined by his own counsel

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and this is the whole of the re-examination as reported to us :—

You say that Belyea owed you, and he gave it to you to collect and to credit him? Yes.

Since then he failed and you got nothing, and you did not prove against the estate? No. I did not prove against the estate at all.

The Belyea failure and the prudence of the respondent in not going to the expense of proving against the estate are not said to have any connection with the Chapman order. The respondent gave nothing and gave up nothing for the order. The change of position by reason of reliance on the order or on any representation conveyed by it, which lies at the foundation of the doctrine of estoppel, is entirely absent.

I do not question the proposition that taking on account of an existing debt is a taking for value as well as purchasing by a payment of money, nor do I assert that, in the case of an existing debt, the value must necessarily consist in the satisfaction of any part of the debt, or that it may not take another form, as *e. g.* suspension or forbearance of proceedings, but here I do not find value in any shape.

If the respondent were properly held to have taken for value it might not follow, as of course, that he would have a right to the whole fund. The relief to which he was entitled would be adjudged upon equitable principles, and might be found to be not more extensive than a return of the value he gave. That was held to be the proper measure of relief in *re Romford Canal Co.* (1), which is one of the cases noticed by the Chancellor in the *Central Bank Case* (2) already referred to.

In my opinion the respondent stands merely in the shoes of Belyea & Co. and holds subject to the state of

(1) 24 Ch. D. 85. (2) 17 O. R. 577.

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their accounts with Chapman, who is, therefore, a necessary party to this action.

I do not overlook the fact that the learned judge at the trial held, after hearing the evidence of both Mr. Belyea and Mr. Chapman, that the latter still owed as much money as the balance in the hands of the appellant, and that the court in banc declined to disturb that finding. Whether or not it may be considered necessary to take further evidence on those accounts I cannot assume to say, but the decision is not binding on Chapman, who is not a party, as against the appellant.

I think the appeal should be allowed with costs and the case sent back in order that Chapman may be made a party to the record.

Appeal dismissed with costs.

Solicitors for appellant: *Gilbert & Straton.*

Solicitors for respondent: *Weldon & McLean.*

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*Jan. 26, 27, 28.

*Nov. 16.

JOHN H. QUIRT AND OTHERS (DEFENDANTS)..... ..... } APPELLANTS.

AND

HER MAJESTY QUEEN VICTORIA (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law.—Right of legislation.—Banking and Incorporation of banks—Bankruptcy and insolvency—31 *V. c.* 17 *(D)*—33 *V. c.* 40 *(D)—Validity of—B. N. A. Act, s.* 91—*R.S.O.* (1887) *c.* 193 *s.* 7 *ss.* 1.

In 1866 the Bank of Upper Canada became insolvent and assigned all its property and assets to trustees. By 31 V. c. 17 the Dominion Parliament incorporated the said trustees giving them authority to carry on the business of the bank so far as was necessary for winding up the same. By 33 V. c. 40 all the property of the bank vested in the trustees was transferred to the Dominion Government who became seized of all the powers of the trustees.

Held, affirming the judgment of the Court of Appeal, that these acts were *intra vires* of the Dominion Parliament.

Per Ritchie C. J.—That the legislative authority of Parliament over "banking and the incorporation of banks" and over "bankruptcy and insolvency" empowered it to pass the said acts.

Per Strong, Taschereau and Patterson JJ.—The authority to pass the said acts cannot be referred to the legislative jurisdiction of Parliament over "banking and the incorporation of banks" but to that over "bankruptcy and insolvency" only.

After the property of the bank became vested in the Dominion Government a piece of land included therein was sold and a mortgage taken for the purchase money, the mortgagor covenanting to pay the taxes. Not having done so, the land was sold for non-payment. In an action to set aside the tax sale:

Held, affirming the judgment of the Court of Appeal, that the crown having a beneficial interest in the land it was exempt from taxation as crown lands. R.S.O. (1887) c. 193 s. 7 ss. 1.

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

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APPEAL from a decision of the Court of Appeal for Ontario, *sub nomine The Queen* v. *The County of Wellington* (1) affirming the judgment of the Divisional Court (2) in favour of the crown.

The suit in this case was brought by the Dominion Government to set aside certain conveyances among the defendants of a lot of land claimed by the crown. The land originally belonged to the Bank of Upper Canada. In 1866 that bank transferred all its assets to trustees for the purpose of having them realized and the proceeds distributed *pro ratâ* among its creditors. In 1867, after confederation, the Dominion Parliament passed an act ratifying this assignment and creating the trustees a corporation with power to carry on the business of the bank, so far as was necessary to wind it up. In 1870 another Dominion act was passed transferring the bank assets to the Dominion Government as trustee to wind it up. In 1877 the land in question was sold to the defendant Anderson, who gave a mortgage for part of the purchase money and covenanted to pay the taxes.

In 1886 the land was sold for taxes, Anderson having allowed them to fall into arrear. The defendant Cutten became the purchaser at the tax sale and the defendant Quirt, at Anderson's instance, purchased the land from Cutten and afterwards transferred it to Anderson's wife. The crown brought a suit to have these conveyances set aside and to have it declared that the land was still vested in the crown and that the Anderson mortgage remained a charge upon it. The defendant Cutten did not appear to defend the suit; the other defendants entered an appearance and defence.

At the trial the conveyances were set aside on the ground that the land being property of the crown was

(1) 17 Ont. App. R. 421. (2) 17 O. R. 615.

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exempt from taxation, and the tax sale was, therefore, void. The Divisional Court held that the tax sale was not void but that the plaintiff's mortgage had priority over the other conveyances, and decided in favour of the crown on that ground. The case was then taken to the Court of Appeal where the judges were equally divided and the judgment of the Divisional Court was sustained. Two of their lordships in the Court of Appeal held the Dominion acts above referred to *ultra vires* of the Dominion Parliament.

The defendants then appealed to the Supreme Court of Canada.

Bain Q.C. for the appellants. The acts of 1867 and 1870, or, at all events, the latter, were *ultra vires*. They are not acts dealing with banking or the incorporation of banks. The bank of Upper Canada had ceased to exist as a bank when these acts were passed, and they simply dealt with the bank property which was held by the trustees under the assignment in 1866 as in the case of any other trust for creditors.

At all events the act of 1870 is *ultra vires*. The trustees were not made a banking corporation by the act of 1867 but were only to carry on the business for winding-up the bank, so the act of 1870 did not deal with a banking corporation.

Nor are the acts valid as dealing with bankruptcy and insolvency. The power given to the Dominion Parliament is only to make general laws on these subjects. *L'Union St. Jacques* v. *Bélisle* (1).

The learned counsel also referred to the following cases on this point: *Municipality of Cleveland* v. *Municipality of Melbourne* (2); *Colonial Building & Investment Assoc.* v. *Attorney General of Quebec* (3); *Citizens Insurance Co.* v. *Parsons* (4).

(1) L. R. 6 P. C. 31.
(2) 4 Legal News 277; 2 Cart. 241.
(3) 9 App. Cas. 157.
(4) 7 App. Cas. 96.

If the property was vested in the crown under these acts it is still liable to taxation. The property exempt is that in which the crown has the beneficial interest and not property held in trust as this was. The Ontario Assessment Act (1) exempts property of the Dominion held in trust for Indians; that shows that no other trust property is exempt. *Expressio unius exclusio est alterius.*

Gamble for the respondents. The Dominion acts are *intra vires.* The power to pass such acts must exist somewhere and if not expressly given to the provinces it must be in the Federal Parliament. *Valin* v. *Langlois* (2); *Leprohon* v. *City of Ottawa* (3); *Lambe* v. *Bank of Toronto* (4).

The courts will not presume that Parliament has exceeded its powers but will strive to uphold the validity of the act rather than to avoid it. *Edgar* v. *Central Bank* (5); *Valin* v. *Langlois* (6).

See also *Citizens Ins. Co.* v. *Parsons* (7); *McArthur* v. *Northern Junction Railway Co.* (8); *Cushing* v. *Dupuy* (9).

The defendant Anderson conveyed the land in fee to the crown by his mortgage and is estopped from denying the plaintiff's title. *Doe d. Hennesy* v. *Meyers* (10).

If the acts were *intra vires* the land was vested in the crown and could not be sold for taxes. B. N. A. Act sec. 125. *Leprohon* v. *City of Ottawa* (11).

The exemption extends to lands held by the crown in trust. *Reg.* v. *Williams* (12); *The Queen* v. *Guinness* (13).

(1) R.S.O. (1887) c. 193, s. 7.
(2) 3 Can. S. C. R. 1; 5 App. Cas. 118.
(3) 40 U.C. Q.B. 488.
(4) 12 App. Cas. 575.
(5) 15 Ont. App. R. 202.
(6) 5 App. Cas. 118.
(7) 7 App. Cas. 96.
(8) 17 Ont. App. R. 124.
(9) 5 App. Cas. 415.
(10) 2 O.S. 424.
(11) 40 U.C. Q.B. 478; 2 Ont. App. R. 522.
(12) 39 U.C. Q.B. 397.
(13) 3 Ir. Ch. 211.

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The mention of lands held in trust for the Indians does not exclude other trusts. The maxim *expressio unius exclusio est alterius* is not of universal application; *Saunders* v. *Evans* (1).

The expression "lands held by the crown in trust for Indians" does not denote a real trust. See *Church* v. *Fenton* (2).

Sir W. J. RITCHIE C.J.—I cannot see how it can be contended that an act for the settlement of the affairs of the Bank of Upper Canada, an insolvent institution, is *ultra vires* of the Parliament of Canada, to which body is confided the exclusive authority to deal with and legislate on banking, incorporation of banks, and bankruptcy and insolvency. If this is so, I think it equally clear that the legislature of Ontario could pass no act repealing, altering or interfering with the provisions of that act, and so could not have passed an act similar in its terms to the 33 Vic. ch. 40, "an act to vest in the Dominion for the purposes therein mentioned the property and powers now vested in the trustees of the Bank of Upper Canada."

Therefore it necessarily follows that the legislative power to do so belongs to the Dominion Parliament alone.

I think the contention that the lands, though vested in the crown, were subject to taxation is equally untenable, and that the express exemption by R.S.O. (1887) ch. 193 sec. 7 ss. 1, of all property vested or held by Her Majesty or vested in any public body, body corporate, officer or person in trust for Her Majesty, or for the public uses of the crown, is too clear to be got over, and is in no way affected or controlled by the exemption of lands vested in Her Majesty in trust for the Indians.

(1) 8 H.L. Cas. 729.

(2) 28 U.C. C.P. 384.

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I think, as suggested by Mr. Justice Street, that this is borne out by sec. 137, which enacts "that the taxes assessed on any land shall be a special lien on such land having preference over any claim, lien, privilege, or incumbrance of any party except the crown.

I therefore think the enactment by the Dominion Parliament *intra vires* of that body, and the interest of the crown being exempt from taxation this appeal should be dismissed.

STRONG J.—This appeal, which was very ably argued at the bar, raises two important questions. The first of these involves the validity of the legislation of the Dominion Parliament relating to the winding up of the affairs and the distribution of the assets of the late Bank of Upper Canada, embodied in the statutes of 1867 and 1870. The second question relates to the scope and construction of the provision in the Ontario Assessment Act, exempting lands and property of the crown from taxation. If the judgment of the court below deciding these two questions in favour of the crown is upheld the other points raised become immaterial and need not be considered.

The first section of the act of 1870 vests all the assets of the bank in the crown, and the second section confers upon the Governor General in Council the same powers of dealing with and realizing these assets as the assignees under the prior act of 1867 had possessed. Therefore, unless it can be demonstrated that this legislation was *ultra vires* of the parliament of the Dominion, the crown had full power to sell the lands in question to Anderson and to take as security for the purchase money the mortgage which it is the object of the present action to enforce.

I am of opinion that the statutes of 1867 and 1870 were in all respects *intra vires*, and that for the reasons

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principally relied on by Mr. Justice Street in delivering the judgment of the Divisional Court, and by the Chief Justice and Mr. Justice Osler in the Court of Appeal. I rest this opinion, however, exclusively upon the 21st enumeration of section 91 of the British North America Act, and in no way upon the 15th which I do not consider applicable.

The 21st subsection gives to parliament the exclusive power to pass laws relating to bankruptcy and insolvency. That the acts of parliament in question come within the literal meaning of these terms appears to me very plain. The bank was insolvent, and the realization and distribution of its assets was a matter consequent upon that insolvency. The only reasonable ground upon which such enactments as these under consideration could be rejected from the category of bankruptcy and insolvency statutes authorized by section 91, subsection 21, would be that they were special and not general laws, and therefore were to be considered as assigned to the provincial legislature under the 16th clause of section 91, which authorizes legislation on matters of a local and private nature within the province. The answer to this, however, is that any matter which comes within the terms of any of the subjects enumerated in section 91, although in other respects it might be classed under the head of local and private legislation, is expressly excepted from the powers of the provincial legislatures by the last clause of section 91, which enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces."

Then, it is said that this class of legislation is appro-

priated to the provinces under the head of property and civil rights. This argument, however, would prove too much since general legislation in matters of bankruptcy and insolvency, which subsection 21 undoubtedly confers on the Dominion, must always be an interference with property.

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Then, it can hardly be said that such special legislation as this, respecting a bank incorporated under the statutes of the Dominion, would be within the competence of a provincial legislature; the incongruity of such a construction, when we consider that the right to incorporate banks is exclusively in the Dominion, would alone be fatal to such contention, more especially as the act of incorporation itself might well provide for the winding-up of a particular bank in case of insolvency.

If the special legislation regarding insolvency is *intra vires* of the Dominion in the case of a new bank, it is hard to see why it should not be so in the present case of a bank incorporated and reduced to insolvency before confederation. Any distinction between the two cases would be purely arbitrary.

On the whole it seems to me that whilst there is no power in the provinces to which these enactments could be reasonably referred the Dominion Parliament does, according to the literal interpretation of the terms used, possess a power which includes them. For these and other reasons, in which I concur, set forth in the opinions of the learned judges whose views prevailed in the courts below it seems to me that this first objection to the judgment under review entirely fails.

As regards authority, I am of opinion that the case in the Privy Council of *Union St. Jacques* v. *Bélisle* (1), so far from being an authority for the appellant, supports the conclusion I have reached. The act of the Quebec

(1) L. R. 6 P. C. 31.

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legislature questioned in that case was held to be *intra vires* upon the distinction expressly taken in the judgment that it was not an act providing for a winding up as in the case of bankruptcy or insolvency, but was rather an enactment designed for the purpose of avoiding such a result. I therefore consider the Privy Council as indicating that a special statute providing for the winding-up of an incorporated company would be bankruptcy or insolvency legislation.

Next it is said that the interest vested in the crown under the mortgage made by Anderson is liable to taxation under the Ontario Assessment Act. I agree, however, with Mr. Justice Osler, in whose judgment on this point the learned chief justice concurred, that it is not so liable. All property vested in the crown is exempted from taxation unless made liable by some express enactment. No statute can be pointed to making the beneficial interest which the crown as mortgagees undoubtedly had in these lands liable to assessment for taxes, and that is sufficient to dispose of the case. I am also of opinion that in the absence of express enactment no difference ought to be made between property vested in the crown as a trustee, and that in which it had a beneficial interest. The crown is entitled to the prerogative of priority of payment out of assets, even though it sues as a mere trustee, as in the case of an action on a recognisance given for the benefit of subjects, and I c
reason why the analogy should not prevail in the present case. However, the crown is far from being a mere trustee in this case. The statute of 1870 recites that it is the largest creditor; it therefore has a beneficial interest in the assets of the bank. As I have said, in the absence of express enactment to the contrary property vested in the crown would not be taxable, and it is, therefore, rather for the appellants to show

that the property of the crown is made liable to assessment than for the respondent to show the contrary.

The argument founded on the provision relating to Indian lands is well answered by Mr. Justice Osler, whose reasoning appears to me conclusive. The rights of the crown as regards Indian lands are of such an anomalous and peculiar nature, and so different from a right of property either as a fiduciary or beneficial owner, that it would be carrying the argument *expressio unius est exclusio alterius* to an altogether unwarrantable length to hold that ordinary trust property vested in the crown was made liable to taxation by a mere inference derived from this exception.

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

FOURNIER J.—Concurred in dismissing the appeal.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Patterson in his judgment.

GWYNNE J.—I have no doubt whatever that the Dominion Parliament had jurisdiction to pass these acts.

PATTERSON J.—When the British North America Act, 1867, took effect the Bank of Upper Canada had forfeited its charter and all its privileges. That was the result of a provision contained in the act of the province of Canada (1) under which the bank had, from the first of January, 1857, held its corporate powers. By the 33rd section of that act a suspension of specie payments, if it extended to sixty days, operated as a forfeiture of the charter and of all and every

(1) 19 & 20 Vic. ch. 121.

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the privileges granted to the bank by that or any other act. Specie payments were suspended on the 18th of September, 1866, and were not resumed. During the sixty days, and therefore while the powers of the bank continued, the bank made an assignment to five trustees of all its property upon trusts declared in the deed.

At the first session of the Dominion Parliament an act was passed (1) which confirmed the assignment, which is set out in a schedule, and declared it valid from the day of the date thereof; incorporated the trustees by the name of the Trustees of the Bank of Upper Canada; added certain special provisions to the provisions of the deed of assignment; and provided a shorter form for the registration of the deed of assignment in the counties where lands of the bank lay, in place of registering it in full as the registry law of Ontario required. The act contained also the declaration, the validity of which is questioned, that the trustees as a corporation should have, hold and possess all the properties, estate and effects, real and personal, of the Bank of Upper Canada.

Then in 1870 another act (2) declared that all the assets, &c., held by the trustees of the Bank of Upper Canada under the former act or acquired by them since the passing of that act should be and were thereby transferred to and vested in Her Majesty for the Dominion of Canada and the purposes of the act.

The transfer of real estate in the province from one person to another obviously falls within the subject of Property and Civil Rights in the province, which by section 92 of the British North America Act, 1867, is assigned to the exclusive legislative authority of the province. The acts are therefore invalid unless the subject falls also within one of the enumerated classes in section 91.

(1) 31 Vic. ch. 17. (2) 33 Vic. ch. 40.

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It is argued that it falls within article 15, Banking, Incorporation of Banks, and the issue of Paper Money; or within article 21, Bankruptcy and Insolvency; or within both of those articles.

In the Divisional Court (1) the decision in favour of the validity of the acts was rested on article 21. In the Court of Appeal (2), two of the learned judges considered that both articles applied, or rather, if I correctly understand the opinions expressed, that either article 15 or article 21 was sufficient; while two judges held the acts to be *ultra vires*.

It is remarked by one of the learned judges who held the acts to be valid that the defendants, when before the Court of Appeal, confined their attack to the act of 1870, but the act of 1867 was, in his opinion, material to be considered as showing the character of the legislation. I also am of opinion that the act of 1867 cannot be left out of the discussion. It is in reality upon that act that the objection is founded, because the act of 1870 purports to vest in Her Majesty whatever the act of 1867 vested in the corporate body called the Trustees of the Bank of Upper Canada, and therefore unless the earlier act was valid the later one had nothing to operate on.

I am unconvinced by the arguments advanced to bring the legislation within article 15. The trustees were not carrying on the business of banking, they were merely administering the assets of an insolvent bank whose powers were forfeited. The incorporation of the trustees was not the incorporation of a bank. And I do not consider that the legislative authority to make laws on the subject of banking or to incorporate banks so far overrides the power conferred expressly upon the provinces to make laws in relation to pro-

(1) *Reg.* v. *The County of Wellington*, 17 O. R. 615.

(2) 17 Ont. App. R. 421.

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perty and civil rights in the province as to carry with it the power to establish a mode of dealing with real estate when a bank is concerned, or for that matter with chattel property either, differing from the provincial system. There is no incident of banking that requires that business to be put on a different footing in this particular from any other business. The judgment of the Judicial Committee in *Bank of Toronto* v. *Lambe* (1), delivered by Lord Hobhouse, may be usefully referred to as an exposition of the extent of this word "banking" in article 15.

I entirely agree with Mr. Justice Burton and Mr. Justice Maclennan in what they said in the Court of Appeal on the subject of article 15.

I cannot, however, adopt their conclusion respecting article 21. The words bankruptcy and insolvency in that article no doubt point primarily to the enactment of a general bankrupt or insolvent law, as was well explained by Lord Selborne in delivering the judgment of the Judicial Committee in *L'Union St. Jacques de Montreal* v. *Bélisle* (2); but, as I think is conceded by the same judgment, a special act for the winding-up of some particular company which was insolvent, and the distribution of its assets, would not be beyond the competency of the Dominion Parliament. It is at least doubtful if a provincial legislature could pass an act of the kind without transgressing the limits of its authority, but that point does not now require to be definitely decided. It is easy to imagine cases arising in connection with bankruptcy proceedings under a general law where special legislation would be required, such for instance as the necessity for curing some irregularity so as to validate or remove doubts as to titles taken under the proceedings. There must be power to do this in one legislature or the other, and I

(1) 12 App. Cas. 575. (2) L. R. 6 P. C. 31.

take it to be obvious that the power would be in the Dominion legislature alone. Such legislation would be, like that now under consideration, special legislation addressed to an individual case, but it would not on that account be *ultra vires*. That seems to have been the view of the provincial legislature when, at its first session, which was early in 1868, in passing a registry act for the province (1) it made an exceptional provision for the registration of the assignment, declaring that:—

> It shall not be necessary to register in full the deed of assignment from the Bank of Upper Canada to Thomas C. Street, &c., bearing date the 12th day of November, A.D. 1866, and confirmed by the act of the Parliament of Canada passed in the 31st year of Her Majesty's reign, chapter 17, which shall be deemed validly registered in any county or city, if registered in the manner provided in and by the said act, or by a declaration under the corporate seal of the trustees of the Bank of Upper Canada in the form following:

The forms given in both acts contain the express statement that the lands are held by the trustees as a corporation under the Dominion act.

Purchasers of lands from the trustees in the interval between March, 1868, when the Provincial Registry Act became law, and May, 1870, when the unsold lands were vested in the crown, took their titles on the faith of this provincial recognition of the validity of the Dominion Act of 1867 thus recorded for their information in the registry books.

It is going very far to ask the courts to say at this distance of time that the legislatures were both mistaken and that the title remained in Mr. Street and the four other gentlemen associated with him as grantees under the deed of assignment.

Now holding, as I think it is imperative upon us to hold, that it was within the authority of the Dominion

(1) 31 V. c. 20, s. 550.

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Parliament to legislate in relation to the winding-up of the affairs of this insolvent bank, whose powers had been forfeited although the corporation was not extinct, —*Brooke* v. *Bank of Upper Canada* (1)—we virtually decide the whole controversy.

The right to legislate concerning bankruptcy and insolvency includes the power to make a statutory conveyance of the estate to the person charged with the administration of it. That is so in every system which the parliament may be supposed to have had in view in passing the act of 1867 (2). It was so under the Insolvent Act of 1864 which was then in force in Ontario and Quebec. It was so under the Insolvent Acts of 1869 and 1875 subsequently passed by the Dominion Parliament. It was not under any misapprehension in this particular that the provincial parliament recognised the title of the corporate trustees.

The act of 1870 must be judged on the same principle as the act of 1867. It altered in some respects the scheme of the earlier act for the winding-up of the affairs of the bank, but it still had that purpose in view. It is described in the title of another act to which I am about to allude, as "respecting the settlement of the affairs of the Bank of Upper Canada." The administration of the estate was taken from the trustees and committed to the Governor in Council, and the estate itself was vested in Her Majesty, which measure was followed in the next year (3) by the appropriation of $250,000 to pay off claims on the bank in anticipation of the realisation of the assets. It is not for us to criticise the mode in which the legislature exercises its powers, and once we reach the conclusion that the authority to make laws in relation to bankruptcy and insolvency brought the affairs of the bank, or, more

(1) 4 Ont. P. R. 162 ; 16 Grant 249 ; 17 Grant 301.

(2) 31 V. c. 17, s. 3, ss. 22.

(3) 34 V. c. 8.

properly, the winding-up of those affairs, within the scope of that authority, there no longer remains any reason for denying the validity of the statutory conveyance.

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On the question of the liability of the lands vested in Her Majesty to taxation I have nothing new to advance. I see no tenable ground for distinguishing them from crown lands in general.

I agree that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Bain, Laidlaw & Co.*

Solicitors for respondent: *C. & H. D. Gamble & Dunn.*

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*Oct. 29.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE COUNTY OF KING'S (N.S.).

FREDERICK W. BORDEN (RESPONDENT) ..... } APPELLANT;

AND

DAVID BERTEAUX (PETITIONER) .....RESPONDENT.

ON APPEAL FROM THE DECISION OF THE SUPREME COURT OF NOVA SCOTIA.

Election petition—Preliminary objections—Service at domicile—R. S. C. ch. 9, sec. 10.

Held, that leaving a copy of an election petition and accompanying documents at the residence of the respondent with an adult member of his household during the five days after the presentation of the same is a sufficient service under sec. 10 of the Dominion Controverted Elections Act even though the papers served do not come into the possession or within the knowledge of the respondent. [See now 54-55 Vic. ch. 20, sec. 8.]

APPEAL from the decision of the Supreme Court of Nova Scotia overruling and dismissing the preliminary objections of the said appellant, Frederick W. Borden, the respondent in the court below to the petition against the election of the said Frederick W. Borden presented by the said respondent, David Berteaux, at the office of the clerk of the court at Halifax, on the twentieth day of April, A.D. 1891.

A number of objections were taken in the said preliminary objections, but these have been confined by notice pursuant to subsection 3 of sec. 51, chapter 9 of the Revised Statutes of Canada, to certain questions.

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

The present appeal was decided upon the fourth question submitted, which is as follows:

Fourthly—Did the act of leaving a copy of the said petition and accompanying documents at the domicile of the said Frederick W. Borden at Canning in the said County of King's with the wife of the said Frederick W. Borden during the five days after the presentation of the same or within the term of the service of the said petition as extended by the order of Mr. Justice Meagher without the said copy of petition or papers coming to the possession or knowledge of the said Frederick W. Borden constitute a service of the said petition and accompanying documents so as to authorize further proceedings thereon?

The petitioner resides at Somerset in the County of King's. The sitting member (appellant) resides at Canning in said County of King's. The petition was filed at Halifax on the 20th April, 1891.

On the 25th April the petitioner obtained an order extending the time for serving the petition.

On the 30th April an order was made by Mr. Justice Graham to serve the petition on the appellant at Ottawa.

The petition and receipts, notice of its presentation, and the orders extending the time for service and directing service upon the respondent at Ottawa, were served upon the said respondent at Ottawa. The said petition and accompanying papers were served at the domicile of the said respondent, at Canning in the County of King's, within five days after the presentation of the petition, and again within the extended time for effecting service of the same.

Roscoe for appellant:

As to the fourth question, there is no evidence that the appellant ever saw or heard of the papers that were left at his residence.

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Section 11 of the act provides for the same manner of service—personal service—of the petition and papers as in civil matters or in such other manner as prescribed.

In the province of Nova Scotia there is but one way of serving process without the intervention of the court in civil cases, namely, actual personal service. It has never been prescribed that service might be made by leaving the papers at the respondent's domicile. There is nothing in section 11 or in any rule or manner prescribed which would warrant such a method of service.

It has been contended, however, that by inference drawn from the latter part of section 10, service might be made by leaving the petition and papers at the respondent's domicile. If this be so then sections 10 and 11 are inconsistent, and in that case the provisions of section 11 must prevail. *Wood* v. *Riley* (1).

But the meaning of the latter part of section 10 as applied to the province of Nova Scotia is not that service may be made by leaving the petition and papers at the domicile of the respondent. In the province of Quebec service of ordinary civil process may be made "upon the defendant in person or at his domicile or at the place of his ordinary residence speaking to a reasonable person belonging to the family." See article 57 of the Code of Civil Procedure. In Quebec, as it is quite evident that service may be made in civil process by leaving the same at the domicile of the party, the words in the latter part of section 10, "if service cannot be effected on the respondent or respondents either personally or at his or their domicile," are capable of literal application, but in Nova Scotia service cannot be effected by leaving process at the domicile of a party to be served unless by order

(1) L.R. 3 C.P. 27.

of the court or a judge, so that the words " if service cannot be effected on the respondent or respondents either personally or at his or their domicile," cannot mean that service may be effected that way, inasmuch as it cannot be effected in Nova Scotia that way at all in civil cases, and saying that if service cannot be effected in one of two ways when it is impossible to have it effected in but one of those methods, is to eliminate from the statute in its application to Nova Scotia the reference to the way which cannot be employed excepting by violating the law in Nova Scotia, and as a consequence violating the terms of sec. 11. The obvious construction of sec. 10 in the light of sec. 11 is to incorporate the operative part of sec. 11, immediately after the word domicile in sec. 10, when the section would read as follows : " If service cannot be effected on the respondent or respondents either personally or at his or their domicile, whichever may be as nearly as possible the manner in which a writ of summons is served in civil matters, then it may be effected upon such other person or in such other manner as the court or judge on the application of the petitioner directs." The evident intent of these two sections—regard being had to the manner of service of civil process in the province of Quebec—is that a petitioner shall try to serve the petition and papers in the way in the province where the petition is to be served applicable to the service of a writ of summons in civil matters, and if he cannot effect such service then the court or a judge shall direct the method of service.

In the construction of statutes the intention to be gotten from the statute should prevail, and the construction is to be made on all the parts of the statute together; Hardcastle's Statutory Law, page 67 and cases there cited.

But there is another reason for the construction

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claimed by the appellant. If the petition is to be served in Nova Scotia by leaving it at the domicile of the party it would be altering the law as to service of civil process in that province and compelling a construction of sec. 10 inconsistent with sec. 11. This should not be done on account of a mere inference or implication to be extracted from part of a clause of a statute. To do that needs an express and unmistakable provision. The respondent to an election petition in Nova Scotia has the right to claim personal service of that paper, and that right should not be taken away unless by a plain and unmistakable provision of the law; Hardcastle's Statutory Law, pages 48, 49, 52 and 53. The case of *Walsh* v. *Montague* (Haldimand) (1) does not consider the effect of sec. 11 of the act nor the necessity of harmonizing it with sec. 10 nor any of the principles involved in adopting the view taken.

Boak for the respondent. Service of the petition and accompanying documents was made at the respondent's domicile within five days after the presentation of the petition and again after the time for effecting personal service had been extended. Such service is a good service within the meaning of sec. 10 of the act; *Walsh* v. *Montague* (Haldimand) (1).

Per Curiam: A service at the residence or dwelling house of the respondent by delivering a copy of the petition and the other papers prescribed by the statute to a grown up person is a good and valid service under section 10 of the Dominion Controverted Elections Act.

Appeal dismissed with costs.

Solicitor for appellant: *W. E. Roscoe.*

Solicitor for respondent: *H. W. C. Boak.*

(1) 1 Ont. El. R. 485.

MOISE BROSSARD *et al.* (DEFENDANTS)..APPELLANTS; 1890

AND *Nov. 24,25.

CALIXTE DUPRAS *et al.* (PLAINTIFFS)..RESPONDENTS. 1891

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE). *Nov. 16.

Composition—Loan to effect payment—Failure to pay—Secret agreement—Mortgage—Avoidance of—Arts. 1082, 1039 *and* 1040 *C. C.*

On the 20th December, 1883, the creditors of one L. resolved to accept a composition payable by his promissory notes at 4, 8 and 12 months. At the time L. was indebted to the Exchange Bank (in liquidation), who did not sign the composition deed, in a sum of $14,000. B. *et al.*, the appellants, were at that time accommodation endorsers for $7,415 of that amount, but held as security a mortgage dated the 5th September, 1881, on L.'s real estate. The bank having agreed to accept $8,000 cash for its claim B. *et al.* on the 8th January, 1884, advanced $3,000 to L. and took his promissory notes and a new mortgage registered on the 13th January for the amount, having discharged and released on the same day the previous mortgage of the 5th September, 1881. This new transaction was not made known to D. *et al.*, the respondents, who on the 14th January, 1884, advanced a sum of $3,000 to L. to enable him to pay off the Exchange Bank and for which they accepted L.'s promissory notes. L., the debtor, having failed to pay the second instalment of his notes, D. *et al.*, who were not originally parties to the deed of composition, brought an action to have the transaction between L. and the appellants set aside and the mortgage declared void on the ground of having been granted in fraud of the rights of the debtor's creditors.

Held, reversing the judgments of the courts below, that the agreement by the debtor L. with the appellants was valid, the debtor having at the time the right to pledge a part of his assets to secure the payment of a loan made to assist in the payment of his composition. The Chief Justice and Taschereau J. dissenting.

Per Fournier J.—The mortgage having been registered on the 13th January, 1884, the respondent's right of action to set aside the mortgage was prescribed by one year from that date; art. 1040 C.C.

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

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

The facts and pleadings are fully stated in the head-note and in the judgments hereinafter given.

Geoffrion Q.C. and *Beausoleil* for the appellants contended:

1st. That the respondents were not Lamoureux's creditors at the time of the granting of such mortgage, and that they had no right as subsequent creditors to put in issue the validity of said mortgage.

2nd. That the said respondents were aware of the existence of the said deed of the 8th January, 1884, which was duly registered at the Registry Office of Coaticooke on the 13th January, 1884, and that the said respondents had knowledge of such mortgage for over a year at the time of the issue of the writ which is dated the 16th of June, 1885; that by article 1040 of the Civil Code their pretended right of action was lost.

3rd. That the transaction was made in good faith; that it did not create any undue preference in favour of the appellants, and that it ought to be declared valid on its own merits.

Ouimet Q.C. for respondents contended that respondents when they paid the Exchange Bank, and became the bearers of Lamoureux's notes, then and there and *de facto* became subrogated to the bank in the latter's action against Lamoureux, and cited arts. 1039 and 1032 C.C; Larombière on Obligations (1). Upon the evidence the learned counsel contended that when the respondents consented to advance $3,000, on the belief that they would stand for being repaid on the same footing as all the other creditors who had consented to take 65c. in the

(1) 2 Vol. p. 497.

dollar, Brossard & Chaput the appellants were behind their back getting a new note of $2,934.86, saddling Lamoureux's estate with that new indebtedness, and such a transaction was void at law. *Rickaby* v. *Bell* (1); Arts. 1032, *Ivers* v. *Lemieux* (2); Arts. 1092, 2090 C. C., *McGauvran* v. *Stewart* (3); and *Dwyer & Fabre* v. *McCarron* (4).

Geoffrion Q.C. in reply cited *Beausoleil* v. *Normand* (5).

Sir W. J. RITCHIE C.J.—I think this appeal should be dismissed and the judgment rendered by the learned judge *en première instance*, unanimously affirmed by the Court of Queen's Bench, should be affirmed.

STRONG J.—For the reasons given by Mr. Justice Fournier I am of opinion that this appeal should be allowed.

FOURNIER J.—L'action des intimés a pour but de faire annuler certains actes et billets promissoires comme faits en fraude de leurs droits et aussi pour faire obliger les appelants Brossard et Chaput à faire rapport de $2,000 à eux payées par Lamoureux qui avait failli. Le 20 décembre 1883, Lamoureux avait obtenu la signature de ses créanciers à un acte de composition, à raison de 65 centins dans la piastre, payable par ses billets promissoires à 4, 8 et 12 mois.

Cette composition (1) est signée par les appelants et par tous les autres créanciers de Lamoureux, à l'exception de la Banque d'Échange qui, ayant refusé de se joindre a la composition, fit avec Lamoureux un arrangement particulier. Les intimés aussi ne sont point

(1) 2 Can. S. C. R. 560.
(2) 5 Q. L. R. 128.
(3) 3 Legal News 323.
(4) 24 L. C. Jur. 174.
(5) 9 Can. S. C. R. 711.

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parties à cette composition parce que alors ils n'étaient pas créanciers de Lamoureux, ne l'étant devenus qu'après la composition.

Lamoureux devait à la Banque d'Échange $14,000, pour au delà de $5,000 de ce montant, il était responsable comme endosseur du papier de ses pratiques. La balance, $8,389 34, se composait de ses propres billets endossés par les appelants.

Une des principales difficultés de cette cause est au sujet de l'arrangement particulier avec la banque. Il est certain que Lamoureux avait fait un compromis avec ses créanciers à raison de 65 pour cent, on en possède la preuve écrite; mais en a-t-il fait autant avec la Banque d'Échange, et quelle est la nature de l'arrangement fait avec elle?

Brossard, entendu comme témoin des intimés, dit que la banque a transigé avec Lamoureux en acceptant et recevant la somme de $8,000, en paiement de sa dette de $14,000.

Lamoureux s'est procuré la somme de $8,000, nécesssaire pour payer sa composition particulière avec la Banque d'Echange de la manière suivante, savoir: $2,000 de sa femme; $3,000 prêtées par Dupras et Emard, et $3,000 aussi prêtées par Brossard et Chaput. Pour ce dernier montant, Lamoureux donna son billet aux appelants pour $2,934.86, avec une hypothèque de $3,000, pour en assurer le paiement. Ces avances furent faites à Lamoureux isolément par ces diverses parties, sans aucun concert ou convention entre elles, chacune agissant pour son propre compte avec Lamoureux, seul ou avec son procureur. Telle est la transaction que l'action des intimés a pour but de faire annuler comme faite en fraude des créanciers, parties à la composition. Brossard explique que le billet ne fut pas fait pour $3,000, pour la raison que Lamoureux avait payé certaines charges à la Banque d'Ontario dont il

lui fut tenu compte, et le billet pris pour la balance, $2,934 86 ; mais il affirme que tout le montant de $3,000 a été remis à M. Emard qui, comme procureur de Lamoureux, conduisait les négociations avec la Banque d'Echange.

D'après ce témoignage il est évident que cet arrangement avec la banque est tout à fait distinct et séparé de la composition de Lamoureux avec ses créanciers. Il n'y est question d'aucun *pro rata* sur la totalité de la dette. L'arrangement n'est qu'une composition pure et simple de $8,000 en paiement complet et parfait de la somme de $14,000. Ces $8,000 furent payées avec les deniers obtenus comme susdit.

Cet arrangement est d'autant plus probable que la banque étant elle-même en liquidation voulait être payée comptant. Pour cette raison elle a accepté 57 pour cent au lieu de 65, à quatre, huit et douze mois de délai. Lamoureux prétend au contraire que ses deux dettes de $5,000 ou environ, et de $8,934.86 ont été réglées séparément avec la banque, que les $2,000 avancées par madame Lamoureux étaient en paiement de la dette de $5,000, et que les $3,000 empruntées des intimés étant acceptées en paiement des 65 pour cent de la somme de $8,389.34, laissent aux appelants Brossard et Chaput à payer, comme endosseurs, les autres 35 pour cent, ce qu'ils firent en prenant le billet de Lamoureux pour le montant exact de 35 pour cent, savoir $2,934.86.

L'arrangement partiel fait avec la banque n'avait évidemment aucun rapport à la composition de 65 pour cent offerte aux autres créanciers. D'après cette version la banque avait accepté environ 40 pour cent pour la réclamation de $5,000, et limité sa réclamation contre les endosseurs de billets au montant de $8,389.94 à 35 pour cent de ce montant, et accepté un autre 35 pour

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cent des insolvables au lieu de 65 pour cent. Il n'est donné aucune raison pour en avoir agi ainsi

Il est certain d'après la preuve que la banque n'a point fait un pareil arrangement, mais qu'elle a composé par une seule transaction, à 57 pour cent, comptant, pour sa réclamation, se montant à près de $14,000 au lieu de 65 pour cent avec délai, c'est-à-dire qu'elle a accepté $8,000 pour les $14,000 qui lui étaient dues

Il n'est pas douteux qu'un projet semblable à celui de Lamoureux a été discuté entre les parties ; probablement aussi avec quelques-uns des employés de la banque. Dans la preuve il est quelquefois question de l'arrangement avec la banque comme si c'était le même que celui dont il avait été parlé entre les parties, mais cet arrangement n'a pas été exécuté.

Un des liquidateurs de la banque a été entendu comme témoin des intimés. Il dit qu'il a été fait ou qu'il a pu être fait une proposition de régler séparément la réclamation de $5,000, avant qu'on ait décidé de faire un règlement, mais que la banque a insisté pour un règlement de toute la dette. Le résultat de son témoignage est qu'en ce qui concerne la banque, il y a eu une composition de la somme de $8,000 acceptée en paiement de celle de $14,000

Le témoignage de M. Emard à tout prendre confirme cet arrangement Il dit qu'une offre a été faite à la banque de payer $1,500 pour les billets se montant à $5,115.84. Cette offre fut faite par une lettre de M. Emard, du 17 décembre 1884. Elle ne fut pas acceptée. M. Emard dit qu'ensuite il a fait verbalement une offre de $2,000, que la banque semblait disposée à accepter, mais qu'avant de l'accepter définitivement et de se déclarer prête à régler pour ce montant, la banque exprima le désir que son autre réclamation contre Lamoureux qui était garantie par les endossements de Brossard et

Chaput, se montant ainsi qu'il le dit à $8,385.32, fut aussi réglée.

En cela M. Emard se trouve d'accord avec M. Campbell, le liquidateur. Il parle ensuite de ce qui a été fait au sujet de la plus forte réclamation. Il dit que Lamoureux, n'étant capable de payer que $2,000, lui demanda d'offrir de racheter les billets. C'est alors qu'il s'assura pour la première fois qu'il pouvait se procurer $3,000 par M. Dupras et qu'il fit alors la proposition à la banque. Les termes de cette proposition furent écrits sur un blanc du télégraphe qui fut produit en preuve, mais a depuis disparu du dossier. Il eut été d'autant plus important de se procurer ce document, que d'autres qui n'ont pas été imprimés, mais qui sont restés dans le dossier et nous ont été transmis, ne confirment pas la version du règlement donnée par M. Emard. Il ne se souvient pas d'avoir payé à la banque $8,000, mais seulement $7,934.56. Cette somme se composant de $2,000, de Mme Lamoureux, $3,000 avancées par Dupras et Emard, et $2,934.56 de Brossard et Chaput. Mais les chèques au moyen desquels cet argent a été payé sont produits et sont pour le plein montant de $8,000. Il y en a quatre, savoir: $1,000, $2,000, $3,000 et $2,000. Ces montants n'ont pas été divisés d'après les sources de leur provenance, mais seulement pour la facilité de retirer les billets qui se trouvaient dans différentes banques.

Il ressort évidemment de cette preuve qu'il n'y a eu de la part de la banque qu'une composition pour $8,000, et que la banque n'a transigé qu'avec Lamoureux, ou avec Emard comme le représentant de Lamoureux, et non pas avec les appelants Brossard et Chaput. Ces derniers ont fourni une partie du montant de la composition. Brossard dit que c'était $3,000, le montant pour lequel Lamoureux a donné une hypothèque; c'est aussi le montant qui, d'après la preuve écrite faite par

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les chèques d'Emard, est celui que Brossard a payé à la banque. Quel que soit le montant qu'il a fourni ; que ce soit $3,000, ou seulement $2,934.86 comme dit Emard, il ne l'a sans doute ainsi avancé que parce qu'il était exposé à payer comme endosseur des $8,000. Le montant pour lequel il a pris le billet de Lamoureux était précisément 35 pour cent du montant entier des billets. Ce calcul fut sans doute basé sur la notion que Lamoureux pourrait fournir la différence. Mais le règlement final ayant eu lieu pour une somme comptant qui permettait d'accorder un escompte libéral, d'environ 57 pour cent, au lieu de 65 pour cent, ce qui faisait une diminution de $1,000 environ, ou 12 pour cent du montant qu'aurait donné la composition à 65 pour cent, on ne voit pas que les motifs de Brossard pour avancer de l'argent soient d'une aussi grande importance, ou que son avance de $3,000 soit d'une nature différente par rapport aux créances en général, des $3,000 avancées par Dupras et Emard. Cette dernière somme paraît avoir été avancée avec l'entente entre Dupras, Emard et Lamoureux, que la différence entre $3,000 et $5,453.67 (ou 65 pour cent des $8,389.34), savoir $2,453.67, serait partagée entre eux trois, ce qui donnait $817 69 pour chacun des trois. Il y a une légère différence due à leur manière d'arriver à ces chiffres, parce qu'il ont déduit $819.48, pour la part de Lamoureux des $5,453.67, laissant $4,633.67 pour laquelle Lamoureux donna à Dupras et Emard cinq billets promissoires à des échéances variant de deux à douze mois à compter du 11 janvier 1884.

Cet arrangement assez étrange est bâsé sur l'idée que les $8,389.34 de billets avaient été achetés de la Banque d'Echange pour $3,000 avancées par Dupras et Emard, donnant aux acquéreurs droit à 65 pour cent en vertu de la composition, mais en laissant complètement de côté Brossard et Chaput qui, s'ils avaient payé en

qualité d'endosseurs, (*accommodation indorsers*) avaient le même droit qu'eux aux dits billets.

Le document suivant qui est en preuve contredit la théorie que les billets ont été achetés pour $3,000, de même qu'il constate que le paiement fait à la banque était le plein montant des $8,000, comme il est prouvé par les quatre chèques auxquels il a déjà été fait allusion. Ce document est un ordre adressé par les endosseurs à la banque, comme ayant légitimement le contrôle des billets. Il est ainsi conçu :—

MONTREAL, 9th January, 1884.

To the Liquidators of the Exchange Bank of Canada.

Please remit to our attorney Mr. J. U. Emard all the notes endorsed by us and held by the Exchange Bank, upon payment of five thousand nine hundred and thirty-four dollars and eighty-six cents, $5,934.86.

BROSSARD, CHAPUT & Co.

Dans son examen au sujet de cet ordre, monsieur Brossard persiste à dire, comme il l'a fait d'ailleurs dans tout son témoignage, que le règlement avec la banque n'a été qu'un seul et même règlement pour $8,000, dont lui et sa société ont avancé $3,000. Il faut, comme il a déjà été remarqué, faire la distinction entre les arrangements pour se procurer les fonds, et la transaction avec la banque. Une chose qui paraît assez claire est que les $5,000 de billets, quoique compris dans la composition avec la banque, sont considérés par les autres parties comme appartenant à Mme Lamoureux, comme si elle les avaient rachetés avec ses $2,000. L'ordre que l'on vient de lire n'avait rapport qu'aux autres billets endossés par Brossard et Chaput et, nullement aux $5,000 de billets. Cet ordre n'a pas d'autre importance maintenant que comme une reconnaissance des droits des endosseurs des billets que l'autre version de l'arrangement considère comme appartenant à Dupras et à Emard.

De la part de Dupras et Emard, la transaction n'a été

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qu'un prêt pour laquelle ils ont stipulé pour leur profit un intérêt exorbitant, et de la part de Brossard et Chaput un autre prêt de $3,000 dont ils devaient être remboursés par le billet de Lamoureux dont le paiement était garanti par une hypothèque qui n'était pas donnée seulement en considération de ce prêt, mais aussi en considération de l'existence d'une hypothèque antérieure qu'ils avaient quittancée.

Cette analyse des faits de la cause, établit que de la part de Dupras et Emard, les intimés, la transaction n'a été qu'un prêt pour lequel ils ont stipulé un intérêt exorbitant, et de la part de Brossard et Chaput un autre prêt de $3,000 dont ils devaient être remboursés par le billet de Lamoureux, de $2,934.86, garanti par l'hypothèque donnée par lui, le 8 janvier 1884, et aussi en considération de la décharge de l'hypothèque de $7,415, du 5 septembre 1881. Le résultat de ces deux transactions fut de réduire la première hypothèque des appelants de $7,415 au montant de celle donnée comme garantie du billet de $2,934.86, c'est-à-dire $3,000. Au lieu de donner une main levée partielle de la première hypothèque ils préférèrent l'acquitter et en constituer une nouvelle.

Lorsque le billet de $2,934.86 de Lamoureux fut consenti aux appelants, afin de lui faire obtenir l'escompte pour les $3,000 que devaient lui faire avoir Brossard et Chaput, le 5 janvier 1884, les intimés Dupras et Emard, n'étaient pas alors créanciers de Lamoureux ; ils ne l'étaient pas non plus, le 8 janvier 1884, lorsque Lamoureux garantit le paiement de son billet par l'hypothèque donnée le 8 du même mois. Ils ne sont devenus les créanciers de Lamoureux que le onze de janvier 1884 et n'ont partant aucuns droits comme créanciers subséquents d'attaquer les transactions faites entre Lamoureux et les appelants pour se procurer les fonds nécessaires pour acquitter sa composition. La

composition qu'il venait de faire avec ses créanciers lui avait rendu la libre disposition de ses biens, et il n'en fait qu'un usage légitime en donnant cette hypothèque de $3,000 sur ses biens pour l'aider à sortir de l'état d'insolvabilité. Ce principe a été maintenu par cette cour dans la cause de *Beausoleil* v. *Normand* (1).

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Il serait plus qu'étrange de considérer cette transaction comme faite en fraude des créanciers de Lamoureux lorsqu'elle n'a évidemment pas d'autre but que de l'aider dans ses arrangements avec ses créanciers,—et il le serait encore davantage de la considérer comme une injuste préférence accordée aux appelants lorsqu'ils n'ont fait que renoncer à une hypothèque de $7,415 pour en accepter une seulement de 2,934.86 comme garantie du billet du montant qu'ils avançaient à Lamoureux pour payer sa composition. En outre si les intimés avaient un droit d'action pour attaquer ces transactions ils devaient, en vertu de l'acticle 1040 du code civil, l'exercer dans l'année. Ils ont eu connaissance de l'acte du 8 janvier enregistré, le 13, et leur action n'a été prise que dans le mois de juin 1885, plus d'un an après les transactions dont il s'agit, et à une époque où leur droit d'action avait cessé d'exister.

L'appel devrait être alloué.

TASCHEREAU J.—This was an action by Dupras *et al.* under article 1032 of the Civil Code to annul certain acts and notes as fraudulent, and to oblige the defendants, Brossard & Chaput, to return the amount of $2,000 to them paid by the defendant Lamoureux in virtue of the aforesaid acts and notes, with conclusions against the other defendant Lamoureux for $3,612.95.

The plaintiffs allege:—

"That towards the month of December, 1883, the defendant Lamoureux, then an insolvent, offered to

(1) 9 Can. S.C.R. 711.

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pay his creditors the sum of 65cts. in the dollar, on the amount due to each creditor respectively, payable at 4, 8 and 12 months.

"That offer was accepted by all his creditors with the exception of the Exchange Bank. It reads in the following terms: —

"We, the undersigned, creditors of MM. Charles Lamoureux & Co., merchants and manufacturers of Coaticooke, agree by these presents to accept sixty-five cents on the dollar on the amount of our respective claims, payable by note to their order at four, eight and twelve months from date."

"On the remittance of the notes, as heretofore mentioned, we agree to give them a full discharge, and we promise to sign an agreement before a notary, if such be required, and we have signed on condition that the creditors for $100 sign the present composition."

"Montreal, 28th November, 1883."

"That the defendants, Brossard & Chaput, were parties to this contract and signed it the first, and in fact it was signed and accepted by all the creditors of Lamoureux with the only exception of the Exchange Bank of Canada."

"That a part of the claim which Brossard & Chaput then held against Lamoureux consisted of certain notes to the amount of $8,385.32, signed by Lamoureux to the order of Brossard & Chaput, and transferred by the latter to the Exchange Bank of Canada."

"That the said bank refused to join in the agreement, but declared their willingness to accept $3,000 in lieu of 65cts. payable by Lamoureux, on condition that the 35cts. remaining would be paid by Brossard & Chaput, the whole to be paid in cash."

"That at the request of the defendants the plaintiffs consented to pay those $3,000 to the Exchange Bank,

on remission to them by the latter of the notes for $8,385.52, and then to accept from Lamoureux in exchange for these his own notes to the amount of $4,633.62."

"That the defendants would not have consented to pay the said sum of $3,000 save on the faith of the compromise made by Lamoureux with his creditors, especially Brossard & Chaput who owned the heaviest claim against Lamoureux."

"That while Brossard & Chaput openly signed and accepted the aforementioned agreement by which they consented to give Lamoureux a full discharge of his indebtedness in consideration of his notes to the amount of 65 cents on the dollar, they secretly and fraudulently exacted from him a further note for $2,934.86, that is to say, for the amount of the 35cts. that they had consented to pay to the Exchange Bank, in discharge of their own liability and indebtedness to the bank, beyond the 65cts. for which they had compromised with Lamoureux. These $2,934.86 represent to a cent the proportion of thirty-five per cent in the above sum of $8,385.52, the amount of the Lamoureux's notes held by the Exchange Bank, bearing the endorsation of Brossard & Chaput."

"That to secure the advantage thus fraudulently obtained over all the other creditors of Lamoureux Brossard & Chaput induced Lamoureux to give them a mortgage on his immovable property, which was done by an act passed the 8th January, 1884, before Pepin, notary, said mortgage, to the amount of $3,000, being especially to secure the payment of the above note of $2,934.86."

"That said note and mortgage were made and given without a lawful consideration, and in fraud of all the other creditors of Lamoureux and especially of the plaintiffs, and for the purpose of giving an illegal and

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fraudulent advantage and preference to Brossard & Chaput.

"That by an act bearing date the 12th January, 1884, Brossard & Chaput, transferred the above mentioned hypothec to La Banque du Peuple, as security for the payment of the same note which they consented to discount for them the same day."

"That by another act, passed the 10th December, 1884, between Lamoureux and Brossard & Chaput, Lamoureux agreed that said hypothec would exist as long as anything was due by him to said Brossard & Chaput, whether on account of the note for $2,934.86, or any other note."

"That all rights or claims falling to Brossard & Chaput in consequence of the last act were transferred to La Banque du Peuple the 19th of the same month, (December, 1884)."

"That all the aforementioned deeds (or acts) were duly registered."

"That at the time of the passing of those deeds Lamoureux was, to the knowledge of Brossard & Chaput, and to that of La Banque du Peuple, notoriously insolvent and has been so ever since and is still insolvent."

"That Brossard & Chaput received on account of the above note of $2,934.86 the sum of, at least, $2,000, as a fraudulent privilege over the other creditors of Lamoureux."

"That at the time of the transfers of the 12th January and 19th December, 1884, the notes that such transfers were destined to guarantee were not yet matured, and that these transfers were made to La Banque du Peuple in violation of the law and of its charter."

"That the plaintiffs have had no knowledge of those deeds and the aforementioned fraudulent pay-

ments until three months previous to the institution of their present action."

"That Lamoureux still owes to the plaintiffs, in virtue of the notes for $4,633.62, a sum of $3,612.95."

"Wherefore the plaintiffs pray that Lamoureux be condemned to pay them the said sum of $3,612.95 with interest and costs; that the deeds (acts) of the 8th and 11th January, and of the 13th and 19th December, 1884, and the note of the 5th January of the same year and all other notes given in renewal of these, be declared fraudulent, null and of no effect, and be annulled, and that Brossard & Chaput be condemned to deposit in the prothonotary's office of this court the sum of $2,000, or all other sums that can be proven to have been received by them from Lamoureux on account of the note of $2,934.86, with interest, in order that the same be divided between the creditors of the latter according to law, and that in default of so doing, within 15 days of the service of notice, they be purely and simply condemned to pay that amount to the plaintiffs, with interests and costs, the said amounts to be, by the latter parties, deposited and distributed in the above mentioned manner."

The *mise en cause*, La Banque du Peuple, filed a declaration in the case that they were willing to abide by the judgment to be rendered by the court (*s'en rapportant à justice*).

The defendants Brossard & Chaput and the defendant Lamoureux filed separate pleas, but substantially offered the same *moyens de défense*, as follows: "that the plaintiffs only became creditors of Lamoureux after the contract between him and the defendants Brossard & Chaput; that the plaintiffs were not subrogated in the rights of the Exchange Bank; that they knew of the transactions complained of and made between the defendants at the time they took place, and their

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action was therefore prescribed, more than one year having elapsed before it was instituted; that the defendants Brossard & Chaput had only accepted the compounding (*composition*) of the defendant Lamoureux for the amount of $11,384.98, besides $100 lent to the defendant Lamoureux, not including the $8,385.52, amount of the latter's notes transferred by them to the Exchange Bank; that the Exchange Bank was creditor of Lamoureux to the total amount of $14,752.14, and that it did not consent to accept a *composition*, but offered to return the notes forming the basis of its claim against Lamoureux, in consideration of the cash payment of the sum of $8,000; that Lamoureux then asked from the defendants Brossard & Chaput a loan of $3,000 to clear himself of the Exchange Bank to which the latter agreed on condition that Lamoureux would give them an hypothecary guarantee, and that it was in execution of these agreements that Lamoureux gave them the note of the 5th January, 1884, payable four months from the date thereof, for $2,934.86, and gave them the hypothecary guarantee of the 8th of the same month; that Brossard & Chaput paid Lamoureux the said sum of $3,000, to the knowledge of the plaintiff Emard; that after said arrangements Lamoureux borrowed from the plaintiffs a further sum of $3,000, and at that period Lamoureux was solvent; that the note for $2,934.86 does not represent the amount for which Lamoureux was previously discharged by his *acte de composition*."

"That, moreover, in December, 1883, the defendants Brossard & Chaput held on Lamoureux's immovables hypothecary guarantees to the amount of $7,415; that without being obliged, but to help Lamoureux, they gave him acquittance (*main levée*) of their hypothec, by a deed passed the 8th January, 1884; that the plaintiffs, knowing Lamoureux to be insolvent, wish-

ed to make a speculation and instead of taking guarantees upon his property for what they advanced, they exacted usurious interest; that in fine, the immovables belonging to Lamoureux and hypothecated to the defendants Brossard & Chaput were sold to J. S. Bousquet, who undertook to pay off all the hypothecary debts attached to them, and agreed, in case certain hypothecs should be annulled, to place the amount in rightful hands to be distributed amongst the creditors." Then the defendants declared themselves ready to consent that after the payment of the loan of $3,000 with interest at 8 per cent per year, all existing balances on the said hypothec should be placed in the hands of those legally authorized to receive them to be distributed amongst the creditors, and they demanded the dismissal of the plaintiff's action.

The plaintiffs replied that Lamoureux's notes endorsed by Brossard & Chaput to the amount of $8,385.52 were withdrawn from the Exchange Bank with $3,000 furnished by the plaintiffs to pay the composition of 65 cents on the dollar payable by Lamoureux, and by means of $2,934.86 paid by Brossard & Chaput to clear off the 35 cents on the dollar that were not covered by the composition ; as to the surplus of the debt held by the Exchange Bank against Lamoureux, Brossard & Chaput had nothing to do with it and it was settled by the amount of $2,000 paid by Lamoureux himself, that is by his wife ; that it appears by the agreement that Brossard & Chaput were the first to sign the agreement (*concordat*) without reserve.

The Superior Court granted the plaintiff's conclusions for $3,612.75 against Lamoureux, and declared null and void the notes by him given to the other two defendants of the 5th January, 1884, and the deeds of 8th and 11th January, and of the 16th and 19th December, 1884. The Court of Appeal unanimously confirmed

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that judgment. Brossard & Chaput now appeal. Lamoureux does not.

I am of opinion that this appeal should be dismissed. It results clearly from the evidence that when respondents consented to advance $3,000, on the belief that they would stand for being repaid on the same footing as all the other creditors who had consented to take 65c. in the dollar, Brossard & Chaput were behind their back getting that new note of $2,934.86, saddling Lamoureux's estate with that new indebtedness, and what was still worse, were getting ahead of all the other creditors by means of a mortgage affecting as security for the payment of that new and secret debt, the best and clearest part of Lamoureux's estate, its immovables, and of the fraudulent character of such a transaction there can be no doubt.

The appellants contend, however, that even assuming this point against them, yet the respondents under art. 1039 C.C. have no action to get these dealings set aside because they were not then creditors of Lamoureux, having become so only a few days subsequently.

This point has been disposed of by the learned judge in the Superior Court by saying that all the divers deeds, notes and agreements formed, with the *concordat*, but one and a continuous transaction, which was affected and vitiated by the work of deception and concealment conducted by the appellants with the apparent intent on their part to gain an undue advantage on the respondents and all the other creditors of Lamoureux.

As a matter of fact this is undoubtedly so, and on this ground alone the appellants' contention based on art. 1039 C.C. fails, without it being necessary to consider respondents' contention that they had become by operation of law subrogated to the Exchange Bank.

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PATTERSON J.—Lamoureux, who was insolvent, effected a composition with his creditors, the terms of which are set out in an instrument which bears date the 28th of November, 1883, but which, according to the evidence, was not completed until the 20th of the following December. The instrument, which is very short, is in these words:—

Nous, soussignés, créanciers de MM. Charles Lamoureux & Cie, marchands et manufacturiers de Coaticook, nous nous engageons par les présentes à accepter une composition de soixante et cinq (65) centins dans le dollar sur le montant de nos créances respectives, payable par billets à leur ordre, à quatre, huit et douze mois de cette date.

Sur remise des billets comme ci-dessus nous leur donnerons leur décharge et promettons signer un acte par devant Notaire si nous en sommes requis, et avons signé à condition que les créanciers au-dessus de $100 signent cette composition.

Montréal, 28 novembre 1883.

Then followed the signatures of Brossard, Chaput & Cie who are the present appellants, and of all the other creditors of Lamoureux with the exception of the Exchange Bank. The respondents Dupras and Emard are not among the signers. They became creditors after the date of the instrument.

The Exchange Bank was a large creditor of Lamoureux, but being in liquidation preferred to compound for a payment in cash to joining in the composition for 65 per cent on time.

Lamoureux's liabilities to the bank may be called in round numbers $14,000. For upwards of $5,000 of that amount he was liable as endorser of customers' notes. The remainder, being $8,389.34, was represented by his own notes on which the appellants Brossard & Chaput were accommodation endorsers.

There is a discrepancy in the accounts given of the arrangement with the bank.

The appellant Brossard, who was examined as a witness on behalf of his opponents the respondents, says

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that the bank received $8,000 in satisfaction of the $14,000. He says that $3,000 of that amount was a loan from him and his partner to Lamoureux. He took from Lamoureux a promissory note for $2,934.86, and to secure payment of that sum Lamoureux gave him a mortgage for $3,000. That is the transaction which this action is brought to set aside as fraudulent against the other creditors. Brossard gives an explanation of the note not being for the even sum of $3,000 by reference to some items of charges which he says Lamoureux paid to the Ontario Bank; and he says that the whole amount of $3,000 was handed to Mr. Emard, who, as attorney for Lamoureux, conducted the negotiations with the Exchange Bank. According to Brossard the arrangement with the bank was a direct and simple composition of $8,000 for $14,000, the $8,000 being made up of $2,000 advanced by Lamoureux's wife, $3,000 obtained from the respondents Dupras and Emard, and $3,000 from Brossard.

This, on the face of it, contains nothing improbable, the payment being about 57 per cent cash in place of a promise to pay 65 per cent at four, eight and twelve months.

The other account is given by Lamoureux, and is supported by Emard if we look only at some of his direct statements. Whether his evidence as a whole, including the documentary part of it, really does support it or is not rather confirmatory of the account given by Brossard is a matter to be considered.

The account given by Lamoureux is that the two debts of $5,000 or thereabouts and of $8,389.34, were settled separately with the bank, the $2,000 contributed by Madame Lamoureux being accepted in satisfaction of the $5,000 debt, and the $3,000 borrowed from the respondents being accepted in satisfaction of 65 per cent of the $8,389.34, leaving the appellants

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Brossard & Chaput to pay, as endorsers, the other 35 per cent, which they did, taking from Lamoureux his note for the exact amount of the 35 per cent, viz., $2,934.86.

If this piecemeal arrangement was made with the bank it is evident that it had very little reference to the 65 per cent composition that was offered to the creditors generally. According to the statement the bank accepted about 40 per cent for the $5,000 claim; confined its claim on the endorsers of the $8,389.34 of notes to 35 per cent of that amount, though why it should have done so is not explained; and accepted another 35 per cent from the insolvents in place of 65 per cent.

I am satisfied from careful consideration of the evidence that the bank did not enter into that arrangement, but compounded, as one transaction, for 57 per cent in cash of its whole claim of nearly $14,000 in lieu of 65 per cent on time.

I do not doubt that a scheme such as that deposed to by Lamoureux was discussed among the parties with some of the bank people as well as amongst the others, and I think that, in giving evidence in the action, the actual arrangement with the bank has been sometimes spoken of as if it was the same as that which had been talked of among the other parties but not carried out with the bank. There seems to be some confusion in this respect. One of the liquidators of the bank was a witness for the respondents. He shows that there was or may have been a proposition to settle the $5,000 claim by itself but that before a settlement of that claim had been decided on it was insisted that one settlement should be made of the whole debt. The effect of his testimony is that, as far as the bank was concerned, there was one composition of $8,000 for the $14,000. I take Mr. Emard's evidence to really bear out that understanding. He shows that an offer was

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made to the bank to pay $1,500 for the notes which amounted to $5,115.84. That offer was made by letter of Mr. Emard dated 17th December, 1884. It was not accepted. Then Mr. Emard says that he verbally made an offer of $2,000 which the authorities of the bank seemed disposed to accept, but before definitely accepting it and declaring themselves ready to settle for the amount they manifested the desire that their other claim against Lamoureux which was secured by the endorsement of Brossard & Chaput, amounting (as he gives the figures) to $8,385.32, should also be settled.

In this Mr. Emard agrees with what is told us by Mr. Campbell the liquidator.

Mr. Emard then speaks of what was done towards providing for the larger claim. He says that Lamoureux, being able to pay only $2,000, asked Emard to make an offer to redeem (*racheter*) those notes, whereupon he first ascertained that he could procure $3,000 through Mr. Dupras, and then made a proposition to the bank. I have been desirous of seeing the terms of that proposition. It was noted, Mr. Emard tells us, on a telegraph blank which was produced in evidence but which I have not been able to find. It is said not now to be with the record. I have been more anxious to see it because other documents which were not set out in the printed case before us, but which remained with the record and have been sent up, do not fully sustain Mr. Emard in the view of the settlement which his oral evidence presents. His recollection seems to be that what he paid to the Exchange Bank was not $8,000 but only $7,934.56, that sum being composed of Madame Lamoureux's $2,000, of the $3,000 advanced by Dupras and Emard, and of $2,934.56 from Brossard & Chaput. But the cheques by which he paid the moneys are produced and are for the full amount of $8,000.

There were four cheques, viz., $1,000, $2,000, $3,000 and $2,000, the amounts not being thus divided by reference to the sources from which the money came, but for convenience in retiring the notes which were held by different banks.

From this evidence I cannot resist the conviction that on the part of the Exchange Bank there was simply one composition for $8,000, and that the bank dealt only with Lamoureux, or with Emard representing Lamoureux, and not with the appellants Brossard & Chaput. Those gentlemen contributed a part of the money. Brossard says it was $3,000, the same amount for which the mortgage was given by Lamoureux, and the amount which we find from the written evidence of Emard's cheques was paid to the bank. I am satisfied that whatever money he raised, whether the full $3,000, or 65\frac{44}{100}$ short of that sum, was raised because he was exposed to be called on as endorser of the $8,000 of notes, and I do not see any reason to doubt that the amount for which he took the note, and which was precisely 35 per cent of the full amount of the notes, was arrived at by a reckoning based on the notion that 65 per cent would be provided for in some way by Lamoureux. But the actual settlement being the acceptance from Lamoureux of a sum which seems to allow a fairly liberal discount for cash, being as I have said about 57 per cent in place of 65, making a rebate of $1,100 or so which was 12 per cent of what the composition at 65 per cent would have come to, I do not see that the motive which led Brossard to raise the money is so material, or that the $3,000 advanced by him differs, in its relation to the general creditors, from the $3,000 advanced by Dupras and Emard. The last named sum was advanced, as it appears, upon an understanding between Dupras, Emard and Lamoureux that the difference between $3,000 and $5,453.07

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(which was 65 per cent of the $8,389.34), viz., $2,453.07, was to be shared among the three. That would seem to give $817.69 to each of the three. There is a slight difference as they computed the figures, for they deducted $819.45 as the share of Lamoureux from $5,453.07, leaving $4,633.62, and for that amount Lamoureux gave to Dupras and Emard his five promissory notes at dates from two to twelve months from the 11th of January, 1884.

This somewhat remarkable arrangement is based on the idea that the $8,389.34 of notes were bought from the Exchange Bank for $3,000, giving the purchasers the right to rank for 65 per cent under the composition arrangement, but ignoring Brossard & Chaput, who, if they paid money in the character of endorsers, and accommodation endorsers, would certainly have had some right to the notes.

We have in evidence the following document which is not consistent with the theory that the notes were purchased for $3,000, nor on the other hand with the proved fact that the payment made to the bank was the full $8,000 as evidenced by the four cheques already referred to, but which, being an order addressed by the endorsers to the bank, properly treats the endorsers as the persons entitled to control the notes :—

MONTREAL, 9th January, 1884.

To the Liquidators of the Exchange Bank of Canada:

Please remit to our attorney Mr. J. U. Emard all the notes endorsed by us and held by the Exchange Bank upon payment of five thousand nine hundred and thirty-four dollars and eighty-six cents, $5,934.86.

BROSSARD, CHAPUT & CO.

Mr. Brossard when examined with reference to this order insisted, as he did throughout his evidence, that the settlement with the bank was one settlement for $8,000, $3,000 of which was advanced by his firm. We must keep in mind, as before noticed, the distinction between arrangements about procuring funds and the transac-

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tion with the bank. One thing that seems clear enough is that the $5,000 of notes, although included in the one composition with the bank, were yet, as between the other parties, understood as going to Madame Lamoureux as if redeemed by her $2,000. The order just read deals with the other notes and not with the $5,000 worth.

Whatever importance attaches at present to the order seems to me to be in its recognition of the legal right of the endorsers to the notes, which is ignored in the arrangement which treated them as belonging to Dupras and Emard.

The real transaction seems to have been a loan of $3,000 from Dupras and Emard for which those gentlemen were to be paid an exorbitant rate of interest, and another loan of $3,000 from Brossard & Chaput which they were to be repaid according to the tenor of the promissory note given them by Lamoureux, payment being secured by a mortgage given, not only in consideration of that loan, but in substitution for a previous mortgage which they released.

I think this case turns essentially on the questions of fact in which I cannot agree with the understanding of the evidence acted on in the court below.

The plaintiffs found their right to attack the transaction with the defendants on their subrogation to the rights of the Exchange Bank as holders of the $8,000 of notes. In that sense only are they parties to the composition. My conclusion is that they are not holders of the notes but that the notes were satisfied by the composition paid to the bank, the plaintiffs being simply creditors of Lamoureux for the $3,000 they lent him. I am not now disputing the power of Lamoureux to promise to repay the plaintiffs their loan with abnormal interest, I am merely dealing with their *locus standi* as compounding creditors. I do not

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think they sustain that character and therefore, in my opinion, they have no right to maintain this action. Further, I am not satisfied that the position of the defendants is open to successful attack by any compounding creditor. I think the proper conclusion from the whole evidence is that the money paid by the defendants Brossard & Chaput was a loan from them to Lamoureux to assist in the payment of his composition. They were parties to the composition deed, but that was as creditors for another debt. This loan was a later matter and was not subject to the composition deed.

Lamoureux had the right to secure its payment by a pledge of part of his assets. To use the language of James L.J. in *Ex parte Burrell* (1):

> He had bought the assets from his creditors * * * He was absolute master of those assets in exactly the same way as any other purchaser.

Or in the language of my brother Strong in *Beausoleil* v. *Normand* (2):

> He was left free to deal with his assets as he thought fit, subject only to this that, like every other debtor, he was bound not to make any fraudulent disposition of them so as to defeat the just claims of his creditors.

I am of opinion that the appeal should be allowed.

Appeal allowed with costs.

Solicitors for appellants: *Mercier, Beausoleil, Choquette & Martineau.*

Solicitors for respondents: *Ouimet & Emard.*

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(1) 1 Ch. D. 537, 551.

(2) 9 Can. S. C. R. 711, 717.

HALTON CONTROVERTED ELECTION CASE.

1891

THOS. LUSH (*Petitioner*)..... APPELLANT;

*Nov. 17.

AND

JOHN WALDIE (*Respondent*).....RESPONDENT.

(THE HONOURABLE MR. JUSTICE PATTERSON IN CHAMBERS.)

Election petition—Appeal—Dissolution of Parliament—Return of deposit.

In the interval between taking of an appeal from a decision delivered on the 8th November, 1890, in a controverted election petition and the February sittings (1891) of the Supreme Court of Canada, parliament was dissolved, and by the effect of the dissolution the petition dropped. The respondent subsequently, in order to have the costs that were awarded to him at the trial taxed and paid out of the money deposited in the court below by the petitioner as security for costs, moved before a judge of the Supreme Court in chambers (the full court having referred the motion to a judge in chambers) to have the appeal dismissed for want of prosecution, or to have the record remitted to the court below. The petitioner asserted his right to have his deposit returned to him.

Held, per Patterson J., that the final determination of the right to costs being kept in suspense by the appeal the motion should be refused.

Held, also, inasmuch as the money deposited in the court below ought to be disposed of by an order of that court the registrar of this court should certify to the court below that the appeal was not heard, and that the petition dropped by reason of the dissolution of Parliament on the 2nd February, 1891.

MOTION to dismiss an appeal in an election case for want of prosecution.

The full court, Taschereau J. dissenting, held that the application should be made to a judge in chambers. The facts are stated in the judgment of Patterson J. hereinafter given.

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Kerr Q.C. for the respondent accordingly applied to His Lordship Mr. Justice Patterson in chambers.

Aylesworth Q.C. for the petitioner opposed the motion.

PATTERSON J.—This petition was presented as long ago as October, 1888, and appears to have been brought to trial with reasonable speed, the trial having been begun on the 30th January, 1889. But, though begun at that time, it was not brought to a close until the last week of October, 1890, and the judgment dismissing the petition and awarding costs to the respondent was pronounced on the 8th of November, 1890. It is not material to attempt to apportion the responsibility for this waste of two years before reaching a decision, so unlike the promptness which is aimed at by the law respecting controverted elections, but it may not be out of the way, in view of the emergency which has led to the present application, to remark that, from the affidavits made for the purpose of former applications to this court, it is clear that a large share of the delay arose from the circumstance that, from one cause or another, it was not always convenient for the respondent's solicitors to give timely attention to the proceedings. This is true of the steps necessary to prepare the appeal for being heard as well as of the trial, although there are some sweeping statements to the contrary contained in the affidavits made on the part of the respondent by a gentleman who evidently was not so well informed respecting what had taken place as he supposed himself to be.

The petitioner appealed against the decision of the 8th of November, 1890. In the ordinary course the appeal would have been heard at the February sittings in the present year, 1891, but before those sittings began Parliament was dissolved. By the effect of the dissolution the petition dropped. The object of the

contest had ceased to exist. If authority were required for that understanding, it is furnished by the cases cited to me, *The Exeter Case*, *Carter* v. *Mills* (1), and *The Taunton Case*, *Marshall* v. *James* (2). The dissolution took place on the 2nd February. On the part of the petitioner an order had been obtained on that day from the registrar of this court settling what materials were to printed for use in the appeal, but after the dissolution the petitioner, properly in my opinion, took no further proceedings in this court. The respondent is desirous of having the costs that were awarded to him at the trial taxed and paid out of the money deposited in the court below by the petitioner as security for costs, and with that view he has moved to have the appeal dismissed for want of prosecution, or to have the record remitted to the court below.

On the other hand the petitioner asserts his rights to have his deposit returned to him on the principle acted on in *The Exeter Case*, *Carter* v. *Mills* (1), on the ground that the petition has dropped before any final adjudication respecting either the merits or the costs.

The respondent would be entitled to be paid his costs out of the deposit if the proceedings under our Controverted Elections Act were the same as under the English Act of 1868, which our act follows in many of its provisions. *The Taunton Case* (2) would be, as I think, authority for holding that the adjudication as to costs could be sustained and enforced notwithstanding the dissolution of the House before the judge had made his report to the speaker, which dissolution put an end to the petition as far as the right to the seat was concerned. But we must notice the difference between the English law and ours. The English act gave no appeal from the judge's decision. It was final both as to the merits and the costs Our statute gives

(1) L. R. 9 C. P. 117. (2) L. R. 9 C. P. 702.

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an appeal to this court which is to "pronounce such judgment upon questions of law or of fact, or both, as in the opinion of such court ought to have been given by the court or judge appealed from (1), and may adjudge the whole or any part of the costs in the court below to be paid by either of the parties." (2)

The respondent, therefore, cannot insist that he has a final judgment in his favour for the costs. If the appeal had gone on the result might have been that he would have to pay in place of receiving costs. Hence the importance to the respondent to have the order he asks for to dismiss the appeal for want of prosecution if the case were one for giving him that relief. That is, however, out of the question. He had no tenable ground on which he could, on the second of February, or at any later date, charge the petitioner with default in the prosecution of the appeal. On the 2nd of February the petition dropped. It did not abate in the technical sense of that word but the effect was quite as fatal. In the Exeter case, in which an order was made to return the deposit to the petitioner, the petition had not gone to trial when the dissolution took place. I suppose it would have been dealt with in the same way if the trial had been begun and not concluded. That is essentially the present position, the final determination of the right to costs as well as of the right to the seat being kept in suspense by the appeal.

I do not see my way to make an order in either of the forms asked for by the respondent, and I think his motion must be refused with costs.

I should not consider it right, even with a view to the petitioner being repaid his deposit, to send the record back to the court below. That would be proper only in case the appeal had been disposed of in some

(1) 49 Vic. ch. 9, sec. 51. (2) Sec. 54.

shape in this court, and if done now might lead to misapprehension. But inasmuch as the money deposited in the court below ought to be disposed of by an order of that court it would, in my opinion, be proper for the registrar to certify to that court that the appeal was not heard, and that the petition dropped by reason of the dissolution of parliament on the 2nd of February.

Motion refused with costs.

Solicitors for appellant: *Moss, Hoyles & Aylesworth.*

Solicitors for respondent: *Kerr, MacDonald, Davidson & Paterson.*

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*Nov. 10.

A. LEONIDAS HURTUBISE AND LA BANQUE JACQUES CARTIER } APPELLANTS;

AND

CHARLES DESMARTEAU (CURATOR)..RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA (IN REVIEW).

Supreme and Exchequer Courts Amending Act, 1891, 54-55 *Vic. ch.* 25 *s.* 3—*Appeal from Court of Review.*

By section 3 of the Supreme and Exchequer Courts Amending Act of 1891 an appeal may lie to the Supreme Court of Canada from the Superior Court in Review, Province of Quebec, in cases which by the law of that province are appealable direct to the Judicial Committee of the Privy Council.

A judgment was delivered by the Superior Court in Review at Montreal in favour of D., the respondent, on the same day on which the amending act came into force. On an appeal to the Supreme Court of Canada taken by H. *et al.*

Held, that the appellants not having shown that the judgment was delivered subsequent to the passing of the amending act the court had no jurisdiction.

Quere—Whether an appeal will lie from a judgment pronounced after the passing of the amending act in an action pending before the change of the law.

APPEAL from a judgment of the Superior Court for Lower Canada sitting in review.

On the 30th September, 1891, the Superior Court for Lower Canada sitting in review confirmed a judgment of the Supreme Court, dismissing the contestation by appellants of the sworn statement made by J. Durocher (insolvent) upon the abandonment of his property, and on the same day the Supreme and Exchequer Courts amending Act, 1891, was sanctioned. There was no evidence at what hour the judgment was delivered.

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

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Geoffrion Q.C. for the respondent moved to quash the appeal on the ground that the statute passed during the last session of the Federal Parliament, amending the general act of the Supreme Court, could not apply in the present case, inasmuch as the said statute was only sanctioned after the judgment was rendered by the Court of Review, and because the said statute could not affect the present case, as the case was then pending and the act had no retroactive effect.

Charbonneau (*Brosseau* with him) opposed the motion. The further ground was taken that the Supreme and Exchequer Courts Amending Act was *ultra vires* of the Dominion Parliament in so far as the provision in question was concerned, but the court having stated that this could not be argued unless the Attorney General for the Dominion was made a party counsel for respondent abandoned it.

Sir W. J. RITCHIE C.J.—I have no doubt that the judgment rendered in this case by the Court of Review is not appealable to this court. It was upon the appellant to show that the statute allowing appeals from judgments of the Court of Review was in force at the time this judgment was delivered. He has not shown this but quite the reverse, and therefore has not fulfilled the condition precedent to enable him to appeal. But even granting that the delivery of the judgment was simultaneous with the passing of the act I am of opinion that it would not give him the right of appeal. It is in vain to say that this is a question of procedure and not one of jurisdiction. It is purely a matter of jurisdiction of this court. We have nothing to do with the right of appeal to the Privy Council. Our jurisdiction depends upon the statute, and if the statute was not in force when the judgment was delivered it is quite clear there is no ap-

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peal. The motion will be allowed and the appeal quashed with costs.

STRONG J.—I agree and I should be of the same opinion even if the action had been pending at the time of the passing of the act and judgment had been delivered afterwards, and I rest my opinion on the decision of this court in the case of *Taylor* v. *The Queen* (1), and on the case of the *Attorney-General* v. *Sillem* (2) which was cited and relied on so much in the case of *The Queen* v. *Taylor* (1). It is true that I dissented in *The Queen* v. *Taylor* (1), but I am bound by the decision of the court.

The coincidence of the statute having been passed on the same day as the judgment was rendered leaves no doubt whatever in my mind. It was upon the party asserting that the case was subject to the new law, to show that the judgment was rendered after the passing of the act and was subject to its provisions, and this has not been done.

It is also well known that sometimes courts will look at fractions of a day in order that they shall not give statutory laws an *ex post facto* effect. That being so in the absence of any evidence to the contrary we are bound to hold that this judgment was rendered prior to and was an existing adjudication at the time of the passing of the statute.

FOURNIER J. concurred with Sir W. J. Ritchie C.J. that the appeal should be quashed.

TASCHEREAU J.—I am of the same opinion. I will not, and do not consider it necessary to, decide in this case whether an appeal would or would not lie even if the judgment in this case had been delivered subsequent to the passing of the statute. I will remark, however that in the case of *Hitchcock* v. *Way* (3), the

(1) 1 Can. S. C. R. 65. (2) 10 H. L. Cas. 730.
(3) 6 A. & E. 943.

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Taschereau J.

court there held that "where the law is altered by statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature, by the language used, shows a clear intention to vary the mutual relation of such parties." And in the case of *The Corporation of the City of Quebec* v. *Dunbar* (1), it was held that "a court of appeal called upon to review a judgment respecting a matter in relation to which there has been a subsequent declaratory law, will construe the old law and the declaratory law as one and the same enactment, and that the judgment appealed from, although anterior to the declaratory law, is affected by its provisions."

I do not wish to express any decided opinion upon this point, and I prefer to rest my opinion on the fact that in this case the judgment was not delivered subsequent to the passing of the new law.

PATTERSON J.—I base my opinion in this case entirely upon this one point that it rests upon the appellant to show that at the time of the pronouncing of the judgment this court had jurisdiction. I do not think the appellant in this case has succeeded in doing that. As to the other question whether an appeal would lie from a judgment pronounced after the passing of the amending act in an action pending before the change of the law, I express no opinion. That is a matter that would require serious consideration, and I prefer to rest my opinion upon the one ground that it is for the appellant to show that this court had jurisdiction when the judgment of the court below was pronounced.

Appeal quashed with costs.

Solicitors for motion : *Archambault & St. Louis.*

Solicitors *contra* : *N. Charboneau & Bisaillon, Brosseau & Lajoie.*

(1) 17 L. C. R. 6.

1890 WILLIAM L. HOLLAND (PLAINTIFF).....APPELLANT;

*Nov. 27, 28.

AND

1891 JOHN ROSS *et al.* (DEFENDANTS).....RESPONDENTS.

*Nov. 16.

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

Crown lands, P. Q.—Location tickets—Transfer of purchaser's rights—Registration of—Waiver by crown—Cancellation of license—23 Vic. c. 2, secs. 18 and 20—32 Vic. c. 11, sec. 13 (Q.)—36 Vic. c. 8 (Q.)

A location ticket of certain lots was granted to G.C.H. in 1863. In 1872 G.C.H. put on record with the Crown Lands Department that by arrangement with the Crown Lands Agent, he had performed settlement duties on another lot known as the homestead lot. In 1874, G.C.H. transferred his rights to appellant, paid all moneys due with interest on the lots, registered the transfer under 32 Vic. c. 11 sec. 18, and the crown accepted the fees for registering the transfer and for the issuing of the patent. In 1878 the commissioners cancelled the location ticket for default to perform settlement duties.

Held, reversing the judgment of the court below, that the registration by the commissioners in 1874, of the transfer to respondent was a waiver of the right of the crown to cancel the location ticket for default to perform settlement duties, and the cancellation was illegally effected. Taschereau J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court.

The action was brought at Aylmer, in the district of Ottawa, in March, 1880, by William L. Holland, the present appellant, against John Ross and Frank Ross of Quebec, merchants, and two other persons who were acting under their orders and directions, for an alleged trespass upon two lots of land situate in the township

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

(1) M.L.R. 2 Q.B. 316.

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of Portland, in the county and district of Ottawa, and being numbers 11 and 12 in the 4th range of lots in that township, of which lots, as by his declaration the plaintiff alleged, he was owner in virtue of a location ticket granted the 9th June, 1863, and asked that the timber cut by the defendants should be returned within a delay to be fixed, and in default that they should be condemned to pay him a sum of four thousand dollars, and also asked for two thousand dollars damages, over and above the value of the timber.

The defendants pleaded first:—a demurrer; second, a peremptory exception that the sale from the Department of Crown Lands of the old province of Canada (which had originally been made to George C. Holland and by him transferred to the present appellant) had, on the 28th of May, 1878, been cancelled by the Commissioner of Crown Lands of the Province of Quebec, and that the lots in question, 11 and 12 in the 4th range of Portland west, had been restored to the timber limit held under license by the defendants; third, a plea of prescription against the damages; fourth, a general denial.

On 20th December, 1872, George C. Holland put it on record with the department that he claimed the arrangement that the settlement duties could be, and actually had been, performed on the homestead lot in the neighbourhood, and not in the lots in question, by getting the Crown Lands Agent Farley to write the commissioner formulating his claim, that is that double duties or their equivalent had been performed on the homestead lot. Farley saw no objection to the issue of the patent.

In 1874 George C. Holland transferred to William L. Holland, the present appellant, all his rights in the lots in question, all payments due on the lots with interest having been paid, and a fee was accepted by the crown

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for registering this transfer, and a further fee of $3 was actually paid and accepted, for the issuing of the patent which was then demanded.

On 28th May, 1878, the cancellation of the sale of the lots for non-fulfilment of conditions was determined by the Commissioner of Crown Lands, without any notice whatever to the Hollands; was posted on the 1st of June, and published in the Official Gazette of Quebec on the 6th of June, the first notice Holland had. On the 23rd September the cancellation was confirmed by the Lieutenant Governor in Council. On the 30th December a list of lots was made by the Assistant Commissioner of Crown Lands to be returned to the timber license of Ross Bros. including the two lots now in question.

On the 9th January, 1879, the Assistant Commissioner wrote that the sale had been cancelled, and the lots had, in consequence, been included in the license of Messrs. Ross Bros. The license is dated 7th March, 1879, but took effect from the 1st of May, 1878.

By the judgment of the Superior Court rendered by Mr. Justice McDougall on the sixth day of October, 1881, the timber in question was declared to be the property of the plaintiff and to have been wrongfully taken from the land, and the defendants were condemned to return the trees, &c., or to pay the sum of $1,023 therefor, and further, $77 damages, and costs.

From this judgment the defendants appealed to the Court of Queen's Bench (appeal side), Montreal, and the judgment of the Superior Court was reversed, and the cancellation of the lots in question was declared to have been validly made, and the plaintiff's action was in consequence dismissed.

The question which arose on this appeal was: Whether the cancellation by the Commissioner of

Crown Lands in 1878 of the sale of the lots made to George C. Holland in 1863 was valid.

Lacoste Q.C., and *Nicholls*, for appellants.

Irvine Q.C., and *Robertson* Q.C., for respondents.

The points of argument, the statutes and documentary evidence relied on by counsel are fully reviewed in the judgments hereinafter given. See also report of argument in M. L. R. 2 Q. B. 316.

Sir W. J. RITCHIE C.J.—The appellant on this appeal contends:

1st. That having acquired under the statute of 1860, his rights are governed by that statute, and cannot be changed by subsequent legislation.

2nd. That under the transfer of rights from the late province of Canada to the province of Quebec, in virtue of the Confederation Act, the province of Quebec acquired only the right to collect a certain sum of money, and no rights of cancellation.

3rd. That if the province of Quebec had any rights with respect to cancellation, such rights were waived (*a*) by the tacit consent to the written application in 1872 by Mr. Holland that the settlement duties on the homestead should avail on the other lots, (*b*) by the agreement of their agent in 1865, that they should so avail, and (*c*) by the acceptance, in 1874, of the balance of the purchase money in full with interest with the fee for transfer, accepting and enregistering the same and receiving the fee for the patent.

Under section 18 of 28 Vic. cap. 2 it was provided that before any assignment of the purchaser's rights could be validly made or registered, "all the conditions of the sale, grant or location must have been complied with or dispensed with by the commissioner of crown lands before the registration is made." This

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clause was reproduced in the same words in the statute of 1869, 32 Vic. cap. II.

I do not think the Crown Lands Agent Collins, had any authority to arrange with George C. Holland, that he (Holland) should perform the settlement duties for the lots now in question in the homestead property where he was living with his father, as the appellant claims he did, but I think Holland having on the 29th September, 1872, brought such an arrangement with the agent of the Crown Lands Department to the notice of the Department in 1874, George C. Holland having transferred to W. L. Holland all his rights in the lots and all payments due on the lots with interest having been paid and accepted in full, and the fees for registering this transfer paid and accepted, and the transfer having been duly enregistered and a further fee for the issuing of the patent paid and accepted, amounted to all intents and purposes to a dispensing under the statute by the Commissioner of Crown Lands with the compliance with the conditions of the sale, inasmuch as no assignment of the purchaser's rights could be validly made or registered until all the conditions of the sale had been complied with or dispensed with by the commissioner before the registration was made. It therefore, in my opinion, must be assumed that the commissioner acted legally in enregistering the transfer, receiving the fee for so doing, and a further fee of $3 for the issuing of the patent, which he could only have legally done by dispensing with the conditions of sale. I do not think anything can be more conclusive than that the Commissioner of Crown Lands, at the time of the enregistering of the transfer and receipt of the moneys paid and received by the crown, and in view of the facts of the case, dispensed with the strict compliance with the conditions of sale, and in so doing I humbly

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think he acted as justice and fairness dictated, and as the honour of the crown required, and subsequently the cancellation of the sale for non-fulfilment of conditions on the 28th of May, 1878, was not justifiable, and the license dated the 7th of March, 1879, to Messrs. Ross Bros. was equally unjustifiable; therefore, on this ground, and this alone, I think the appeal should be allowed and the judgment of the Superior Court restored.

STRONG J.—Upon the argument of this case I was certainly much impressed in favour of the respondent, but a subsequent consideration of the evidence has convinced me that there was waiver of the conditions of the original sale which required the performance of the settlement duties. I wish to rest my judgment solely upon the ground that there was such a waiver by the registration of the transfer. The conduct of the appellant seems to have been honourable throughout, and what he did was a reasonable and substantial equivalent for the performance of the settlement duties and was done honestly and in good faith under the authority and with the sanction of the government officers prior to the registration of the transfer and must or ought to have been known by Mr. Taché, the Deputy Commissioner, when he sanctioned the transfer. The appeal must be allowed with costs and the judgment of the Superior Court restored with costs to the appellant in all the courts.

FOURNIER J.—Le jugement soumis à la revision de cette cour par le présent appel, a été rendu le 21 septembre 1886, par la cour du Banc de la Reine, siégeant à Montréal, dans une action portée devant la cour Supérieure du district d'Aylmer. L'appelant W. L. Holland réclamait de John Ross, l'intimé, la valeur

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d'une certaine quantité de bois de commerce et des dommages résultant de voies de faits par lui commises sur les terres de l'appelant, dans le township de Portland.

L'appelant alléguait dans son action qu'il était propriétaire en vertu de billets de location, en date du 9 juin 1863, accordés par le commissaire des terres, à George C. Holland, des lots n^{os} 11 et 12 du 4ème rang du township de Portland, qui lui avaient été transportés par le dit George C. Holland.

L'intimé a plaidé d'abord par défense au fonds en droit et, ensuite, par une exception péremptoire que la vente faite par le département des terres de la ci-devant province du Canada, faite à George C. Holland et par ce dernier transportée à l'appelant, a été le 28 mai 1878, cancellée par le commissaire des terres de la province de Québec, et que les lots en question, 11 et 12, avaient été réintégrés dans les limites de sa licence pour coupe de bois ; il a aussi plaidé prescription pour les dommages et une défense au fonds en fait.

Le 6 octobre 1887, l'honorable juge McDougall rendit jugement déclarant que le bois en question était la propriété de l'appelant et qu'il avait été illégalement coupé sur les terres de l'appelant, et condamna l'intimé à rendre le bois et à payer les dommages.

Ce jugement porté en appel à la cour du Banc de la Reine fut renversé et la cancellation de la vente des lots en question déclarée valable, et l'action de l'appelant renvoyée avec dépens. C'est de ce dernier jugement que le présent appel est interjeté pour le faire déclarer erroné et faire revivre celui de la cour de première instance.

Il ne s'élève sur le présent appel que la question qui a servi de base au jugement de la cour du Banc de la Reine, savoir, si la cancellation de la vente en question a été légalement faite par le commissaire des terres.

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L'appelant s'en est tenu à combattre ce motif pour démontrer l'erreur du jugement et faire voir que son action aurait dû être maintenue.

Le titre de l'appelant aux lots nos 11 et 12 est un billet de location en date du 9 juin 1863, dans la forme ordinaire, adoptée et en usage par le département des terres publiques, à l'époque où George C. Holland en a fait l'acquisition. C'est la formule de vente qui avait été adoptée en vertu de l'acte 23 Vict., ch. 2, réglant alors la vente des terres publiques. L'original du billet de location ayant été perdu, les parties l'ont remplacé de consentement, par le suivant qui est admis comme en étant une copie exacte. Il est ainsi conçu:—

No. CROWN LANDS AGENCY.

$ Received from the sum of being the first instalment of one-fifth of the purchase money of acres of land contained in Lot , No. in the Range of the Township of P. Q., the remainder payable in four equal annual instalments with interest from this date at 6 per cent.

This sale, if not disallowed by the Commissioner of Crown Lands, is made subject to the following conditions, viz.: The purchaser to take possession of the land within six months from the date hereof, and from that time continue to reside on and occupy the same, either by himself or through others, for at least two years, and within four years at furthest from this date, clear and have under crop a quantity thereof in proportion of at least ten acres for every 100 acres, and erect thereon a habitable house of the dimensions of at least 16 by 20 feet. No timber to be cut before the issuing of the patent, except under license or for clearing of the land, fuel, buildings and fences; all timber cut contrary to these conditions will be dealt with as timber cut without permission on public lands. No transfer of the purchaser's right will be recognized in cases where there is default in complying with any of the conditions of sale. In no case will the patent issue before the expiration of two years of occupation of the land or the fulfilment of the whole of the conditions even though the land be paid for in full, subject also to current licenses to cut timber on the land, and the purchaser to pay for any real improvements now existing thereon, belonging to any other party, and further subject to all mining laws and regulations.

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Il n'est pas inutile de faire remarquer qu'entre ce billet de location et celui imprimé dans le factum de l'intimé, il y a une différence importante qui a, sans doute, eu beaucoup d'influence sur la décision de la cour du Banc de la Reine. Elle consiste dans l'insertion faite par erreur d'un extrait de l'acte 32 Vict., ch. 11, comme faisant partie du billet de location de l'appelant qui avait été émis six ans avant la passation de cet acte, en vertu de l'acte, alors en force, 23 Vict., ch. 2. Cet extrait contient les mots suivants : *or neglects to comply with*, dans les conditions de la vente,—donnant pour la première fois au commissaire le pouvoir de canceller pour simple négligence de remplir les conditions du billet de location.

Pour la décision de cette cause, il faut se référer à la loi en force lors de l'émission du billet de location, en date du 9 juin 1863, en faveur de George C. Holland. Par la 23 Vict., ch. 2, les pouvoirs du commissaire des terres quant à l'annulation des ventes, billets de location ou licences d'occupation, sont définis et limités ainsi qu'il suit par la section 20 :

If the Commissioner of Crown Lands is satisfied that any purchaser, grantee or locatee or lesssee of any public land, or any assignee claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of sale, grant, location or lease, or of the license of occupation, or if any such sale, grant, location or lease or location of occupation has been or is made or issued in error or mistake, he may cancel such sale, grant, location, lease or license, and resume the land therein mentioned, and dispose of it as if no sale, grant, location or lease thereof had ever been made.

Par la section 18 il est pourvu à ce qu'aucun transport des droits de l'acquéreur ne puisse être valablement fait ou enregistré à moins que toutes les conditions de la vente n'aient été remplies ou que dispense n'en ait été accordée par le commissaire des terres.

All conditions of the sale, ground or location must have been complained with or disposed with by the Commissioner of Crown Lands, before the registration is made.

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Cet acte, à la différence de la législation subséquente, n'accorde au commissaire des terres aucun pouvoir de prononcer, en faveur de la Couronne, la confiscation des argents payés ou des améliorations faites sur la propriété dans le cas où la vente serait annulée. C'est en vertu de cet acte que le billet de location en question a été émis, sujet à la condition que la vente pouvait être annulée seulement dans le cas où le concessionnaire aurait violé les conditions de la vente.

George C. Holland avait pris avec l'agent des terres Collins des arrangements pour être autorisé à remplir les conditions d'établissements pour les deux lots sur le *homestead property*, où il vivait avec son père.

Depuis l'acte de la confédération les terres publiques étant passées sous le contrôle de la province de Quebec, une nouvelle législation a été introduite. L'acte 32 Vic., ch. 11, reproduit en entier la section 20 de l'acte 23 Vic., ch. 2, avec une seule exception de l'addition des mots suivants :—*or neglected to comply with the conditions of the sale*, dans cette clause qui ne donnait le pouvoir d'annuler que dans le cas de violation des conditions, étendant ainsi ce pouvoir au cas de simple négligence de se conformer aux conditions de la vente. Mais cette section 20, ainsi amendée, ne donne encore aucun pouvoir au commissaire des terres de prononcer la confiscation des argents payés ou des améliorations faites sur la propriété.

La section 18 de l'acte 23 Vict. ch. 2, pourvoyant à l'enregistrement des ventes dans le département des terres est aussi reproduite en entier dans la 32 Vict. ch. 11 et contient aussi la même disposition au sujet de l'accomplissement des conditions avant que l'enregistrement puisse être fait :—

Et toutes les conditions de la vente, concession ou location devront avoir été remplies, ou le commissaire des terres de la Couronne devra

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avoir dispensé de leur accomplissement avant que tel enregistrement soit fait.

C'est en 1872, par l'acte 36 Vict. ch. 8, que pour la première fois il a été déclaré que l'annulation valablement prononcée emporterait la peine de la confiscation de tous les argents payés et des améliorations faites. Cependant le commissaire était autorisé à accorder telle compensation ou indemnité qu'il croirait juste et raisonnable. Une dernière clause de ce statut, accordait, dans les soixante jours de l'avis de cancellation un appel au lieutenant-gouverneur en conseil. Pendant ce temps le commissaire ne pouvait disposer de la propriété.

Le 20 décembre 1870, G. C. Holland représentant qu'il avait accompli les conditions d'établissement suivant l'arrangement mentionné plus haut, sur le *homestead lot*, non sur ceux dont il s'agit, fit faire par l'agent Farley, une demande au commissaire alléguant ces faits et réclamant sa patente.

Lors du transport par G. C. Holland de tous ses droits à W. L. Holland, l'appelant, sur les lots en question, tous les paiements avaient été faits avec intérêt, et la Couronne avait même accepté un honoraire pour l'enregistrement du transport qui fut fait régulièrement le 5 juin 1874, et de plus $3.00 pour l'émission de la patente.

Sans aucun avis aux Holland, la cancellation de la vente des lots en question pour inexécution des conditions fut prononcée par le commissaire des terres et les lots réintégrés dans les limites de la licence de coupe de bois accordée à l'intimé.

D'après cet exposé des statuts sur la matière et les faits en preuve en cette cause la cancellation prononcée est-elle légale ? La cour Supérieure a décidé dans la négative, mais son jugement a été infirmé par la cour du Banc de la Reine.

On a vu que la vente annulée avait été faite à George

C. Holland par billet de location du 9 juin 1863, en vertu de l'acte 23 Vict., ch. 2. C'est sans doute par la loi alors en force que doit être décidée la légalité des procédés du commissaire. A cette époque la loi ne donnait pas au commissaire des terres des pouvoirs aussi étendus que ceux qui lui furent conférés plus tard. Il ne pouvait en vertu de la section 20 de cet acte annuler les ventes que pour cause de fraude ou violation des conditions de la vente; ce n'est que par la 32ème Vict, ch. 11 que le pouvoir de les annuler pour négligence d'accomplir les conditions de la vente lui fut accordé. Il semble qu'il y aurait une différence à faire entre ces deux dispositions et que la violation des conditions ne peut être mise sur le même pied que la simple négligence de les accomplir. Le législateur l'a reconnu en ajoutant, par un acte subséquent, au pouvoir d'annuler pour violation des conditions, celui d'annuler aussi pour simple négligence de les remplir. Cette législation subséquente ne peut sans doute pas s'appliquer au billet de location accordé en vertu d'une autre loi, celle de 1860. C'est cependant en vertu de la 32ème Vict., ch. 11 que la cancellation a été prononcée *for non-fulfilment of the conditions thereof.* C'est-à-dire pour une cause qui n'était pas admise par le statut en vertu duquel a été émis le billet de location annulé.

Ainsi, le commissaire a, contrairement aux autorités, donné un effet rétroactif à la 32 Vict., ch. 11, qui affectait les droits acquis de l'appelant, voir:—

Guyot, (1); Pothier, contrat de vente, (2); Dalloz, (3); Toullier, (4); Potter's Dwarris on statutes, (5); Hardcastle, (6); Maxwell, (7); Domat, (8).

Il est indubitable que les droits de Holland auraient

(1) Rep. vo. clause commina-toire.
(2) No. 459.
(3) Rep. vo. condition.
(4) 6 Vol., page 581 No. 550.
(5) Ed. 1871, p. 162.
(6) Ed. 1879, pp. 197-201.
(7) Ed. 1875, pp. 190-192.
(8) Liv. 1, tit., 1 sec. 4.

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dû être déterminés par la loi en force lorsqu'il a obtenu son titre.

Il pourrait s'élever encore plusieurs autres questions importantes soit sur la nécessité d'une mise en demeure, avant de prononcer la cancellation, soit sur l'étendue des pouvoirs conférés à la province de Québec par l'acte de l'Amérique Britannique du Nord, sur les terres publiques,—mais il est inutile pour la décision de cette cause d'entrer dans l'examen de ces questions, car la décision du litige repose sur une question plus simple et plus claire—la reconnaissance par le gouvernement de la province de Québec de la validité du titre de l'appelant.

Le département des terres tient un bureau régulier pour l'enregistrement des transports de terres faits, soit par les concessionnaires originaires, les acquéreurs, locataires ou locateurs subséquents de terres publiques, ou leurs héritiers ou représentants légaux, – où ils peuvent en suivant les formalités indiquées dans la section 18, 23 Vic., ch. 2, faire enregistrer leurs titres dans un livre tenu à cet effet et obtenir sur le dos de leur titre un certificat d'enregistrement. Cette disposition déclare que tels transports ainsi enregistrés seront valides contre tout autre préalablement exécutés, mais subséquemment enregistrés ou non enregistrés. Mais tous tels transports doivent être faits sans condition,—et toutes les conditions de la vente ou location doivent avoir été accomplies, ou dispense obtenue du commissaire des terres avant que l'enregistrement soit fait.

La 32 Vic., ch. 11, section 18 contient la même disposition que la 23 Vic., ch. 2, et déclare en termes positifs :

> Et tout tel transport, etc., etc., ou le commissaire des terres de la Couronne devra avoir dispensé de leur accomplissement avant que tel enregistrement soit fait.

D'après la loi en force lors de l'émission du billet de

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location, comme d'après celle qui l'était lors de sa cancellation, l'enregistrement ne pouvait avoir lieu qu'après avoir accompli toutes les conditions du titre, ou en avoir obtenu une dispense du commissaire. Cette disposition est impérative et rend le titre qui a été enregistré inattaquable pour défaut d'exécution des conditions auxquelles il a été accordé. C'est la position dans laquelle se trouve l'appelant par l'enregistrement de son transport des billets de location en question, qui a été fait le 5 juin 1874, en vertu du statut 32 Vict., ch. 11. L'enregistrement en a été payé, ainsi que $3.00 d'honoraire pour la patente. L'accomplissement de ces formalités a eu l'effet de donner un titre complet et absolu à l'appelant. La cancellation qui en a eu lieu quatre ans après pour inexécution des conditions est évidemment en violation de la loi, parce que, par l'enregistrement, il y a preuve que toutes les conditions en avaient été accomplies ou que du moins le commissaire en avait dispensé l'appelant, sans quoi cet enregistrement n'aurait pu avoir lieu. La Couronne ne pouvait donc plus être reçue à se plaindre de l'inexécution des conditions puisqu'elle a reconnu par l'enregistrement qu'elles avaient été accomplies ou que dispense en avait été accordée.

Après les demandes faites par l'appelant auprès du département des terres pour obtenir la permission de faire sur le *homestead* les améliorations qu'il était tenu de faire sur les lots n^{os} 11 et 12, on ne peut plus mettre en doute le fait que cette demande a été admise par le commissaire qui a accordé l'enregistrement du transport, qu'il n'aurait pas eu le pouvoir de faire à moins d'avoir dispensé l'appelant de faire ces améliorations. L'enregistrement constitue une preuve irréfutable de la dispense accordée, et donne à l'appelant tout le bénéfice que la loi lui confère par l'enregistrement, en rendant son titre parfait.

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L'appelant pourrait aussi faire valoir en sa faveur la renonciation que la Couronne a faite au droit de canceller les billets de location, par l'acceptation du prix avec les arrérages d'intérêt, les frais d'enregistrement du transport et l'honoraire pour l'émission de la patente, en se fondant sur l'autorité de la cause de *Attorney General of Victoria* v. *Ettershank* (1) qui a admis des faits analogues comme constituant un *waiver*. Mais la position que lui fait la sec. 18 concernant l'enregistrement de son transport lui suffit, puisqu'elle lui donne un titre parfait.

En conséquence, je suis d'avis que l'appel doit être alloué avec dépens.

TASCHEREAU J.—I would dismiss this appeal. I understand that the only point upon which the court is about to reverse is the one raised under sec. 18 of the statute, 28 Vic. c. 2, which enacts that :

Before any assignment of the purchaser's right could be validly made or registered:—" all conditions of the sale, grant or location must have been complied with or dispensed with by the Commissioner of Crown Lands before the registration is made."

It is contended that the assignment by George Holland to the present appellant having been registered by the Crown Lands office the respondents cannot now avail themselves of the non-compliance of any of the conditions of the location ticket. I cannot give that effect to the statute. It is clearly proved that he did not comply with the conditions, and that they were not dispensed with, so that the consequence may be that the registration was not validly made and that is all.

GWYNNE J.—Concurred with FOURNIER J.

Appeal allowed with costs.

Solicitors for appellant : *Chapleau, Hall, Nicholls and Brown.*

Solicitors for respondent : *Robertson, Fleet and Falconer.*

(1) L. R. 6 P. C. 354.

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AND

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*Jan. 21, 22, 23.

*Nov. 16.

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

Corporation—Contract of—Seal—Performance—Adoption—Municipality —By-law—Manitoba Municipal Act, 1884, *s.* 111.

A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. Ritchie C.J. and Strong J. dissenting.

In sec. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. Ritchie C.J. and Strong J. dissenting.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1), affirming the judgment of nonsuit at the trial.

The action in this case was brought to recover the amount alleged to be due plaintiff for building a bridge for the defendant municipality. The defence set up was that the contract was not under the corporate seal of the municipality and the plaintiff, consequently, could not maintain an action. The trial judge nonsuited the plaintiff and his judgment was affirmed by the full court from whose decision this appeal was brought.

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

(1) 6 Man. L. R. 88.

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The facts are fully set out in the judgments of Mr. Justice Gwynne and Mr. Justice Patterson.

Tupper Q.C. for the appellant. The law is not yet settled as to the necessity for a seal in contracts with municipal corporations. In *Young* v. *Leamington* (1) though there are *dicta* against the appellant's position, Lord Bramwell expressly said, in the House of Lords, that the question did not arise.

The law on this matter has been made by the courts and in 1856 it was settled that in the case of trading corporations the seal was not essential in all cases.

In executed contracts, the benefit of which has been enjoyed, the courts have always striven to make corporations liable. The latest case is *Scott* v. *Clifton School Board* (2); and see *Clarke* v. *Cuckfield Union* (3); followed in *Nicholson* v. *Bradfield Union* (4); *Sanders* v. *St. Neat's Union* (5), approved in *Smart* v. *Guardians of West Ham Union* (6).

There are a number of Ontario cases in the same direction beginning with *Marshall* v. *School Trustees* (7). See *Pim* v. *Ontario* (8); *Lawrence* v. *Corporation of Lucknow* (9); *Canada Central Railway Co.* v. *Murray* (10).

Osler Q.C. and *Martin*, Attorney-General of Manitoba, for the respondents cited *Wallis* v. *Municipality of Assiniboia* (11); *Silsby* v. *Dunnville* (12).

Sir W. J. RITCHIE C.J.—Concurred in the judgment prepared by Mr. Justice Strong.

(1) 8 Q.B.D. 579; 8 App. Cas. 517.
(2) 14 Q.B.D. 500.
(3) 21 L.J.Q.B. 349.
(4) L.R. 1 Q.B. 620.
(5) 8 Q.B. 810.
(6) 10 Ex. 867.
(7) 4 U.C.C.P. 373.
(8) 9 U.C.C.P. 304.
(9) 13 O.R. 421.
(10) 8 Can. S.C.R. 313.
(11) 4 Man. L.R. 89.
(12) 8 Ont. App. R. 524.

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STRONG J.—I am of opinion that this appeal must be dismissed. The appellant seeks to recover as the assignee of one John F. Grant for work done in the building of a bridge under an alleged contract with the respondent. The work was performed under an agreement which was signed by Grant but which was not sealed with the corporate seal of the respondents, nor authorized by any by-law passed by the council of the municipality. Subsequently to the commencement of the work a resolution of the council authorising the payment of $200 to Grant on account of the contract was passed, but this was a mere resolution, not a by-law, and was not under the seal of the corporation. The Municipal Act of Manitoba, in force when the agreement mentioned was signed, was that of 1883. The act of 1883 was afterwards, and before the work was completed, superseded by the "Manitoba Municipal Act of 1884." By both these acts, however (the sections applicable being the 113th of the former and the 111th of the latter act), the power of a municipal council to enter into contracts and to expend money for the construction of bridges was, according to the view I take, restricted to cases in which a by-law authorising the contract and the expenditure under it should be passed. Section 111 of the act of 1884 is as follows:

> The council may pass by-laws for such municipality in relation to matters coming within the classes hereinafter enumerated, that is to say: (1) The raising of a municipal revenue. (2) The expenditure of the municipal revenue. (3) Roads and bridges and the construction and maintenance of roads and bridges wholly within the municipality.

Section 113 of the act of 1883 was, as I have said, in the same words. These are the only provisions in the acts to which the authority of a municipal council to contract for the construction of a bridge can be referred. The 180th sections of both

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the acts are identical and in the following words:

> Every by-law shall be under the seal of the corporation and shall be signed by the head of the corporation or by the person presiding at the meeting at which the by-law has been passed and countersigned by the clerk or acting clerk of the corporation.

Without statutory authority the municipality could not enter into a contract for building a bridge, and we are therefore bound to enquire whether the conditions upon which alone the power invoked could be exercised have been complied with. That the words "construction and maintenance of roads and bridges" embrace contracts for the performance of such works, and are not to be restricted to cases in which the municipality may take upon itself to perform the work by workmen hired from day to day, cannot admit of a doubt, for if it were otherwise there would be no power to enter into such a contract as the plaintiff insists upon in the present case, and having regard to what, from common experience, we know to be universal, such a power is always exercised by means of a contract. Then the provision of the statute is plain; it is an indispensable condition to the validity of such a contract that it should be authorised by a by-law which by-law, according to the 180th section, must be under the seal of the municipality. Then no such by-law was ever passed.

The consequence is, therefore, inevitable that the work in question was not performed under any contract binding upon the municipality. The contention that the work having been executed and accepted the case is taken out of the statute is, in the face of the recent decision of the House of Lords in *Young* v. *Leamington* (1), and that of the English Court of Appeal

(1) 8 App. Cas. 517.

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in *Hunt* v. *Wimbledon* (1), wholly untenable. These cases decide, absolutely and unequivocally, that where a statutory power is conferred upon a municipal corporation to make contracts in a particular form that form must be followed, and no dispensation with the requirements of the statute is admissible upon the ground of part performance, or because the corporation has taken the benefit of the contract; and this is so held apart altogether from the vexed question of the general liability of corporations upon contracts not under seal which have been executed by the other contracting party.

How then is it possible to come to any other conclusion than that which has been arrived at by the Court of Queen's Bench in Manitoba? Were we to hold otherwise we should be treating the enactment of the legislature as a dead letter, and upon the mere ground of hardship setting aside the statute.

But even if it were admissible to treat a contract to build a bridge as one which the municipal council had incidentally power to enter into, without regard to the preliminary requirements of a by-law as provided for by sections 111 and 113 of the respective statutes, I should feel great difficulty in coming to any other conclusion than that arrived at by the court below. It is true that the cases of *Young* v. *Leamington* (2) and *Hunt* v. *Wimbledon* (1) already referred to are decisions proceeding upon the terms of the act of parliament conferring the power, but still the judgments delivered in these cases in the Court of Appeal do contain *dicta* of very eminent judges adverse to the doctrine which the English Court of Queen's Bench, following Mr. Justice Wightman's decision in *Clarke* v. *Cuckfield Union* (3), acted upon in several cases, namely, that irrespective

(1) 4 C. P. D. 48.
(2) 8 App. Cas. 517.
(3) 21 L. J. Q. B. 349.

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altogether of the exceptions dispensing with a seal to contracts of corporations, in the case of trading corporations and in matters of trivial importance and frequent recurrence, there was a third exception in all cases where the contract had been executed by the other contracting party and the execution had been accepted and the benefit of it taken by the corporation. The Ontario Courts of Common Pleas and Queen's Bench in the cases of *Pim* v. *Ontario* (1) and *Fetterly* v. *Russell and Cambridge* (2) did, it is true, adopt and act upon this principle, but it has been so strongly disapproved of in very late cases by the highest authority in England that I doubt much whether, if the matter were now *res integra*, the same result would be arrived at in the Ontario courts.

It is to be observed that the English Court of Exchequer always rejected the doctrine of *Clarke* v. *Cuckfield Union* (3) and acted upon the reverse principle.

Lord Justice Lindley, in his late work upon the Law of Joint Stock Companies (4) published in 1889, thus decisively treats the distinction in favour of executed contracts as exploded and states the law:

> Even a resolution of a body corporate is not equivalent to an instrument under its seal, and a corporation will not be compelled to execute a contract which it has been resolved shall be entered into by it. A distinction was at one time supposed to exist between executed and executory contracts; but except where the equitable doctrines of part performance are applicable a corporation is no more bound by a contract not under its seal, of which it has had the benefit, than it is by a similar contract which has not been acted upon by either party.

As regards part performance in equity that (as is the doctrine of part performance generally) is limited to such cases as courts of equity ordinarily exercise jurisdiction in, such as contracts for the sale of land and others in which courts of equity will grant specific

(1) 9 U. C. C. P. 304.
(2) 14 U. C. Q. B. 433.
(3) 21 L. J. Q. B. 349.
(4) P. 221.

performance. That the mere want of a seal in the case of a contract with a corporation not coming within the ordinary jurisdiction of the court affords no ground for equitable interference is a proposition most clearly and conclusively established by the cases of *Kirk* v. *Bromley Union* (1) and *Crampton* v. *Varna Railway Company* (2).

Upon the whole I see no reason to doubt that the law is now as stated in the very full and able judgment of Mr. Justice Killam, though I prefer to rest the decision of the present appeal on the ground first mentioned, namely, that the respondents, a statutory body, had no authority to enter into such a contract as that which the appellant asks us to enforce otherwise than in a particular form and under conditions, prescribed by the statute, which have not been complied with.

The appeal must be dismissed with costs.

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

TASCHEREAU J.—I would allow this appeal. I concur in my brother Gwynne's judgment.

GWYNNE J.—In 1868 all the cases theretofore decided in the English courts relating to the rights of action arising upon parol contracts entered into with corporations aggregate were brought under review in *South of Ireland Colliery Company* v. *Waddle* (3), where Bovill C.J. says :

> The contract declared on is admitted to have been made by the directors with the defendant. The objection is that it is not under the corporate seal of the company, and it is contended on the defendant's behalf that by reason of the absence of a seal there is no mutuality; that the plaintiffs are not bound by it, and therefore are not entitled

(1) 2 Ph. 640.
(2) 7 Ch. App. 562.
(3) L. R. 3 C. P. 463.

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to sue upon the contract. It appears further that the contract had been partly performed, and that the company were ready and willing to perform the rest. It had in fact been adopted and acted upon by both parties. The objection is a technical one, but though technical if it be in accordance with law the court is bound to give effect to it. Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants and the like. But in progress of time, as new descriptions of corporations came into existence, the courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict, and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions which if inconsistent with them must, I think, be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they were incorporated. A company can only carry on business by agents, managers and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company and are not inconsistent with the rules and regulations which govern their acts they are valid and binding on the company though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument. It can never be that one rule is to obtain in the case of a contract for £50 or £100, and another in the case of a contract for £50,000 or £100,000.

He then proceeded to show that there was no special provision either in the act of parliament under which the company became incorporated or in the articles of association which required the contract sued upon to be under seal, and the court, therefore, held that the contract was valid without a seal notwithstanding the rule of the common law, and Montague Smith J. winds up his judgment by saying that the result is that *East London Waterworks Co.* v. *Bailey*(1) can no longer be considered to be law. Upon appeal to the Exchequer Chamber that court (2), consisting of three judges of the Court

(1) 4 Bing 283. (2) L. R. 4 C. P. 617.

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of Queen's Bench and three of the Court of Exchequer, unanimously affirmed the judgment of the Court of Common Pleas. Cockburn C.J. delivering the judgment of the court there says:

> We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. It is unnecessary to say more than that we entirely concur in the reasoning and authority of the cases referred to in the judgment of Bovill C.J. which seems to us to exhaust the subject. In early times, no doubt, corporations could only, subject to the well known exceptions, bind themselves by contracts under seal, and for some time that rule was applied to corporations which were formed for the purpose of carrying on trade. But the contrary has since been laid down by a long series of cases and may now be considered settled law. The machinery contracted for in this case was clearly necessary for the purpose for which the company was formed, namely, the working of coal mines.

Now that was the case of an executory contract. It is only necessary now to consider whether the principles established by the cases decided prior to the *South of Ireland Colliery Co.* v. *Waddle*, (1) and upon which that case proceeded, are limited in their application to trading corporations only, or whether they are not equally applicable in the case of a municipal corporation, such as the defendants in the present case are, who have received the benefit of a work executed for them upon a parol contract made with them in relation to a matter within the purposes for which the corporation was created, which work the governing body of the corporation has accepted as completed under the contract, and has paid part of the price agreed upon. In the *Mayor of Stafford* v. *Till* (2) it was held by the Court of Common Pleas in 1827 that a corporation aggregate might sue in assumpsit for use and occupation where the tenant held premises under a parol contract with the corporation. The principle upon which that case proceeded was that the tenant being in occupation of the land the contract between him and the corpora-

(1) L. R. 3 C. P. 463. (2) 4 Bing. 75.

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tion must be considered as executed, and that the contract having been executed the defendant was in justice bound to pay for his occupation, so that a promise to pay might be implied although in the case of an executory contact it might be otherwise. In the *East London Waterworks Co.* v. *Bailey* (1) the same court in the same year in the case of an executory contract held that although an act of parliament authorized the directors of the plaintiff company to make contracts, agreements and bargains with the workmen, agents, undertakers and other persons engaged in the undertaking, the company could not sue upon a parol contract with the defendants for the supply of pipes at certain stated periods for a breach of such contract, In *The Mayor of Ludlow* v. *Charlton* (2) to an action for rent payable under a demise by deed executed under the corporate seal of the plaintiffs the defendant pleaded a set-off, whereby he claimed to be allowed a sum of money alleged and proved to have been expended by him under a parol contract contained in a resolution passed at a corporate meeting and entered in the books of the corporation. The Court of Exchequer in that case held that notwithstanding the defendant had executed the work he could not set-off the amount so expended, the contract not having been under the corporate seal. It cannot be denied that the Court of Exchequer in that case, which was decided in 1840, were of opinion that the exceptions of the general common law rule that corporations can contract only under their common seal are to be limited to cases of urgent necessity, where, in fact, to hold the common law rule applicable would occasion very great inconvenience or tend to defeat the object for which the corporation was created. The court, however, in delivering judgment (3) say:

(1) 4 Bing. 283. (2) 6 M. & W. 815.
(3) P. 823.

The seal is required as authenticating the concurrence of the whole body corporate.

That is the principle upon which the common law rule is founded. They go on, however, to say, and to lay down principles which might reasonably be construed as affording good foundation for future exceptions, as follows :

If the legislature in erecting a body corporate invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act, and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is after all not the act of the whole body. Every member knows he is bound by what is done under the corporate seal and by nothing else.

It is necessary, therefore, in every case to refer to the particular act or acts of parliament creating a corporation for the purpose of determining whether any express *or implied* authority is given to any particular person or persons, or part of the corporate body, to bind the whole body, for if there be, then upon a reasonable construction of the above language of the Court of Exchequer the reason assigned for the necessity of affixing the corporate seal to any contract would seem to cease to exist. Now, by the acts incorporating municipal institutions throughout the Dominion of Canada, the inhabitants of every municipality, be it a city, town, village, county or township, are the body corporate. Convenience and necessity require that the powers vested in the corporate body should be, and accordingly all such powers are by express enactment required to be, exercised by a deliberative, legislative governing body called a municipal council, consisting of members of the corporate body elected for that pur-

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pose by the inhabitants of the municipality. All of the proceedings, resolutions and minutes of these deliberative, legislative, governing bodies in respect of every matter coming under their consideration are recorded in a book required to be kept for that purpose by their clerk, so that, in the above language of the Court of Exchequer, every inhabitant of the municipality, or member of the corporate body, knows that he is liable to be bound in his corporate character by the resolutions and acts of the council or governing body. It may well, I think, be doubted whether any officers of such municipal corporations could bind the corporate body by setting the corporate seal to any contract not authorised by the council by resolution or otherwise. It is difficult, therefore, as it seems to me, to understand why in the case of those municipal institutions the affixing a seal to a contract with the corporate body should be deemed of such vital importance if, before the seal can be effectually set, there must be a precedent resolution of the council authorising the contract. It may more correctly be said that these municipal corporations speak and act by and through the acts and resolutions of their deliberative councils or governing bodies than by and through a seal, the affixing of which in such cases, as is admitted by the Court of Exchequer in *The Mayor of Ludlow* v. *Charlton* (1), would be a "matter purely of form."

In *Arnold* v. *The Mayor of Poole* (2) it was held by the Court of Common Pleas, in 1842, that a corporation could not appoint an attorney except under the corporate seal.

In *The Fishmongers Co.* v. *Robertson* (3) the contract sued upon was not one coming within any of the established exceptions to the general rule that con-

(1) 6 M. & W. 815.
(2) 4 M. & G. 861.
(3) 5 M. & G. 131.

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tracts of corporations must be by deed. The subject-matter of the contract had no relation to any of the purposes for which the company were incorporated. It was a contract whereby the Fishmongers Company of London agreed with the defendants to withdraw their opposition to a bill introduced into parliament by the defendants whereby they sought to be invested with power to drain certain marsh lands in Ireland contiguous to which the Fishmongers Company owned land which they feared might be injuriously affected by the powers sought by the defendants; and the plaintiffs, alleging that they had performed all the stipulations and conditions agreed to be performed by them, averred in their declaration divers breaches by the defendants of the stipulations agreed to be performed by them, and it was held by the Court of Common Pleas in 1843, upon the objection that the contract was not executed under the seal of the plaintiffs, and was therefore invalid, that the contract having been executed by the plaintiffs and the defendants having thereby received the benefit of it they could not *upon any principle of reason or justice* be permitted to raise the objection. In that case the corporation, it is true, were the plaintiffs, but the same principle of reason and justice seems to me to apply to prevent a corporation, which has received the full benefit of a parol contract executed in every particular as agreed upon with the managing body, from resisting payment of the price agreed upon by contending that the contract had not been executed under their seal. Such a defence would be equally fraudulent and unjust whether urged by an individual in an action at the suit of the corporation who had executed the parol contract, or in an action by an individual who had executed it on his part against the corporation who had accepted and enjoyed the full benefit of it. In the *Fishmonger Co.*

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v. *Robertson*, (1) a case before Sir J. Leach, V.C, in 1823, was cited, *Marshall* v. *Corporation of Queensborough* (2), wherein the Vice Chancellor said:

> If a regular corporate resolution passed for granting an interest in a part of the corporate property, and upon the faith of that resolution expenditure was incurred, he was inclined to think that both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution.

And in *The London and Birmingham Railway Company* v. *Winter* (3), in 1849 an objection to a bill by an incorporated railway company for specific performance of a parol contract entered into by their agent that it did not appear that the agent was authorised under the corporate seal, and therefore that there was no mutuality, was overruled, the Lord Chancellor Cottenham holding that as the company had, before the bill was filed, not only acted on the contract by entering into possession of the land, but actually made a railroad over it, if it had been necessary for the defendants to have filed a bill for specific performance against the company he had no doubt they would be compelled specifically to perform the contract.

In *Paine* v. *The Strand Union* (4) it was held by the Court of Queen's Bench in Hilary term, 1846, that the guardians of a poor law union could not bind themselves by an order not under seal for making a survey and map of the ratable property in a parish forming part of the union; and the reason of that judgment was that the making of the plan so ordered was not in any way incident to the purposes for which the corporation was created. Lord Denman C.J. delivering the judgment of the court, says:

> The plan was wanted in order to enable a fair and correct estimate to be made of the net value of the hereditaments rated in that parish;

(1) 5 M. & G. 131.
(2) 1 Sim. & Stu. 520.
(3) Cr. & Ph. 57.
(4) 8 Q.B. 326.

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the other parishes in the union had nothing to do with it, nor were in any way benefited by it, so that the making the plan cannot have been in any way incident to the purposes for which the defendants were incorporated, which purposes related to the whole union, the defendants having no power to act as a corporation in matters confined to any particular parish.

And in the following term the same court in *Sanders* v. *The Guardians of St. Neot's Union* (1) held that where work had been done for the corporation under a verbal order, which work had been accepted and adopted by them, the corporation could not in an action to recover the price object that the order was not given under seal. Lord Denman C.J. delivering judgment there, saying :

> We think that they (the corporation) could not be permitted to take the objection, inasmuch as the work in question after it was done and completed was adopted by them for purposes connected with the corporation.

The court, it is submitted, based their judgment in that case upon a sound and rational principle, equally applicable to the case of every corporation and not limited to trading corporations only, namely, that where work has been executed for a corporation under a parol contract, which work was within the purposes for which the corporation was created, and it has been accepted and adopted and enjoyed by the corporation after its completion, it would in such case be fraudulent for the corporation, while enjoying the benefit of the work, to refuse to pay for it upon the ground that the contract in virtue of which it had been executed was invalid for want of the corporate seal, and that reason and justice required that they should not be permitted to commit such a fraud; that they cannot be permitted, in fact, to appeal to the rule of common law so as to enable them to commit a manifest fraud. In *Lamprell* v. *Billericay Union* (2), in 1849, it must be

(1) 8 Q. B. 810.

(2) 3 Ex. 283.

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admitted that the Court of Exchequer, professing to act upon the authority of their own decision in *The Mayor of Ludlow* v. *Charlton* (1), held that a person who had performed work for a corporation under the directions of the architect of the corporation could not recover against the corporation upon a *quantum meruit* for the work done, although it had been accepted by the architect as completed in accordance with his directions and the corporation enjoyed the benefit of the completed work. In that case the Court of Exchequer assumed the decisions of the Court of Queen's Bench in *Arnold* v. *The Mayor of Poole* (2) and *Paine v. The Strand Union* (3) to be in affirmance of the judgment of the Exchequer in *The Mayor of Ludlow* v. *Charlton* (1), an assumption which does not appear at all warranted by the reports of those cases or by the expressions of judges of the Queen's Bench in subsequent cases.

In *The Copper Miners Co.* v. *Fox* (4) A.D. 1850, the action was upon a parol contract with the defendant, who undertook to supply the company with iron rails averring mutual promises and breach by the defendant. The court held that the action would not lie the contract not being under seal, the plaintiffs' charter of incorporation having only authorized them to deal in copper as copper miners. Lord Campbell C.J. delivering judgment, says :

> Had the subject of this contract been copper, or if it had been shown in any way to be incidental or ancillary to carrying on the business of copper miners, the contract would have been binding though not under seal.

This language of the court, applied as it was to an executory contract, is in direct conflict with the judgment of the Exchequer in the *The East London Waterworks Co.* v. *Bailey* (5). In *Diggle* v. *The London and*

(1) 6 M. & W. 815.
(2) 4 M. & G. 861.
(3) 8 Q. B. 326.
(4) 16 Q. B. 230.
(5) 4 Bing. 283.

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Blackwall Railway Company (1) where a railway company entered into an agreement not under seal with a contractor that he should execute certain works upon their railway for the purpose of changing the system of locomotion which they then employed, the rope and stationary engine system, to the ordinary locomotive principle, and the contractor had entered upon the work and performed a portion but was dismissed by the company before the works were completed, the Court of Exchequer decided that he could not recover upon a *quantum meruit* for the work done. Pollock C.B. there says :

> The evidence shows that the parties never intended to deal as on an implied contract, such as a corporation may, under certain circumstances, enter into without their seal. They intended to contract by writing and to enter into a solemn and express contract ; and the offer of the plaintiff to do the work was accepted on the faith that there would be such a contract. It is, however, suggested that under the act incorporating the company the defendants were competent to contract by their directors without writing, merely by a resolution communicated to the plaintiff authorizing him to set about the work, and I am not quite prepared to say that might not be the case ; for there is a material distinction between the clauses of this statute and those in *Cope* v. *The Thames Haven Dock Company* (2) cited for the defendants ; but assuming that the directors here could so contract by resolution communicated to the plaintiff without writing (about which, being a matter of some doubt, I am not prepared to give an opinion) ; assuming also, as to which there can be no doubt, that they could contract by writing under the hands of three of them ; assuming also that they could contract under the seal of the company ; the foundation of my judgment is that there is no contract under seal, none signed by three directors, and none entered into under such resolution of the directors.

This case was not the case of a work which had been completely executed under a parol contract which work the corporation for whom it had been so executed had accepted as completed in accordance with the terms of the parol contract, and enjoyed the

(1) 5 Ex. 442. (2) 3 Ex. 841.

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benefit thereof; to such a case, *Diggle* v. *The London and Blackwall Railway Company* (1) cannot apply; much less can it apply to a case in which, during the progress of the work which was within the express purposes for which the corporation was created, the contract was recognized, adopted and acted upon as valid by resolutions of the governing body of the corporation, and by like resolutions was partly paid for and finally accepted as completed. The case of *Cope* v. *The Thames Haven Dock Co.* (2) referred to by the Chief Baron in *Diggle* v. *The London and Blackwall Railway Co.* (1), was a decision merely to the effect that where a section of the act incorporating the company had prescribed certain forms to be observed by directors of the company in all contracts entered into by them to be binding on the company, a person purported to have been appointed an agent of the company to enter into certain negotiations with another company by the directors, but not in the manner prescribed in the act of incorporation, could not sue the company under such contract for the services rendered by him in executing the agency so purported to have been conferred upon him. In *Finlay* v. *The Bristol and Exeter Railway Company* (3) where the defendants had occupied certain premises of the plaintiff for two years at a fixed rent under a parol demise, and at the expiration of the two years continued in occupation without any new agreement for three months when they left the premises, paying, however, for the three months at the rate they had previously paid, it was held by the Court of Exchequer in 1852, in an action against the company for the rent for the nine months of the year after the company had ceased to occupy the premises, that the landlord could not recover on a count for use and occupation for they

(1) 5 Ex. 442.

(2) 3 Ex. 841.

(3) 7 Ex. 409.

did not occupy ; and that no contract to occupy the premises for another year could be implied from the continuance of the company in occupation for the three months subsequent to the expiration of the two years ; that as against a corporation no contract could be implied from conduct ; and so that under the circumstances, there having been no contract under seal, the plaintiff had no action against the company. This decision appears to have no application upon the question of the liability of a corporation to pay for work executed for them under a parol contract in respect of a matter within the purposes for which the corporation was created, and which work the corporation have accepted as completed within the terms of the contract, and continue to enjoy the full benefit thereof. In *Clarke* v. *The Cuckfield Union* (1) it was held in 1852 that the guardians of a poor law union, who at a board properly constituted and authorized to enter into contracts give orders to a tradesman to supply and put up water closets in the Union workhouse and he puts them up and the guardians approve and accept them, they cannot afterwards in an action against them as a corporation for the price defend themselves by showing that there was no contract under seal, for that the purposes for which the guardians were made a corporation require that they should provide such articles. Wightman J. after reviewing all the cases, says:

> The question is whether the demand in question comes within any of the recognized exceptions to the general rule. I am disposed to think it does, and that wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect * * * and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods supplied and accepted by the corporation, and the whole consideration for payment

(1) 21 L. J. Q. B. 349.

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executed, the corporation cannot keep the goods or the benefit and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal was wanting and then say—no action lies, we are not competent to make a parol contract, and we avail ourselves of our own disability.

The principle thus enunciated is applicable to every corporation; it is not limited in its application to trading corporations only; exceptions to the common law rule as recognized in the case of trading corporations rest upon principles equally applicable to every corporation aggregate. The judgment of Wightman J. in *Clarke* v. *Cuckfield Union* (1) recommends itself to my mind as founded upon the plainest principle of justice; it is based upon precisely the same principles as that upon which the Court of Queen's Bench held in *Paine* v. *The Strand Union*, (2) that under the circumstances of that case the action did not lie, and in *Sanders* v. *St. Neot's Union* (3), that under the circumstances of that case the action well lay, which principle may be thus enunciated, namely, that a corporation which has received the full benefit of a parol contract made with it for the execution for it of work within the purposes for which the corporation was created, and has accepted the work so contracted for as completely executed within the terms of the parol contract, cannot be permitted to set up to an action for the price the fraudulent defence that although the corporation has received the full benefit of the contract they can claim exemption from payment of the price upon the ground that the contract under which they procured the work to be executed for them was not under the corporate seal. *Smart* v. *West Ham Union* (4) decided in 1885 has not much bearing upon the point under consideration. The deci-

(1) 21 L. J. Q. B. 349.
(2) 8 Q. B. 326.
(3) 8 Q. B. 810.
(4) 10 Ex. 867.

sion of the Court of Exchequer in that case was, that assuming the appointment of a collector of rates by the guardians of a union to be valid although not under the corporate seal, a point which was not decided, still the act of parliament 4 & 5 Will. 4, ch. 76, which authorized the guardians to make the appointment, did not make them liable for payment of the collector's salary.

In *The Australian Steam Navigation Co.* v. *Marzetti* decided by the Court of Exchequer in 1855 (1) the case was that the company had by parol contract bought from the defendant large quantities of ale for the use of steamships which their act of incorporation authorized them to employ for the carrying of the mails and passengers and cargo. The ale for which they had paid proved to be unsound, unwholesome and unfit for use, and thereupon the company sued the defendant in assumpsit for not furnishing ale of the quality contracted for and for furnishing ale unfit for use. To an objection that the contract under which the ale had been supplied was not under the corporate seal it was held that such objection could not be entertained, Pollock C.B. there saying:

> It is now perfectly established by a series of authorities that a corporation may, with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public convenience and is in accordance with common sense.

This language of the Chief Baron seems to me, I confess, to be in affirmance of the principle as laid down by the Queen's Bench in *Paine* v. *The Strand Union* (2); *Sander* v. *St. Neots Union* (3), and *Clarke* v. *The Cuckfield Union* (4). In *Henderson* v. *The Australian Steam Navigation Co.* decided in 1855 (5) it was held by the Court of Queen's Bench that the corporation were liable under

(1) 11 Ex. 228.
(2) 8 Q. B. 326.
(3) 8 Q. B. 810.
(4) 21 L. J. Q. B. 349.
(5) 5 E. & B. 409.

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a contract made by their directors, not under the corporate seal, to pay remuneration for services rendered in bringing home a disabled vessel. Wightman J. there in plain terms reaffirms the principle upon which he proceeded in *Clarke* v. *The Cuckfield Union* (1), namely :

> That the general rule that a corporation cannot contract except by deed admits of an exception in cases where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created.

And Erle J. says :

> I am also of opinion that there should be judgment for the plaintiff on the ground that the contract was made for a purpose directly connected with the object of the incorporation, as it was a contract to bring home one of their ships the company being incorporated to trade with ships.

He then proceeds to show that this principle is recognized in *Beverley* v. *Lincoln Gas Co.* (2) ; in *Sanders* v. *St. Neot's Union* (3) ; in *Clarke* v. *Cuckfield Union* (1) ; and in *Copper Mining Co.* v. *Fox* (4) ; and he might have added *Paine* v. *The Strand Union* (5) ; and also by Pollock C.B. in *Australian Steam Navigation Co.* v. *Marzetti* (6), only that this case was not decided in the Exchequer Court until two days after the delivery of judgment in *Henderson* v. *The Australian Steam Navigation Company* (7). The learned judge then proceeded to show that, in his opinion, the principle upon which the court was proceeding did not come in question in *The Mayor of Ludlow* v. *Charlton* (8), or in *Arnold* v. *The Mayor of Poole* (9), for as to these cases he says :

> It is quite clear that the mayor, aldermen and burgesses of the borough of Ludlow were not incorporated for the purpose of altering stables

(1) 21 L. J. Q. B. 349.
(2) 6 A. & E. 829.
(3) 8 Q. B. 810.
(4) 16 Q. B. 230.
(5) 8 Q. B. 326.
(6) 11 Ex. 228.
(7) 5 E. & B. 409.
(8) 6 M. & W. 815.
(9) 4 M. & G. 861.

(which was the work for executing which the contract, sought to be enforced in that case, was entered into). nor the mayor, aldermen and burgesses of the borough of Poole for the purpose of litigation. There is more difficulty, he proceeds to say, in reconciling some of the other decisions of the Court of Exchequer with this principle, and *Diggle* v. *The Blackwall Ry. Co.* (1) may, perhaps, be in direct conflict with it. Perhaps it may be distinguished on the ground that the contract there was for the purpose of changing the railway from a line worked by stationary engines to a line for locomotives, and therefore in its nature unique and such as could occur only once in the life time of the corporation. Unless it can be distinguished on that ground the case is in conflict with the other authorities. I do not pretend to overrule the decision of a court of co-ordinate jurisdiction, but if *Diggle* v. *The London and Blackwall Ry. Co.* (1) is in conflict with the authorities laying down this principle I adhere to them and not to it.

I have already endeavoured to point out that it may, perhaps, be distinguished upon another ground, namely, that the moneys sought to be recovered there were not for a completed work which the company had accepted as completed and enjoyed the full benefit of, and the court held that for so much of the work that had been done when the company prevented the plaintiff from proceeding further he could not recover as upon an implied assumpsit, the evidence having shown that the parties never contemplated dealing as on an implied contract. This case appears to me to have little bearing upon a case where the whole work contracted for by parol has been completed and has been received by the company as completed and enjoyed by them and they seek to avail themselves of the defence that the contract was not under their corporate seal, and that, therefore, they are under no obligation to pay for the work of which they enjoy the benefit.

In *Reuter v. The Electric Telegraph Company* (2), decided in 1856, it appeared that by the deed of settlement of the company the directors were to manage

(1) 5 Ex. 442. (2) 6 E. & B. 341.

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the company's business, but there was a special provision in the deed that all contracts above a certain value should be signed by at least three directors or sealed with the seal of the company under the authority of a special meeting. The plaintiff sued the company on an agreement involving a sum above the prescribed value. The matter of the contract was within the scope of the company's business but it was not signed by three directors nor under the seal of the company; it was made by parol with the chairman who had entered a memorandum of it in the minute book of the company. It was recognized in correspondence with the secretary, and the plaintiff did the work and received payments on account of it by cheques, which payments passed into the accounts of the company. On a case stating these facts, with power to draw inferences of fact, it was held that the contract, although not signed as required by the deed of settlement by three directors, nor under the company's seal, was ratified by the company by the conduct above and being so ratified was binding. In *London Dock Company* v. *Sinnott* (1), A.D. 1857, the action was upon an executory, not upon an executed, parol contract. The defendant had tendered for a contract with the plaintiffs for scavenging the London docks for a year, but when a contract for the performance of the work in accordance with the conditions contained in his tender was presented to him he refused to sign it, and it was held that no action would lie against him for such refusal for that no power to enter into such a contract by parol is conferred upon the corporation of the London docks, and that the plaintiffs did not bring themselves within any of the exceptions to the general rule that a corporation aggregate can only be bound by contracts under the seal of the corporation.

(1) 8 E. & B. 347.

The case simply decides that a parol contract with a corporation aggregate to enter into and sign a contract binding in law with them is not recognized to be an exception to the general rule that corporations aggregate can contract only under their corporate seal.

In *Haigh* v. *North Bierley Union* (1) it was held by the Queen's Bench, in 1858, that where a plaintiff had been employed under resolutions of the board of guardians to do certain work for them, but no contract was made under the seal of the board, the plaintiff was entitled to recover in assumpsit for the work and labour performed by him. Erle J. there in very clear language affirms *Sanders* v. *St. Neot's Union* (2) and *Clarke* v. *The Cuckfield Union* (3) as laying down the principle that an action lies against the guardians of a union to recover money for work and labour though performed under a contract not under seal. And he says that the question, therefore, before the court was one rather of fact than of law, namely, whether the work performed by the plaintiff was incidental to the purposes for which the guardians were incorporated, and he was of opinion that it was. Compton J. concurred, but felt, as he said, a difficulty in distinguishing the case from *The London Dock Company* v. *Sinnott* (4). But with great deference the distinction is to my mind very apparent, that being an action at suit of the corporation for breach of a parol contract to enter into a binding contract, which action could not be maintained as the corporation were under no obligation to enter into a contract under seal with the defendant if he had called upon them to so do and they had refused. But *Haigh* v. *North Bierley Union* (1) was an action against the corporation to recover the price or value of work completely executed for them under a

(1) E. B. & E. 873.
(2) 8 Q. B. 810.
(3) 21 L. J. Q. B. 349.
(4) 8 E. & B. 347.

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parol contract but in relation to matters within the purposes of which the corporation was created, and of which they had received and enjoyed the benefit.

In *Laird* v. *The Birkenhead Railway Co.*(1) the plaintiff, having under the terms of a parol agreement with the railway company constructed a tunnel under land lying between a coal yard of the plaintiff and a station on the railway of the defendants for the use of the plaintiff by way of communication between his coal yard and the defendants' station, filed his bill to enforce specific performance by the railway company of the parol contract on their part, to which bill the company set up the defence that the contract was not under their seal and so was not binding upon them. This defence was overruled by Sir W. Page Wood V.C., in 1859, who in the course of his judgment made use of the following language :

> I must say that when works of this kind are commenced in this way and carried on continually in the presence of the company's servants, for all the purposes of knowledge and acquiescence the company are bound, so far as the agency of the servants goes, just as much as individuals would be. The consequence of what took place was that with the full knowledge therefore of the company, under the eyes of their servants, the plaintiff proceeded to lay out £1,200 and the tunnel was completed.

And again he says :

> I very much doubt, looking at the authorities, whether having allowed the plaintiff to lay out his money which could only be for a particular purpose they can now break up the whole matter and say, you have been very foolish ; and he overruled the objection.

In *Wilson* v *West Hartlepool Ry. Co.* (2) where the plaintiff filed his bill against the company for specific performance of an agreement for the purchase of a piece of land entered into with the plaintiff by the defendants through the medium of an agent, who, however, had not been appointed under the corporate

(1) 6 Jur. N. S. 140. (2) 10 Jur. N. S. 1064.

seal, Sir John Romilly M. R. upon the authority of *The London and Birmingham Ry. Co.* v. *Winter* (1) held that the directors of the company having held out to the world a person as their agent for a particular purpose could not afterwards dispute the acts done by such person within the scope of the agency, which he held the contract sued upon to be, upon the ground that the agent had not been appointed under their corporate seal; and upon the ground of the contract being within the scope of the agency, as he conceived it to be, as well as upon the ground of acts done in accordance with the contracts by the servants and officers of the company which were referable to the contract and to nothing else, he decreed a specific performance of the contract. Upon appeal to the Court of Appeal in chancery (2) Lord Justice Turner, so far as the case rested upon any direct authority having been given by the directors to the person who entered into the contract to enter into it, was in favour of the defendants.

But then it was said (he proceeds) on the part of the plaintiff that the directors ratified the contract, and I think they must be held to have done so. Upon this contract being entered into the machinery belonging to the plaintiff which had been deposited on some lands on the west of the railway, which the plaintiff alleges he had previously bought from the company, was brought over to the land in question and there deposited. Other machinery belonging to the plaintiff which had been landed at the company's harbour was also brought by the company's waggons to and deposited on this land; the plaintiff was let into possession of the land; the land was measured by an officer of the company; the company laid down lines of rails for the purpose of communication between this land and their main line of railway, and they made borings in the land. These acts were in conformity with the contract and they amount, I think, to representation by the defendants to the plaintiff that the contract was a subsisting and valid contract.

And so he held the acts to be a ratification of the

(1) Cr. & Ph. 57. (2) 11 Jur. N. S. 124.

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contract and in part performance of it. He then proceeds to state the principles upon which the court proceeds in such a case, namely, that it would be a fraud to permit the defendants to defeat the contract. He says:

> The court proceeds in such cases on the ground of fraud, and I cannot hold that acts which, if done by an individual, would amount to fraud ought not to be so considered if done by a company. * * * * There is authority for saying that in the eye of this court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it.

He then deals with a question which was raised by the defendants whether the contract ought to be held binding on the company, having regard to the statutory provisions affecting the company, and upon this point he says:

> It is not disputed that the directors had power on behalf of the company to sell the land in question, and having that power it must, as it seems to me, have been competent for them to ratify a contract made by the manager of the company for the sale of it. They in fact ratified this contract.

Then holding that apart from the enactment of any statutory provisions to the contrary the court could not refuse specific performance of the contract, he entered upon the enquiry whether certain statutory provisions relied upon in argument had made any alteration, and he held that they had not, saying:

> These provisions are contained in 8 & 9 Vic. ch. 16 sec. 97. The legislature has in this section pointed out modes in which the powers of directors to contract may lawfully be exercised, and has enacted that all contracts made according to these provisions shall be binding and effectual; but it has not said that contracts made in other modes shall not be binding and effectual where there is power so to make them, and certainly it has not said that any equity which may have existed in the court before these provisions were introduced shall no longer exist. The act, it is to be observed, is in the affirmative, and affirmative acts are not generally to be construed so as to take away pre-existing rights or remedies. Had this been intended I cannot but think that it would have been expressed.

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He was of opinion, therefore, that the decree of the Master of the Rolls was right. Lord Justice Knight-Bruce, while not dissenting from any of the principles laid down by Lord Justice Turner, was of opinion that a decree for specific performance should not have been made for the reason solely that he thought there were some provisions in the contract which could not be enforced.

In *Nicholson* v. *The Bradfield Union* (1) to an action for the price of coal sold and delivered to the defendants in 1866, under a parol contract, the corporation set up by way of defence that the contract was invalid not being under the corporate seal. The court overruled the objection and rendered judgment for the plaintiff upon the authority of *Clarke* v. *The Cuckfield Union* (2), Blackburn J. who delivered the judgment of the court, saying:

> It is not necessary to express any opinion as to what might have been the case if the plaintiff had been suing in this court for a refusal to accept the coals, or any other breach of the contract whilst still executory, or how far the principle of the *London Dock Company* v. *Sinnott* (3) would then have applied to such a contract. The goods in the present case have actually been supplied to, and accepted by, the corporation. They were such as must necessarily be from time to time supplied for the very purposes for which the body was incorporated, and they were supplied under a contract, in fact, made by the managing body of the corporation. If the defendants had been an unincorporated body nothing would have remained but the duty to pay for them. We think that the body corporate cannot under such circumstances escape from fulfilling that duty merely because the contract was not under seal. The case of *Clarke* v. *The Cuckfield Union* (2) is in its facts undistinguishable from the present case.

Upon a careful consideration of these cases, and of the manner in which the governing principle is discussed and applied in them, it is obvious, I think, that the principle which is to govern is equally applicable to

(1) L. R. 1 Q. B. 620. (2) 21 L. J. Q. B. 349.
(3) 8 E. & B. 347.

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all corporations aggregate, whether they be or be not trading corporations; and it cannot, I think, admit of a doubt that the great weight of authority deducible from those cases is that the principle upon which *Paine* v. *The Strand Union* (1) proceeded, which was the same as that upon which *Sanders* v. *St. Neot's Union* (2) proceeded, and upon which also was based the judgment in *Clarke* v. *The Cuckfield Union* (3), and which was expressly affirmed and acted upon in *Henderson* v. *The Australian Steam Navigation Company* (4), and several others of the above cases, is the true principle; and that *The Mayor of Ludlow* v. *Charlton* (5), unless it is, for some such reason as that suggested by Erle J. in *Henderson* v. *The Australian Steam Navigation Company* (4), or that hereinbefore suggested by me, or for some other reason, distinguishable from, and in so far as it is at variance with, *Clarke* v. *The Cuckfield Union* (3), and the other cases which proceeded upon the principle of that case, is not law. All of the above cases came under review in the *South of Ireland Colliery Company* v. *Waddle* (6), and the judgment in that case and the principles therein laid down, as well those applicable to executory parol contracts with corporations, as those applicable to such contracts as have been completely executed, approved as they have been in such emphatic language by the judgment of the Exchequer Chamber, must be taken to be now established law unless and until a court of higher authority shall decide otherwise, an event which I venture to think will never take place and which, in my opinion, cannot take place without doing violence to every principle of justice, public convenience and sound sense. As regards executed parol contracts, with which alone we

(1) 8 Q. B. 326.
(2) 8 Q. B. 810.
(3) 21 L. J. Q. B. 349.
(4) 5 E. & B. 409.
(5) 6 M. & W. 815.
(6) L. R. 3 C. P. 463.

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are concerned in the present case, the judgment of the Exchequer Chamber in *South of Ireland Colliery Company* v. *Waddle* (1) has established that exceptions to the common law rule are no longer limited to matters of frequent occurrence and small importance; that it is a matter of indifference whether the amount involved in the contract be £50 or £50,000; that in the language of the Chief Baron Pollock in *Australian Steam Navigation Company* v. *Marzetti* (2), it is now formally established that with respect to all matters within the purposes for which the corporation was created it may deal without seal; and that where the managing body of a corporation aggregate contracts by parol for the execution of any work in respect of a matter within the purposes for which the corporation was created, and the work has been executed in accordance with the contract and accepted as complete, it would be a fraud in the corporation to refuse to pay for the work so executed the stipulated price, or in the absence of a stipulated price the value thereof, and so to repudiate the contract upon the ground that it was not executed under the corporate seal; and therefore, upon every principle of justice, public convenience and sound sense, they cannot in the absence of a special statutory enactment affecting the particular case be permitted to urge such a defence to an action instituted to recover from them the price or value of the work. We have applied this principle in this court in two cases, viz.: in *The London Life Assurance Company* v. *Wright* (3) and *The Canada Central Railway Company* v. *Murray* (4) In *Crampton* v. *Varna Railway Company* (5) it was held by Lord Chancellor Hatherly that the person who

(1) L. R. 3 C. P. 463.
(2) 11 Ex. 228.
(3) 5 Can. S. C. R. 466.
(4) 8 Can. S. C. R. 313.
(5) 7 Ch. App. 562.

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had executed certain work for the company under a parol contract entered into with him could have no relief against the company in a court of equity, because the claim was for a mere money demand over which courts of equity in England never assumed jurisdiction. It was further held, that in the particular case the contract was wholly invalid as not executed under the corporate seal, an objection upon which ground neither a court of law or equity could reject, because by an express provision in the act incorporating the company it was enacted that

> all contracts and agreements to be made by the company involving sums of more than £500 (which the contract in question did) shall have the common seal affixed thereto together with the signatures of at least two members of the council and the secretary.

The Lord Chancellor, however, entertained no doubt that in a proper case for a court of equity to entertain the court would have no difficulty in granting relief against the common law rule requiring corporation contracts to be under the corporate seal, for he says that he thinks the arm of the court always strong enough to deal properly with such cases.

> There might, he says, be a contract without seal under which the whole railway was made, and of which the company would reap the profit, and yet it might be said that they were not liable to pay for the making of the line. When any such case comes to be considered I think there will be two ways of meeting it. It may be, and perhaps is so in this case, that the contractor has his remedy against the individual with whom he entered into the contract ; or it may be that the court, acting on well recognized principles, will say that the company shall not in such case be allowed to raise any difficulty as to payment.

I have already referred to some cases where those principles have been recognized and acted upon. Thus in all the courts of law and equity it may be asserted to have become, at least in 1868, when, in *South of Ireland Colliery Company* v. *Waddle* (1), it was

(1) L. R. 3 C. P. 463.

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by the Court of Exchequer Chamber established, too firmly to be further questioned, that where a corporation aggregate have by their managing body procured work to be done for them within the purposes for which the corporation was created under a parol contract, and where the managing body of such corporation has accepted the work as completed under the parol contract, and the corporation have received the benefit thereof, it would be a fraud in the corporation to resist payment of the price or value of the work upon the ground that the contract was not executed under their corporate seal, and therefore, unless there be some express statutory enactment to the contrary governing this particular case, they cannot upon every principle of justice and sound sense be permitted to do so, either in courts of law or equity, whose principles as to prevention of the committing of such a fraud are identical.

Hunt v. *Wimbledon Local Board* (1), and *Young* v. *The Mayor and Corporation of Leamington* (2), proceeded upon the same principle as did *Crampton* v. *Varna Railway Company* (3), namely, that there was a special statutory enactment governing the cases. The questions arose under the Public Health Act of 1875, 38 & 39 Vic. ch. 55, the 174th sec. of which enacted that:

With respect to contracts made by an urban authority under this act the following regulations shall be observed :—

1st. Every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority.

This clause was held to be obligatory and not merely directory, and as the amounts involved in those cases respectively did exceed £50, and the contracts were not entered into under the corporate seal as required

(1) 4 C. P. D. 48. (2) 8 App. Cas. 517.
(3) 7 Ch. App. 562.

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by the statute, they could not, although executed, be enforced against the corporations who contested their liability for want of the seal. They have no application in the present case, save only that parliament when passing the Board of Health Act of 1875, had been, as well may be assumed, aware of the state of the law upon the subject of parol contracts with corporations aggregate as laid down by the courts in the above cases, and more especially of the latest decision in *The South of Ireland Colliery Company* v. *Waddle* (1), affirmed in the Exchequer Chamber which finally established that the exception from the common law rule is no longer limited to matters of frequent occurrence and small importance, and that it is a matter of indifference whether the amount involved be £50 or £50,000 ; and it was no doubt for this reason that it was especially provided by the act of parliament that corporations created by the Board of Health Act should have no power to enter into any contract in respect of a matter exceeding £50, otherwise than under their corporate seal, leaving the law as finally established by the Exchequer Chamber in the *South of Ireland Colliery Company* v. *Waddle* (1), in respect of corporations governed only by the common law, to apply to contracts entered into by the corporations created by the act of 1875 wherein the amount involved did not exceed £50.

Now the evidence in the present case has established beyond controversy the following facts, namely, that one John F. Grant in September, 1882, under his hand, executed a contract for the construction of the bridge in question, which contract had been drawn up for his signature by the clerk of the municipality within the limits of which the bridge was required to be erected ; by this contract Grant undertook

(1) L. R. 3 C. P. 463.

to build the bridge in question for $800.00, to be paid to him by the municipality as follows, viz.: $200.00 at the commencement of the work, $200.00 more at its completion, and the balance of $400.00 one year after the completion of the work. Before the bridge was commenced the legislature divided the municipality into two municipalities; the new municipality within which was the place where the bridge was to be erected was organised in January, 1884, and its council met immediately thereupon.

Before anything had been done towards the erection of the bridge under the agreement signed by Grant in 1882, the question of the erection of the bridge was discussed by the council of the new municipality at several meetings at which or at some of which Grant was present, and the council having satisfied themselves as to the terms of the contract signed by Grant at a meeting of council approved thereof and directed Grant to proceed with the work upon the terms of the contract he had signed, and the $200.00 payable at the commencement of the work was subsequently paid to Grant in pursuance of a resolution of the council to that effect passed on the 29th March, 1884.

Thereupon Grant proceeded to erect the bridge. In the month of November, 1884, in consideration of $500.00 paid to him by the plaintiff he assigned to the plaintiff his contract with the municipal corporation for the building of the bridge, and thereby undertook to assist the plaintiff in the completion thereof. Plaintiff thereupon proceeded with the erection of the bridge. In the month of January, 1885, Grant gave an order upon the municipality in the following words to one Clendinning:

Municipality of North Dufferin will please pay W. H. Clendinning $37.00 for sawing plank for bridge over Boyne River in township 6,

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R. 4 W., and charge to account of my contract for that work and oblige

JOHN F. GRANT.

In acceptance of this order the municipality gave an order or cheque signed by the reeve and clerk upon their treasurer.

To THE TREASURER OF NORTH DUFFERIN.

CARMAN, MANITOBA, 20th Sept., 1885.

Pay to the order of W. H. Clendinning the sum of thirty-seven dollars, account of order by J. F. Grant on bridge account.

R. P. ROBLIN,
Reeve.

J. H. HAVERSON,
Clerk.

Shortly after this, but when in particular does not precisely appear, the plaintiff sent to the council a copy of Grant's assignment of his contract to the plaintiff. Afterwards in the month of April, 1885, a resolution was passed by the council of the municipality which was transmitted to Grant by the clerk of the council as follows:

Moved by councillor Morrison, seconded by councillor Reekie, that the clerk be instructed to notify John F. Grant, that unless he takes immediate steps to complete the bridge between sections 28 and 33, township 6, R. 4 W., his contract will be annulled and the council will proceed to complete the same.—Carried.

You will please govern yourself according to above motion and accept this notice.

Yours truly,
J. H. HAVERSON,
Clerk.

Under these circumstances it is impossible to come to any other conclusion than that the original parol contract with Grant, made with the corporation as formerly constituted, was ratified and adopted and made their own by the managing body of the municipality as subsequently constituted, who alone had power to bind the corporation. It was further proved in evidence that the bridge was an actual necessity for the public

convenience of the inhabitants of the municipality, that is to say, of the corporate body. That the erection of the bridge was a matter within the purposes for which the municipal corporation was created cannot, in my opinion, admit of a doubt. By the 19th section of the Manitoba Act respecting municipalities, passed on the 14th February, 1880, roads and bridges are enumerated among a long list of other matters which are placed under the jurisdiction of the councils of every municipality. By an act passed on the 23rd December, 1880, it is expressly enacted that:

> All roads and road allowances within the province shall be held to be under the jurisdiction of the municipality within the limits of which such roads or road allowances are situated, and such municipality shall be charged with the maintenance of the same with such assistance as they may receive from time to time from the Government of the province.

Under this act there can, I think, be no doubt that jurisdiction is vested in the councils of every municipality to construct a bridge over a river crossing a road within the limits of the municipality, so as to unite the termini of the road on either side of the river, and thus to make the bridge when constructed a part of the road. By the act respecting municipalities in the Revised Statutes of Manitoba, passed on the 15th May, 1881, it is enacted in its 20th section that:

> In every municipality the council may pass by-laws for such municipalities in relation to (among other things enumerated) roads and bridges, provided that no by-law shall compel any person bound to perform statute labour on any public highway, road or bridge to perform the same, or any part thereof, at any point more than three miles distant from the land in regard to which the liability to perform the labour is imposed.

By the 111th section of 47 Vic. ch. 11, entitled "an Act to revise and amend the Acts relating to Municipalities," passed on the 29th April, 1884, the same provision is made in the following language:

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'In every city, town or local municipality the council may pass by-laws for such municipalities in relation to (among other things enumerated) roads and bridges, and the construction and maintenance of roads and bridges wholly within the municipality, provided that, &c.,' as in the identical language of the 20th section of the act of 1881, above quoted.

Now, it has been argued that as these sections authorised the municipal councils to exercise their jurisdiction over roads and bridges by by-laws, they are precluded from exercising their jurisdiction otherwise than by a by-law, and so that no road or bridge could be repaired or made fit to be travelled on unless a by-law should be first passed for the purpose. The answer to this contention is to be found in the language of Lord Justice Turner in *Wilson* v. *West Hartlepool* (1) quoted above. Affirmative words in a statute saying that a thing may be done in one way do not constitute a prohibition to its being done in any other way. The word "may" in the section of the Manitoba act enacting that the councils may pass by-laws, &c., in relation to the several purposes mentioned in the act is by the Manitoba Interpretation Act to be construed as permissive only, not as imperative. Although, therefore, a by-law is a mode by which councils may exercise their jurisdiction over roads and bridges within the municipality, still there is nothing in the above acts affecting municipalities in Manitoba which prohibits the councils from exercising their jurisdiction in any other way. As to the defendants' pleas, that before they had notice of the assignment by Grant to the plaintiff of the former's contract with the defendants, and his causes of action thereunder, they paid certain moneys in the pleas mentioned under a judge's order made at the hearing of a certain garnishee summons sued out by one Glendinning against the

(1) 11 Jur. N. S. 126.

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said Grant, and duly served on the defendants, all that is necessary to say is that the defendants failed to produce evidence in support of these pleas and rested their case upon the contention that the contract was void for want of the corporate seal.

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The appeal must be allowed with costs, and judgment be ordered to be entered for the plaintiff in the court below for $563, together with interest upon $163, part thereof, from the 7th July, 1885, and upon $400, balance thereof, from the 7th July, 1886, together with the plaintiff's costs of suit.

PATTERSON J.—The local municipality of North Dufferin was organized by the statute of Manitoba 46 & 47 Vic. ch. 1, which was passed in July, 1883, and took effect on the first of January, 1884. It consists of the townships 4, 5 and 6, in ranges 3, 4 and 5 west.

By an act passed in 1880, 43 Vic. ch. 1, the province of Manitoba had been divided into municipalities, one of which was called Dufferin North and comprised six townships. Those six townships were by the act of 1883 formed into two municipalities, three of them becoming the municipality of Carlton, and the other three, viz., 4, 5 and 6, in ranges 3, 4 and 5 west the municipality of North Dufferin. The old name of Dufferin North was not continued.

Every municipality formed under the said acts and the inhabitants thereof were declared to be a body corporate. The powers of every such municipality were, by express enactment, to be exercised by the council thereof.

The municipal council of Dufferin North had, in 1882, made an agreement with one Grant for the building of a bridge over the river Boyne upon a road allowance in township No. 6. The price was to be $800; $200 to be paid at the commencement of

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the work, $200 at the completion of it and $400 one year after completion. The defendants allege that that contract was not under the seal of the corporation, but there is no direct evidence in proof of that allegation. Grant had one part or copy of the contract. It was produced at the trial but has since been mislaid, which I regret for I should like to see it. It was signed by Grant but was not under the corporate seal, nor was it signed by any one on behalf of the municipality. But there was another—the original or duplicate original, we are not told which. It was retained by the council but it had unfortunately got out of sight and could not be found by the clerk when the new council wanted to see it in January, 1884, and has not since been found. The following is the information given by the clerk of the old council to the clerk of the new council:

28th January, 1884.

Agreement between J. F. Grant and municipality of North Dufferin has, by some means, got mislaid. I have it some place, but can't tell where just now. I remember the conditions which were, as to payment, two hundred dollars at commencement of work, two hundred on completion, and four hundred in one year from completion.

Said bridge to be subject to an inspector to be appointed by the council. Council expected the bridge to be completed by 1st January, 1883.

I am, yours truly,

CHRIS. F. COLLINS.

To JNO. H. HAVERSON.

The case is discussed in the court below as if it had been established that the original contract was not under seal, not merely that the plaintiff had failed to prove that it was sealed. I cannot adopt that affirmative finding. It is unsupported by any direct evidence. It assumes, what no witness is reported to have said, that the paper retained by Mr. Collins was in all respects like the one given to Grant, not even signed on behalf of one of the contracting parties. I should be

slow to assume that, and should think it more likely that Grant had the paper that was meant to be retained by the council, being the one with Grant's signature, and that one which was to be his voucher as against council was inadvertently kept from him. If the fact were important I should without hesitation presume that the contract was duly sealed. That presumption would be warranted, if not compelled, by the conduct of the whole matter. It would be in support of justice and would not be, as presumptions have often been, opposed to any fact that appears in evidence.

But it is of little or no consequence whether the municipality of Dufferin North was or was not legally bound to Mr. Grant. The defendant municipality did not inherit the burden or the benefit of the contracts of the defunct corporation. That devolution occurred only when a new municipality was coterminous with one of the old ones (1). The defendant corporation has to answer only for its own engagements, and its liability to the plaintiff must depend on the effect of its own doings.

No part of Grant's contract had been performed when the new council took office. That council probably assumed that he was bound to the defendant municipality, and Grant perhaps thought so too. The council procured from Mr. Collins the particulars contained in his letter and urged the doing of the work. Grant was sometimes present at the meetings when the matter was discussed. The reeve gave very distinct and very fair evidence about the matter in his examination and somewhat prolix cross-examination. The substance is contained in this answer:

A. The municipality of North Dufferin were prepared to carry out the conditions of the contract that had been entered into by the old municipality of North Dufferin, and we instructed the clerk to notify Mr. Grant that we would do so.

(1) 47 Vic. ch. 11 s. 434.

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On the 29th March, 1884, a payment of $200 to Grant was included in an order passed in the council for the payment of sundry accounts, and the money was paid to him.

On the 18th of April, 1885, a resolution was passed:

That the clerk be instructed to notify John F. Grant, that unless he took immediate steps to complete the bridge between sections 28 and 33, township 6, range 4 west, his contract will be annulled, and the council will proceed to complete the same.

Then the bridge was built, and on the 4th of July, 1885, it was resolved:

That the bridge over the Boyne river, between sections 28 and 33, township 6, range 4, west, as built by John F. Grant be accepted, and that $200 as per contract be paid into county court, on solicitor's advice less $37, amount already paid on order.

The payment into court was made because the debt had been garnished by a creditor of Grant.

In November, 1884, Grant had assigned his contract to the plaintiff. The plaintiff had completed the bridge and had, on the 25th of June, 1885, given the following notice to the council:

I wish to notify the hon. warden and councillors of the municipality of North Dufferin, that I have completed the bridge over the Boyne river between the north-east ¼ of sec. 28 and the south-east ¼ of sec. 33, township 6, range 4 west. I solicit the hon. council to have it inspected at your earliest convenience, by so doing you will much oblige your humble servant,

DOSITHE BERNARDIN.

That notice led to the resolution of the 4th July, and the resolution and payment were communicated to the plaintiff by the clerk of the municipality, by the following letter:

CARMAN, MANITOBA, 7th July, 1885.

D. BERNARDIN, Esq.

DEAR SIR,—In answer to your letter to the council relative to completion of Grant bridge: I beg to inform you that the same has been accepted, and by order of council $200 will be paid into county court (less amount of previous orders paid) on advice of municipal solicitor.

You are, no doubt, aware that Grant's contract money has been garnished by W. H. Clendinning, which necessitates this step.

Yours truly,

J. H. HAVERSON.

The $37 had been paid to Clendenning in April, 1885, on an order given to him by Grant after the assignment to the plaintiff.

The plaintiff maintains that the $200 thus paid to the creditor of Grant ought to have been paid to him, and he sues for that sum together with the deferred instalment of $400 which was payable one year after the completion of the work, or in July, 1886.

The defence is that the municipality is not liable to pay for the bridge because there was no contract under its corporate seal.

That defence was sustained by Mr. Justice Bain who tried the action, and afterwards by the Chief Justice of Manitoba and Mr. Justice Killam in *banc*, Mr. Justice Dubuc dissenting.

The case presents some striking features. The statute which incorporates the municipality declares that the powers of the body politic shall be exercised by the council thereof. The council at its formal meetings, and acting in furtherance of what it deemed to be the interest of the municipality, urge Mr. Grant to build the bridge on terms that had been agreed on with another body, and which the council and Grant were willing should be the terms between them. Grant having been set in motion, a sum of $200 is paid to him on account of the work and in accordance with the terms of the original agreement. The work is then completed, partly by Grant and partly by the plaintiff as transferee of the agreement. The plaintiff formally notifies the council of the completion of the work. It is, thereupon, inspected on the part of the council and approved, and the council's approval and

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acceptance of the work formally embodied in a resolution which is formally communicated to the plaintiff. Something further is done. The $200 which was to be paid on the completion of the work is set apart for that purpose and is actually paid, but by an oversight is paid to the wrong person. A year later $400, half the price of the work, should also have been paid.

The bridge is on one of the travelled highways of the municipality, crossing a river which the reeve tells us was impassable without it. It is as much a part of the highway as the gravel or broken stone that metals the roadway. It has been kept in repair by the municipality. But the plaintiff is told that he has no claim on the municipality for payment because he has no contract under the common seal of the corporation.

If the decision proceeds upon a true conception of the spirit and effect of the municipal system adopted for the Province of Manitoba it proves that, in one particular at least, the system is not well fitted for the conduct of the affairs of rural communities such as the municipality of North Dufferin. The settlers in these communities, recruited from many nations, being for the most part tillers of the soil, and with no pretension to knowledge of the intricacies of the English law relating to corporations, may find it hard to understand why a man is not entitled to be paid by the municipality for work of a character not only useful to the community but one of the most essential local improvements, which he has done at the express instance of the governing body of the municipality, the body charged by statute with the management of affairs, and which that body has further by express and formal action approved and accepted.

We must, of course, be careful not to let the hardship of the plaintiff's position affect our views of the law further than as it illustrates the importance of inter-

preting a statute like the one before us so as to make the working of it by the members of these rural municipalities, or local municipalities as they are called in the statute, as simple and beset with as few intricacies and pit-falls as the language of the law will allow.

I think, however, that the plaintiff is entitled to have the evidence treated as favourably as it will fairly warrant on one or two subsidiary matters of fact, which may or may not be important but in regard to which a somewhat strict view seems to have been taken. Thus, the learned judge at the trial remarks that no evidence was given to show the necessity of the work further than the bridge was across the river at a well travelled highway. That was by itself pretty good evidence but there was more than that. The action of the two successive councils was evidence of the necessity for the work furnished by those whose duty it was to deal with the matter, and there was in addition the following testimony from the reeve who was the only witnessed examined :

Q. After the completion of that bridge, after its acceptance on the 4th July, what has been done with it since, between that time and now ? A. It has been used by the municipality.

Q. What is it ? A. It is a bridge over the Boyne river, on the road allowance, between sections 28 and 33.

Q. Is that a still travelled road ? A. Yes, a regular highway.

Q. Do you think you would be able to get across if there was not a bridge ? A. No.

Q. Is it a necessity ? A. Yes.

Q. Who has taken charge of the bridge with regard to repairs, &c., since that time ? A. The municipality.

Q. The present defendants ? A. Yes.

Again, Mr. Justice Killam, with whose judgment the learned Chief Justice concurred, remarked that it did not appear whether the $200 ordered to be paid to Grant on the 24th of March, 1884, was paid, though the plaintiff gave credit for it, apparently overlooking the resolution of the 4th of July, 1885, which provided

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for the second $200 that was due on the completion of the work, from which the inevitable inference as against the council is that the first $200 had been paid. In my view of the statute of 1884 the 44th section has an important bearing on the question before us.

> The powers of every such municipality shall be exercised by the council thereof.

I am unable to construe this section as it has been construed by the majority of the court below. The view there held will best appear from an extract from the judgment of Mr. Justice Killam.

> The plaintiff's counsel has referred us to the 44th section of the Municipal Act of 1884, which provides that, "The powers of every such municipality shall be exercised by the council thereof." What are the powers of the municipality and in what mode can the council exercise them?
>
> The 43rd section provides that the municipality "shall have all the rights and be subject to all the liabilities of a corporation," and especially to acquire, &c., property, to sue and be sued, to "become parties to any contracts or agreements in the management of the affairs of the said municipality," &c. The language of the section is all very general, and if interpreted generally would involve the right to make any kind of contract for any purposes whatever. Such can never be considered to be intended. We must look elsewhere to find the objects and purposes for which these corporations are created, the "affairs" to be managed. We find no mention of the roads and bridges or similar local improvements, to be constructed or made by the municipality itself, until we come to the 111th section, under which, "the council may pass by-laws for such municipality in relation to matters coming within the classes of subjects hereinafter enumerated, that is to say: (1) The raising of a municipal revenue * * * (2) The expenditure of the municipal revenue. (3) Roads and bridges and the construction and maintenance of roads and bridges wholly within the municipality," &c., and giving a large number of other subjects.
>
> Except under these provisions the act itself gives the municipalities no power whatever to undertake the construction or maintenance of roads and bridges. The only other authority for their doing so is found in the Act 44 Vic. (2nd sess.) c. 5, if, indeed, that be applicable.

With great respect for the learned judge, who has given us the assistance of a full and able presentation

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of his views upon the controversy in the case, I submit that his mode of looking at this portion of the statute assumes that the legislature took a rather roundabout way of conveying what could, if intended, have been easily said in plain terms. When the 43rd section declares that municipal corporations—

> shall be in law capable of * * * becoming parties to any contracts or agreements in the management of the affairs of the said municipality—

there is no suggestion that we are to look to section 111 to find what is meant by the affairs of the municipality. Nor do I see any reason to be startled by the extent of the power to contract affirmed by the words in their literal force. The limitation of the contracting power to the affairs of the municipality, which is expressed and would have been implied if it had not been expressed, must not be overlooked. Section 43 declares that the municipality shall have all the powers and shall be subject to all the liabilities of a corporation. That covers all the ground. The enumeration that follows—"and especially to acquire," &c., &c.—does not limit the generality of the former expression. It embraces some of the ordinary corporate franchises and bestows some others, such as borrowing powers. The object of the incorporation is to provide for the convenient and efficient management of matters of common interest, "the affairs of the municipality," and amongst those the making and maintenance of roads must have a prominent place. Express power to make or mend roads was not necessary, and the existence of the power is tacitly recognised by the statute in such provisions as those contained in sections 206 to 217 concerning statute labour, and in sections 221, 427, 431 and others respecting the alteration of old roads and the opening of new ones.

Section 111 gives certain powers of a legislative

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character to the council, but does not meddle with its executive functions. It enacts that:

> In every city, town, or local municipality the council may pass by-laws for such municipality in relation to matters coming within the classes of subjects hereinafter enumerated, that is to say:—[Setting out 39 classes of subjects] and such by-laws shall be executory and remain in force until they are amended, repealed or annulled by competent authority, or until the expiration of the period for which they have been made.

The council is thus empowered to make general regulations for the municipality, or to adopt a systematic method of dealing with the subjects there enumerated. All of those subjects, with one or at most two exceptions, are obviously matters that cannot be properly dealt with except under such general regulations. Article No. 3 relates to—

> roads and bridges and the construction and maintenance of roads and bridges wholly within the municipality.

But that a general law on that subject is what is meant, which may regulate the exercise of a power not derived from this section, is apparent not only from the context but from the remainder of the article itself, which is:

> Providing that no by-law shall compel any person bound to perform statute labour on any public highway, road or bridge to perform the same or any part thereof at any point more than three miles distant from the land in regard to which the liability to perform the labour is imposed.

The section is strictly permissive in its form. Some of the subjects enumerated in its 39 articles, probably most of them, would not, without special authorization, be within the scope of municipal management, but others would be so—roads and bridges for example, and the expenditure of the municipal revenue, which is the subject of article 2. A corporation has the same right to pay its way as a natural person has, and the authority given to the council to pass a by-law for the

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municipality in relation to the expenditure of the municipal revenue does not imply anything to the contrary. This topic being collateral to the main enquiry which I shall presently deal with it may be occupying time unnecessarily to refer to authorities, but I may be permitted to cite the resolution of the court in the case of *Sutton's Hospital* (1). I read the passage as it is quoted by Mr. Justice Blackburn in *Riche* v. *Ashbury Railway Company* (2), with an observation thereon made by that learned judge:

But the resolution of the court, as reported by Coke (at p. 30b), was that " when a corporation is duly created all other incidents are *tacite* annexed * * * and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1, by the same to have authority, ability and capacity to purchase ; but no clause is added that they may alien, &c., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c.; that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising, but in a certain form ; that is an ordinance testifying the King's desire, but it is but a precept and doth not bind in law." This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own.

The case of *Evan* v. *Corporation of Avon* (3) places a municipal corporation on the same footing as other corporations, showing that, apart from the municipal corporations act, it has full power to dispose of all its property like a private individual.

One word with reference to the statute, 44 Vic. ch. 5, which is mentioned by Mr. Justice Killam. The 1st section of it enacts that:

All the roads and road allowances within the province shall be held to be under the jurisdiction of the municipality within the limits of which such roads or road allowances are situated, and such munici-

(1) 10 Coke 1.

(2) L. R. 9 Ex. 224, 263.

(3) 29 Beav. 144.

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pality shall be charged with the maintenance of the same with such assistance as they may receive from time to time from the government of the province.

I throw this into the scale along with the considerations I have advanced upon the proposition that the maintenance of roads is one of the affairs of the municipality irrespective of and anterior to any by-law which the council may pass.

A suggestion made in argument that "maintenance" did not include construction, but merely keeping the roads and road allowances in the state the council found them in, can hardly have been made seriously. If a road allowance was simply to be let alone the assistance of the government was not required.

The act of 1883 (1) which divided the province into counties cast upon the county council the duty of erecting and maintaining bridges over rivers that form or cross the boundary lines of municipalities, but made no provision in express terms for bridging rivers that cross roads within a municipality. That was obviously treated as the affair of the municipality.

The English Municipal Corporations Act, 1882 (2), provides that:

> The municipal corporation of a borough shall be capable of acting by the council of the borough, and the council shall exercise all powers vested in the corporation by this act or otherwise.

And, by another section, that the council may from time to time make such by-laws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances, &c., &c., which provision is analogous in principle and also in form, though with less of detail, to section 111.

The English Municipal Corporations Act, 1835 (3), had a provision which may have been equivalent to

(1) 46 & 47 Vic. ch. 1 s. 453. (2) 45 & 46 Vic. ch. 50, ss. 10, 23.
(3) 5 & 6 Wm. 4, ch. 76, s. 6.

section 10 of the act of 1882, but was differently framed. After declaring that a long list of corporate bodies, named in schedules, should take and bear the name of The Mayor, Aldermen and Burgesses of the several boroughs it added :

And by that name shall have perpetual succession and shall be capable in law, by the council hereinafter mentioned of such borough, to do and suffer all acts which now lawfully they and their successors respectively may do and suffer by any name or title of incorporation, &c.

I may have to allude again to these English acts.

It should be noticed, in connection with the topic of the power of the council to act for the corporation, that the Manitoba statute does not prescribe the method by which the council is to act. While it is enacted that every by-law is to be sealed with the corporate seal there is no general provision, such as is contained in the Ontario Municipal Acts, that the powers of the council shall be exercised by by-law. The omission is, I think, significant and it strikes me as being well advised.

It would be useless for me to enter into an examination of the general subject of the liability of a corporation when it has not bound itself by any instrument under its common seal. The subject will be found discussed with sufficient fulness in one or two judgments which I intend to read as part of my argument. The ancient rule, as it is called, has long lost the attribute of inflexibility. The present rule may, not inaptly, be thus expressed : A corporation can be bound only by its common seal unless when it is convenient that it should be bound without it. The range of the so-called exceptions to the rule has reached an extent which will be shown by the judgments to which I allude. I shall merely remark at present that I do not agree with an observation made in the court below

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that cases such as the *Mayor of Stafford* v. *Till* (1) and *Beverley* v. *Lincoln Gas Light Company* (2) where the immediate point was the form of action, are to be regarded as a distinct class of cases on the subject. When the right or liability of a corporation to sue or be sued in assumpsit is discussed the question is the capacity of the corporation to be a party to a simple contract, which is the main question.

Dicta of judges have now and then been addressed to the explanation of the principle of the exceptions, but the explanations given vary a good deal from one another. If stress is to be placed on opinions thus expressed it will be found that the reasons sometimes given for adherence to the general rule show its inapplicability to cases like the present. Take the case of *The Mayor, &c., of Ludlow* v. *Charlton* (3) which is so much relied on against the relaxation of the rule where municipal corporations are concerned. Lord Cranworth (then Rolph B.) who delivered the judgment of the court said, amongst other general observations :

> The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be purely a matter of form and not of substance. * * * The resolution of a meeting, however numerously attended, is after all not the act of the whole body. Every member knows that he is bound by what is done under the corporate seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing : Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation, and the attempt to get rid of the old doctrine by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.

(1) 4 Bing. 75.
(2) 6 A. & E. 844.
(3) 6 M. & W. 815.

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Now let us see how the doctrines thus formulated apply to the case before us. The corporation under the statute of Manitoba (1) consists of the municipality and the inhabitants thereof, a comprehensive definition even if savouring of tautology. The seal would not express the sense of every member of the corporation. It would, if so understood, be a delusion. The statute which creates the corporation invests certain members of it, viz.: the reeve and six councillors, with authority to bind the whole body. "The powers of the municipality shall be exercised by the council thereof." There is no such thing as a general meeting or any other method of managing the affairs of the corporation or ascertaining the corporate will. The seal is therefore a matter of form and not of substance. It may bind the corporation as being affixed by persons authorised to act for the corporation, but is only a formal act.

The rule in the United States is thus stated by Mr. Dillon in section 450 of his treatise on municipal corporations:

> Modern decisions have established the law to be that the contracts of municipal corporations need not be under seal unless the charter so requires. The authorised body of a municipal corporation may bind it by an ordinance, which in favour of private persons interested therein may, if so intended, operate as a contract; or they may bind it by a resolution, or by a vote clothe its officers, agents or committees with power to act for it; and a contract made by persons thus appointed by the corporation though by parol (unless it be one which the law requires to be in writing) will bind it.

Reading this passage along with that which I have quoted from the judgment in *Mayor of Ludlow* v. *Charlton* (2), and with reference to this Manitoba corporation, it seems to me that the action of the council in the matter of the contract in question can be brought under the American doctrines without transgressing the principle expounded by Lord Cranworth.

(1) 7 Vic. ch. 11, sec. 43. (2) 6 M. & W. 815.

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I do not think that what was said by Patteson J. in *Beverley* v. *Lincoln Gas Light Company* (1), partly with reference to the American law a leading decision of which is that of the Supreme Court of the United States in *Bank of Columbia* v. *Patterson* (2), has ever been disapproved. He said:

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> It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded in practice by the courts of the United States in America. The decisions of those courts, though intrinsically entitled to the highest respect, cannot be cited as direct authority for our proceedings; and there are obvious circumstances which justify their advancing with a somewhat freer step to the discussion of ancient rules of our common law than would be proper for ourselves. It should be stated, however, that, in coming to the decision alluded to, those courts have considered themselves, not as altering the law, but as justified by the progress of previous decisions in this country and in America. We, on our part, disclaim entirely the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out; but when we have to deal with a rule established in a state of society very different from the present, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to engraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it which we find to have been established by previous decisions. If that principle, in fair reasoning, leads to a relaxation of the rule for which no prior decision can be found expressly in point, the mere circumstance of novelty ought not to deter us; for it is the principle of every case which is to be regarded; and a sound decision is authority for all the legitimate consequences which it involves.

These remarks seem very pertinent in the present case. The state of society in the province of Manitoba differs widely from that of the ancient days in England. Whatever were the conditions that pointed towards the discussion of the ancient rules of the common law in the United States with less restraint than might be felt in England the same conditions repeat themselves in the new province.

(1) 6 A. & E. 829, 837. (2) 7 Cranch 299.

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The question whether an executory contract made by the council of one of these municipalities, not under the corporate seal, can be enforced against the corporation should, I think, be considered as an open question. It is not necessary now to decide it because this contract is executed. It has not, for the same reason, been fully argued. I therefore say no more with regard to the point than that there is room for argument on both sides of the question.

Regarding the contract as executed, and I have shown why I think that beyond dispute, I think the preponderance of authority, amounting to an overwhelming preponderance, as well as the reason of the thing and the plain demands of justice, concur in favour of the plaintiff's right to recover, even if by reason of the absence of the seal the council could have withdrawn before the work was done.

In the province of Ontario similar questions have often arisen but during the last thirty years they have been decided upon the law as settled by the Court of Error and Appeal in *Pim* v. *The Municipal Council of the County of Ontario* (1). The corporation in that case had made a parol contract for the building of a court house and gaol, and had accepted the buildings but refused to pay for them until compelled by the decision I refer to. Setting aside the point I make as to the effect of section 44 the case may be considered as on all fours with the one in hand. The corporation had possession of the buildings in *Pim's* case and occupied them, but I take it that the acceptance of the bridge in the present case is even more complete, having regard to the expressed approval of the work, and there is moreover as complete an assumption of possession as the nature of the work admits of. To revert to an illustration already used, what was done

(1) 9 U. C. C. P. 304.

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is in effect the same as if the council gave an order or made a contract in any other way, but not under seal, for the supply and laying on the road of so much broken stone at so much a toise, and then, when the work was done, approved and accepted it by formal resolution communicated to the contractor. The bridge case is somewhat stronger because it is proved that the municipality keeps the bridge in repair.

The points which I desire to make on this branch of the case are clearly made and ably supported by Chancellor Blake in the judgment delivered by him in Pim's case. In place of myself traversing the same ground I shall read the report of his remarks as part of my argument. I refer also to what was said on the same occasion by Mr. Justice Hagarty, who is now the Chief Justice of Ontario. The judgment of the Chancellor is as follows :

The Chancellor.—The present state of the law upon the subject is a reproach to the administration of justice in England. It may be that the evil calls for legislative interference, but if the legislature will neither declare the law nor alter it courts of justice are bound to place their decisions upon some principle intelligible to the public and sufficient for their guidance.

It is said, I believe, in the case now under appeal, that the decisions in the English courts harmonise and negative the right of the present plaintiff to relief. But the cases which have arisen since the decision in the court below show that the judgments in the English courts are in direct conflict, and are so treated by the learned judges by whom they were pronounced. In *Smart* v. *The Guardians of the Poor of the West Ham Union* (1) Parke B. says, "The case which has been cited and relied upon for the plaintiff is a case with which I cannot agree. It would in effect overrule several previous decisions of this court"; and Alderson B. adds, "I quite agree with the observation of my brother Parke in reference to the judgment in *Clarke* v. *The Guardians of the Cuckfield Union* (2) as it is directly in opposition to several cases decided by the court upon similar questions. To these cases we should

(1) 10 Ex. 867.

(2) 21 L. J. Q. B. 349 ; 16 Jur. 686.

adhere until they are overruled by a court of error." While in the case alluded to, Mr. Justice Wightman admits his inability to reconcile his own judgment with the cases in the Exchequer; and in *Henderson* v. *The Australian Steam Navigation Co.* (1), which is, I believe, the latest case upon the subject, Mr. Justice Crompton says with becoming candour, "At the same time I cannot distinguish this from *Diggle* v. *The Blackwall Railway Co.* (2), *Homersham* v. *The Wolverhampton Water Works Co.* (3). I cannot disguise from myself that we are deciding the case in opposition to these authorities, which have, however, I believe, excited some surprise." See also and contrast *Clarke* v. *The Cuckfield Union* (4), and *Sanders* v. *St. Neot's Union* (5), with *Diggle* v. *The Blackwall Railway Co.* (2) and *Lamprell* v. *The Guardians of the Poor of the Billericay Union* (6), and other cases in the Exchequer.

It cannot be doubted therefore, that the authorities in the English courts conflict, and it is certainly difficult, moreover, to extract from them any satisfactory principle for our guidance. But the cases have been so often collected and so fully commented upon of late days, and are so familiar to every one conversant with the subject, that it would be mere pedantry to enter upon a detailed review of them here. I shall content myself, therefore, with a short statement of the principle upon which, in my humble opinion, the judgment of the court below ought to be reversed.

The action in this case is brought upon an executed contract. The court house had been built under the supervision and to the satisfaction of the defendants' architect before action brought. The justice, therefore, of compelling the defendants to pay for the work, labour and materials, of which they have had the benefit, is obvious; and if there be a principle upon which they are to be absolved from that just liability, it must be the principle that being a corporation their will cannot be expressed except through their common seal; and as they are incapacitated from making their own will known except through their common seal, so it cannot be implied by courts of justice from their conduct, so as to subject them to any liability either in *tort* or assumpsit.

Now it will be found, I apprehend, that there never was any such universal rule as that which has been supposed. The old notion certainly was, that a corporation being a body politic, and invisible, could neither act nor speak, except by its common seal (7), or as it was expressed in argument in *Rex* v. *Eigg* (8), the common seal was

(1) 5 E. & B. 409.
(2) 5 Ex. 442.
(3) 6 Ex. 137.
(4) 21 L. J. Q. B. 349.
(5) 8 Q. B. 810.
(6) 3 Ex. 283.
(7) Bro. Abr. Tit. Corporation and Capacities.
(8) 3 P. Wm. 423.

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the hand and seal of the corporation. But that dogma, never well founded in point of reason, was from the first subject to considerable qualification, and has undergone, from time to time, still further limitations.

Matters of small amount and frequent recurrence were always treated as exceptions from the rule. It is difficult to understand the principle upon which that class of cases is said to have proceeded. Had the rule rested upon a different foundation it might have been relaxed for purposes of convenience, but being a rule of necessity, and not of policy, it is difficult to understand how it can be made to consist with the cases to which I have referred. See observations of Macaulay C. J. in *Marshall* v. *The School Trustees of Kitley* (1) and of Patteson J. in *Beverley* v. *The Lincoln Gas Light and Coke Co.* (2). In *Henderson* v. *The Australian Steam Navigation Co.* (3), already cited, Erle J., says: "It would be very dangerous to rest the exception upon the ground of frequency or insignificance; nor do I gather from the cases that that has been put forward as the principle. Certainly as to trading corporations the exception has not been so limited, and I think that the soundest principle on such a matter is to look to the nature and subject-matter of the contract, and if that is found to be within the fair scope of the purposes of incorporation to hold the contract binding, even though not under seal." The doctrine propounded by Mr. Justice Erle, if it be sound, and I am very much inclined to think it so, would furnish a solution for most of the difficulties which have arisen upon the subject; but upon that point, which does not necessarily arise in the case before us, we need not express any opinion, because the plaintiff's right to maintain this action may be rested, as it seems to me, on well-established principles.

When it had been determined that the corporate will might be ascertained in certain cases otherwise than through the common seal, and that, as a necessary consequence, assumpsit might be maintained in such cases either by or against corporations even upon executory contracts, the difficulty of maintaining the rule as to torts and executed contracts must have been obvious. Had the old dogma been maintained in its integrity a corporation could not have been liable in tort unless the agent had been appointed or the act adopted under the corporate seal, and in no case could a promise have been implied by law from conduct; and upon reasoning of that sort the liability of corporations under such circumstances has been from time to time resisted. But the inconvenience and injustice of such a rule was felt to be intolerable. Had this been the law corporations would have been, as Mr. Justice

(1) 4 U. C. C. P. 378.
(2) 6 A. & E. 844.
(3) 5 E. & B. 409.

Coleridge has expressed it, a great nuisance. *Hall* v. *The Mayor of Swansea* (1).

And it is now well settled that corporations aggregate are liable in tort although there has been nothing under the common seal authorizing the agent or adopting his act. *Yarborough* v. *The Bank of England* (2); *Smith* v. *Birmingham Gas Co.* (3); *Eastern Counties Railway Co.* v. *Broom* (4). Again when land has been used and occupied by a corporation the law implies a promise to pay a reasonable compensation. *Dean and Chapter of Rochester* v. *Pierce* (5); *Mayor of Stafford* v. *Till* (6); *Lowe* v. *London and North Western Railway Co.* (7). And when money has been wrongfully received, assumpsit for money had and received may be maintained. *Hall* v. *The Mayor of Swansea* (1).

Now if trover and trespass may be maintained under the circumstances to which I have alluded, and if the law implies a contract when land has been used, or moneys wrongfully received, it is difficult to understand why the same principle should not be applied wherever the contract being legal has been executed and the corporation has received all that it could have demanded if there had been a contract under the corporate seal. The argument seems to me, I must confess, conclusive. In *Hall* v. *The Mayor of Swansea* (1) Lord Denman rests the judgment of the Court of Queen's Bench, which has not, I believe, been questioned, upon the ground of necessity; and that language of Lord Denman has been since translated by Lord Campbell to mean "no other than a moral necessity; that the defendants should pay their debts"; or as Mr. Justice Erle has expressed the same sentiment, "that it was absolutely necessary that the defendants should be compelled to do that which common honesty required." *Lowe* v. *The London and North-Western Railway Co.* (7). Now, if the necessity in *Hall* v. *The Mayor of Swansea* (1) was the moral necessity of compelling the defendants to do what common honesty required, assuredly that necessity exists to as great an extent at least in cases circumstanced like the present when the consideration has been executed and the corporation has received all that it could have required if there had been a formal contract under the corporate seal.

But the distinction between executed and executory contracts does not depend upon the reason of the thing, however clear; it has been repeatedly recognized by judges of the greatest eminence; in *The East London Waterworks Co.* v. *Bailey* (8) Best C. J. in enumerating the

(1) 5 Q. B. 544.
(2) 16 East 6.
(3) 1 A. & E. 526.
(4) 6 Ex. 314.
(5) 1 Camp. 466.
(6) 4 Bing. 75.
(7) 18 Q. B. 632.
(8) 4 Bing. 287.

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cases in which a corporation is liable, although no contract has been executed under the corporate seal, says, "The first is when the contract is executed; in that case the law implies a promise, and a deed under seal is not necessary, as we have lately decided in *The Mayor of Stafford* v. *Till* (1), where it was holden that a corporation might maintain assumpsit for the use and occupation of the land." And in *Beverley* v. *The Lincoln Gas Light and Coke Co.* (2), Mr. Justice Patteson, who delivered the judgment of the Court of Queen's Bench, says: "In the progress, however, of these exceptions, it has been decided that a corporation may sue in assumpsit on an executed parol contract; it has, also, been decided that it may be sued in debt on a similar contract; the question now arises on the liability to be sued in assumpsit. It appears to us that what has been already decided in principle warrants us in holding that the action is maintainable."

It is said, however, that the distinction between executory and executed contracts was exploded by *Church* v. *The Imperial Gas Light and Coke Co.* (3) which has been treated by some as a governing case upon the subject. I am not certain that Lord Denman's language, properly interpreted, means that: his lordship's object was to negative the distinction between executed and executory contracts—not generally—but as to contracts of a particular class; contracts which would be valid without the corporate seal, and in parts of the judgment the language is distinctly limited to that object; it is said, for instance, (4) "assuming it therefore to be now established in this court that a corporation may sue or be sued in assumpsit upon executed contracts of a certain kind, among which are included such as relate to the supply of articles essential to the purposes for which it is created, the first question will be whether, as affecting this point, and in respect of such contracts, there is any sound distinction between contracts executed or executory." The question proper on that principle is strictly confined to contracts of the particular class to which I have referred, and viewed as a solution of that question the judgment is quite sound; it must be admitted, however, that the language in other parts is much less guarded and that the case has been often assumed to be an authority for the general proposition. The *Mayor of Ludlow* v. *Charlton* (5); *Clarke* v. *The Guardians of the Cuckfield Union* (6).

In answer to the argument deduced from *Church* v. *The Imperial Gas Light and Coke Co.* (3), and the subsequent authorities in which that case has been recognised, an argument which possesses, I must admit,

(1) 4 Bing. 75.
(2) 6 A. & E. 845.
(3) 6 A. & E. 846.
(4) At p. 859.
(5) 6 M. & W. 815.
(6) 21 L. J. Q. B. 349.

considerable force, I have to say, first, that the point was not decided. Secondly, that Lord Denman's reasoning as an argument for the general proposition is, in my humble judgment, quite conclusive. And, lastly, that since the decision of the case alluded to, the distinction in this respect between executory and executed contracts has been recognized by the Court of Queen's Bench, including Lord Denman himself, on more occasions than one, and has received the sanction of other judges of still greater eminence. In *Sanders* v. *The Guardians of St. Neot's Union* (1), Lord Denman, delivering the judgment of the Court of Queen's Bench, says: "A motion in this case was made for a new trial on the ground that no contract under seal was proved against the defendants. But we think that they could not be permitted to take the objection, inasmuch as the work in question, after it was done and completed, was adopted by them for the purposes connected with the corporation." In *Doe d. Pennington* v. *Taniere* (2), the same learned judge observes: "To enforce an executory contract against a corporation, it might be necessary to show that it was by deed; but where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made." In *The Fishmonger's Company* v *Robertson* (3), Chief Justice Tindal says: "The question therefore becomes this, whether in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer to an action of assumpsit by the corporation that the corporation itself was not originally bound by such contract, the same not having been made under their common seal. Upon the general ground of reason and justice no such answer can be set up." Lastly in *The Governor and Company of Copper Miners in England* v. *Fox* (4), Lord Campbell intimates his opinion that the distinction between executory and executed contracts had not been exploded by *Church* v. *The Imperial Gas Light and Coke Co.* (5).

Upon the whole, I quite concur in the principle enunciated upon the subject so often and so clearly by His Lordship, the Chief Justice, and by the late Chief Justice of the Court of Common Pleas, Sir J. B. Macaulay; I am of opinion that the distinction in this respect, between executed and executory contracts, is sound and ought to be maintained. I do not disguise from myself that this opinion is opposed to many

(1) 8 Q. B. 810.
(2) 12 Q. B. 1013.
(3) 5 M. & G. 193.
(4) 16 Q. B. 229.
(5) 6 A. & E. 846.

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cases in the Exchequer, and to much that is to be found elsewhere; but when these decisions are in such manifest and painful conflict it becomes the duty of the court to adopt that conclusion which appears upon the whole most consistent with the principles of justice.

I desire also to refer to opinions expressed about the same time by other judges who, like the two just named, rank high in the annals of the jurisprudence of Upper Canada.

The case of *Marshall* v. *School Trustees of Kitley* (1), and *Pim* v. *The Municipality of Ontario* (2), involved the same question. Both actions were in the Common Pleas, and both were decided by that court in favour of the corporation. The former was decided one term before the latter. The decision was either reversed in appeal, though there is no published report of its having been appealed, or at all events it was overruled on the appeal of Pim's case. In Marshall's case Chief Justice Macaulay dissented from the judgment of his two colleagues, delivering a judgment which I might also quote as part of my argument if time permitted. One judge who took part in the decision was Richards J., who afterwards became Chief Justice of the Common Pleas, later Chief Justice of the Queen's Bench, and ultimately Chief Justice of this court. His shrewd and practical common sense, and his knowledge of the real life of the country which no man understood more thoroughly, give interest and value to his views on the state of the law which I am about to quote:

> In this country, he said, studded as it is with municipal and trading corporations, and where the legislature has given great facilities for the establishment of these bodies, it may be of great convenience, almost amounting to necessity, that the decision arrived at in the Supreme Court of the United States, and to some extent approved of by the Court of Queen's Bench here, should be law in this province, and if it should be so decided, either by the Court of Appeals or the legislature, I am far from being certain that it would not be most convenient and advantageous.

(1) 4 U. C. C. P. 373. (2) 9 U. C. C. P. 304.

These remarks apply as directly to the state of things in Manitoba as they did to Upper Canada. The thirty-five years that have passed since they were uttered have not made the reasons for adopting the suggestions less numerous or forcible. In one respect at least the contrary has been the case, because the great extension during that period of the scheme of incorporation under general laws has been, and no doubt will continue to be, prolific of corporate associations for all kinds of objects and pursuits.

Stoneburgh v. *The Municipality of Brighton*(1) is another Upper Canada case which was decided by the Court of Common Pleas shortly after the decision of Pim's case by the Court of Error and Appeal, but which found its way into the reports before Pim's case. The action was for building a bridge. Draper C. J. tried the action and also delivered the judgment of the court in *banc*, deciding on both occasions against the plaintiff, who had built the bridge under the direction of persons acting as a committee but without sufficient authority from the council. I refer to the case for the sake of what was said as to the law and as to the evidence that would have proved an adoption of the work. On both points the remarks bear upon the questions before us.

The latest decisions in England have established that when a corporation is a trading one, and as I understand especially where it is established for a special purpose, they are bound by a contract made in furtherance of the purposes of the corporation, though not under their corporate seal. The same doctrine and fully to the same extent has been established in this province by the decision of the Court of Appeal in *Marshall* v. *School Trustees of Kitley* (2) and *Pim* v. *The Municipal Council of Ontario* (3). We cannot, therefore, entertain any objection for the mere want of a contract under seal to charge the defendants as a corporation. But there are other difficulties in the way. I am not prepared to

(1) 8 U. C. C. P. 155. (4) 4 U. C. C. P. 373.

(3) 9 U. C. C. P. 304.

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admit that the township council can, by resolution, delegate to third parties power to bind them by contract for purposes which the legislature have specially entrusted to the council and enabled them to execute by the passing of by-laws. The plaintiff did not contract with any known officer or servant of the municipal corporation. * * * If therefore there is a liabilty on the part of the municipality it must arise from their subsequent adoption of the contract or a receiving of the work. * * * I thought, if in fact there had been an adoption of the contract and the work done by an appropriation of a sum on account of it after it was so nearly brought to a conclusion, it was a matter capable of easy and direct proof. * * * When the expense incurred by the committee became known, and it was proposed to make an appropriation for it, the appropriation was refused, because it was thought the expenditure was unauthorized and that an unfair advantage was sought to be taken of the resolution appointing the committee. * * * As to any acceptance of the work there was no proof whatever of it, except that it was conceded that the public used the bridge as part of the highway which had theretofore been in use, and this I thought formed nothing on this point for the plaintiff.

Can it be doubted that, with evidence such as there is in this case of the contract by the council, the acceptance of the work and the other facts already dwelt upon, the liability of the corporation would have been unhesitatingly affirmed?

The difficulty which the plaintiff has encountered in this case seems to have been to a great extent due to the effect attributed by the court to two comparatively recent English decisions, *Hunt* v. *Wimbleton Local Board* (1) and *Young* v. *The Mayor and Corporation of Royal Leamington Spa* (2); and the difficulty, if not suggested, seems at least to have taken apparent bulk, by reason of something said in the Ontario courts respecting those cases.

I cannot help thinking that the decisions have been misunderstood. I do not think they have nearly so

(1) 4 C. P. D. 48, (1878).

(2) 8 Q. B. D. 579; 8 App. Cas. 517, (1883).

much bearing on the present controversy as has been supposed.

It will be useful when considering those cases to refer also to two cases of *Frend* v. *Dennett* (1) one of which was decided in 1858 at law, and the other three or four years later in equity.

Hunt v. *Wimbleton* (2) was decided under a section of the Public Health Act, 1875 (3), which declared that:

> Every contract made by an urban authority, whereof the value or amount exceeds £50, shall be in writing and sealed with the common seal of such authority.

An earlier section of the act declared that every local board, being an urban authority, should be a corporation, but nothing turned on that provision, the urban authority sued being already a municipal corporation.

Hunt's case was discussed and decided also under the act of 1875, although, as we are told in the report, the contract was made while the Public Health Act, 1848 (4) was in force.

Frend v. *Dennett* (1) was of course altogether under the act of 1848.

Under that act I do not understand that every local board of health was a corporation, though every board had a seal. The 85th section enacted that:

> The local board of health may enter into all such contracts as may be necessary for carrying this act into execution; and every such contract, whereof the value or amount shall exceed £10, shall be in writing and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof and (in the case of a corporate district) sealed with the common seal.

Under each act there was the requirement of a seal, whether the common seal of a corporation, such as the

(1) 4 C. B. N. S. 576 at law and 5 L. T. N. S. 73 in equity.
(2) 4 C. P. D. 48.
(3) 38 & 39 Vic. ch. 55 (Imp.)
(4) 11 & 12 Vic. ch. 63 (Imp.)

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Mayor and Corporation of Royal Leamington Spa or the seal of an unincorporated local board such as probably was the Wimbleton Local Board when the contract with Hunt was entered into, though the board was afterwards incorporated by the act of 1875.

Frend v. *Dennett* (1) was an action against the clerk of a local board of health. The question under the Public Health Acts was the same in each of the three cases. It was not a question of the capacity of a corporation to bind itself or to be bound without seal. It was, whether a contract which a statute gave power to make, and directed to be made with certain formalities, could be made without those formalities.

The circumstance that one of the parties to the contract was a corporation was, to my apprehension, an accident which did not alter the character of the question under the statute.

In the common law case of *Frend* v. *Dennett* (1), Cockburn C.J. said :

> It is sought to make the rates for the district liable upon this contract by means of an action against the clerk to the local board. Now, the power given to the board to make contracts so as to bind the rates is the creature of the Act of Parliament, and that, by the very same clause which gives the board power to enter into contracts, amongst other things expressly enacts "That, &c. [quoting the part of section 85, which I have read.] I think the local board had no power to contract so as to bind the rates unless they did so in the manner pointed out by the statute.

The equity case (2) was disposed of by Lord Hatherly, then Vice Chancellor Wood, on precisely the same grounds.

So also were the cases of Hunt and Young.

In Hunt's case the clause of the statute was held to be mandatory and not directory only. I understand the decision further to have been that it was impera-

(1) 4 C. B. N. S. 576. (2) 5 L. T. N. S. 73.
(1) 11 & 12 V. c. 63 Imp.

tive even as to executed contracts, although the contract in question was held not to be executed because the local board had not, in the opinion of the court, had the benefit of the plaintiffs' work.

There was some general discussion by the lords justices of doctrines concerning corporations, and opinions were given which in the later case of *Young* v. *Leamington* (1) it was thought advisable to refrain from expressing. Lord Esher (then Brett L.J.) in particular expressed a doubt whether there was any such rule in law or equity as that

> where orders are given by or on behalf of a corporation, and those orders result in an apparent contract, though not under seal, and the party with whom that apparent contract is made has fulfilled the whole of his part of the contract, and the corporation on whose behalf such apparent contract has been made accept and enjoy the whole benefit of the performance of the contract, that then the corporation is liable, although the contract is not under seal.

But he did not explain the grounds of his opinion, and expressly said that it was unnecessary, for reasons which he gave, to consider the point.

Bramwell L.J. had been a member of the Court of Exchequer, but not until after the decision of the cases of *Mayor of Ludlow* v. *Charlton* (2) and *Smart* v. *Guardians of West Ham Union* (3). He did not share the doubt expressed by Lord Justice Brett, nor did he appear to entertain the extreme views on which the cases in the Exchequer had been decided.

> This doctrine exists, he said, to some extent or to some amount, that where a man has done work for a corporation under a contract not under seal, and the corporation have had the benefit of it, the person who has done the work may recover. But whether that is limited to contracts for small amounts or not, I repeat, I will not say. It is, however, certainly limited to cases where the benefit has been actually enjoyed, and so far as I know, to cases in which it could be said that the work is such as was necessary; that it was work which, if the cor-

(1) 8 App. Cas. 517. (2) 6 M. & W. 815.
(3) 10 Ex. 867.

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poration had not ordered, they would not have done their duty ; or if they had not given the order for its execution, they would not have been able to carry out the purposes for which they were called into existence. That seems to have been the state of things in those cases which have decided that the plaintiff may recover when the work has been done.

Those remarks seem to me to recognise the decisions to which they refer as having very much the effect on which the plaintiff in this action relies. Cotton L J. made some observations which point to a distinction between a corporation such as one of these boards of health which acts on behalf of the public, and our municipal corporations which are themselves the public and for whom the councils act. Brett L.J. had also referred to the fact that the corporation was the board and acted for the inhabitants. What Cotton L.J. said on this point was:

> But it is urged that there is another exception, namely, that corporations are liable when goods have been supplied or work done in pursuance of a contract entered into not under seal and the corporation have had the full benefit of such contract. I entertain very grave doubts whether such a corporation as this could be bound on any such ground, because the parties who have a beneficial enjoyment of anything supplied on the order of this body are not the corporation but those for whom the corporation act as trustees.

The principal judgment in the Court of Appeal in *Young* v. *Mayor and Corporation of Royal Leamington Spa* (1) was delivered by Lord Justice Lindley. The case was decided expressly on the same ground as *Frend* v. *Dennett* (2) as had also been the case of *Hunt* v. *Wimbleton Local Board* (3) The question of the effect of the contract there in question having been executed was not discussed by the court, Lord Justice Lindley saying that the cases on the subject were very numerous and conflicting and required review and authoritative exposition by a court of appeal. Brett L.J , ex-

(1) 8 Q. B. D. 579.
(2) 4 C. B. N. S. 576.
(3) 4 C. P. D. 48.

pressing, as Cotton L.J. also did, his concurrence with Lindley L.J., did so—

upon the ground that the defendants were acting as an urban sanitary authority, so that the statute and the former decision of this court apply exactly to the case. I think that the mere want of seal prevents the plaintiffs from recovering, and I am further of opinion, having read all the cases on the point, that the fact that the defendants had the benefit of the contract will not prevent them from setting up the statute in answer to the plaintiffs' claim. The mere want of a seal is a complete bar.

It appears from the report in the House of Lords that, in delivering his judgment, the lord justice added a statement of his opinion that in the case of a municipal corporation not bound by the statute the proper decision in point of law, according to the cases and principle, would be that the want of seal prevented in such a case as the one before him the plaintiffs succeeding, but this statement he did not allow to appear in the published report of the case. Lord Blackburn suggests that in the revised report Brett L. J. (who had become M.R.), had abstained from expressing the opinion because on reflection he saw that it was not necessary for the decision of the case to decide that, and that what he had said was a mere *obiter dictum*. It strikes me as possible that another reason may have had some influence, and that is that when the judgment was delivered, viz.: on 18th March, 1882, the lord justice spoke with reference to corporations governed by the Municipal Corporations Act, 1835. The Municipal Corporations Act of 1882 was passed on the 18th of August, 1882, and it may have occurred to him before the judgment appeared in the law reports, which was later than August, that it would be prudent to withdraw a *dictum* that might require modification when the new act came to be worked under. The new act happens to be more like this Manitoba Act than the former one in one particular to which I have already

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adverted, though I do not say that the effect is different. I have not considered that point.

When *Young* v. *Leamington* (1) was before the House of Lords, Lord Blackburn, holding that the provision of the Public Health Act required contracts of the value of over £50 to be under seal, suggested that the enactment of that provision may have been induced by the differences of opinion that existed on the matter of the liability of corporations on executed contracts not under seal. He reviewed the principal cases in which the divergent views were shown, the stricter views being held in the Exchequer and the more liberal in the Queen's Bench, down to 1866, when the Queen's Bench decided the case of *Nicholson* v. *Bradfield Union* (2) on the doctrine acted on in *Clarke* v. *Cuckfield Union* (3). There was not, he said, any decision in the question between 1866 and the passage of the Public Health Act of 1875, and he expressed his idea that the legislature, knowing of the difference of opinion that existed, and the difficult questions that might yet have to be decided, really intended to provide that those difficulties should not arise with respect to the urban authorities they were creating. Now, without presuming to criticise this theory by suggesting that the measure was not a new one, but was the re-enactment of a law made seven and twenty years before, we may take from Lord Blackburn's statement these two conclusions: There is no rule settled by English decisions opposed to that on which the case of *Pim* v. *Ontario* (4) was decided, but while there has been a conflict of opinion, as not overlooked in that case, the latest decision, pronounced several years after Pim's case, agrees with the judgment of the Upper Canada Court; and secondly, the

(1) 8 App. Cas. 517.
(2) L. R. 1 Q. B. 620.
(3) 21 L. J. Q. B. 349.
(4) 9 U. C. C. P. 304.

corporations, acting as urban authorities under the Public Health Act, are not left to the operation of the common law rules affecting the corporations as expounded and applied by the courts, but are under a rule concerning their contracts which, being statutory, does not permit the modifications and adaptation to changing circumstances which the ancient rule of corporations allows. Lord Bramwell gave judgment also. He said :

> As I think the case turns on the construction of the statute, I have not thought it necessary to go into the doubtful and conflicting cases governed by the common law.

Lord Blackburn had expressly intimated that the case at bar did not give an opportunity for reviewing those cases, and he only examined them so far as he thought was required for the purposes of construing the Public Health Act, 1875.

It seems manifest to me that these cases of Hunt and Young leave the general question of the contracts of corporations, either at common law or under the municipal system, just where they found it, and I am at a loss to understand how they were supposed to affect the question. If there were serious doubt of that it would be worth while to notice that the action which the Public Health Acts required to be done with the formalities of signature and seal was the action of the corporation itself, not something to be done by a body delegated, like the council under the Manitoba statute, to exercise the powers of the corporation. The position is almost the converse of that noticed by Lord Justice Cotton, as existing under the Public Health Act, for here the council accepts on behalf of the corporation, and the corporation enjoys the benefit of the work. It is not necessary, however, to pursue this topic.

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The decisions since *Young* v. *Leamington* (1), do not throw much new light upon the subject, but as far as they have come under my notice they appear to confirm the views of that case and of Hunt's case which I have taken. In *The Attorney-General* v. *Gaskill* (2), which was decided while Young's case was on its way to the House of Lords, Bacon V. C. held an agreement made by a local board, without being sealed, valid, section 174 of the Public Health Act, 1875, notwithstanding, because it was not an agreement "necessary for carrying the act into execution," which is the class of contracts authorized by the section and required to be under seal. The agreement related to the compromise of an action, and the Vice-Chancellor applied to it the ordinary rule applicable, according to many cases, to ordinary corporations.

In December, 1884, the case of *Scott* v. *Clifton School Board* (3) was decided by Mathew J. The action was by an architect to recover payment for plans prepared for the school board which is a corporate body. There was no contract under seal. Mathew J. said:

> If it were necessary for my decision I should hesitate to regard the cases relied on for the defendants [which were the same cases now relied on for the defendants] where contracts by corporate bodies were held to require to be under the common seal, to be a safe guide in the present case (or indeed in any other case) where the contract was for a purpose incidental to the performance of the duties of the corporate body, and its necessity was shown by proof that the corporation, with full knowledge of its terms and of all the facts, had acted upon and taken the benefit of the performance.

The case was decided, however, on the ground that the contract in question was one which, under the learned judge's construction of a provision of the Elementary Education Act, 1870, was well made by a minute of the board, a distinction which is not with-

(1) 8 App. Cas. 517. (2) 22 Ch. D. 537.
(3) 14 Q. B. D. 500.

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out resemblance to that which I have just hinted at between contracts made by a corporation and those made by another body which has power to bind the corporation.

In *Melliss* v. *The Shirley and Freemantle Local Board of Health* (1), Mr. Justice Cave decided, in April, 1885, that when a contract with a local board had been made without a seal and partly performed, the seal being then attached and the contract work afterwards completed, the contract was binding, under section 174, for the whole work. Under the strictest apprehension of the rules touching corporations the question could not have been raised. Mr. Justice Cave held the plaintiff entitled to recover notwithstanding that he came under section 193, which imposed a penalty on persons contracting with an urban authority with respect to a matter in which they were interested. The Court of Appeal held that section 193 made the contract void, and reversed the decision on that ground, saying nothing about the point taken under section 174 (2).

In *Phelps* v. *Upton Snodsbury Highway Board* (3), Mr. Justice Lopes in 1885, holding that a highway board which was a corporate body was not bound to pay a solicitor for opposing a bill in parliament because he was appointed by resolution only and not by deed, put his decision on the ground that the purpose for which the retainer was given was not incidental to the purpose for which the highway board was incorporated.

The greater strictness applied to the restrictions of section 174 than to the ordinary doctrines respecting corporations was exemplified in 1889 in the case of *Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board* (4), before Mr. Justice Kay, where a peti-

(1) 14 Q. B. D. 911.
(2) Weekly Notes, 1885, p. 224.
(3) 1 Cababe and Ellis 524.
(4) 60 L. T. 172.

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tion under the seals of both the plaintiff and defendant corporations set out an agreement between them respecting which they presented the petition to the Local Government Board. The agreement was not under the seal of the defendant corporation, wherefore it was held, nothwithstanding the petition, not to bind the board under section 174.

Burial boards, appointed under 15 & 16 Vic. ch. 85, are incorporated by the statute and authorized to make certain contracts which are directed to be made in a certain way. The plaintiff in *Stevens* v. *Hounslow Burial Board* (1) contracted in proper form to do repairs to chapels of the defendants for £38, and did extra work under verbal orders for which he sought to recover £13 more.

Fry L.J. and Mathew J., sitting as a divisional court, differed as to his right, the former holding that the statute was against it, and the latter thinking that the board was liable because the extras were each of trivial importance, and the board could not be expected to affix their seal to every order for small matters as they were required.

These are all the English cases of later date than *Young* v. *Leamington* (2) which I have happened to see. They certainly indicate no apprehension of the law being what is asserted by the defendants.

In my opinion the rule settled and acted on in Upper Canada thirty-five years ago in Pim's case, and adhered to in that province and the province of Ontario, as shown by numerous decisions which it would be alike tedious and unprofitable to notice in detail, is still the law of Ontario, and should be held to be also the law of Manitoba under the municipal system of that province which takes that of Ontario for its model, though differing from it in occasional matters of detail.

(1) 61 L. T. 839. (2) 8 App. Cas. 517.

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I think the judgment of Mr. Justice Dubuc in the court below gives sound and conclusive reasons for maintaining that under the circumstances of this case the corporation is liable to the plaintiff.

It would, in my judgment, be a matter seriously to be deplored in the interests of the people of both provinces if the more rigid black letter rule contended for were held to be the law. I see no reason why the rule established so long ago in Upper Canada should not be maintained as the law of that province, and as also the rule of interpretation to be acted on in Manitoba, even if, upon a review of the matter, the English courts should adopt the views which Lord Esher seemed inclined to take of the result of the previous decisions. The rule which enjoins caution in disturbing principles that have been long settled and acted on ought to apply.

It has been declared in England by the highest authority that there is there a conflict of opinion which requires to be set at rest by a court of appeal. The Ontario rule was settled by the decision of an appellate court thirty-five years ago. Since that time the municipal law has been re-enacted a number of times in that province, and as far as the constitution and functions of municipal corporations and municipal councils are concerned, the same law has been made the law of Manitoba.

Under these circumstances it would be, in my judgment, our duty to affirm, or refuse to disturb, the rule so settled, even if upon an independent examination of the question we should not ourselves necessarily arrive at the same conclusion.

It is reasonable to assume that if the legislatures of the province of Manitoba and the province of Ontario, which cannot be accused of reluctance to introduce into the municipal law any change that was deemed

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desirable, had not treated the rule as being finally settled by the decision of the Court of Error and Appeal they would when re-enacting the law have acted on the suggestions thrown out by Chancellor Blake in Pim's case, and before that by Sir William Richards in *Marshall* v. *School Trustees of Kitley*(1), and have removed all question by some express enactment. The decision in Pim's case may thus fairly be regarded as indirectly sanctioned by the legislature, and confirmed as the law of the province of Ontario with regard to its municipal corporations; and it may properly be held that the legislature of Manitoba adopted the rule in question as part of the municipal system in which it followed the older province.

In my opinion the appeal should be allowed with costs, and judgment given for the plaintiff for $600, with interest on $200 from the fourth day of July, 1885, and on $400 from the fourth day of July, 1886, with costs.

Appeal allowed with costs.

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

Solicitor for respondent: *J. B. McLaren.*

(1) 4 U. C. C. P. 373.

THE LAKEFIELD LUMBER AND MANUFACTURING COMPANY (DEFENDANTS)..... } APPELLANTS;

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*Feb. 4, 5.

*Nov. 17.

AND

WILLIAM SHAIRP (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Crown lands—License to cut timber—Free grants—Patent—Interference with rights of patentee.

By sec. 3 of R.S.O. (1887) ch. 25—the Lieutenant-Governor in Council may appropriate any public lands * * * * as free grants to actual settlers, &c., and by sec. 4 such grants or appropriations shall be confined to lands * * * within the tract or territory defined in that section. By sec. 10 pine trees on land located or sold within the limits of the free grant territory after 5th March, 1880, shall be considered as reserved from the location, and shall be the property of Her Majesty, and sec. 11 enacts that patents of such lands located or sold shall contain a reservation of all pine trees on the land and that any licensee to cut timber thereon may, during the continuance of his license, enter upon the uncleared portion and cut and remove trees, &c.

The L. Co. held a license, issued 30th May, 1888, to cut timber on land within the free grant territory but which had not been appropriated under sec. 3 of the above act. A license was first issued to the company in 1873 and had been renewed each year since that time. The license authorized the cutting of timber on lands unlocated and sold at its date; lands sold or located while it was in force; pine trees on lots sold under orders in council of 27th May, 1869; and pine trees, when reserved, on lots sold under O. in C. of 3rd April, 1880, upon the location described on back of license.

Regulations made by O. in C. of 27th May, 1869, provide that "all pine trees on any public land thereafter to be sold, which at the time of such sale or previously was included in any timber license, shall be considered as reserved from such sale and shall

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

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be subject to any timber license covering or including such land in force at the time of such sale, or granted within three years from the date of such sale, &c. All trees remaining on the land at the time the patent issues shall pass to the patentee. A patent for a lot in the free grant territory was issued to S. on 13th March, 1884.

On the back of the license was a schedule of lots included in the location with the date of sale or location, and the sale or location of S.'s lot was mentioned. The company claimed the right to cut timber on said lot which had not been appropriated by the L. G. in C.

Held, affirming the judgment of the Court of Appeal for Ontario, that the provisions in secs. 10 and 11 of R. S. O. (1887) c. 25 relating to the pine trees in the territory, only apply to such lots as have been specifically appropriated under sec. 3; that the license of the company, though renewed from year to year, was only an annual license; that the license issued in 1888 did not give the holders a right under the regulations of 27th May, 1869, to the timber on land patented in 1884, and that the company had notice, by their license of 1888, that the lot in question had been patented to S. more than three years previously.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment at the trial in favour of the plaintiff.

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

The case was tried before MacMahon J. and a jury, when damages were assessed and judgment was reserved on certain points of law raised during the trial. Judgment was subsequently given in favour of the plaintiff which was affirmed by the Court of Appeal. The defendants appealed to the Supreme Court.

McCarthy Q. C. and *Poussette* Q.C. for the appellants cited *Boynton* v. *Boyd* (2); *Walker* v. *Rogers* (3).

Edwards for the respondent referred to *Canada Permanent Loan Co.* v. *Taylor* (4); *Doe d. Henderson* v.

(1) 17 Ont. App. R. 322.
(2) 12 U. C. C. P. 334.
(3) 12 U. C. C. P. 327.
(4) 31 U.C.C.P. 41.

Westover (1); *Cockburn* v. *Muskoka Lumber Co.* (2); *Dunkin* v. *Cockburn* (3); *McArthur* v. *Northern and Pacific Junction Railway Co.* (4); and *McLure* v. *Black* (5).

Sir W. J. RITCHIE C. J.—For the reasons given in the court of first instance, and in the Court of Appeal confirming the judgment of the trial judge, I think this appeal should be dismissed.

STRONG J.—I concur in the judgment of Mr. Justice Gwynne in this case.

FOURNIER and TASCHEREAU JJ.—concurred in dismissing the appeal.

GWYNNE J.—This appeal must, in my opinion, be dismissed.

The learned counsel for the appellants rested their contention upon the grounds:

1st. That the land in question, lot 4 in the 15th concession of the township of Burleigh, is within what is spoken of as "Free Grant Territory," in the Ontario statute of 1880, intituled "An Act to amend the Free Grants and Homesteads Act," and therefore subject to the provisions of that act and the regulations made in pursuance thereof, and that being such the license under which the appellants claim prevails over the letters patent under which the respondent claims; and 2nd. That even if the land be not within the operation of the "Free Grants and Homesteads Act," the license issued in 1884 under which the appellants claim is the same license as that originally issued, which was about 1873, and renewed from year to year

(1) 1 E. & A. (Ont.) 465.
(2) 13 O. R. 343.
(3) 13 O. R. 254; 15 Ont. App. R. 493.
(4) 17 Ont. App. R. 86.
(5) 20 O. R. 70.

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ever since, and as the lot in question is still specially named in the license of 1884 it must prevail over the letters patent and sale made to the respondent under the act respecting the management and sale of public lands upon the authority of *McMullen* v. *Macdonell* (1) and *Farquharson* v. *Knight* (2).

The statute of the late province of Canada 23 Vic. ch. 2 intituled "An Act respecting the Sale and Management of the Public Lands" in its 11th section, enacted that except as thereinafter provided no free grant of public land should be made. In its 13th section it enacted that:

> The Governor in Council might appropriate any public lands as free grants to actual settlers upon or in the vicinity of any public roads opened through the said lands in any new settlements, under such regulations as shall from time to time be made by order in council. But no such free grant shall exceed one hundred acres.

By the 14th section the Governor in Council was empowered to set apart and appropriate such of the crown lands as he might deem expedient for wharves, piers, market places, and other purposes therein stated, and to make free grants thereof for such purposes subject to certain limitations therein expressed. And as to the sale of public lands it was enacted that the Governor in Council might from time to time fix the price per acre of the public lands and the terms and conditions of sale and settlement and payment. Then by the 16th section the Commissioner of Crown Lands was authorized to issue to purchasers, as well as to settlers on land, as a free grant, licenses of occupation, and that such license of occupation should operate to enable the holder to maintain suits against any wrong-doer or trespasser as effectually as he could under a patent from the crown, but that it should have no force against a license to cut timber existing

(1) 27 U. C. Q. B. 36. (2) 25 U. C. Q. B. 413.

at the time of the granting thereof. The 17th section gave to a certificate of sale, and to a receipt for money received on the sale of public lands, the same force and effect as by the previous section were given to the license of occupation.

The legislature of the province of Ontario in its first session passed an act, 31st Vic. ch. 8, intituled "An Act to secure Free Grants and homestead to actual settlers on the public lands," and thereby enacted that the statute of the Parliament of the late province of Canada, passed in the 23rd year of Her Majesty's reign, intituled "An act respecting the sale and management of the public lands," might be cited and designated in all acts and proceedings as "The Public Lands Act of 1860," and is the act thereinafter so designated; it then repealed the 13th section of the above act, and enacted that the Lieutenant Governor in Council might appropriate any public lands considered suitable for settlement and cultivation, and not being mineral or pine timber lands, as free grants to actual settlers under such regulations as should from time to time be made by order in council not inconsistent with the provisions of the act, but that such grants or appropriations should be confined to lands then already surveyed or thereafter to be surveyed within a very extensive tract of country particularly described in the fifth section of the act.

In the sixth section it was enacted that all persons to whom any land might be allotted or assigned under such regulations for a free grant should be considered as located for the land; and by sections seven and eight, that no person should be located for any land under the act or the said regulations unless certain conditions should be fulfilled; and by section nine, that no patent should issue for any land located under the act, or under said regula-

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tions, until the expiration of five years from the location, nor unless certain settlement duties should be performed. Then by section ten, all pine trees on the land, except such as might be actually necessary to be removed for the clearing of the land and for building, fencing or fuel, were reserved as the property of Her Majesty until the patent should issue, at which time all trees remaining on the land should pass to the patentee.

Now by orders and regulations made under the above "Free Grants and Homesteads Act of 1868," and "The Public Lands Act of 1860," and passed by the Lieutenant Governor in Council on the 27th May, 1869, it was provided among other things:

Par. 1.—That the quantity of land to be located to any person as a free grant, under "the Free Grants and Homesteads Act of 1868," should be 100 acres.

Par. 2.—That any locatee under said act, being the male head of a family, should be allowed to purchase an additional 100 acres at 50 cents per acre cash at the time of such location, subject to the same reservations and conditions, and the performance of the same settlement duties, as are provided in respect of free grant locations by the 9th and 10th sections of said act, except that actual residence and building on the land purchased will not be required.

Par. 5. All pine trees growing or being on any land hereafter located as a free grant under the said act *or sold under the preceding regulation* shall be subject to any timber license in force at the time of such location or sale or granted within five years subsequently thereto, and may at any time before the issue of the patent for such land be cut and removed under the authority of any such timber license while lawfully in force.

Upon the same 27th May, 1869, another order in council was approved and passed whereby regulations of a wholly different nature were established in relation *to the sale* of lands under "The Public Lands Act of 1860." By this order it was provided that

all pine trees growing or being upon any public land hereafter to be sold and which at the time of such sale or previously were included in any timber license, shall be considered as reserved from *such sale and*

such sale shall be subject to any timber license covering such land in force at the time of such sale or granted within three years from the date of such sale, and such trees may be cut and removed from such land under the authority of any such timber license *while lawfully in force,* but the purchaser at such sale or those claiming under him or her may cut and use such trees as may be necessary for the purpose of building, fencing and fuel on the land so purchased, and may also cut and dispose of all trees required to be removed in actually clearing said land for cultivation ; but *no pine* trees except for the necessary building, fencing and fuel as aforesaid *shall be cut* beyond the limit of such actual clearing *before the issuing of the patent for such land;* and all pine trees so cut and disposed of (except for the necessary building, fencing and fuel aforesaid) shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs. *All trees remaining on the land at the time the patent issues shall pass to the patentee.*

And it was, apparently *ex majori cautelâ*, provided that

this order shall not apply to any land to be sold as mining land nor to land to be sold to any free grant locatee under the regulations or order in council bearing date this day.

From the above orders and regulations it appears that while lands sold to a free grant settler under the above regulations in that behalf are made subject to any timber license in force at the time of such sale or granted within five years subsequently thereto, lands sold under the Public Lands Act of 1860 are made subject only to such licenses as may be in force covering such land at the time of such sale or granted within three years from the date of such sale, and that the provision in the 10th section of "The free grants and Homesteads Act of 1868," that all trees remaining on the land at the time the patent to a free grant locatee issues shall pass to the patentee, is by the order and regulation made in relation to land sold under "The Public Lands Act of 1860" made part of the contract of sale entered into with the purchaser to the benefit of which he is entitled.

The Lieutenant Governor in Council, prior to the month of February, 1871, appears to have exercised the

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authority vested in him by the 4th and 5th sections of "The Free Grants and Homesteads Act of 1868," by appropriating certain of the townships comprised in the tract of country described in the 5th section of the act as townships in which free grants might be made to actual settlers, but the date or terms of the order in council making such appropriation do not appear for the order has not been produced; but on the 13th February, 1871, an act was passed intituled "An Act to encourage settlement in the Free Grant Territory," whereby after reciting that

> it is expedient to ascertain how far immigration would be encouraged, and the welfare of settlers promoted by the partial clearance of lands forming part of the public lands appropriated for free grants * * * *

authority was given to set apart $20,000 from the consolidated fund for the purpose.

It appears further that prior to the appropriation of such townships for free grants by the Lieutenant-Governor in Council, under the said "Free Grants and Homesteads Act of 1868," contracts of sale for the sale of some lots in some of these townships to settlers had been made under "The Public Lands Act of 1860," and the above regulations made thereunder, which sales the Government seems to have desired to convert into free grants, for on the 2nd of March, 1872, the statute 35 Vic. ch. 21, intituled "An Act to provide for the remission of sums due by settlers in certain *Free Grant Townships*," was passed whereby it was enacted that:

> The Lieutenant-Governor in Council may remit the sums due to the crown in respect of their lands by *bonâ fide* settlers still in occupation of their lands *in all free grant townships* save and except (four townships named) and place such settlers in the same position as those who settled in the *free grant townships under the free grant regulations.*

Then again, on the 24th March, 1874, an act 37 Vic. ch. 23 was passed, intituled "An Act respecting sales

of pine trees by certain settlers" in the free grant townships in the districts of Muskoka and Parry Sound whereby an order in council of the 4th of October, 1871, was affirmed and declared to be good and valid in law. Then on the 2nd March, 1877, the act 40 Vic. ch. 15, intituled "An Act respecting the Free Grants and Homesteads Act of 1868," was passed, whereby after reciting that

> doubts have arisen as to the right of the Commissioner of Crown Lands to issue licenses to cut timber over and upon lots located or sold to free grant settlers under the "Free Grants and Homesteads Act of 1868," and that it was expedient to remove such doubts,

it was enacted that

> nothing in the said act or in the act passed in the 37th year of Her Majesty's reign, chaptered 23, or in any other act passed by the legislature of this province or within its legislative authority contained, shall be held to have in any way restricted the authority of the Commissioner of Crown Lands to grant licenses to cut timber on lots located or sold under the said Free Grants and Homesteads Act of 1868, and on the contrary it is hereby declared that the said commissioner ever since the passing of the said act had and now has under chapter 23 of the Consolidated Statutes of Canada intituled "An Act respecting the sale and management of Timber on public lands," full authority to grant licenses to cut timber on lots located or sold under the said Free Grants and Homesteads Act of 1868.

If this act had stopped here, although it may be difficult to conceive what doubt could have existed as to the right of the Commissioner of Crown Lands to grant licenses to cut timber on lands in the free grant townships equally as on crown lands in other townships under the regulations to be issued from time to time by order of the Lieutenant-Governor in Council, still, if any such doubts did exist, this first section of the act now in recital was sufficient to remove them; but the act, while in its form a mere declaratory act passed for the purpose of removing the doubts said to exist proceeds to repeal, not in terms but in substance and effect, the very plain

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provision of the 10th section of "The Free Grants and Homesteads Act of 1868," which enacted that "all trees remaining on the land at the time the patent issues shall pass to the patentee," for the 2nd section declares that

> every such license heretofore issued, whether the same has expired or is still current, and every such license which may be hereafter issued, to cut timber within the limits of any territory appropriated as free grant territory under the said "Free Grants and Homesteads Act of 1868," shall be deemed to have been and to be good and valid in all respects whatever for the period for which the same was or may be granted, notwithstanding the patents for lands included may in the meantime have been issued; and every such license shall be taken to have conferred and to confer upon the holder thereof the right to cut timber on the lands included therein until its expiration, whether such lands were or are located or sold under the said act, or were or are unlocated or unsold, subject, however, to such conditions, regulations and restrictions specially applicable to the free grant territory, or to the said lots so sold or located, as may have been heretofore or may be hereafter made by the Lieutenant-Governor in Council in respect to the payment of timber dues or otherwise, and subject also to such exceptions or restrictions as may be contained in any such license. Provided that no license shall confer the right to cut any other than pine timber upon lands which have been located or sold in the said territory prior to the date of such license unless the location or sale shall have been cancelled.

This mode of repealing the plain language of a prior statute as to the construction of which no doubt is alleged to have been entertained was corrected, however, by the Ontario statute, 43 Vic. ch. 4, whereby secs. 7 and 10 of the said "Free Grants and Homesteads Act of 1868," were expressly repealed and other provisions substituted therefor. The clause substituted for the repealed 10th section of the act of 1868 enacts that

> all pine trees growing upon any land located or sold within the limits of the free grant territory after the passing of this act shall be considered as reserved from said location, and shall be the property of Her Majesty [subject to certain specific exceptions stated.]

And that

> the patents for all lands hereafter located or sold as aforesaid shall

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contain a reservation of all pine trees standing or being on said lands, which pine trees shall continue to be the property of Her Majesty, and any person or persons now or hereafter holding a license to cut timber or saw logs may at all times during the continuance of such license enter upon the uncleared portion of any such lands and cut and remove such trees and make all necessary roads for that purpose and for the purpose of hauling in supplies, doing no unnecessary damage thereby; but the patentees or those claiming under them may cut and use such trees as may be necessary for the purpose of building and fencing on the lands so patented, and may also cut and dispose of all trees required to be removed in actually clearing the said land for cultivation, but no pine trees (except for the said necessary building and fencing as aforesaid) shall be cut beyond the limit of such actual clearing; and all pine trees so cut and disposed of shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs.

And further that

the patentee, his heirs or assigns, of land hereafter located or sold under the Free Grants and Homesteads Act and this act shall be entitled to be paid out of the consolidated revenue of the province on all pine trees cut on such land subsequent to the 3rd day of April next after the date of the patent and upon which dues have been collected by the crown, the sum of twenty-five cents on each thousand cubic feet of square or waney pine timber; and the Lieutenant-Governor in Council is to make regulations for ascertaining and determining the persons from time to time to receive such payments and the sums to be paid.

Now, it is to be observed that all of the above acts passed since the passing of "The Free Grants and Homesteads Act of 1868," were passed wholly in relation to the lands by that act authorized to be appropriated by order of the Lieutenant-Governor in Council for free grants to be made to actual settlers, and for the purpose of giving effect to that act or by way of amendment thereof; so that it might be well doubted whether any of them would have any application to the case of a lot of land sold even in a free grant township, if such a sale should be made and a patent be issued therefor under the provisions of "The Public Lands Act of 1860," and the regulations

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established by order in council under that act. With that question, however, we are not now concerned. For the purposes of the present case it is sufficient to say that the above acts leave no doubt as to the construction to be put upon the term "free grant territory" as used in 43 Vic. ch. 4 now consolidated in ch. 25 of the revised statutes of Ontario, namely, that it is the same construction as must be put upon the words in 40 Vic. ch. 15: "Any territory appropriated as free grant territory under the said Free Grants and Homesteads Act of 1868" and upon the words in 37 Vic. ch. 23, "free grant lands in townships open for sale and location under the 'Free Grants and Homesteads Act of 1868,'" and on the words in 35 Vic. ch. 21 "free grant townships," and upon the words in 34 Vic. ch. 5, "lands forming part of the public lands appropriated for free grants to settlers under the term of the Free Grants and Homesteads Act of 1868," and that construction must be, lands in those townships which by order of the Lieutenant-Governor in Council have been appropriated for free grants to be made therein to actual settlers.

The above several acts having been consolidated in ch. 25 of the Revised Statutes which is intituled "An Act respecting Free Grants and Homesteads to actual settlers on public lands," their provisions must receive in the consolidated act the same construction as they must have received in the original acts as they stood before consolidation. By a book produced from the Crown Lands Department it appeared that 133 townships within the limits prescribed by the act of 1868 have been by order of the Lieutenant-Governor in Council appropriated as free grant townships for free grants to be made therein, and that Burleigh, which has been a township of the county of Peterborough at least as far back as 1851, is not one. There can, therefore, be no

doubt, in my opinion, that neither the above act 43 Vic. ch. 4 nor the revised statute ch. 25 has any application whatever to the lot of land in question in this suit, which must be regarded in point of law, as it in point of fact was, as sold and patented under the provisions of "The Public Lands Act of 1860" now consolidated as ch. 24 of the Revised Statutes under the title "An Act respecting the sale and management of Public Lands."

Now the lot was sold to the respondent on the 13th of March, 1884, and by the regulations, under which the sale took place as above extracted, we have seen that the land was subject only to such timber license as was then in force, or as should be granted within three years from the date of the sale; and by these regulations, which constituted the terms of the sale, it was declared that all trees remaining on the land at the time the patent issues should pass to the patentee. It is admitted that all settlement duties were performed by the purchaser, and that his last instalment of purchase money was all paid up in full on the 18th of April, 1888. We must assume then, and it is not disputed, that the respondent became then entitled to receive his patent, and this being so it is contended by the respondent that it was not competent for the Commissioner of Crown Lands to grant a license to cut any timber upon the lot after the 18th of April, 1888. But in my opinion the Commissioner of Crown Lands has not done so or affected to do so unless it be under the words in the license "and pine trees on lands or lots sold under orders in council of the 27th May, 1869." It is true that he issued the license under which the appellants claim upon the 3rd of May, 1888, but the true construction of the license, in my opinion, is that it covers and professes to cover only such of the lots comprised in the location described

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on the back of the license as were unlocated and unsold at the date of the issue of the license on the 3rd May, 1888. Now in the location endorsed on the license the lot in question is mentioned as it had been in licenses issued ever since 1873, yet by an express notice, also endorsed on the license, the licensee was informed that this particular lot had been sold on the 13th March, 1884, and so was not included in the lots over which the license operated. The chief object of the regulations under which the public lands are sold to purchasers is to prescribe the extent to which the lands sold shall be subjected to licenses to cut timber thereon. I have no doubt, therefore, that when a lot was unsold when a license to cut timber thereon issued, but was sold while such license was in force, the licensee would be bound to ascertain and to conform himself to the terms of such regulations as among those which, by the express terms of the act respecting timber on public lands, now ch. 26 of the revised statutes of Ontario, the license is subjected to. But in the present case, as the lot had not been only sold, but the right of the purchaser to receive his patent therefor had accrued before the license issued, the license construed as above, and as I think it must be construed, in express terms excludes the lot in question from the operation of the license, which conferred upon the licensee the right to cut timber only upon such of the lands enumerated on the back as had not been sold before the issue of the license, and the notice endorsed gave express information to the licensee that the lot in question had been sold on the 13th of March, 1884.

It is said, however, that the license expressly authorizes the licensee to cut "pine trees on lands sold under order in council of the 27th May,

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1869." From the context in connection with which these words are used they certainly seem to be used as applying to the regulations of that date under "The Public Lands Act of 1860," and not those of the same date made under "The Free Grants and Homesteads Act of 1868," but in virtue of what authority these words were inserted in the license did not appear. However, assuming them to have been intended to apply to lands sold under the Public Lands Act of 1860, now ch. 26 of the revised statutes of Ontario, the licensee must be regarded as having thereby express notice of those regulations and must be bound by them, and by reference to them it appears that no timber is reserved to the crown otherwise than as is stated in those regulations, and that by the express terms thereof all trees remaining on the land at the time the patent issues shall pass to the patentee; and as all the timber in question was cut long after the issue of the patent it is unnecessary to enquire whether there was any right over the timber reserved to the crown which the Commissioner of Crown Lands could grant over the lot in the interval between the final payment of the balance of purchase money on the 18th April, 1888, and the issuing of the patent. As to the point that the license which issued on the 3rd May, 1888, was the same license as that issued in all the years subsequent to and in the year 1873 when the first appears to have been granted and before the lot in question was sold, and that, therefore, the license of 1888 covered the lot in question equally as did that issued in 1883, and in prior years, it does not seem to me to be necessary to make any observations further than that it cannot be entertained.

The appeal, therefore, must be dismissed with costs.

PATTERSON J.—I am of opinion that this appeal

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should be dismissed for the reasons given in the court below in the judgments of Mr. Justice Osler and Mr. Justice Maclennan.

Appeal dismissed with costs.

Solicitors for appellants: *Poussette & Johnston.*

Solicitor for respondent: *E. B. Edwards.*

HENRY M. WILLISTON (PLAINTIFF) ...APPELLANT; 1891

AND *Feb. 17.
*Nov. 17.

HENRY LAWSON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Statute of Frauds—Matters for future arrangement—Sale of land or of equity of redemption.

L. signed a document by which he agreed to sell certain property to W. for $42,500, and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased "subject to the encumbrances thereon." With this exception the papers were, in substance, the same, and each contained at the end this clause "terms and deeds, &c., to be arranged by the 1st of May next."

On the day that these papers were signed L., on request of W.'s solicitor to have the terms of sale put in writing, added to the one signed by him the following: "Terms, $500 cash this day, $500 on delivery of the deed of the Parker property, $800 with interest every three months until the six thousand five hundred dollars are paid, when the deed of the entire property will be executed."

The property mentioned in these documents was, with other property of L., mortgaged for $36,000. W. paid two sums of $500 and demanded a deed of the Parker property which was refused. In an action against L. for specific performance of the above agreement the defendant set up a verbal agreement that before a deed was given the other property of L. was to be released from the mortgage and also pleaded the statute of frauds.

Held, affirming the judgment of the court below, Patterson J. doubting, that there was no completed agreement in writing to satisfy the statute of frauds.

Per Ritchie C.J.—The agreement only provides for payment of $6,500 leaving the greater part of the purchase money unprovided for. If W. was to assume the mortgage it was necessary to provide for the release of L.'s other property and for matters in relation to the leasehold property.

Per Strong J.—The agreement was for sale of an equity of redemption

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

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only, and as questions would arise in future as to release of L.'s other property from the mortgage and his indemnity from personal liability to the mortgagee, which should have formed part of the preliminary agreement, specific performance could not be decreed.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment given at the trial in favour of the plaintiff.

The facts upon which the appeal was brought and decided sufficiently appear from the above head note.

At the trial before Mr. Justice Townshend judgment was given in favour of the plaintiff, the learned judge being of opinion that the documents in evidence, coupled with the surrounding facts and circumstances, established an agreement sufficient under the Statute of Frauds to bind the defendant. The court *en banc* reversed this decision and ordered judgment to be entered for the defendant. From the latter decision the plaintiff appealed.

Newcombe for the appellant. The agreement in writing was complete and any subsequent dealings not reduced to writing cannot defeat the contract contained in it; *Foster* v. *Wheeler* (1); *Bolton Partners* v. *Lambert* (2); *Gray* v. *Smith* (3); *Bellamy* v. *Debenham* (4); *Rossiter* v. *Miller* (5).

The expression at the end of the signed documents only contemplates a more formal agreement which will not render the contract invalid; *Parker* v. *Taswell* (6).

The alleged parol agreement was a mere negotiation. *Harding* v. *Stair* (7); Fry on Specific Performance (8).

(1) 36 Ch. D. 695; 38 Ch. D. 130.
(2) 41 Ch. D. 295.
(3) 43 Ch. D. 208.
(4) 45 Ch. D. 481.
(5) 3 App. Cas. 1124.
(6) 2 DeG. & J. 559.
(7) 21 N. S. Rep. 121.
(8) 2 ed. sec. 1006.

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Plaintiff is certainly entitled to recover back the $1,000 which he paid.

Russell Q.C. for the respondent. The parties were never *ad idem*, there being matter to be settled before a complete contract could be made. *Stanley* v. *Dowdeswell* (1); *Honeyman* v. *Marryatt* (2).

The contract was abandoned and a new one made. *Britain* v. *Rossiter* (3); *Leroux* v. *Brown* (4).

Sir W. J. RITCHIE C.J.—I think there was no final arrangement and adjustment of the terms and deeds to be arranged and signed by the first of May then next, as provided by the memorandum of the 9th of April, 1889, and therefore the defendant was justified in refusing to give a deed of the Parker property until such terms were arranged, or at any rate until plaintiff had arranged to release and discharge defendant and his property at the north end, mentioned in the mortgage for $36,000, from such mortgage.

Mr. Justice Ritchie says, and I agree with him, that it is quite evident from the testimony of Mr. Barnhill that the terms which the defendant added to the agreement at his request were only those which had previously been agreed to, and not those which were to be arranged between the parties before the first of May. No other terms were ever afterwards agreed to between plaintiff and defendant; an attempt was made to do so which failed.

And I also agree with him that taking into consideration the position of affairs a good many additional terms required to be arranged so as to make a conclusive agreement.

There is no reference made in either agreement to the mortgage, and according to the terms of that signed

(1) L. R. 10 C. P. 102.
(2) 6 H. L. Cas. 112.
(3) 11 Q. B. D. 123.
(4) 12 C. B. 801.

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by plaintiff he was to pay $42,500 for the land subject to the encumbrances thereon; no provision is made for the payment of the larger portion of the purchase money, and if the mortgage is to be assumed by the plaintiff and taken as part of the purchase money there is no arrangement for obtaining the consent of the mortgagees, or as to the release or other disposal of the north end property. The agreements import the purchase of the fee simple, but the transfer of the leasehold portion is not provided for nor is any provision made in relation to the existing lease and the payment of the rent by the tenants of the defendant, which would have to be settled in some way before the purchase was concluded.

STRONG J.—There would, in my opinion, be no difficulty in holding that the two documents dated the 9th of April, 1889, one signed by the plaintiff and the other by the defendant, when read and construed in the light of the surrounding facts, contained all the essential requisites of a completed contract of sale sufficient to satisfy the requirements of the Statute of Frauds, were it not for the reference to the further arrangement of terms contained in each of them.

When land in mortgage is sold it is, of course, competent to the parties to agree to the sale either of the land itself or of the equity of redemption subject to the encumbrance. It appears that this property was, together with other property belonging to the defendant, subject to a mortgage of $36,000. According to the strict construction of the article signed by the defendant, read without the addition prefaced by the word "terms" subsequently added to it, it would appear that what was intended to be sold was the land for the gross sum of $42,500. The added memorandum, however, shows sufficiently that it was the equity of redemption

subject to the mortgage which was to be sold. This also sufficiently appears from the document signed by the plaintiff where the purchase by him is expressed to be for the price of $42,000 subject to encumbrances. Literally construed this would mean $42,000 over and above the encumbrances, but read in conjunction with the paper signed by the defendant I think it sufficiently appears that what was meant was that the whole price was to be $42,500, and that it was to be subject to the encumbrances the amount of which was to be deducted out of the price.

It is important to distinguish between a sale of the land itself, though in fact subject to encumbrances, and a sale of the equity of redemption the purchaser assuming the encumbrances, inasmuch as the rights of the parties in carrying out the sale are not the same.

If the land itself was sold then, a good title having been shown, or the purchaser having accepted the title, the vendor is bound to procure the concurrence of the mortgagee in the conveyance, he being paid off in the first instance by the vendor or by an appropriation of a sufficient part of the purchase money. The encumbrance in such a case does not constitute an objection to the title but is said to be a matter of conveyancing, that is to say, a matter respecting the completion of the sale by a conveyance. This is the general law and practice which regulates the carrying out of executory contracts of sale, and is always strictly adhered to in English practice and also (in Ontario) in carrying out sales under a decree of the Court of Chancery, though in the case of private contracts the distinction between matters of title and matters of conveyancing is not so strictly observed. This assumes that the vendor is entitled to compel the mortgagor to take his money, that is, the mortgage must be overdue; if this is not so the mortgage

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constitutes an objection to the title and is not a mere matter of conveyancing.

In the case of a sale of an equity of redemption, in other words a sale of land in mortgage upon the terms that the purchaser is to take a conveyance of the mere equity of redemption paying the vendor the specified price for that, a court of equity assumes (unless there is some agreement to the contrary) that the purchaser is to indemnify the vendor against the mortgage if there is any personal liability on his part in respect of it.

As I have said I am of opinion that this was a sale of the equity of redemption subject to the mortgage and therefore the plaintiff would be bound to indemnify the defendant against it. It turns out, however, that this mortgage comprises other lands belonging to the defendant which the plaintiff has not purchased. Now upon the plaintiff paying off the mortgage he would be entitled to an assignment of the mortgage. Supposing this to have been done, what are to be his rights regarding these other lands? Is he to be entitled to turn round and call upon the defendant to redeem the other lands by paying him the full amount of the mortgage money? This, of course, it is out of the question to suppose was ever intended by either party. Or was he to be entitled to insist upon having an apportionment of the mortgage money and a ratable proportion of it according to value charged upon the defendant's other lands which the plaintiff would have to redeem in order to get his own property acquired under this contract of purchase exonerated from the mortgage, or would the defendant be entitled to insist on a reconveyance of his other lands without in any way contributing to the payment of the mortgage money, thus making it compulsory upon the plaintiff, when redeeming the property which is the subject of

the purchase, to redeem the defendant's other lands also, and precluding the plaintiff from making any terms with the mortgagee for partial redemption? I do not say what the rights of the parties would be as regards any of these questions. Perhaps there may be little foundation for any apprehension regarding them, or perhaps the law is clear one way or the other. I only refer to them to show that there were, on the proper construction of the contract as a purchase of the equity of redemption, future questions sure to arise which it was reasonable and proper should be determined by some fixed and settled arrangement in the preliminary contract. If the mortgage had embraced no other lands but those which were the subject of the sale no difficulty could have arisen. The well settled principles of law as administered by courts of equity between vendor and purchaser would have supplied the deficiencies of the written agreements of the parties, and I am far from saying that it would not do so notwithstanding the fact that the mortgage covers these other properties of the defendant. The materiality of what I have endeavoured to point out is with reference to the question of there being a completed and concluded agreement in view of the reference to the arrangement of further terms contained in both the articles, as well that signed by the plaintiff as that signed by the defendant. It appears to me, when we find these questions I have adverted to left outstanding and unprovided for, to be impossible to say that the added terms which were appended by the defendant to the memorandum he signed dispose of all that could be meant to be referred to by the proviso "Terms, deeds, &c., &c., to be arranged by 1st May next," and this is still further strengthened by the word "deeds" in the plural having been used in the corresponding proviso in the article signed by the plaintiff.

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I am of opinion that there never was a concluded agreement between the parties. The appeal must therefore be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred in dismissing the appeal.

GWYNNE J.—I retain the opinion I had when this case was argued that the appeal should be dismissed.

PATTERSON J.—The first question in this case, which is raised under the Nova Scotia statute equivalent to the fourth section of the Statute of Frauds, does not seem to me to create any great difficulty.

The defendant wrote with his own hand on the 9th of April, 1889, two memorandums, one of which he signed and gave to the plaintiff, and the other of which the plaintiff signed and the defendant kept. They differed in one respect, but they agreed in the essential matters of the parties to the contract, the land that was sold, and the price of it. The price was $42,000, and the difference between the two papers was that that which the plaintiff signed had the words "subject to the encumbrances thereon," which were not in the other. Those words are capable of meaning that the price named was what the purchaser was to pay in addition to assuming the encumbrances, but they do not necessarily mean that, and they were not intended to have that meaning. The defendant himself swears to that. They may without difficulty be construed according to the real agreement, which was that $36,000 of the price was to be reckoned for with the holder of a mortgage on the land for that amount, and $6,500 paid to the defendant. That was made more clear, if it were necessary to show it upon the face of the papers, by the note added on the same day

by the defendant to the memorandum which he had signed, viz.:

> Terms, $500 cash this day, $500 on delivery of the deed of the Parker property. $800 with interest every three months until *the six thousand five hundred* dollars are paid, when the deed of the entire property will be executed.

It is not "until $6,500 are paid," but "until *the* $6,500 are paid." This sum was the margin of purchase money coming to the defendant.

The sufficiency of the memorandum in relation to the statute is disputed principally because of the words "terms, deeds, &c., &c., to be arranged by 1st May next," which it is argued indicate that the agreement was not complete. I think that is a mistaken idea, but it has been the occasion of a good deal of ingenious argument. On the part of the plaintiff it has been urged that when the defendant, on the day of the date of the agreement, added the note which he headed "terms," doing so because asked by the defendant through his solicitor to set down the mode in which the money was to be paid, the arrangement of terms was made which was to have been made by the first of May. The defendant controverts this construction of his act and is right in so doing, as I apprehend the matter. I think he merely put in writing what was already agreed upon, and what the plaintiff understood and acted on when he sent his solicitor to the defendant with money to pay the $500 cash instalment. At all events these terms of payment, whether previously agreed upon or now for the first time settled, became part of the written agreement and no longer remained a matter that could be treated as still to be arranged. The "terms," whatever that word was used in the contract was intended to denote, either never included, or ceased to include, the mode of payment or the time when the conveyances were to be completed. If we

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assume the added note to state what had been previously agreed upon it is plain that the words "terms, deeds, &c., &c.," cannot have been intended to refer to the time when the deeds were to be executed. The first of May was only three weeks off, and the deed of the entire property was not to be executed till the $6,500 was paid, the payments being, as to $5,500 at least, at the rate of $800 every three months. When that sum of $6,500 was all paid the deed was to be *executed*. The expression seems carefully chosen. The arrangements concerning "terms, deeds &c., &c." were to be completed within the three weeks, but the actual execution of the deeds was to be deferred—the deed of the Parker property to be *delivered* when the plaintiff was prepared to pay a second $500, and the other deed *executed* when the whole was paid.

I understand the office of the words in question to be to fix the first of May as the limit for the completion of such matters of conveyancing as investigating titles, settling forms of deeds and other arrangements, including perhaps arrangements with tenants and with the mortgagee, matters essential to the carrying out of the contract but not being a part of the contract which the statute of frauds required to be in writing.

The word "terms" is no doubt a sufficiently comprehensive expression to include terms of payment, but if the terms of payment had been left at large, or if any other terms of like nature were left for future arrangement, the contract would nevertheless be, in my opinion, a complete contract which, being in writing, would satisfy the statute.

As said by Wilde C.J., in *Valpy* v. *Gibson* (1):

> The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold, and frequently are sold, when it is the intention of

(1) 4 C. B. 837, 864.

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the parties to bind themselves by a contract which does not specify the price or mode of payment, leaving them to be settled by some future agreement or to be determined by what is reasonable under the circumstances.

In *Ashcroft* v. *Morrin* (1) the offer was to buy goods "on moderate terms." Tindal C.J. said:

> The order here is to send certain quantities of porter and other malt liquors on "moderate terms." Why is not that sufficient? This is the contract between the parties.

In my opinion this written contract satisfies the statute.

It appears that difficulties arose between the parties owing, as I gather, to the discovery that the $36,000 mortgage covered other land of the defendant besides that which the plaintiff was buying, and it was attempted to avoid trouble by making a new agreement by which the plaintiff was to pay $500 less for the land and was to provide for the mortgage debt so as to set free the defendant's land. That new agreement, which was not reduced to writing, was pleaded and was relied on at the trial as having superseded the written contract, but it was shown to have been tentative only and not absolute, depending on contingencies one of which was the ability of the plaintiff to raise the necessary amount of money. There was conflicting evidence as to its having been expressly negotiated without prejudice to the former agreement, but it strikes me as of very little moment whether that was expressed or not. If an absolute agreement was made it would of course supersede the other. They could not both stand, and it would be idle to talk of its being without prejudice. On the other hand the negotiations could not prejudice the existing contract as long as they fell short of a binding agreement. I believe there was no difference of opinion

(1) 4 M. & G. 450.

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on this point in the court below—though upon the question of the original contract opinions were equally divided, Mr. Justice Townshend at the trial and the Chief Justice in *banc* taking one view, and two judges, forming a majority of the court in *banc*, differing from them.

The inclination of my opinion is to restore the judgment pronounced by Mr. Justice Townshend and to allow the appeal, but I do not feel strong enough in that view to formally dissent from the conclusion arrived at by the other members of the court, particularly having regard to the fact that the plaintiff seeks specific performance, his right to which is complicated by the misunderstanding respecting the property covered by the $36,000 mortgage.

Appeal dismissed with costs.

Solicitor for appellant: *J. L. Barnhill.*

Solicitor for respondent: *John T. Ross.*

SIMON PETERS AND OTHERS.....APPELLANTS ; 1891

AND

*Feby. 25, 26, 27.

THE QUEBEC HARBOUR COMMISSIONERS..... .... } RESPONDENTS. Mar. 2, 3.

*Nov. 17.

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

Contract—Engineer's certificate—Finality of—Bulk sum contract—Deductions—Engineer's powers of—Interest.

In a bulk sum contract for various works and materials, executed, performed and furnished on the Quebec Harbour Works, the contractors were allowed by the final certificate of the engineers a balance of $52,011. The contract contained the ordinary powers given in such contracts to the engineers to determine all points in dispute by their final certificate. The work was completed and accepted by the commissioners on the 11th October, 1882, but the certificate was only granted on the 4th February, 1886. In an action brought by the contractors (appellants) for $181,241 for alleged balance of contract price and extra work.

Held, 1st, that the certificate of the engineers was binding on the parties and could not be set aside as regards any matter coming within the jurisdiction of the engineers, but that the engineers had no right to deduct any sum from the bulk sum contract price on account of an alleged error in the calculation of the quantities of dredging to be done stated in the specifications and the quantities actually done, and therefore the certificate in this case should be corrected in that respect.

2. That interest could not be computed from an earlier date than from the date of the final certificate fixing the amount due to the contractors under the contract, viz., 4th February, 1886. Fournier J. dissenting.

Strong and Gwynne JJ. were of opinion that the certificate could have been reformed as regards an item for removal of sand erroneously paid for to other contractors by the commissioners and charged to the plaintiffs.

APPEAL AND CROSS APPEAL from a judgment of

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

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the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing a judgment of the Superior Court for Lower Canada (2).

In 1876 the Quebec Harbour Commissioners, having resolved on the construction of extensive works on their property, lands and foreshore, between the Ballast Wharf at the City of Quebec and the Gas Works at the mouth of the River St. Charles, caused specifications and bills of quantities of the proposed undertaking to be prepared by their engineers, Messrs. Kinipple & Morris, of Greenock, and advertised for tenders on the part of contractors for their execution.

On the original proposition, the contract works were to be briefly these :—The construction, the completion and maintenance of a wall and embankment, forming the North Quay of a proposed South Tidal Harbour, inclusive of an 80 foot entrance and bridge over the same; a wall and an embankment, forming the North Quay of the proposed South West Dock; the dredging out and the formation of a channel way parallel to both walls; cribwork at the end of the embankment next the Gas Works; cribwork and retaining wall adjoining the Ballast Wharf, and other works; and the offer of the party tendering "was to be in a lump sum, based upon the prices filled in against the various items of work in the bills of quantities."

The appellants' offer was accepted and the contract awarded to them. On the 2nd May, 1877, the formal agreement was executed and soon after the undertaking was begun. From time to time great changes were made in the nature of the works, additions and modifications being largely made, and additional dredging was called for. In December, 1881, the contract was completed and the works handed over to the commissioners who, on the 22nd of

(1) 16 Q. L. R. 129. (2) 15 Q. L. R. 277.

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that month by letter, asked for a final detailed statement showing the balance due the contractors, which was duly furnished. These accounts were submitted to the engineers, who in the judgment of the contractors were disqualified from personal interest from giving a fair decision, and objection was therefore taken to their acting, the contractors asserting that they would not be bound by the decision. Ultimately it was agreed that the respective claims of the parties should be referred to the Dominion Arbitrators, this course being sanctioned by an Order in Council of the Executive Government of Canada. The arbitrators heard the matter, and awarded the contractors $118,333.34, a sum considerably less than their demand, but in excess of the sum stated to be due by the engineers. This award was made in October, 1882. After keeping the parties in suspense for many months the commissioners repudiated the award on the ground that there was no submission, and that the reference did not fall under the statutory powers of the arbitrators. Negotiations for settlement went on for some time without success. Ultimately, after obtaining with some difficulty the consent of the commissioners, a final certificate showing a balance due of $52,011 was issued by the engineers on the 4th February, 1886, four years and two months after the contract was ended and the works handed over, but the contractors did not accept this balance and the present suit was brought.

In 1882 a new contract was entered into between the commissioners and the firm of Larkin, Connolly & Co., involving additional dredging and the construction of a cross wall, and during the years 1883 and 1884 these latter excavated and deposited on the embankment large quantities of material.

The alleged final certificate, together with the de-

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tailed statement upon which it is based, were filed in the case. The former reads thus:

"FINAL CERTIFICATE.

"We hereby certify that Messrs. Peters, Moore & "Wright are entitled to a final payment under their "contract of the sum of Fifty-two thousand and "Eleven dollars ($52,011).

"KINIPPLE & MORRIS."

By their action the contractors objected to this certificate on five grounds. They objected to two deductions, which they asserted were improperly made by the engineers—the first of $34,720 for "Clerical error and dredging under Tidal cribs;" and the second of $13,326, "for removal of sand left on Louise Embankment." And they claimed that in three particulars, sums that were fairly and honestly due to them were omitted by the engineers.

The commissioners met this demand by various pleas.

1. On the 20th October, 1886, they filed a confession of judgment for $52,011 with interest from the 4th February, 1886 (the sum awarded by the certificate), and costs of suit, and consented that judgment be entered up against them pursuant to such confession.

2. By temporary exception they alleged that the engineers should have been made parties to the suit.

3. By demurrer that fraud and collusion were insufficiently set out.

4. By perpetual exception alleging:—

That by the contract between the parties it was agreed that in the event of any difference of opinion between the engineers and the plaintiffs the decision of the engineers upon such dispute should be final.

The 48th clause of the contract provided that alterations, deductions and modifications of the works might be made by the engineers without rendering void the contract; that the value of such additions,

deductions, modifications and omissions, should be determined by the engineers according to the schedule of prices specified in the contract ; that if any work or material was ordered to which the schedule prices did not apply, the engineers should price out the additions or omissions and their decision as to such price should be binding ;

The 55th, 56th and 57th clauses of the contract provided that on the termination of the contract all the accounts relating thereto between the plaintiffs and the defendants must be submitted to and adjusted and settled by the engineers who thereupon should issue their certificate fixing the balance due to the contractors, which certificate should be conclusive and binding on both parties without any appeal ; that the contractors should not be entitled to demand and the commissioners should not be bound to pay any sum for work completed, extras or any other cause until a certificate had been granted that such sum is due ;

By the 67th clause all disputes connected with the contract in any way were left to the final decision of the engineers ;

That the works claimed for by the declaration, in so far as done at all, were done under the provisions of the contract ; that all the accounts relating thereto including all the claims now put forth were submitted to the engineers and adjusted by them and they thereupon issued the final certificate attached, which certificate is conclusive and final between the parties ; and the defendants tender a confession of judgment for the amount thereof with interest from the date of the certificate and costs of suit up to the filing of the confession;

That with the exception of the amount of the final certificate the plaintiffs were fully paid for all work, &c., done by them.

5. By a further plea they set up a penalty fixed by

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the contract for failure to deliver the works at the agreed time—an alleged delay of 56 weeks, amounting to $6,500; and damages $5,834, due from a supposed fault in the wall; and they prayed compensation for so much of these two sums as might turn out to be due as against the confession.

To these pleas the plaintiffs replied specially, that large extra works had been ordered and executed; that great modifications had been made; that there had been strikes during the pendency of the contract; that there had been remarkably high tides interfering with the progress of the work, and that for these reasons, under section 52 of the agreement, the penalty could not be claimed.

Upon these issues the parties went to proof and hearing and in the result the Superior Court at Quebec overruled in part the certificate of the engineers, the confession based upon it, and the special pleas of the defendants, and awarded the plaintiffs $91,809.72 with interest on $119,586.17, from the 11th October, 1882, to the 22nd September, 1883; on $113,009, from the 22nd September, 1883, to the 13th October, 1883; on $111,809, from the 13th October, 1883, to the 28th February, 1884; and on the sum of $91,809.72, from the 28th February, 1884, till paid, with costs and interest on the whole debt from the 11th October, 1882.

The Court of Queen's Bench for Lower Canada (appeal side) reversed the judgment of the Superior Court and awarded the appellants the amount of $56,418.71 with interest from the 11th October, 1882.

The principal questions which arose on this appeal were:—Have the engineers, properly or improperly, made the deductions of $34,472 and $13,326, as stated in the detailed schedule of their final certificate? Was the quantity of the concrete placed behind the

wall by the engineer's orders other and different from that stipulated; and if so, what loss did the change occasion to the contractors? Have the engineers allowed for the whole quantity of concrete actually placed; and if not, what is the amount and value of the portion not allowed for? And have the engineers pursued the contract in measuring by the ton of 2,240 lbs.?

From what date should interest be allowed the appellants on the amount to be awarded? Can the certificates of the engineers be reformed by the court?

Osler Q.C. and *Cook* Q.C. for appellants contended:

(1.) That the deduction of $34,472 for dredging is unjustifiable; that in fact there was no substantial error; that by the express clauses of the contract, and notably by clause 48, no deduction was to be made from the contract sum, except on a corresponding deduction from the work made on the written orders of the engineers—none such being made in the present instance; that no covenants in the contract empower the engineers to deal with errors in the specifications; that no reference in this respect was ever made to them by the parties, and that their action in dealing with the pretended error is wholly *ultra vires*; that under the circumstances their assuming to exercise powers not entrusted to them is a breach of duty amounting to fraud.

(2.) That the deduction of $13,326, now reduced by the Court of Queen's Bench to $8,918.50, for alleged levelling of sand is unjustifiable; that the proof shows that both in fact and to the knowledge of the engineers, no sand was left above grade, with the exception of a few yards at their request for concrete; that the time, manner, and circumstances of this deduction establish clearly its fraudulent nature, originating with the

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Commissioners and adopted by the engineers in the interest of the succeeding contractors, Murphy, Connolly & Co.

(3.) That the engineers having under their extensive powers, with a view to improve the permanent character of the works, compelled the contractors to substitute for the stipulated concrete behind the walls a concrete of a different nature, and unquestionably more expensive, in wholly refusing reasonable compensation for the change have violated both the letter and the spirit of the contract, and are guilty of a breach of duty, and that the contractors are entitled to additional remuneration at the rate of $1.50 per cubic yard.

(4.) That having increased the thickness of the concrete backing in rear of the stone the engineers, in violation of the agreement and of the special undertaking contained in the correspondence between the contractors and the resident engineer, wrongfully refused payment for 3,074 out of 16,079 cubic yards, thus injuring the contractors to the extent of $14,000.

(5.) That the engineers had violated the contract in computing the value of material to be furnished under the contract by the English ton of 2,240 lbs., in lieu of by the Canadian statutory ton of 2,000 lbs.

(6.) That the appellants are entitled to interest on the balance due (less 10 per cent) from December, 1881, the date of the entry of the commission into possession of the works, and upon the ten per cent withheld, from December, 1882.

(7.) That the proof of record establishes disqualification on the part of the engineers, and fraud and collusion between them and the commissioners.

(8.) That in these various respects the certificate should be reformed.

The learned counsel also relied on the points of argu-

ment and cases cited in the court below (1), and art. 283 C. C.; Pothier, Vente (2).

Irvine, Q.C. and *G. Stuart* Q.C. for respondents, contended:

1st.—The plaintiffs had not made a beginning of proof of fraud or collusion on the part either of the commissioners or the engineers.

2nd.—The plaintiffs had not shown even error in law or in fact though the court would not be justified in going into either in default of fraud.

3rd.—That one partner having admitted in formal terms that this certificate is just and equitable and that he is satisfied therewith his declaration binds his partners.

4th.—That the plaintiff's pretensions with reference to the concrete both as to quality and quantity are so entirely without foundation as to cast a grave suspicion on the sincerity of the demand with reference to the other items.

5th.—The plaintiffs after adopting a standard for the calculation of stone and clayey material, using it throughout the works and finally sending in a statement of the money claimed in connection with this part of the contract, have no right to demand an additional sum exceeding $5,000 on the assumption that a new legal measure, which became law four days before the signing of the contract, was not used.

6th.—The plaintiffs could not complain of the rectification of a manifest error in the specification of the dredging, and at the same time adopt a rectification made in their favour of the quantity of concrete in the works.

7th.—The plaintiffs attempt to deny the error in the amount of dredging because of the non existence of the scale on the plan showing it when they know quite

(1) 16 Q. L. R. 144. (2) No. 283.

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well that any engineer can establish the scale without difficulty.

8th.—If the final certificate be set aside the only amount which the plaintiffs can recover is the $12,807.29.

9th.—The judgment awards interest from the year 1881, where interest under any circumstance was payable only from the date of the final certificate.

And in addition to the cases cited in the court below (1) relied on *Jones* v. *The Queen* (2); *McGreevy* v. *McCarron* (3); *McGreevy* v. *Boomer* (4); Troplong Vente (5); Larombière (6); Guyot Répertoire (7); Demolombe (8); Arts. 1070, 1077 C. C.

Sir W. J. RITCHIE C.J.—I think the certificate of 4th February, 1886, is not binding on the contractors as to what has been called a clerical error, which, in my opinion, was no error at all. The engineers acted beyond their duty or jurisdiction in respect to this, and in fact changed the contract, which was for a lump sum, by deducting $34,472 by, as they allege, a clerical error in the amount of dredging set out in the specification which they had no right to do, and which was not within the terms of the contract, the quantities specified therein being, in my opinion, final between the parties.

As to the sand, for the removal of which the defendants paid and now claim as a set-off, I have had very considerable doubt, but as this was a question of fact on which there was very considerable contradictory testimony I do not feel able to say that the conclusion arrived at was so clearly incorrect as to justify this

(1) 16 Q.L.R. p. 136 & seq.
(2) 7 Can., S.C.R. 570.
(3) Cassels's Dig. 79.
(4) Cassels's Dig. 73.
(5) Nos. 598 and 599.
(6) 1 Vol. p. 475.
(7) Vol. 3 Vo. Demeure p. 396.
(8) 24 Vol. p. 492.

court in reversing the conclusion arrived at by both the courts below on such a pure question of fact.

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As to the difference claimed on the long and short tons, the Dominion Revised Statute ch. 104, sec. 15, declares that 2,000 lbs. shall be a ton, but it does not appear that the long ton was adopted. Boxes were used as standards by agreement between the parties and the determination of this question comes within the powers of the engineers.

I also think the item for cement or concrete was clearly by the contract to be determined by the engineers.

Then should interest be computed from the date of the termination of the contract, 11th October, 1882, the time fixed by the judgment of the Court of Queen's Bench, or, as the commissioners claim, from the 4th February, 1886? The plaintiffs claim that the work was completed and accepted on the 1st December 1881, and that they are entitled to interest from that date, but until the certificate the plaintiffs had no right of action and until the amount was established there was nothing on which interest could be computed.

The appeal and cross-appeal should be allowed with costs.

STRONG J.—For the reasons which I fully expressed during the long argument of this appeal I am of opinion that the judgment of the Court of Queen's Bench should not be interfered with as regards the item relating to concrete, and that the judgment of the court below should also stand as to the long and short ton, all objection to which I consider to be concluded by the certificate of the engineer.

Then as regards the clerical error, that is the error made by the engineer in calculating the number of yards of dredging as set out in the specifications, I am

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of opinion that this was a matter beyond the jurisdiction of the engineer under the contract to deal with. They had no power to make the allowances which they did and therefore the appeal to the extent of that amount should succeed.

As to the sand—I think it was within the jurisdiction of the engineers and they did assume to deal with it. But it is clearly established that they never exercised their own judgment in regard to this matter and therefore, in my opinion, the proper conclusion is that the certificate is not binding as to this item.

I believe the majority of the court are of opinion that the sand was left on the embankment by the appellants, and they were properly charged for its removal, and as both courts have found this as a matter of fact it is conclusive. In my opinion the evidence strongly establishes that, as contended for by the appellants, the sand was placed on the embankment not by the appellants but by other contractors. I arrive at this conclusion, not from the mere testimony of witnesses, but from all the surrounding circumstances which point to this as the true result. The amount charged for the removal of this sand should therefore, in my opinion, have been allowed, and the judgment ought therefore to be rectified in this respect.

The interest can only run from the date of the certicate under the terms of the contract, and therefore the cross-appeal upon this head should prevail.

The result is that the appeal should be allowed as regards two items, the clerical error and the sand, and the cross-appeal allowed as to the interest. The costs should be apportioned as proposed by my brother Patterson.

FOURNIER J.—Je concours dans le jugement qui va être prononcé en cette cause, excepté dans la partie

concernant les intérêts. Il est en preuve que les parties étant incapables de s'entendre sur le montant de la réclamation des appelants, consentirent à s'en rapporter à la décision des arbitres officiels du Canada. Le ministre des Travaux Publics ayant donné son consentement à cette référence, il fut passé le dix-neuf août 1882 un ordre en conseil à cet effet, et plus tard, le onze octobre de la même année, la majorité des arbitres après avoir entendu les parties et leurs témoins, décida que l'intimée devait payer aux appelants la somme de cent dix-huit mille trois cent trente-trois piastres et trente-quatre centins ($118,333,34.)

Bien que les appelants ne se soient pas prévalus de cette sentence, parce qu'ils en trouvaient le montant insuffisant, le consentement de l'intimée à cette procédure ne peut pas être considéré autrement que comme un abandon formel de sa part du droit stipulé dans le contrat du 2 mai 1877, de ne payer la balance du prix du contrat, qu'après la production du certificat final des ingénieurs, constatant la complète exécution des travaux. La balance due étant alors devenue exigible par l'appelant en conséquence de cette procédure qui a été une véritable mise en demeure et demande judiciaire les appelants ont alors acquis le droit aux intérêts sur ce qui leur était dû. Pour cette raison, je serais d'avis de condamner l'intimée, comme l'a fait la Cour Supérieur, au paiement des intérêts à dater du onze octobre 1882.

Une autre raison de la condamner à payer les intérêts, c'est que la propriété dont il s'agit étant de nature à produire des fruits et revenus, l'intimée en a pris possession en 1881. Par ce fait elle s'est soumise au paiement des intérêts qui, dans ce cas courent de plein droit et sans qu'il soit besoin d'aucune mise en demeure, en vertu de l'art. 1534 du code civil.

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Taschereau J.

TASCHEREAU J.—I agree with what has been said in the reasons given for the dismissal of the appeal on all the items except the one known as the clerical error. It is the only amount which should be added to the judgment of the Court of Queen's Bench. The costs of the *enquête* before the Superior Court are very heavy and we must therefore make a distinction, and I agree with the result arrived at by my Brother Patterson.

GWYNNE J.—I agree with my Brother Strong on the two items he thought should be allowed.

The item of sand was deducted not only because it was a matter of compulsion by letter addressed to them by the commissioners but also upon the fact that the work had been accepted and taken over long before the subsequent contractor removed any sand. However, the majority of the court are of opinion that only one item should be added.

PATTERSON J.—The engineer's certificate dated the fourth of February, 1886, must in my judgment be regarded as the final certificate under the contract. It may, however, be properly read in connection with the details afterwards furnished showing how the amount of $52,011.21 (the odd cents were omitted in the certificate) was arrived at, so that without questioning the decision of the engineers upon the matters respecting which they were authorised to certify any matters outside of their jurisdiction may be eliminated. One of these is what they call a clerical error, being a part of the amount estimated by them in the specifications as the number of cubic yards to be dredged. They deduct $31,050 from the contractors' earnings on the ground that the actual dredging fell short of the estimate by the number of yards which at 25 cents a yard made up that sum. But the contract was for a lump sum, the

price per yard being named for the purpose of progress certificates, or for computing the price to be paid or allowed for additions to or deductions from the specified work, if such additions or deductions had been made in manner provided by the contract. No such additions or deductions were made in this instance.

The contractors contend that there was not in fact a smaller number of yards of dredging than the number assumed by the specifications. It is clear, however, that the dredging, whether more or less than the assumed amount, was included in the gross contract and that the deduction varies the contract, which the engineers had no power to do. The term "clerical errors" which is the euphemism under which they cover the supposed mistake in their preliminary calculations, which was seemingly no mistake after all, is not properly applied to the item.

Another deduction is of $13,326 for removal of sand said to have been left by the contractors on the embankment. We have here again a serious dispute on the question of fact, but a glance at the contract and at one or two undisputed facts makes it clear that the deduction was beyond the powers of the engineers. The contract works were completed by the contractors and handed over to the Harbour Commissioners in the autumn of 1881. A new contract was given to other contractors who continued dredging during the summers of 1883, 1884 and 1885, depositing sand on the embankment in question. In the winter of 1885 the new contractors were required to level the sand on the embankment and they did so, but they allege that a portion which, at 25 cents a cubic yard, made the amount of $13,320 had been left there by the plaintiff. The duty of the engineers with regard to the plaintiff, and their functions under the contract, are plainly provided for:

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"The contractor, on the completion of the works, shall give notice to the engineers in writing, and the engineers shall forthwith examine the whole of the works.....in the event of the works not being completed to the satisfaction of the engineers, they shall give notice to the contractor in writing to remedy such defects."—(Sec. 65. See also sec. 68.)

No such action was taken by the engineers, and it was at the instance and by the direction of the commissioners that the sum of $13,320 was charged to the plaintiff by the engineers who themselves knew nothing of the matter.

That proceeding was not authorised by the contract and was not binding on the plaintiff. It has, however, been found as a fact that the commissioners actually paid the other contractors $8,918\frac{50}{100}$ for work which the plaintiff ought to have done in removing or levelling sand, and they are entitled to set off that amount by way of compensation against the plaintiff's claim. Therefore we add to the nominal balance of $52,-011\frac{29}{100}$, the full $31,050 for the so-called clerical error, and in respect of the sand we add the difference between $13,326 and $8,918\frac{50}{100}$, or $4,407\frac{50}{100}$, making the whole claim of the plaintiff $87,468\frac{71}{100}$, which is the same amount adjudged by the Court of Queen's Bench plus the clerical error.

There are other items attacked by the appellants as improperly found against them by the engineers. Two of these relate to concrete, one referring to the quality and one to the quantity. Another item is the weight of stone which the appellants complain was computed at 2,240 lbs. to the ton in place of 2,000. These complaints were the subjects of much evidence and much argument, but they came within the scope of the duty of the engineers and we cannot put ourselves in their place.

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I do not see any tenable ground for allowing interest to the plaintiffs from any date earlier than that of the certificate, viz., the 4th of February, 1886. It is apparently a hardship on the plaintiffs that it cannot be computed four years farther back, but under the contract, clause 57, the money was payable only upon the engineer's certificate, and, in the absence of an agreement to pay interest it cannot be claimed until the debtor is in default.

We cannot undertake to say who was to blame for the long delay in procuring the certificate. The enquiry would be irrelevant, because even if the delay were occasioned by any contrivance or act of the commissioners of which the plaintiffs could complain their remedy would be by way of damages for the wrong, and not as interest upon a debt which by the terms of their contract was not yet payable.

The appeal and cross-appeal both succeed and should be allowed with costs. The plaintiff has failed on some items the investigation of which in the court below must have involved a good deal of expense on both sides. It would therefore seem just that each party should bear his costs of *enquête*. In other respects the plaintiffs should have the general costs of the action, including the costs of the appeal to the Queen's Bench, but should pay the costs of the cross-appeal to that court. The costs of appeal to this court allowed to the plaintiffs are not to include any costs of printing the *enquête*.

Appeal and cross-appeal allowed with costs.

Solicitors for appellants: *W. & A. H. Cook.*

Solicitors for respondents: *Caron, Pentland & Stuart.*

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*Mar. 16, 17.

*Nov. 17.

THE RURAL MUNICIPALITY OF CORNWALLIS (DEFENDANTS)..... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS)... } RESPONDENTS.

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

Assessment and taxes—Lands of the C. P. Ry. Co.—Exemption from taxation until sold or occupied.

By the charter of the C. P. Ry. Co. the lands of the company in the North-West Territories, until they are either sold or occupied, are exempt from Dominion, provincial or municipal taxation for twenty years after the grant thereof from the crown.

Held, affirming the judgment of the court below, that lands which the company have agreed to sell and as to which the conditions of sale have not been fulfilled out are not lands "sold" under this charter.

Held, further, that the exemption attaches to lands allotted to the company before the patent is granted by the crown.

Lands which were in the N. W. T. when allotted to the company did not lose their exemption on becoming, afterwards, a part of the Province of Manitoba.

APPEAL from a decision of the Court of Queen's Bench (Man.) affirming the judgment for the plaintiffs at the trial.

The action in this case was brought against the Municipality of Cornwallis to recover the amounts paid for taxes on certain lands of the Canadian Pacific Railway Co. who had paid the same under protest claiming that said lands were exempt from taxation.

By the contract between the Government of Canada and the Canadian Pacific Railway Co., which was

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ratified by Parliament, the company was to receive a subsidy of land in Manitoba and the North-West Territories, and sec. 16 of the contract provided that:

"The Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be for ever free from taxation by the Dominion, or by any province hereafter to be established or by any municipal corporation therein; and the lands of the company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the crown."

The lands taxed by the municipality were a part of the lands so allotted to the plaintiffs under the contract At the time they were allotted they were situated in the North-West Territories, but shortly afterwards the boundaries of the province of Manitoba were extended and these lands then became part of that province and were so when the said taxes were imposed.

At the time the taxes were imposed the plaintiffs were entitled to patents of the said lands from the crown but the patents had not been issued. The lands had not been sold by the company, nor were they occupied. The company had entered into agreements for sale in respect to each lot, but the purchase money had not been paid in any case and no conveyances had been executed.

The lands were assessed by the defendant municipality and sold for taxes. In order to redeem them within the time prescribed by law the plaintiffs paid the taxes and served upon the appellants at the time a protest claiming that the lands were exempt.

At the trial before Mr. Justice Bain judgment was given for the plaintiffs, and the decision was affirmed

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by the full court. The defendants appealed to the Supreme Court of Canada.

Christopher Robinson Q.C. and *Gormully* Q.C. for the appellants. The exemption from taxation does not attach to these lands until a grant issues from the crown. See *Vicksburg, &c., Railroad Co.* v. *Dennis* (1); *Yazoo & Mississippi Valley Railroad Co.* v. *Thomas* (2).

The lands were sold within the meaning of clause 16 of the contract. *London & Canadian Loan Co.* v. *Graham* (3); *Shaw* v. *Foster* (4); *The New York Indians* (5); *Ex parte Hillman* (6).

E. Blake Q.C. and *Tupper* Q.C. for the respondents.

Sir W. J. RITCHIE C.J.—There must have been a completed sale and the property must have passed out of the Canadian Pacific Railway Co. and vested in the purchaser before it could become liable to taxation. The lands never were sold and occupied; the conditions of the agreement for sale had not been carried out at the time the lands were taxed and the title and occupation, if any, continued in the Canadian Pacific Railway Co.; it was not the agreeing to sell that made the lands liable to taxation; to make them assessable the lands must be actually sold before a right to tax enures to the municipality. The terms of the agreement to sell may never be carried out; in fact in one instance the terms were not complied with, and the agreement was cancelled and none of the payments had been fully made at the date of the trial, and there was not, as the learned judge found, any occupation of the lands.

If the lands are not exempt till there is a grant from the crown I do not see that the defendants are in any

(1) 116 U. S. R. 665.
(2) 132 U. S. R. 174.
(3) 16 O. R. 329.
(4) L. R. 5 H. L. 349.
(5) 5 Wall. 761.
(6) 10 Ch. D. 622.

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better position because while the title was in the crown the lands were exempt from taxation as crown lands, and I think the contract with the government, approved and ratified by parliament, conferred on the Canadian Pacific Railway Co. such an interest in these lands as justified them preventing a deed or certificate passing calculated to damage and interfere with their rights.

I think, therefore, the lands were illegally taxed and sold, and respondents are entitled to recover the money paid to prevent the issue of a deed or certificate in pursuance of the illegal sale. The appeal should be dismissed.

Ritchie C.J.

STRONG J.—I am of opinion that this appeal should be dismissed for the reasons given by the learned Chief Justice of the court below.

FOURNIER and GWYNNE JJ. concurred in the appeal being dismissed.

PATTERSON J.—By clause 16 of the company's contract which has the force of an act of parliament, it is declared that the railway and all stations and station grounds, workshops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be for ever free from taxation by the Dominion or by any province established after the date of the contract; and that the lands of the company in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for twenty years after the grant thereof from the crown.

By section 125 of the British North America Act no

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lands or property belonging to Canada or any province shall be liable to taxation.

The grant of land agreed by the contract to be made to the company was, by clause 11, to be made in alternate sections of 640 acres each, extending back 24 miles deep on each side of the railway from Winnipeg to Jasper House, the company receiving the sections bearing uneven numbers. The exemption clause did not apply to the sections between Winnipeg and the western boundary of Manitoba which was the eastern boundary of the North-West Territories, but applied to all the rest of the land grant, Jasper House being within the North-West Territories. It is scarcely necessary to refer to the contention that when any part of the land ceased to answer the description of land in the North-West Territories, by reason of another name being given to it by an act of the parliament of Canada, it was taken out of the exemption The limits of Manitoba were extended over a portion of the lands, but those lands were still the same lands that the contract described. The contract continued to apply to them just as a contract with or devise to Mary Smith will hold good although by her marriage she becomes Mary Jones.

The lands remained the property of Canada after they came to form part of the province of Manitoba, and as such were not liable to taxation. In this respect lands belonging to Canada and lands belonging to a province are put on the same footing by section 125 of the British North America Act, which probably means that the Dominion shall not tax provincial lands nor shall a province tax Dominion lands, for the taxation of its own lands by either government would be an unprofitable proceeding.

By clause 9 (*b*) it was provided that

Upon the construction of any portion of the railway hereby con-

tracted for, not less than 20 miles in length, and the completion thereof so as to admit of the running of regular trains thereon, together with such equipment thereof as shall be required for the traffic thereon, the Government shall pay and grant to the company the money and land subsidies applicable thereto according to the division and appropriation thereof made as hereinbefore provided.

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The grant of the lands in question was not actually made until 1890. It is conceded that some years before that date the company had become entitled to the grant of them. Why the grant was delayed does not appear. The provision is that as soon as the conditions are fulfilled as to each twenty miles the Government shall grant the land subsidy applicable to that portion of the road.

Whether the twenty years' period of exemption from taxation under clause 16 should be reckoned from the date of the patent for each section granted, or from the time when the company became entitled to the grant and when it became the duty of the Government to make the grant, is a question which was not overlooked upon the argument but which does not now call for decision.

The contract is evidently framed with the idea that the lands shall be granted to the company as soon as the company becomes entitled to them, and without any contemplation of a debatable interval between the ownership of the crown, during which the land is not taxable, and the ownership of the company under the grant, and it does not countenance the rather ingenious contention of the appellants that the land might be taxable before patent issued though exempt after patent.

I have no doubt that the proper construction of clause 16 is that, unless sold or occupied, no part of the land subsidy in the North-West Territories shall be liable to taxation until after the specified period of exemption. The immunity from liability to be taxed, which

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the British North America Act secures to these North-West Territories lands while they are crown lands, is to continue for the twenty years with regard to such of the lands as remain the unoccupied lands of the Canadian Pacific Railway Co.

The lands now in question were never occupied. Were they sold within the meaning of clause 16 ?

It need not be said that lands actually conveyed by the company to a purchaser are sold and are outside of the exemption, and would so remain even if the company should happen to repurchase them unless repurchased for a purpose to which the perpetual exemption under the first part of clause 16 applied. That is one extreme in which the meaning of "sold" is not doubtful.

The other extreme is an agreement to sell such as exists with regard to the portions of land now in dispute.

On the part of the company it is urged that the term "sold" refers only to a sale completed by conveyance, while the contention on behalf the municipality is that the agreement to sell at once brings the land within the description of land sold, taking it out of the exemption and rendering it subject to the provincial legislation respecting taxation and sale for non-payment of taxes.

I do not think that either of these propositions can be maintained in its entirety. The existing provinces have their system of taxation, differing now and then in details but founded on the same principle, which also prevails generally in many of the states of the American Union. The term "taxation" as used in clause 16 of the contract is a very general term, and does not, by its own force, express or include the methods or incidents attendant on the working of the system in any particular province, nor does it imply

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any limitation of the right of whatever province may be organised out of the North-West Territories to arrange its own system and to work it out by its own methods. At the same time the term must be understood to be used in view of the history of the taxation of lands in the provinces and of the ordinary incident of sale of the lands to realise arrears of taxes. The phrase "sold or occupied" seems to recognise the practice of some of the provinces, if not of all of them, of assessing land in the name of both owner and occupant, but which practice is not, during the twenty years, to be followed with regard to such of the North-West Territories lands as the company continues to own.

The system of assessment which now prevails in the province of Ontario took its present general form under legislation of the province of Canada in 1850 (1) and 1853 (2); but land had been taxable in Upper Canada as far back as 1820 whenever "held in fee simple or promise of a fee simple by Land Board Certificate, Order in Council or certificate of any Governor of Canada or by lease" (3). A list was furnished to the County Treasurer every year, beginning with the year 1820, from the Department of Crown Lands, showing what lands were "described as granted," what were ungranted, and clergy reserves, &c., leased (4); and all lands "described as granted" or leased were liable to taxation.

The taxes were made a charge on the lands but it was some years later before the summary process of sale was authorised (5). The effect of the sale under these earlier statutes was to vest the land in the purchaser in fee simple, and that title was held to

(1) 13 & 14 Vic. ch. 67.
(2) 16 Vic. ch. 182.
(3) 59 Geo. III ch. 7 s. 4.
(4) 59 Geo. III ch. 7 ss. 12, 13.
(5) 6 Geo. IV ch. 7.

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prevail against a patent subsequently issued granting the same land to the heir of the original nominee of the crown. *Ryckman* v. *Van Voltenburg* (1); *Charles* v. *Dulmage* (2).

It was enacted in 1853 (3) and it has continued to be the law of Ontario under the successive assessment acts of that province, that only the interest of the locatee or lessee of unpatented lands should be sold for taxes, and that the conveyance in pursuance of such sale should give the purchaser the same rights as the original locatee or lessee enjoyed.

These are examples of legislation by an old province, which are not unlikely to be followed by a new province, authorising the sale of an interest, be it the whole or less than the whole interest, in lands not yet patented. We must take cognisance of the fact that in the case of a new province embracing these North-West Territory lands such legislation is at least possible, dealing not with the interest of the crown, which would be out of the question unless the crown lands were ceded to the province, but with the interest of the settler upon crown lands, or of a purchaser who was not a settler.

Now I see no reason, either in the language of the clause 16 or in any considerations of policy, for holding that a purchaser from the company is to be better off than a purchaser from the crown, as he would be if his land or his interest in it could not be taxed until he took a conveyance from the company, while the purchaser from the crown would, under probable legislation, be unable to protect himself by showing that he had not yet obtained his patent. It would be against good policy to throw an undue share of the burden on the even-numbered sections. No

(1) 6 U. C. C. P. 385. (2) 14 U. C. Q. B. 585.
(3) 16 Vic. ch. 182 s. 56.

doubt the contract must be construed in view of the circumstances under which it was made and in furtherance of the public object for which the land subsidy was granted. But this is done when we recognise these lands as retaining during the twenty years the quality of crown lands in relation to the matter of taxation. For these reasons I do not assent to the proposition that the exemption from taxation is absolute until the lands are conveyed. I agree that the interest of the company is not liable to sale for taxes, and is not chargeable with taxes, but I think that a contract of the company by which an interest in land is given to a purchaser is, within the meaning of clause 16, a sale of the land.

It by no means follows that that is a sale which, as contended for by the municipality, does away with the exemption. The terms of the contract must be looked to. If the sale is conditional on payment of purchase money or on any thing else, and is to fail on non-performance of the condition so that the land reverts to the company as of its first estate, and not as purchaser under its own vendee, there is, after condition broken, no sale. A purchaser of the interest of the vendee at a sale for taxes would be, of course, in no better position than the defaulting tax-payer. He would have merely—to adopt the language of a statute to which I have referred—the same rights as the original vendee enjoyed.

This view is fatal to the claim of the municipality in this case, because the municipality has assumed to sell the corpus of the land itself and not merely the rights, if any rights there were, which existed under the agreements with the company.

These lands not being occupied I have made no allusion to considerations which would call for discussion in the case of occupied lands. It would be

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useless to enter upon such a discussion in the absence of an actual occupation the character of which would necessarily be an important matter.

On the other point respecting the right to maintain this action for money paid I merely say that I think the right is undisputable.

In my opinion we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants: *Henderson & Matheson.*

Solicitors for respondents: *Macdonald, Tupper, [Phippen & Tupper.*

THE REVEREND H. J. PETRY *et al.* (PLAINTIFFS) ..... } APPELLANTS;

AND

LA CAISSE D'ÉCONOMIE DE NOTRE DAME DE QUÉBEC (DEFENDANTS) ..... } RESPONDENTS.

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*May 12, 13.

*Nov. 17.

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

Bank stock—Substituted property—Registration—Arts. 931, 938, 939 *C.C.—Shares in trust—Condictio indebiti—Arts.* 1047, 1048 *C.C.*

The curator to the substitution of W. Petry paid to the respondents the sum of $8,632, to redeem 34 shares of the capital stock of the Bank of Montreal entered in the books of the bank in the name of W. G. P. in trust, and which the said W. G. P. one of the *grevés* and manager of the estate had pledged to respondents for advances made to him personally. J. H. P. *et al.*, appellants, representing the substitution, by their action demanded to be refunded the the money which they allege H. J. P., one of them had paid by error as curator to redeem shares belonging to the substitution. The shares in question were not mentioned in the will of William Petry, and there was no inventory to show they formed part of the estate, and no *acte d'emploi* or *remploi* to show that they were acquired with the assets of the estate.

Held, per Ritchie C.J., and Fournier and Taschereau JJ.—affirming the judgment of the court below, that the debt of W. G. P. having been paid by the curator with full knowledge of the facts, the appellants could not recover. Arts. 1047, 1048 C. C.

Per Strong and Fournier JJ.—Bank stock cannot be held as regards third parties in good faith to form part of substituted property on the ground that they have been purchased with the moneys belonging to the substitution without an act of investment in the name of the substitution and a due registration thereof. Arts. 931, 938, 939 C. C. (Patterson J. dissenting.)

APPEAL from a judgment of the Court of Queen's

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

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Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court (1) which dismissed the appellants' action.

The appellants claiming to represent the estate of the late William Petry and the substitution created by his will, by their action demanded to be refunded the sums which they allege the Reverend James Henry Parker, one of them, has paid, by error, as curator to the substitution, to the respondents to redeem thirty-four shares in the capital stock of the Bank of Montreal belonging to the substitution and which Wentworth Gray Petry one of the *grevés* and manager of the estate had illegally transferred to them.

The circumstances which gave rise to the litigation between the parties are as follows:

From the 12th February to the 1st of December, 1885, Wentworth Gray Petry borrowed from the respondents, an incorporated saving bank and loan company, divers large sums of money, upon his own notes secured by transfers of thirty-four shares in the capital stock of the Bank of Montreal. At the respective dates at which these transfers were made, these shares stood in the stock ledger of the Bank of Montreal, as being held by Wentworth Gray Petry, in trust, without any indication of the name of the beneficiary or *cestui que trust* for whom they were held.

On the 16th March, 1886, Petry, who had then become insolvent, and was indebted to the respondents in a sum of $9,400 paid them by a cheque of the Rev. George Henry Parker, curator to the substitution created by the will of the late William Petry, and drawn on the funds of the estate, a sum of $6,000, and on the same day or on the next day the balance of $3,400 was paid by a note of the Rev. M. Parker—bearing date the 16th March, 1886. Upon this settle-

(1) 16 Q.L.R. 193.

ment the notes of Petry were returned and he authorised in writing the respondents to transfer to Parker, in trust, the thirty-four shares of the Bank of Montreal which they held as security. The transfer being effected, Mr. Parker's note for $3,400 was subsequently paid, and the whole transaction was absolutely closed, as far as the respondents were concerned.

Nearly three years after this settlement had taken place, the Rev. George Henry Parker, in his capacity of curator to the substitution created by the last will and testament of the late William Petry, Gertrude Petry, his wife, and the Rev. Henry James Petry, two of the three surviving children of the late William Petry instituted this action. It was admitted that out of the $9,400 paid by Parker $768 were due by the estate William Petry and that it is only the difference of $8,632, claimed by the action, which was paid by error. It was not contended that there was any error of fact in the matter, but that the payment was made through an error of law which Mr. Parker declared he had only discovered in 1887, after the decision of the Privy Council, of the case of *Sweeny* v. *The Bank of Montreal* (1).

The appellants' action was dismissed in the Superior Court on the ground that two out of three conditions essential to the success of the action *condictio indebiti*, were wanting, viz., that there was no debt and that the payment was made by error.

The Court of Queen's Bench (appeal side) affirmed the judgment. Mr Justice Bossé dissenting.

Irvine Q. C. & *G. Stuart* Q. C., for the appellants.

If Mr. Parker had refused to pay but had sued the bank for the restitution of the stock fraudulently pledged, could the bank have successfully resisted the

(1) 12 App. Cas. 617.

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action? In face of the decision of this court in *Sweeny* v. *The Bank of Montreal* (1), confirmed by the Privy Council (2), it would be difficult to do so, but it is pretended that by voluntarily paying the debt, for which he was no wise responsible, he has deprived himself of all recourse.

We submit, 1st, that the action *condictio indebiti* will lie when there is error in the use or consideration, as well as when there is error as to the existence of the debt. Arts. 1047, 1048, 1140.

See also Pothier, Prêt de Consomption (3), Larombière, Obligations (4), Aubry & Rau (5), Dalloz, Repertoire, Vo. Obligations (6), *Haight* v. *The City of Montreal* (7), *Baylis* v. *The City of Montreal* (8), *City of Montreal* v. *Walker* (9).

2nd. That the bank being a party to the fraud practised by W. G. Petry in pledging trust property, will not be heard to urge its own wrong-doing as a reason why the appellants should be deprived of their rights.

The bank at the time that it took the shares in pledge, had notice that they were held "in trust." At the time of the payments, now sought to be recovered back, it had express notice of the nature of the trust, by the cheques with which it was signed "G. H. Parker, curator," and by the acknowledgment of the indebtedness which it took from Mr. Parker for the sum of $3,400, balance remaining after payment of the $6,000: the acknowledgment of the indebtedness is expressed to be by "Revd. George Henry Parker of Compton, Curateur Succession feu W. Petry."

The bank is evidently in bad faith; it received

(1) 12 Can. S. C. R. 661.
(2) 12 App. Cas. 617.
(3) No. 142.
(4) 5 vol., pp. 612, 613.
(5) 4 vol. ss. 345, 442.
(6) No. 5511.
(7) M. L. R., 4 Q. B. 353.
(8) 23 L. C. Jur. 301.
(9) M. L. R. 1 Q. B. 469.

money which it knew it had no right to receive in consideration of the transfer of shares to their proper owner, which it had no right to withhold. *Bank of Montreal* v. *Sweeny* (1).

Hamel Q.C. and *Mr. Fitzpatrick* with him for respondent, relied on the reasons for judgment of Mr. Justice Larue in the Superior Court (2), and also contended that as it was alleged by the plaintiffs that the moneys belonged to a substitution it was necessary for them to prove that they had complied with all the requirements of the law in regard to substitutions and this had not been done (3). They also contended that the appellants' claim could not be maintained, because the curator to the substitution was not authorized to receive and claim the rights of those entitled under the substitution. See *Dorion* v. *Dorion* (4).

The institutes to make this claim should all be parties in the case and W. G. Petry, the respondents' debtor, is not a party to these proceedings, and the institutes cannot claim from the respondents what eventually may return by the effect of the substitution to W G. Petry, its debtor.

Sir W. J. RITCHIE C.J.—I concur in dismissing this appeal.

STRONG J.—I am of opinion that this appeal should be dismissed for the reasons given by the late Chief Justice Dorion.

FOURNIER J.—I am opinion that this appeal should be dismissed for the reasons given by Mr. Justice

(1) 12 Can. S.C.R. 661.
(2) 16 Q.L.R., 193, *et seq.*
(3) Arts. 938, 939, 940 and 943 C.C.
(4) 13 Can. S.C.R. 193.

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Fournier J.

Larue in the Superior Court. I also adopt the view taken of the case by the late Chief Justice Sir A. A. Dorion of the Queen's Bench. The requirements of the laws with regard to the registration of the substitution have not been complied with. If the substitutes and *grevés* had such confidence in their manager as not to see that the necessary precautions had been taken to save the moneys belonging to the substitution, they cannot now complain if he has acted imprudently.

There is another reason why this appeal should be dismissed. It is not a case of *condictio indebiti*, for the curator to the substitution paid the debt of one of the substitutes with full knowledge of all the facts. The cases to be cited by my brother Taschereau are in point, and I concur with him in holding that the reasons given by the Superior Court for dismissing the appellants' action are good, and, therefore, that this appeal should be dismissed with costs.

TASCHEREAU J.—(Oral). Je suis d'avis de renvoyer le présent appel. L'action n'est pas prise en vertu de l'article 1047 du Code Civil, car cet article déclare que: "Celui qui reçoit par erreur de droit ou de fait ce qui ne lui est pas dû, est obligé de le restituer." Or, dans le cas présent il est évident que la Caisse d'Economie n'a reçu que ce qui lui était dû. Elle ne tombe pas non plus sous l'article 1048 qui déclare que:

"Celui qui paie une dette s'en croyant erronément le débiteur, a droit de répétition contre le créancier."

Dans le cas présent, les demandeurs n'ont certainement pas payé le montant parce qu'il s'en croyaient les débiteurs. L'article 1140 n'a pas non plus d'application:

"Tout paiement suppose une dette; ce qui a été payé sans qu'il existe une dette est sujet à répétition."

Il y avait ici un montant dû à la Caisse, par Wentworth Petry, et c'est cette dette que les demandeurs ont payée, non pas parce qu'ils croyaient erronément en être les débiteurs, mais purement dans le but de recouvrer les parts ou actions que Wentworth Petry avait données en gage à la Caisse. Les demandeurs allèguent qu'ils auraient eu le droit de recouvrer ces parts sans payer la dette de Wentworth Petry, sous l'autorité de la décision du Conseil Privé, dans la cause de *Sweeny* v. *Bank of Montreal* (1). Cela peut être. Néanmoins ce qu'ils ont payé était réellement dû à la Caisse.

Larombière (2) et Laurent (3) cités par le savant juge de la Cour Supérieure, dans ses notes rapportées en 16 Q.L.R. 193, ainsi qu'Aubry et Rau (4), sont autorités que, sous ces circonstances, les demandeurs ne peuvent pas recouvrer.

Pothier dit que lorsqu'une personne, qui a été payé, n'a reçu que ce qui lui était dû, il faut qu'il y ait eu erreur de fait, pour donner droit à l'action *condictio indebiti*. Et d'après la loi romaine " l'erreur dans la cause n'empêche pas la validité du paiement quand la chose est due d'ailleurs, et l'erreur dans le paiement donne lieu à la répétition seulement s'il y a eu erreur de fait, et si celui qui a reçu en est devenu plus riche, c'est-à-dire a reçu frauduleusement ce qui ne lui était pas dû. Thevenot-Dessaules dit: (5) " l'ignorance de droit s'admet rarement."** Le principe était que *nulla repetitio est ab eo qui suum recipit*, lorsque celui qui a payé l'a fait au nom du débiteur (6).

(1) 12 App. Cas. 617.
(2) 7 vol. art. 1377, ss. 10.
(3) 20 vol. n° 357.
(4) 4 vol. 733.
(5) Dict. Dig., vo. Erreur, Nos. 7 et 16.
(6) Idem vo. Ignorance, No. 5. Voir aussi Pothier *de condictione indebiti* No. 153.

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Taschereau J.

Le juge en chef Dorion pouvait bien dire, comme il l'a fait dans l'espèce, qu'il est douteux si le paiement par un tiers d'une somme légitimement due peut donner lieu à l'action *condictio indebiti*, excepté pour erreur de fait bien clairement prouvée.

Ici les demandeurs disent qu'ils se sont crus obligés de payer pour délivrer leur gage, et que ce n'est que subséquemment, par la décision *in re Sweeny* v. *Bank of Montreal* (1), qu'ils ont découvert leur erreur. Mais, dit la Cour de Cassation *re Leblanc* (2).

L'erreur fondée sur une jurisprudence ultérieurement reconnue fausse n'est pas une cause de la nullité de la convention. Pour l'action *condictio indebiti* proprement dite, il faut que la somme payée ne soit pas due.

Un endosseur d'un billet le paie après protêt. Plus tard, il découvre que le protêt était nul. Il ne peut répéter, parce que, dit la Cour de Cassation dans deux arrêts, ce qu'il a payé était dû (3) ; Mongaley et Germain, Code de commerce (4) ; Massé, Droit commercial (5) ; Nouguier (6) ; Pardessus, Droit commercial (7) ; Demolombe, Des contrats (8) ; aussi *in re* d'*Erlanger* (9). Et la répétition est toujours plus difficilement accordée que l'exception pour se refuser à payer (10).

Dans *Caldwell* v. *Patterson* (11), il fut jugé que—

The amount voluntarily paid on a protested bill of exchange by the drawer cannot be recovered on the ground of an error in the payment, in point of law.

Quelle est la cause du paiement ici ? Ou plutôt, qu'est-ce qui a été payé ? Clairement, la dette de Wentworth Petry. Et la Caisse se s'est pas enrichie aux dépens d'autrui. Elle n'a reçu que ce qui lui était dû. L'erreur des demandeurs a porté sur le motif qui

(1) 12 App. Cas. 617.
(2) S. V. 4, 2.677.
(3) S.V. 15, 1 26 ; S.V. 33, 1 639.
(4) Tome 1er, page 270.
(5) 5 vol. 162.
(6) 1 vol. 407.
(7) No. 434.
(8) 1 vol. 345 et 355. 8 vol. 295.
(9) S. V. 71 1, 197.
(10) 5 Duranton 127, 128 ; 6 Toullier, 69.
(11) 2 R. de Leg. 27.

les a fait agir. Mais la Caisse n'avait rien à voir à ce motif. Elle n'en a pas même été informée. Elle pouvait bien croire que c'était un prêt que les demandeurs faisaient à Wentworth Petry. Wentworth Petry l'a autorisé à remettre le gage aux demandeurs, et elle a dû le faire, sans s'enquérir des rapports qui pouvaient exister entre eux, les demandeurs et Wentworth Petry, ou des motifs qui les faisaient agir.

La différence entre la cause de l'obligation et le motif du contrat ressort de cette idée ; l'une est le but immédiat et direct que le débiteur s'est proposé d'atteindre en s'obligeant ; l'autre c'est la considération plus éloignée qui l'a déterminé à faire le contrat. Demante et Colmet de Santerre (1).

Ici, je le répète, c'est la dette de Wentworth Petry que les demandeurs ont de fait payée et voulu payer. C'est là la cause commune du paiement ; la seule cause de la réception du paiement par la Caisse. Ils ne l'ont pas fait, il est vrai, pour bénéficier Wentworth Petry, mais dans leur propre intérêt, et c'est là leur motif d'action, le but qu'ils voulaient atteindre

Mais il y a une distinction à faire entre la cause d'un contrat, et le motif qui de fait a déterminé l'intention des parties, disent Massé et Vergé, sur Zachariæ (2).

Le motif du contrat est la *cause impulsive*, comme l'appelle Demolombe, (loc. cit.) et l'erreur sur les motifs, ajoute-t-il, n'est pas une cause de nullité.

Maynz, Obligations dit (3) :

Ainsi l'erreur relative aux motifs qui ont pu nous engager à contracter ne constitue amais une cause de nullité, l'erreur sur l'existence ou la nature légale de l'objet, l'erreur sur le droit du promettant est sans influence sur la validité de la convention, par la raison qu'elle tombe sur quelque chose en dehors de la prestation qui est l'objet soumis au consentement.

La Caisse ne pouvait refuser le paiement. Elle était obligée de l'accepter.

Et en la payant, les demandeurs sont devenus les créanciers de Wentworth Petry, qui a été, dès lors, complètement libéré vis-à-vis d'elle.

(1) 5 vol. Nos. 18, 46. (2) 3 vol. § 615, note 1.
(3) P. 127.

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De plus, Wentworth Petry a placé ces argents des demandeurs dans la société Petry et Beaulieu. Et les demandeurs, lorsqu'ils en ont été informés, en 1835, non en 1886, comme ils l'allèguent, ont reconnu Wentworth Petry et la société Petry et Beaulieu comme leurs débiteurs, ratifiant par là tout ce qu'il avait fait, en filant une réclamation contre le syndic de la faillite Petry et Beaulieu. Le placement fait par Wentworth Petry pouvait-il plus clairement être ratifié par eux?

Et en supposant que les demandeurs eussent pû recouvrer de la Caisse, est-ce qu'ils auraient pu le faire sans mettre Wentworth Petry en cause? Leur action tend à faire annuler le contrat de gage, fait entre Wentworth Petry et la Caisse. Comment pourraient-ils le faire en l'absence de Wentworth Petry? Ils allèguent bien, et prouvent qu'il a refusé de les joindre comme demandeurs, mais alors il fallait le joindre comme défendeur. Dans *Sweeny* v. *La Banque de Montréal* (1), Rose, le *trustee* qui avait mis en gage les parts des demanderesses était en cause. Dans *Raphael* v. *McFarlane* (2), une action du même genre, celui qui avait transféré sans droits des parts de banque appartenant au demandeur était aussi défendeur co-joint.

Je renverrais l'appel.

PATTERSON J.—This case being purely one of French law I do not pretend to discuss it with confidence, though we have had ample assistance in apprehending the views presented on each side, in the well-reasoned opinions of Chief Justice Dorion and of Mr. Justice Bossé, and in the full and able arguments of counsel. My opinion at the argument was in favour of the views of Mr. Justice Bossé the dissentient judge in the court below, and after a further careful consideration of the case I retain the same opinion.

(1) 12 Can. S. C. R. 661. (2) 18 Can. S. C. R. 183

I do not understand that there is any conflict on questions of fact, although in one important particular something depends on the way the facts are looked at.

There is no dispute as to the fact that W. G. Petry held the shares of the Bank of Montreal stock "in trust," and that the bank, the respondents in this appeal, took the shares in pledge for the loan made to W. G. Petry personally, knowing that they were held in that manner. That being so, it would be against ordinary principles of fair dealing, and contrary to the doctrine acted on in *Sweeny* v. *Bank of Montreal* (1) and in *Raphael* v. *Macfarlane* (2) to hold that they were taken innocently, as against those beneficially entitled, or in good faith; wherefore it appears to me the defence of want of registration of the substitution, so strongly urged and so much relied on in the opinion delivered in the court below by the learned Chief Justice, is excluded by the terms of article 940 of the Civil Code.

Then as to the motive of the appellant in redeeming the shares, which is the fact that I say may be looked at in more than one way. The payment certainly had the effect of discharging W. G. Petry's debt to the bank, but it was not made for the sake of paying that debt. The motive was to save the shares for the estate, which the appellant Parker, by reason of a mistake in law, believed he could do only by repurchasing them, the price being measured by the amount of the debt.

Under that mistake the appellant Parker paid the money which belonged to the estate. Having discovered his mistake he demands a return of the money he paid, and is met in the first place by the defences to which I have just alluded and by another which, under the present constitution of the record would not be fatal to the action, but which only touches his personal

(1) 12 Can. S.C.R. 661. (2) 18 Can. S.C.R. 183.

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right to sue. The respondent says to him " True, you paid us the money and we have no right to retain it, but you who paid it are not the right person to demand the return of it." It appears to me that the position of Mr. Parker differs materially from that of the curator to the substitution in the case of *Dorion* v. *Dorion* (1) who was held not to be entitled to maintain an action to recover moneys belonging to the institutes which he had never had possession of.

I think, though with distrust of my conclusion, that the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for appellants: *Caron, Pentland & Stuart.*

Solicitors for respondents: *Hamel & Tessier.*

(1) 13 Can. S. C. R. 183.

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