REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER.

GEORGE DUVAL, ADVOCATE.

ASSISTANT REPORTER

C. H. MASTERS, BARRISTER-AT-LAW.

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JUDGES

OF THE

SUPREME COURT OF CANADA.

DURING THE PERIOD OF THESE REPORTS.

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

" " Samuel Henry Strong J.

" " Télesphore Fournier J.

" " Henri Elzéar Taschereau J.

" " John Wellington Gwynne J.

" " Christopher Salmon Patterson J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable Sir John S. D. Thompson, K. C. M. G., Q. C.

ERRATA.

Page 147.—Line 9. The word "not" at the end of the 9th line should be at the end of the 8th line.

Page 253.—Transpose numbers (2) and (1) of foot notes.

Page 420.—Line 1 of head-note. For "1888" read "1883,"

Page 495.—Line 6 from bottom. For "12 Can." read "2 Can."

Page 528.—Line 3. For "port" read "part."

A TABLE

OF THE

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IN THIS VOLUME.

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ON APPEAL

FROM

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AND FROM

THE EXCHEQUER COURT OF CANADA.

JEAN VÉZINA (CLAIMANT)..... .....APPELLANT; 1889

AND *Feb. 11.

THE QUEEN (DEFENDANT).....RESPONDENT. *April 30.

ON APPEAL FROM THE EXCHEQUER COURT.

Expropriation of land—Railway Company — Damages, estimation of — R. S. C. c. 39 s. 3, sub-sec. (e) — Farm crossings — R. S. C. c. 38 s. 16.

Where land is taken by a railway company for the purpose of using the gravel thereon as ballast, the owner is only entitled to compensation for the land so taken as farm land, where there is no market for the gravel.

The compensation to be paid for any damages sustained by reason of anything done under and by authority of R. S. C. c. 39 s. 3, sub-sec. (e), or any other act respecting public works or Government railways, includes damages resulting to the land from the operation as well as from the construction of the railway.

The right to have a farm crossing over one of the Government railways is not a statutory right and in awarding damages full compensation for the future as well as for the past for the want of a farm crossing should be granted.

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*PRESENT.—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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Gwynne J., dissenting, was of opinion that the owner had the option of demanding, and the Government had a like option of giving, a crossing in lieu of compensation, and that on the whole case full compensation had been awarded by the court below. (See now 52 V. c. 38 s. 3.

APPEAL from a judgment of the Exchequer Court of Canada, granting the appellant the sum of $2,871 and interest and costs on his claim for compensation against the crown, for land taken for the St. Charles Branch of the Intercolonial Railway.

The appellant's claim in the Exchequer Court was for $7,476 divided as follows :—

Land expropriated, 5 arpents and 10 perches.....	$ 800 00
44606 cubic yards of gravel at 6 cts.	2676 00
Damages.....	4000 00
	$7476 00

and the learned judge of the Exchequer Court allowed claimant—

For 8.077 arpents of land expropriated at $100 per arpent.....	$ 807 70
For depreciation in market value of remaining property (7000.00—807.70=6192.30) ⅓ allowed.....	2064 10
	$2871 80

and there being no evidence of any tender he adjudged to the claimant interest from the date of expropriation and his costs.

The railway crosses the claimant's farm in two places, dividing it into three parts : the north part on which are the claimant's house, barn and other buildings, the centre part, and the easterly part

Upon the appeal before the Supreme Court of Canada, the appellant did not complain of the valuation put upon the land expropriated as farming land in the judgment appealed from, but complained that he was

entitled to a greater sum for damages, and that the court should have entertained his claim for the gravel taken from his land.

Belleau for appellant:

A proprietor whose land is expropriated by a railway company has a right to be paid all the damages which are the necessary result of the working of the railway through his property.

See Russell on awards (1); *Chamberlain*, v. *The West End of London and Crystal Palace Ry. Co.* (2).

The farm is a dairy farm, and the crossing in use between parts I and II is used only on sufferance, and appellant ought to have been allowed damages for the want of a crossing. If a subway had been provided it would have been different. A subway is protected and the cattle can go through it without any body to look after them, whilst they cannot cross the line over the embankment without being led by some one, which increases to a large extent the injury to that part of the property.

There remains the claim for gravel taken from the property, which was altogether rejected by the Exchequer Court.

The Exchequer Court was of opinion that the claimant could only be allowed the value of his land as a gravel pit if he could have used it as such to any more advantage than he could have used it as farming land. This would permit the Government to take from claimant's property, for the small price of $300, a large quantity of gravel that under the most favorable circumstances they could not have got in any other place for less than $1,400 or $1,500. It is true that there is no evidence that claimant's property was ever used as a gravel pit, and it is not likely that he

(1) 6 ed. pp. 460 et seq.

(2) 32 L. J. Q. B. 173.

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would have ever drawn such a quantity of gravel out of his land to sell in the market if the railway had never been built. But it is equally true that claimant's property was the only one in the vicinity where gravel could be got, and that the market value of gravel to be used on the spot far exceeded the ordinary value of farming lands. Whether that value was derived from the opening of the railway or not does not matter much. The general increase of value, and the advantages which result from the building and putting into operation of a railway, is a public benefit for which everybody pays, and the law does not intend that the railway company should offer that general advantage as a set off against private claims. The increase in value which can be opposed by a railway company as a compensation to a claim for land expropriated and for damages, is the increase which is a benefit peculiar to that very land, not the general benefit resulting from the construction of the railway. For instance, if a railway company expropriates a certain piece of land for the purpose of building a station thereon, the indemnity to be paid can be compensated by the increase in value resulting to the remaining property from the expropriation for said purpose.

Angers for respondent:

If the claimant could have used this piece of land as a gravel pit to any more advantage than he could have used it as farming land he would, I think, be entitled to be allowed its value as a gravel pit. But there is no evidence that it was ever so used by the claimant, or any reason to believe that it would ever have been of any use to him for that purpose.

Upon the whole case full compensation has been awarded by the court below.

STRONG, FOURNIER and TASCHEREAU JJ. concurred with PATTERSON J.

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GWYNNE J.—In this case the Minister of Railways has taken for the use of the St Charles Branch of the Intercolonial Railway $8\frac{7}{100}$ arpents off a farm of about 133 arpents belonging to the appellant. The railway, as constructed upon the land so taken, crosses the farm on a curve in such a manner as to divide the farm into three parts. On one is situate the appellant's house and barn which stand a short distance from the northern limit of a public highway which crosses the farm, the southern limit of which highway constitutes the northerly limit of the land taken for the railway as it crosses the farm opposite to the appellant's house and barn, which are thus separated by about the space of three times the width of the public highway from the centre line of the railway track; this piece of the appellant's farm lying north of the railway is called for convenience in the proceedings in the Exchequer Court and here part No. 1. A piece of the same farm called part No. 2, lies between the railway as it crosses the farm opposite to the appellant's house, and the land taken for the railway as it again crosses the farm on the curve near the south-easterly end of the farm where the railway crosses a small stream called the river L'Allemand; the land taken at the south-easterly extremity of this part No. 2 is wider than the land taken in other parts of the farm, having been taken not only for the track, but also as a borrowing or ballasting pit lying alongside of the part whereon the railway track is laid From the highway in front of the appellant's house there has been a communication made under the railway to the part No. 2, but an embankment under which this communication is made destroyed a spring and a well, from the former of which the appellant's cattle, and from the latter his house, were accustomed to obtain water. The farm was used as a dairy farm, and this spring and the river

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L'Allemand and two small streams or watercourses on part No. 2 constituted the appellant's supply of water for his cattle. From the part No. 2 a farm crossing has been constructed by the Government, across the railway track and the ballast pit, to the residue of the farm which is called part No. 3, through which the river L'Allemand flows. From the above it appears plainly enough that the appellant's farm is undoubtedly injuriously affected by the manner in which the railway is constructed across it. The question is as to the reasonable amount of compensation to be awarded to the appellant as well for the value of the land taken as for the depreciation of the land not taken.

We may, I think, start with the assumption that the amount estimated by the learned judge of the Exchequer Court as the full value of the farm with all the buildings on it at the time of expropriation was very liberal indeed, viz.: $7,000.

The learned judge says in his judgment:

> For land such as that expropriated in this cause $40 or $50 per acre would, I think, be a fair price if a considerable number of acres were so taken as not seriously to injure the balance by the manner of severance, but taken in the place and manner in which this was taken I am of opinion that $100 per acre is not an unreasonable value to put upon it.

and so he allowed this latter sum, $807 in round numbers for the land taken. Now, by the above language of the learned judge, I understand him to mean that the full value of the farm and buildings before, and at the time of, the expropriation was $40 or $50 per arpent for the land taken to cover the actual value of the land taken and to compensate in some degree the damage done to the land not taken by reason of the manner in which the railway severed the farm into three parts, so that one half at least of this sum of $100 per arpent was awarded by way of compensating to some extent the injury done to the land not taken by the mode of

its severance; and for further depreciation in value of the land not taken he awarded one-third of its value at the time of expropriation, amounting in the whole to the sum of $2,871.80 to be paid to the appellant.

The appellant's claim was for $7,476, that is to say, for the eight arpents taken and depreciation to the residue a sum exceeding by $476 the full value of the farm, and this amount the appellant still claims, not being satisfied with the amount awarded by the learned judge.

As to the part No. 1 counsel for the appellant in his factum says:

> We notice in relation to part 1 another remark of the learned judge to the effect that it is injuriously affected not by construction but by the operation of the railway;

and he argues from this remark that the learned judge has allowed nothing for any injury to the farm if assignable to the operation of the railway, but on the contrary has excluded from his consideration all such injury; but I do not so understand that portion of the learned judge's judgment in which the passage quoted appears. It seems to me rather that the learned judge was enumerating the several grounds of injury in respect of which the appellant suffered damage with the view of compensating them, not severally by distinct amounts, which would have been very difficult, if not impossible, as some might be incapable of being estimated in advance by any reliable or rational measure, but in the end by the lump sum of one-third of the full value of the land not taken. When the learned judge thought the appellant not to be entitled to any particular item of damage for which he claimed compensation he did not hesitate to say so distinctly. Nothing could be more difficult, if not impossible, than to lay down any rule by which to measure, or any specific amount by which to compensate,

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for damage not yet arisen but which may possibly in future arise from the operation of the road, and no one can, I think, say that what the appellant charges the learned judge with having excluded from his consideration is not amply covered by the one-third of the full value of the land not taken, which the learned judge has allowed for the whole depreciation in value sustained by the land not taken. The remark extracted from the learned judge's judgment, appears in the midst of an enumeration of the various injuries caused, or claimed to have been caused, to the appellant's farm by the railway having been constructed across it in the manner in which it was. He says :

> By reference to the plan and the evidence, it will be seen that the farm is divided by the railway into three parts nearly equal in extent. On the north-westerly part are the claimant's house, barn and other buildings. The highway and the railway separate this part from the centre portion, and the latter is separated from the south-easterly portion by the railway, where near the River L'Allemand it again crosses the farm. I shall hereafter refer to these three parts respectively, and in the order mentioned as parts 1, 2, 3.
>
> Part 1 is injuriously affected, not by construction but by the operation of the railway. The injury as stated by the witnesses, consists in the proximity of the railway to the claimant's buildings. In addition, at a point near the claimant's barn is the western end of a long snow shed from which trains emerge suddenly and without notice or warning, causing the claimant's horses to be much frightened. From part 1 to part 2, which was used principally as a pasture, the claimant has convenient access by a subway. The injury to part 2 consists in this, that by the construction of the railway, a well and spring at the westerly end thereof were destroyed, and that access therefrom to the River L'Allemand was cut off. The claimant's cattle before the expropriation, were accustomed to drink either at the spring or at the river, and the fences of the pasture were always so arranged as to give them access to one or the other. The witnesses for the claimant all agreed that there is not on part 2 any other spring or natural water courses, and that the cattle cannot now be driven to the River L'Allemand, which is on part 3. They have, I think, however, greatly magnified any difficulty there is in procuring water for the cattle.

It appears from the evidence of the claimant's son that there is at the easterly end of part 2 a ditch which is filled with water except in the dry season. When I visited the property in the present month (June, 1888) there was a good stream of water running from this ditch, and it was evident, I think, from the character of the land, that there would be no difficulty, at least by digging a well, in finding at any time an ample supply of water on part 2.

Then again, in regard to the means of access to the river L'Allemand the witnesses who stated that there were none, were entirely mistaken. It appears that until last winter when the snow shed was extended the claimant had a crossing, but that by its extension that crossing was destroyed; and witness after witness stated that there is now no way of crossing the railway because of the ballast pit. One of the witnesses, Mr. Simard, speaks of making a crossing by constructing a bridge 110 feet long by 13½ high. It will be observed, however, that the claimant's son does not state that there is no crossing now, and the fact is that there is a fair road across the ballast pit, with a reasonable grade, and a good crossing over the railway. These I saw in the presence of the claimant's attorney, and they bore evidence of having been in use.

Part 2 then is depreciated in value by the fact that the claimant must either dig a well and pump water for the cattle pasturing there or drive them across the railway tracks for water during the dry season.

Part 3 is injuriously affected, according to the evidence of the claimant's witnesses, by the absence of any communication between it and part 2. In this, as I have already stated, they are manifestly mistaken. The means of communication are very good, and the depreciation is not, I think, very considerable.

The learned judge, thus, as it appears to me, enumerates the several items which he has to consider in estimating the amount of compensation which should be paid by the Government to the claimant.

On part 1 he found damage to be compensated for to arise from the operation of the road, which damage being wholly prospective, there was no measure by which it could be estimated with any degree of accuracy. Although it had to be taken into consideration, it was wholly of a speculative character. Then upon parts Nos. 2 and 3 the learned judge by a personal inspection of the premises, satisfied himself that the estimate, as represented by some

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of the complainant's witnesses, was greatly exaggerated, and in some particulars wholly without any foundation in point of fact, as indeed is a common occurrence in all those claims of compensation for the expropriation of land for public purposes. The learned judge, in consequence found, as he says, great difficulty in concluding how much he should allow, and he seems to me to have resolved that his judgment should not be open to any just complaint upon the ground of insufficiency in the amount awarded. Accordingly, he estimated the land taken at about double its ordinary value, that is to say, for the purpose for which it was used before the expropriation, and the depreciation in market value of the property not taken, upon what appears to me to have been a most liberal scale. For the land taken he allowed $100 per arpent, or at the rate of $13,300 for the whole farm without any buildings on it, while, with its buildings, it was upon a most liberal estimate not worth more than $7,000, and for the depreciation in market value of the land not taken he allowed one-third of the full value of the farm with all its buildings after deduction of the $100 per arpent for the 8.077 arpents of land taken.

Thus, for the land taken in the manner in which it was taken he allowed	$ 807 70
And for depreciation in value of the remaining land one-third its full value, or	2,064 10
Making in all	2,871 80

with interest thereon from the time of the land having been taken.

From the nature of the injuries actual, prospective and speculative done to the claimant's farm, it is impossible, I think, to say with any degree of certainty,

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that too much or too little has been awarded, while there can be no difficulty in saying that the demand of the claimant was unconscionable in the extreme.

As to the claim urged before us, based upon the contention that it is only by mere sufferance that the claimant has had, or has any communication across the railway from part 2 to part 3, and that he may be deprived of it at any moment at the will and caprice of the Government, or by sale by the Government of the piece taken for and used as a ballasting pit, it is, in my opinion, utterly devoid of the slightest foundation; for it is preposterous, in my judgment, to conceive it to be competent for the Government to divide a man's property, in the manner in which the claimant's property has been divided, by the railway and leaving him the severed parts to deprive him of all right to a crossing over or under the railway from one part to another suitable to the exigencies of the case and the full enjoyment of his farm, as severed into parts by the railway, or having once provided a necessary crossing to deprive the land of the benefit of such crossing.

In cases of this description, that is to say the severance by a railway of a man's property into parts requiring a convenient crossing for the full enjoyment of the severed parts, the question is, not whether such a right is conferred upon the owner of property severed by the statute authorizing the railway to be constructed, but whether any statute in virtue of which the railway is constructed has conferred upon the persons constructing it power to deprive against his will the owner of the property severed into parts, of a right so necessary to the full enjoyment of his property as convenient access across the railway from one of the severed parts to another; and in my opinion, as has been already determined by the judgment of this court

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in the *Canada Southern Railway Company* v. *Clouse* (1), the General Railway Act under which all railways, including the Intercolonial, are authorized to be constructed confers no such power either upon the Government or any railway company. No man can against his will be compelled to accept pecuniary compensation in lieu of a crossing, when a crossing is necessary to the full enjoyment of the severed parts and can conveniently be constructed, nor upon the other hand, can the owner of property severed by a railway compel a railway company, or the Government, constructing a railway across his property, to compensate him, against their will, by pecuniary compensation in lieu of a crossing when they are willing to give and can give a suitable crossing; and the ordinary courts of the country, in case the parties can not agree among themselves, and not arbitrators, under the statute in the case of railway companies or the Exchequer Court in the case of a Government railway, are the proper tribunals to be appealed to to have determined what number and what description of crossings would in each case be reasonable and proper to be ordered to be given.

My brother Patterson, as I understand him, takes exception to an expression in my judgment in the *Canada Southern Railway Company* v. *Clouse* (1) wherein I refer to two Statutes of the State of New York, the one being, ch. 140, sec. 44, of the Acts of 1850, and the other ch. 282, sec. 8, of the Statutes of 1854, as the probable source from which respectively were taken sec. 13 of the Statute of Canada, 14 and 15 Vic., ch. 51, and sec. 13 of ch. 66 of the Consolidated Statutes of Canada, and referring to sec. 8 of the above ch. 282 I said: "In the courts of the State of New York this amendment has not been considered to make any difference in the construction, and that it should not

(1) 13 Can. S.C.R. 157.

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is, I think, the right conclusion." I then proceeded to show why, in my opinion, judgment upon sec. 13, of ch. 66 of the Consolidated Statutes of Canada should not be different from the judgment which had been pronounced upon sec. 13 of 14 and 15 Vic., ch. 51. My brother Patterson now says, that sec. 8, of chap. 282 of the New York statute of 1854, was not substitutional for the sec. 44 of the statute of 1850, but additional thereto. That I find upon more particular inspection of the statutes is the case when applied to railways constructed under the statute of 1850, but it applies independently to all railways not constructed under the Act of 1850, and that there are such railways appears, I think, from the case of *Purdy* v. *The New York and New Haven Railway Company* (1). However, the point raised is wholly unimportant as the judgment in *Canadian Southern Railway Company* v. *Clouse* (2) was not rested upon the supposed construction put by the courts of the State of New York upon the statutes of that State, but upon principle and the arguments offered in support of the conclusion arrived at, namely that the section as amended in chap. 66 of the Consolidated Statutes is to be construed as regarding "farm crossing," to be a necessary convenience for the use of the proprietors of the lands adjoining the railway when one part of a man's property is separated from the residue by the railway, to which necessary convenience the proprietor is entitled as of right, unless it shall appear that he has released and abandoned that right upon receiving compensation from the railway company, and that the ordinary courts of the country are the courts wherein all differences as to the nature, location and number of the crossings they are entitled to have, and also other matters incidentally arising, are to be adjudicated upon and

(1) 61 N. Y. 353.

(2) 13 Can. S. C. R. 157.

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determined, in support of which latter view I found four cases in the American courts, which I cited.

In the case now before us the Government appear to have constructed such crossings as appeared to them to be sufficient. It is not, in my opinion, in the power of the Government by sale of the land which has been used for a ballast pit to deprive the claimant of his right of crossing from one part of his farm to the other over the railway and ballast pit by the crossing supplied by the Government equally after such sale, if any should take place, as before. Assuming it to be possible that the Government could find a purchaser for the ballast pit, to which no access could be given except by the railway, the sale of it would necessarily be subject to the right of the claimant to cross from one part of his farm to the other, to which the land was subject when in possession of the Government, and if the claimant's, his heirs or assigns' rights should at any future time be interfered with by any one, the courts are open to him and competent to give him adequate relief. So that it is quite out of the question, in my judgment, that any compensation should be awarded to the claimant upon the assumption which has been made the basis of his appeal in respect of this crossing.

In fine, I can see no ground whatever upon which, as an appellate court, we can with any propriety say that there is any error either in point of law or of fact in the amount as awarded by the learned judge of the Exchequer Court who, having had the advantage of personally inspecting the premises and judging for himself of the degree of weight to be attached to the several witnesses, has had opportunities of estimating the amount proper to be awarded to the complainant which we have not. We should, therefore, be very careful not to interfere, unless for some manifest error

in law, with the judgment of the learned judge in matters of this nature to which no accurate measure of damages can be applied. I am of opinion that this appeal should be dismissed with costs.

PATTERSON J.—The land of the appellant, taken for the purposes of the St Charles Branch of the Intercolonial Railway is a trifle over eight arpents, 5.10 arpents being taken for the track and 2.977 for a borrowing pit whence gravel for ballast is taken. The expropriation was made, as we are informed, in June, 1882, and not in August as the learned judge of the Exchequer Court understood. The difference of date affects the computation of interest, as the valuation has to be made as of the date of the expropriation (1). The evidence in support of the claim was not taken till May, 1888. There was therefore ample time to ascertain the extent to which the property of the claimant was affected.

The railway crosses the claimant's farm in two places, dividing it into three parts: the north part on which are the claimant's house, barn and other buildings, the centre part, and the easterly part.

The claim is for the land taken and for injury by the severance, and in other ways, to the remainder of the land.

The learned judge has allowed $807.70 for the land taken, being $100.00 per arpent. This valuation is not complained of so far as the five arpents taken for the track are concerned, and it is not asserted that the three arpents taken for the gravel pit were, as farm lands, of any greater value. But the claimant insists that it shall be valued with reference to the gravel, some 45,000 cubic yards, taken from it, as if he had sold the gravel at so much a yard. The learned judge con-

(1) 50-51 Vic. ch. 16 sec. 32.

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sidered that those three arpents were, to the owner, simply three arpents of his farm, not rendered any more valuable to him by the existence of a bed of gravel under the soil, as there was no market for gravel, and it became of value to the Government only because the railway required it for ballast.

I do not see any reason for finding fault with that view, and there is no doubt that the price per arpent of $100 was a liberal estimate.

In addition to the value of the land taken, the learned judge has allowed for depreciation of the remainder one-third of its value. He bases this calculation on an estimate of $7,000 as the value of the property, land and houses, and considers, rightly I think, the $7,000 an outside value. Then deducting the $807.70, which leaves $6,192.30, he allows one-third of that, or $2,064.10, making his whole amount $2,811.80.

It must be an exceptional case in which, on a mere estimate of damage depending on appreciation of the evidence and the exercise of judgment, this court can be expected to interfere with the amount settled by the tribunal primarily charged with the inquiry, and which has facilities for arriving at a correct conclusion that are not possessed by the appellate court. Where the tribunal of first instance has proceeded on correct principles and does not appear to have overlooked or misapprehended any material fact, an appeal against the amount awarded will in most cases resemble an appeal against an assessment of damages in an action, which would be a hopeless proceeding unless some very special reason for the interference of the appellate court can be shown.

This appeal is not addressed to the estimate of damages solely, but Mr. Belleau has, in the careful argument of which we have had the advantage, pointed out particulars in which he contends that the learned

judge has taken incorrect views of the legal rights of the appellant.

The learned judge has not awarded damages for the depreciation of each portion of the land by itself, but he has noted the views he took respecting the effect of the railway or works upon each portion. Thus of the northerly division he says:

> Part I is injuriously affected, not by the construction but by the *operation* of the railway. The injury as stated by the witnesses consists in the proximity of the railway to the claimant's buildings. In addition, at a point near the claimant's barn, is the western end of a long snow shed from which trains emerge suddenly and without notice or warning, causing the claimant's horses to be much frightened.

Both parties understood, as appears from their factums, that these damages from the operation of the railway of which the learned judge speaks were excluded by him in making his award.

I think they were a proper subject for compensation under the statutes.

By the Expropriation Act, R.S.C. ch. 39, sec. 3, subsec. (e.), the Minister is empowered to contract for the purchase of any land necessary for the construction, maintenance and use of the public work, and also as to the amount of compensation to be paid *for any damages sustained by reason of anything done under and by the authority of that act* or of any other act respecting public works or government railways. Sections 10 and 17 in their amended shape under 50-51 Vict., ch. 17, provide for a reference to the Exchequer Court when the Minister fails to agree with any person as to the value to be paid for any land or property taken, or for compensation as aforesaid; and by 50-51 Vict., ch. 16, sects. 30 and 31, some rules are laid down for the guidance of the court in determining the amount to be paid to any claimant for land or property taken for the purpose of any public work or for injury done to any land or property.

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The terms under which the right to compensation is given are wider than those of the English Lands Clauses Act 1845, where the compensation is for "lands taken "or required for or injuriously affected by the execution "of the undertaking," as in sec. 32, the expression being somewhat varied or expanded in other sections, as in sects. 49, 63 and 68; or those of the Railway Clauses Consolidation Act, 1845, section 6 of which requires the company to "make to the owners and occu- "piers of, and all other parties interested in any lands "taken or used for the purposes of the railway or in- "juriously affected by the construction thereof full com- "pensation for the value of the lands so taken or used, "and for all damage sustained by such owners, occu- "piers and other parties by reason of the exercise, as re- "gards such lands, of the powers by this or the special "act, or any act incorporated herewith vested in the "company."

The rule now settled as applicable to the English acts in a case where, like the present case, part of the claimant's land is taken and compensation is claimed for injury to his other land by reason of the unavoidable effect of the operation of the railway, may be taken from the language of Lord Chelmsford in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1).

In *Hammersmith Railway Company* v. *Brand* (2) it was held that a person whose land had not been taken for the purposes of a railway was not entitled to compensation from the railway company for damage arising from vibration occasioned (without negligence) by the passing of trains after the railway had been brought into use. And in *City of Glasgow Union Railway Company* v *Hunter* (3) it was held that compensation could not be claimed by reason of the noise or

(1) L. R. 5 H. L. 418, 458. (2) L. R. 4 H. L. 171.
(3) L. R. 2 H. L. Sc. 78.

smoke of trains, by a person no part of whose property had been injured by anything done on the land over which the railway ran. In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damages caused by the use and not by the construction of the railway. But if in each case lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury for adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise occasioned by passing trains.

That rule was acted on in the *Duke of Buccleuch's Case* (1) by holding that the arbitrators properly took into consideration the traffic, and dust and dirt and commotion and noise which would be the result of the construction of a road upon the Thames embankment, for which a part of his property had been taken.

That rule applies in the present case. Whether it would also apply under our statutes if no part of the claimant's property had been taken is a question which does not now arise.

The compensation is to be in respect of land taken for the purpose of a railway, and the injury sustained is not simply the deprivation of so many arpents of land, but the establishment upon that land of a railway which cannot be operated without injuriously affecting the property from which the expropriated portion is taken.

This is happily put by Mr. Justice Lush in giving his opinion to the House of Lords in *Hammersmith Ry. Co* v. *Brand*, (2) where he said,

In professing to give compensation for all damage sustained by the

(1) L. R. 5 H. L. 418.
(2) L.R. 4 H.L. 171, 187.

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owners of the adjacent land by the 'execution of the works,' or 'the exercise of the powers of the Act as regards such lands' (Sec. 6, *Railway Clauses Act*,') the legislature must, as it appears to me, have had in view the ultimate object aimed at, the works when complete and in operation—the dock, railway or canal—not abstractedly as a mere excavation, embankment or reservoir, but in connection with its appropriate traffic, and with the ordinary incidents of a business undertaking.

See also the recent judgment of the House of Lords in *Essex* v. *Local Board of Acton*, reversing the judgment of the Court of Appeal in *The Queen* v. *Essex*, (1) which has as yet reached us only in the weekly notes of the 13th inst., and in the Times Law Report (2).

It would, therefore, have been proper for the learned judge to have considered the effect upon the northerly or north-easterly part of the claimant's property of the railway as a running concern.

There is a late case which shows that the sudden emerging of a train from the snow shed in the ordinary working of the road, though calculated to frighten the claimant's horses, is something of which he must take the risk. It is an incident of the operation of the road differing only in degree from the tendency of a moving train on an exposed railway to frighten horses; and, therefore, is a proper subject for consideration in fixing, once for all, the compensation to be paid in connection with the expropriation of the land. *Simkin* v. *London and North-Western Ry. Co.* (3).

The injuries in respect of the centre and the eastern portions of the land are in one way associated together. The farm is a dairy farm, and the claimant's cattle used to drink either at a spring in the centre part or at the river Allemand on the eastern portion of the land. The works have destroyed the spring, and the railway has to be crossed to get from the centre to the eastern portion.

I see no reason to find fault with the principle on

(1) 17 Q.B.D. 447.
(2) Since reported in 14 App. Cas. 153.
(3) 21 Q.B.D. 453.

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which this branch of the claim has been looked at by the learned judge, except with regard to the railway crossing. He gives his opinion that the crossing in use, and which by reason of the extension of the snow shed is the only practicable crossing, is sufficient. It traverses the gravel pit as well as the track. The sufficiency of the way is a matter of fact, on which the opinion of the learned judge who heard the evidence and saw the place is of more value than my opinion could be; but M. Belleau points out in his argument that this way is used on sufferance only, and not under any title which could be asserted against the company if the company should find it to its interest to sell the gravel land, or should decide to fence it in.

The point seems to me to be well taken.

The right to have a farm crossing over one of our government railways is not, as I understand the law, a statutory right. The only provision on the subject of farm crossings in the Government Railways Act, which is now ch. 38 of the Revised Statutes of Canada, is in section 16, where the Minister is required to erect and maintain on each side of the railway fences at least four feet high and of the strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings at farm crossings of the railway for the use of the proprietors of the lands adjoining the railway, and also cattle guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway; and in section 19 which requires that at every road and farm crossing on the grade of the railway the crossing shall be sufficiently fenced on both sides so as to allow of the safe passage of trains.

The statute 50-51 Vict., ch. 18, added a definition of hurdle gate, and provided that every gate at a farm

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crossing shall be of sufficient width for the purpose for which it is intended.

There is no direction as to what persons are to have farm crossings, or how many, or what kind of crossing any farmer is to have. The provision simply is that, where there is a farm crossing, it is not to be blocked by the fences of the railway, but is to be furnished with suitable gates. This is the law under the Government Railways Act.

Under the general Railway Acts of the Dominion the law was the same down to the year 1888, when a change was made which was not extended to the government railways but which was confirmatory of my interpretation of the law as it previously stood. I shall notice it further on. An amendment had also been made in 1884, by 47 Vict. ch. 11, sect. 9, not extending to government railways, and not altering the law on the particular point in discussion. It enacted that farm crossings which railway companies were bound to make should be made as there specified, but left the obligation to make crossings to depend, as I understand the law to have been, on contract, the farmer making his own arrangement with the company or the Minister, when his land was being expropriated, respecting such crossings as he required, or receiving compensation for the severance of his farm.

A different rule once prevailed in Ontario owing to the construction put upon the clause respecting "fences" as it appeared in the General Railway Act of 1851, 14 & 15 Vict ch. 51. By what seems very like a typographical error the clause which, as it has always been in the Dominion Railway Acts, speaks of gates, &c. at farm crossings of the railway, was worded in the Act of 1851, "gates, &c., *and* farm crossings of the road.

This expression, appearing though it did in the

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section whose general subject was fences, and unlikely as it was that so important a subject as the right to a farm crossing, which might be anything from a simple footpath on the level to a costly bridge or culvert, would be dealt with in this incidental way and by an allusion rather than a substantive enactment, was nevertheless acted on by the courts of Upper Canada as a legislative declaration of the right of every farmer whose land was divided by a railway constructed under that act to have, in addition to the purchase money of the land expropriated or voluntarily sold for the purpose of the railway and to the compensation for incidental injury to his other land, one or more farm crossings.

I am not able to say how the statute was acted on by the courts of Lower Canada.

The course of decision continued in Upper Canada until after the consolidation of the statutes of Canada in 1859. In the Consolidated Statute, ch. 66, the word *and* was changed to *at*, and the clause appeared in the form it has always assumed in the Dominion acts.

Singularly enough, this change from *and* to *at* was not followed in the French copy of the Consolidated Statutes. I shall refer by-and-by to the later legislation of the Province of Quebec.

On the first occasion on which the question came before any court in Upper Canada after 1859, which was in *Brown* v. *Toronto and Nipissing Ry. Co.* (1), it was held that there was no longer any statutory obligation upon the railway company to make a farm crossing.

The same question was discussed in this court in *Canada Southern Ry. Co.* v. *Clouse* (2), upon the construction of the present law of the Province of Ontario, where my brother Gwynne, who had taken part in the

(1) 26 U.C.C.P. 206.

(2) 13 Can. S.C.R. 139.

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judgment of the Court of Common Pleas in *Brown's Case*, came to the conclusion that that decision was erroneous, and considered that conclusion supported, as I gather from his judgment, by decisions on a statute of the State of New York which was the model from which the act of Canada of 1851 was framed.

I am relieved from much of the hesitation which I should feel in differing from my learned brother by two considerations: First, that the second thoughts, which I do not on this occasion think the best, are his own second thoughts to which I prefer his first, and secondly, because I am satisfied that his attention cannot have been called to the real state of the law in New York.

It is true that the general railway law of New York of 1850 contained the clause, chapter 140, section 44, which was adopted *verbatim* in the Canadian act of 1851 with the word *and*—"*and* farm crossings of the road." It is true also that, by a line of decisions, the courts of that State construed this as a statutory mandate to the railway companies, formed under that act, to make farm crossings, and that the courts of Upper Canada simply followed the New York decisions in so construing the act of 1851.

It is true, moreover, that in 1854, a railway law was passed in New York, chapter 282, the 8th section of which enacted that:

> Every railroad corporation whose line of road is open for use shall within three months after the passage of this Act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall before the lines of such railroad are opened, erect and thereafter maintain fences on the sides of their roads of the height, &c. with openings or gates or bars therein *at* the farm crossings of such railroads, for the use of the proprietors of the land adjoining such railroad;"

and so on; but it is not true, however much this enactment may look like a correction of the clause of 1850,

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that it superseded that clause. It is regarded as cumulative and not substitutionary. Both clauses will be found at full length in the Revised Statutes of New York of 1875 and 1882. In Revised Statutes of 1875, where the various railroad acts are thrown into one, the act of 1850 being taken as the basis, and the original number of the section given in brackets when the section is taken from that act, these two sections concerning fences are sections 66 (44) and 67. They are at p. 548 of the 2nd vol. The revision of 1882 is on a different system, each act being printed by itself. The clauses are there found at pages 1569 and 1585 respectively.

Now remembering that section 44 of 1850, continued as it is in its original wording, applies to "every corporation formed under this act," and that the act is the general one under which railroad corporations in New York, as a rule, are formed, it will readily be seen that the law of 1850, under which the first cases were decided, is still the law.

I have looked at all of the large number of cases on the subject which are mentioned in the notes in the revised act of 1882, as edited by Mr. Montgomery H Throop.

Four of those cases are referred to by my brother Gwynne in *Clouse's Case* (1), and they are enough for me to refer to now, as they are, I believe, the latest cases, as well as those which best illustrate the position. They bear out the view of the New York law which I have taken.

Of the other cases I find one and only one in which the section with *at* is quoted, but the case was not upon the subject of a farm crossing. The four cases are *Clarke* v. *Rochester, Lockport &c. R. R. Co.* (2) which was decided under the act of 1850, and before the passing

(1) 13 Can. S. C. R. 160. (2) 18 Barb. 350.

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of the act of 1854; *Wademan* v. *Albany &c. R. R. Co.* (1) which, though decided in 1873, was decided under the act of 1850, Johnson, C., expressly saying "the question in this case arises upon the 44th section of the General Railroad Act of 1850," (2); *Smith* v. *New York & Oswego Midland Railway Company* (3) which was also a decision under the act of 1850, no reference being made to the act of 1854; and *Jones* v. *Seligman* (4) which follows *Smith's Case*. In the judgment delivered by Miller J. the act of 1854 is quoted but with the words in question omitted. Thus: "with opening gates or bars for the use of the proprietors, &c."

There is no decision that the change from *and* to *at* made or would make no difference, and that question could not easily be raised for decision while the general act under which companies are constituted contains the original form of the clause, nor has the matter ever, so far as I have been able to discover, been a subject of discussion in the courts of New York.

New York precedents are thus outside of the lines presented by our legislation. The Dominion Statutes have always been, and the law of the Province of Canada was from 1859 onwards, just as we find it in the Railway Act, and the Government Railways Act in the R. S. C., that is to say with a direction, under the subject of fines, to make gates, &c., at farm crossings, but without any direction on the subject of furnishing crossings. Such a direction, if it were to be found, would properly be looked for under some other heading than "fences."

L rd Chelmsford remarked in *Hammersmith Railway Company* v. *Brand* (5):—

(1) 51 N. Y. 568.
(2) Laws of 1850 p. 233.
(3) 63 N. Y. 59 (1875).
(4) 81 N. Y. 190 (1880).
(5) L. R. 4 H. L. 171, 203.

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That the sections of the Railway Clauses Act are arranged under different heads which indicate the general objects of the provisions immediately following, and these may be usefully referred to to determine the sense of any doubtful expression in a section arranged under a particular heading.

The same learned lord had used similar language, as had also Bramwell, B. and Lord Wensleydale, in *Eastern Counties &c. Companies* v. *Marriage* (1).

The Government Railways Act must of course be construed according to the natural and proper meaning of its own language. The considerations which influenced the original decisions in Upper Canada on the Railway Act of 1851 have no place in the discussion, and any interest they have is chiefly historical.

In Quebec the legislature has taken a different course, but in departing from the language of the Dominion acts, it recognises the effect of those acts as being what I understand it to be.

The Quebec Railway Act, 1869, followed the Dominion Railway Act, 1868, in adopting the language of the English version of the Consolidated Statute, ch. 66, which provided for gates, &c., "*at* farm crossings of the railway;" but this was altered in 1875 by 38 Vic. ch. 42, (Q.) which returned to the original form of words, substituting "*and* farm crossings" for "*at* farm crossings," and adding a positive enactment which is probably somewhat vague, and the English version of which is translated (not very happily) from the French, that "farm crossings shall be made and maintained by the company upon the application of any owner of land, present or future, on each such land."

So the law of Quebec remains as to railway companies incorporated under the General Railway Act of that province (2), and such is now the law applicable

(6) 9 H. L. Cas. 32.

(2) 43-44 Vic., ch. 43, s. 16; 2 R. S. Quebec p. 470, Art. 5171.

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under the Railway Act of 1888 to all railways subject to the legislative authority of the Dominion, except government railways.

The Railway Act, 51 Vic. ch. 29, sec. 191, declares that

> Every company shall make crossings for persons across whose land the railway is carried, convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles.

We do not find this enactment associated with the provisions respecting fences in the act of 1888. It properly stands by itself, and I take it to confirm, as I before remarked, my reading of the sections by which gates are required in fences, at farm crossings, as not involving the duty to furnish or construct crossings.

Mr. Belleau was, in my opinion, correct in his contention that the uncertainty of the tenure of the way now used by Vézina, should have been considered in awarding the compensation, notwithstanding that it may, for the time being, serve his purposes well enough.

I have no doubt that it is intended that Vézina shall have a crossing, and that on attention being called to the matter steps will be taken to secure him a sufficient right of way. That being done his claim for damages on this score will cease.

Apart from that question and the other question of damage to the remaining land from the proper use by the railway of that which is taken I should not disturb the award.

I have felt inclined to remit the matter to the Exchequer Court for further consideration of those two points and to give an opportunity to have the crossing definitely settled. On reflection, however, I am satisfied that it will be better to close the litigation by ourselves adjusting the amounts. I would add to the present award two sums of five hundred dollars each,

one being in respect of what has been called the operation of the railway, and the other in respect of the want of a farm crossing. These additions will make the award $3811.30. But in case the Government shall, within three months from the pronouncing of this judgment, confirm to the applicant the farm crossing which he at present uses, or another crossing with which he shall be satisfied, then no sum is to be allowed in respect of the crossing, and the award is to be for $3311.80.

The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors for appellant: *Belleau, Stafford & Belleau.*

Solicitors for respondent: *Casgrain, Angers & Hamel.*

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*Feby. 12.
*April 30.

BENONI GUAY (CLAIMANT).....APPELLANT;

AND

THE QUEEN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT.

Expropriation for Government Railway purposes—Severance of Land—Farm crossings—Compensation.

Where land expropriated for Government railway purposes severed a farm, the owner although not at the time entitled to a farm crossing apart from contract was entitled to full compensation covering the future as well as the past for the depreciation of his land by the want of such a crossing.

Gwynne J. dissenting on the ground that the owner was entitled to a crossing as a matter of law. [See now 52 V. c. 38 s. 3.]

APPEAL from a judgment of the Exchequer Court of Canada, upon a claim for expropriation under the Government Railway Act.

The appellant was the owner of two lots situate in the Parish of St. Joseph, Levis. On the 8th June, 1882, the Intercolonial Railway authorities expropriated two parcels of these lots for the construction of what is generally known under the name of the St. Charles Branch.

The appellant thereupon filed the following claim, which was contested by the crown and referred to the Exchequer Court, to wit:

Plan Nos. 1 & 2—1st range.

Land expropriated.....	$ 200 00	
Damages.....	1,200 00	
		$1,400 00

*PRESENT:—Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

Plan No. 3—3rd Range.			
Land expropriated.....	$120 00		
Damages.....	380 00		
		500 00	
		$1,900 00	

On the 30th day of June, 1888, the court awarded the claimant the sum of $1,070 as follows, to wit:

Plan Nos. 1 and 2—1st Range.			
Land expropriated.....	$200 00		
Damages.....	500 00		
		$ 700 00	
Plan No. 3—2nd Range.			
Land expropriated.....	$120 00		
Damages.....	250 00		
		370 00	
		$1,070 00	

With this award the claimant was dissatisfied and hence the present appeal.

The court below having awarded the claimant the full amount he demanded for lands expropriated, and there being no cross appeal, this part of the award was not attacked.

The only question, therefore, that arose on this appeal was in relation to the amount of damages awarded on each of appellant's properties for depreciation of value caused by the construction of the railway.

Belleau for appellant contended that a subway which was constructed upon lot 1 on the side of a hill was impassable, and that having no crossing nor gate upon lot 2 appellant had not received full compensation for the future as well as for the past in consequence of the want of such a crossing.

Angers Q.C. for respondent contended that the hill is not steeper on lot 1 than it was before and that in

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assessing the damages on lot 2 the learned judge had included the cost of the crossing.

The judgment of the majority of the court was delivered by

PATTERSON J.—This appeal raises no question beyond the amount of damages for the depreciation of or inconvenience caused in respect of the claimant's land, by severance and by the effect of the railway upon the natural flow of water upon his land. The amount awarded for the land expropriated is not complained of.

It may be that we are as able to appreciate the evidence as was the learned judge in the court below, because the witnesses appear to have been examined before the registrar, but we are in no better position.

I do not see any good reason to suppose that my estimate of the value of the opinions of the witnesses, if it differed from that formed by the learned judge, would be more likely to be right than his estimate; on the contrary I must regard the award as that of the tribunal primarily charged with the adjustment of compensation in these cases, and not to be disturbed unless a wrong principle appears to have been acted on, or unless some error as to facts or some oversight is apparent.

The learned judge appears to have had before his attention all the considerations affecting the injury, and the only point on which I should criticise his decision is upon the question of farm crossings, particularly with reference to the property in the third range. As to that property, the learned judge remarks that the claimant was entitled to a crossing, and I understand him to attribute the depreciation of that portion of the property chiefly to the want of a crossing and to take that into account in estimating the damages (1). As explained in what I have said in *Vézina's Case*, I do not think the statutes give a right to a crossing over this

(1) See p. 21 et seq.

railway apart from contract. If the right existed it would be enforceable notwithstanding the award in question, but when no right is given by statute or reserved by contract, full compensation, covering the future as well as the past, should be given.

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It is not quite clear that the award is intended to give this full compensation, wherefore it will be proper for us to put it beyond question.

We therefore add one hundred dollars to the amount, which will still be less than the estimate of the witnesses for the claimant and not much above that of some of the witnesses for the crown.

The award is thus increased from $1,070 to $1,170 and the appeal is allowed with costs.

GWYNNE J.—The only point in which any objection could, with propriety, as it appears to me, be made to the award of the learned judge of the Exchequer Court, is with respect to the sum of $250 allowed under the head of depreciation of the property in the 3rd range, if that sum was awarded upon the assumption that the owner was deprived of a right to cross the railway from one of the severed parts of his farm to the other. For the reasons given in *Vezina* v. *The Queen* (1), I am of opinion that a person whose property is severed by a railway into two or more parts, access between which across the railway is necessary to the full enjoyment of the severed parts, cannot against his will be deprived of his right to have such access by a suitable crossing under or over the railway and cannot be compelled to accept pecuniary recompense in lieu of such a crossing. The statute which authorizes the construction of a railway across a man's property is not, in my judgment, open to the imputation that it justifies any such autocratic interference with the property of a person across whose lands a railway is

(1) 17 Can. S. C. R. 1.

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authorized to be constructed, whether it be constructed by a company or by the Government. Again, on the other hand, a land owner cannot in my judgment compel a railway to compensate him in money as in lieu of a crossing which can be supplied. In the present case the Government has not appealed or raised any objection to the amount awarded, but lest payment of this amount might hereafter present an obstacle to the owner of the land obtaining a suitable crossing which, it is apparent, can readily be given, and as an act has been passed during the present session of Parliament, which, I think, gives ample power to the Exchequer Court to make an order in the proceedings upon expropriation for the construction of a suitable crossing in cases like the present, I am of opinion that we should remit the case to the Exchequer Court to be dealt with under that act. As to the grounds of appeal taken by the appellant, I cannot see anything which would justify us as an appellate tribunal in pronouncing the judgment of the learned judge of the Court of Exchequer to be erroneous. I think that there should be no costs given on the appeal.

Appeal allowed with costs

Solicitors for appellant: *Belleau, Stafford & Belleau.*

Solicitors for respondent: *Casgrain, Angers & Hamel.*

THE NEW BRUNSWICK RAILWAY CO. AND ROBERT LAW (DEFENDANTS) ..... APPELLANTS;

AND

ALICE M. VANWART, ADMINISTRATRIX OF JOSEPH M. VANWART, DECEASED (PLAINTIFF) ..... RESPONDENT.

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*Nov. 15.
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*Mar. 18.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Railway Co —Negligence—Approaching siding—Notice of approach.

At a place which was not a station nor a highway crossing the N. B. Ry. Co. had a siding for loading lumber delivered from a saw mill and piled upon a platform. The deceased was at the platform with a team for the purpose of taking away some lumber, when a train coming out of a cutting frightened the horses, which dragged the deceased to the main track where he was killed by the train.

Held that there was no duty upon the company to ring the bell or sound the whistle or to take special precautions in approaching or passing the siding.

APPEAL from a decision of the Supreme Court of New Brunswick (1) setting aside a non-suit granted at the trial and ordering a verdict to be entered for the plaintiff.

The action in this case was brought to recover damages from the defendant for the death of Joseph M. Vanwart, caused, as alleged by the plaintiff, by the negligence of the servants of the company.

The deceased was at a siding of the railway with a pair of spirited horses, his business there having no connection with the railway. While there he was told that a train was approaching, and he endeavored

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

(1) 27 N. B. Rep. 59.

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to unhitch the horses but before he could do so the train approached, the horses ran away and dragged deceased on the track and he was killed. No whistle was sounded or bell rung as the train approached the siding. The company was under no statutory obligation to give warning.

The defendants contended on the trial that there was no evidence of negligence to go to the jury, and if there was the plaintiff was guilty of such contributory negligence as to relieve the company.

At the trial the counsel agreed that a non-suit should be entered subject to the same being set aside by the court if it should be considered that there was evidence of negligence and not of contributory negligence, in which case a verdict might be entered for the plaintiff for the damages agreed upon or a new trial be granted, the court to draw inferences of fact. The court set aside the non-suit and ordered a verdict to be entered for the plaintiff. The company then appealed to the Supreme Court of Canada.

Weldon, Q.C. for the appellants, cited *Dublin, &c., Railway Company* v. *Slattery* (1); *Wright* v. *The Boston & Maine Railroad* (2); *Gaynor* v. *The Old Colony Railway Company* (3); *Wakelin* v. *The London & South Western Railway Company* (4); Taylor on Private Corporations (5); *Skelton* v. *The London & North Western Railway Company* (6); *Larmore* v. *The Crown Point Iron Co.* (7).

J. A. Vanwart for the respondent—The decision of the court below must be treated as the verdict of a jury, and will not be interfered with on questions of fact.

(1) 3 App. Cas. 1155.
(2) 129 Mass. 440.
(3) 100 Mass. 208.
(4) 12 App. Cas. 41.
(5) 2 Ed. sec. 376.
(6) L.R. 2 C.P. 631.
(7) 101 N.Y. 391.

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(PATTERSON J, refers to the case of *Young* v. *Moeller* (1) as an authority, showing that where the court below has power to draw inferences from the evidence a court of appeal may also draw inferences)

The learned counsel referred to the cases of *Rosenberger* v. *The Grand Trunk Railway Company* (2); *Davie* v. *The London & South Western Railway Co.* (3);

The judgment of the court was delivered by :—

PATTERSON J.—The plaintiff has judgment for $1,500 for herself, as widow of the deceased, and for $500 for his father. An objection was made to the father's right to recover damages for the death of his son, but the authorities are against the objection. He is properly held to have had reasonable expectations of future pecuniary benefit from the life of his son. I think all the English cases on the point, decided under Lord Campbell's Act, will be found collected in my judgment in *Lett* v. *St. Lawrence and Ottawa Ry. Co.* (4), and considered in chronological order. The cases of *Franklin* v. *South Eastern Ry. Co.* (5); *Dalton* v. *South Eastern Ry. Co.* (6); and *Hetherington* v. *North Eastern Ry. Co.*, (7), amongst others, will be found to be in point upon the present objection, if the defendants are held liable at all.

Upon the main question of the defendants' liability we have the advantage of elaborate and able judgments delivered in the court below. The opinion of the majority of the court was in favor of the plaintiff's right to recover. The question was treated as one of some novelty, as well as of some difficulty. It is not a matter of surprise to find it regarded in different lights by the judges by whom it was discussed, but after the

(1) 5 E. & B. 755.
(2) 8 Ont. App. R. 482; 9 Can. S.C.R. 311.
(3) 11 Q.B.D. 213.
(4) 11 Ont. App. R. 1.
(5) 3 H. & N. 211.
(6) 4 C. B., N. S. 296.
(7) 9 Q. B. D. 160.

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further discussion it has received in the argument before us, I cannot say that I have any doubt of the right of the defendants to our judgment in their favor.

The incidents connected with the unfortunate accident which occasioned the death of the intestate need not now be stated in detail. The essential facts on which the liability of the defendants must be tested are within a narrow compass.

The freight train was making its ordinary daily trip, in the ordinary manner, and at its regular time, when the horses of the deceased, which he had just brought to a place very near the track for the purpose of taking away a load of lumber, were frightened by the train, became unmanageable, and dragged him with or under the waggon on to the track, where he received fatal injuries from the train if he had not been already fatally injured by the horses and the waggon.

There was a cutting at a short distance each way from the place of the accident, and the approach of the train was not easily discovered until it was about to emerge from the cutting. The fright of the horses may have been in this case caused by the sudden appearance of the train, and reason is given for the belief that the accident might have been avoided if the deceased had had time, after he knew the train was coming, to turn the horses' heads towards it.

No whistle was sounded or bell rung to give notice of the approach of the train.

The place was not a highway crossing, and there was no statutory duty to whistle or to ring.

Under the facts so stated, if those were all the facts, there could be no suggestion of negligence on the part of the defendants.

The position would be that which recurs every hour in the day along all our railways.

It is precisely that of a farmer unloading his grain

at a warehouse beside the railway, or a team standing at a flag station while an express train rushes past, or being driven along a highway that runs alongside of a railway as many highways do, or crosses the railway by a bridge or culvert where the statutory duty to whistle or to ring does not apply.

In cases like these the sight and noise of a train passing along the line may frighten horses unused to such objects. The business of the railway would be materially impeded if account had to be taken of every such possibility. The duty, if recognised, would, by an easy process of reasoning, be found to extend also to ordinary farm crossings. The danger to horses from the supposed cause may easily be exaggerated. It may be found, just as in the present instance, that while work with trains is plied all the year round in such situations, no trouble occurs in any but exceptional cases, where the horses may be excitable or the drivers imprudent.

It has long been the law with regard to nearly all our railways, under the provisions of our railway legislation, that notice of the approach of a train to a level crossing of a highway must be given by sounding the whistle or ringing the bell. We are told that that rule did not apply by statute to the defendant company until after the accident now in discussion. The existence of the legislative rule may, however, afford a criterion of what is reasonable, and as a warning not to impose on the company a burden more onerous than that indicated by the legislature as sufficient :—

> It would be extremely difficult, Lord Halsbury remarked in *Wakelin's case* (1), to lay down as a matter of law that precautions which the legislature has not enjoined should be observed by a railway company in the ordinary conduct of their traffic.

Nothing turns on the circumstance that the unfortu-

(1) 12 App. Cas. 41, 46.

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nate man was dragged on to the track and mangled by the engine. The legal position would have been the same if his injuries had been sustained without that distressing incident. This was fully recognised in the court below.

There are, however, some other facts, and it is upon the effect attributed to them that I understand the judgment to have proceeded. I think the fallacy consists in regarding those other facts as essential facts.

A Mr. Tapley had a sawmill at or near the spot in question. For the convenience of shipping his lumber by the railway he had made a road from the mill to the railway grounds, and the company had constructed a siding. There was a structure which is called a wharf, and was, if I correctly apprehend the evidence, some kind of platform on which boards could be piled and from which they could be conveniently loaded upon cars on the siding. The deceased had been sent by a customer of Tapley's for boards, and Tapley, not having what was wanted at the mill, directed the deceased to take them from the wharf. He had just driven his horses into position to begin loading from the wharf when the train appeared and the horses took fright.

I am unable to see that the knowledge by the company of the existence and use of this wharf, or the consent and concurrence of the company in its erection and in the use of the siding for the purpose of the shipment of Tapley's lumber, and of bark or other produce brought there by others for shipment, alters the position in any respect material to the present inquiry. Setting aside the fact that the deceased was not using the structures for their intended purpose, or acting under any permission from the company, but regarding him in the same way as if he had brought lumber from the mill to pile it on the wharf for ship-

ment, his position did not differ from that of a farmer delivering his grain at a warehouse beside the track, or a teamster waiting at a way station whose horses might be frightened by a passing train, without any breach of duty on the part of the company, and without any duty attaching to the company to give any kind of special notice that the train was approaching.

Several cases have been relied on for the plaintiff either as showing that there may be circumstances in which special care is called for in operating the railway or that a liability may be incurred by neglecting to sound the whistle, and even by unnecessarily sounding it, and that the company may be liable even when the injury is sustained at a distance from the track. I do not propose to discuss those cases in detail. They will be found to be of two classes, viz.: cases where the railway crossed a highway, or where the complainant was injured while lawfully using or passing over the railway property. In *Rosenberger* v. *The Grand Trunk Railway Company* (1), which went as far as any case has gone, the railway crossed the highway, and the company neglected their statutory duty. The general remark of Spragge C.J., quoted by the learned Chief Justice in the court below, as to the duty of the company not being confined to that prescribed by the statute may perhaps be rather wide. It was merely obiter, because it was the neglect of a statutory duty that was there in question; but, at all events, it was made with reference to the crossing of a highway on the level, and cannot properly be taken to bear on a situation like that now under consideration.

In *Sneesby* vs. *Lancashire and Yorkshire Railway Company* (2) the negligence was in allowing some trucks to run down a siding over which the cattle were cross-

(1) 8 Ont. App. R. 482; 9 Can. S.C.R. 311.

(2) L. R. 9 Q. B. 263; 1 Q. B. D. 42.

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ing on their way from the railway carriage in which they had been conveyed. The cattle were killed on another railway to which they had found their way, and which happened to belong to the same company. The ownership of that railway did not affect the liability of the defendant company, which would have been the same if the cattle had met their deaths by rushing in their fright over a precipice.

Two very recent cases may be usefully noted. One is *The Victorian Railways Commissioners* v. *Coultas* (1) decided by the Judicial Committee of the Privy Council after the argument of the rule *nisi* in this case, where a person who was, by the negligence of the railway gatekeeper, allowed to drive across the track when a train was approaching, and who escaped actual impact but received a severe nervous shock from fright, was held not entitled to recover, the committee holding that the damages were too remote without deciding whether actual impact was necessary to the maintenance of the action. The other and later case, *Simkin* v. *London and North-Western Railway Company* (2) approaches more nearly to the present case in some of its facts than any other case which I have met with. The plaintiff's horse was frightened when leaving the station by an engine blowing off steam. The jury found that there was no negligence in the manner of the blowing off of the steam, but that the company ought to have erected a screen to shut out the view of the engines from the horses on the road. It was held that the evidence did not warrant the finding.

I cite these because they are the latest cases on our subject, and not as necessarily bearing more directly than some others on the case in hand. It will be found, however, that the decisions proceed on the principles on which I have formed the opinions I have expressed,

(1) 13 App. Cas. 222. (2) 21 Q.B.D. 453.

and that in *Simkin's Case* (1) the judgment delivered by Lopes C.J. follows to a great extent the same line of argument and illustration by which I have reached my conclusion.

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The question of contributory negligence does not arise here as a separate question. The whole of the facts appear from the evidence adduced by the plaintiff, and the question is whether upon those facts the accident can properly be held to have been caused by the negligent conduct of the defendants in the running of the train.

For the reasons I have given, I am of opinion that that question must be answered in favor of the defendants.

I have treated the case as if the company had been the only defendants. The engine-driver, who has been joined with them in the action, of course succeeds when the company succeeds. If the plaintiff had succeeded against the company the right of action asserted against the engine-driver might have required some consideration which is now unnecessary.

I am of opinion that appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for appellants: *Weldon & McLean*

Solicitors for respondent: *J. A. & W. Vanwart.*

(1) 21 Q. B. D. 453.

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*Feb. 21,22.

*June 14.

WILLIAM F. DANAHER..... APPELLANT ;

AND

B. LESTER PETERS AND JOHN R. MARSHALL..... RESPONDENTS.

JOHN O'REGAN.....APPELLANT ;

AND

B. LESTER PETERS.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

New Brunswick Liquor License Act, 1887—*Constitutionality of—Prohibition of sale of liquor—Granting a license—Powers of Mayor of a city—Disqualifying liquor sellers—Effect of.*

The New Brunswick Liquor License Act, 1887, provides that "all applications for license, other than in cities and incorporated towns, shall be presented at the annual meeting of the council of the municipality and shall then be taken into consideration, and in cities and incorporated towns at a meeting to be held not later than the first day of April, in each and every year." The interpretation clause provides that in the City of St. John the expression "council" means the mayor who has the powers given to a municipal council. It is also provided that when anything is required to be done at, on or before a meeting of council, and no other date is fixed therefor, the mayor may fix the date for doing the same in the City of St. John.

Held, affirming the judgment of the court below, that the provision requiring licenses to be taken into consideration not later than the first day of April is directory only, and licenses granted in St. John are not invalid by reason of the same being granted after that date.

Held, per Gwynne J., that this provision does not apply to the city of St. John.

Applications for licenses under the act must be endorsed by the certificate of one-third of the rate-payers of the district for which the license is asked. No holder of a license can be a member of the

*PRESENT.—Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

municipal council, a justice of the peace, or a teacher in the public schools.

Held, that the legislature could properly impose these conditions to the obtaining of a license, and the provision is not *ultra vires* the local legislature as being a prohibitory measure by reason of the rate-payers being able to prevent any licenses being issued ; nor is it a measure in restraint of trade by affixing a stigma to the business of selling liquor.

APPEAL from a decision of the Supreme Court of New Brunswick, refusing a writ of prohibition to restrain the defendants from enforcing a conviction for selling liquor without license, contrary to the provisions of the Liquor License Act, 1887 (1).

This appeal raises only two questions which are dealt with in the following judgments of the Supreme Court. One question is as to the constitutionality of the act; the other as to the validity of licenses issued under it in the City of St. John.

The act provides that applications for licenses must be accompanied by a certificate of the applicant's fitness to hold a license, and that the premises for which it is asked are suitable, signed by at least one-third of the rate-payers for the polling sub-division established for the purposes of the last previous Dominion or Provincial Election for the district for which the license is asked. It was contended by the appellants that this provision enabled the rate-payers, by acting in concert, to prevent the granting of any licenses, and that it was, therefore, in effect a measure prohibiting the sale of intoxicating liquors, and *ultra vires* of the local legislature.

Another provision of the act was that no holder of a license should be qualified to sit on the commission of the peace, to be a member of a municipal council or a teacher in the public schools. The contention of the appellants under this provision was that it interfered with the public rights of persons engaged in the

(1.) 50 Vic. (N.B.) Ch. 4.

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liquor business and, by affixing a stigma to that business, was calculated to prevent persons engaging in it, which made it a measure in restraint of trade and *ultra vires* of the local legislature.

The power to grant licenses under this act is vested in the municipal councils and, for the City of St. John, in the mayor, who has all the powers of a council. Applications for license in cities and incorporated towns are to be considered at a meeting of the council, (the expression council in relation to St. John meaning the mayor) to be held not later than the first day of April in each year. Anything required to be done at, or on or before, a meeting of council, when no other date is fixed therefor, shall be done in St. John on a day to be fixed by the mayor, of which he shall give notice by advertisement in a newspaper.

The mayor of St. John gave notice for, and received and considered applications for, license on the 26th day of April. The appellants, who were applicants for a retail and wholesale license respectively, appeared before him on that day and protested against any licenses being issued, and they afterwards sold liquor without license, and were convicted of an offence against the act for so doing by the respondent Peters, Police Magistrate for the city. They then applied for, and obtained, a rule *nisi* for a prohibition to prevent the said magistrate and the Chief of Police from enforcing the conviction. On the return of the rule *nisi* it was argued before the full court and discharged. This appeal was then brought to the Supreme Court of Canada.

The different sections of the act on which the decision of this court and that of the court below is founded are set out in the judgments of Gwynne and Patterson JJ.

McCarthy Q.C. and *Milledge* (*Quigley* with them) for the appellants. That the power to prohibit abso-

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lutely the sale of liquor in Canada is vested in the Dominion Parliament is settled by authority. *Russell* v. *The Queen* (1); *City of Fredericton* v. *The Queen* (2).

It is not necessary that prohibition should appear as a feature apparent on the face of the act. If it can be utilized as a means for effecting prohibition it is beyond the legislative authority of the province.

Then can licenses be granted in the City of St. John later than April 1st? By the act certain privileges are granted to a certain class of traders and the procedure provided must be strictly followed. That was not done in this case. The act negatively provides that applications for license must be considered on or before the first of April. See *Becke* v. *Smith* (3); *River Wear Commissioners* v. *Adamson* (4); *Sussex Peerage Case* (5); Maxwell on Statutes (6); *Williams* v. *Swansea Canal Navigation Co.* (7); *Howard* v. *Bodington* (8).

There is no such thing in England as an unconstitutional act of Parliament. The English decisions on construction of statutes must be looked at in the light of our different position. *White* v. *Tyndall* (9); *Leader* v. *Duffey* (10); *Caldwell* v. *McLaren* (11), can only be upheld on a strict and literal construction of statutes.

The learned counsel referred also to *Hodge* v. *The Queen* (12), and the decision of the Privy Council in *re Dominion Liquor License Act*, 1883.

Jack, Recorder of the City of St. John for the respondents, cited the following cases and authorities: *Sharp* v. *Dawes* (13); *Pearse* v. *Morrice* (14); *Le Feuvre* v. *Miller* (15); *Siddell* v. *Vickers* (16); *The People* v. *Allen* (17);

(1.) 7 App. Cas. 829.
(2.) 3 Can. S.C.R. 505.
(3.) 2 M. & W. 195.
(4.) 2 App. Cas. 764.
(5.) 11 C. & F. 143.
(6.) 2 Ed. p. 456.
(7.) L. R. 3 Ex. 158.
(8.) 2 P.D. 203.
(9.) 13 App. Cas. 275.
(10.) 13 App. Cas. 301.
(11.) 9 App. Cas. 392.
(12.) 9 App. Cas. 117.
(13.) 2 Q.B.D. 26.
(14.) 2 A. & E. 96.
(15.) 8 E. & B. 332.
(16.) 39 Ch. D. 92.
(17.) 6 Wend. 486.

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Maxwell on Statutes (1); *Severn* v. *The Queen* (2); *Bank of Toronto* v. *Lambe* (3); R.S.N.B. (1).

STRONG J.—Was of opinion that the appeals should be dismissed.

FOURNIER J.—I am of opinion that these two appeals should be dismissed with costs for the reasons mentioned in the very elaborate notes of the judges of the court below.

TASCHEREAU J.—I am of opinion that whether the Mayor could hold the meeting for the issue of licenses after the first of April or not is immaterial in this case (Danaher's). If he could do so, as he has done, the appellant stands without a license; if he could not do so the result is the same, the appellant is without a license and could not sell liquor without infringing the provisions of the Liquor License Act. As to the constitutionality of the act there can be no doubt. This is not a statute to prohibit, it is a statute to regulate, to permit under certain conditions. If these conditions are not fulfilled it may be that the consequences are that the sale of liquor is virtually prohibited, but that consequence cannot render the act unconstitutional.

As to O'Regan's case, he also sold liquor without a license. Whether he sold wholesale or retail is immaterial. It is not because he sold a large quantity that he can claim to have the action against him dismissed.

GWYNNE J.—The first question which arises in these cases is as to the authority and jurisdiction of the mayor of the City of St. John, in the Province of New Brunswick, under the Provincial Statute 50 Vic. ch.

(1.) Ed. of 1875, p. 334, *et seq.*
(2.) 2 Can. S.C.R. 70.
(3.) 12 App. Cas. 575.
(4.) Vol. 3 p. 1006.

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4, to issue the licenses issued by him on the 26th April, 1888. In the construction of this obscure act all that we are concerned with is as to its application to the City of St. John in relation to the issue of licenses to sell liquors therein. We are bound to find, if we can, an intelligible meaning for the seeming obscurity and this, I think, a careful study of the act will enable us to do, although not, perhaps, without some difficulty.

Sec. 2, sub-sec. 4, enacts in substance in so far as the City of St. John is concerned, that by the word "council" where it occurs in the act standing thus alone, shall be understood, unless the context otherwise requires, "the mayor of the city" whom the act invests with all the powers and duties which in other municipalities are imposed upon the councils of the municipalities, and then sec. 8 enacts that:

Every application for a license to sell liquors (in the City of St. John) either by wholesale or retail shall be by petition of the applicant to the mayor of the city.

Sec. 9. Every petition for a license shall be filed with the chief inspector of the city on or before the first day of March in each year.

Sec. 13. The chief inspector shall cause to be posted up in his office the name of each applicant for license, the description of license applied for, and the place, described with sufficient certainty, where such applicant proposes to sell, at least fourteen days before the first day of April.

Sec. 15. It shall be the right and privilege of any person residing in the ward for which the license is required to file objections in writing to the granting of any license. The objections which may be taken to the granting of a license may be one or more of the following:

1. That the applicant is of bad fame or character or of drunken habits, or has previously forfeited a license, or that the applicant has been convicted of selling liquor without license within the period of three years; or

2. That the premises in question are out of repair, or have not the accommodation hereby required, or reasonable accommodations if the premises be not subject to the said regulations; or

3. That the licensing thereof is not required in the neighborhood, or that the premises are in immediate vicinity of a place of public

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worship, hospital, or school, or that the quiet of the place in which such premises are situate will be disturbed if the license is granted.

Sec. 17. Any petition or memorial against the granting of a license shall be lodged with the chief inspector not less than four clear days before the day on which the application shall be considered.

Sec. 18. The chief inspector shall keep a list posted in his office for three days previous to such day of all certificates and petitions lodged with him as aforesaid, and every such petition or memorial shall be open for public inspection without fee.

Sec. 20. Every application for a license, and all objections to every such application shall be investigated by the chief inspector of the city;

1. Every such investigation shall be open to the public.

2. The chief inspector may, at his discretion, adjourn such investigation from time to time.

Sec. 21. On every application for a license, the chief inspector shall report in writing to the mayor of the city, and such report shall contain, &c.

Sec. 22. The inspector shall with his report return to the mayor of the said city the evidence taken by him at any investigation, and such report and evidence shall be for the information of the mayor of the city who shall nevertheless exercise his own discretion in each application.

Then sec. 23 enacts that—

Whenever by this act anything is required to be done at a meeting, or on or before a meeting of council, and no other day is fixed therefor in this act, *such act or thing may be done in the City of St. John on or before a date to be named and fixed by the mayor of the said city*, of which date he shall give seven days previous public notice by advertisement in one or more of the daily newspapers published in the city.

This section read in connection with sec. 17 shows that the day upon which the applications for licenses in the City of St. John are to be considered must be a day to be appointed and fixed by the mayor, of which seven days notice by advertisement in one or more of the daily newspapers published in the city must be given, and, therefore, that such day may be, and indeed, generally, perhaps, would be, a day subsequent to the first of April in each year.

I have stated above what appears to me to be the correct reading of sections 17 and 18 in relation to the

issuing of licenses in the City of St. John, and that this is the correct reading will, I think, appear by applying to their construction this 23rd section.

Sec. 17 literally reads as follows:

Any petition or memorial against the granting of a license shall be lodged with the Chief Inspector not less than four clear days before the day of the meeting of the Council at which the application shall be considered.

Now, this expression—

Not less than four clear days before the meeting of Council at which the application shall be considered—

supplies the very condition precedent required by sec. 23 to determine its application to sec. 17.

The lodging a petition or memorial against the granting of a license which has been applied for, is a thing required by the act to be done—

Before a meeting of Council, and no other day is fixed therefor in the act.

It must, therefore, in the City of St. John, be done by force of sec. 23 not less than four clear days *before a day to be named and fixed by the mayor of the city* for taking applications for licenses into his consideration, of which day seven days previous public notice by advertisement in one or more of the public newspapers published in the city must be given. In so far, therefore, as the City of St. John is concerned a day to be fixed by the mayor, of which seven days public notice, as aforesaid, is given, is the day upon which applications for licenses in the City of St. John are to be considered, and such day may be subsequent to the first of April in each year, notwithstanding the ingenious arguments of the learned counsel for the appellants founded upon the words—

Not later than the first day of April in each and every year,

in the 27th section, the sentence in which these

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words occur, properly understood, having no application whatever to the City of St. John.

That section enacts that

All applications for license other than in cities and incorporated towns shall be presented at the annual meeting of the council of the municipality, and shall then be taken into consideration, and in cities and incorporated towns at a meeting to be held not later than the first day of April in each and every year.

As to the first branch of the sentence it is expressly limited to municipalities other than cities and incorporated towns. The word "council" as it is used in that sentence cannot be construed as coming within the 4th sub-section of section 2 of the act; the context requires that it should not be so construed; what the sentence relates to is an annual meeting of a council of a municipality other than a city or an incorporated town. So likewise, as it is the manifest design of the act to make special provision for the City of St. John different from the provision made for all other cities and for all incorporated towns, the City of St. John cannot be comprehended under the words in the latter clause of the sentence "and in cities and incorporated towns, &c." The cities and incorporated towns there referred to are these at the meeting of whose municipal councils the applications are to be presented; the word "meeting" as here used would be manifestly insensible as applied to the mayor of the city to whom, by sections 8 and 21 read in the light of section 2, sub-section 4, applications for licenses in the city of St. John are to be presented. Moreover, the expression "council" is not used in the latter branch of the sentence at all, so that for these reasons it is apparent that the sentence has no application to the City of St. John as to which special provision is made quite different from that made for all other cities and for all incorporated towns. The same observation applies to the 1st sub-section of sec. 27. The word "council" as there used in connec-

tion with the words "at such meeting" refers to the municipal council of a municipality other than a city or incorporated town and to the municipal council of cities and incorporated towns in the previous sentence referred to, that is to say to cities whose councils receive and take into their consideration applications for licenses at a meeting of council held not later than the first of April in each year—in other words all cities except the City of St. John; the context requires that the word "council" in this sub-section is not to be read as meaning the mayor of the said City of St. John.

The word "council" in the 2nd sub-section and wherever it occurs in the other sub-sections can be applied in relation to the City of St. John to the mayor of the said city. Thus sub-section 3:

The mayor of the City of St. John shall hear and determine all applications, &c.

Sub-sec. 5. No objection from an inspector shall be entertained unless the nature of the objection shall be stated in his report furnished to the mayor of the city.

Sub-sec. 6. Notwithstanding anything in this act contained, the mayor of the said city may of his own motion, &c., &c.

Thus reading the 27th section all argument based on the words in it "at a meeting to be held not later than the first day of April in each and every year" is removed, and these words have no application as regards the issuing of licenses in the City of St. John. Whether, therefore, the language of the section is imperative or directory is unimportant in the present case.

It was contended that in effect the act operates as a total prohibition of the sale of liquor in the City of St. John and that it was therefore *ultra vires* and void. The argument in support of this contention was rested upon sections 27 and 10. In so far as section 27 is concerned I have already, I think, shewn that it has no application to the issuing of licenses in the City of St.

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John, and it is with this point alone that we are concerned.

Sec. 10 enacts that—

In case of an application for a license, the petition must be accompanied by a certificate signed by one-third of the rate-payers in the polling sub-division in which the premises sought to be licensed are situate, which polling sub-division shall be that established by law for the purposes of an election for the House of Commons, or if none such be established then the polling sub-division used for the last election.

The argument based upon this section was that it shewed clearly the intention of the legislation to be that any number of rate-payers in a polling sub-division exceeding two-thirds should have the power of totally prohibiting the sale of liquor by refusing to sign the certificates for applicants for licenses. Then it was contended that section 31 authorises the majority of the rate-payers in a city or incorporated town to prohibit the sale of liquor by petitioning against the granting of licenses, and for those reasons it was contended that the act was, in effect, an act for the total prohibition of the sale of liquor in the City of St. John, and therefore *ultra vires* and void; but there is nothing in the language of the act which would justify us in pronouncing the intention of the Legislature to have been to enact a prohibition of the sale of liquors in a municipality or in any part thereof under colour of passing an act upon the subject of municipal regulations relating to the sale of liquors, which is a subject clearly within the jurisdiction of the local legislatures.

The objections which alone the act authorises to be urged by petition against the granting of a license to a particular person or for a particular house, enumerated in section 15, seem to be very reasonable grounds of objection as affecting the person and place sought to be licensed as regards the retail trade in liquors, and although these objections may seem to be unreasonable

if applied to a person or shop for which a license to sell liquors by wholesale is sought to be obtained, we cannot for that reason hold the object of the legislature to have been to effect prohibition of the trade of dealing in the sale of liquors under colour of an act establishing municipal regulations affecting that trade. So neither can we hold that the certificate of approval of the fitness of the applicant to obtain a license, or of the place in which he proposes to carry on the trade required by the act, however stringent the provision upon that subject is, has been enacted for the purpose of effecting a prohibition of the sale of liquors in any part of a municipality. The act may be defective, also, in some particulars, as in the absence of a provision (which was much relied upon) for supplying throughout the year the places of licensed persons dying, or being deprived of their licenses. So, likewise, it may to some seem to be reasonable, to others it may seem to be unreasonable, that a licensed tavern keeper should not be eligible to serve as a trustee of schools or hold a place in the commission of the peace, or to be a member of a municipal council, &c., but defects or imperfections in the act or provisions therein which may be, or may appear to some to be, unreasonable will not justify us in pronouncing the true object of the act to have been prohibition, total or partial, of the trade of dealing in the sale of liquors, under pretence of establishing municipal regulations upon that subject.

As to sec. 73, and the argument founded thereon as affecting brewers and distillers, we have no concern in my opinion in the present case with any consideration of that section or its effect upon brewers and distillers. The appeals must in both cases be dismissed with costs.

PATTERSON J.—I agree that these appeals must be

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dismissed, and I do not propose to discuss at much length the questions that have been debated before us.

The power of the local legislatures to provide for the issuing of licenses for the sale of spirituous liquors, either in large or small quantities, to limit the number of licenses, and to prohibit, under penalties, the sale of such liquors without license, cannot now be treated as an open question.

The contention for the present appellants is that the New Brunswick Liquor License Act, 1887, while professing merely to deal with the subject of licenses, contains provisions which, either from their inherent tendency or from the way in which they may be acted on, give the measure the effect of a prohibitory law, either as to the whole province and for all time, or as to particular localities and particular calendar years.

The larger question of the power of the province to prohibit the sale of intoxicating liquors within its own borders is not presented for discussion, and we have to deal only with questions which concede that total prohibition can be decreed only by the Dominion Parliament.

Three points have been made before us, but two of them may be dismissed with a few observations. They were, if I am not mistaken, raised for the first time in this court.

One relates to the requirement of a certificate signed by one-third of the rate-payers of the locality as a qualification for obtaining a license, and the other to the disqualification, under sec. 76, of licensed persons for holding commissions of the peace or municipal offices. These provisions, it is urged, interfere with the freedom of individuals in the matter of engaging in the liquor trade by making their right to a license depend on the action of their neighbors, and by attaching a stigma to the business. The stigma may or may not

be implied. There may be other motives for desiring that under a system of popular government the liquor seller shall control public affairs to as small an extent as possible, without any more imputation against him or his calling than is implied by the exclusion of judges from the electoral franchise.

But the objections are too fanciful and far-fetched to be seriously discussed without denying to the local legislature the right to prescribe the conditions on which licenses can be obtained. They assume a right in every man to demand a license, ignoring the right of the legislature to limit the number.

The main point, and that with which the judgments delivered in the court below are almost altogether occupied, is the effect of section 27, which declares that—

> All applications for license other than in cities and incorporated towns shall be presented at the annual meeting of the council of the municipality and shall then be taken into consideration, and in cities and incorporated towns at a meeting to be held not later than the first day of April in each and every year.

With this section are to be read section 2, sub-section 4, where it is enacted that in the City of St. John the expression "Council" shall mean the mayor of the city who shall have and exercise all the powers and duties imposed by the act upon the council, and also section 23 which declares that—

> Whenever by this act anything is required to be done at a meeting, or on or before a meeting of Council, and *no other day is fixed therefor in this act, such act* or thing may be done *in the City of Saint John* on or before a date to be named and fixed by the mayor of *the said city*, of which date he shall give seven days previous public notice by advertisement in one or more of the daily newspapers published in the said city.

The mayor of St. John sat for the purpose of receiving and disposing of applications for licenses on the 26th of April, 1888, and not on the first day of that

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month. He had given seven days previous public notice of his intention to attend on the 26th by advertisement in a daily newspaper published in the city, and applicants for licenses, the appellants being among them, also attended. Licenses were granted to others, but not to the appellants who protested against the right of the mayor to act in the matter after the first of April.

The appellants afterwards sold spirituous liquors without license in violation of the 71st section of the act, and were fined therefor by the respondent Peters.

The point made is that there was no power to issue licenses except at a meeting held not later than the first of April; that therefore no licenses for St. John could be legally issued for the year that began on the first of May, 1888; and therefore it was lawful to sell without license, or rather that the act which prohibited selling without license during a period when under the terms of the act no valid license could be obtained, or which left it open to an officer, by neglecting to do an act at the proper time, to suspend for a year the power of vendors of liquors to obtain a license, was a prohibitory act, and therefore beyond the legislative jurisdiction of the province.

On the other side it is denied that the conclusion follows from the premises, and the premises are also disputed.

The judgments delivered in the court below deal chiefly with the question of the validity of what was done by the mayor, notwithstanding that it was done later than the first of April; and the court held, with one dissentient opinion, that the licenses were valid which were issued on the 26th. If that decision is correct it will not be necessary now, as it was not found necessary in the court below, to consider whether or not the conclusion against the statute

would follow from the different premises on which the appellant bases his syllogism.

I agree with the views expressed by the majority of the court. The judgments of the learned Chief Justice and of Justices King, Wetmore and Fraser deal with the matter so fully, and to my mind so satisfactorily, both on reason and on the authorities, that to attempt to discuss the matter would be but to repeat what they have said.

I am satisfied that the reference to the time in section 27 cannot be properly treated as otherwise than directory, so that even if the provisions of that section apply to the mayor of St. John in the same way as to a municipal council the adjudication on the applications for license on the 26th of April was good and valid.

I am a good deal struck by the view, to which I understand Mr. Justice Wetmore to have been inclined, that there was no irregularity, but that the proceeding on the 26th was within the letter of the statute. It may be suggested that as the existing licenses expired on the 30th of April an earlier day than the 26th ought to have been adopted. That is a speculation on which I cannot enter.

The mayor of St. John may be credited with knowing better than I can be expected to know what the general convenience required. The question is: What does the statute say?

It says that licenses shall be issued by municipal councils or city or town councils, except in St. John where the mayor is to do what the council does elsewhere. Section 27 is framed with special reference to meetings of council. The phraseology of the section does not enable us to read the word "mayor" in place of the word "council" as directed by section two, because the word "council" does not happen to be ex-

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pressed along with the word "meeting" in relation to cities and towns. The meeting means, of course, a meeting of council, but the absence of the word renders gratuitous some ingenious discussion which we heard concerning the practicability of the mayor holding a meeting by himself.

The draftsman of the statute very likely supposed that he had named the first of April as the latest day for the mayor as well as for meetings of city and town councils to deal with applications for licenses. Section 13, which directs the posting up of notices with the names of applicants fourteen days before the meeting of council and, in the City of St. John, fourteen days before the first of April, shows that that date was thought of in connection with the functions that were to be discharged by the mayor, but it was evidently thought of as the *earliest* day on which he was to act.

It may be that section 23, which Mr. Justice Wetmore refers to as possibly leaving the time for the mayor's action very much to his own discretion, is not precise enough to be relied on for that purpose, but that reading of it would scarcely be a strained one.

The fact is that these several sections will not bear the close scrutiny which the appellants ask us to apply to them; and the close and critical reading which they urge would not lead to the conclusion on which they insist. The matter is not of much consequence, and is noticeable chiefly as a feather in the directory scale as against the application of section 27 according to its literal interpretation.

In my opinion we should dismiss the appeals with costs.

Appeals dismissed with costs.

Solicitor for appellants: *R. F. Quigley.*

Solicitor for respondents: *J. Allen Jack.*

JOHN McARTHUR *et al* (PLAINTIFFS)..APPELLANTS;

AND

DAVID WILBUR BROWN *et al* (DEFENDANTS)..... RESPONDENTS.

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*Oct. 11.

*Dec. 15.

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

Estoppel—Lease of mining rights—Option of locating.

J. McA. *et al's*, (plaintiffs') *auteurs* having leased a certain portion of a lot of land for mining purposes described in the deed by metes and bounds with the following option: "Pourra le dit acquéreur changer la course des lignes et bornes du dit lopin de terre sans en augmenter les bornes, l'étendue ou superficie en suivant dans ce cas la course ou ligne de la dite veine de quartz qu'il peut y avoir et se rencontrer en cet endroit, après que lui, le dit bailleur, aura prospecté le dit lopin de terre susbaillé," adopted certain lines of a survey made by one Proulx, as containing the vein of quartz. B. *et al's* (defendants') *auteurs* leased another portion of the same lot. In an action *en bornage* between the parties the court appointed three surveyors to fix the boundaries. Each surveyor made a separate report, and the report and plan of the surveyor Legendre, adopting Proulx's lines, was adopted and homologated by the court.

Held,—affirming the judgment of the court below, Gwynne J. dissenting, that plaintiffs' *auteurs* having located their claim in accordance with the terms of their deed they were now estopped from claiming that their property should be bounded according to the true course of the vein of quartz, and that the judgment homologating the survey adopting Proulx's lines and survey was right and should be affirmed.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming the judgment of the Superior Court.

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

(1) 13 Q. L. R. 168.

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The following special case was submitted to the Court of Queen's Bench by consent.

"The action brought by appellants in the court below was *en bornage*.

The parties appellant and respondent were both mining firms who acquired the following emphyteutic leases for the purpose of working the gold lead on Lot 11, in the St. Charles concession of the seigniory Rigaud-Vaudreuil, St. François parish, Beauce, formerly belonging to Jos. Poulin, who granted the leases to both parties to mine on different portions of the said lot.

The appellants' *auteurs* acquired the following leases held by appellants at the time of the institution of their action.

1o. Lease for ten years by deed before Ls. Blanchet, N. P., granted on the 27th June, 1876, and conveying the following portion of the lot.

"Un lopin de terre de trois-quarts d'arpent de terre "de front sur environ deux arpents de profondeur, "faisant partie d'une terre de trois arpents de front sur "vingt-six arpents de profondeur, étant le numéro onze "de la concession Saint Charles, en la seigneurie de "Rigaud-Vaudreuil, susdite paroisse de Saint François, "borné le dit lopin de terre comme suit: par le nord-"ouest au terrain déjà vendu par le vendeur dans la "même terre à Ned Sands, par le nord-est au bout des "dits deux arpents, en suivant la course d'une certaine "veine de quartz, par le sud-est à la terre de George "Veilleux, et par le sud-ouest au bailleur. Pourra "cependant le dit acquéreur changer la course des "lignes et bornes du dit lopin de terre, sans en "augmenter l'étendue ou superficie, en suivant dans "ce cas la course ou ligne de la dite veine de quartz "qu'il peut y avoir et se rencontrer en cet endroit, "après que lui le dit preneur aura prospecté le dit lopin

" de terre sus-baillé, avec de plus un chemin ou passage
" pour communiquer au susdit lopin de terre par et sur
" la dite terre numéro onze, sans cependant causer de
" dommage. Tel que le tout est actuellement, et dont
" le preneur se déclare content et satisfait, l'ayant vu
" et visité.

" Pour par le dit preneur, ses dits héritiers, repré-
" sentants ou ayant cause, jouir, faire et disposer les
" dites prémises sus-baillées aux termes des présentes,
" au dit bailleur appartenant, à justes titres, dont il
" s'oblige aider le dit preneur en cas de trouble à
" l'avenir.

" Cède de plus le dit bailleur au dit preneur, ce
" acceptant comme ci-dessus, pour et pendant la durée
" du présent bail seulement, et sans aucune garantie
" quelconque de sa part, tous les droits et prétentions
" généralement quelconque qu'il a et peut avoir et
" prétendre dans et sur toutes les mines d'or, minéraux
" et d'autres métaux précieux qui pourraient se trouver
" dans l'étendue du dit lopin de terre sus-baillé durant
" le dit bail, ainsi que le droit d'y faire des travaux
" nécessaires à la découverte et l'exploitation des dites
" mines, minéraux et autres métaux susdits, et d'y
" prendre à cet effet toutes les voies nécessaires à la con-
" fection des dits travaux, sans pour ce payer aucune
" indemnité ni dommage quelconque au dit bailleur."

The respondents' *auteur* acquired emphyteutic leases for mining purposes, also held by the respondents, dated the 15th, 17th and 29th days of March, 1879, and granting the following properties.

" 1. Toute cette partie de terrain comprise entre les
" claims et placers de William P. Lockwood, James
" Forgie et Cie, Louis St. Onge et Cie, et le côté sud-
" ouest de la rivière Gilbert, le tout enclavé dans la
" terre du bailleur, connu et désigné par le numéro

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"onze de la concession Saint Charles, en la dite paroisse "Saint François, contenant la dite partie de terrain en "superficie deux arpents de terre plus ou moins sans "garantie de mesure précise, et borné comme suit, "savoir: par le nord-ouest, au dit William P. Lockwood; "par le nord-est, au dit James P. Forgie et Cie; par le "sud-est, au dit Louis St. Onge, et par le sud-ouest, au "côté sud-ouest de la rivière Gilbert.

"Pour les preneurs jouir de la dite partie de terrain "sus-louée pour les fins minières seulement en pleine "propriété aux termes des présentes.

"2. Un arpent de terre en superficie plus ou moins "et sans garantie de mesure précise, enclavé dans la "terre du bailleur, connu et désigné par le numéro onze "de la concession Saint Charles, susdite paroisse Saint "François, et borné le dit arpent de terre comme suit, "savoir: par le sud-est, par la ligne de division entre la "terre du bailleur et celle de George Veilleux; par le "sud-ouest, au côté sud-ouest de la rivière Gilbert, et "par le nord-ouest et le nord-est, au canal claim ou "placer de la Compagnie St. Onge.

"3. Toute cette partie de la rivière Gilbert dans "toute sa largeur d'un équerre à l'autre, en front du "claim ou placer de William P. Lockwood, le tout "enclavé dans la terre du Bailleur, étant le numéro "onze de la concession Saint Charles, paroisse Saint "François; borné la dite partie de rivière, comme suit, "savoir: par le nord-est, au dit William P. Lockwood; "par le sud-est, au preneur; par le sud-ouest, partie au "bailleur et partie à Jean-Baptiste Bélanger, et par le "nord-ouest, au Preneur."

The appellants by deed before Doyle, N. P., passed on the 28th April, 1881, acquired the said lot of land No. 11, of the said St. Charles concession, as proprietors, subject however to all of the leases above mentioned.

The prayer of the declaration was the usual one in

actions of *bornage*, praying to have the boundaries of all of the said properties established and the *bornes* planted.

The defendants declared that they were ready to bound in accordance with the rights acquired by title and possession of themselves and their *auteurs*; and by consent of all the parties, three surveyors were appointed by the court, each of whom made a separate report. By the judgment of the Superior Court at Beauce the plan and report of the surveyor Legendre were adopted.

The reports, plans and evidence are referred to at length in the judgments hereinafter given.

D. McCarthy Q. C., and *Gibson* Q. C., appeared on behalf of the appellants: and *Pentland* Q. C., and *Fitzpatrick*, on behalf of the respondents.

The points of argument relied on and cases cited by counsel are referred to in the judgments.

Sir W. J. RITCHIE C.J.—As the majority of the court think that this appeal should be dismissed (the surveyors appointed by the court having all differed in their reports and the courts having adopted Legendre's report) I am not able to say that the judgments of the courts below are so clearly wrong as to justify me in reversing them.

STRONG J. -The evidence establishes that Boissoneau and Poulin deliberately adopted Proulx's lines and survey as shown by the photographed plan (found amongst Proulx's papers after Legendre's survey was made, but duly put in proof) and that Legendre, not having this plan before him, after ascertaining the lines of Proulx's survey as well as he could by the testimony of witnesses, made his plan which the Court of Appeal have homologated upon what he assumed and

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found from evidence to be Proulx's lines, but which when Proulx's plan was afterwards discovered, were found to give the appellants rather more than they were entitled to according to Proulx's survey, and so to prejudice the respondents to a small extent of which, however, they do not complain. Therefore as the "*auteurs*" of both the parties, the appellants and the respondents *i. e.* Boissoneau the appellants' "*auteur*" and Poulin the respondents' "*auteur*," adopted these lines which Legendre's plan establishes and according to which Poulin, with the express assent of Boissoneau, sold to the respondents or their "*auteurs*;" and inasmuch as the *acquéreurs* from Poulin bought on the faith of this plan of Proulx's and have worked mines made improvements and expended large sums of money, all on the strength and faith of the assurance and representation of Boissoneau that he acquiesced in and would be bound by Proulx's survey, it is out of the question to say that the appellants can now be permitted to return on what their predecessor in title Boissoneau agreed to, and question the accuracy of the survey he deliberately adopted. They are met by what in English law is technically called an estoppel and cannot now be heard to repudiate Boissoneau's acts and agreements. There is no technical difficulty in the way of adopting this view of the case for Proulx's plan was a sufficient commencement of proof, and the fact of the possession could of course be proved by testimony. For these reasons I am of opinion that the judgment of the Court of Queen's Bench homologating Legendre's survey was entirely right and should be affirmed with costs.

FOURNIER J.—Par leur action en cette cause, les appelants ont demandé le bornage judiciaire des immeubles décrits dans leur déclaration, appartenant res-

pectivements aux parties en cette cause. Les défendeurs, présents intimés, ont répondu à cette demande par une déclaration invoquant un jugement rendu par l'honorable juge Angers, entre les parties en cette cause, lesquelles étaient aussi les parties dans une demande d'injonction ayant pour but de contraindre les intimés à cesser d'exploiter comme terrain minier le lopin de terre à raison duquel s'élève la principale difficulté au sujet du bornage des immeubles en question. Dans cette déclaration ils ont invoqué un bornage par les auteurs des appelants, antérieur au jugement de l'honorable juge Angers, sur lequel ils fondent une allégation de chose jugée, déclarant en outre que sans renoncer à leurs droits acquis en vertu de ce jugement, ils sont encore prêts comme ils l'ont toujours été, à borner suivant la loi.

Les parties dérivent d'un auteur commun, Joseph Poulin, leurs titres aux propriétés dont le bornage est demandé et qui sont décrites comme suit dans le *Special Case*, signé par les deux parties (1).

Après la production de la déclaration des intimés, les appelants firent une motion pour référer la cause à des arpenteurs experts, sur laquelle le jugement suivant fut prononcé :

In the presence of the said parties, or in their absence after due notification to them given in the manner required by this court, to draw the boundary line of separation and division between the contiguous lands of the plaintiffs and defendants mentioned and described in the title deeds of the parties cited in their declaration in this cause, and fyled in this cause by the plaintiffs ; the said surveyor or surveyors to have communication of the record in this cause especially of all deeds fyled, and also of the titles herewith fyled, being deed of lease passed before Ls. Blanchet, N. P., on the twelfth of October, eighteen hundred and seventy-six, from Joseph Poulin to Edward Sands.

Resiliation of said deed before same Notary, passed on the seventeenth day of March, eighteen hundred and seventy-nine, and deed of

(1) See p. 62.

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lease passed before same Notary, on the eleventh day of February, eighteen hundred and seventy-nine, from Joseph Poulin to James Forgie, with power also to examine witnesses if required to establish any pretention of the parties which may be made at the time of the survey, the said surveyor or surveyors to prepare a plan of the locality and properties aforesaid, showing the respective pretentions of the parties, and indicating the localities of the said boundaries and division lines between all the said properties, according to the titles of the said parties, the said surveyor or surveyors to produce and fyle the said plan with a report or reports thereon, and of the proceedings by them taken in the preparation of the said plan.

MM. Sewell, Legendre et Ross, arpenteurs de profession, ayant été nommés pour procéder à l'exécution de ce jugement interlocutoire, et n'ayant pu s'entendre sur un rapport commun, firent des rapports séparés, dans lesquels ils en sont arrivés à des conclusions contradictoires. Ce résultat était inévitable, car chacun d'eux a pris un point de vue différent de l'autre, suivant l'interprétation qu'il a donnée à l'acte du 27 juin 1876, sur lequel repose toute la difficulté. La description du terrain baillé par cet acte est donné plus haut sous le numéro 1. Il est borné par le nord-ouest au terrain de Ned Sands, par le nord-est au bout des dits deux arpents, en suivant la course d'une certaine veine de quartz; par le sud-est à la terre de Georges Veilleux, et par le sud-ouest au bailleur. Il est ensuite donné à l'acquéreur la faculté de changer la course des lignes en ces termes: "pourra cependant, le dit acquéreur changer la course des lignes et bornes du dit lopin de terre, sans en augmenter l'étendue ou superficie, en suivant dans ce cas la course ou ligne de la dite veine de quartz qu'il peut y avoir, et se rencontrer en cet endroit après que lui le dit bailleur aura prospecté le dit lopin de terre sus-baillé." Comme on le voit la ligne par le nord-ouest doit diviser le terrain en question de celui de Ned Sands, et courir deux arpents pour rejoindre au nord-est la ligne de division entre le bailleur et Georges Veilleux son voisin propriétaire du

No. 10, et par le sud-ouest au bailleur. N'était la faculté accordée, comme on vient de le voir, de changer les lignes en suivant la course d'une certaine veine de quartz, il ne pourrait y avoir de difficulté à localiser et borner le terrain en question.

Quelle peut être la véritable signification à donner à l'option ainsi accordée? Peut-elle, comme le prétendent les appelants, être exercée en tout temps et quand bon leur semble, et une fois exercée, peuvent-ils encore changer les lignes et bornes pour suivre la veine de quartz à mesure qu'ils la découvrent en poursuivant leurs travaux souterrains. Ou bien ne devait-elle pas, suivant la prétention des intimés, être exercée une fois pour toutes et les lignes demeurer ensuite fixées et déterminées? La limite à l'exercice de cette faculté me paraît avoir été déterminée par la convention même qui impose au preneur l'obligation de faire son option, *après que lui le dit preneur aura prospecté le dit lopin de terre sus-baillé.*

Le preneur et ses associés ont pris possession du terrain en question et y ont travaillé à l'exploitation de l'or pendant plusieurs années, jusqu'à ce qu'ils aient vendu aux présents appelants. Leur possession, sans trouble, a déterminé les limites du terrain en question, qui plus tard ont été fixées d'une manière plus certaine par l'arpenteur Proulx. C'est cette opération que les intimés ont invoqué dans leur déclaration en réponse à l'action, comme un bornage antérieur, en se déclarant toutefois prêt à borner de nouveau, mais suivant la possession telle qu'elle avait alors été déterminée. Il est clair que cette opération, où toutes les parties intéressées n'étaient pas présentes ou représentées, ne peut empêcher le bornage judiciaire, mais elle peut être invoquée comme preuve de la possession des auteurs des appelants et servir à fixer les bornes et limites de leur terrain suivant la possession qu'en ont eu leurs auteurs, Louis

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St-Onge et ses associés, maintenant représentés par les appelants.

La pièce No. 5 du dossier est un plan de l'opération de l'arpenteur Proulx pour fixer les lignes des terrains en question. Il n'y a pas eu de procès-verbal de l'opération, du moins il n'en a pas été produit, mais l'opération parait avoir donné pleine satisfaction aux seules parties intéressées à cette époque, le bailleur Poulin et le preneur Louis St-Onge, comme on va le voir par leurs témoignages, approuvant positivement l'opération de l'arpenteur Proulx.

Le principal intéressé, Louis St-Onge, dit :

Le morceau de terrain en question n'était pas divisé, alors M. Lockwood a fait diviser ce terrain après que je l'ai acheté. Quand cette ligne a été tirée par M. Lockwood, je l'ai acceptée comme notre borne ; j'ai accepté cette ligne telle qu'elle était, à tout risque, parce que je croyais qu'on était alors sur la course de l'or

Quoiqu'il ne puisse dire la date à laquelle cette ligne a été tracée, il sait que c'est après son acquisition, et que d'après leurs opérations ils se croyaient sur la course de l'or. Cette date est fixée au 14 novembre 1876, dans le plan de Proulx, un peu plus de quatre mois après la date du bail du 27 juin 1876. Il ajoute :

Quand Lockwood a tiré sa ligne, il y a planté des piquets tout le long de notre terrain.

A la question suivante :

Y a-t-il eu un bornage entre vous et Poulin ?

Il répond comme suit :

Réponse.—Non, mais le bornage a été tel comme ceci : On s'est arrangé avec M. Lockwood pour le droit de miner et de travailler la grandeur qu'on avait chez Poulin, et c'est là que M. Lockwood a fait tirer la ligne, et c'est là qu'on a compris que la ligne était tirée entre Poulin et nous autres. En tirant la ligne avec Lockwood, on comprenait qu'on prenait seulement notre terrain. Quand je dis qu'on comprenait, je veux dire que moi et mes associés et Lockwood, nous comprenions que c'était là notre ligne. Poulin n'est pas intervenu dans cette ligne, mais il savait qu'on la tirait.

Pour bien comprendre toute la valeur de ce témoi-

gnage, il ne faut pas perdre de vue le rôle important de M. Lockwood dans cet arrangement au sujet de la ligne. Il était alors le gérant de la compagnie des mines d'or De Lery. Cette compagnie, comme on sait, avait acquis les droits aux mines d'or, appartenant au Seigneurs de Lery, en vertu d'une patente de la Couronne. Ce droit fut longtemps contesté par les propriétaires du sol réclamant pour eux le droit aux mines d'or qui se trouvaient dans leurs propriétés. Il n'était pas encore reconnu à cette époque, parce que les tribunaux n'avaient pas encore décidé la question de propriété des mines en faveur de la compagnie. C'est ce qui explique l'arrangement avec M. Lockwood, représentant de la compagnie pour le droit de miner et travailler la grandeur qu'on avait chez Poulin. Sans un arrangement à cet effet St. Onge et ses associés ne pouvaient travailler sur leur propre terrain. Cet arrangement fut fait avec le propriétaire en titre, Louis St. Onge, et après la ligne ainsi tirée lui et ses associés ont travaillé et possédé leur terrain sans trouble comme il le dit :

Après que la ligne de Lockwood a été tirée je sais que Poulin en a eu connaissance, mais je ne me rappelle pas s'il l'a acceptée formellement, toujours est-il qu'on a travaillé notre terrain et nous n'avons pas été troublés par personne.

La seule personne intéressée à se plaindre de cette opération aurait été le bailleur Joseph Poulin, propriétaire d'un terrain voisin ; mais loin d'en manifester aucun mécontentement, il s'est au contraire déclaré satisfait, comme il le dit dans son témoignage.

J'ai vu la ligne tirée par Proulx, l'arpenteur, après qu'elle l'a été, et je n'étais pas présent dans le temps qu'elle a été tirée. Je ne sais pas s'il y a eu un procès-verbal, je n'en ai pas signé, dans le temps j'ai vu la ligne tirée par Proulx et j'en ai été content.

St. Onge travaillait sur le terrain en question dans ce temps-là et il ne m'a jamais parlé que la ligne n'était pas bonne, c'est eux-mêmes qui l'ont pris. Je peux vous montrer à peu près la ligne sud-ouest, là où on rencontre la terre de Veilleux.

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Ces deux témoignages positifs établissent incontestablement deux faits de la plus haute importance. 1o. la ligne tirée par l'arpenteur Proulx, en suivant une course oblique de la ligne de Sands à celle de Veilleux, au lieu d'une ligne à angle droit entre ces deux points indiqués, à laquelle les seuls intéressés, St. Onge et Poulin ont donné une adhésion formelle; 2o. le fait de la possession et de l'exploitation. Ainsi, c'est non seulement après avoir "prospecté," mais après avoir fait constater les lignes de son terrain par Proulx, que Louis St. Onge en a pris possession et l'a exploité avec ses associés, pendant plus de quatre ans avant de le vendre aux appelants. Il n'était pas possible de donner une preuve plus positive et plus certaine de l'exercice du droit réservé de changer les lignes.

Les appelants ont vainement essayé d'ébranler cette position en se fondant sur le témoignage d'Amable Coupal, un des membres de la société St-Onge, qui dit avoir été présent au bornage et déclare qu'il n'a jamais considéré cette ligne de Lockwood comme ligne de leur terrain et qu'ils l'ont dépassée par place. S'il était présent, comme il le dit, il ne paraît pas avoir fait alors aucune objection, du moins Louis St. Onge, le propriétaire en titre et le seul autorisé à consentir à l'opération, n'en fait aucune mention. Coupal dit encore qu'on se disputait parce qu'on ne voulait pas faire borner par Lockwood. Il a, sans doute, pu avoir quelque hésitation en voyant l'intervention de Lockwood, représentant de la compagnie, à qui appartenait la mine d'or; mais St. Onge, le propriétaire, n'en a pas eu, car on a vu dans son témoignage que ce bornage avait été le sujet d'un arrangement qui lui assurait de la part de l'agent de la compagnie De Lery le droit d'exploiter l'or. Toutefois Coupal confirme la preuve de l'acceptation de ce bornage en disant: "On a accepté "le bornage de Lockwood, mais pour ne pas déranger

"notre contrat." Ce motif fait voir que déjà on s'en tenait à la possession qu'on avait prise d'après le contrat, et que la crainte exprimée, si toutefois elle l'a été alors, par Coupal était vaine, puisque l'opération de bornage de Proulx n'a fait que les confirmer dans leur possession conforme au contrat et qu'ils l'ont ainsi continuée jusqu'à ce qu'ils aient vendu aux appelants. Cette possession a duré depuis la date de leur acquisition, 27 juin 1876, jusqu'à la date de leurs ventes respectives aux appelants, en septembre 1880.

En se déclarant prêts à borner suivant la loi, comme ils l'ont fait par leur réponse à l'action, les intimés n'ont pas dit autre chose qu'ils borneraient d'après leurs titres, leur possession et celle de leurs auteurs.

C'est la signification des expressions dont ils se sont servis. Si le bornage de Proulx n'a pas l'autorité légale suffisante pour empêcher un bornage en justice, il établit du moins avec la preuve de la possession le droit des intimés à un bornage suivant leur titre et leur possession qui a été conforme au plan de Proulx. On ne peut certainement pas les déranger de cette position. C'est cependant la prétention des appelants qui, sans tenir aucun compte du bornage, de la possession pendant plusieurs années, ni de l'option exercée, voudraient faire faire aujourd'hui le bornage comme s'ils avaient encore le droit de changer les lignes. Cette faculté n'existant plus, le bornage doit être fait conformément à la possession et au titre de leurs auteurs, car la possession doit servir à déterminer le lieu où il devait être planté des bornes. Duranton (1). C'est le principe adopté par l'arpenteur Legendre dans le rapport qu'il a fait accompagné d'un plan, montrant les endroits où les immeubles en question doivent être bornés. Son rapport est fondé sur les témoignages

(1) Vol. 5, No. 260, p. 234.

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cités plus haut, de Louis St. Onge le preneur, et de Joseph Poulin le bailleur.

En face de cette preuve il m'a semblé (dit-il) devoir baser mon rapport sur ces données et travailler avec soin à retracer le plus correctement possible les lignes tirées par l'arpenteur Proulx.

Ce dernier n'ayant pas planté de bornes permanentes, il n'est pas surprenant que les témoins n'aient pas été d'accord à les retracer exactement, car la face du terrain a été bien changée et bouleversée depuis ce temps-là. Ayant à choisir entre les différentes lignes mentionnées par les témoins, soit la ligne E. D. indiquée par George Thérien et Joseph Poulin, soit la ligne E. B. indiquée par Louis St. Onge, ou la ligne N. E. indiquée par Anthony Miller, il a donné la préférence à la ligne E. B. indiquée par Louis St. Onge,

Parce que le témoin étant sur les lieux lors du tracé des premières lignes; et ayant exploité pour des fins minières ce lopin de terre pendant plusieurs années, il doit être plus en état qu'aucun autre témoin, qui n'a vu ces lignes qu'en passant, de fixer la place primitive de leur trace.

J'ai ensuite tiré la ligne I. A. parallèlement à la ligne E. B., donnant ainsi au dit lopin de terre trois quarts d'arpent de front, ce qui d'après moi répond parfaitement aux limites et mesures mentionnées dans le bail et fixées par consentement des parties.

Cette conclusion est certainement correcte puisqu'elle est conforme non seulement aux mesures et limites mentionnées dans le bail du 27 juin 1876, mais parce-qu'elle l'est aussi au plan de Proulx, ou du moins s'en rapproche beaucoup, ainsi qu'à la possession de la compagnie St. Onge, auteurs des appelants.

Il explique ensuite la différence d'étendue du placer (*claim*) représenté sur son plan par les lettres J K L B, baillé aux auteurs de D. W. Brown, par l'acte du 17 mars 1879, auquel il donne un arpent quatre-vingt-cinq perches, tandis qu'il est limité par le contrat à un arpent, plus ou moins. Il attribue cette différence à ce que les parties n'ont jamais mesuré le terrain en question avant la transaction.

L'arpenteur Sewell, partant d'une fausse interprétation du bail du 27 juin 1876, est arrivé à une conclusion bien différente de celle de Legendre, et tout-à-fait en contradiction avec le titre et les faits prouvés. Le titre, comme on l'a vu, donne au lopin en question trois quarts d'arpent de front sur environ deux arpents de profondeur, c'est-à-dire, les deux arpents qui restent à partir de la ligne de Sands à aller à celle de Veilleux. Les lignes de ce lot, sur sa profondeur, sans la réserve accordée de suivre la veine de quartz, auraient dû être tracées en ligne directe de celle de Sands à celle de Veilleux. Au lieu de cela, St. Onge en prenant possession, ayant exercé son droit d'option de changer les lignes, les a fait tirer par Proulx dans une direction diagonale, au lieu d'une ligne à angle droit sur celles de Sands et Veilleux, parce qu'il se croyait, comme il le dit dans son témoignage, dans la direction de l'or.

Malgré l'exercice bien prouvé de cette option, Sewell se fondant plutôt sur des travaux souterrains postérieurs que sur la possession de St. Onge, a, sous prétexte de suivre la veine d'or, tracé une ligne partant, il est vrai, du même point A., sur la ligne de Sands, adopté par les trois arpenteurs, et lui fait suivre une course légèrement diagonale qui se prolonge au delà de la rivière Gilbert, à une distance d'au delà de quatre arpents. Il est vrai qu'il arrive là aussi à toucher la ligne de Veilleux. Il aurait été tout aussi raisonnable de conduire cette ligne jusqu'à l'extrémité de la terre de Veilleux, où elle aurait encore pu toucher la ligne latérale qui la sépare du No. 11. Le titre ne fait aucune mention de la rivière Gilbert dans sa désignation du lot, il donne au contraire des lignes bien clairement indiquées, celle de Sands d'où il faut partir pour arriver à celle de Veilleux, avec l'option de changer la direction sans toutefois augmenter l'étendue en superficie du terrain concédé. Il est vrai qu'avec

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l'option accordée on ne peut pas se départir des lignes directes entre Sands et Veilleux, pour adopter une ligne oblique sans donner au lot plus de deux arpents d'une ligne à l'autre, de Sands à Veilleux. Mais outre que ce changement a été fait lors de l'arpentage de Proulx, avec le consentement ou du moins l'approbation de tous les interessés, s'il était à faire aujourd'hui ne faudrait-il pas le faire conformément au titre, c'est-à-dire, sans augmenter l'étendue en superficie. L'opération de Sewell a pour effet de donner au lot en question quatre arpents et 58 perches, au lieu de trois quarts de front sur deux de profondeur, ou une superficie d'un arpent et demi. Ce résultat démontre à l'évidence l'absurdité du rapport de Sewell.

Pour changer les lignes adoptées lors de l'arpentage de Proulx, on ne peut pas dans l'intérêt des appelants prétendre que St. Onge s'est trompé sur la direction de la veine d'or. On a vu, au contraire, par la preuve ci-dessus citée que ce choix a été fait délibérément. St. Onge dit à ce sujet :

> Quand la ligne a été tirée par M. Lockwood je l'ai acceptée comme notre borne, j'ai accepté la ligne telle qu'elle était à tout risque, parce que je croyais qu'on était alors sur la course de l'or. Notre intention était de travailler à percer des puits (*shafts*) pour avoir l'or d'alluvion. Ce n'était pas notre intention d'acheter une veine de quartz.

Coupal, l'un des associés, dit :

> C'était notre intention d'acheter le terrain entre la ligne de Sands et la ligne de Veilleux, on a pris trois quarts d'arpents, plus ou moins, joignant d'une ligne à l'autre. Notre intention était d'acheter l'or d'alluvion qui se trouverait sur le morceau de terre acheté.

D'après cela il est évident qu'il n'y a pas eu d'erreur dans le choix qui a été fait des lignes de Proulx,—mais lors même qu'il y aurait eu erreur de calcul de leur part, en exploitant l'or d'alluvion de préférence à la veine de quartz, cela n'empêche pas que leur choix a été fait en connaissance de cause, puisqu'ils disent tous que leur objet en achetant n'était

pas d'exploiter une veine de quartz. Leur choix a eu l'effet non seulement de les lier aux lignes qu'ils ont adoptées et d'après lesquelles ils ont possédé, mais il a également l'effet de lier les appelants, qui ne peuvent réclamer plus de droits que leurs auteurs.

On aurait tort de considérer comme lignes établies par une convention verbale celles qui ont été tracées par Proulx. Elles sont, au contraire, bâsées sur le bail du 27 juin 1876 et tracées spécialement pour localiser le terrain baillé,—et c'est en exécution de la convention au sujet du pouvoir de changer les lignes et bornes que ces lignes ont été tracées diagonalement, parcequ'on croyait, en les adoptant, se trouver dans la direction de la veine d'or. Je serais fort enclin à adopter le plan de Proulx, mais comme celui de Legendre s'en approche beaucoup et que, d'ailleurs, il donne au terrain en question les lignes modifiées suivant l'option réservée et l'étendue mentionnée dans le bail, j'en viens à l'opinion avec la majorité de cette cour d'adopter le rapport de Legendre.

Les parties possèdent d'autres terrain dont le bornage est aussi demandé, mais leur location dépendant de celle du terrain ci-dessus baillé par l'acte du 27 juin 1876, Legendre leur a aussi assigné leurs limites et bornes d'après les titres des parties, à l'exception du lot comprenant partie du lit de la rivière Gilbert, dont il a omis d'indiquer les bornes. A l'argument, cette omission a été signalée et invoquée comme un moyen de faire rejeter son rapport. Cette omission a été expliquée par le conseil des intimés qui a déclaré qu'il ne s'était élevé aucune difficulté à propos des autres lots, et qu'il n'y en avait positivement aucune par rapport au lot ainsi omis. Le conseil des appelants en est convenu. L'arpenteur qui sera nommé pour planter les bornes conformément au rapport approuvé, pourra si les parties sont encore d'accord lors du règle-

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ment de la minute du jugement, recevoir instruction de placer aussi les bornes de ce lot.

En conséquence de ce qui précède je suis d'avis que le rapport de l'arpenteur Legendre doit être homologué et l'appel renvoyé avec dépens.

TASCHEREAU J.—This was an action *en bornage*, by which the plaintiffs, now appellants, seek to have the boundaries of their property, which is contiguous to that of the defendants, now respondents, ascertained and determined.

The defendants by their plea declared that they were ready to bound in accordance with the rights acquired by title and possession of themselves and their *auteurs*; and by consent of all the parties, three surveyors were appointed by the court, each of whom made a separate report. By the judgment of the Superior Court the plan and report of the surveyor Legendre, which are in entire accord with the pretensions of the defendants, were adopted.

This judgment was confirmed in appeal.

The facts are as follows:

One Joseph Poulin, being proprietor and in possession as such of lot 2, Concession St. Charles, Seigniory of Rigaud-Vaudreuil, which is supposed to contain three arpents in front by twenty-six arpents in depth, by deed before Blanchet, N. P., 12th October, 1876, leased to one Edward Sands a portion of the said farm described in the said deed as follows:

Un lopin de terre d'un arpent de front sur un arpent de profondeur, enclavé dans la terre du bailleur,

and whereof the said Sands was at the time in possession. On the 27th June, 1876, by deed before Blanchet, N. P., Poulin leased to Boissoneau (plaintiffs' now appellants' *auteur*) another portion of the said farm described in the deed as follows (1).

(1.) See p. 62.

and finally on the 17th March, 1879, by deed before Blanchet, N.P., defendants' (now respondents') *auteurs* leased from the said Poulin another portion of the said farm described in their deed as follows (1).

There are different other deeds alleged in plaintiffs' declaration, and produced in the record, which show that the parties, plaintiffs and defendants, subsequently acquired other portions of the same lot for mining purposes, but the controversy turns specially upon the interpretation of the above cited deeds.

The respondents contend that if the language of the description of the land intended to be conveyed admits of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making the quantity altogether different, the former construction must prevail. *Herrick* v. *Sixby* (2).

What is the plaintiffs' (now appellants') mining claim and what are its bounds?

The primary intention of the deed, and also Mr. William Sear's understanding of it, was that their claim was three-quarters of an arpent by two arpents, extending from Sands' claim on the north to George Veilleux's or the division line between lots 10 and 11 on the south. It is well to remember that Mr. Smart was at one time the plaintiff's manager, and also their chief witness in this case.

This is shown by the fact that the whole lot was three arpents wide. Sands' claim covered one arpent and plaintiffs' had the balance adjoining Sands' and extending to Veilleux.

Now where does plaintiffs lot begin?

Evidently at Sands' boundary line, the deed so states. The action of plaintiffs and their predecessors confirm this—they worked up to Sands' lot.

(1) See p. 64 .

(2) 17 L. C. R. 146; L.R. 1 P.C. 436.

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Chapman, a witness, says "Sands' shaft was on a line between Sands' Company and St. Onge. St. Onge worked close to us, viz: up to the drift made for the dividing line." Whether this drift was on the exact line of one arpent distant from the division line between lots 11 and 12 is of minor importance. This drift and the line are near enough for the purpose of this trial—Sands' claim as worked, was fully one arpent from the bank of the river.

Now according to the lease under which plaintiffs claim, they could run from Sands' claim two arpents, either directly across lot 11 South, to lot 10, George Veilleux, or they could change the direction according to the lead, but in no event could they extend two arpents in length or the distance from Sands' lot directly across to lot No. 10.

Have the plaintiffs or their predecessors made a location of their claim in accordance with the terms of their deed which is as follows:—

> Pourra cependant le dit acquéreur changer la courses des lignes et bornes du dit lopin de terre---sans en augmenter l'étendue ou superficie, etc., etc., après que le bailleur aura prospecté le dit lopin de terre?

St. Onge, appellants *auteur* did so—he so told George Thérien, and showed him the pickets as put down by his surveyor, and told him that his upper line, viz: the one to the east from the river, was along the line of Forgie & Co. and three-quarters of an arpent wide from the line. This conforms with the plan of Legendre.

St. Onge also informed Joseph Poulin of the same fact. Poulin asked them if they did not want to buy the land now in dispute, viz: between their land and the river, and between the canal on the north and division line between lots 10 and 11 on the south, and they said "no," and, further, they said to Poulin "if

you find a chance to sell, then sell, perhaps they will set up a wheel and that will serve us," viz: drain the water and assist us so much. That was before the present plaintiff had purchased.

Louis and John St. Onge pointed out to Thomas Richards their location, bounded on the east by the Forgie and Company line, and having a width of three-quarters of an arpent, the westerly line running close to their wheel shaft (McArthur's shaft No. 2 on plaintiffs' plan and D on defendants' plan). Mr. Richards says he thinks Mr. Smart was then present, Mr. Smart does not deny this.

This Louis St. Onge held the title, and was manager after they formed a company. The evidence fixes the fact that the plaintiffs' lot was then definitely located. I think the courts below were right in adopting Legendre's plan and I would dismiss the appeal with costs.

The parties admitted at the hearing that Legendre's report was incomplete, as it did not include the *born-age* of the other lots described as No. 3 in the special case. The necessary order to cover this omission is to go with the judgment, and the surveyor should be ordered also to put *bornes* between the parties' said lots if the parties agree where these *bornes* should be. The parties will see that this order is duly and correctly entered when the minutes are settled. If they do not agree as to the exact locality where these *bornes* should be, then the judgment to stand as it is in the Superior Court.

GWYNNE J.—In the month of June, 1876, one Poulin was seized of concession lot No. 11, in the St. Charles Division of the Seigniory of Rigaud-Vaudreuil. This lot was in the shape of a right angled parallelogram of about three arpents in width and twenty-six

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arpents in depth. The northerly and southerly limits or side lines of the lot cross a river, known as the River Gilbert, which traverses the whole width of the lot in an oblique devious course from the northerly to the southerly side line of the lot, which latter line constitutes the boundary line between the said lot No 11 and lot No. 10 in the same concession then the property of one Veilleux. Through the lot No. 11 a vein of quartz containing gold passed or was supposed to pass from the northerly to the southerly side line of the lot, but in what precise course, as it was altogether some distance under the surface, was unknown. It was supposed, however, to be situate within the area of a square arpent of land measured off the northern extremity of the lot, the north-west angle of such arpent being at a point distant about one arpent from the north-easterly side of the River Gilbert as it crosses the northerly side line of the said lot. Being so seized the said Poulin verbally agreed to let to one Sands the said arpent, and on the 12th October, 1876, executed a lease demising the same to him for the term of three years computed from the 24th day of June, 1876, by the following description:

> A piece of land having one arpent of frontage by one arpent of depth enclosed in the land of the lessor in the concession St. Charles, in the parish of St. Francis, in the Seigniory of Rigaud-Vaudreuil, the said piece of land to be taken at about one arpent distant from the north-east side of the River Gilbert as it intersects and crosses said land, and is bounded on the north-west by George Ferrier, and on all other sides by the lessor.

The George Ferrier here mentioned was then the proprietor of, or in possession of, lot No. 12 in the said concession which lot therefore constituted what is called the north-west boundary of the piece of the adjoining lot No. 11 demised to Sands. The piece of land thus demised to Sands was one square arpent situate upon, and at the northern extremity of, the said lot No.

11, the northerly boundary line of which arpent was the northerly side of the said lot No. 11, and the north westerly angle of which arpent was at a point in the said northerly side line of lot 11, distant *à peu près un arpent* from the intersection of such side line with the north-easterly side of the river Gilbert; and the southerly limit or boundary of this arpent demised to Sands was distant from the said northerly side line of lot No. 11 precisely one arpent or 180 French feet, measured on a line drawn at right angles therewith, and such southerly limit was parallel with both side lines of said lot No. 11, thus leaving on the said lot No. 11, between Sands' southern line and the side line between the said lot No. 11 and Veilleux's land on lot No. 10 in the same concession, *environ deux arpents de profondeur.*

About the same time that the verbal agreement was made between Poulin and Sands for the demise to the latter of the said arpent, Poulin and one St. Onge entered into an agreement for a lease from the former to the latter, for the period of ten years, of a portion of the same gold bearing land to be enclosed within lines of three-fourths of an arpent in length, measured upon the southerly boundary line of Sands' arpent as above described and on the line of Veilleux' land on lot No. 10, that is to say at the line between said lots 11 and 10, and extending from Sands' said line to that of Veilleux, across that portion of lot No. 11, of *environ deux arpents de profondeur* lying between Sands' line and that of Veilleux. St. Onge the lessee as to this point says:

Quand j'ai acheté le terrain en question, mon intention était d'acheter la terre entre le terrain de Sands et celui de Veilleux, sur trois quarts d'arpent. Dans le premier temps, c'était notre intention d'acheter toute la largeur du lot numéro onze sur trois quarts d'arpents, mais Sands ayant pris un arpent nous avons pris *les deux arpents*, ce que nous comprenons la terre avait trois arpents, et Sands en ayant un arpent *il en restait deux pour nous.*

Poulin the lessor upon the same point says:

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Mon intention quand j'ai vendu à St. Onge, était de lui vendre un lopin de terre *de trois quarts d'arpents mesurés sur les lignes de Sands et de Veilleux et qui traverserait d'une ligne à l'autre.*

The intention of both the lessor and the lessee in the contract made by them for the lease plainly was that Poulin should demise and that St. Onge should acquire a piece of land having its base or front of three-fourths of an arpent, or 135 French feet in length, measured on Sands' southerly line and its rear line of like length measured on Veilleux's line and extending across the remaining width of lot No. 11 of *environ deux arpents* lying between Sands' said line and that of Veilleux's on lot No. 10. Such a piece of land would contain an area of 1½ arpents more or less accordingly as the precise distance in a direct line drawn at right angles with the base on Sands' line should be more or less than two arpents or 360 French feet. The intention and agreement of the parties as above expressed was reduced into writing in a lease bearing date the 27th June, 1876, whereby Poulin leased to St. Onge for a term of ten years to be computed from the said 27th of June a piece of the said lot No. 11 described as follows (1)

This is the only piece of land described as being leased thereby to which any lines and boundaries are assigned and it conforms precisely (if such an inartistic, inaccurate, and loose description can be said to be precise) with what both the lessor and the lessee declare was their intention, namely, that the piece of land intended by the former to be let, and by the latter to be acquired, was a piece of land to be comprised within a regular figure constructed on a base line of three-fourths of an arpent or 135 French feet in length measured on the southerly side of Sands' arpent as hereinbefore described, and having its opposite or rear

(1) See p. 62.

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line of like length measured on Veilleux's line or the boundary line between lots 11 and 10 and extending from such front or base line to such rear line across the two arpents or thereabouts lying between Sands' line and that of Veilleux. The natural meaning and plain intent of the parties and of the language of the lease to give effect to such intent, as it appears to me, was that the figure comprising the piece of land as above described should be a quadrilateral figure the side lines of which drawn across the said "two arpents or thereabouts" should be drawn in a direct line from either extremity of the base line to the opposite extremities of the rear line, and as these base and rear lines were prescribed to be equal, and were in fact parallel, the side lines uniting their extremities must of necessity be equal and parallel. The result must therefore needs be that whatever might be the angles formed by such side lines with the base—whether right angles or however obtuse or acute any of them should be—the area of the figure would be precisely the same, namely $1\frac{1}{2}$ arpents. If the vein of gold should be found to proceed into the space of "two arpents or thereabouts" between Sands' line and that of Veilleux on a course at right angles with the base of three-fourths of an arpent measured on Sands' line and should fall short of reaching Veilleux's land and then disappear wholly, still the side lines must needs be continued to Veilleux's line on the original course of a perpendicular with the base; so, likewise, at whatever angle with the base the vein of gold should cross the base, and however acute, therefore, or obtuse the north-east and north west angles of the demised piece might be, the side lines forming such angles at either extremity of the base must be continued on the same course to Veilleux's land to locate the rear line of three-fourths of an arpent in length on Veilleux's line, although the

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vein of gold should happen to fall short of reaching that line. What the person who drew the description appears to have had in view was to prescribe a mode by which the four corners of the piece of land intended to be demised should be located on the ground. He describes the piece of land as "*bornée par la nord-ouest au terrain déjà vendu par le vendeur dans la même terre à Sands.*" By reference to the plans now produced we find that in point of fact Sands' arpent bounded the piece intended to be demised to St. Onge upon the north; the southern boundary line of Sands' arpent was intended to be the northern boundary line of the piece demised to St. Onge and in this line, of necessity, must be found both the north-west and the north-east angles of the piece intended to be demised to St. Onge but where in particular within the limits of this line they are to be found the draftsman does not say. If the point where the south-western angle of Sands' arpent was should be adopted as the point where the north western angle of St. Onge's piece should be formed it would follow that the north-east angle of St. Onge's piece must be at a point precisely three-fourths of an arpent, or 135 French feet, distant from such north-west angle, measured in an easterly direction on Sands' line. So, if the south-easterly angle of Sands' arpent should be adopted as the point where the north-easterly angle of St. Onge's piece should be found, it would necessarily follow that the north-westerly angle of St. Onge's piece must be at a point precisely the 135 French feet distant from such north-easterly angle measured in a westerly direction upon the said southerly line of Sands' arpent, or both the north-westerly and north-easterly angles of St. Onge's piece might be formed at any two points distant from each other the prescribed distance of 135 French feet on Sands' southerly line between the south-westerly

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and south-easterly angles of Sands' arpent, as above described. The draftsman, however, indicates only the line within the length of which both the north-easterly and north-westerly angles of St. Onge's piece must be formed, the intention most probably having been that as the site of the vein of gold was unknown St. Onge was left at liberty to locate his northern boundary line of 135 French feet in length wherever he pleased, upon, and within, the prescribed length of Sands' southern boundary line of one arpent or 180 French feet. The draftsman proceeds with his description thus—"*par le nord-est au bout des dits deux arpents.*" What was meant by these words "*au bout des dits deux arpents*" as here used it is difficult to understand; the only "*deux arpents*" coming under the designation "*les dits deux arpents*" are "*les deux arpents de profondeur*" of the demised piece, and as the front or base line of three-fourths of an arpent in extent is beyond all doubt to be found within the southern boundary line of the arpent let to Sands, and as the description goes on to show that the other extremity of the demised piece is on Vielleux's line, it is clear that "*les deux arpents de profondeur*" must refer to the space between the southern boundary line of Sands' arpent and Veilleux's line, between lots No. 11 and 10. Again as the north-east angle of the demised piece equally as its north-west angle must be at either extremity of the same front or base line, the words "*en suivant la course d'une certaine veine de quartz*" can not be read as indicating the course to be followed from the north-western extremity of the front or base line to the north-eastern extremity of the same line, following such a course from the north-western extremity of the base wherever it may have been located by St. Onge within Sands' southern line, would never, as appears by the plans produced, lead to the north-

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eastern extremity, but would lead in a quite different, and, indeed, an opposite direction, namely, to Veilleux's line. It is obvious, therefore, as it appears to me, that the words, "*bout des dits deux arpents*," which is said to bound the demised piece on the north-east, must be the extremity of the base or front line of the demised piece within Sands' line, thus establishing that these words as here used, can have no meaning attached to them unless they be construed as referring to that extremity or "*bout des deux arpents*" which is coincident with Sands' line, and that "*les deux arpents de profondeur*" of the demised piece must be the space between that line and Veilleux's land on lot 10.

Having thus the base or front line of the demised piece determined so far as to be wherever it should be selected and located by St. Onge, within the 180 French feet prescribed as the length of Sands' line, how are the lines to be drawn which will form the south-eastern and south-western angles of the demised piece?

Having determined the north-eastern extremity of the front or base line, it is necessary that a course should be given in order to determine the point on Veilleux's line which should be the south-eastern extremity of the rear line of the demised piece. Here and here only, as it appears to me, can the words "*en suivant la course d'une certaine veine de quartz*," be introduced, and read so as to give any appropriate and sensible application to them. Having determined the north-eastern extremity of the demised piece, the description proceeds to define its south-eastern extremity thus: "*En suivant la course d'une certaine veine de quartz par le sud-est à la terre de George Veilleux.*" Thus, by drawing (parallel with the vein of quartz as it proceeds from the base line in the direction of Veilleux's land) a straight line from the north-eastern extremity of the base to the land of Veilleux, on lot 10

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we get the south-easterly angle of the demised piece, extending thus three-fourths of an arpent in width across "*les dits deux arpents de profondeur*," at whatever angle the vein of quartz may be found to intersect the base. Having thus got the south-easterly angle, the south-westerly angle of the demised piece is readily obtained, either by measuring from the south-easterly angle so obtained 135 French feet in a westerly direction along Veilleux's line, or by drawing, from the north-westerly extremity of the base or front line, a line in like manner parallel with the vein of quartz as it intersects the base, and therefore parallel with the easterly side line already drawn, a straight line until we reach lot 10 or Veilleux's land. We shall thus have the precise piece intended to be demised "*de trois quarts d'arpent de front sur environ deux arpents de profondeur*." The superficial contents or area of which piece of land so determined will be one arpent and one half, and this is the only way in which a definite area can be given to the piece of land intended to be demised as above described. It is clear from the terms of the demise that the piece of land as described should have certain lines and bounds or limits, and that it should contain a definite area, and that such area should be that which would be comprised within a regular figure "*de trois quarts d'arpent de front sur environ deux arpents de profondeur*," or one arpent and a half. The description as given was, no doubt, based upon the assumption that the gold, lead, or vein of quartz, would continue through "*les deux arpents de profondeur*" upon the same course that it should be found to cross the base or front upon Sands' line; and this, as it appears, is made more clear from the subsequent provision in the lease which seems to have been designed to meet the possible contingency of its being found not to be so. The privilege was thereby

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granted to the lessee, if he should think fit to exercise it after prospecting the piece of land above described and leased, of substituting for that piece a different portion of the same lot No. 11, and such as the lessee should himself select within the terms of the provision, which contained a peremptory condition that the substituted piece should not be of greater superficial area than the piece of land as above described, that is to say than 1½ arpents. The provision prescribes the manner in which this change may be made as well as sets limits to it, in the words following:—

Pourra cependant le dit acquéreur changer la course des lignes et bornes du dit lopin de terre sans en augmenter l'étendue ou superficie, en suivant dans ce cas, la course ou ligne de la dite veine de quartz qu'il peut y avoir et se rencontrer en cet endroit après que lui le dit preneur aura prospecté le dit lopin de terre sus-baillé.

This last sentence plainly shows that the piece as before described was the piece intended to be leased unless and until the lessee, under the privilege contained in the above provision, should designate by precise boundaries the piece of land, if any, which he should select in substitution for the piece described as leased. The right of exercising this privilege which was given to the lessee under the above provision would seem to have been conferred upon him personally, and to have been intended to have been exercised by him within a reasonable time. It never could have been intended that he might exercise it at any time he pleased during the term created by the lease, thus keeping the lessor in doubt during all that time as to the land remaining to him over which he had disposing power. Now in point of fact the lessee never did, nor did his assigns, assuming them to have had the power, at any time exercise this privilege, and it is impossible that it could be exercised after the expiration of the term.

On the 11th February, 1879, the same Poulin

demised to George Forgie for the term of three years to commence and be computed from the first day of May, which should be in the year 1881, a pièce of the same lot No. 11 having:

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Trois arpents et demi plus ou moins de front sur une ligne oblique au travers ou largeur de la dite terre (No. 11),

and bounded as follows:

Par le nord-ouest au terrain de William P. Lockwood, par le sud-est à la terre de George Veilleux, par le sud-ouest au terrain de la compaigne St. Onge et par le nord-est au terrain ci-après designé et loué.

The site of the line to be drawn from the north-westerly extremity of the piece of land as above described to its south-westerly extremity is all that, in so far as this lease is concerned, is necessary to be determined.

Now the William P. Lockwood in the above description mentioned whose land is said to bound the demised piece on the north-west had no land upon lot No. 11 except the northerly half of the square arpent demised to Sands, and this he only had in virtue of some arrangement made between him and Sands the nature of which has been suggested but not proved; it is not, however, claimed to have been, nor could it have been, more extensive than the interest of Sands himself. This piece of land as above demised to Forgie had its north-western extremity abutting on the north-easterly side line of Sands' arpent, and its northerly boundary line of "un demi-arpent de profondeur" must have been the line between said lots 11 and 12, and its westerly side line must have extended from such last mentioned line along the easterly side line of Sands' arpent to the south-east angle of that arpent and must have thence followed and have been coincident with the easterly side line of the piece demised to St. Onge, to the point on the line between lots Nos. 11 and 10 where the south-easterly angle of the piece demised to St. Onge as described in his lease was situate. A reference to the description of the piece designated as "*ci-après*

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designé et loué" and which is said to bound on the north-east the piece first demised, places this beyond all doubt, although that description is confused by the introduction of the other words "*partie au terrain de William P. Lockwood*," who had no land at the point indicated, that is to say abutting on the north-east side of the piece firstly demised. This piece "*ci-après designé et loué*" is also stated to be part of the same lot No. 11, and to have a front of the same extent as that of the piece firstly demised, namely:

Trois arpents et demi plus ou moins de front sur une ligne oblique au travers ou largeur de la dite terre, sur un arpent de profondeur.

And bounded as follows:

par le nord-ouest partie au terrain du dit William P. Lockwood et partie à celui de George Terrain; par le nord-est au Bailleur, par le sud-est à George Veilleux, et par le sud-ouest au terrain sous loué."

Now as Lockwood had no land in the vicinity other than the northerly half of the square arpent demised to Sands the introduction of the words "*partie au terrain de William P. Lockwood*" in this description appears to be an error of the draftsman, but the words "*et partie à celui de George Terrain*," who owned lot No. 12, show that the northerly boundary line of the piece above described must be on the line of Sands' northerly boundary line continued that is to say, the line between lots Nos. 11 and 12; and as the front line of both of the pieces demised to Forgie measured in an oblique direction across lot No. 11 to lot No. 10 are designated as of the same length namely "*trois* (3) *arpents et demi plus ou moins*" it is obvious that the northerly boundary line of both of the demised pieces equally as the southerly were intended to be on the same lines respectively, that is to say, the northerly on the line between lots 11 and 12 and the southerly on the line between lots 11 and 10; the piece, therefore, as first above demised to Forgie must have its westerly

boundary line coincident with the easterly boundary lines of the square arpent demised to Sands and of the piece demised to St. Onge.

On the 15th of March, 1879, Poulin demised to Henry Powers and Archibald McDonald for a term of fifteen years to commence upon, and to be computed from, the 24th day of June then next a piece of the same lot No. 11 by the following description:

Toute cette partie de terrain comprise entre les claims et placers de William P. Lockwood, James Forgie, Louis St. Onge, et cie et le côté sud-ouest de la rivière Gilbert, le tout enclavé dans la terre du Bailleur connue et designé par le numéro onze de la concession St. Charles en la dite paroisse de St. François. Contenant la dite partie de terrain deux arpents de terre en superficie plus ou moins sans garantie de mesure precise et borné comme suit-savoir: par le nord-ouest au dit William P. Lockwood—par le nord-est au James Forgie et Cie par le sud-est au dit Louis St. Onge et Cie et par le sud-ouest au côté sud-ouest de la dite rivière Gilbert."

It is to be observed that this lease provided that the term thereby granted in the piece of land therein described was not to commence until the 24th day of June then next, when the lease of the square arpent demised to Sands (the north half of which was the only land in which William P. Lockwood had any interest) would expire by effluxion of time. It is apparent also that the piece intended was bounded on the north-east by the piece demised to James Forgie by the lease of the 11th February, 1879, and firstly therein described, (which piece of land, as already shown, abutted on the north-easterly boundary line of the arpent demised to Sands) and on the south-west was bounded by the land demised to St. Onge, that is to say, by the southerly line of the arpent demised to Sands which constituted the northerly boundary line of the piece demised to St. Onge. Now the piece of land thus extending from Forgie's line to the river Gilbert and bounded on its south-eastern extremity by the piece

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demised to St. Onge, that is to say, by the line between the pieces demised to Sands and to St. Onge, and extending along that line continued to the river Gilbert, would contain just "*deux arpents plus ou moins*"—the quantity of land expressed to be demised by the lease, and consisting of the arpent let to Sands, (whose term would expire before the new term, expressed in the lease to commence on the 24th of June, should commence) and the arpent or thereabouts lying between it and the river Gilbert, and this piece would be well described as lying between James Forgie's land and the river Gilbert, and having its south-easterly boundary line abutting on the land demised to St. Onge, and this appears to me to have been the piece intended by the description in the lease, which is confused by the reference to the name of William P. Lockwood, who would have no interest in any land there situate on the 24th June, when the term granted by this lease of the 15th March, 1879, would commence.

Upon the 17th day of March, 1879, Poulin demised to the same Henry Powers and Archibald McDonald for a term of fifteen years, to commence upon, and to be computed from, the said 17th March, another piece of the said lot No. 11 :

Borné comme suit, savoir par le sud-est à la ligne de division entre la terre du dit bailleur et celle de George Veilleux ; par le sud-ouest, au côté sud-ouest de la rivière Gilbert, et par le nord-ouest et le nord-est au canal—claim ou placer, de la compagnie St. Onge.

This piece of land is declared in the lease to contain un arpent de terre en superficie, plus ou moins.

On the 29th March, 1879, Poulin demised to the same Henry Powers and Archibald McDonald, for a term of fifteen years, to commence upon and to be computed from, the said 29th of March, another piece of the same lot No. 11—namely, all that part of the river Gilbert lying in front "*du claim ou placer de William*

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P. Lockwood." Although William P. Lockwood did not possess any "claim ou placer" on the said lot No. 11 bordering on the river Gilbert, or in fact any part of the said lot No. 11, except the north half of the square arpent demised to Sands in which he appears to have some interest through, and only through, Sands, who, by notarial deed, duly executed upon the 17th March, 1879, surrendered his lease to Poulin, and annulled the term thereby granted, there can be no doubt that the portion of land covered with the waters of the river Gilbert, demised by the lease of the 29th March, 1879, was that part which may have been said to have been in front of, though not contiguous to, the north half of the arpent demised to Sands, which was the only land there situate in which Lockwood had any interest.

In the month of August, 1880, Poulin, by a notarial deed, duly executed, sold and conveyed all the said lot No. 11, and all his estate and interest therein, unto Louis St. Onge and others in the said deed named, who were then the only persons interested in and possessed of the term granted by the said lease bearing date the 27th June, 1876, and who, upon the execution of the said deed of sale, became seized of the said lot, subject only to the said leases executed by Poulin to James Forgie, and to the said Brown and McDonald for the several and respective terms granted of the lands respectively described in the said respective leases bearing date the 11th of February and the 15th, 17th and 29th days of March, 1879, and the said grantees in that deed of sale mentioned, in the month of April, 1881, by like notarial deed duly executed, sold and conveyed the said lot No. 11, and all their estate, right, title and interest therein, to the above appellants, subject only to the said last mentioned leases and the terms thereby granted.

Upon the 1st day of May, 1884, the term granted

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to the said James Forgie by the lease of the 11th February, 1879, expired by effluxion of time, and the above appellants thereupon became absolutely seised of the lands so demised to the said James Forgie.

Now, the present appellants, being so seized and entitled, instituted an action *en bornage* against the above respondents, who then were, and still are possessed of the terms granted by the said several leases, bearing date the 15th, 17th and 29th days of March, 1879, executed as aforesaid by Poulin, for the purpose of having established the boundaries between the lands in the said respective leases comprised, and the other lands of the appellants situate upon the said lot No. 11. In this action *en bornage* the above respondents admitted that no boundaries had by law been established between them and the now appellants, and that it is the interest of both parties to have the boundaries established between the said properties; and thereupon it was ordered and adjudged by the judgment of the court in the said action that the boundary line of separation and division between the contiguous lands of the plaintiffs and defendants, mentioned and described in the title deeds of the parties cited in their declaration in the cause, and filed by the plaintiffs, should be drawn by a surveyor or by surveyors chosen by the parties, or in default to be named by the court, and that the said surveyor or surveyors should have communication of the record in the cause, especially of all deeds filed, and also of the titles therewith filed, being deed of lease passed before Louis Blanchet, N.P., on the 12th day of October, 1876, from Joseph Poulin to Edward Sands, resiliation of the said deed before the same notary passed on the 17th day of March, 1879, and deed of lease passed before the same notary on the 11th day of February, 1879, from Joseph Poulin to James Forgie, with power also to examine witnesses if requir-

ed to establish any pretension of the parties which may be made at the time of the survey ; the said surveyor or surveyors to prepare a plan of the locality and properties aforesaid, showing the respective pretensions of the parties, and indicating the localities of the said boundaries and division lines between all the said properties according to the titles of the said parties ; the said surveyor or surveyors to produce and file the said plan, with a report or reports thereon, and of the proceedings by them taken in the preparation of the said plan. In accordance with this judgment the plaintiffs nominated as their surveyor one Alexander Sewell, the defendants nominated as their surveyor one Alphonse Le Gendre, and these so nominated selected one Robert J. Ross as a third surveyor, and these three so appointed were ordered to proceed with the survey as above directed and to report to the court.

Inasmuch as the plaintiffs are seised of the whole of the lot No. 11, whereof Poulin was formerly seized, and subject now only to the leases of the 15th, 17th and 29th March, 1879, under which the defendants claim, the only lines which are material to be determined are, first, the line referred to in the lease of the 17th of March as bounding the piece of land thereby described on the north-west and the north-east, "*un canal claim, ou placer de la compagnie St. Onge*" or, in other words, where is the site of the line which, under the description in the lease of the 27th June, 1876, constituted the westerly or south-westerly, whichever it may be called, side line of the piece thereby demised to St. Onge, for as to the site of the canal there is no dispute ; secondly, where is the site of the westerly or south-westerly boundary line of the piece firstly demised to James Forgie by the lease of the 15th March, 1879, at its north-westerly extremity contiguous to the arpent demised to Sands as described in the lease of

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the 12th October, 1876. This line, as I have already hereinbefore shown, is identical with the easterly or north-easterly boundary line of the arpent demised to Sands; and thirdly, the site of the piece of the river Gilbert demised by the lease of the 29th March, as to which however the parties are all agreed.

Now Sewell, one of the surveyors appointed to establish the aforesaid boundaries, made a report and plan showing the piece of land which, in his opinion, was that which was comprised in the lease of 27th June, 1876, which, if adopted, would not only not leave one arpent, but would leave no land at all to pass under the description in the lease of the 17th March, 1879, from Poulin to Brook and McDonald. The mode adopted by Sewell for determining this to be the piece of land which in his opinion was described in the lease of the 27th, June, 1876, was as follows:

All three of the surveyors concurred, first in determining the course taken by the vein of gold as it passed through the lot No. 11, and they laid it down on a map; then from a point "A" designated on the plan accompanying his report and which was agreed to by all the parties as being, and was taken to be, the north-westerly angle of the piece demised by the lease of the 27th June, and as corresponding with the south-westerly angle of Sands' arpent, Sewell let fall a perpendicular upon the vein of gold as laid down on the map as proceeding from Sands' line; this perpendicular he continued across the vein of gold until he reached a point distant on the perpendicular precisely one hundred and thirty-five French feet, or three-fourths of an arpent, from the point "A;" through the point so reached he drew, from a point assumed, but not established, to be the south-east angle of the arpent demised to Sands, a line in a southerly or south-westerly direction for the distance of about 500 English feet to a point on the

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map designated by the figure "5," and from thence he drew another line in a direction still more west of south for the distance of about 450 English feet until he reached Veilleux's line, or the line between lots 11 and 10 at a point designated on the map by the figure "4;" then from the point "A" he drew a line parallel with the line first drawn for the distance of about 387 English feet from the point "A" to a point designated on the map by the the figure "1," and from thence he drew a line parallel with the line from "5" to "4," and distant from it on a perpendicular to it 135 French feet, until he reached the river Gilbert at a point designated on the map by the figure "2," and from this last mentioned point he drew a line across the river Gilbert to a point on Veilleux's line about 340 English feet distant in a southerly and easterly direction from the point designated by the figure "4." The piece of land comprised within the above lines contained 4 arpents 58 perches.

As an alternative proposal, in case the above piece should not be accepted by the court as conformable with the lease of the 27th June, Sewell suggested the continuation of the line as above drawn from "A" to the figure 1, until such line so continued should reach Veilleux's line, at a point designated on the map by the letter "W." His only object for the suggestion of this line appears to have been in order to provide 90 perches to supply the piece described in the lease of the 17th of March as "*un arpent plus ou moins.*" The surveyor Ross has approved of this line. Now, it is very clear, as it appears to me, for the reasons given when I defined the lines and boundaries of the piece demised by the lease of the 27th June, 1876, in the manner that the terms of that lease, in my judgment, required them to be laid down, that neither of the pieces as suggested by Sewell can be adopted as that demised

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by the lease of the said 27th of June, or as at all conformable with the description contained in that lease, although the line alternatively suggested when slightly altered may prove to be the line proper to be adopted as the boundary line of the piece demised to St. Onge on its westerly or south-westerly side,—that is to say, from the point "A" to Veilleux's line, and identical with the line of such westerly or south-westerly boundary ascertained and determined in comformity with the description in the lease, interpreted, as in my judgment it should be, as hereinbefore explained, assuming the point "A" to be the north-west angle of the piece demised to St. Onge, as it is now admitted to be by the parties hereto. Both of the pieces as suggested by Sewell are much in excess of the quantity assigned by the lease of the 27th June to the piece therein described, and that portion of the lease, which required the 135 French feet constituting the front and rear of the demised piece to be measured on the respective lines of Sands and of Veilleux, has been wholly disregarded. There can therefore, I think, be no doubt that the court below adjudged rightly in rejecting the report of Sewell as wholly erroneous.

The surveyor LeGendre has furnished a separate report and plan wherein he has adopted a wholly different piece of land as that which, in his opinion, is to be regarded as the piece comprised in the lease of the 27th June, 1876.

In arriving at this conclusion he does not seem to have thought it necessary to comply with the direction of the court to define the boundaries according to the titles of the parties as appearing on the deeds filed in the action. He does not seem to have exercised his own judgment in laying down the boundaries of the piece of land demised by the lease of the 27th June, 1876, which was the governing instrument in accord-

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ance with the description as contained in that deed. He did not start upon the front or base line as given by that deed, controlled by the lease of the 12th October, 1876, defining the piece let to Sands. On the contrary, he set out by trying to find a line which appears to have been run in October or November, 1876, by one Proulx not for the lessor and the lessee, or either of them, but for Lockwood, who claimed some interest in the gold which might be found on the said lot No. 11; and being unable to find that line accurately or by any traces or indices upon the ground, he substituted another for it upon vague and unsatisfactory evidence, and this he assumes to be the line run by Proulx, and he undertook to make it the front or base line of the piece he has described, wholly disregarding the description given by the lease. He in fact constituted himself a court to take evidence and thereupon to adjudicate and determine as a matter of fact and law that the lessee of that lease by adoption of the line run by Proulx had estopped himself and his assigns from now contending that such line was erroneous, and does not correctly lay down the boundary line of the land demised by the lease of 27th June, 1876, which adjoins the piece demised to Brown and McDonald by the lease of 17th March, 1879.

Apart from the objection that LeGendre had no power in this manner to affect the rights of the parties and to usurp the functions of the court and vary its judgment, the evidence upon which he proceeded was of the loosest possible character and utterly insufficient to work the estoppel which is asserted and relied upon. Neither Proulx or St. Onge could with any degree of justice be now heard to give evidence which, if it should prevail to make the terms of the lease of the 27th June, 1876, yield to a verbal agreement for a conventional line, would enable them to detract, the for-

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mer from the express terms of his deed of sale to St. Onge and others of August, 1880, and the latter from the terms of their deed of sale to the plaintiffs of April, 1881, whereby the whole estate of Poulin and his vendees respectively became vested in the plaintiffs, subject only to the rights of Poulin's lessees, as expressed in their respective leases.

St. Onge indeed, in the evidence which he gave, admits that whatever recognition he gave to Proulx's line was based upon the assumption and belief that it was correctly run on the course of the vein of gold, an assumption and belief which proves to have been utterly erroneous if the vein of gold runs through the lot on the course which LeGendre and the other surveyors employed to lay down the boundaries under the order of the court agree that it does; and it is well established that such a recognition of a line, upon the assumption and belief that it has been run correctly, will never estop a party from showing the true line.

But, in truth, however much Poulin and St. Onge may now desire to detract from the title sold and conveyed to the plaintiffs, it sufficiently appears, by acts and conduct which admit of no doubt, that neither St. Onge or his assigns ever did adopt the line as run by Proulx as their true boundary line, for during the whole existence of the lease of the 27th June, 1876, and ever since it became merged in the fee, they always have carried on and still do carry on their works, which are of very considerable extent and nature, far outside of the line run by Proulx, and upon land which has ever been and still is in their actual possession. Now it is well established that the principle upon which the validity of a verbal agreement for a conventional line rests is that it has always been acted upon by both parties, and that possession has always since been held in accordance with the agreement.

No question arises here as to what length of occupation of land, in accordance with a verbal agreement as to a boundary line between contiguous properties, and what acquiescence in such boundary line, is necessary to be established in order to estop the parties from showing that the line is not the true one. In *Mooney* v. *McIntosh* in this court (1), several cases in our own courts and in those of the United States upon that point were reviewed, all of which recognized the principle that acquiescence for some length of time in a possession of land, held in accordance with the conventional line, is absolutely essential to be shown in order to raise the estoppel. In the present case it clearly appears that possession has never at all been held in accordance with Proulx's line; it, therefore, could not now be established, unless it be the true line according to the description contained in the lease of the 27th June, 1876.

When Poulin executed the lease of the 17th of March, 1879, it is plain that he believed himself to possess only one arpent between St. Onge's line under the lease of 27th June, 1876, and the St. Onge canal and the river Gilbert, and this is all that the lessees of that lease expected or contracted to acquire. The lease calls it one arpent more or less. Now, if Proulx's line should be adopted there would be little short of three arpents; if LeGendre's survey should be adopted there would be more than two arpents ; whereas, if the line should be drawn from the point "A," in the manner in which I have above stated that, in my opinion, it should be drawn to comply with the terms of the lease of the 27th June, 1876, and the intention of the parties thereto, there would be something over the one arpent, and so the intention and expectations of the parties to the lease of the 17th March, 1879, would be realized.

After LeGendre had prepared his report a diagram

(1) 14 Can. S. C. R. 740.

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of the lines run by Proulx was found. By this diagram it appeared that in November, 1876, when he ran the lines, Sands' arpent was treated as being, as I have held it should be, a square arpent having its southerly boundary line parallel with the line between lots 11 and 12, which constituted its northerly boundary, and distant from that line precisely 180 French feet, measured upon a perpendicular to it.

This southerly line of Sands' arpent is made the northerly or front line of the St. Onge piece, which, however, by some great mistake, is made to extend along and beyond the whole length of the 180 French feet constituting the line of Sands' arpent, instead of being limited to 135 French feet, or three-fourths of that arpent. It is said, however, and not disputed, that the point which Proulx treated as the south-west angle of Sands' arpent and the north west angle of the St. Onge piece is about 70 feet further from the river Gilbert, measured on such southerly line of Sands' arpent, than is the point "A" on the surveyor's plans, and the point from which Proulx is said to be shown by his diagram to have proceeded is accordingly shown on the surveyor's plans furnished to the court upon the argument; so that it appears that LeGendre's plan is not at all in accordance with Proulx's line, although it must be admitted that it is more favorable to the plaintiffs than would that of Proulx's be, but both of them cut off from the plaintiffs and would have the effect of depriving them of almost the whole of their extensive works. Now, this difference between the line run by Proulx (which is shown on the surveyor's plan, furnished to the court, by — — — a black dotted line) and the line run by LeGendre as for Proulx's line, serves to illustrate the absurdity and disregard of all principle which would be involved in the adoption of Le Gendre's line, which neither agrees

with Proulx's line nor is in conformity with that designated by the lease.

Proulx's line, so far from having been adopted and acted upon, had no marks whatever upon the ground by which it could be traced by LeGendre; it could not, it is said, and not questioned, have been drawn from the same point as that from which LeGendre drew the line which he drew for it.

Possession never had been held in accordance with Proulx's line. Now, assuming it to have had any validity as a conventional line, the clear duty of LeGendre when he failed to find it was to run his line in accordance with the requirements of the lease. The difficulty which he experienced in discovering the line whose only validity, if it had any, was as a conventional line, was fatal to its adoption, and he had no authority whatever to run a new line in substitution for the one he was unable to find.

To adopt LeGendre's report, instead of affirming a verbal agreement acted upon by the parties, and confirming them in a possession which has followed, and has always been held in accordance with, such agreement, would have the effect of transferring now for the first time into the possession of the respondents a considerable portion of land covered with the extensive underground works of the plaintiffs, of which piece of land and of the works thereon they have always held exclusive possession; instead, in fact, of establishing a line in accordance with the title of the parties as expressed in their title deeds and as ordered by the court, there would be established a line inconsistent with and in defiance of those deeds. The court below has therefore, in my opinion, erred in homologating that report.

1° As all parties are agreed that the point "A" on the surveyors' plans furnished with their reports is the

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north-west angle of the piece demised to St. Onge by the lease of the 27th June, 1876, the true line to be run from that point to the line between lots 11 and 10 according to the lease will, in my opinion, be a line drawn parallel with the gold vein as shown on the surveyors' plans from "H" to "I" and continued in a straight line to the lot No. 10. The portion of that line which shall extend from its intersection with the canal St. Onge to lot No. 10 will be the true boundary of the piece demised by the lease of the 17th March, 1879.

2. The true boundaries of the piece of lands demised by the lease of the 15th March, 1879 are: *First*, the easterly line of Sands' square arpent which constitutes the westerly boundary line at the northerly extremity of the piece first demised to James Forgie by the lease of the 11th of February, 1879; *Secondly*, the line between lots 11 and 12, from the north-east angle of Sands' said arpent to the river Gilbert. *Thirdly*, A line drawn parallel with the line between said lots 11 and 12, from the south east angle of Sands' said arpent (which is a point distant from the said north-east angle 180 French feet, measured upon a perpendicular to the line between lots 11 and 12) and continued to the south-west side of the river Gilbert; the piece demised by the lease of the 15th March, 1879, is the piece lying between these lines.

3. As to the piece demised by the lease of the 29th March, 1879, there is no difference; that piece is so much of the land covered with the waters of the river Gilbert as lies in front of the northerly half of the piece as lastly described—that is to say, in front also of the northerly half of the square arpent demised to Sands, which is the only piece of land upon said lot No. 11, in which it appears that William P. Lockwood can be said to have had any interest.

The appeal, in my opinion, should be allowed, and

the case should be remitted to the court below, with directions to have the boundaries established as herein above stated. Each party should, I think, bear their own costs of this appeal.

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Appeal dismissed with costs.

Solicitors for appellants: *Gibsone & Aylwin.*

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

Solicitor for respondents Brown, *et al: C. Fitzpatrick.*

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*May 15.
*June 14.

THE EXCHANGE BANK OF CANADA, (PLAINTIFFS)..... } APPELLANTS;

AND

FRANCIS E. GILMAN, (DEFENDANT), RESPONDENT.

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

Article 451 *C.C.P.—Retraxit—Subsequent action—Document not proved at trial—Consideration of on appeal—Lis pendens and Res judicata —Pleas of.*

The Exchange Bank of Canada, in an action instituted by them against G. filed a withdrawal of a part of their demand in open court, reserving their right to institute a subsequent action for the amount so withdrawn. The court acted on this *retraxit*, and gave judgment for the balance. This judgment was not appealed from. In a subsequent action for the amount so reserved:

Held—reversing the judgment of the court below, Fournier J. dissenting, that the provisions of Art. 451 C.C.P. are applicable to a withdrawal made outside, and without the interference of, the court and cannot affect the validity of a withdrawal made in open court and with its permission.

2.—That it was too late in the second action to question the validity of the *retraxit* upon which the court had in the first action acted and rendered a judgment which was final and conclusive.

A document not proved at the trial but relied on in the Court of Queen's Bench for the first time cannot be relied on or made part of the case in appeal. *Montreal L. & M. Co.* v. *Fauteux* (3 Can. S. C. R. 433) and *Lyonnais* v. *Molson's Bank* (10 Can. S. C. R. 527) followed.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side), reversing the judgment of the Superior Court.

The questions arising for adjudication in this appeal proceed from a former action between the parties in

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

which the bank sought to recover some $50,000 from the defendant on three distinct causes of action, namely, a balance of $8,000 on a promissory note for $42,000, a promissory note for $15,000 and a running account for some $29,000. On the trial of this action the plaintiffs found themselves unable to prove the items of the open account and also the $15,000 note and they filed the following notice:

> The plaintiffs hereby declare, in order to avoid difficulties and expedite and obtain a judgment, that they withdraw, in the present action, all portions of their demand except that in reference to the check for $42,000, under, however, express reserve of their rights to institute actions upon the note for $15,000; and upon all the vouchers, documents and claims contained in the Exhibit No. 1, herein filed, and upon all other claims or demands they may have against the defendant, the whole without prejudice.

And then proceeded on the $42,000 note and recovered a judgment for the balance claimed thereon. The court subsequently granted to the plaintiffs *acte* of their discontinuance and gave them leave to sue on the claims thereby withdrawn.

In the action brought pursuant to such leave on the $15,000 note and the running account the defendant pleaded, *inter alia*, *lis pendens* and *chose jugée*, and on the trial he contended that the discontinuance had no effect, as part of a plaintiff's claim could not be withdrawn and afterwards sued on, though the whole claim might; or, if the withdrawal could be allowed it could only have effect by the requirements of the code being observed, one of which is that the notice must be served on the defendant, which was not done in this case. The Court of Queen's Bench gave effect to this last objection and dismissed the action, reversing the judgment of the trial judge for the plaintiffs who then appealed to the Supreme Court of Canada.

Macmaster Q.C. for the appellants contended that

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article 451 of the Civil Code of Procedure requiring notice of withdrawal to be served is only directory and merely points out one mode of effecting a withdrawal. That there is abundant authority to show that it can be done in open court and then no service is required. *Ryan* v. *Ward* (1); Dalloz Rep. Gén. (2); Carré et Chauveau Proc. Civ. (3); Thomine-Désmazures C.P.C. (4); Favard de Langlade (5); Pigeau Proc. Civ. (6); *Talansier* c. *Loyseau* (7); Bioche Proc. Civ. (8).

F. E. Gilman, respondent in person, contended that the authorities cited only applied to an abandonment of the whole cause of action. See articles 450, 451, 452, 453 C.P.C. That there was nothing to show that the discontinuance was filed in open court, and the whole claim was disposed of in the former action and so became *chose jugée* and barred to the plaintiffs in this suit.

Sir W. J. RITCHIE C J.—I think this appeal should be allowed. I have been favoured with a perusal of Mr Justice Taschereau's notes with which I entirely concur. I think the *retraxit* was given in open court in the presence of the parties and did not require other notification, and was adjudicated on and allowed by the court and the judgment not appealed from.

FOURNIER J. was of opinion that the appeal should be dismissed for the reasons stated by the judges of the Court of Queen's Bench for Lower Canada (appeal side).

TASCHEREAU J.—The Bank in the present action

(1) 6 L.C.R. 201 at. p. 215.
(2) Vo. Désistement No. 56.
(3) 3 vol. Question 1458.
(4) 2 vol. pp. 628.
(5) Vo. Désistement p. 79.
(6) 1 vol. p. 455.
(7) Journal du Palais, 1832 p. 558.
(8) Vo. Désistement No. 83.

claims from Gilman $41,627.93 being, as they allege, due to them from Gilman as follows :—

Promissory Note, 12th July. 1882, $15,000.00.
Amount to balance Trust Account, 19,956.51.
Ordinary Account..... 6,671.42.

To this action, the defendant pleaded, as to the note, want of consideration, and as to the other two items a general denial, coupled with an allegation that all that he owed to the bank had long been paid and satisfied. The defendant further pleaded—1st. *Lis pendens*, that the causes of action in the present suit were part of the cause of action, by plaintiffs, against him in a previous suit, which, he alleged, was still pending; 2nd, that there was *chose jugée* in that first suit of the matters in issue in this suit.

Two more contradictory pleas than these last two, it is impossible to imagine. If the first action referred to in these pleas is still pending, how can it justify a plea of *res judicata*? If, on the contrary, it is determined, and *res judicata*, how can it justify a plea of *lis pendens*?

The Superior Court (Torrance J., June 26, 1886) dismissed all of the defendant's pleas, and gave judgment in favor of the bank for the full amount claimed, but the Court of Appeal reversed that judgment and dismissed the action on the ground of *lis pendens*, as appears by the following *considérant*:

Considering that the respondent's declaration of discontinuance of suit, alleged by the respondent, in his answer to the first and second pleas of the said appellant to the present action, was not served upon the said appellant, as required by article 451 of the Code of Civil Procedure, and consequently that the delivery of the same into court and its production in the prothonotary's office was of no effect against the appellant under said article, and the judgment granting *acte* of such declaration was not acquiesced in by the appellant, nor was it final, nor *chose jugée*, as regards him, and in fact was afterwards set aside and could not make said discontinuance effective, and said demand against the said appellant is still pending and undetermined in the court below.

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From that judgment the bank now appeals. I am of opinion that this appeal should be allowed. There was, when this action was instituted, no *lis pendens* as invoked by the defendant. The facts which gave rise to that plea are as follows:—

The Exchange Bank, in January, 1884, sued Gilman for $52,317.92, the action being based—

1st. On a promissory note for $42,000, on which there remained unpaid a balance of $8,000.

2nd. A promissory note for $15,000, signed by Mr. Gilman and given the bank for a deposit receipt for $15,000, issued by the bank, to be deposited with the Dominion Government for the execution of a contract.

3rd. The balance due to the bank in connection with his trust and ordinary deposit accounts, $29,317.92.

To the action so brought, the defendant pleaded that the $42,000 note "was fully paid and satisfied." He pleaded special circumstances regarding the $15,000 which he pretended exempted him from the obligation to pay it, and denied that he was indebted to the bank for any portion of the accounts for $29,317.

3. The case came on for trial at *enquête and merits* on the 30th May, 1884, before Mr. Justice Mathieu. On that day and during the trial, the plaintiffs filed a withdrawal of a part of their claim as follows:

> The plaintiffs hereby declare, in order to avoid difficulties and expedite and obtain a judgment, that they withdraw in the present action all portions of their demand, except that in reference to the check for $42,000, under, however, express reserve of their rights to institute an action upon the note for $15,000 and upon all the vouchers, documents and claims contained in the Exhibit "No. 1," herein fyled, and upon all other claims or orders they may have against the defendant, the whole without prejudice.

The case then went "*en delibéré*" with this withdrawal appearing on the face of the record, and on the 14th June following, 1884, Judge Mathieu gave judgment against Gilman for the $8,000 due on the note for

$42,000, granting *acte*, to the plaintiffs, of their withdrawal of the other items of their demand in the following terms:

The court having heard the parties by their counsel upon the merits of this cause, examined the proceedings, the evidence and proof of record, seen the declaration made and filed by plaintiffs on the thirtieth of May last past, whereby they withdraw in the present action all portions of their demand, except that in reference to the check (note) for forty-two thousand dollars, under, however, express reserve of their rights to reinstitute actions upon the note for fifteen thousand dollars, and upon all the vouchers, documents and claims contained in Exhibit No. 1. filed in this cause, and upon all other claims and demands they may have against the defendant, and upon the whole duly deliberated:

Doth grant *acte* to plaintiffs of their said declaration of withdrawal of portions of their demand as aforesaid.

From this judgment the defendant appealed to the Court of Review, but that court unanimously confirmed Judge Mathieu's decision. This judgment of the Court of Review was a final judgment, no appeal lay therefrom.

The bank on the 4th of December, 1884, instituted the present action for the recovery of the balance of that part of their claim against Gilman which they had withdrawn in the suit determined by Judge Mathieu, under express reserve of their right to institute their present action, as stated above.

It is on the case so determined by Judge Mathieu that the defendant grounds his plea of *litis pendens* upon which the Court of Appeal has dismissed the action.

It appears from the extracts of the registers of the court printed in the case, that the withdrawal by plaintiffs of part of their claims in the first action, was made at the trial and in presence of the court. If that is so, it is clear that the procedure is unimpeachable. Art. 451 of the Code of Procedure purports only to permit of a withdrawal outside and without the inter-

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ference of the court and a reference to section 25, ch. 82, C.S.L.C. shows by the words therein "even in vacation" that the enactment was made only for the purpose of allowing a withdrawal outside of the court. A withdrawal in court and with permission of the court, was always legal without that enactment: See Pigeau Procédure Civile (1).

The commentators under the corresponding articles of the French Code of Civil Procedure, 402, 403, are all unanimous in the conclusion that these articles are permissive only. Carré et Chauveau, Procédure Civile, says (2):

Le désistement et l'acceptation peuvent-ils être faits de toute autre manière que celle indiquée par l'article 402 ?

L'affirmative parait resulter de ce que l'article est conçu en termes facultatifs: "le désistement comme l'acceptation peut, etc., et non doit, etc." Il peut donc être fait de différentes manières, par exemple: à l'audience en présence du juge qui en peut décerner acte; mais il faut que le demandeur et le défendeur se trouvent à l'audience en personne ou par des mandataires; alors leur présence est constatée par le juge, et sans qu'il soit besoin de signatures.

Le contrat judiciaire est formé parce qu'aucune loi n'exigeant que les parties ou leurs fondés de pouvoir signent leurs dires ni les arrangements qu'ils font à l'audience, l'intervention du tribunal qui atteste et consacre ces arrangements supplée éminemment les signatures.

Thomine-Désmazures (3).

Il pourrait encore être fait à l'audience, par l'avoué qui demanderait acte du désistement de sa partie, en déposant des conclusions d'elle ou de son fondé de pouvoir.

La seconde condition est que l'acte de désistement soit signifié d'avoué à avoué. Cette seconde condition est indépendante de la validité de l'acte: elle ne doit évidement être observée que quand il y a avoué constitué de part et d'autre, et elle n'a pour but et pour effet que d'arrêter le cours de la procédure et les frais ultérieurs.

Journal des avoués (4).

Le désistement peut être accepté à l'audience, et les juges ont le droit d'en donner acte sans qu'il soit besoin d'une signification préalable d'avoué à avoué.

(1) 1st vol., p. 358.
(2) Vol. 3, question 1458.
(3) 1 vol., pp. 620-621.
(4) Vol. 10, p. 465, question 22.

C'est ce qui a été décidé par la cour de Rennes, le 31 janvier 1811 : Attendu que l'article 402 du code de procédure civile, portant que le désistement peut être fait et accepté par un simple acte, signifié d'avoué à avoué, il en résulte que les parties ont la faculté de faire et accepter le désistement de toute manière juridique.

Favard de Langlade, Vo. Désistement (1).

Quand il (le défendeur) a constitué avoué, le désistement peut être fait et accepté par de simples actes, signés des parties ou de leurs mandataires et signifiés d'avoué à avoué, (Code de Procédure, article 402). Il peut aussi être donné sur la barre à l'audience. Pour qu'il soit valable, il faut que le demandeur et le défendeur se trouvent à l'audience, et que leur consentement soient constatés par le juge.

Pigeau, Procédure Civile (2).

L'article 402 ne dit pas que le désistement *doit*, mais seulement qu'il *peut* être fait et accepté par acte signifié d'avoué à avoué. Ainsi il peut se faire valablement dans toute autre forme suffisante pour constater la volonté des parties ; il peut donc être fait à l'audience en présence du juge qui en donne acte.

Cour Royale de Paris. *Talansier* c. *Loyseau* (3).

Les juges peuvent valider un désistement régulier que la partie refuse d'accepter bien que ce refus soit fondé sur ce que le désistant s'est réservé d'intenter une nouvelle action.

I may also refer to Favard de Langlade (4). Boncenne (5) and to the case of *Ryan* v *Ward* (6) and to the remarks of the judges therein.

The respondent, however, contends that the withdrawal in question was not made in open court, and that consequently it has no effect against him, not having been served upon him under Art. 451 C. C. P.

I do not attach much importance to this, taking it for granted that it was so. Judgment has been passed upon it in that first action : that judgment is final and conclusive. The withdrawal of a portion of the demand, under reserve of the right of instituting a new action therefor, has been sanctioned and allowed by the

(1) T. 2, p. 79.
(2) T. 1, p. 455
(3) Journal du Palais 1832, p. 558.
(4) Vo. Désistement,
(5) Proc. Civ. 7 vol., p. 688.
(6) 6 L. C. R. 201.

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court. In that case, and in that case alone, could that question be determined. The judgment of the court in that case cannot be reviewed in this case. The court in that former case might have refused to admit that conditional withdrawal and either remit the case for further evidence or dismiss the action for the part thereof not proved; but not having done so, and having allowed the plaintiffs' withdrawal, I do not see how, in this case, we can review that decision. That judgment stands, and to argue that there is *lis pendens* now because the plaintiffs demand from the defendant that portion of their claim which they withdrew on the first action seems to me untenable. How can a case upon which a final judgment has been passed be said to be pending? And, on the other hand, how can the defendant contend that there is *res judicata* in his favor as to the claim withdrawn in the first case by permission of the court, with reserve of the right by the plaintiffs to institute a new action thereof? That claim has not been dismissed, has never been adjudicated upon. The only claim determined in that first action was the one of $8,000.

The judgment of the Court of Appeal alludes to the fact that the judgment on the first action has since been set aside on a *requête civile* for want of stamps on the promissory note for which the plaintiffs had recovered. I think this fact was erroneously taken into consideration. There is no issue of that kind on the record, and the copy of the judgment as setting aside the first judgment was irregularly introduced in the record in the Court of Appeal. It could not have been invoked in the Superior Court for the good reason that it was rendered on the 22nd December, 1887, more than a year after the judgment of the said Superior Court. And the Court of Appeal could not give a judgment which the Superior Court could not have

given, or take into consideration, as a ground of their judgment, a fact which did not exist when the Superior Court pronounced its judgment (1). Moreover, by the judgment of the Court of Appeal on the *requête civile*, the only case remitted to the court below was the case on the $8,000. The withdrawal as to the other items of the plaintiffs' claim remained in full force. The plaintiffs having instituted the present action as to these items, could not have been allowed, in the Superior Court, to desist from that withdrawal.

As to the evidence of the plaintiffs' claims, the Superior Court, as I have remarked, has granted them the full amount demanded by the action, $41,627. At the argument, the plaintiffs, however, agreed to take a judgment for $25,000. I think that the evidence fully justifies a judgment for that amount with interest from 4th December, 1884, and costs *distraits*.

Gwynne and Patterson JJ. concurred with Taschereau J.

Appeal allowed with costs.

Solicitors for appellants: *Macmaster, Hutchinson & MacLennan.*

Solicitor for respondent: *J. D. Cameron.*

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(1) Montreal L. and M. Co. *v.* Fauteux 3 Can. S. C. R. 433; Lyonnais *v.* Molson's Bank 10 Can. S. C. R. 527.

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*May 23.

*Dec. 14.

HER MAJESTY THE QUEEN (DEFENDANT)..... APPELLANT;

AND

MICHAEL STARRS, JOHN HERBERT AND JOHN LAWRENCE POWER O'HANLY (CLAIMANTS).. RESPONDENTS.

APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Claim against Government—Certificate of engineer—Condition precedent—Arbitration—31 *V. c.* 12.

S. et al. made a contract with Her Majesty the Queen, represented by the Minister of Public Works, for the construction of a bridge for a lump sum. After the completion of the bridge a final estimate was given by the chief engineer, and payment thereof made, but *S. et al.* preferred a claim for the value of work, not included in such final estimate, alleged to have been done in the construction of the bridge, and caused by changes and alterations ordered by the chief engineer of so radical a nature as to create, according to the contention of the claimants, a new contract between the parties.

Held, reversing the judgment of Henry J. in the Exchequer, Fournier J. dissenting, that the engineer could not make a new contract binding on the crown; that the claim came within the original contract and the provisions thereof which made the certificate of the chief engineer a condition precedent to recovery, and such certificate not having been obtained, the claim must be dismissed. The Crown having referred the claim to arbitration instead of insisting throughout on its strict legal rights, no costs were allowed.

APPEAL from a judgment of the Exchequer Court of Canada (Henry J.) (1), setting aside the award of the official arbitrators, and allowing the respondents (claimants) the sum of $11,393.71,

The claim in this case arose out of a contract for constructing a bridge across the Ottawa River at Des Joachims, for the lump sum of $25,300. The bridge

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

(1) See vol. 1 of the Exchequer Court Reports shortly to be issued.

was completed by the respondents in the summer of 1885, and in the month of August of that year, the chief engineer of the Department of Public Works made out and certified, under contract, the final estimate of the contractors in respect to the work on the bridge at $41,896.50, and the balance due upon that certificate was paid to the respondents in October of the said year of 1885.

The respondents after the completion of the bridge presented a claim to the Department of Public Works, claiming the sum of $81,100.17 as the value of the work done by them, alleging that the chief engineer had made such radical changes in the plan of the work that the original contract was virtually superseded and they requested the department to recommend to the Government of Canada the payment of this sum, after deducting the amount of the said final certificate of $41,896.50, and they asked that in the event of their claim not being so entertained and paid it should be referred to the board of official arbitrators for their award, and on or about the 29th day of December, 1885, the said claim was duly referred by the said Department of Public Works to the board of official arbitrators for investigation and award.

The claim was heard by the said arbitrators in the month of November, 1886, when evidence both on the part of the claimants and the crown was submitted, and on the 8th day of December following the arbitrators made and published their award in the matter.

The award as made by the arbitrators was for the sum of $44,279.

The contractors not being satisfied with the award as made appealed therefrom to the Exchequer Court of Canada, and by their notice of appeal they in effect asked the court to declare that the sum awarded by the official arbitrators, was a balance due them by the crown in respect to the said bridge works, after deducting all previous payments made to them, and they

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asked to have the award amended in such manner as to carry into effect their request that the amount awarded should be declared a balance due to the contractors over and above all payments already made.

A cross-appeal was taken on behalf of the crown by which it was contended that the claimants were not entitled to be paid any sum upon their claim, and that it was clear that the amount awarded was intended to be, and was in fact, in full payment and satisfaction of all the work performed on the bridge, and that from the said sum so awarded should be deducted all payments previously made to the contractors, which would leave the amount the arbitrators intended to award to be the sum of $2,382.50, and in support of the latter contention the arbitrators filed affidavits, stating in effect that their intention was that the award was in full of all work done by the contractors on the bridge works, from which was to be deducted the amount of the chief engineer's certificate, leaving the balance only to be paid to the respondents.

The appeal and cross-appeal came on for hearing in the Exchequer Court before His Lordship Mr. Justice Henry, when His Lordship stated that he would in the first place hear argument upon the question of the validity of the award which was then proceeded with, and on a subsequent day His Lordship gave his judgment setting aside the award, and he then announced that the case being open he would hear arguments on the whole case and dispose of it on the evidence in the same manner, and as if no award had ever been made, and such argument having taken place judgment was reserved, and on the 10th day of October, 1887, His Lordship rendered his judgment, by which he ordered and adjudged that Her Majesty should pay to the respondents the sum of $11,393.71 in full of all claims against the crown.

From this judgment Her Majesty appealed to this court, and contended that the said judgment was not warranted by the evidence in the case or the law respecting it.

The respondents filed notice of cross-appeal.

The principal clauses of the contract are the following:—

4. That the several parts of the contract shall be taken together, to explain each other, and to make the whole consistent; and if it be found that anything has been omitted or mis-stated which is necessary for the proper performance and completion of any part of the work contemplated, either in the drawings hereinbefore referred to or the specification hereunto annexed, the explanation and interpretation given by the Chief Engineer shall be received and shall be final, binding and conclusive upon the contractors, and the contractors will, at their own expense, execute the same as though it had been properly described, and the correction of any such error or omission shall not be deemed to be an addition to or deviation from the works hereby contracted for.

5. The engineer shall be at liberty at any time either before the commencement or during the construction of the works or any portion thereof, to order any extra work to be done and to make any changes which he may deem expedient in the dimensions, character, nature, location or position of the works or any part or parts thereof, or in any other thing connected with the works whether or not such changes increase or diminish the work to be done or the cost of doing the same, and the contractors shall immediately comply with all the written requisitions of the engineer in that behalf, but the contractors shall not make any change in or addition to, or omission or deviation from the works, and shall not be entitled to any payment for any change, addition, omission, deviation or any extra work, unless such change, addition, omission, deviation, or any extra work shall have been first directed in writing by the engineer, and notified to the contractors in writing, nor unless the price to be paid for any addition or extra work shall have been previously fixed by the engineer in writing, and approved of by the Minister of Public Works for the time being, and the decision of the engineer as to whether any such change or deviation increases or diminishes the cost of the work, and as to the amount to be paid or deducted, as the case may be, in respect thereof, shall be final, and the obtaining of his decision in writing as to such amount shall be a condition precedent to the right of the contractors to be paid therefor. If any such change or alteration constitutes, in the opinion

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of the said engineer, a deduction from the works, his decision as to the amount to be deducted on account thereof shall be final and binding.

6. That all the clauses of this contract shall apply to any changes, additions deviations or extra work, in like manner, and to the same extent as to the works contracted for, and no changes, additions, deviations or extra work shall annul or invalidate this contract.

7. That if any change or deviation in or omission from the works be made by which the amount of work to be done shall be decreased, no compensation shall be claimable by the contractors for any loss of anticipated profits in respect thereof.

8. That the engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material, or as to the meaning or intention of this contract and the plans, specifications and drawings shall be final, and no works or extra or additional works and changes shall be deemed to have been executed, nor shall the contractors be entitled to payment for the same unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractors to be paid therefor.

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

26. It is intended that every allowance to which the contractors are fairly entitled will be embraced in the Engineer's monthly certificates; but should the contractors at any time have claims of any description

which they consider are not included in the progress certificates, it will be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of each and every certificate in which they allege such claims to have been omitted.

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

34. It is hereby agreed that all matters of difference arising between the parties hereto, upon any matter connected with, or arising out of this contract, the decision whereof is not hereby specially given to the Engineer, shall be referred to the award and arbitration of the Chief Engineer for the time being having control over the works, and the award of such engineer shall be final and conclusive; and it is hereby declared that such award shall be a condition precedent to the right of the contractors to receive or be paid any sum or sums on account or by reason of such matters in difference.

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

Hogg Q. C., for appellant.—The only contract that could be made binding on Her Majesty for such a work as the construction of this bridge, is a contract made in pursuance of the 7th section of the Public Works Act, 31 Vic. ch. 12, which must be "signed and sealed by "the Minister of Public Works or his deputy and "countersigned by the secretary," and the contract of the 8th September, 1882, was so executed, so that the contract which the suppliants say superseded the contract of the 8th day of September, 1882, could not, if it

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ever had any existence, be binding upon Her Majesty. *Wood* v. *The Queen* (1); *O'Brien* v. *The Queen* (2).

Under the provisions of the contract, the court would have no power to order payment of any sum beyond what the engineer had certified. Emden on building contracts, (3); *Jones* v. *The Queen* (4). By the 35th clause of the contract, no implied contract can in any way arise between the respondents and the crown in respect to the work. It is therefore quite plain, that the only contract binding on either party, is the contract of the 8th September, 1882. See *O'Brien* v. *The Queen* (5); *Sharpe* v. *San Paulo Ry. Co.* (6).

However, the evidence shows that the respondents have been liberally paid for all the work done by them upon the bridge, both as regards the work alleged to have been contracted for, and the extra or additional work caused by changes and alterations in the designs and works as finished.

O'Gara Q. C. for respondents.—The plans and the evidence show there was a radical difference between the bridge contracted for by the contract made in 1882, and the one actually built, and the fact of the department accepting the work and, when the respondents put in their claim, agreeing to refer the matter to arbitration, is evidence that the written contract was set aside.

But it is now urged that the respondents should get nothing. 1st. Because there was no contract in writing between the respondents and the Minister authorizing the work or changes. 2nd. There is no certificate of the Government engineers allowing the amount.

By the Public Works Act, 31 Vic. ch. 12, secs. 10 and 15, Parliament has entrusted to the Minister of Public

(1) 7 Can. S.C.R. 634.
(2) 4 Can. S.C.R. 575.
(3) Page 125.
(4) 7 Can. S.C.R. 606.
(5) 4 Can. S.C.R. 529.
(6) 8 Ch. App. 597.

Works the absolute control of the erection of bridges, &c. 35 Vic. ch. 24, sec. 1, again repeats this.

42 Vic. ch. 7, sec. 4, divides the Public Works Department into two departments—Railways and Canals and Public Works—and sec. 5 defines their duties, and to the latter department is again given the absolute jurisdiction to erect bridges, &c.

Sec. 10 defines the duties of the chief engineer, &c.

The Minister of Public Works having by these acts the absolute authority to undertake the work, the provisions in the subsequent sections of these acts are only for the guidance and direction of the Minister himself. They cannot take away the power conferred by the previous clauses.

As regulations for the working of the department they do not affect the outside public, and even if they did, they could be waived, as they were in this case: 1° by the conduct of the department, the chief engineer and the Minister, in making payments on account of the work from time to time.

2nd. By the Minister and chief engineer advising an arbitration.

3rd. By the order in council referring to arbitration.

4th. By the letter of the department enclosing the account to the arbitrators.

See *Park Gate Co.* v. *Coates* (1), which shows that negative words in a statute do not take away a power conferred by a prior clause, and that the provisions contained in these negative clauses are only directory and may be waived.

Sec. 20 of ch. 12, 31 Vic. provides that tenders are to be always invited unless there is a pressing emergency.

Sec. 6 defines the duty of the chief engineer.

(1) L. R. 5 C. P. 634.

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Sec. 34 provides for the reference of disputed claims to arbitration.

Sec. 36. No arbitration is allowed where it is the duty of the Minister or of the engineer to determine the matter themselves.

The statutes do not declare that there is to be no claim for work done unless there is a writing executed by the Minister.

Sec. 7. No deeds, contracts, documents, or writing shall be deemed to be binding, &c., unless executed in a certain way. The word "contract" in that section means, from the context in which the word is found, a writing of some kind on which it might be sought to enforce some claim as for the breach of an executory contract.

That clause does not apply here, as this claim is not brought for a breach of an executory contract.

The claim being for work done and accepted the Government is liable, because :

1st. The certificate of the engineer is not necessary. The work is not done under the old contract, and the new agreement made did not require a certificate.

2nd. The Government engineer, by his certificate of the 5th January, 1885, had certified the value of the work to the department to be $39,000, and having thus, previously to all the work being done, bound himself to a particular sum, with the knowledge and at the request of the department, he has become unfit to act as an unbiassed judge. *Kimberley* v. *Dick* (1), *Kemp* v *Rose* (2).

3rd. Even if the old contract applied, it was waived by the department by the reference to arbitration. See *Parke Gate Co.* v. *Coates* (3).

4th. As by section 36 of ch. 12, aforesaid, no arbitra-

(1) L. R. 13 Eq. 1. (2) 1 Giff. 258.
(3) L. R. 5 C. P. 634

tion can be allowed where it is the duty of the Engineer or Minister to settle the matter, the allowance of the arbitration by the Minister and Government shows conclusively that the Government and the Minister and his agents did not consider that any certificate was required, or that it was the duty of the Minister to give a final certificate, otherwise they would, by permitting an arbitration, be violating the statute itself, which must not be supposed or should not be urged on their behalf.

5th. The chief engineer, moreover, shows in his evidence that he made out his prices without ever seeing the work, making any inquiries as to the value of materials there, the difficulties of the place, &c., all which showed such gross carelessness and disregard of the rights of the respondents as to amount to fraud, and such misconduct renders him unfit to be an umpire.

6th. The chief engineer, in giving his estimate, disregarded the contract, calculating the price of the works at a scale of prices fixed by himself according to measurements, and not the contract price.

The respondents then should be allowed to recover, and the amount they are entitled to is a matter of detail, and a final certificate is not required.

When the case was before Mr. Justice Henry in the Exchequer Court that learned judge only allowed the respondents for their expenditure and $3,000 for loss of time.

On the cross-appeal, I submit that the claimants should be allowed for their work the prices established, namely: $61,905.85 for the bridge as it stands, and $18,195.22 for their other claims, which they incurred by reason of the changes and the instructions from time to time given to them by the officers of the Department of Public Works.

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Hogg Q.C., in reply, referred to sec. 41 of the Public Works Act, 31 Vic. ch. 12, which provides, that "in "awarding upon any claim arising out of any contract "in writing, the arbitrators shall decide in accordance "with the stipulations in such contract, and not award "compensation to any claimant on the ground that he "expended a larger sum of money in the performance "of his contract than the amount stipulated therein;" and pointed out that while the amount stipulated in this contract was the sum of $25,300, that sum was increased by reason of extra work caused by changes and alterations in the character of the structure, to the sum of $41,896.50, which latter sum must be taken under the provisions of this section to be the amount stipulated in the contract.

Sir W. J. RITCHIE C.J., after stating the facts as hereinbefore set out, proceeded as follows:—

The claimants in this case claim that the position of the bridge contracted for was changed and that radical changes were made in the plan of the bridge. There is no doubt that the position of the bridge was changed and that great changes and alterations took place in the character and nature of the works, but it was in consequence of these changes and alterations that the chief engineer made out under the requirements of the contract a final certificate and allowed the contractors $41,896.50 instead of $25,300.

It has been contended that the engineer and contractors had altered the original contract, in fact, had put it aside and that there was a new contract. But neither the engineer nor contractor could put an end to the contract and make a fresh verbal contract binding upon the crown. The work clearly was done under the contract and it must be governed by the provisions of the contract.

As to the contention that there was an implied contract, there is an express provision declaring that there could be no implied contract. The contract that binds the parties is that of the 8th September, 1882, and under that contract the engineer's certificate is indispensable. These clauses 4, 5, 6, 7, 8, 25, 26, 27, 34 and 35 cannot be got over, and the final estimate and certificate having been paid, the contractors can have no further claim.

The only objection the crown appears to have raised in the first instance to the award was that the amount of the certificate, $41,896.50, should be deducted from the amount awarded by the arbitrators $44,279.32, leaving a balance of $2,382.82. The contractors claimed that the award was in addition to the certificate and the crown claimed that the payment of the certificate should be deducted, leaving the above amount $2,382.82. Had this been acquiesced in by the contractors, in all probability the controversy would have been at an end. Had the crown intended to rely on its strict legal rights, as it has done throughout this case, this matter should never have been sent to the arbitrators, for in such a case there was nothing for the arbitrators to adjudicate on, and this reference caused all the subsequent litigation. If the circumstances could have permitted me to come to the relief of the respondents, I should have been disposed to allow the contractors the balance of $2,482.82, but the crown insisting on its strict legal rights I am bound to give them. While conceding to these rights which we are bound to do, we can only mark our disapproval of this reference, in consequence of which these claimants have been put to the enormous expenses of this litigation, by depriving the crown of costs in any of the courts.

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FOURNIER J.—En 1882, les intimés ont contracté à forfait avec le département des Travaux Publics pour la construction d'un pont sur l'Ottawa au-dessus de Pembroke, aux rapides des Joachims, pour le prix de $25,300. Le pont devait être en bois, construit dans un endroit spécifié, avec deux culées, six piliers et sept arches (*spans*), suivant certains plans et spécifications.

Dans l'hiver suivant, les intimés se procurèrent à grand frais les matériaux nécessaires. Ils se préparaient à commencer l'ouvrage dans le mois d'avril suivant, lorsque le département, à la demande des intimés, envoya sur les lieux un ingénieur pour localiser l'endroit des piliers et des culées du pont. Cet ingénieur constata que l'endroit choisi par l'ingénieur Austin employé à cet effet par le département ne convenait aucunement et que les plans et spécification qu'il avait faits ne pouvaient nullement servir à cette construction, et il en fit rapport à l'ingénieur-en-chef, qui, avec l'appropation du département, les changea tellement qu'il fallut faire une construction tout à fait différente de celle originairement projetée et beaucoup plus coûteuse.

De nouveaux plans et spécification furent donnés aux intimés par Perley, l'ingénieur-en-chef, avec instruction de s'y conformer dans la construction du nouvel ouvrage—les prix des ouvrages devant être déterminés plus tard. En conséquence de ce nouvel arrangement, les contracteurs se mirent à l'œuvre et s'acquittèrent avec diligence de la tâche qu'ils avaient ainsi acceptée.

Plusieurs témoins, ainsi que l'ingénieur Perley, prouvent que tel a été l'arrangement pour la construction du pont après que le contrat originaire et les premiers plans et spécification eurent été mis de côté. Si les intimés eussent insisté sur l'exécution des ouvrages du premier contrat, comme ils en avaient le

droit, le gouvernement ne pouvait les faire exécuter à cause de l'imperfection des plans et spécification, et aurait eu, dans ce cas, des dommages à leur payer.

C'est alors que sur les représentations des officiers du département, ils renoncèrent à ce premier contrat et s'engagèrent, à la demande de l'ingénieur-en-chef, à construire un pont d'après des nouveaux plans et spécification qui devaient leur être fournis. L'ouvrage a été fait conformément à ces nouveaux plans et spécification, et leur présente demande a pour objet d'être payés de la balance qu'ils réclament comme leur étant due sur la valeur de ces ouvrages.

La construction qu'ils ont eu à faire est essentiellement différente de celle mentionnée au premier contrat. Hamel, l'ingénieur qui a fait les nouveaux plans, ceux qui ont été exécutés, dit à ce sujet :—

There was evidently an error in the original plans. In September, 1883, I got orders to change the site of the piers. I found original plan would not do.

Perley dit :

In August, 1883, difficulty as to finding centre line, I got Austin to go and pick up centre line and the work proceeded. When we found that Austin's soundings were wrong we took fresh soundings and revised the bridge and readjusted the spans to suit the altered circumstances. I never saw the work, but I was in the locality before the work was begun. The contractors were paid the progress estimates as the work went on. I never had such radical changes as there was in this contract. Before making out my final estimate, I asked the contractors for a detailed statement of their claim, but I did not get it before making final estimate.

O'Hanly, l'un des intimés qui est lui-même un ingénieur civil, dit en parlant de ces changements :

The whole thing was changed. There was a new location of the piers and abutments, the lengths of the spans and the number of the spans. The result was to put the piers in a much greater depth of water than the original.

Being asked to specify the depth, he answers :

Where there was five feet of water shown on the plan, there was 20

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feet. Of course the bottom was very irregular at the time. I have soundings of the whole to show.

Il est inutile d'entrer dans le détail des différences entre les deux plans de construction de ce pont, les différences sont bien établies par la preuve et mentionnées en détail dans l'exhibit du dossier. Elles sont tellement considérables qu'après les avoir indiquées spécialement, l'ingénieur Bell, employé du département dit :

They bear a certain resemblance to each other. They are both made of wood, but they are different structures.

Q. You could not, in other words, take out of the second plan the first one, say so much is extra and so much is according to the original plan.

Oh, no.

La différence dans le coût des deux plans est également donnée et elle est beaucoup plus élevée dans le deuxième (celui qui a été exécuté) que dans le premier.

En conséquence de ces changements, il était absolument impossible d'exécuter le premier plan conformément au contrat. Le délai pour son exécution était même expiré et le contrat avait cessé d'exister lorsque les nouveaux plans et spécification pour l'ouvrage exécuté, ont été fournis aux intimés.

Dans cette situation d'affaire, l'intimé O'Hanly s'adressa à M. Perley, l'ingénieur-en-chef, pour connaitre d'après quel arrangement se ferait l'ouvrage du deuxième plan. Voici comment il rapporte ses entretiens à ce sujet avec Perley :

Q. What did you say to him ?

A. I said to Mr. Perley, everything being radically changed there was not a shred left of the original design : and I asked him now as we had neither plans nor anything to guide us whether we would have a written order for everything we did.

Q. What did Mr. Perley say ?

A. Mr. Perley said that the whole design having been entirely recast and radically changed altogether, that now, to go on and do whatever we were ordered verbally or otherwise.

Q. And leave the prices to be settled afterward?

A. There was nothing said about prices; but I wanted to know how we stood, and this is the answer I got.

By Mr. Cowan.

Q. Repeat it.

A. That work having been entirely changed, and everything in connection with it re-cast, and the designs being set aside, and no designs being yet ready, we were to do whatever we were ordered by the inspector or the engineer in charge.

By Mr. O'Gara.

Q. There is no difficulty between you and Mr. Perley as to that?

A. I think not; I am not aware of any.

Q. Will you look at the paper, Mr. Perley's report of the 25th January, 1885, when he was asked to state why the money paid exceeded the original contract?

A. I have read it.

Q. That admits the fact that things were changed, and that the original plans were all wrong and had to be recast?

A. Yes, it admits it; as a necessity they had to do it.

Q. And that before he had to do the best he could to provide additional money to complete the structure.

A. Yes. (Report filed as exhibit "I.")

Q. When did you get any plans upon that?

A. We got no detailed plans at all of any pier from beginning to end. We got a plan of the first span in January 1884; and we got a plan of the remaining spans in the end of March 1884. We never got any plan of the sub-structure at all.

Q. You have those plans?

A. Yes.

Q. Have you got them here?

A. No.

Q. When were you made aware of the sizes of the piers and changes in the abutment?

A, Just as the work went on. Wherever they located it they told us to build there.

Q. And gave you the description and sizes &c.?

A. Yes, and sometimes they got no sizes to work on, as the inspector told us. The inspector was changing every day.

Q. What effect had those changes upon the first material that you got out?

A. The timber and iron, a great deal of it, was valueless in consequence of the changes, worthless to us.

Q. And where did you get the material for the new design?

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A. We had to hunt round everywhere we could, and from the lumbermen principally we got what we required for the design for the new piers.

Q. You had to pick it up wherever you could?

A. Yes, from the lumbermen.

Q. Had you any time to get it cut in the woods?

A. No, there was no chance of getting it out that season. It was impossible.

A. You were getting orders gradually, and you had to give the orders gradually for the timber?

A. Yes.

Q. Is there any difference in the expense to yourself of timber so acquired and of timber got out regularly by contract in the woods?

A. There is a great difference, oftentimes double the price besides the loss of time and trouble the expense in hunting round for it, getting a little here and a little there.

Q. What was the result in this particular case?

A. It nearly doubled the price.

Q. What was the effect of it upon your iron?

A. A great deal of the iron was worthless. We could not use it at all. When the spans were changed, bolts for the one would not do for the other.

Q. You said that after these changes were ordered and the new piers were to be put in that you saw Mr. Perley and told him about the changes and difficulties that were going to take place?

A. I do not know if I said difficulties or not.

Q. You said there was a new class of work which would be more difficult to do, etc., and that he told you to go on and what you were ordered?

A. Yes, that is the answer he made. He said that the whole work was changed and that we were to carry out the instructions of the inspector and engineer in charge.

Q. Did he say that you were to carry out the instructions of the engineer and inspector because the work was changed?

A. Yes; because the work was radically changed, he said.

Q. Did you infer from that that you were to carry out the orders of the inspector and engineer whether the work was changed or not—under your contract originally?

A. No, of course we knew that under the contract and specification we had to carry out the instructions of the engineer, but that was another thing altogether.

Q. I want to get the exact words that Mr. Perley said, that because the work was changed radically you must go and carry out the work under the instructions of the engineer and inspector.

A. I went to Mr. Perley specially to ask him whether, as everything had been changed, the whole character of the work changed, would it be necessary for us to have a written order for everything that was to be done. He said, no, in consequence of this entire change, you will have to carry out every instruction that you will get either from the engineer in charge or the inspector. "All right," I said.

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C'est d'après l'arrangement mentionné dans ce témoignage que l'ouvrage en question a été fait. Plusieurs autres témoins font preuve que c'est sous la direction immédiate du département et sans aucun contrat en forme, comme il en avait été fait un pour l'exécution du premier projet, que le deuxième plan a été exécuté.

Dans un cas semblable, quelle est la responsabilité du département des Travaux Publics vis-à-vis des intimés? Est-il vrai qu'en l'absence d'un contrat par écrit entre le ministre des Travaux Publics et les intimés, ceux-ci n'ont droit de rien réclamer pour la valeur de leur ouvrage et des matériaux fournis? Est-il nécessaire, dans le cas actuel, qu'ils produisent comme condition préalable à l'exercice de leur action, un certificat de l'ingénieur-en-chef des travaux en question?

A cette dernière question, je répondrai de suite qu'on ne peut exiger dans ce cas la production d'un tel certificat, parce qu'il n'y a eu aucune condition à ce sujet dans l'arrangement en vertu duquel les travaux ont été faits. Il est vrai qu'il en existait une dans le premier contrat, mais ce contrat a été complètement abandonné et remplacé par une entreprise toute différente, dont les travaux ont été exécutés sous la direction immédiate du département et sans contrat par écrit.

En outre, il n'est pas inutile de faire remarquer que l'ingénieur-en-chef déclare dans son témoignage qu'il n'a eu aucune connaissance personnelle des ouvrages; qu'il n'est allé sur les lieux qu'une seule fois, et ce avant le commencement des travaux. Quel certificat pouvait-il donner? Heureusement pour les intimés

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que ce certificat n'est pas nécessaire dans le cas actuel et qu'on ne peut leur opposer les décisions rendues en d'autres cas, où il existait une condition à ce sujet.

L'autre question semble au premier abord beaucoup plus difficile à résoudre, en conséquence de certaines dispositions des actes concernant les travaux publics. Elle s'est toutefois déjà présentée devant la cour d'Echiquier, dans la cause de *Wood* v. *La Reine*, (1) dans laquelle Sir William Richards ex-juge en chef de cette cour se fait deux questions tendant à définir la responsabilité du département des Travaux Publics.

Elles étaient posées comme suit:—

Can the crown in this Dominion be made responsible under a petition of right, on an executory contract entered into by the Department of Public Works, for the performance of certain works placed by law under the control of that department, when the agreement therefor was not in writing, nor signed or sealed by the Minister of Public Works or his Deputy, or countersigned by the secretary?

If work had been done for and at the request of the Department, will a petition of right lie for the value of such, which causes an expenditure not previously sanctioned by Parliament?

La loi alors en force, la 31 Vict. ch. 12, est encore la même, avec certaines modifications faites par la 42 Vict. ch. 7, qui a divisé en deux le département des Travaux Publics pour en faire le département des canaux et chemins de fer et celui des Travaux Publics.

La section 11 de ce dernier acte déclare bien qu'aucun contrat, document, ou écrit ne sera obligatoire pour l'un ou l'autre de ces deux départements, ou ne sera considéré l'acte de tel département à moins d'être signé et scellé par lui ou son député, et contresigné par le secrétaire ou autre personne autorisée à cet effet. Cette disposition qui est à peu près la même que la 31 Vict. ch. 12, est conçue en ces termes:—

Sec. 7. No deeds, contracts, documents or writings shall be deemed to be binding upon the Department, or shall be held to be the acts of the

(1) 7 Can. S. C. R. 634.

said Minister, unless signed and sealed by him or his deputy, and countersigned by the Secretary.

La comparaison des deux textes fait clairement voir que la loi n'a pas été changée en ce qui concerne la responsabilité du département.

L'honorable juge après avoir décidé que le contrat allégué par Wood n'était pas obligatoire pour le département, et que le pétitionnaire n'avait pas droit à des dommages pour avoir été empêché de l'exécuter, s'exprime comme suit sur la deuxième question qui est la même que celle soulevée en cette cause (1).

I do not think, however, that the 7th section would prevent the suppliant recovering for the actual value of the work done by him and accepted by the department. I see no reason why the law may not imply a contract to pay for the work done in good faith, and which the department has received the benefit of. Suppose, instead of work done the contract had been to furnish a quantity of lumber, the lumber had been supplied and worked up by the workmen of the department in finishing one of the the public buildings; suppose for some reason the department repudiated the verbal contract and refused to be bound by it, could it be said that the property of the suppliant could be retained and used for the purposes of the department, and he not be paid for it, because the statute said the contract on which it was furnished was not deemed binding on the department. I should say not. The contract which is binding is that which arises from the nature of the transaction; having received the benefit of the contractor's property he ought to be paid for it—under the new contract which the law implies. For the same reason, for the value of all services actually rendered by the suppliant, before he was notified not to do any further work, he ought to be paid. If only the 7th section were considered, I should, as at present advised, say the suppliant is entitled to recover what the services rendered by him were worth under the implied contract. It may be, that on further consideration my views as to the suppliant's right on this point would be less favorable.

L'honorable juge, par ces dernières expressions, fait allusion à la 15ème section, défendant au ministre des travaux publics d'autoriser des dépenses qui n'ont pas

(1) 7 Can. S. C. R. at p. 645.

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été préalablement sanctionnées par le Parlement. La clause est en ces termes:

The minister shall direct the construction, maintenance and repairs of all canals, harbors, roads, or parts of roads, bridges, slides or other public works, or building in progress, or constructed or maintained, at the expense of Canada, and which by this Act are, or shall hereafter be, placed under his management and control; but nothing in this Act shall give authority to the minister to cause expenditure not previously sanctioned by Parliament, except for such repairs and alterations as the necessities of the public service may demand.

L'honorable juge, après avoir examiné les précédents et la pratique suivie en Angleterre à ce sujet, en vient à la conclusion qu'en vertu de cette section, si le Parlement n'a pas autorisé la dépense, il n'y a pas lieu à la pétition de droit pour ouvrage fait à la réquisition du département des Travaux Publics, à moins que ce ne soit pour des ouvrages de réparations, et de changements rendus nécessaires par les exigences du service public:

Unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded.

That in this case, if Parliament has made appropriations for these works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the department, under section 20 of said Act, then no written contract would be necessary to bind the department, and suppliant could recover for work so done.

Le principe ainsi posé par l'honorable juge est d'une application parfaite aux faits de la présente cause On a vu que la preuve établit positivement que, en août 1883, même après l'expiration du délai pour l'exécution du premier contrat, on s'est aperçu que les plans et specifications de cet ouvrage ne convenaient aucunement pour l'endroit où il fallait construire. En conséquence, de nouveaux plans et de nouvelles spécifications devinrent nécessaires et furent ordonnés et préparés. La saison étant alors avancée, l'ouvrage à faire étant d'une haute importance pour le public, la nécessité des communications à établir entre les deux

rives de l'Ottawa, urgente, et comme il n'y avait plus le temps nécessaire pour demander de nouvelles soumissions pour l'exécution des nouveaux plans et spécifications,—il fut alors décidé, comme on l'a vu plus haut, de faire faire les ouvrages en question sous la direction du département des travaux publics.

Les circonstances justifiaient cette action en même temps qu'elles dispensaient de la nécessité de nouvelles annonces.

Dans la cause de Wood où il n'y avait comme dans celle-ci ni contrat par écrit ni annonces, Sir William Richards s'exprime ainsi sur le droit de recouvrer du département en pareil cas.

On the broad question whether the suppliant can recover, and in the view I take of the 15th section the suppliant can only recover if the work and services rendered come under the exception referred to in that section, and in which necessity would also justify the omitting to advertize for tenders under the 28th section.

L'honorable juge termine ses notes par l'observation suivante au sujet de l'autorisation de la dépense par le parlement:

It was contended on the agreement, that Parliament has made appropriations for those work and so sanctioned the expenditure. If that be so, and the work done was of that kind, that might properly be executed by the officers and servants of the department, then I apprehend no contract would be necessary to bind the department for work done, and so suppliant should recover for work so done ; and in every view also for the work actually done, if the expenditure was previously sanctioned by Parliament.

Dans cette cause, l'autorisation du parlement n'est pas mise en question ; non-seulement les deniers pour la construction du pont des Joachims ont été votés, mais ils ont été, en grande partie, payés par le département ; ce qui reste à payer n'est que pour la différence entre l'exécution des travaux des derniers plans et ceux des premiers. Les circonstances ont imposé aux officiers du département la nécessité de se charger de la direction

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des travaux et les ont justifiés de ne pas demander de nouvelles annonces. Je considère que sous tous les rapports cette cause est analogue à celle de *Wood et La Reine*, et que l'on doit y faire l'application des principes posés par Sir William Richards dans le jugement dont j'ai donné de si copieux extraits.

Par tous ces motifs, je suis d'opinion que les requérants ont droit à la confirmation du jugement rendu en leur faveur par feu l'honorable juge Henry.

Taschereau, Gwynne and Patterson JJ. concurred with Sir W. J. Ritchie C. J. (1).

Appeal allowed without costs.

Cross-appeal dismissed without costs.

Solicitors for appellant—*O'Connor and Hogg.*

Solicitors for respondent—*O'Gara and Remon.*

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(1) Owing to the death of Mr. Justice Henry, the appeal was twice argued.

THE ONTARIO AND QUEBEC RAILWAY CO..... .... } APPELLANTS; 1889 Nov. 5.

AND

MAURICE MARCHETERRE.....RESPONDENT. 1890 *Jan. 27.

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

Application to give security for costs—Supreme and Exchequer Courts Act, Sec. 46—Appeal—Jurisdiction—Judgment, interlocutory or final —Art. 1116 C.C.P.—Amount in controversy not determined—Supreme and Exchequer Courts Act, secs. 28 and 29.

1. A judgment of the Court of Queen's Bench for Lower Canada (appeal side), quashing a writ of appeal on the ground that such writ had been issued contrary to the provisions of Art. 1116 C.C.P. is not "a final judgment" within the meaning of section 28 of the Supreme and Exchequer Courts Act. (*Shaw* v. *St. Louis*, 8 Can. S.C.R. 387 distinguished).
2. The Supreme Court has no jurisdiction under sec. 29 of the Supreme and Exchequer Courts Act, upon an appeal by the defendant where the amount in controversy has not been established by the judgment appealed from.

(Gwynne J. reserving his opinion on this point).

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) quashing an appeal to that court from the judgment of the Court of Review, by which the appellants' demurrer to respondent's action for damages was dismissed and the case was referred back to the Superior Court to ascertain the amount of damages.

The appellant in this case first applied to a judge of the Court of Queen's Bench for an order to settle the case and give the proper security. This application

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

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was refused, and thereupon the appellant made another application to Mr. Justice Strong in chambers for an order allowing security to be given on his appeal in accordance with the provisions of section 46 of the Supreme and Exchequer Courts Act.

Upon this application and after having heard the parties the following judgment was delivered:—

STRONG J.—This application is made by the Ontario and Quebec Railway Co. who were the appellants in an appeal to the Court of Queen's Bench and the defendants in the court of first instance, to allow them to pay $500 into court as security for costs and for the due prosecution of the appeal pursuant to the 46th section of the Supreme and Exchequer Courts Act. The judgment of the Superior Court was in favor of the plaintiff, but it directed a reference to ascertain the amounts of damages which the plaintiff had sustained. By his action the plaintiff claimed damages to the amount of $5,000. The Court of Queen's Bench held that this was not a final, but a mere interlocutory judgment, and, therefore, not appealable without special leave, which had not been obtained.

Although I have determined to grant the application, I have great doubts as to the competence of the Supreme Court to entertain the appeal, and my object in making the order asked for is to give the parties an opportunity of having the question of jurisdiction decided by the full court. As the delay for appealing prescribed by the Statute, and which I have no power to enlarge will elapse before the sitting of the court, this can only be done by allowing the security to be put in now, for otherwise, the appellant will be foreclosed by lapse of time before the court sits. I therefore, make the order asked for allowing the deposit of $500 in court as security pursuant

to section 46 of the statute, and I would suggest to the parties that they should bring the case before the court as soon as possible and before incurring any expense in printing the record or factums. I may add that my doubt upon the point of jurisdiction is founded on the 29th section of the statute. It appears to me that at present it cannot be said that the matter in controversy in this action for damages amounts to the sum or value of $2,000 and it is not pretended that a question coming within any of the several categories specified in the sub-sections to section 29 is involved in the appeal. Before the rule laid down in *Joyce* v. *Hart* (1) was displaced (as I consider it has been) by *Allan* v. *Pratt* (2), it would according to the former authority have been sufficient to give jurisdiction that the damages claimed in the conclusions of the action amounted to $2,000. The decision of the Privy Council in the case last referred to, however, establishes that in an appeal by a defendant, the amount of the damages in which the appellant has been condemned affords the test to be applied in ascertaining the question of competence. The enactment under which *Allan* v. *Pratt* (2) arose being identical with that of section 29 of the Supreme Court Act it appears to me that the same interpretation must be applied to the last mentioned section also. It may be remarked here that this 29th clause differs entirely in its wording from section 2311 of the Revised Statutes of Quebec, which is an express enactment that the competence of a case for appeal whenever that depends on the amount in dispute is to be ascertained from the amount demanded and not from that recovered by the judgment if they are different. Without at present expressing any decided opinion I am inclined to think that it is a proper inference to be drawn from the case of *Allan* v. *Pratt* (2) that

(1) 1 Can. S.C.R., 321. (2) 13 App. Cas. 780.

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when a defendant in an action for damages or other money demand seeks to appeal to the Supreme Court he must be able to show from the judgment that the amount in controversy is not less than $2,000, in other words he must establish that a judgment to that amount at least has been rendered against him, and, as at present advised, it appears to me not to be sufficient to say, that although no amount has been actually ascertained by the judgment rendered, yet the proceeding ordered by that judgment may result in h e condemnation of the defendant in damages to the amount of $2,000. It was also contended by Mr. Abbott on behalf of the appellant that if he proceeded to execute the judgment by taking part in the reference ordained by it, he would be precluded by acquiescence from objecting to it hereafter in case he should appeal from the final judgment, even though the damages when ascertained should amount to $2,000 or upwards, and that thus on an appeal from the final judgment he would be restricted to the question of damages and altogether debarred from impugning the principle of the present judgment establishing the defendant's liability in the action. And for this position *Shaw* v. *St. Louis* (1) was cited as an authority. As the judgment sought to be appealed against has been held by the Court of Appeals to be interlocutory and not final, this objection does not at present appear to me to be conclusive, and I should probably so hold if I now undertook to decide the point which, however, I expressly refrain from doing.

As both the points taken are worthy of consideration I think it better instead of taking it upon myself sitting alone in chambers to decide such important questions of jurisdiction relating to appeals from the province of Quebec, to give the parties an opportunity of

(1) 8 Can. S.C.R. 385.

obtaining the opinion of the court, and, therefore, for that reason, and for that reason alone, I allow the proposed security to be given.

Archambault Q.C. moved to quash the appeal on two grounds: 1. That the judgment appealed from was not a final judgment; 2. That it does not appear by the judgment appealed from that the matter in controversy amounts to $2,000.

H. Abbott Q.C. *contra.*

Sir W. J. RITCHIE C.J. concurred with Taschereau J.

STRONG J.—I am of opinion that this motion to quash the appeal for want of jurisdiction ought to be granted.

The appellants do not bring themselves within the 29th section of the Supreme Court Act, inasmuch as they do not establish that the matter in controversy amounts to $2,000.

My reasons for this conclusion are the same as those intimated in the note of my judgment in chambers, to which it is sufficient to refer without repeating them here.

It also appears to me that the judgment appealed from is not a final judgment. The learned judges of the Court of Queen's Bench have so held, and their decision upon a question of procedure, such as this undoubtedly is, would be conclusive to me, even if my own individual opinion was different which, however, it is not. It is true that according to French procedure a judgment referring the estimation of damages to experts appears to be considered a definitive and not a mere preparatory or interlocutory judgment, but there are doubtless good reasons why the practice in the province of Quebec should be held otherwise as it always has been.

The supposed difficulty founded on the decision in

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Shaw v. *St. Louis* (1) and which, if well founded, would virtually deprive suitors of an appeal to this court in all cases where a preliminary judgment of reference, like that in the present case, might be pronounced, seems to me chimerical and not to follow from that decision. It is sufficient for me to say that it is entirely disposed of by the reasons given in the judgment of my brother Taschereau, in which I concur.

TASCHEREAU J.—This case is before us on a motion to quash the appeal. The respondent's action is one in damages for $5,000 for bodily injuries by him suffered, as he alleges, by the negligence of the company appellant. The Superior Court dismissed the action, but the Court of Review reversed that judgment, admitting the respondent's right of action, but referred the case back to the Superior Court to ascertain the amount of damages.

From this judgment of the Court of Review the company appealed to the Court of Queen's Bench, but that court on motion by the respondent, before any other proceeding on the appeal, quashed the writ of appeal on the ground that it had been issued *de plano* and not with the permission of the court, as required by Art. 1116 of the Code of Procedure.

The appeal here is from this judgment of the Court of Queen's Bench on that motion. The respondent moves to quash the appeal on two distinct grounds upon which the parties were heard :

1st. That the judgment appealed from is not a final judgment.

2nd. That the matter in controversy does not amount to $2,000. I think both of these grounds well founded.

The judgment of the Queen's Bench is purely and

(1) 8 Can. S.C.R. 385.

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simply on a question of procedure, which finally determines nothing but that the writ of appeal as issued was illegal and voidable. It does certainly put an end to that writ, but that is not sufficient to bring it within the interpretation of the words "final judgment" in sec. 28 of the Supreme and Exchequer Courts Act. If the Court of Queen's Bench had dismissed the respondent's motion instead of granting it the respondent could have appealed to this court, yet the judgment would not have put an end to his motion. To give to the words "final judgment" in the Supreme Court Act the wide interpretation contended for at the argument by the appellant here in answer to the respondent's motion, would be to render appealable all judgments of the Court of Queen's Bench by which a motion or any proceeding in that court would be dismissed or finally disposed of. We cannot give that construction to these words. The judgment quashing the writ of appeal, on an interlocutory proceeding, though final as to that appeal is an interlocutory judgment in the cause. The appellant argued, referring to *Shaw* v. *St. Louis* (1), that he might eventually find himself precluded from appealing to the court. Whether that is so or not, a point which of course we have not to determine here, that will be simply because the statute does not provide for an appeal in such a case. In that case of *Shaw* v. *St. Louis* (1), speaking for the court, I cautiously refrained from expressing any opinion on the point whether Shaw, in that case, could have appealed to this court from the judgment of 1880; and Mr. Justice Fournier, I am sure, though he expressed an opinion on it, did not intend to give a decision not necessary for the determination of that case.

The appellant's attempt to establish by the decision of this court in that case of *Shaw* v. *St. Louis* (1) that the

(1) 8 Can. S.C.R. 385.

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judgment of the Court of Review in the present case was not an interlocutory but a final judgment cannot succeed. There is no analogy whatever between the two cases. The gist of our decision there was that a judgment of a court of appeal, *passée en force de chose jugée*, which is partly interlocutory and partly final, binds the Superior Court and the Court of Appeal itself, if the case comes up a second time, as to all of it that finally determined the issues between the parties or any of these issues, and we held the judgment in that case to have been partly a final judgment, though the case was referred to ascertain the amount the plaintiff was entitled to, but only in the sense that the maxim "*l'interlocutoire ne lie pas le juge*" did not apply to such a judgment. Here, we are asked to determine that the judgment of the Court of Review, certainly interlocutory for part, is not interlocutory in the sense given to this word in Art. 1116 of the Code of Procedure, a totally different question. Now we could not do so without unsettling a constant and long established jurisprudence in the province, a conclusion we could not come to, in any case, but with great hesitation and particularly so where on a question of practice and procedure, as we have often said, as a general rule we cannot interfere. This Art. 1116 C. C. P., moreover, as I read it, to express my own opinion on it, must apply to others than mere *jugements préparatoires ou d'instruction*, as it extends in express words to cases where the judgment in part decides the issue, or orders the doing of anything which cannot be remedied by the final judgment. In *Shaw* v. *St. Louis* (1) in express terms, referring to the case of *Wardle* v. *Bethune* (2) I refrained from expressing any opinion on the question as to what class of judgments Art. 1116 of the Code of Procedure applied.

(1) 8 Can. S. C. R. 385.

(2) 6 L. C. Jur. 220.

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The second ground against the appeal is also well taken. It is now a settled point that upon an appeal to this court by the defendant the amount awarded by the judgment appealed from, and not the amount demanded by the declaration, is to be considered as the matter in controversy under sec. 29 of the Supreme and Exchequer Courts Act, where the jurisdiction of the court depends upon the amount. Now, here the defendants, appellants, have not yet been condemned to any sum or amount whatever. How can it be said that the matter in controversy now amounts to $2,000? The plaintiff's demand, so far as the amount goes, is in abeyance. The defendants, appellants, may eventually be condemned to $500 or $1,000 only. This court has no jurisdiction in a case of the kind, where the amount in controversy, upon an appeal by the defendant, is not yet established.

To refer again to *Shaw* v. *St. Louis* (1) it must be remembered that, at that time, the jurisprudence of the court was that the amount demanded was the amount in controversy on the appeal to this court.

GWYNNE J.—I rest my judgment simply upon the point that the Court of Appeal in the province of Quebec, from whose judgment the present appeal is taken, in substance and effect merely quashed the appeal *de plano* as an irregular procedure according to the practice of the court of the province of Quebec, and did not render any judgment either approving or disapproving the judgment of the Court of Revision upon the point raised and argued before it. I desire to reserve my opinion upon the question raised as to there not being in the present case the sum of $2,000 in controversy so as to warrant an appeal to this court, until a case arises which must necessarily be tested and determined upon that question.

(1) 8 Can. S. C. R. 385.

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Where judgment has been rendered in favor of a plantiff for a sum awarded by a judge or jury, the amount so awarded is the amount in controversy regulating the right of appeal to this court; but where a plaintiff brings an action claiming in his statement of claim, say $5,000 or any sum exceeding $2,000, and a final judgment on the merits is rendered for the defendant in the Superior Court of the province of Quebec, which judgment is reversed by the Court of Revision whose judgment is sustained by the Court of Appeal in that province upon an appeal duly instituted, then in such a case the defendant's right of appeal against the judgment reversing the final judgment in his favor must, in my opinion, (as at present advised) be regulated, so far as the amount in controversy is concerned, by the amount claimed in the statement of claim,—the plaintiff insisting on his right to recover that amount, and the defendant denying any such right,—otherwise the result, in my judgment as at present advised, would be absurd, namely, that a defendant has no right of appeal to this court in a case where he is not liable to any judgment being rendered against him; but here the Court of Appeal in the province of Quebec reverses a final judgment in his favor upon the merits, and erroneously remits the case to be tried over again, or to have damages assessed against him in the Superior Court. The case of *Allan* v. *Pratt* (1), in the Privy Council is, in my opinion, no authority for any such conclusion.

PATTERSON J.—Concurred with Taschereau J.

Appeal quashed with costs.

Solicitors for appellants: *Abbotts, Campbell & Meredith.*

Solicitors for respondent: *Archambault & Pellissier.*

(1) 13 App. Cas. 780.

CANADIAN PACIFIC RAILWAY COMPANY *et al.* (DEFENDANTS)..... } APLELLANTS;

AND

THE WESTERN UNION TELEGRAPH COMPANY (PLAINTIFF) } RESPONDENT.

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*May 8,9,10.
June 14.

ON APPEAL FROM THE SUPREME COURT IN EQUITY OF NEW BRUNSWICK.

Foreign corporation—Telegraph company—Doing business in Canada—Exclusive right—Contract for—Restraint of trade—Public interest.

In 1869 the E. & N. A. Ry. Co. owning the road from St. John, N.B. westward to the United States boundary, made an agreement with the W. U. Tel. Co. giving the latter the exclusive right for 99 years to construct and operate a line of telegraph over its road. In 1876 a mortgage on the road was foreclosed and the road itself sold under decree of the Equity Court of New Brunswick to the St. J. &. M. Ry. Co., which company, in 1883, leased it to the N.B. Ry. Co. for a term of 999 years. The telegraph line was constructed by the W. U. Tel. Co. under the said agreement, and has been continued ever since without any new agreement being made with the St. J. & M. Ry. Co. or the N.B. Ry. Co. The W. U. Tel. Co. is an American company, incorporated by the State of New York, for the purpose of constructing and operating telegraph lines in the State. Its charter neither allows it to engage, or prohibits it from engaging, in business outside of the State.

In 1888 the C.P. Ry. Co. completed a road from Montreal to St. John, a portion of it having running powers over the line of the N.B. Ry. Co., on which the W.U. Tel. Co. had constructed its telegraph line. The N.B. Ry. Co. having given permission to the C.P.R. to construct another telegraph line over the same road, the W.U. Tel. Co. applied for and obtained an injunction to prevent its being built. On appeal to the Supreme Court of Canada from the decree of the Equity Court granting the injunction—

Held, 1. That the agreement made in 1869 between the E. & N. A. Ry. Co. is binding on the present owners of the road.

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

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2. That the contract made with the W.U. Tel. Co. was consistent with the purposes of its incorporation, and not prohibited by its charter nor by the local laws of New Brunswick, and its right to enter into such a contract and carry on the business provided for thereby is a right recognized by the comity of nations.
3. The exclusive right granted to the W.U. Tel. Co. does not avoid the contract as being against public policy, nor as being a contract in restraint of trade.

Held, per Gwynne J. dissenting, that the comity of nations does not require the courts of this country to enforce, in favor of a foreign corporation, a contract depriving a railway company in Canada of the right to permit a domestic corporation, created for the purpose of erecting telegraph lines in the Dominion, to erect such a line upon its land, and depriving it of the right to construct a telegraph line upon its own land.

APPEAL by consent from the judgment of a judge of the Supreme Court of New Brunswick, sitting in equity, making perpetual an injunction restraining the defendants from erecting telegraph poles on the line of the New Brunswick Railway, between Vanceboro', in the State of Maine, and the City of St. John, N.B.

This road was originally built and operated by the European and North American Railway Company for extension from St. John, N.B., westward, and an agreement was entered into in 1869 between that company and the respondents, the Western Union Telegraph Co., by which the latter company was granted the exclusive right for 99 years to erect and maintain one or more lines of telegraph upon the said line of railway, and upon the lands of the said railway company, with all the necessary powers and privileges to the telegraph company, their successors and assigns, to enable them to construct and maintain such lines.

This road is now known as the St. John and Maine Railway, and is now under lease to the appellants, the New Brunswick Railway Co. No new agreement has ever been made between the Western Union Tele-

graph Co. and the New Brunswick Railway Co., in respect to the telegraph lines over the said road, although agreements have been made similar to the above with the New Brunswick Railway Co. in regard to its own road, and with other railway companies in New Brunswick. The Western Union has continued to operate the telegraph lines over the road in question under the original agreement.

In 1888 the Canadian Pacific Railway Co. undertook the construction of a line of telegraph between Montreal and St. John, N.B., which they wished to place over the line of the St. John and Maine but on the opposite side of the track from that of the Western Union. The latter company then applied for and obtained a perpetual injunction restraining the Canadian Pacific from building the said line, as being a violation of their exclusive right to operate telegraph lines over the said road. From the judgment granting such injunction this appeal was brought.

The principal grounds upon which the appellants claimed that the injunction should be set aside are, that the Western Union is incorporated in the State of New York, for the purpose of building and operating telegraph lines in the State or beyond it, and this gives them no power to operate such lines in Canada; if it does it should be shown that the preliminary proceedings were taken to build such road as directed by the charter; that by its charter the European and North American Railway Co. had no power to enter into the agreement; and that the agreement is void as being in restraint of trade and against public policy.

Weldon Q.C. and *Ferguson* for the appellants. A foreign corporation cannot invoke the aid of the courts in Canada to have an agreement enforced giving them a monopoly of a particular business in any part of the

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Dominion. *Bank of Augusta* v. *Earle* (1); *Bank of Montreal* v. *D. Bethune* (2); *Howe Machine Co.* v. *Walker* (3); *Newby* v. *Colt's Patent Firearms Co.* (4); Lindley on Joint Stock Companies (5); Westlake on Private International Law (6).

By their charter the plaintiffs could not operate outside of the State of New York; acts of 1851, 1853, 1855; acts of 1862, ch. 425; acts of 1870, ch. 568.

The original company had no power to enter into the agreement. *Coleman* v. *Eastern Counties Railway Company* (7); *Mulliner* v. *Midland Railway Company* (8); *Winch* v. *Birkenhead & Lancashire Railway Co.* (9); *Great Northern Railway Company* v. *Eastern Counties Railway Company* (10); *Hinckley* v. *Gildersleeve* (11); *Attorney General* v. *International Bridge Company* (12).

These cases show that a corporation cannot divest itself of a franchise obtained from the Legislature without the sanction of the same Legislature.

The following cases, also, were cited—*London & North Western Railway Company* v. *Evershead* (13); *Marriott* v. *London & South Western Railway Company* (14); *Thomas* v *Railroad Co.* (15); *Ashbury Railway Co.* v. *Riche* (16); *Western Union Telegraph Co.* v. *Chicago & Paducah Railway Co.* (17).

Barker Q.C. and *Cameron* Q.C. for respondents. A court of equity will enforce an agreement such as the one in question. *Brogden* v. *Metropolitan Ry. Co.* (18); *Duke of Devonshire* v. *Eglin* (19); *Somerset Canal Company* v. *Harcourt* (20).

(1) 13 Peters 587.
(2) 4 U. C. O. S. 341.
(3) 35 U. C. Q. B. 37.
(4) L. R. 7 Q. B. 293.
(5) 4 Ed. vol. 2, p. 1484.
(6) Par. 286–7.
(7) 10 Beav. 14.
(8) 11 Ch. D. 619.
(9) 5 De G. & Sm. 572.
(10) 9 Hare 306.
(11) 19 Gr. 215.
(12) 20 Gr. 34.
(13) 3 App. Cas. 1035.
(14) 1 C. B. N. S. 499.
(15) 101 U. S. R. 71.
(16) L. R. 7 H. L. 653.
(17) 86 Ill. 246.
(18) 2 App. Cas. 666.
(19) 14 Beav. 530.
(20) 24 Beav. 571.

As to the status of the plaintiffs as a foreign corporation see *Runyan* v. *Lessee of Coster* (1); *Cowell* v. *Springs Co.* (2); *Christian Union* v. *Fount* (3).

The original agreement was within the powers of the Railway Company. Redfield on Railways (4); Morawitz on Corporations (5); Story on Contracts (6).

The following authorities also were referred to:— *The Shrewsbury &c. Ry. Co.* v. *London & North Western Ry. Co.* (7); *Hare* v. *London & North Western Railway Company* (8).

Weldon Q.C. in reply.

SIR W. J. RITCHIE C.J. — The comity of nations distinctly recognises the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burthens imposed by the laws enforced therein; for there can be no doubt that a state may prohibit foreign corporations from transacting any business whatever, or it may permit them to do so upon such proper terms and conditions as it may prescribe. With respect to foreign corporations generally, the statutes of New Brunswick provide for the service of process on foreign corporations carrying on business by agents in the Province "whose chief place of business is without the limits of the Province, and if established by the law of any other place," and provision is made for the proof of contracts by foreign corporations.

(1) 14 Peters 131.
(2) 100 U. S. R. 59.
(3) 101 U. S. R. 352.
(4) 6 Ed. Vol. 1 p. 265.
(5) 2 Ed. secs. 958, *et seq.*
(6) 5 Ed. sec. 674.
(7) 17 Q. B. 652.
(8) 2 J. & H. 80.

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Chapter 46 sec. 16, C. S. N. B., provides:

16. Upon any trial of any cause before any court in this Province, wherein it shall be necessary to prove any contract or engagement entered into by any foreign corporation, or body politic or corporate, doing business in this Province, or which contract or engagement may have been entered into in this Province, it shall only be necessary for the party or parties, plaintiff or plaintiffs, defendant or defendants, seeking to prove such contract or engagement, or to put the same in evidence before such court, *to prove that such contract or engagement has been duly signed or issued by the accredited agent or officer of such foreign corporation*, body politic or corporate, in this Province; and upon such proof having been given, the court before which such trial shall be had shall admit the same in evidence, and the same shall be considered as duly proved without any other or further evidence of the execution thereof by such foreign corporation, body politic or corporate, any law, usage or custom to the contrary notwithstanding.

Provision is also made for the assessment of foreign corporations by chapter 100, sec. 27:

27. A foreign corporation having a place of business within the Province shall be assessed in respect of its personal property within the Province, and upon its income derived from its business within the Province, in the same manner as to personal property as a joint stock or other corporation referred to in the twenth-fourth section, and as to its income as an inhabitant of the Province.

In the absence, as in this case, of any prohibition or restriction, no intention to exclude can be presumed. Why then should the telegraph company be prohibited from carrying on business in New Brunswick? The establishment of a telegraphic line through New Brunswick connected with a telegraphic system of the United States is neither repugnant to the policy nor prejudicial to the interests of the Province of New Brunswick or the Dominion On the contrary, the legislation in New Brunswick shows that such was a matter of great importance and highly desirable. We find in the recital of the act incorporating the New Brunswick Electric Telegraph Company, which it was admitted on the argument is now leased to the Wes-

tern Union Telegraph Company, the following language used (1) :—

Whereas the speedy transmission of information by means of electric telegraph has become a matter of great importance, and it is highly desirable that lines of communication by such telegraph should be established in this Province, and that the same should be connected with other lines in Nova Scotia, Canada and the United States; and whereas certain persons are desirous of being incorporated for the purpose of establishing such communication * * *

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It cannot be denied that the Western Union Telegraph Co., before and at the time when this contract was entered into, was carrying on its business as a telegraphic company in New Brunswick and Nova Scotia without let or hindrance, and was dealing, and being dealt with, from and before that time, as an existing company for certainly more than twenty years, and was recognized and taxed by the local authorities as a corporation legally carrying on such business under the provincial act to which I have referred; and the right of this company to exist and do business in this Dominion may be said to have been recognized by the Dominion Government, as it is well known, though not, I think, in proof in this case, that all the telegraphic business over the Intercolonial Railway, through New Brunswick and Nova Scotia, is done through the instrumentality of special agents over the line of this company, the Intercolonial having no telegraph line of its own.

There was no law in force to prohibit or restrain this company from doing business in New Brunswick and Nova Scotia, and it is obvious they were doing business consistent with their charter, and by which they were, by their charter and the law of New York, authorized to transact and do outside of the State in which they were incorporated. The provision of the

(1) Local and Provincial Statutes of N. B., 11 V. c. 55, passed 30 Mar. 1848.

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act of the State of New York in evidence in this case is as follows :

CHAPTER 425.

An Act further to amend the Act entitled "An Act to provide for the Incorporation and Regulation of Telegraph Companies," passed 12th of April, eighteen hundred and forty-eight.

Passed April 22nd, 1862 ; three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows :—

Section 1.—Any telegraph company which is duly incorporated under, and in pursuance of the Act entitled "An Act to provide for the Incorporation and Regulation of Telegraph Companies," passed 12th April, eighteen hundred and forty-eight [which the present plaintiffs were], may construct, own, use and maintain any line or lines of electric telegraph not described in their original certificate of organization, whether wholly within, or wholly or partly beyond, the limits of this State, and may join with any other corporation or association in constructing, leasing, owning, using or maintaining such line or lines, and may own and hold any interest in such line or lines, and may become lessees of any such line or lines, upon the terms and conditions and subject to the liabilities prescribed in said act, so far as such provisions are applicable to the construction, using, maintaining, owning or holding of telegraph lines, or any interest therein pursuant to the provisions of this act.

The Western Extension Railway Company, with whom the original contract was made, having been empowered to construct and operate a line of railway from St. John to the boundary line of the United States, had as incident to and necessary for the safe operation of the road the right and power to erect a line of telegraph, and had the exclusive right to do so along their line of railway, and having themselves such exclusive right I can see no reason why they should not confer such exclusive right and the other privileges mentioned in the contract whereby they were enabled to secure ample telegraphic services for the operation of the road, instead of erecting and equipping a line of telegraph for themselves. I think the contract was, at the time it was made, most fair and

reasonable, and this, to my mind, is conclusively shown by the fact that it has existed and been acted on from 23rd February, 1869, to the present day, notwithstanding the road was for two years in the hands of and operated by receivers appointed by the court in certain foreclosure proceedings taken for the foreclosure of a mortgage made by the Western Extension Railway Co., and after the sale in the foreclosure suit on the 23rd August, 1878, to the St. John & Maine Railway Co., and by that company from the 31st August, 1878, to the 21st May, 1883, and the New Brunswick Railway Co. leased it and have since that time operated the railway to the present day, during all which time the agreement has never been inpugned or questioned, but, on the contrary, during the whole period has been recognized and acted upon by all parties; that the New Brunswick Railway Company deemed an agreement of this character reasonable, is shown by the fact that they made a similar agreement with the respondent in reference to a line of railway built by them; and after they had leased the line from Vanceboro' to Fairville they made another agreement with the respondents, dated 25th June, 1884, by which further concessions were given and the previous agreements were ratified, and not the slightest difficulty appears to have arisen, nor a suggestion made, that the agreement was not reasonable, valid and binding until the Canadian Pacific Ry. Co., who are not shown to have any interest in the line from Vanceboro' to St. John, along which they desire to erect a telegraph line, appear for the first time to have put forward the claim which is now contended for.

If, then, there is a reasonable valid contract, what is more just and proper than that the plaintiffs should be protected in their rights under it, and above all from the acts and doings of the Canadian Pacific Ry. Co.,

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who have shown no right whatever to interfere with either the railway or the line of telegraph erected thereon?

The main objections seem to be that this agreement creates a monopoly, and its provisions are against public policy?

If the railway company deem it in the interest of the company that there should be only one telegraphic line on the right of way, why may they not give an exclusive right to a telegraph company to occupy the right of way, and prohibit other telegraph companies from interfering with such exclusive right except by consent of the company to whom the exclusive right is given? If the railway company can give a right at all, why may it not give an exclusive right? A telegraph along the line may be, and no doubt is, indispensable for the safe working of the road. The financial condition of the railway company may render it impossible for it to work the telegraph line for itself, and assuming that no telegraph company could be found who would erect it without the exclusive privilege, and so be protected against competition, what law is there to prevent the railway company from securing the line by granting such an exclusive privilege? I know of none. I fail entirely to see how this creates a monopoly and prevents competition. It certainly prevents the erection of another telegraphic line on the roadway, but how does it prevent the erection of a line on either side of the track, if the parties can secure the privilege of doing so over adjoining lands? If they cannot do so, in what different position are they than if the railway had erected this line for their own exclusive use, and refused to grant the privilege to any other person or company?

That there was no monopoly is abundantly clear from the fact proved on the trial and admitted on the

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argument, that the Canadian Pacific Ry. Co. have, at this very time, built their line on the railway track, having their poles just beside the right of way between Vanceboro' and St. John, ranging in places from twenty-five to thirty feet from the track.

The argument that an exclusive right to erect a telegraphic line along the line of railway is against public policy would seem to rest necessarily on this delusion, if it has any foundation at all, that the public generally have a right to erect telegraphic lines along and on the line of railroad, and therefore their exclusion of any such right may cripple and prevent competition, and tend to create monopolies ; but as the public have clearly no such rights, and as there is nothing to prevent telegraph lines from being erected contiguous to and parallel with railroads, provided the right of way is secure, how can it be said to cripple and prevent competition and tend to create monopolies any more than the erection of the line of telegraph unconnected with the railway by private individuals for their own exclusive use on a line they have procured at their own expense would prevent competition, on a line parallel or contiguous thereto ? What is there to prevent the erection of a dozen different lines by a dozen different companies for their own exclusive use respectively ?

When the Western Extension Railway Company and the New Brunswick Railway Company recognized the Western Union as a telegraph company existing and doing business as a telegraph company in New Brunswick, and induced the Western Union, under a valid agreement, to erect this line on the line of railway, are they or any parties claiming under them, who have recognised and acted on the agreement, in a position to repudiate the contract as void and, as a consequence, appropriate the line to their own use, on

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the ground that a foreign corporation, specially incorporated for the purpose of constructing telegraph lines, has no power whatever to construct or manage telegraph lines within any part of the Dominion of Canada; and, therefore, such a corporation cannot enforce any contract for the purpose of acquiring an interest in the Dominion, in order to enable it to construct or manage telegraph lines therein. Assuming that the Western Extension had itself built the telegraph line and leased it to the Western Union, would the New Brunswick Railway Company not be bound by such a contract, and could not such a contract be enforced in the courts of this Dominion? Or suppose that the New Brunswick Railway Company had sold the line so erected by it to the Western Union and received the price, could the New Brunswick Railway Company keep the line and the money on the ground that the Western Union had no right to own or maintain a telegraph line in New Brunswick, and could not enforce any contract for acquiring such an interest?

I should not have discussed the matter at this length but that I understand it to be the view of one of the members of this court that a foreign corporation cannot own or maintain telegraph lines in this Dominion, and that all contracts in reference thereto are void. But the defendants do not venture to go so far as this. Their contention, as I understand it, is not that the Western Union and the railway company cannot contract, but that in a contract between them they cannot agree to prohibit and exclude all other lines from the track of the roadway. By paragraph seven of the appellant's factum this is very clearly put forward :

7. It must be remembered that this controversy does not arise upon any effort to displace the lines of wire established by the Western Union, nor in any way to interfere with the free use and enjoyment

thereof, but arises upon an interference, as is claimed, with its exclusive right to occupy the entire right of way—that is, that no other telegraph company, except by its consent, shall ever use or occupy any part of the right of way.

But would it not be most unreasonable and unjust that having contracted for a good and valuable consideration to give the Western Union an exclusive right over the railway they could, in defiance of their contract, ignore the exclusive right, and grant similar privileges to other companies? What could be more natural and reasonable than that the railway company and the Western Union, dealing legally with the subject matter of the contract, the former should debar themselves from the right practically to destroy the subject matter dealt with by the contract, and that the latter should insist, as an essential condition of entering into the contract, that the exclusive use of the road should be secured to them?

The following authorities, both English and American, may be cited to establish the principles before indicate

The law of Domicile. A. V. Dicey. Rule 42, p. 198;

The existence of a foreign corporation duly created under the law of a foreign country is recognized by our courts.

The principle is now well established that a corporation duly created in one country is recognized as a corporation by other States. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals.

Story on Conflict of Laws, ch. 4, sec. 106:

The power of a corporation to act in a foreign country depends both on the law of the country where it was created and on the law of the country where it assumes to act. It has only such powers as were given to it by the authority which created it. It cannot do any act by virtue of those powers in any country where the laws forbid it so to act. It follows that every country may impose conditions and restrictions upon foreign corporations which transact business within its limits. *Liverpool Insurance Co.* v. *Massachusetts* (1); *Attorney General* v. *Bay State Mining Co.* (2); *Bard* v. *Poole* (3); *Phoenix Insurance Co.* v. *Commonwealth* (4)

(1) 10 Wall. 566.
(2) 99 Mass. 148.
(3) 12 N. Y. 495.
(4) 5 Bush (Ky.) 68.

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Erichsen v. *Last* (1).

Lindley J.—I am of opinion that the company are liable to pay income-tax upon the annual profits which they receive in this country. It appears that the company is a foreign corporation resident in Denmark, and having its principal place of business there, so that in one sense in which the phrase is used it would be held "to carry on its business" abroad. It further appears that the company have three marine cables in connection with this country, and that these cables are brought into communication with telegraph wires belonging to the post office at Aberdeen and Newcastle.

Watkin Williams J.—I am of the same opinion. This company, although not resident in England, nevertheless carry on trade here. They make their contracts and demand and receive payments in respect of them in this country. The ownership of the different cables by which they forward their messages is for the present purpose immaterial, for the only matter for our consideration is whether they carry on business in this country.

In *Merrick* v. *Van Santvoord* (2) Porter J. says :—

We think the policy of this State is in harmony with that of the country, and that it would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights, and exclude others from the enjoyment here of privileges which have always been accorded to us abroad.

* * * * *

The rules of comity are subject to local modification by the law-making power; but until so modified, they have the controlling force of legal obligation. The franchises and immunities which they secure it is the duty of the courts to respect, until the sovereign sees fit to deny them. The rights of a foreign suitor or defendant, so far as they are unabridged by legislation, are as imperative and absolute as those of the citizen. These rules have their place in every system of jurisprudence.

* * * * *

The rights of foreign corporations have been protected in the English courts on the same general principle of public law. *The Nabob of Carnatic* v. *The East India Co.* (3); *The Dutch West India Company* v. *Henriquez* (4); *The King of Spain* v. *Hullett* (5). We had the benefit of the rule in the suit instituted in Great Britain, in the case of *The United States* v. *Smithson's Executors.* Indeed, the law of international comity in the interest of commerce, which has so long prevailed in

(1) 7 Q. B. D. 16.
(2) 34 N. Y. 216.
(3) 1 Ves. 371.
(4) 1 Strange 612.
(5) 2 Bligh's N.S. 31.

that country, is recognised in a provision of Magna Charta, which elicited from Montesquieu the encomium, that the English have made the protection of foreign merchants one of the articles of their own liberty.

* * * * *

It was a suggestion in answer to the argument that, inasmuch as the corporation could not migrate, it could neither contract nor sue, except in the State of its domicile. He admitted its incapacity to migrate, but held that it did not follow that its existence there would not be recognised elsewhere. It was accordingly adjudged, in that case, that contracts made in the city of Mobile, between citizens of Alabama and a Georgia bank, a Pennsylvania bank and a Louisiana railroad company respectively, could be enforced under the general law of comity as contracts within the scope of their respective charters, though unauthorised by the State of Alabama. The Chief Justice expressed the opinion that no valid reason can be assigned for refusing to give effect to the contracts of foreign corporations "when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person, created by the laws of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognising the law of another State" (1). The concession referred to was reiterated in the same sense by Judge Thompson, and in answer to a similar argument in the case of *Runyan* v. *Costar*, in which it was adjudged that a coal company organised in New York, for the purpose of mining coal in Pennsylvania, could exercise its franchise by purchasing and holding lands in the latter State; and though, by a statute of Pennsylvania, lands so acquired were subject to forfeiture, the title of the company was good so long as the forfeiture was not enforced by the State. (2).

In *Bank of Augusta* v. *Earle* (3) Taney C.J. says:—

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible

(1) 13 Peters 519, 588–590. (2) 14 Peters 122, 129.
(3) 13 Peters' 588.

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and intangible; yet it is a person for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *The United States* v *Amedy* (1) and in *Beaston* v. *The Farmer's Bank of Delaware* (2). Now, natural persons through the intervention of agents are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

* * * * *

Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the laws of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts since the case *Henriquez* v *The Dutch West India Company*, decided in 1729 (3). And it is a matter of history, which this court are bound to notice, that corporations, created in this country, have been in the open practice, for many years past, of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts by any Court or any jurist.

* * * * *

It has been decided in many of the State courts, we believe in all of them where the question has arisen, that the corporation of one State may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same

(1) 11 Wheat. 412. (2) 12 Peters 135.
(3) 2 Ld. Raym. 1532.

sovereignty—where the last mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time, to accept something else in satisfaction, to give him a release, and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue that the latter could not be effectually exercised if the former were denied.

* * * * *

We think it is well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union.

* * * * *

But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.

* * * * *

We have already shown that the comity of suit brings with it the comity of contract, and where the one is expressly adopted by its courts. the other must also be presumed according to the usages of nations, unless the contrary can be shown.

The result, then, is that the comity of nations and the express legislation of New Brunswick recognizes the right of foreign corporations to carry on business and make contracts outside the country where incorporated, consistent with the purposes of its incorporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business is carried on: but the plaintiffs have shown the business to be carried on consistent with their charter, and expressly permitted to be carried on outside the limits of the place of incorporation; that the contract in this case is binding on the New Brunswick Railway Company, does not create a monopoly, and is not contrary to public policy or the laws of New

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Brunswick or the Dominion, nor inconsistent therewith; that the carrying on business in New Brunswick and Nova Scotia has been recognized alike by the local and Dominion authorities, by the local by assessing the company for the business so carried on, and by the executive of the Dominion in contracting and dealing with the company for the use of their line over the Intercolonial Railway, which is an historical fact; that the New Brunswick Railway Company are estopped, by acquiesence and adoption of the contract, with full knowledge, from raising any objection to the contract, and the Canadian Pacific Ry. Co. have shown no *locus standi* to interfere with it; and I feel constrained to add that I think it would be a sad scandal on the administration of justice if this court should hold that this company, having brought in an enormous amount of capital in this Dominion, and without let or hindrance, in peace and quietness, carried on the large business, in fact, the entire electric telegraph business between St. John and the United States for a period of twenty years, and throughout all portions of New Brunswick and Nova Scotia for still longer periods, constructing, leasing, managing telegraphic lines, and otherwise carrying on the telegraph business for which they were incorporated, and having paid their scot and lot with others doing business in the Dominion, should now be told, at this day, that they had no rights the courts of this Dominion would recognize and protect.

FOURNIER J. concurred.

TASCHEREAU J.—I concur with the Chief Justice that this appeal should be dismissed. I do not think that the appellants have the right to put in view, in this case, the right of the respondent to enter into the contract in question.

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Gwynne J.

GWYNNE J.—I am of opinion that this appeal should be allowed with costs, upon the simple ground that an act of incorporation passed by the Legislature of a foreign country, incorporating certain persons for the purpose of constructing telegraph lines in the foreign country, confers no power whatever upon the corporation to construct a telegraph line within any part of this Dominion, and that therefore the foreign corporation cannot enforce any contract for the purpose of acquiring an interest in land in the Dominion in order to enable it to construct and maintain a telegraph line therein. The right of foreign corporations to bring actions in the courts of this country is recognized only upon the principle of the comity of nations, and that comity does not require the courts of this country to enforce a contract of the nature of that before us in the present case, which purports to deprive the New Brunswick Railway Company of the right to permit a domestic corporation created for erecting telegraph lines in the Dominion, to erect such a line upon any of its land, and to deprive the railway company of the power of constructing a telegraph line upon their own land. Such a power vested in a foreign corporation might be very prejudicial to the interests of the Dominion and its inhabitants, and of the railway companies, nationally and commercially, and should not therefore be recognized or given efficacy in the courts of this country.

For these reasons, I am of opinion that the appeal should be allowed.

PATTERSON J. concurred in the judgments dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellants : *Weldon & McLean.*

Solicitors for respondents : *Barker & Belyea.*

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*Dec. 13,14.
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*Jan. 22.

CHARLES WESLEY COLTER (RESPONDENT IN COURT BELOW.)..... } APPELLANT;

AND

WILLIAM GLENN (PETITIONER).....RESPONDENT;

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE FALCONBRIDGE, SITTING FOR THE TRIAL OF THE HALDIMAND CONTROVERTED ELECTION.

Controverted election—Bribery by agent—Proof of agency—Proof by conduct.

An election petition charged that H., an agent of the candidate whose election was attacked, corruptly offered and paid $5 to induce a voter to refrain from voting. The evidence showed that H. was in the habit of assisting this particular voter, and that being told by the voter that he contemplated going away from home on a visit a few days before the election, and being away on election day, H. promised him $5 towards paying his expenses. Shortly after the voter went to the house of H. to borrow a coat for his journey, and H's. brother gave him $5. He went away and was absent on election day.

Held, that the offer and payment of the $5 formed one transaction and constituted a corrupt practice under the Election Act.

At the election in question there was no formal organization of the party supporting the appellant. The County Reform Association had been disbanded and the minutes, regularly kept since 1882, destroyed, as were the rough minutes of every meeting of a convention of the party held since that date. In lieu of local committees vice-presidents were appointed for the respective townships, and on the approach of a contest the vice-presidents called a meeting of the county association, composed of all reformers in the riding, to go over the lists and do all the necessary work of the election.

The evidence of H's. agency relied on by the petitioner was, that he had always been a reformer, had been active for two elections, had attended one important committee meeting and been recognized

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

by the vice-president of his township as an active supporter of the appellant, and that he acted as scrutineer at the polls in the election in question. The trial judge held that all these elements combined, in view of the state of affairs regarding organization, were sufficient to constitute H. an agent of the appellant. On appeal to the Supreme Court of Canada—

Held, Ritchie C. J. dissenting, and Taschereau J. hesitating, that the circumstances proved justified the trial judge in holding the agency of H. established.

APPEAL from the judgment of Mr. Justice Falconbridge on the trial of an election petition against the return of the appellant as a member of the House of Commons on an election in the County of Haldimand, whereby the appellant was unseated for bribery by an agent.

The election in question was held on Jan. 30th, 1889, and resulted in the return of the appellant. A petition was filed against such return which was tried before Mr. Justice Falconbridge in Sept., 1889, with the result that the appellant was unseated for bribery committed by one Haslett, his agent. He appealed to the Supreme Court of Canada from such decision.

The appeal was limited to two charges of bribery, numbered 8 and 82 in the petition. It is only necessary to refer to No. 82, which was follows:

"That on or about the day of the election in question, at the Township of Walpole, James Haslett, of Walpole, an agent of the respondent, offered and promised to pay and did pay to Henry Bridges, of the same place, a voter in the said electoral district, the sum of $5 to induce him, the said Bridges, to refrain from voting in the election at question or to vote thereat for the said respondent."

The respondent filed a cross-appeal submitting the other charges in the petition which were not passed upon by the trial judge as grounds for retaining the judgment appealed from.

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The following were the circumstances of the act of bribery charged in the petition as above set out: The voter, Bridges, was a conservative and a neighbor of the alleged briber Haslett who was in the habit of assisting him occasionally with loans and gifts of money and in other ways. A few days before the election he was at Haslett's house, having gone there to borrow a flail, and in conversation with Haslett told him that he contemplated going to Petrolia on a visit for two or three weeks. Haslett then said that if $5 would be of use to him he could have it. In giving evidence at the trial, Bridges swore that he demurred to taking the money as it might make trouble about the election. This Haslett denied. Shortly after this Bridges again went to Haslett's house to borrow a coat for his journey to Petrolia and while there a younger brother of Haslett gave him $5. He went to Petrolia and was away on polling day. The trial judge found that this payment to Bridges was a corrupt act on the part of Haslett.

To show that Haslett was an agent of the reform candidate at this election the petitioner produced evidence of his having been active on behalf of the same candidate at a former election in Haldimand; of his having attended a committee meeting during the election in question in this case and gone over the list of voters; and of his acting as scrutineer at this present election. It was also shown that there was no organization of the reform party in connection with this contest but that the candidate had addressed a mass meeting of the electors and stated that he wished them all to do their best to secure his return This, it was contended, made every reformer in the riding an agent under the act.

The evidence relating to the conduct of Haslett as given by himself at the trial is as follows:

Q. Your politics, I believe, are pretty well pronounced, are they not? A. I do not know as they are.

Q. Have you any doubt about your own politics? A. Oh, I have no doubt about it.

Q. Well, why do you cast doubt upon it? A. Well, I never took any very active part in politics.

Q. But which side are you on? A. I am a Reformer.

Q. Always been on the Reform side? A. Yes.

Q. Did you say you never took any active part? A. Well, I did not until these last two elections.

Q. These last two elections you have taken an active part? A. Well, I did not do but very little.

Q. You contrast these last two with the former elections. What have you been doing at these last two elections more than you did at the former elections? A. I do not know that I did anything particularly, any more than go out to vote.

Q. But didn't you go out to vote at the former elections? A. Yes.

Q. Well, you did take an active part in the last two elections? A. Very little.

Q. What do you mean by taking an active part? A. Going out and getting in voters.

Q. You then went into the meeting? A. Yes.

Q. And were there how long? A. Perhaps an hour or so.

Q. While the talking was going on about the list? A. Yes.

Q. Did you take any part in it? A. Nothing more than looking at the list and seeing who were the outside men.

Q. Discussing whether they would come and so on? A. Yes.

Q. Did you do any of that? A. No.

Q. Well, what did you do these last two elections? A. Well, this last election I was the agent for Mr. Colter.

He explains in his cross-examination that this was as an agent appointed to attend as a scrutineer at the poll, and again he says: "I am not positive who asked me to act."

Q. Were you appointed at a meeting? A. No, I was not.

Q. Well, if you were not appointed at a meeting you can tell me who asked you to act? A. Well, I think maybe it was Mr. Noble.

Q. And who was Mr. Noble? A. A tailor.

Q. Mr. Noble is the tailor of Jarvis? A. One of the tailors.

Q. What part does Mr. Noble take in politics? A. Well, he was not in our polling division this last election.

Q. James Noble, do you mean? A. Yes.

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Q. He is the vice-president, is he? A. Well, I think he is for the township.

Q. Who is the chairman for the polling division? A. I do not know if there is one.

Q. You have been showing some interest in this election? A. Well, I do not know as I took any great interest in it.

Q. Did you canvass any person? A. I did not.

Q. Did you attend any political meetings? A. Yes, I attended political meetings in Jarvis.

Q. How many? A. I was at Mr. Colter's and at Dr. Montague's.

Q. Anybody else's? A. No, that is all there were.

Q. Did you attend any private meetings? A. No.

Q. You know what a committee meeting is, do you? A. Yes.

Q. Were you ever at a committee meeting? A. I have been at them.

Q. Where? A. In Jarvis.

Q. And when? A. Well, there was a committee meeting before the election.

Q. Where was that held? A. I think it was held in the hotel.

Q. Whose hotel? A. Hanrahan's.

Q. And you attended that? A. Yes.

Q. Did you attend only one meeting? A. I think that is all.

Q. How long was that before the election? A. Probably a couple of weeks.

Q. Who gave you notice to attend that meeting? A. Well, there was nobody gave notice.

Q. How did you know about it? A. Well, we just met one another on the street.

Q. Who was it told you? A. I could not say.

Q. Was it a day meeting or a night meeting? A. Night.

Q. What was done at that meeting? A. Just to look up the outside vote, and see about getting it in.

Q. What else? What about the doubtful vote at home? A. There was nothing particular done about that.

Q. You went over the voters' list, I suppose? A. Yes.

Q. And were doubtful men assigned to different parties to be seen after? A. No.

Q. For what purpose then, did you go over the list? A. Just to kind of see, to have an idea, how many men were outside the county.

Q. That was the particular business? A. Yes.

Q. And how long did the meeting last? A. Perhaps an hour.

Q. And who was the chairman? A. I do not think there was a chairman.

Q. Who was the secretary? A. There was no secretary.

Q. Who had the voters' list? A. I think I had the voters' list.

Q. Who gave you the voters' list? You were the secretary? A. I guess not.

On his cross-examination he says:

Q. You told Mr. McCarthy you had been appointed Mr. Colter's agent in this last election? A. Yes.

Q. In what way, agent for what? A. To act as scrutineer at the polling division of Jarvis.

Q. Is that all you mean? A. Yes.

Q. You mean the appointment in writing, I suppose? A. No, just to check the votes as they came in.

Q. Did you get a written appointment? Or do you remember? A. I do not remember.

Q. Did you see Mr. Colter personally about it? A. No.

Q. Did you see him at all during the campaign, except at the public meetings? A. No.

Q. Have any private talk with him at all? A. Never had a private talk with Mr. Colter.

Q. And you were asked by somebody or other to be scrutineer? A. Yes.

Q. You had once been scrutineer before at a previous election? A. No, I had been appointed but they got some other man in my place and I did not act.

Q. At this time you did act? A. Yes.

Q. As inside scrutineer? A. Yes.

Q. Some party asked you to act? A. Yes.

Q. Mr. Noble asked you to act, and you did act? A. I am not sure whether it was Mr. Noble or not.

Q. Besides this was there any other work that you did at this election? A. No.

Q. How was it you happened to go to this meeting? A. I was just told of it on the street and went.

Q. Then you did not go from your own home intending to go to the meeting? A. No.

The judgment at the trial on the question of Haslett's agency was as follows:

"It remains to consider the question of agency. In dealing with this, regard must be had to the plan adopted by the party supporting Mr. Colter for carrying on the last campaign. Mr. Parker, Dr. Harrison and other leading reformers stated with some com-

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placency that having discovered at the trial of an election petition in the county in October, 1887, that the conservative organization was superior to theirs they set out to remodel their own system so as to make it at least equal to that of their opponents. To this end they at once after said trial destroyed all the minutes of the county reform association which had been regularly kept since 1882; they immediately after every meeting of a convention and association destroyed the rough minutes of that meeting; and they substituted for the appointment of local committees vice-presidents (generally one for each township) which vice-presidents were named by the townships at meetings of the county association. There was no shibboleth or test for membership of the association, save only sympathising with the reform cause. The association was supposed to comprehend in its ranks every reformer within the limits Conventions are held by the township associations sending delegates."

"When a contest is approaching the vice-president or chairman of the township is instructed to call a meeting of the township association, to go over the lists, to appoint agents at the polls, bring out voters, look after absentees, &c., and the work is carried on by the aid of reformers who choose to assist."

"Shortly what is meant is this:—

(1.) As to the proceedings of the party as an organization there are to be no records except such as repose in frail human memory. As Mr. Parker puts it, 'so that no information could be got out of me except what I could remember.'"

"(2) The abolition of local committees was apparently intended to serve a double purpose, viz., to lessen the apparent number of persons for whose acts the candidate might be responsible and to render it more difficult to ascertain afterwards who those persons were"

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"It may be that in their avowed desire to improve on the tactics of their opponents, the friends of the respondent have increased instead of diminishing the number of his agents. Certain it is that the law of agency in election matters is so elastic that the courts will be astute to meet and cope with the ever-increasing ingenuity of some of those who manage election contests."

"The evidence of agency relied on by the petitioner is that Haslett has always been a reformer, has been active for two elections, that he was a scrutineer at the polls and that he attended one important committee meeting. No one of these elements is perhaps sufficient by itself to constitute Haslett an agent, but all taken together, with the recognition conferred on him by his local chief, Mr. Noble, in view of the state of affairs as regards organization which I have above alluded to, constrain me to hold him to have been an agent of the candidate."

"I therefore find that James Haslett, an agent of the respondent, committed the corrupt practice charged, without the knowledge or consent of the respondent."

Aylesworth for the appellant. The act of Haslett was not a corrupt act under the circumstances proved. *Somerville* v. *Laflamme* (1); *Windsor Election Case* (2); *Kingston Election Case* (3).

A loan to induce a voter to be absent on election day has been held not a corrupt act. *East Elgin Election Case* (4).

The agency of Haslett was not proved. *Berthier Election Case* (5)

McCarthy Q.C. for the respondent, cited the judgment of Mr. Justice Patterson in *Muskoka and Parry Sound*

(1) 2 Can. S.C.R. 216.
(2) 31 L.T.N.S. 135.
(3) Hodgin's El. Cas. 625.
(4) 1 Ont. El. Cas. 475.
(5) 9 Can. S.C.R. 102.

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Case (1); *West Simcoe Case* (2); Leigh & Le Marchant (3); Mattinson & MacKaskie (4); *Limerick Case* (5); *Waterford Case* (6).

Sir W. J. RITCHIE C. J.—Mr. Colter, the appellant, was nominated a candidate at a meeting of delegates selected from different parts of the riding of persons holding reform principles, and accepted the nomination. The regular nomination of candidates took place on the 23rd of January, 1889; the polling was on the 30th January, 1889; the trial of this petition was on the 3rd and 10th of September, 1889.

Two charges of corrupt practices by agents were considered by the learned judge who tried the petition and found to have been established. The first, which we have now to deal, with was alleged to have been by James Haslett to the effect that he offered and promised to pay one Henry Bridges $5 to induce him to refrain from voting at the said election. I think the petitioner has established that such an offer and payment were made; that the offer and the payment formed in fact one transaction though the offer and the payment were made at different times; and that a corrupt practice was thereby committed. The only question then that remains to be determined is as to the agency of Haslett. This agency should be established beyond all reasonable doubt to the satisfaction of the learned judge and the burthen of the proof of agency was, in my opinion, clearly on the petitioner. As to the necessity of making a case out beyond all reasonable doubt ample authority is to be found.

In *The Westminster Election Case* (7) Mr. Baron Martin says—

(1) 1 Ont. El. Cas. 203.
(2) 1 Ont. El. Cas. 159-161.
(3) 4 Ed., p. 75.
(4) P. 108.
(5) 1 O'M. & H. 260.
(6) 2 O'M. & H. 2
(7) 1 O'M. & H. 95.

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But I think I am justified, when I am about to apply such a law, in requiring to be satisfied beyond all reasonable doubt that the act of bribery was done, and that unless the proof is strong and cogent—I should say very strong and very cogent—it ought not to affect the seat of an honest and well-intentioned man by the act of a third person.

In *The Taunton Case* (1) Mr. Justice Grove says—

To use the language of that eminent judge, the late Mr. Justice Willes, 'No amount of evidence ought to induce a judicial tribunal to act upon mere suspicion or to imagine the existence of evidence which might have been given by the petitioner, but which he has not thought it to his interest actually to bring forward, and to act upon that evidence and not upon the evidence which really has been brought forward. The second principle, which is more particularly applicable to circumstantial evidence, is this, that the circumstances to establish the affirmative of a proposition, where circumstantial evidence is relied upon, must be all, such of them as are believed, circumstances consistent with the affirmative, and that there must be some one or more circumstances believed by the tribunal, if you are dealing with a criminal case, inconsistent with any reasonable theory of innocence, and when you are dealing with a civil case (otherwise expressed though probably the result is for the most part the same), proving the probability of the affirmative to be so much stronger than that of the negative that a reasonable mind would adopt the affirmative in preference to the negative.'

* * * * * * * *

In *The Sligo Case* (2); Mr. Justice Keogh, as to the law of agency, said:—

An observation was made by the counsel for the respondent that the evidence ought to be strong—very strong, clear and conclusive—of agency before a judge allows himself to attach the penalties of the Corrupt Practices Prevention Act, 1854, to any individual. I agree to that.

As to the nature of the evidence necessary to establish a charge of bribery, Judge O'Brien says in the *Londonderry Case* (3);

The charge of bribery, whether by a candidate or his agent, is one which should be established by clear and satisfactory evidence. The consequences resulting from such a charge being established are very serious. In the first place it avoids the election, and in the recent

(1) 2 O'M. & H. 74. (2) 1 O'M. & H. 301.
(3) 1 O'M. & H. 279.

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trial of the Warrington election petition, Baron Martin is reported to have said that he agreed with what had been said by Mr. Justice Willes at Lichfield, that before a judge upset a election, he ought to be satisfied beyond all doubt that the election was altogether void.

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Accepting then these cases as truly expounding the law as to the amount of evidence required to sustain charges of bribery and agency, let us consider how far the case has been made out beyond all reasonable doubt.

The learned judge after stating the plan adopted by the party supporting Mr. Colter for carrying on the campaign, says (1):

The learned judge thus says it is by combining the three considerations, viz: the organization of the association, the attendance at the meeting of the appellant and the appointment of the appellant as scrutineer that the agency is made out, and that neither alone would establish it.

Now, as to Haslett's having acted as scrutineer, whether appointed to that position by the appellant, or acting as such at the request of Noble, a vice-president for the township of Walpole, or as one of the electors under section 36 of the Election Act, R.S.C. ch. 8, by no means clearly appears, but assuming that he was duly appointed to and acted in that capacity at the poll in the interests of the appellant, did this constitute him an agent of the appellant generally and make the appellant liable for his acts committed before such appointment? I think not, and I think the learned judge should not have considered that appointment as an element in determining the question of agency. The appointment of such an agent as provided for by R.S.C. ch. 8, secs. 36 and 38, has clearly reference only to the proceedings on polling day and, therefore, the whole question of agency must turn on the fact of

(1) See pp. 177–8.

Haslett having attended a so called committee meeting shortly before this election, probably a couple of weeks, and of being a person professing reform principles. Would these two establish the agency? As I read the judgment they would not, for the learned judge says, "It is the combination of the three that does it not the combination of any two." But I think the question of being a reformer must be also eliminated. Colter did not accept the nomination directly from the reformers of Haldimand, for it is abundantly clear that those who nominated Colter were not the body of the reformers of the Riding but a select body of delegates, of whom Haslett was not one, who when appointed were no doubt from, but entirely independent of, the whole body of persons holding the views of the reformers. Having accepted such nomination I cannot think he thereby made all persons in the constituency professing reform principles his agents. In this case it is not necessary to enquire how far or to what extent, if any, he made the members of that convention his agents; it is for the purposes of this case sufficient to say that he did not, apart from them, make all or any of the persons professing reform principles his agents unless he or his agents gave them the authority to act for him or recognised their right to do so by adopting their acts. This leaves then only the attendance at the meeting which the learned judge admits would not alone be sufficient to establish the agency. Had he not attended this meeting I can see no pretence whatever for the contention that he was an agent of Mr. Colter. It does not appear that this meeting was held at the instance or even with the knowledge of the candidates, or was called by or held at the instance of any person having the charge or management of the election or in any way authorized to call or hold it.

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There was no evidence that Haslett canvassed; on the contrary he distinctly swears that he did not; nor is there any evidence that he did any other act directly or indirectly touching the election save and except attending the meeting in question, of which he swears he had only accidentally heard, and going through the list in order to ascertain who the absent voters were. This is the account he gives of the meeting and he is the only witness who speaks of it. (His Lordship here read the evidence of Haslett which will be found in the statement of facts at p. 174.)

Haslett does not appear to have been in any way entrusted with any duty whatever of managing or influencing the election, or procuring Mr. Colter's return, and he does not appear ever to have spoken to Mr. Colter; in fact he says he never spoke to him. There is not a tittle of evidence that Colter by any act or deed in any way authorized Haslett to act for him or recognized him as his agent directly or indirectly, or ratified or adopted any of his acts. Haslett appears to have been simply a volunteer, not selected by Colter or any person having any authority in connection with the management and conduct of the election, nor does he appear to have been in any way in the counsels of those conducting the election.

I think the cases clearly establish that there must be an appointment as agent or an acting in the business of the election with the knowledge and consent of the candidate or of some person duly authorized to give him power to act in the election or some adoption or ratification of his acts by the candidate or his duly authorized agent, or such on acting in the business of the election with the knowledge of the candidate or his agent from which authority to act can be inferred, all of which appear to me to be entirely wanting in this case.

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The Westminster Case (1) Mr. Baron Martin—

I have said, and the other judges have said, that bribing by one of his committee would affect the candidate; but by a 'committee' I meant a number of persons, comparatively few (of course in a county that extends over a considerable district it would be larger), who were entrusted by the candidate with the work of carrying out his election, in whom he put faith and trust, and who, in fact, were his agents for the purpose of carrying it out; but I have never supposed, nor do I believe that either Mr. Justice Blackburn or Mr. Justice Willes ever considered, that where a number of people (600 or 700) choose to call themselves 'a committee' thereupon they become 'agents' of the candidate for the purpose of making him responsible for an illegal act done by one of them. I think it is a conclusion that could not be borne out by common sense. The committee-man whom I mean, and whom I would hold the respondent to be responsible for, is a committee man in the ordinary intelligible sense of the word, that is to say, a person in whom faith is put by the candidate, and for whose acts therefore he is responsible.

How can it be said in this case that Haslett was such a committee man?

In *The Londonderry Case* (2) Mr. Justice O'Brien, on the question of agency, said—

It is clear (as held in the Windsor Case) that the employment of a man as messenger is not sufficient to constitute him an agent. Mr. Justice Willes in that case, in those accurate terms for which he is remarkable, said, 'I have stated that authority to canvass—and I purposely used the word authority and not employment, because I meant the observation to apply to persons authorized to canvass, whether paid or not for their services—would, in my opinion, constitute an agent.' I cannot concur in the opinion that any supporter of a candidate who chooses to ask others for their votes and to make speeches in his favor, can force himself upon the candidate as an agent, or that a candidate should be held responsible for the acts of one from whom he actually endeavors to disassociate himself.

In *The Taunton Case* (3) Mr. Justice Grove says—

So far as regards the present case, I am of opinion that to establish agency for which the candidate would be responsible he must be proved by himself or by his authorized agent to have employed the persons whose conduct is impugned to act on his behalf, or to have to some extent put himself in their hands, or to have made common cause

(1) 1 O'M. & H. 92. (2) 1 O'M & H. 278.
(3) 2 O'M. & H. 74.

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with them for the purpose of promoting his election. To what extent such relation may be sufficient to fix the candidate must, it seems to me, be a question of degree and evidence to be judged of by the election petition tribunal. Mere non-interference with persons who, feeling interested in the success of the candidate, may act in support of his canvass, is not sufficient, in my judgment, to saddle the candidate with any unlawful act of theirs of which the tribunal is satisfied he or his authorized agent is ignorant. It would be vain to attempt an exhaustive definition, and possibly exception may be taken to the approximate limitation which I have endeavored to express.

In *The Windsor Case* (1) the report states that—

In the course of the case, it was proved that one Pantling wrote a letter to a voter named Juniper, who at the time of the election was away from the Borough, offering to pay his travelling expenses if he would come and vote; and it was admitted that this offer, if made by the respondent or an agent of his, would have unseated him. The only evidence of Pantling being an agent was that he was a member of a committee which had been formed for the purpose of promoting the respondent's election. It was not proved who put him on the committee, or how he got there, what his duties were, or what he did; but his own statement as to this was that he understood that his duties were to do the best he could for the respondent.

Mr. Baron Bramwell, in his judgment, said as to this:

I am invited to believe that in some way or other a man who has given no description of himself, except that he was on a committee, was an agent so that his act in writing this letter should unseat the respondent. It appears to me really impossible to hold that he was an agent. I think that according to the authorities, and according to the good sense of the matter, he was not an agent. He has given us no account of how he came to write this letter to Juniper, he having told him where he had gone to and having told him to write upon the occasion of an election. I cannot help agreeing with Mr. Giffard that if we were to hold this man to be an agent it would make the law of agency as applicable to candidates positively hateful and ludicrous.

The Stroud Case (2). Mr. Baron Pigott:—

It is clear that a person is not to be made an agent of the sitting member by his merely acting, that is not enough; he must act in promotion of the election, and he must have authority, or there must be circumstances from which we can infer authority.

Borough of Dungannon (3). Baron Fitzgerald:—

(1) 2 O'M. & H. 88. (2) 3 O'M. & H. 11.
(2) 3 O'M. & H. 101.

I think it must be made out that a party, before he is chargeable as an agent, has been entrusted in some way or other by the candidate with some material part of the business of the election which ordinarily is performed, or is supposed to be performed, by the candidate himself. Whether it has any distinct reference to canvassing or anything of that kind, appears to me to be immaterial, but in some sense or another he must be considered as entrusted by the candidate with the performance of some part of the business of the election, which properly belongs to the candidate himself, though he is unable to perform it in many cases without somebody to aid him. But that entrusting may be made out not merely by an express appointment to the performance of some material duty in reference to the election, but may be made out by implication. The circumstances of each case may differ, but that implication ordinarily must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election. If that part of the business of an election which ordinarily and properly belongs to the candidate himself be done to the knowledge of the candidate by some other person, it appears to me that that other person is an agent of the candidate, and the candidate is responsible for any corrupt act done by that person.

How can it be said that anything that was done by Haslett was done with the knowledge of Mr. Colter, or that anything was entrusted to Haslett by Colter or by any person authorized to give Haslett authority to act?

Can it be said that the agency has been established in this case beyond all reasonable doubt? The most that can be said, I think, is that there are suspicious circumstances in relation to the bribery but it is clear that these suspicions will not do.

Under these circumstances I am of opinion the agency was not established and therefore as to this charge the appeal should be allowed.

STRONG J.—For the reasons stated by Mr. Justice Falconbridge in giving judgment in the court below on charge No. 82 (which I adopt in their entirety, and to which I have nothing to add) I am of opinion that this appeal should be dismissed with costs.

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TASCHEREAU J.—On that charge 82, "that on or about the day of election in question James Haslett, an agent of the respondent (now appellant), offered and promised to pay and did pay to Henry Brydges, a voter in the same electoral district, the sum of $5 to induce him, the said Brydges, to refrain from voting at the election in question, or to vote thereat for the said respondent (now appellant)," the evidence is conclusive. I need not repeat the facts of the case. They, it seems to me, show a clear and unmistakable act of corrupt practice, and we are, I believe, unanimous on this point.

I have great doubts, however, on the question of Haslett's agency. I am free to say that had I presided at the trial, with the evidence on record, as I read it, I would have hesitated before finding agency. On the other hand, I am impressed here with the grave and obvious reasons which, in cases of this kind more particularly, should restrain an appellate court from interfering with the finding of the judge at the trial. I have not succeeded yet in bringing my mind to that point of certainty always required to reverse. At the same time, I see the difficulty of finding on this record clear evidence of agency. I cannot say that I have made up my mind one way or the other, and if my conclusions were to affect the result of the judgment I would require more time to consider the point. But as a majority of the court have come to a final determination of the matter it would have been utterly useless for me to delay the judgment, a course I would not, it seems to me, have been justified in taking in a case of this nature, where public interests require a judgment as speedily as possible.

GWYNNE J.—The questions in this case are purely questions of fact and I cannot say that the conclusions

upon them, which have been arrived at by the learned judge who tried the election petition, are clearly erroneous. I cannot say that the evidence clearly does not justify the conclusion that the organization of the reform association in the County of Haldimand, as detailed in the evidence, (and of which organization the appellant was an approving member, and whose nomination as a candidate, which was offered to him by a convention of the association in pursuance of the scheme of organization, he accepted), was devised for the purpose of giving to a candidate brought forward by a convention of the association the benefits of the organization as a general committee of the candidate without exposing him to the risk attending his nomination of committeemen to manage and conduct the election for him Nor can I say that the evidence clearly does not justify the conclusion that the attendance by James Haslett at the committee meeting held at Hanrahan's Hotel was an act done by him in perfect accordance with the scheme of organization, and in pursuance of it in the character of a committeeman acting in the interest of and as an agent of the candidate, just as if he had been appointed by the candidate himself. If these conclusions do not appear to my mind to be clearly erroneous I must adhere to the rule laid down by this court, and acted upon in several cases, and among these in the *Bellechasse Election Case* (1) and decline to interfere and to reverse as beyond all doubt erroneous the judgment of the learned judge who tried the case upon mere questions of fact. I entirely concur in the observation of the learned judge, to the effect that the courts should be astute to meet and cope with the ever-increasing ingenuity of those who manage election contests. This timely suggestion thus thrown out appears to me to be a mild criticism

(1) 5 Can. S. C. R. 91.

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by no means inappropriate to the evidence given in this case, as to the origin, the object and the *modus operandi* of the organization in the County of Haldimand. The appeal must, in my opinion, be dismissed with costs, and the result communicated in the ordinary way to the Speaker of the House of Commons.

PATTERSON J.—The decision that the act of bribery which constituted charge 82 was committed by Haslett was so amply sustained by the reported evidence that, after hearing from Mr. Aylesworth all that could be urged against the view taken by the learned judge, we did not think it necessary to hear Mr. McCarthy on that subject.

On the question as to Haslett's agency there is more to be said on both sides but no sufficient reason has, in my judgment, been shewn for interfering with the finding of the learned judge who presided at the trial and who heard and saw the witnesses.

The rule which will be found a safe one to bear in mind in approaching a question of election agency was well stated many years ago by Mr. Justice Grove in the *Wakefield Case* (1), in language which has lost none of its force, and is still applicable to contests like the present. After speaking of the impossibility of laying down such definitions and limits as shall meet every case he said:

> It is therefore well that it should be understood that it rests with the judge, not misapplying or straining the law, but applying the principles of the law to changed states of facts, to form his opinion as to whether there has or has not been what constitutes agency in these election matters. It is well that the public should know that they cannot evade the difficulty by merely getting, as they suppose, out of the technical meaning of certain words and phrases.

Many reported cases illustrate the application of the general principles referred to widely differing

(1) 2 O'M. & H. 100.

states of facts, cases found in the English reports and in those of our own provinces, as well as some which have been before this court. It would not serve any useful purpose to refer to them in detail, while to do so might perhaps tend to suggest the erroneous idea that the doctrine was in some way limited to facts like those on which the decisions turned.

This caution may not be unnecessary, especially when English cases are referred to. The principles acted on in those cases will be found to be wide enough and elastic enough to reach every variety of facts, yet under the system on which elections are conducted in this country facts may exist, and may be expected to exist, differing from those found in England much more than the facts of one English case will ordinarily differ from those in another English case. This difference is notably found in the relation of a candidate to his constituency, the mode of selecting the candidate, and the machinery for conducting the contest.

I have had occasion more than once to discuss the subject of election agency and to act upon my opinion. Amongst other cases there are three reported in the first volume of the Ontario Election Cases. I refer to portions of the judgments delivered by me in the *Prescott Case* (1); the *West Simcoe Case* (2); the *Muskoka Case* (3); repeating the caution that I do so for the enunciation of general principles, and not because of the facts appearing to be like those now before us, and referring to the reports in place of repeating what I then said.

When an election is approaching, the custom in the county of Haldimand is shown to be for a convention

(1) 1 Ont. El. Cas. 93-98. (2) 1 Ont. El. Cas. 146-8.
(3) 1 Ont. El. Cas. 202-6.

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of the reform association of the county to nominate a candidate.

Mr. Colter, the present appellant, was nominated for the election now in question, as he had been on more than one previous occasion, and he accepted the nomination.

There was, as there of necessity must have been, some understanding as to the mode in which the contest was to be carried on. Work had to be done. That is shown by the evidence, though proof of the fact was hardly needed. Who was to do the work? Was the candidate to do it himself personally or did he rely on the aid of others? The understanding on the subject may have been expressed or have been tacit. These contests were no new thing in the county. The association had been in operation for a number of years, and unless a change in the way of doing things was intended the plan of campaign would not be likely to be talked over at every nomination. The *modus operandi* was already established and sufficiently understood.

Mr. Parker, the secretary of the association, gives information as to the general character of the work to be done and the very active part taken by himself, not taken, as he tells us, by reason of any consultation with Mr. Colter or with other leading men, though he had frequent communication with Colter who would inquire how he was getting on and so forth. He was asked:

Q. What part was Mr. Colter taking in the contest? A. Conducting his meetings, I suppose; I never attended any of his meetings.

Q. You were seeing to the organization of the portion of the riding that you have spoken of? A. Yes.

Q. Then Mr. Colter, so far as you know, was attending the public meetings. And was he also looking after the organization? A. Not that I know of.

Q. Did he say that to you? A. No. I suppose he would get some person else to attend to the other portion of the riding, to do the work I was doing in the part I attended to.

There is abundant evidence, apart from the necessity of the case, that many persons must have been relied on by the candidate to do the work of seeing to get voters out and whatever else an organized canvas required. These persons, whoever they were, must be held to be the agents of the candidate.

Work had to be done. No means, apart from the organization of the association, were provided for doing it. The candidate was not doing it himself.

Mr. Colter was himself an active member of the association for six or seven years preceding 1886. Then he was nominated as candidate and went through two elections before the one now in contest under the auspices of the association. He was, therefore, familiar with the way in which things were done. The organization included local associations. There was one for the township of Walpole, which is the scene of charge 82. The associations comprise all the reformers of the locality, though only a few of them, according to Mr. Parker, usually take an active part.

Haslett had been active at the last two elections, though he modestly says he did but very little. That little, he says, was going out and getting in voters.

He afterwards said that it was only at the last election that he took an active part. One thing which he did was to attend a meeting held one night in the village where he lives.

Q. How long was that before the election? A. Probably a couple of weeks.

Q. Who gave you notice to attend that meeting? A. Well, there was nobody gave notice.

Q. How did you know about it? A. Well, we just met one another on the street.

Q. Who was it told you? A. I could not say.

Q. Was it a day meeting or a night meeting? A. Night.

Q. And was that the meeting when the affairs of the polling subdivison were arranged? A. No.

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Q. What was done at that meeting? A. Just to look up the outside vote and seeing about getting it in.

Q. What else? What about the doubtful vote at home? A. There was nothing particular done about that.

Q. You went over the voters' list, I suppose? A. Yes.

Q. And were doubtful men assigned to different parties to be seen after? A. No.

Q. For what purpose, then, did you go over the list? A. Just to kind of see; have an idea how many men were outside the county.

Q. That was the particular business? A. Yes.

Q. And how long did the meeting last? A. Perhaps an hour.

Q. And who was the chairman? A. I do not think there was a chairman.

Q. Who was the secretary? A. There was no secretary.

Q. Who had the voters' list? A. I think I had the voters' list.

Some interest and activity are implied by the incident of his being provided with the voters' list, which was of some use for the purposes of the meeting.

These questions and answers of Haslett have been pressed on the part of the appellant as proving that, a meeting having been called by some one, Haslett casually heard of it, and that his being there was so casual and unpremeditated as to have no significance on the question of his position in relation to the organized work of the election. It is possible that that is what the witness meant to convey by his answers, but it is not what he said. If we take the answers literally, as reported to us, they are consistent with the notion that Haslett may himself have arranged for the meeting and invited his neighbors, and that notion would not be discredited by the circumstance that Haslett was the man who had the voters' list at the meeting.

The want of written or formal notices of the meeting does not strike me as a circumstance of any importance as an indication of Haslett having heard only by chance of this meeting, particularly when it is remembered that the policy of the association, in which the tactics of another association on a different side of poli-

tics are said to have been adopted, was to have no written evidence to produce on an election trial. Obviously there was some sufficient notice to bring the men together whether Haslett gave the notice or received it. The evidence as we have it certainly does not, to my mind, account for his presence at the meeting in any way which weakens the effect, whatever the effect should properly be, of the fact of his attending the meeting with his voters' list and assisting at the business for which the meeting was convened.

It is not my purpose to go at greater length into an examination of the evidence, though I have not failed to consider it with care, because I do not understand it to be the duty of the court to deal with it as if trying the fact as a court of first instance. We have not to disturb the finding of the trial judge unless satisfied that his finding is wrong. It rested with him, as said by Mr. Justice Grove in the passage I have quoted, to form his opinion as to whether there had or had not been in the case of Haslett what constitutes election agency. I see no reason to impute to him, in connection with that enquiry, any misapplication or straining of the law of election agency, nor can I say he arrived at a wrong decision on the facts, although on the same evidence all persons might not arrive at the same conclusion.

In the short reference I have made to the evidence I have touched but slightly upon the fact, which to my mind is an important one and which distinguishes most elections in this country from most of those in England, that the candidate makes no provision for doing many things which we know from common knowledge must be done. The election is in fact less the business of the candidate than of the party organisation by which he is nominated.

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Nor have I placed any stress upon the appointment of Haslett is scrutineer at the last election. That, by itself, occurring as it did after the act of bribery, would not prove agency at an earlier period, or agency for any other purpose than the purpose specified in his appointment. At the same time it is a fact that may fairly be considered in connection with any part he may have taken in the election work. I mean work of a systematic kind, such as meeting to go over the voters' lists or the like, not merely advocating the candidate or the cause, like the person whose agency was in question in the *Prescott case* (1) to which I have already referred.

It is urged that the extension (as it is called) of the scope of election agency to include persons like Haslett exposes candidates to risk to an unreasonable extent. The result, if it follows, seems to be due to the footing upon which party organizations have placed these matters. I have nothing to do with the merits or defects of the system as a method of collecting the suffrages of the constituencies. It is not my province to discuss it from the standpoint of either logic or politics. What I am concerned with is to ascertain whether a person convicted of committing a corrupt act in the interest of a candidate has been properly held to come within the description of agent for the candidate. If I find that a candidate who takes the field as the nominee of a party that acts through an organized association, whether the organization is strict and formal, or loose and elastic, depends upon the efforts of the association to promote his election, or relies upon such efforts, I must, as I understand the principles of the law, hold all persons accredited by the association to be the agents of the candidate. Whether a particular

(1) 1 Ont. El. Cas. 95 *et seq.*

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individual does or does not come within the description is a question of fact.

I cannot say that I am impressed by the suggested danger of hardship to candidates or constituencies of letting the validity of an election be imperilled by the conduct of any one of so many people as may be election agents in a case like the present. The danger to the purity of election at which our legislation aims from holding a candidate free from risk from the corrupt acts of those on whom he relies for the conduct of his election, seems to be at least as great and as worthy of being guarded against.

I agree that we should dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for appellant: *A. K. Goodman.*

Solicitors for respondent: *McCarthy, Osler, Hoskin & Creelman.*

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WILLIAM PARTLO (PLAINTIFF).....APPELLANT;

AND

*Mar. 22.
*June 14.

THOMAS TODD AND MARTIN N. TODD (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trade mark—Infringment of—Effect of registration—Exclusive right of user—Property in descriptive words—Rectification of registry.

It is only a mark or symbol in which property can be acquired, and which will designate the article on which it is placed as the manufacture of the person claiming an exclusive right to its use, that can properly be registered as a trade mark under the Trade Mark and Design Act, 1879 (42 V. c. 22.)

A person accused of infringing a registered trade mark may show that it was in common use before such registration and, therefore, could not properly be registered, notwithstanding the provision in s. 8 of the act that the person registering shall have the exclusive right to use the same to designate articles manufactured by him. Taschereau J. dissenting.

Where the statute prescribes no means for rectification of a trade mark improperly registered the courts may afford relief by way of defence to an action for infringement.

Per Gwynne J.—Property cannot be acquired in marks, &c., known to a particular trade as designating quality merely and not, in themselves, indicating that the goods to which they are affixed are the manufacture of a particular person. Nor can property be acquired in an ordinary English word expressive of quality merely though it might be in a foreign word or word of a dead language.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Mr. Justice Proudfoot (2), by which the plaintiff's action was dismissed.

This was a suit for damages for infringing the plaintiff's trade mark, and claiming an injunction. The

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

(1) 14 Ont. App. R. 444. (2) 12 O. R. 171.

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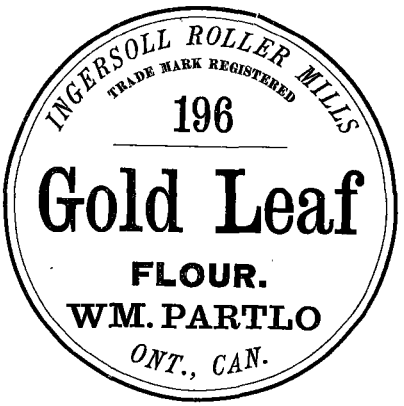
trade mark was used by the plaintiff to designate a particular brand of flour manufactured and sold by him and consisted of a label on the barrels of flour as follows :—



The defendants were commission merchants and had been selling the plaintiff's flour on commission. They was desirous of securing the sole right to sell the plaintiff's flour in the Maritime Provinces which the plaintiff refused to give them, and they thereupon purchased flour from other millers and branded it as follows :—

and sold it with such brand on the barrel. This, the

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plaintiff claims, is an infringement of his trade mark for which he brings this suit.

The defendants claim that their brand is sufficiently unlike that of the plaintiff to prevent purchasers from being deceived, and also deny the plaintiff's right to the exclusive use of such trade mark alleging user of the words "gold leaf" on barrels of flour by other parties.

The cause was heard before Mr. Justice Proudfoot who upheld the defendants' contention as to user and dismissed the suit. The Court of Appeal affirmed this judgment. The plaintiff then appealed to the Supreme Court of Canada.

W. Cassels Q.C. and *Hegler* for the appellant.

The plaintiff rests his claim for an injunction on two grounds. First, that under the statute he has an exclusive right to the use of this trade mark and—secondly, if not, the evidence is not sufficient to destroy his right to such use.

If the plaintiff has a right to the use of the trade mark the infringement by the defendants is clear on the evidence.

The statute gives plaintiff an exclusive right to the use of the trade mark which right is absolute until the registry is cancelled.

Somerville v. *Schembri* (1) and *Barsalou* v. *Darling* (2) were cited.

McCarthy Q. C. and *Moss* Q. C. for respondents. *Re Edwards' Trade Mark* (3) and *McAndrew* v. *Bassett* (4), show that there must be property in the words constituting the trade mark to make the trade mark itself property.

Unless such property is acquired there can be no exclusive right of user conferred by registration.

(1) 12 App. Cas. 457.
(2) 9 Can. S.C.R. 677.
(3) 30 Ch. D. 454.
(4) 4 DeG. J. & S. 380.

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SIR W. J. RITCHIE C.J.—The defendants are simply in this position as public millers that they have the right to use this term "Gold Leaf" as a brand for patent flour of a particular description, as being "common to the trade," that is in common use by the trade, as a distinctive term applied to flour of a particular description; a common property which any one in the trade had the right to use; a common mark and *publici juris*; in other words, that it had been public property; no doubt under sec. 7 the certificate signed by the Minister or his deputy to the effect that the said trade mark had been duly registered in accordance with the provisions of this section and stating the date, month and year of the entering thereof in the register shall be received in all courts of law or equity in Canada as *primâ facie* evidence of the facts therein alleged withont proof; but does not the very fact of the act making this certificate *primâ facie* evidence show that this *primâ facie* case may be rebutted by showing that there has been no legal registration? And this section 8, which is relied on as giving an absolute exclusive use, must be read in connection with the other provisions of the statute and it is quite clear that this exclusive use is only to attach when there is a legal registration If, then, there has been no legal registration there can be no exclusive use.

Then the question arises: Had the plaintiff any right to register this mark as his trade mark? For whom is this register to be kept? As to this the first section of the act is most explicit.

The 1st sect. of the 42 Vic. ch. 22, declares that a registry of trade marks shall be kept in the office of the Minister of Agriculture in which any proprietor of a trade mark may have the same registered by complying with the provisions of this act. Does not this clearly show that the applicant must be the proprietor

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of the trade mark he desires to have registered ? And sec. 6, which provides that the proprietor of a trade mark may have it registered, requires a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof.

When the applicant under the provisions of the 6th sec. signs a declaration that the same was not in use to his knowledge by any other person, he no doubt makes out a *primâ facie* case for registration; but does not this inferentially involve that if he did know it was in use by any other person it would not be proper that it should be registered ? And does it not necessarily follow that though he may not have known that it was so in use, if in reality, as was shown in this case, it was and had been for years in common use as a mark or brand in the very article in reference to which he desires to claim an exclusive use, upon principle should he be permitted to have that exclusive use when, if the fact as it existed had been brought to the knowledge of the officer, the registration would have been refused, or to claim that simply because he had obtained an improper registration he had obtained an indefeasible exclusive right to its use ? I think the learned judge was right in receiving evidence to show the invalidity of the plaintiff's alleged trade mark.

It is not the registration that makes the party proprietor of a trade mark; he must be proprietor before he can register; so we see by sec. 17 "a suit may be maintained by any proprietor of a trade mark against any person using his registered trade mark, or any fraudulent imitation thereof, &c."

Now, when did this plaintiff become proprietor of this trade mark, to entitle him to register it and to claim under such registration an absolute indefeasible ex-

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clusive right to it for all time to come as is claimed in this case ?

I think the term " proprietor of a trade mark " means a person who has appropriated and acquired a right to the exclusive use of the mark, and where a party has a trade mark he can institute no proceedings to prevent its infringement until and unless such trade mark is registered in pursuance of this act; but this by no means implies that one man can copy and register a trade mark belonging to another or a trade mark in common use.

McAndrew v. *Bassett*. Lord Westbury (1) :—

The essential qualities for constituting that property (property in a trade mark) probably would be found to be no other than these : first, that the mark has been applied by the plaintiff's properly, (that is to say) that they have not copied any other any other person's mark, and that the mark does not involve any false representation ; secondly, that ihe article so marked is actually a vendible article in the market ; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description.

I think the evidence in this case shows that the name Gold Leaf had before the registration of plaintiff become public property, and that the plaintiff had not any exclusive right to the use of that term, a term which had been for years before such registration a well-known and convenient name or brand by which the article of patent flour was defined.

I think the learned judge was right in following the authority of *McCall* v. *Theal* (2) which, in my opinion, was rightly decided.

As a public user of this trade mark previous to plaintiff's registration, defendants were not shut out from continuing its use it by reason of plaintiff's registration.

I think the defendants had a perfect right to question the validity of plaintiff's claim to this trade mark, and

(1) 33 L.J. Ch. 567 ; 4 DeG. J. & S. 384. (2) 28 Grant 48.

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to show that his *ex parte* proceedings in obtaining registration thereof were not justified. This is not a case between two conflicting claimants, each claiming to be entitled to this trade mark or brand, but by one of the public who claims, not the exclusive right to the trade mark but the right to use the mark or brand as being the common property of the public at large engaged in the manufacture or sale of patent flour.

The following cases show that the defendant plainly had this right :

In re J. B. Palmer's application (1).

Jessel M. R.—It is clear that the 3rd section does not expressly say that the application under the 5th section shall not be made after five years, but the respondents contend that the words which I am about to read impliedly have that effect. " The registration of a person as first proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of such trade mark, and shall after the expiration of five years from the date of such registration be conclusive evidence of his right to the exclusive use of such trade mark." Now what is the meaning of the words, " the registration of a person as first proprietor of a trade mark ?" Does it mean his registration as proprietor of " a mark," or does it mean what it says, his registration as proprietor of " a trade mark ?" I think the literal meaning is to be preferred. It is true that the registrar ought not to enter anything which is not capable of being a trade mark but he may be deceived, and that is alleged to be the case here.

* * * * *

It appears to me that reason and convenience are entirely in favor of the construction which we put upon this act of Parliament. I am glad to see (though I do not know whether it ought to influence us either way) that the well known writer, Mr. Sebastian, takes the same view of the act, so that our decision will be no surprise to anyone. He says (Sebastian on Trade Marks) (2) : "The registration as a trade mark of a name of this description will somewhat complicate the question, as such registration is to be *primâ facie* evidence, and after five years registration conclusive evidence, of the right of the registered owner to the exclusive use of such trade mark, but this enactment does not preclude a defence on the ground that the name so registered

(1) 21 Ch. D. 57. (2) P. 33.

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is in fact no trade mark, and was registered or is continued on the register by error." So Mr. Bryce says (Bryce on the Trade Marks Registration Acts, 1875 and 1876) (1) : "After the expiry of five years the right of the registered proprietor becomes absolute, and cannot be disputed by a defendant. But it is apprehended that after, no less than before, the expiry of the five years, the right of the registered proprietor may be contested on any ground going to show that the mark ought never to have been registered at all, for example, that it is not a trade mark within the meaning of the act." So both writers on the subject take the same view, and go so far as to think that if a description which is not capable of being a trade mark is registered, a person who sells goods under that description, and is sued, may defend himself on the ground that it is not a trade mark, though it has been five years on the register. The question has not been argued before us, and we have not to decide it, but I am not by any means prepared to say that those distinguished writers are wrong, because the act only says that after five years the person who has registered a trade mark shall be entitled to the trade mark, but does not say that the mark as registered shall be deemed to be a trade mark.

Lindley L.J.—After careful examination of sections 3, 5 and 10, of the Trade Marks Registration Act, 1875, I am satisfied that a mark which is not a trade mark, and which therefore ought never to have been registered, does not become a trade mark by being on the register for five years.

In re Lloyd & Son's Trade Mark. Lloyd v. *Bottomley* (2).

CHITTY J.—On the evidence it is plain that this so-called mark was common in the trade, inasmuch as it was in use by more than three persons before the application to register, and, if so, it was not a distinctive mark or device, but was common in the trade, inasmuch as it had been publicly used by more than three persons on the same or a similar description before the application to register. If so, goods having this mark on them had no distinctive mark such as was required by section 74. In *re Hyde & Co's. trade mark* (3), the late Master of the Rolls on motion ordered the registration which had been made to be struck out. Reliance, however, has been placed on the argument on behalf of the respondents on an observation of the Master of the Rolls, which was to be found in the shorthand notes of the argument in that case. But the Master of the Rolls reconsidered the matter afterwards in *re J. B. Palmer's application*, (4) and at best it was a mere dictum. I hold, therefore, that it is competent to the applicants, notwithstanding

(1) Page 3.
(2) 27 Ch. D. 650.
(3) 7 Ch. D. 724.
(4) 21 Ch. D. 47.

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the expiration of five years from the date of registration, to show that the thing called a trade mark is not a trade mark at all, and ought not to have been registered.

In re Wragg's Trade Mark (1).

The registration of a mark as a trade mark and the lapse of five years do not, under sec. 76 of the Trade Marks Act, 1883, confer on the person who has made the registration an indefeasible title to the use of the mark as a trade mark if, by reason of its being at the time of registration in common use in the trade, it ought not to have been registered.

PEARSON J.—I come, therefore, to the conclusion that in the year 1876, when Mr Wragg registered this device, it was a device which had been publicly used up to that time by more than three persons, "and had become common to the trade in such goods."

But it is said that, because Mr. Wragg has registered, he has got an exclusive right to it. To my mind he could get an exclusive right only to that which he was authorized to register under the act, and it is quite plain that no person can with propriety go to the Comptroller and ask to register as his exclusive property a mark which is common to all persons engaged in the same trade.

I hold, therefore, that when Mr. Wragg registered this mark he registered that which he had no right whatever to register, and that he has acquired no title whatever by the lapse of time, and, inasmuch as the mark was not properly registered when it was registered in 1876, it ought to come off the register now. It ought to come off for this reason that, so long as it remains on the register, it apparently gives the person who has registered it an exclusive right to use it; it enables him, if he is minded to do that which is unjust and fraudulent, to terrify other persons by informing them that they have no right to use that which is common to the trade, because he has chosen improperly to register it as his own. I am of opinion that the five years' registration cannot by any possibility make good that which was invalid in its inception, and on that ground I order this mark to be taken off the register, with cost to be paid by the respondent.

Edwards v. *Dennis* (2).

Bacon V. C.—The meaning of the act of Parliament is obvious enough. The whole object is that persons in the enjoyment of what are called "trade marks" shall, if they register those trade marks in the manner prescribed so that entire publicity may be given to their alleged rights, have an indefeasible right to them. That is the general scope and object of the statute.

* * * * *

(1) 29 Ch. D. 551 (2) 30 Ch. D. 462.

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The Vice-Chancellor quoted the following from the judgment in *Re Palmer's Application* (1):

The Master of the Rolls proceeds to read the 3rd section of the act, and then he says: "Now what is the meaning of the 'words the registration of a person as first proprietor of a trade mark?' Does it mean his registration as proprietor of 'a mark,' or does it mean what it says, his 'registration as proprietor of 'trade mark?' I think the literal reading is to be preferred. It is true that the registrar ought not to enter anything which is not capable of being a trade mark, but he may be deceived, and that is alleged to be the case here. The registrar of trade marks cannot know nor can the commissioners know the meaning of all technical terms used in a trade." Then, after dealing with the name 'braided fixed stars,' and with the contention of the respondents, his lordship takes the case of a man selling palm oil soap under the name of 'palm oil soap,' and he says: "suddenly somebody comes down against him and says, 'I registered those words five years ago as a trade mark. I therefore change by the force of act of Parliament those words which are ordinary words of description into a trade mark, and now I am entitled to restrain you from using them.' If this were to be allowed it would be allowing a man who had taken an improper advantage of the ignorance of the registrar, and of the commissioners if it came before them, as to the use of the technical terms of the trade, to lay a trap for an honest tradesman who had done nothing but sell his goods under their proper description."

Cotton L.J.—In the first place what is the object of that act? Speaking generally, its object is, not to give new rights, but to place restrictions on the bringing of actions for infringement of trade marks by requiring that a trade mark shall be registered before any action to prevent its infringement can be brought. That is provided for by the first section of the act as amended by the subsequent act of 1876. Another object of the act is to facilitate evidence of title to trade marks by means of registration; for the 3rd section of the act provides that registration of a person as first proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of the trade mark, and that five years registration shall be conclusive evidence of his right to such exclusive use.

* * * * *

No doubt the intention of the Act is to give a right to what is on the register so as to enable a person who has been registered for five years as the proprietor of a trade mark to maintain an action against any other person taking or infringing that trade mark;

* * * * *

(1) 21 Ch. D. 47.

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The 3rd section contains this provision: "The registration of a person as first proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade mark."

Then the 4th section continues the title of the first proprietor in the hands of a subsequent proprietor. I am not now considering how far the fact of Mr. Edwards and his predecessor having been on the register for five years is an answer to this application, though, in my opinion, it is not. It appears to me that the 3rd section is intended to afford assistance to a person who is bringing an action against another person of passing off his goods as the goods of the person who brings the action. In such a case, if the plaintiff shows that he has been on the register for five years, that dispenses with the necessity of his adducing evidence of exclusive user of his trade mark. But the third section is no bar to an application under the 5th section for rectification of the register, and in the case of such an application the court is bound to consider—as the Court of Appeal held in *re Palmer's Application* (1)—whether the trade mark is properly on the register; for, although it may have been on for five years, if it ought not to have been on at all, then it can be taken off. So that, on the question whether a trade mark is properly on the register, the 3rd section is no bar to an application to rectify the register.

* * * * *

A trade mark is a mark used in trade to distinguish the goods of the person who uses it; and the act appears to contemplate a user of the particular mark contemporaneously with, if not before, registration. The first section places a restriction on actions being brought for infringement of trade marks for it says that "From and after the 1st day of July, 1876, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by this Act until and unless such trade mark is registered in pursuance of this Act." The person with whom the Act is dealing is a person who would have been entitled under the old law to bring an action for the infringement of his trade mark, that is to say, a trade mark actually used by him. The first section therefore assumes that it is dealing with a person who is using his trade mark.

* * * * *

Lindley L.J.:

Then with regard to the five years' registration. When we come to look at sections 3 and 5 it is clear that they do not depend on one

(1) 21 Ch. D. 47.

another, sec. 5 not being consequent on section 3. The meaning of the sections is this: when a man brings an action for infringement, if he has been on the register for five years, sec. 3 is conclusive as to his right to bring the action, and in that particular action such registration is conclusive evidence of his right to the exclusive user of his trade mark; but having regard to section five it appears to me that the register can be rectified in respect of that trade mark, notwithstanding the five years registration, if proper proceedings are taken for that purpose.

I can discover no analogy whatever between this and a crown grant. If the legislature has not provided a special remedy to meet this case in my opinion not the courts but the law clearly gives the remedy by enabling the defendant to say: "You claim by virtue of a registration which, I will show, is no legal registration and therefore confers on you no rights and, therefore, I have the right to ask for a rectification of the register, and cancellation thereof, on the ground that the trade mark never should have been on it at all and should now be taken off. I entirely repudiate the idea, that this is legislation in the courts or anything else than the proper administration of the law by affording to the parties that remedy which, in my opinion, the law clearly gives him.

STRONG J.—I am of opinion that this appeal should be dismissed for the reasons given by the majority of the judges in the Court of Appeal.

FOURNIER J. concurred in the judgment of the majority of the court dismissing the appeal.

TASCHEREAU J.—I would allow this appeal for the reasons given by Burton J., dissenting, in the court below.

GWYNNE J.—The plaintiff, in his statement of claim, alleges that he is a miller engaged in the manufacture

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of flour at the town of Ingersoll, in the county of Oxford, and that some time prior to the month of October, 1884, he had perfected a certain brand of roller process flour at his mills, which he named "gold leaf" and that in order to secure the said brand of flour, so designated, from being imitated by others, and to give notice that the designation, "gold leaf," as applied to this particular brand of flour was his sole property, he, upon the 19th of December, 1884, procured to be registered in the Department of Agriculture, at Ottawa, the said specific trade mark, to be applied to the sale of flour, which trade mark consists of the words "Gold leaf," surrounded by the numbers 196, within a circle and, underneath the said designation, the word "flour" and the registrant's name, the whole surrounded by the words "Ingersoll Roller Mills, Ontario, Canada." That, since the 3rd of December, 1884, the defendants, who are commission merchants, residing and carrying on business at the town of Galt, in the county of Waterloo, have branded their flour of an inferior quality with a mark similar to the trade mark of the plaintiff, and have sold the same as purporting to be the "gold leaf" of the plaintiff, and have thereby caused the plaintiff great loss. That the flour of the plaintiff has acquired a good reputation all over the Dominion of Canada and is in great demand, and there is a large sale therefor, and that the defendant, well knowing this to be the case, and with the object and intent of selling flour of an inferior brand and less value as the flour of the plaintiff, have branded their flour with a mark similar to that of the plaintiff, and that the similarity of the said marks enables the defendants to deceive and mislead the public by selling their said flour as the flour of the plaintiff, and that the defendants do, in fact, fraudulently put their flour in the market as the flour of the plaintiff,

to his great prejudice. That the plaintiff has suffered damage by the defendants.

1st. Destroying the sale of the plaintiff's said flour.

2nd. Destroying the character of the said flour and deteriorating its value in the eyes of flour dealers, who, prior to this time, had dealt in " Gold leaf," and by loss of market; that from the infringement of the said trade mark and from the facts before stated, the plaintiff has suffered great loss and the plaintiff claimed $3,000 damages and prayed that the defendants may be restrained by injunction from using said trade mark, and from selling the said flour of the plaintiff and from so branding or marking the same so as to enable others to deceive the public.

The defence of the defendants to this complaint is, in short substance that the words "Gold leaf " used in the label registered by the plaintiff, were words well known in the flour trade, and in common use by traders other than the plaintiff, and that the same was not capable of registration by the plaintiff and that the plaintiff falsely stated that the same was a new and original word or design of his own in order to obtain registration of the same, and the defendants denied that they had infringed any rights, if any were acquired by the plaintiff by such registration as in the statement of claim is alleged.

The learned judge before whom the case was tried has found as a fact, and the evidence abundantly supports his finding, that the term "Gold leaf" was a common brand for a superior class of flour made by what is called a " patent process " or " roller process," well known by and in use in the trade for some years prior to and at the time that the plaintiff registered his label. The practice appears to be for millers, and dealers in flour upon commission also, to keep different brands of the same quality of flour. That which is

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manufactured by "patent" or "roller" process, is known to some purchasers both at home and abroad as "Ruby," by others as "Egmont," by others as "Nyphos" and by others as "Gold leaf," and when a purchaser orders one or other of these brands, it is put on the flour by the miller from whom it is bought or by the commission merchant through whom it is ordered, if ordered through a commission merchant, and the brand simply designates, and is known as designating, only the quality of the flour, and as made by "patent" or "roller" process, and not at all that the flour is the manufacture of any particular mill or miller. In the autumn of 1883 the plaintiff altered his mills into "roller" mills, and then he procured one Alderdyce to cut for him a "Gold leaf" brand, but what if anything other than these words was on the brand then cut by Alderdyce does not appear, for that brand has not been produced and this brand, whatever was upon it, appears to have been the only brand with the words "Gold leaf" upon it which the plaintiff used from the 10th December, 1883, until he registered the label which has been produced upon the 19th December, 1884; but during that same period he sold to and through the defendants the same quality of flour under the brands "Ruby," "Nyphos" and "Egmont," and in the month of June, 1884, he sold to them for the first time the same quality of flour with the brand "Gold leaf" upon it. In the month of October, 1884, the defendants procured for themselves a brand with the words "Gold leaf" upon it. This brand the defendants had cut with the intent of making some arrangement with the plaintiff as to dealing with him and that the defendants' said brand should be put upon all flour bought from the plaintiff by or through the defendants, but no arrangement having been come to, the defendants kept the brand, together with others which they had, and it

is their use of this brand which is relied upon by the plaintiff as an infringement of what the plaintiff calls his trade mark.

From the above facts, which the evidence disclosed, it is apparent that every one of the material allegations, upon which the plaintiff in his statement of claim rests his case, was disproved. The term "Gold leaf" was not first introduced into use by the plaintiff as a brand of flour, nor did the term by itself ever indicate, nor was it supposed to indicate, that flour so branded was manufactured by the plaintiff or at his mills. On the contrary, when the plaintiff first converted his mills into "roller" mills and first manufactured flour by what is known in the trade as roller mill or patent process, the term was well known and in use as a brand designating a particular quality of flour manufactured by what was known in the trade as "patent process" or "roller mill process" wherever or by whomsoever the same should be manufactured; the term had no connection whatever with any particular person or mills.

Such being the purpose for which the brand was in use when the plaintiff registered his label, he had not acquired, and could not have claimed, any property in the term "Gold leaf" as a brand for flour. What constitutes, therefore, his property in the label registered by him as his trade mark is that part only of the label which indicates that flour having upon it the well known brand "Gold leaf" (which designates quality only) was manufactured by the plaintiff at his mills—namely, the words "Ingersoll Roller Mills, Ont., Can." and "Wm. Partlo"—and it is apparent that flour having upon it the label in use by the defendants bears no indication or representation whatever that flour so branded was manufactured by the plaintiff, and the use of it, therefore, by the defendants can give to the plaintiff no cause of action or ground of complaint

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whatever. The right which a manufacturer has in his trade mark is the exclusive right to use it for the purpose of indicating where and by whom or at what manufactory the article to which it is attached was manufactured. A man may mark goods of his own manufacture either by his name or the initials of his name, or by using for the purpose any symbol or emblem, however unmeaning it may be in itself, and, if such symbol comes, by use, to be recognized in the trade as the mark of the goods of a particular person, no other person has a right to stamp his goods of a like description with a mark so resembling the mark of the former as to be likely thereby to induce incautious purchasers to believe that the goods were the manufacture of the former; but no person can acquire property in any marks, names, letters or symbols, which are known in the trade as designating quality merely, wholly irrespective of the goods to which they are affixed being the manufacture or stock-in-trade of any particular person. All manufacturers of the same description of goods have equal right to use such marks, names, &c., as are known in the trade as designating quality, and each in such case can only acquire property in some name or mark used by him in connection with such *indicia* of quality, as aforesaid, as will indicate that the particular article of the designated quality is of his manufacture; and if an article originally manufactured by a particular person comes to be known in the trade by the name of such person, not as expressing the maker of the particular specimen, but as describing the nature of the article by whomsoever made, every person has a right to manufacture the article bearing such name and to sell it by that name. This was one of the canons laid down by Lord Kingsdown in the *American Leather Cloth Company case* (1).

(1) 11 Jur. N. S. 517.

So, likewise, no property can be acquired by any person in an English word, which is expressive of quality merely, stamped upon goods of his manufacture; this was the case of *Raggett* v. *Findlater* (1), in which it was held that a person could acquire no property or trade mark in the words "nourishing" stout or "nourishing" London stout, but that words added showing the name of the dealer in the article and the words, "analysed and reported on by Dr. Hassall" were words in which the party originally using them on the stout sold by him might acquire property as his trade mark. But a foreign word or a word in a dead language not known to people in general, because it is not understood, may become the trade mark of the person who first uses it upon a particular article sold by him; this was the case of *McAndrew* v. *Bassett* (2); so in *Wotherspoon* v. *Currie* (3), where the plaintiff had first applied the word "Glenfield" to starch, and under that name had introduced into the market starch manufactured by him, which, under that name, had acquired celebrity in the trade, it was held that he had thereby acquired a property in the word "Glenfield" as applied to starch. Upon the same principle the court proceeded in *Braham* v. *Bustard* (4), with regard to the "Excelsior White Soft Soap," and in *Ford* v. *Foster* (5), with regard to the "Eureka" shirts. All these cases are commented upon, and the principle upon which they proceeded explained by Malins, *V.* C. in *Raggett* v. *Findlater* (1).

In *Seixo* v. *Provezende* (6), the principle upon which relief is granted as for infringement by one of the trade mark of another is stated to be that one trader cannot

(1) L. R. 17 Eq. 29.
(2) 4 DeG. J. & S. 380.
(3) L. R. 5 H. L. 508.
(4) 1 H. & M. 447.
(5) 7 Ch. App. 611.
(6) 1 Ch. App. 196.

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offer his goods for sale representing them to be the manufacture of a rival trader. If what is relied upon as the trade mark by the complainant is a word or mark two questions arise :—1st. Whether the word or mark is known in the trade as specially designating the goods to which it is affixed to be the manufacture or property of the complainant ; and 2nd. Whether the mark or word as used by the defendant is so similar to that used by the complainant as to be likely to induce incautious purchasers to believe that the goods offered for sale by the defendant are the manufacture or property of the complainant.

In *Cocks* v. *Chandler* (1), although the first manufacturer of a sauce which came to be known in the trade as "Reading sauce" had not acquired any property in the word "Reading," and could not restrain another person from selling sauce manufactured by him under that name, yet it was held that the first manufacturer had acquired property in the word "original" prefixed to the words "Reading sauce."

In *Lee* v. *Haley* (2), where the plaintiff had established his place of business on Pall Mall for selling coal where he had for many years carried on the business under the name of the "Guinea Coal Company" and the defendant many years afterwards opened a place of business upon Pall Mall also where he offered coal for sale under the name of the "Pall Mall Guinea Coal Company" it was held, although the plaintiff had not and could not have acquired any property in the words "Guinea Coal Company" as constituting his trade mark, because those words were known in the trade to designate a particular quality of coal sold at a guinea per ton, and there were a number of companies calling themselves "Guinea Coal Companies," that the defendant should be restrained

(1) L. R. 11 Eq. 446. (2) 5 Ch. App. 155.

from using the name "Pall Mall Guinea Coal Company" on Pall Mall because it manifestly appeared on the evidence that the defendant's object in transferring his business from where he had before carried it on to Pall Mall and in opening an office there was to obtain possession of the custom or a part of the custom which the plaintiff had established there by having had his place of business there for many years.

The relief appears to have been granted in that case not for any infringement of a trade mark but for actual fraud in the defendant offering his goods for sale and selling them under circumstances calculated to induce and which had induced persons accustomed and intending to deal with the plaintiff to believe that they were in point of fact dealing with him.

So no property can be acquired in the letters X,XX. or XXX. applied to beer as a trade mark for these letters are known to be used in the trade as designating merely the strength of the beer to which they are affixed, wholly irrespective of the person by whom the beer has been manufactured. So neither can property be acquired in the use of a crown or horseshoe or any marks or words in connection with manufactures in iron which are used in the iron trade to designate a particular description or quality of the manufacture in iron on which they are stamped, but the names or initial letters of the name of a firm which manufactures or deals in the article, in connection with any symbol designating the description or quality of the iron used in the manufacture of the article, will constitute good trade marks, as they will also when used in connection with the letters X., &c., on beer.

So far as the letters, symbols or words claimed are descriptive of quality they cannot be trade marks—no property can be acquired therein,—but when they are connected with the initials of the firm or the name of

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the works where the article is manufactured the whole combination constitutes one trade mark. *In re Barrows Trade Marks* (1).

Now, the evidence establishes that at the time the plaintiff registered his label, the words "Gold leaf" used on flour never did indicate that the flour upon which they were stamped, was manufactured by the plaintiff. They indicated merely that the flour was of a particular quality manufactured by what was known as "patent process" or "roller mill process," by whomsoever manufactured; they gave no indication whatever as to the particular mills where, or as to the person by whom, it had been manufactured. They were, therefore, words in which the plaintiff could not have, and has not, acquired any property whatever, unless he has acquired it under and by force of the provisions of the Dominion Statute, 42 Vic. c. 22. Accordingly, it has been contended that, although these words "Gold leaf" were in common use as designating merely a particular description or quality of flour, the effect of the act is to have enabled the plaintiff by becoming the first to register a label having those words upon it to take them out of the common use to which they had been applied—to divest them of the meaning and character which, by such common use, they had acquired, and to make them his special property and, thereafter, to represent that the flour on which they are stamped is manufactured by him alone.

The argument in support of this singular contention is this—the statute, as is contended, gives to every person who first registers any mark as his trade mark a right to the exclusive use thereof, whether such mark was or not, prior to the registration thereof, capable of being recognized in law as a trade mark.

The effect of this contention, if sound, would be

(1) 5 Ch. D. 363.

that any brewer who should first register a label with his name upon it in connection with the letters X.,XX.,XXX. would thereby acquire exclusive right to use those letters upon beer. The argument is sought to be supported by a reference to the Imperial Statute 38-39 Vic. c. 91, the 3rd section of which enacts that:

> The registration of a person as first proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of this Act as to its connexion with the goodwill of a business.

and the contention upon this point is that as our statute provides (as is contended that it does in its 8th section) that immediately upon registration the person registering shall have an exclusive right to the use of the mark or label as registered by him to designate articles manufactured or sold by him without any delay of five years as is provided in the English act, and as there is in our act no clause similar to the 5th section of the English act which provides for rectification of the registry in the event of an entry upon it of a mark, &c., which could not in law be recognized as a trade mark, and in which therefore the person registering had not acquired any property, the result is that no relief can be given to any person except a person claiming a right to register as his own trade mark a mark or symbol which had been taken by another and already registered as his, and that in this latter case the party claiming to be the true owner of the trade mark registered by another can obtain relief only in the manner pointed out in the 15th section by petition to the Minister of Agriculture.

If this contention be sound there is no mode by which any relief can be obtained in a case where one trader should succeed in getting upon the registry as his trade mark a word, letter, or symbol in common

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use in the trade for the purpose of designating the nature, description or quality of an article upon which it is stamped, and in which word, letter or symbol, the principles of law established by decisions have laid down that no trader can acquire property as his trade mark. This, in fine, is the contention that to an action brought for infringement of any mark which has been registered as a trade mark, no defence whatever which calls in question the validity of the registrant's right to the exclusive use of it can be entertained, whatever may be the law upon that point as applied to the English act, in which ample provision is made sufficient for the rectification of every case of erroneous registration. The fact that like ample provision is not made in our act would rather seem to require that the court should hold that redress can be obtained in the form of defence to an action for infringement, rather than that the statute had rendered remediless a grievous wrong. There is no case, however, in which it has been adjudged in England that the procedure provided by the English statute is the only mode in which the registrant's title to the mark as registered by him can be disputed, and that it can not be disputed by way of defence to an action for alleged infringement. The only authority bearing upon the point would seem to lead rather to the conclusion, that in a case where a mark gets upon the registry as a trade mark which cannot, in accordance with the established principles of decided cases, be recognized as a trade mark a defendant in an action for alleged infringement of such a registered mark may call in question the registrant's title to the exclusive use of it as his property.

Sir George Jessel, M. R. in *Palmer's trade mark case* (1) quotes with approbation the observations of

(1) 21 Ch. D. 59.

Sebastian and Bryce, text writers upon the subject of trade marks and their registration, as follows :—

Sebastian says :—

The registration as a trade mark of a name of this description (which could not be a trade mark) will sometimes complicate the question, as such registration is to be *primâ facie* evidence, and after five years' registration conclusive evidence, of the right of the registered owner to the exclusive use of such trade mark, but this enactment does not preclude a defence on the ground that the name so registered is in fact no trade mark and was registered or is continued on the register by error.

So Mr. Bryce says :

After the expiry of five years the right of the registered proprietor becomes absolute and cannot be disputed by a defendant. But it is apprehended that after, no less than before, the expiry of the five years, the right of the registered proprietor may be contested on any ground going to show that the mark ought never to have been registered at all, for example that it is not a trade mark within the meaning of the Act.

So both writers on the subject take the same view and go so far as to think that if a description which is not capable of being a trade mark is registered, a person who sells goods under that description and is sued may defend himself on the ground that it is not a trade mark though it has been five years on the register. That question has not been argued before us and we have not to decide it, but I am not by any means prepared to say that those distinguished writers are wrong, because the Act only says that after five years the person who has registered a trade mark shall be entitled to the trade mark but does not say that the mark as registered shall be deemed to be a trade mark.

And Lindley J. says :—

I will only add that I have availed myself of the opportunity afforded by the adjournment of the court of looking into some of the cases which have been decided upon similar provisions in other acts which render certificates conclusive. Thus the Companies' Act, 1862, makes the Registrar's certificate conclusive of the incorporation of a company, but that has been held to be confined to companies capable of being registered. There are other similar enactments which have received a similar construction. After careful examination of Secs. 3, 5 and 10 of the Trade Marks' Registration Act, 1875, I am satisfied that a mark which is not a trade mark and which, therefore, ought never to have been registered does not become a trade mark by being on the register for five years."

Lord Justice Cotton concurred in the judgment of the Master of the Rolls.

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Such being the opinion of those learned judges I cannot doubt that if the question had come before them in an action they must have decided that the objection taken to the registration of the words "braided fixed stars" could have been raised by the defendant in such action, for if the statute does not authorise the registration of any name or mark which is not capable of being a good trade mark, it must be only in a trade mark authorised by the statute to be registered that the statute confers on the proprietor thereof the exclusive use. Registration of a word or symbol which is not authorised by the statute to be registered as a trade mark cannot confer upon the registrant thereof a benefit which the statute annexes only to trade marks and the proprietors thereof. Eventually, in 24 Ch. D. 514, it was held that the words "braided fixed stars" were not words which the statute had authorised to be registered as a trade mark and, for that reason, the registration was ordered to be expunged.

When it appears that the word registered is not capable of being a trade mark and, for that reason, the statute had not authorised it to be registered, being registered in defiance of the authority of the statute, the statute surely cannot be appealed to as annexing to it a property which it only annexes to what it has authorised to be registered—namely, good trade marks; and, therefore, to an action complaining of an illegal use by the defendant of such a word so illegally registered, the defence that the use by the defendant was not illegal because, the word not being one which the statute had authorised to be registered, the statute had annexed no benefit to its registration, must be open.

That it is open under our statute is, in my opinion, the reasonable and necessary and, indeed, literal construction of the statute. The language of Lord Selborne

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in *Leonard and Ellis* v. *Wells* (1) with respect to the word "Valvoline" is quite applicable to the present case; he there says:—

So long as the word "valvoline" is not used in such a manner as to represent that the article sold under that name is manufactured by the plaintiffs or by persons identified in business with the plaintiffs, it seems to me that the use of it cannot be restrained.

So, likewise, is the language of Fry L.J. in the same case; he says at p. 305:—

Then, upon the application for an injunction, the real question is this: 'Are the defendants selling their manufacture as and for the manufacture of the plaintiffs?' Now if the word "Valvoline" had come to mean that the article so designated was manufactured by the plaintiffs they, *primâ facie*, would have been entitled to an injunction.

As, however, the defendants were using the term not as meaning an oil made by the plaintiffs, but a particular kind of oil, it was held that they could not be restrained from using the word but were at liberty to manufacture that kind of oil, and to sell it under that name. So, likewise, the language of Lord Justice Cotton, in *Edwards* v. *Dennis* (2), is exceedingly appropriate to the present case, where he says—

A trade mark is a mark used to distinguish the goods of the person who uses it, and the act appears to contemplate a user of the particular mark contemporaneously with, if not before, registration.

And again:—

The person with whom the act is dealing is a person who would have been entitled under the old law to bring an action for infringement of his trade mark, that is to say, a trade mark actually used by him.

Construing now the Dominion statute, 42 Vic. c. 22, by the right of the principles established by these decisions, we find by the first section that the register authorised to be kept is of "trade marks" only; and that it is only a proprietor of a "trade mark" who is authorised to have his trade mark registered. That section provides the proceedings to be adopted by "the proprietor of a trade mark" to have it registered.

(1) 26 Ch. D. 299. (2) 30 Ch. D. 473.

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By the 7th section the Minister of Agriculture is authorised only to register the trade mark of a proprietor thereof and by the 8th section it is enacted that for the purposes of the act "all marks, names, brands, labels, packages or other business devices which may be adopted for use by any person in his trade for the purpose of distinguishing any manufacture, product or article by him manufactured, &c., &c., shall be considered and known as trade marks and may be registered for the exclusive use of the party registering the same in the manner herein provided."

Then by the 17th section it is the "proprietor of a trade mark" who is given an action against any person using his registered trade mark, or any fraudulent imitation thereof, and by the 4th section it is enacted that:

> No person shall be entitled to institute any proceeding to prevent the infringement of any "trade mark" until and unless such "trade mark" is registered in pursuance of this Act.

We see, therefore, that the statute expresses, sufficiently clearly as I think, that the only action which the statute authorises to be brought as for an infringement of a trade mark is one which must be brought by the "proprietor of the trade mark" who has registered under the provisions of the statute the "trade mark" of which independently of registration he was the "proprietor," and that no name, brand, &c., &c., which may not be adopted by a trader for the purpose of distinguishing his goods from the goods of a rival trader, shall be considered to be a trade mark or capable of being registered for the exclusive use of the party registering.

Now, as the words "Gold leaf" stamped on flour was a brand in common use in the trade for the purpose of designating the quality merely of the flour, and the process by which it was manufactured, namely, by

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"roller mill process" or "patent process," and not at all for the purpose of distinguishing the manufacture of the plaintiff, or of any miller in particular from the manufacture of any other, that word could not have been adopted by the plaintiff as his special property or trade mark; and it was not a trade mark within the meaning of the statute, and could not be registered for the exclusive use of the person registering. Registration therefore of such word could not vest in the plaintiff a right to the exclusive use of it as if it were a trade mark. The plaintiff's contention, that by registering the word he could take it out of its common use and make it his own special property, (to use the language of Sir George Jessel in *re Hyde's trade mark* (1), applied to somewhat similar facts), is not the law. The defendants in the present case do not dispute the plaintiff's right to have adopted as his trade mark, and to have registered as such in connection with the words "Gold leaf" (as descriptive of quality), the words on his label, which are adequate to distinguish flour of his manufacture of the known description, or quality of "Gold leaf" from that of all other manufacturers, namely, "Ingersoll Roller Mills, Ont., Can.," and "Wm. Partlo." On the contrary, this is what the defendants contend is precisely what he has done, and as appears by his application for registry, wherein he says, in effect, that the words "Gold leaf" designate "a particular brand of flour denoting the quality thereof," not that they are used to distinguish the manufacture of the plaintiff from that of other manufacturers of flour of the same description and quality. The evidence, however, shows that the defendants have not, upon any flour sold by them, ever used any part of these words which the plaintiff has used on his label as distinguishing his manufacture from the manufac-

(1) 7 Ch. D. 726.

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ture of other persons, and that in point of fact they never have sold any flour under circumstances which could induce any persons to suppose that they were purchasing the manufacture of the plaintiff.

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

Appeal dismissed with costs.

Solicitors for appellant : *Hegler & Jackson.*

Solicitors for respondents : *Ball & Ball.*

DAVID W. HIGGINS (DEFENDANT).....APPELLANT ; 1888

AND *Oct. 22, 23, 24.

THE HONORABLE GEORGE ANTHONY WALKEM (PLAINTIFF)..... } RESPONDENT. 1889

*June 14.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Libel—Newspaper publication—Innuendoes—Trial of action—Direction to jury—Consideration of innuendoes—Withdrawal of from jury—Effect of misdirection—Excessive damages.

W., a judge of the Supreme Court of B. C., brought an action against H., editor, for a libel contained in the following article published in his paper :—

"THE MCNAMEE-MITCHELL SUIT.

"In the sworn evidence of Mr. McNamee, defendant in the suit of *McKenna* v. *McNamee*, lately tried at Ottawa, the following passage occurs : 'Six of them were in partnership (in the dry dock 'contract) out in British Columbia, one of whom was the Pre-'mier of the Province.' The Premier of the Province at the time referred to was Hon. Mr. Walkem, now a judge of the Supreme Court. Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. McNamee must be laboring under a mistake. Had the statement been made off the stand it would have been scouted as untrue ; but having been made under the sanctity of an oath it cannot be treated lightly nor allowed to pass unheeded."

The innuendoes alleged by the declaration to be contained in this article were :—

1. That W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money.
2. That he did so under cloak of his public position and by fraudulently pretending that he acted in the interest of the Government.

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

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3. That he committed criminal offences punishable by law.

4. That he continued to hold his interest in the contract after his elevation to the bench.

Held, that the article was susceptible of the first of the above innuendoes, but not of the others which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial.

On the trial the jury found a verdict for the plaintiff, with $2,500 damages.

Held, per Strong, Fournier, Taschereau and Gwynne JJ., that the case was improperly left to the jury but the only prejudice sustained by the defendant thereby was that of excessive damages, and the verdict might stand on the plaintiff consenting to the damages being reduced to $500.

Held, per Ritchie C. J., that there had been a mistrial, and the consent of both parties to such reduction was necessary.

APPEAL from a decision of the Supreme Court of British Columbia, sustaining the verdict at the trial in favor of the plaintiff.

The plaintiff (respondent) in this case was Mr. Justice Walkem, of the Supreme Court of British Columbia, who brought an action against the defendant, editor of the *British Colonist* a newspaper published in Victoria, B.C., for publishing in said paper an article which plaintiff considered libellous. The alleged libel and the innuendoes charged to have been contained therein were set out as follows in the declaration in the action:—

The defendant in his said newspaper, dated the 20th of November, 1885, falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning the official conduct of the plaintiff, while a member of the Government, and holding therein offices of public trust and confidence, the following libellous and defamatory words:

"THE MCNAMEE-MITCHELL SUIT.

"In the sworn evidence of Mr. McNamee," (meaning Frances Bernard McNamee, above mentioned) "defend-

ant in the suit of *McKenna* v. *McNamee*, lately tried at Ottawa, the following passage occurs:

"'Six of them' meaning the witness McNamee and five other persons), were in partnership in the dry dock contract,' (meaning the contract of the 4th of October, 1880, ('out in British Columbia, one of whom was the Premier of the Province.'

"The Premier of the Province at the time referred to was Hon. Mr. Walkem," (meaning the plaintiff) now a Judge of the Supreme Court," (meaning the Supreme Court of British Columbia). "Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself" (meaning to the judicial character thus acquired as well as to his character generally) to refute this charge" (meaning the charge implied in the above statement that he had been guilty of corruption in having been a partner with the contractors in the said dry dock contract). "We feel sure that Mr. McNamee must be laboring under a mistake. Had the statement" (meaning the said charge of corruption) "been made off the stand it would have been scouted as untrue; but having been made under the sanctity of an oath it cannot be treated lightly nor allowed to pass unheeded."

Meaning and intending it to be believed, by the said false and malicious libel, that at the time the plaintiff held the several offices of public trust and confidence mentioned he secretly, and by corrupt means, and for corrupt and unworthy considerations of personal gain and profit, and in betrayal of such trust and confidence, acquired and held a partnership interest conjointly with the said contractors "F. B. McNamee and Company," in their said dry dock contract of the 4th of October, 1880, and that as such secret partner

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with them he fraudulently and unlawfully obtained large sums of public money, and made large gains and profits at the expense of the Province, in respect of work done, or pretended to have been done, on the dock under the said contract; and that he procured the award which was made of the said contract, and thereupon executed the contract, and thereafter obtained the said public moneys, and made the said profits in manner mentioned, under cloak of his position and influence in the Government, and especially of his office and authority as Chief Commissioner of Lands and Works, and by falsely and fraudulently pretending that he was acting as such officer in the premises solely on behalf of and in the interests of the Government, and not on his own personal behalf, as was the fact; and that he had by reason of the premises committed criminal offences punishable by law, which should not be "treated lightly nor allowed to pass unheeded;" and further, that the plaintiff, actuated by the corrupt and unworthy motives and considerations above mentioned, continuously held his said secret partnership in the contract while the latter remained in force, that is to say, for a considerable period before and after his resignation of office, and his appointment to his present position on the bench.

At the trial, at the close of the plaintiff's case, defendant's counsel offered evidence of other publications in defendant's newspaper favorable to the plaintiff. The evidence was rejected, whereupon the counsel asked the trial judge if the words of the alleged libel were capable of bearing the meaning set out in the innuendo, and the learned judge replied as follows:—

"Court.—I certainly think that the main libel, viz., the alleged report of McNamee's testimony, may bear the full meaning attributed to it. Whether the added remarks in the defendant's editorial necessarily imply

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the full meaning as expressed in the subsequent innuendo is another question. I think they may bear that meaning, though they may also bear a meaning less than that the plaintiff actually pocketed money; they may mean that he hoped to pocket money. But I cannot conceive that the whole, the alleged extract from McNamee's testimony, and the defendant's comments thereon, bears a neutral meaning or other than a derogatory meaning."

In his charge to the jury the learned judge does not appear to have referred to the innuendoes set out in the declaration, but simply directed them to find whether the publication was or was not a libel, and, if it was, whether it was true or untrue. The jury returned as their verdict: "We find that it is a libel. Damages $2,500."

The defendant made two motions against this verdict before the full court, one for the verdict to be set aside and a non-suit entered; the other for a new trial. Both motions were refused and the defendant was allowed, by order of a judge of the court below, to bring two appeals to the Supreme Court of Canada.

Christopher Robinson Q.C. and *Bodwell* for the appellant.

Whether or not the publication was susceptible of the innuendoes alleged was a question for the judge at the trial and should have been distinctly withheld from the jury. *Capital and Counties Bank* v. *Henty* (1); *Hunt* v. *Goodlake* (2).

There was nothing to justify the amount of damages awarded; *Massie* v. *Toronto Printing Co.* (3); *Cook* v. *Cook* (4); *Ontario Copper Lightning Co.* v. *Hewitt* (5).

S. H. Blake Q.C. and *Gormully* for the respondent.

(1) 7 App. Cas. 744.
(2) 43 L. J. (C. P.) 56.
(3) 11 O. R. 362.
(4) 36 U. C Q. B. 553.
(5) 30 U. C. C. P. 172.

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The trial judge dealt with the publication as a whole, and so left it to the jury.

The innuendoes can be fairly inferred from the publication; *Watkin* v. *Hall* (1); *Barrett* v. *Long* (2).

Sir W J. RITCHIE C.J.—It is clear that an innuendo may not introduce new matter or enlarge the natural meaning of the words. The innuendo in this case violates both of these principles, and the declaration is therefore objectionable.

Mr. Justice McCreight says—

> It is true, indeed it seems to have been taken for granted at the close of the plaintiff's case, and certainly at the end of the trial, that the innuendoes were to be disregarded. The Chief Justice but once refers to them in his charge and then only casually, and on the jury retiring he told them they might disregard them. No allusion is made to them in the questions submitted to the jury. The question put to them was: "Is it a libel?" and their answer was: "We find it is a libel." It is agreed that they took the *Colonist* newspaper with them on retiring, and I have no doubt they found their verdict upon a perusal of it; and it is very unlikely that they troubled themselves with pleadings and innuendoes when no one invited them to do so.

I think the very opposite appears. At the close of the plaintiff's case, as shown in the extract from the record (3) I think the learned counsel raised this objection that the publication was incapable of the innuendo at the proper time, namely, at the close of the plaintiff's case, and the learned judge having decided against him he was bound by such decision, and I cannot discover in the record of the judge's charge submitted to this court that the Chief Justice even casually referred to the objectionable innuendoes or that on retiring he told the jury they might disregard the inuendoes. Had he done so I think it would have been an insufficient direction. The jury should have been told that they must disregard

(1) L. R. 3 Q. B. 396. (2) 3 H. L. Cas. 395.

(3) See p. 228.

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Ritchie C.J.

the innuendoes, which should have been specifically withdrawn from their consideration, and more particularly so after it had been adjudged that the words might bear the meaning attributed to them in the objectionable innuendo I do not think it is sufficient to say, as Mr. Justice McCreight does, that it is very unlikely that they, the jury, troubled themselves with pleadings and innuendoes when no one invited them to do so. I cannot think the jury could have assessed the damages at so large an amount had the matter of the objectionable innuendoes been clearly and distinctly withdrawn from their consideration. The finding of the jury is general, and it is impossible to say the damages have not been given on the whole declaration as it continued throughout the trial and still continues on the record. I find it impossible to say that the damages given were for that part of the declaration only which may be unobjectionable.

I do not wish it to be understood that the jury were not fully justified in finding that the alleged publication was libellous, and could I discover that the matter contained in the innuendo had been distinctly withdrawn from their consideration I should have had great difficulty in disturbing the verdict, though I think the damages were, in the language of the late Mr. Justice Gray, "severe, and unnecessarily severe."

I think we have no right arbitrarily to assess the damages in this case—a right which belongs to the jury and to the jury alone—but that the defendant is entitled to have the damages assessed by a jury on a proper trial and charge, and that there should be a new trial, unless both parties consent to the proposed reduction. I think the assent of the plaintiff alone not sufficient in a case like this, where there has been, in my opinion, a mistrial.

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STRONG, FOURNIER and TASCHEREAU JJ. concurred in the judgment of Mr. Justice Gwynne.

GWYNNE J.—The plaintiff's statement of claim charged four innuendoes as attributable to the article complained of. The learned Chief Justice who tried the case erred, I think, in holding that it was capable of having all of those innuendoes attributed to it. Some of them were of an aggravated character, involving the imputation of criminal offences of a very serious nature. The analysis made of the article by the learned Chief Justice, coupled with the opinion which he himself expressed of its character and of the meanings which were capable of being attributed to it, was calculated, I think, to draw the attention of the jury from their proper function on the trial and to convey to them the impression that all they had to do was to visit the offence of which the defendant, in his opinion, was clearly guilty with heavy damages, as had been done in the case of *Bryce* v. *Ruston* (1) which he stated to the jury to have been £5,000. I do not by any means desire to be understood as entertaining an opinion that the article was not libellous; on the contrary, I am clearly of opinion that it contained a very serious libel; but to say thay the article was susceptible of all the innuendoes which were attributed to it by the plaintiff was, I think, an error. It was, however, susceptible of the first, but it is impossible to say what effect in increasing the amount of damages the ruling of the learned Chief Justice that it was susceptible of all the others, of a very aggravated nature, may have had upon the jury. What the learned Chief Justice should have done beside telling the jury what is the legal definition of a libel, I think, was to have told them that the article was susceptible of the meaning attributed

(1) 2 Times L. R. 435.

to it in the first innuendo, and that it was for them to say whether in point of fact that meaning was fairly attributed to it. If on such a charge they had rendered a verdict for the amount of damages which they have given, although that amount might seem to me to be excessive, I should have had great difficulty in interfering with it; but as I think the case was submitted to the jury in a manner which may have misled them, and as it is impossible to say how much the opinion of the learned Chief Justice that the article was susceptible of all the meanings, of an aggravated nature attributed to it—in which, I think, he erred—may have influenced the jury in awarding the amount of damages given by their verdict, I think there should be a new trial, unless the plaintiff is willing to reduce his verdict to five hundred dollars and to alter the judgment which has been entered accordingly. This amount, together with the costs incurred, will amply satisfy the ends of justice. The only prejudice which I think the defendant can be said to have incurred by the manner in which the case was submitted to the jury was that thereby excessive damages may have been awarded against him by the jury, for there can be no doubt of the libellous character of the publication; and as the appellant did not rest his appeal upon this ground, but insisted throughout that the publication was not actionable, I think that upon the plaintiff consenting to take the verdict and the judgment therein as suggested the appellant should pay the costs of the appeals. The appellant's contention throughout was, first, that the rule *nisi* for entering a non-suit should have been made absolute; and if not secondly, that the verdict in favor of the plaintiff was not justified by the law and the evidence. In support of this contention he instituted two appeals when one only was necessary, one

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against the rule refusing leave to enter a non-suit and the other against the judgment entered upon the verdict. Under any circumstances the former appeal being utterly without foundation must have been dismissed with costs, and as upon the other appeal the appellant fails upon the grounds upon which he rested his appeal, and as there will be but one bill of costs as upon one appeal, there exists no reason for making any distinction between the two appeals in respect of costs. The ends of justice will, I think, be attained if, upon the plaintiff consenting to reduce his verdict to $500 and to alter the judgment already entered accordingly, the appeal should be dismissed with costs. In default of the plaintiff filing his consent to the above effect within two months, then the judgment of this court to be entered dismissing the appeal against the rule refusing leave to enter a non-suit with costs, and allowing the appeal against the judgment which has been entered, but without costs, and directing a rule to issue in the court below for a new trial without costs.

Appeal dismissed with costs on plaintiff filing consent to damages being reduced to $500.

Solicitor for appellant: *Theodore Davie.*

Solicitor for respondent: *H. Dallas Helmcken.*

DAME LURENA DAVIS *ès qualité* (PLAINTIFF) ..... } APPELLANT;

AND

HARRIET ELIZABETH KERR (DEFENDANT) (TWO APPEALS).... } RESPONDENT.

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*Nov. 5,6,12.
1890
Mar. 10.

DAME LURENA DAVIS *ès qualité* (PLAINTIFF)..... } APPELLANT;

AND

MARY LOUISA KERR (DEFENDANT)...RESPONDENT.

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

Tutor and minor—Loan to minor—Arts. 297 *and* 298 *C.C.—Obligation—Personal remedy for moneys used for benefit of minor—Hypothecary—action.*

Where a loan of money is improperly obtained by a tutor for his own purposes and the lender, through his agent who was also the subrogate tutor, has knowledge that the judicial authorization to borrow has been obtained without the tutor having first submitted a summary account as required by Art. 298 C.C., and that such authorization is otherwise irregular on its face, the obligation given by the tutor is null and void.

The ratification by the minor after becoming of age of such obligation is not binding if made without knowledge of the causes of nullity or illegality of the obligation given by the tutor.

If a mortgage, granted by a tutor and subsequently ratified by a minor when of age, is declared null and void, an hypothecary action by the lender against a subsequent purchaser of the property mortgaged will not lie.

A person lending money to a tutor, which he proves to have been used to the advantage and benefit of the minor, has a personal remedy against the minor when of age for the amount so loaned and used.

APPEALS from judgments of the Court of Queen's Bench for Lower Canada (appeal side) (1).

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

(1) M.L.R. 5 Q.B. 156 ; 17 Rev. Leg. 620, 622.

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The appellant, in her quality of executrix of her deceased husband's will, sued the respondent, Harriet Elizabeth Kerr, for the sum of $6,044.62, of which $3,064 was for the amount of a notarial obligation and hypothec, dated 8th January, 1880, and given by one T. C. Fields in his quality of tutor to said Harriet Elizabeth Kerr, and $2,380.62 was for the amount of another notarial obligation and hypothec given by the said Harriet Elizabeth Kerr on the 23rd of February, 1885, the appellant alleging that in the said last mentioned obligation the said Harriet Elizabeth Kerr had ratified the first obligation granted by her tutor. To this action the respondent, Harriet Elizabeth Kerr, pleaded that she was not indebted; that the obligation of the 8th of January, 1880, was illegal, null and void; that Fields had never been legally authorized to borrow money from the appellant for her; that if Fields received any money from appellant it was for himself; that she had abundant means to live on and no necessity existed for borrowing more on her behalf; there was no cause nor consideration given for said obligations and hypothec; that her signature to the last mentioned obligation was obtained from her by threats and violence practised upon her by George Simpson, subrogate tutor and agent of the appellant as well as trustee and heir of his late father, Robert Simpson, and by Mrs. Fields on the advice of whom she was accustomed to rely when she was in a feeble condition of health, bodily and mentally.

At the same time the appellant brought an hypothecary action against the respondent, Mary Louisa Kerr, for the amount of the obligation granted by the deed of the 8th of January, 1880, and ratified by the deed of the 23rd of February, 1885. To this action the respondent, Mary Louisa Kerr, pleaded that the obligation of the 8th of January, 1880, was illegal, null and void.

The Superior Court gave judgment in the action

against Harriet Elizabeth Kerr in favor of the appellant for the sum of $2,380 62, being the amount of the obligation of the 23rd of February, 1885, and dismissed the action for the surplus, holding that the obligation of the 8th of January, 1880, was null and void, having been executed without the observance of the formalities required by law which constitute the guarantee of minors under such circumstances ; and as regards the hypothecary action the obligation on which it was based being annulled it was dismissed.

Each party appealed to the Court of Queen's Bench for Lower Canada (appeal side) from the judgments of the Superior Court in the suit of *Davis* v. *Harriet Elizabeth Kerr*, and the plaintiff appealed in the suit of *Davis* v. *Mary Louisa Kerr*. The Court of Queen's Bench for Lower Canada (appeal side) dismissed both actions with costs.

Three appeals were then taken to the Supreme Court of Canada and were argued together.

The evidence given in support of the respondents' pleas is fully reviewed in the reports of the case in the courts below (1), and in the judgment of Mr. Justice Taschereau hereinafter given.

Laflamme Q.C. for appellant.

The principal question which arises in these cases is :

Was the tutor, Fields, legally authorised to execute the obligation of the 8th January, 1880; if not, was the want of proper authorization, or the irregularity which accompanied it, remedied and effaced by the ratification and confirmation by Harriet E. Kerr as mentioned in the obligation of the 23rd of February, 1885 ?

The requirements of the law (arts. 297 and 298, and 1010 C.C.) were complied with and it is proven that at least $6,000 of improvements had been made on

(1) M.L.R. 5 Q.B. 156 ; 17 Rev. Leg. 620, 622.

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the property of the minor when the loan was applied for.

Now the authority to whom is entrusted the care of protecting the minors, and who is invested with judicially determining the power to borrow money on behalf of minors and to sanction any loan so made, is conclusive, unless there be fraud on the part of the lender, or notice given to him, or that he has direct knowledge of serious irregularities. Such authorisation must be held a complete protection for the party advancing the money which cannot be questioned by the minor or his representatives at any subsequent period. It is obvious that if the party from whom the minor seeks to obtain means which he needs is bound to guarantee the action of the judiciary, and if the minor after many years could question the correctness and the truth of the allegations sanctioned by a proper tribunal, no minor could find relief and protection from ruin when necessity, or his manifest interests, would require the assistance and loan of capital.

Then as to ratification I contend that under art. 1008 C.C., the plaintiff is entitled to recover the full amount acknowledged to have been received by her unless she can prove violence or fear within the meaning of arts. 994 and 995. Upon this question the Superior Court gave judgment in favor of the appellant and the evidence fully justifies this finding.

As to art 1214 C.C. The true meaning of the article is the expression of the existing law on the subject and as explained by our old authorities and best commentators on the corresponding articles of the French Code. Articles 1337, 1338, clearly show that article 1214 applies to ratification in general terms as not sufficient to cover nullities unknown to the party ratifying and not disclosed in the original deed, but was never

intended and cannot be intended to exact from the party obtaining the ratification a detailed mention of all the grounds of objection or irregularities which could be opposed to the original obligation.

The ratification set up in the present case is more an actual execution of the original obligation than a ratification proper, and the free execution of a deed, otherwise valid in form and substance, implies a renunciation of the right to invoke any nullities, which is equal in effect to an express formal ratification. Moreover, all the conditions required by the article 1214 are fulfilled by this act of ratification in which the substance of the obligation is mentioned and specially referred to. The obligation was for and on behalf of the party ratifying who was then alleged to be a minor; the only cause of nullity would be the fact that the property was mortgaged by the tutor without the proper formalities; but two years' after the majority of the minor, she expressly ratifies the act and declares it to be binding on her. What more direct expression as to the substance of the obligation, the cause of its being voidable and the intention to make it valid, can be found than what this deed of ratification contains? She knew of the existence of the mortgage, the circumstances under which it was granted. She must be presumed to have taken cognizance of it. She must be held in the same manner as if it were the ratification of an act done on her behalf without her consent and knowledge. Every authority declares that any ratification of an act done by a third party without authority is completely binding if the party in whose name the same was done thinks proper to approve of it.

The learned counsel cited Rolland de Villargues, Dic.

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du Droit Civil, (1) ; Duranton, (2) ; Toullier, (3) ; Freminville, de la Minorité, (4) ; Solon, Nullités, (5).

As to the case against Mary Louisa Kerr, if the mortgage should be held valid the hypothecary action would necessarily be maintained.

Hutchinson for respondent.

The tutor has no authority to borrow on behalf of the minor nor to hypothecate his immovable property without the authorization of the judge or prothonotary and that only in case of necessity or for the evident advantage of the minor. Arts. 297, 298, 267, 269 C. C. Meslé (6) ; Lamoignon Arrêtés de (7) ; Argou (8) ; Pothier, Obligations, (9) ; Pothier, Vente (10) ; Toullier, Droit Civil (11).

The law provides that in case of necessity the judge or the prothonotary can only give the authorization required when it is established by a summary account submitted by the tutor that the moneys, moveable effects and revenues of the minor are insufficient. The question, therefore, at once arises : Did the tutor present an account and show that the moneys, moveable effects and revenues of the minor were insufficient ? Of course, with this provision of the law staring the tutor and the family council in the face some account had to be presented, and some attempt had to be made to show the prothonotary from whom the authorization was asked that the moneys, moveable effects and revenues of the minor were insufficient. How was it done ? Simply by resorting to—falsehood.

The next question of importance which presents itself, is to know what knowledge the appellant, who it

(1) 7 Vol. Vo. Ratification art. 1, Par. 20, 21, 22.
(2) 13 Vol. liv. 3, par. 274.
(3) 8 Vol. par. 495.
(4) 2 Vol. p. 286.
(5) 2 Vol. p. 250.
(6) Ch. 8, No. 22.
(7) Tit. 4 No. 84.
(8) 1 Vol. p. 138.
(9) No. 76.
(10) No. 14.
(11) 2 Vol. No. 1224.

is alleged lent this money, had of the deception that was practised upon the prothonotary, in order to get this authorization, and as to the necessity which existed on the part of the minor to borrow this money.

In the first place the appellant, who is an elderly lady, acted in this matter entirely through her son, George Simpson. This fact appears by her own evidence, consequently the knowledge of her agent is the knowledge of the appellant. And George Simpson had full knowledge of everything that was done by the tutor with respect to borrowing this money. He was also the subrogate tutor of the said minor, Harriet Elizabeth Kerr.

Moreover the law does not entitle a tutor to borrow money and mortgage the property of his minor as security for the loan of money with which to pay himself. Sirey Codes annotés, (1) ; Chardon. Traité des trois puissances, (2) ; Demolombe Code Civil, (3). The learned counsel also referred to *Beliveau* v. *Chevrefils*, (4) ; *Poustie* v. *McGregor* (5).

It is, however, pretended by the appellant that even if this mortgage given by the respondent's tutor was valueless and without effect, yet the respondent, after she became of age, ratified and confirmed it by a subsequent deed of the 23rd of February, 1885.

In answer to this, the respondent says :—

That this pretended ratification cannot avail the appellant, inasmuch as the first deed of the 8th of January, 1880, being voidable as above shown, it is necessary that the act of ratification should expressly recite the substance of the former obligation and set forth the cause of its being voidable, and also expressly men-

(1) Art. 459, No. 8, art. 471, No. 4. (4) 2 Q. L. R. 191.
(2) No. 499. (5) 9 L. C. Jur. 332.
(3) 7 Vol. Nos. 751, 755, 756, 757, 765.

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tion that it is the intention of the parties to cover the nullity, which has not been done. Art. 1214.

As to the second obligation of the 23rd February, 1885, the respondent contends that this obligation is also entirely null and void and without effect because the respondent never received any lawful cause or consideration for the said obligation. Art. 989.

On the question of duress, I refer to art. 994, 995, 996, C.C. ; Pothier on Obligations, (1) ; Marcadé, (2) ; Duranton, (3). The evidence is ample to justify the conclusion arrived at on this question of fact by the Court of Appeal.

The judgment of the court was delivered by:—

TASCHEREAU J.—On the 2nd of January, 1880, one Thomas Craig Fields, in his quality of tutor to the defendant, Harriet Elizabeth Kerr, then a minor, obtained from the prothonotary of the district of Terrebonne, acting in lieu of a judge, the authorisation to borrow from the present plaintiff the sum of $3,664 for and in the name of the defendant, upon the security of a mortgage on the properties of the defendant situated at St. Andrew's, within the said district. Pursuant to that authorisation on the 8th of the same month the said tutor passed an obligation in the defendant's name in favor of the plaintiff for the said amount, and it is that amount, *inter alia*, that the plaintiff now seeks to recover from the defendant by the present action.

The defendant pleads to the action that she received no consideration for the obligation sued upon ; that the authorisation granted to her tutor to borrow for her the said amount and give a mortgage therefor on her property was null and void; and that the amount thereof went to pay her tutor's personal debts.

(1) Nos. 21, 22, 23. (2) 4 Vol. Nos. 410, 411, 413.
(3) 10 Vol. No. 152.

She has made out that plea, in my opinion, as to a great portion of this item of the demand.

It appears that the plaintiff's transactions in this matter with Thomas Craig Fields were negotiated entirely through her son, one George Simpson, who was her general business agent.

This George Simpson carried on a general store with his brother, Moses, and the firm had on the 8th January, 1880, an account in their books against T. C. Fields, personally, for $1,381.

This same George Simpson was the defendant's subtutor. In December, 1879, he, apparently getting anxious to obtain a settlement from Fields of the large amount standing against him in his books, concocted with him, Fields, the tutor, upon the suggestion and advice of a notary named Howard, whose conduct in the matter I cannot but qualify as deserving of severest censure, the means to get himself paid by this minor child of these $1,381 due to him by Fields personally, under cover of a loan from his mother, the present plaintiff, to this minor.

A family council had by law to be called for the purpose. One was assembled accordingly before that notary Howard, who knew all the parties, on the 26th Dec., 1879, at the request of the tutor, Fields, and was composed of George Simpson himself, Field's creditor, and agent of the lender, of Moses Simpson, his brother and partner, and as such also Field's creditor, of L. T. Simpson, another brother and creditor for $84, of one Christie Davis, their uncle and the lender's brother, of one Howard, the notary's son, and two others who are said to have been then George Simpson's clerks.

These seven persons "having been duly sworn upon the holy evangelists, and having examined the tutor's declaration, and the summary statement of accounts produced by him, and maturely deliberated together,

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were unanimously of opinion that it was expedient and necessary that the said tutor should be authorised to borrow from Lurena Davis (the present plaintiff) for and on behalf of the said minor, $3,664 and to mortgage the said minor's property as security for the said loan." Such are the very words of the notary's *acte* or *procès verbal* of the deliberations of the family council.

The prothonotary of the district a few days after homologated these proceedings in apparently the loosest possible manner. Acting in a judicial capacity, and bound by law to scrupulously scan every proceeding brought before him that might in any way be prejudicial to minor children's interests, this officer granted the permission to mortgage this young girl's property for the large amount of $3,664 without making any inquiry whatsoever, without having the family council, or the tutor, or the sub-tutor examined before him, and even without requiring from the tutor the summary account of the minor's revenues required by art. 298 C.C. In utter disregard of the duties assigned to him in the matter, and seemingly unconscious of the responsibility attached to his functions, he contented himself with relying upon the notary's proceedings, and granted the authority to borrow a large sum in this minor's name without any attempt whatever to exercise his own judgment on the merits of the application or on the necessity of the loan. A more iniquitous proceeding, a more glaring fraud against the law, is hardly conceivable; and that it should have so readily received the sanction of two public officers in the province demonstrates, it seems to me, that the protection due to minors is not, under the system there in force, always surrounded with the proper safeguards. A family council, called to protect the minor and advise on the opportunity of a loan for her, composed of two of the creditors who are to be paid from the pro-

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ceeds of that loan, one of them the special agent of the lender, three of them sons of the lender, and a fourth a brother of the lender, called together on a petition of the debtor, whose debt to two of the council is to be paid from the proceeds of the loan ; all of them swearing upon the holy Evangelists that after having maturely deliberated they are *unanimously* of opinion that, in the minor's interest, the loan from their mother was expedient and necessary; and all this upon the petition of a tutor who is to get his share of the loan; is a proceeding so ludicrous that I would think it fanciful if I had not this record before me. The whole transaction was evidently nothing but a deceitful contrivance, and this to the knowledge of the plaintiff, through her agent.

A party who lends money to a minor, through her tutor legally authorized to borrow, is not bound to see that these moneys are really expended in the minor's interest; neither has he, when in good faith, to go behind the judicial order that authorises the loan, if such order on its face is legal and regular. But the plaintiff here was, through her agent, a party to the illegality and fraud against the law which entirely vitiates the authorisation to effect this loan from her. She, the lender, formed, through her agent, part of the family council called to get her to determine upon oath whether or not, in the minor's interest, this loan was expedient or necessary. She, through her agent, knew that the proceeds of a great part of this loan were to go to the agent himself. She, through her agent, was aware that no summary of the minor child's revenues had been submitted to the prothonotary or family council as required by law. *Qui mandat ipse fecisse videtur.* I am of opinion that all this *a nécessairement eu pour effet de vicier dans son essence même la constitu-*

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tion du conseil de famille. Re Gielly (1). *Fraus et dolus nemini patrocinere debent.*

I do not lose sight of the fact that Simpson, examined as a witness, swears that it was to Fields as tutor for the defendant this $1,381 was advanced, but this is directly contradicted by his own books where the amount stands charged to Fields personally, and then, were this true, the fact remains that the loan to that amount was to go to him, Simpson, who formed part of the family council. And this, in my opinion, absolutely avoids this authorisation, not only as to the $1,381, but as to the whole amount of the loan. Could it be contended, however, that the loan was legally effected as to the surplus over the $1,381, there remains the objection to this surplus that, on Field's own statement produced before the family council upon his own application, as tutor to borrow for his pupil, this surplus was to reimburse him, Fields, as creditor of his pupil, for advances made and money expended for her. The illegality of this is patent. Sirey (2). Where the interest of a minor is to be considered and dealt with *uberrima fides* must be the rule, and the law will neither allow proceedings to be instituted for a minor by a tutor interested in the result nor tolerate in the family council the presence of any party who has directly or indirectly an interest in the matter submitted for consideration. Towards a tutor, a sub-tutor or a member of a family council, more than to any others perhaps, the tribunals are bound to rigorously enforce the wholesome doctrine that "no one having duties of a fiduciary character to discharge shall be allowed to enter into engagements or assume functions in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those he is bound to protect;" or as the

(1) Dalloz 80, 2, 9. (2) 32, 2, 289.

Privy Council tersely puts it in *Bank of Upper Canada* v. *Bradshaw* (1), that an agent or mandatary (and a tutor or a sub-tutor are mandataries) cannot be allowed to put his duty in conflict with his interest.

I do not think, however, that this entails the dismissal of the whole of the action as to this item. Any one who lends money to a tutor even not legally authorized to borrow for the minor, or even to a minor himself without the intervention of his tutor, has the right to recover all of this loan which he the lender proves to have been used to the advantage and benefit of the minor. This is unquestionable. I need only refer on this and other points arising on the case, to the authorities cited in *Miller* v. *Demeule* (2); and to *Gagnon* v. *Sylva* (3); *Venner* v. *Lortie* (4): Demolombe (5); Laurent (6); Sirey (7); Sirey (8); *Urquhart* v. *Scott* (9); *Payne* v. *Scott* (10).

The issue on this item of the demand is consequently reduced to a mere question of evidence. For what amount has the defendant been proved to have benefited? The evidence on this is very meagre. There are, on the one hand, three witnesses who estimate the additional value given by Fields to the defendant's property at from $3,000 to $6,000. But on the other hand, it is in evidence that Fields during his administration received from New York and elsewhere for the defendant divers large sums of money. So that it is impossible to tell, Fields being now dead, precisely which portion of this loan was spent on the property. Yet the plaintiff cannot recover more than what she has actually established to have benefited the defend-

(1) L. R. 1 P. C. 479.
(2) 18 L. C. Jur. 12.
(3) 3 L. N. 332.
(4) 1 Q. L. R. 234.
(5) No. 174.
(6) 5 Vol. Nos. 94, 101, 108; 16 Vol. Nos. 40, 42, 47, 53; 18 Vol. No. 556; 19 Vol. No. 70.
(7) 31, 1, 162.
(8) 70, 1, 307.
(9) 12 La. An. 674.
(10) 14 La An. 760.

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ant. That amount I cannot find to be from this record over $1,230, that is to say $1,000 paid to McIntosh on a previous mortgage he had on the defendant's property, and $230 for the outbuildings erected thereon by Fields. I would give only the legal interest, not 7 per cent., because that amount was not even authorised by the family council, and then the plaintiff recovers on the moneys disbursed for the defendant's benefit, and not on the obligation of the 8th January.

As to the hypothecation granted by the deed of 1880, it cannot stand even for the amount that the minor has benefited from the loan: Art. 1009 C.C. not in Code Napoleon. I refer for this to Duranton (1); Demolombe (2); Solon Nullités (3).

L'hypothèque constituée est nulle, lorsque les formalités requises n'ont pas été observées, encore bien qu'elle ait eu pour cause un emprunt qui a tourné au profit du mineur; en ce cas, le prêteur n'a qu'une simple action personelle; le mineur n'est point tenu en vertu d'un contrat, mais, *ex lege*, en vertu du principe d'équité qui ne permet à personne de s'enrichir aux depens d'autrui (4).

See also *re Beauquis* (5).

The reporter's summary of the case of *Beliveau* v. *Duchesneau* (6) is misleading. The court there did not hold that a mortgage given by a minor is not radically null when the nullity is invoked by the minor or on his behalf.

The hypothecation being null it follows, of course, that the hypothecary action against Mary Louisa Kerr stands dismissed.

As to the ratification by the defendant of this obligation of the 8th of Jan., 1880, by the deed of 23rd February, 1885, the plaintiff's contentions have been, in my opinion, rightly dismissed by the Superior Court.

(1) 19 Vol. No. 848.
(2) 7 Vol. No. 739.
(3) 2 Vol. No. 370, 376.
(4) 2 Boileux page 439.
(5) S. V. 82, 2, 211.
(6) 22 L.C. Jur. 37.

It was consented to by the defendant at a time when she was in complete ignorance of the circumstances under which the first obligation had been passed by her tutor, and at the instances and through the agency of the very man who had been her sub-tutor, and who thereby attempted to make her unwittingly ratify his own improper dealings in his own interest and those of his mother, the plaintiff, when acting for her, the defendant, under the guise of a friend and protector in the family council of 1879. A confirmation or ratification, either express or tacit, either under art. 1213 or under art. 1720, is not binding if the arty assenting to it was not aware of the causes of nullity or illegality of the first obligation. No one can be presumed to abandon voluntarily his rights. And no one can be held to have abandoned them when he did not know them. Sirey (1). "Acquiesence and ratification must be founded on a full knowledge of the facts" said their lordships of the Privy Council, in *Banque Jacques Cartier* v. *Banque d'Epargnes* (2), or, as the French courts put it in other words, *l'intention évidente de réparer avec connaissance de cause le vice dont l'acte est atteint.* And, says Bédarride (3), *On ne peut renoncer à un droit dont on n'a aucune connaissance.*

As to the second item of the plaintiffs' demand, $2,385.63, for so much acknowledged by the defendant to be by her due to the plaintiff, by the deed of the 23rd Feb., 1885, apart from the first obligation, I think she is entitled to recover. The defendant was then of full age, and had been since 1881. This deed is expressed to be for valid consideration for advances made to her. On the defendant, then, was the burden of proving that the deed was false in this particular. She has entirely

(1) Codes Ann. under Art. 1338, No. 49; Codes Ann. under Art. 1998, Nos. 32 seq.; 63 1, 457; 791, 57; 81, 2, 17.
(2) 13 App. Cas. 118.
(3) Dol. et Fraude No. 584.

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failed to do so. As to the contention that she consented to sign this deed only through fear and pressure, I am of opinion with the Superior Court, and Tessier and Bossé JJ. in the Court of Appeal, that she has not proved it. A plea of this nature, to destroy a solemn deed received by a public officer, cannot prevail but on the clearest evidence. The only witnesses on the point are the defendant herself, whose testimony must be read out of the record, her sister, who is herself a defendant on an hypothecary action where the same deed of ratification is attacked by her on the same ground, and Mrs. Fields, their foster mother, whose evidence is so palpably biassed that it is not surprising that the learned judge before whom the evidence was taken did not rely on it.

I would, on this item, restore the judgment of the Superior Court.

Appeals of Davis v. *Harriet E. Kerr allowed with costs of one appeal.*

Appeal of Davis v. *M. L. Kerr dismissed with costs.*

Solicitors for appellants: *Laflamme, Madors & Cross.*

Solicitor for respondents: *M. Hutchison.*

E. R. C. CLARKSON (DEFENDANT).. .....APPELLANT; 1890

AND *Jan. 21.
*June 12.

WILLIAM RYAN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lien—Costs of execution creditor—Assignment for benefit of creditors—Construction of statute—48 V. c. 26 s. 9—49 V. c. 25 s. 2.

Under 48 V. c. 26 s. 9, as amended by 49 V. c. 25 s. 2, an assignment for the general benefit of creditors has precedence of executions not completely executed by payment subject to the lien of any execution creditor for his costs, where there is but one execution in the sheriff's hands, or of the creditor who has first placed his execution in the sheriff's hands when there are more than one.

Held, Gwynne and Patterson JJ. dissenting, that the lien created by this statute is not confined to the costs of issuing the execution but covers all the costs of the action.

The section of the Ontario Judicature Act, 1881, (s. 43) which provides that in cases where the amount in controversy is under $1,000 no appeal shall lie from the decision of the Court of Appeal to the Supreme Court of Canada, except by leave of a judge of the former court, is *ultra vires* of the legislature of Ontario and not binding on this court. Remarks on an order granting such leave on appellant undertaking to ask no costs of appeal.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour C. J. in favor of the plaintiff.

The appellant is assignee under an assignment for the general benefit of creditors, and the respondent an execution creditor, of one Kidd. The respondent's execution was placed in the sheriff's hands the day before the assignment was executed, and the sheriff seized the goods of Kidd but released them on being

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

(1) 16 Ont. App. R. 311.

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notified of the assignment. These proceedings were subsequently brought to determine the extent of the respondent's lien for costs under 48 Vic. ch. 26 s. 9, as amended by 49 Vic. ch. 25 s. 2, the respondent contending that the lien attaches to the full costs of suit and the appellant that it is limited to the costs pertaining to the issue of, and proceedings on, the writ of execution.

48 Vic. ch. 26 s. 9 provides that "an assignment for the general benefit of creditors under this act shall take precedence of all judgments and of all executions not completely executed by payment."

49 Vic. ch. 25 sec. 2 enacts as follows: "Section 9 is amended by adding thereto the following words, 'subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands;" and so amended the section is now sec. 9 of R.S.O. (1887) c. 124.

The case was argued before Armour C. J., who gave judgment for the plaintiff (respondent) thus deciding that the lien attached to the full costs of suit. His judgment was affirmed by the Court of Appeal, Mr. Justice Burton dissenting. The defendant then appealed to this court.

Foy Q.C. for the appellant. Prior to the amending act an execution creditor had no lien for either debt or costs; *Porteous* v. *Myers* (1). Then the amendment gave him the costs of execution so that his diligence would not place him in a worse position than other judgment creditors. This was all the legislature had in view and the act should be construed in the light of that intention. *Hawkins* v. *Gathercole* (2); *Caledonian*

(1) 12 Ont. App. R. 85.

(2) 6 DeG. M. & G. 1.

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Railway Co. v. *The North British Railway Co.* (1); *Thomas* v. *The Great Western Railway Co.* (2).

Aylesworth for the respondent cited *Allan* v. *The Great Western Railway Co.* (3); *Scott* v. *The Great Western Railway Co.* (4)

(In the course of the argument the Chief Justice called attention to an order published in the record and purporting to be made by the Court of Appeal which gave defendant leave to appeal to the Supreme Court he undertaking to ask no costs of such appeal.

His Lordship said: "The Court of Appeal was not justified in making this order and had no right to insert any undertaking as to costs which is a matter entirely in the discretion of this court.

Mr. Foy referred to the Ontario statute requiring leave to appeal when the amount in controversy is under $1,000.

HIS LORDSHIP.—We have repeatedly stated in this court that we are not bound by that statute. The effect of this order is that the waiver of costs is a condition of the appeal. There was no necessity for an application for leave to appeal and if such leave were granted it should not be tramelled with conditions.

PATTERSON J.—The matter has been discussed in the Court of Appeal and there being no reported decision that the Ontario Act is *ultra vires* it has been acted upon.

HIS LORDSHIP.—The matter has been before this court more than once, appeals from Ontario being objected to on the ground that leave has not been granted under the Ontario Act, and it has been stated most unequivocally that this court is not bound by the act. If it is, then each province could legislate so as to take away the jurisdiction of this court altogether

(2) 6 App. Cas. 114.
(1) 24 U.C.Q.B. 326.
(3) 33 U.C.Q.B. 483.
(4) 23 U.C.C.P. 182.

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In one case where the Court of Appeal refused leave to appeal this court granted it on that ground alone (1). And in a subsequent case, where it was sought to raise the question again, we refused to hear it because it had been decided already. No person practising in Ontario, who has anything to do with this court, can be ignorant of our position in regard to that statute. I do not wish it to be imagined that we have the slightest doubt as to our jurisdiction without regard to that act, for to hold so would be to disturb numerous decisions of the court.)

Foy Q.C. in reply.

SIR W. J. RITCHIE C.J.—The facts of the case are thus stated in the judgment of Chief Justice Armour:

It was admitted by the pleadings that the plaintiff, on the 15th December, 1887, recovered judgment for debt and costs against one Kidd; that on the same day he placed writs against goods and lands in the hands of the proper sheriff, and that on the same day the said sheriff seized sufficient goods of the said Kidd to satisfy the said debt and costs. It was also admitted that on the 16th day of December, 1887, the said Kidd made an assignment to the defendant for the benefit of his creditors, under the provisions of the act R. S. O. cap. 124, of all his real and personal estate. It was also admitted by the defendant that the plaintiff was entitled to be paid in full the costs of the writ of execution against goods and the sheriff's proper expenses in connection therewith, but it was denied by him that the plaintiff was entitled to be paid in full any other part of his costs.

The act 48 Vic. cap. 26 sec. 9, gave an assignment for the general benefit of creditors under that act precedence of all judgments and of all executions not completely executed by payment.

This section was amended by section 2 of the act 49 Vic. cap. 25, by adding thereto the words: "Subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor who has the first execution in the sheriff's hands," and so amended this section stands as section 9, R. S. O. cap. 124.

I agree with the learned Chief Justice of the Queen's

(1) *Forestall* v. *McDonald* Cassels's Dig. 241, 406.

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Bench Division and the majority of the Court of Appeal that the words used therein "for his costs" mean for his whole costs of recovering judgment, issuing execution, and of the sheriff's fees thereon, and are not to be limited, as was contended, to the costs of the writ of execution against goods and the sheriff's proper expenses in connection therewith.

I can see no ambiguity in the language used by the legislature which must be read in its plain, ordinary, grammatical meaning and so read it can, in my opinion, only mean all the costs recoverable by the creditor from the debtor under the execution. I can discover nothing in the act to limit the term costs to the costs of the execution to the exclusion of the costs in the cause.

I can discover nothing to induce me to suppose that the legislature used the language of the enactment in any other than its ordinary, natural sense. The fact of the legislators having shown that they well understood the difference between costs in the cause and costs on the execution so far from limiting the nature of the costs exempted, assuming we should go out of the statute to discover its construction the propriety of which I very much doubt, to my mind is strongly confirmative of the contention that where it used the word "costs" without any such limit it intended that word to be understood in its fair and full meaning, without limitation or application to one description of costs rather than the other, but intended it to apply alike and without distinction to all costs. I therefore think the appeal should be dismissed.

FOURNIER J.—I am of opinion that the appeal should be dismissed for the reasons given in the judgments in the Court of Appeal.

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

GWYNNE J.—In an action brought by the respondent against one Kidd, a question of account therein was referred to Daniel Home Lizars, Esquire, local master at Stratford, under the authority, it must, I think, be presumed for it is not so stated on the appeal book, of sec. 189 of ch. 50 of the Revised Statutes of Ontario of 1887 and the Judicature Act of 1881; before the 21st November 1885 the said local master made his report or certificate whereby he found that there was due from Kidd to the above respondent, the plaintiff in the said action, the sum of $522, and he directed that the defendant Kidd should pay to the said plaintiff his costs of the said action. These costs upon the 5th of September, 1887, were taxed at the sum of $795.55. No judgment was ever entered in the said action upon the said master's report or certificate, as required by the Ontario Judicature Act of 1881, order 37, p. 281 of McLellan's Judicature Act of 1881, but subsequently to the taxation of the said costs Kidd, the defendant in that action, paid to the plaintiff therein, the now respondent, upon the said sum of $522.00 and interest thereon and the said costs, the sum of $900.00 leaving the sum of $498.50 due in respect of the said action. Upon the 15th day of December, 1887, the local registrar at Stratford entered a judgment in favor of the now respondent against the said Kidd, not upon the said local master's report or certificate for the amount found due in the action the question of account wherein was referred to him and the taxed costs of the said action, but, upon what authority does not appear, for the said sum of $498.50, stating it in the judgment roll to be for balance of costs. In the absence of any authority suggested for the insertion of this statement in the judg-

ment, the question now is whether that statement so made in the judgment roll can make the said sum of $498.50 for which the judgment was entered to be *costs* within the meaning of the Ontario statute 49 Vic. ch. 25 sec. 9; for upon the 16th day of December, 1887, the day after the entering of the said judgment and the issue of execution thereon, the judgment debtor Kidd made to the above appellant, as assignee, a general assignment for the benefit of his creditors under the provisions of the Ontario statute 48 Vic. ch. 26 as amended by said 49 Vic. ch. 25, and the respondent now claims, against the assignee of that assignment, to be a privileged creditor of the assignor for the amount of the above judgment debt and the costs of two executions issued thereon against the goods and lands of the judgment debtor, sheriff's percentage and other fees.

At the time of the passing of 48 Vic. ch. 26, upon writs of execution being placed in a sheriff's hands, the judgment debtor's goods and land became liable to the satisfaction of the judgment debt, and the judgment debtor could make no valid disposition thereof to the prejudice of the judgment creditor, but the latter acquired no "*lien*" upon his judgment debtor's goods or lands. He acquired simply the right of having his judgment paid out of the judgment debtor's property, and of preventing the judgment debtor making a valid disposition of any part unless he should leave sufficient to satisfy the judgment debt. Now the statute in its 9th section enacted that an assignment for the general benefit of creditors under that act should take precedence of all judgments and of all executions not completely executed by payment; the effect of this section was to deprive a judgment creditor of all right of precedence in payment of his judgment debt as to so much of the debt as remained unpaid or unrealised

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by execution executed; and to give precedence to the assignment for the general benefit of creditors over all judgments, even though executions issued thereon should be in the sheriff's hands to be executed.

This 9th section of 48 Vic. ch. 26, was amended by 49 Vic. ch. 25 sec. 2, and so amended thereafter read and reads:—

> An assignment for the general benefit of creditors under this act shall take precedence of all judgments and of all executions not completely executed by payment subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands.

This language, which has been introduced by way of amendment of what was clear and just, has made an alteration in the act which has occasioned some perplexity. In the provision of 48 Vic. ch. 26, there was apparent both sound reason and justice in putting all creditors of a person unable to pay his debts in full upon an equal footing as to participation in his estate assigned for the equal benefit of all. It is difficult to see why a judgment creditor, by putting an execution in the sheriff's hands a day or an hour before the execution of an assignment by the judgment debtor for the general benefit of all his creditors, and it may be for the express purpose of obtaining precedence over the assignment which the judgment creditor may have known was being prepared for execution, should obtain precedence for that portion of his judgment debt which consisted of costs; for this is the extent to which the respondent's contention must go if it prevails. So, likewise, is it difficult to perceive why, where there are several executions in the sheriff's hands against the same debtor, that privilege of precedence for costs over an assignment for the general benefit of all the judgment debtor's creditors should be granted to him who had his execution first in the sheriff's hands. No

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rational explanation for this preference being made in favor of the first of several execution creditors, has been or, as it seems to me, can be suggested. Then what can be the meaning of the words twice used in this amended section "subject to the *lien* if any," of an execution creditor, or of the first of several, for his costs?

It is only with execution creditors whose executions are in the sheriff's hands that the section deals at all. To an execution creditor who has not yet placed his writ of execution in the sheriff's hands when the assignment for the general benefit of creditors was executed the section gives no preference. The placing of a writ of execution in the sheriff's hands did not, as already observed, give to the judgment creditor a *lien* upon any goods or lands of the judgment debtor. The section does not purport to create a *lien* which before did not exist; it simply enacts that the assignment for the general benefit of creditors immediately upon its execution shall have precedence over all judgments and all executions save only as regards any *lien*, if an execution creditor having an execution in the sheriff's hands has any lien, for his costs. If independently of the section the execution creditor had no such lien the section does not give him one. There is a difficulty in construing the section as treating the right, which a judgment creditor acquired by placing a writ of execution in the sheriff's hands, of preventing the judgment debtor making any valid disposition of his property unless he should leave sufficient to satisfy the judgment debt as constituting a lien upon such judgment debtor's goods or lands, for in that case as *ex-præmissis* the placing the writ of execution in the sheriff's hands would effectually perfect the lien, the qualification involved in the words, "if any" twice deliberately used in the section would be quite insen-

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sible. There is, as it appears to me, much force in the view taken by Mr. Justice Burton in the Court of Appeal for Ontario, namely, that the costs referred to are costs of an execution creditor in relation to his writ of execution, that is to say, costs incurred subsequently to the writ of execution being placed in the sheriff's hands, for which costs a lien may have been obtained by a levy made under the execution, as, for example, for the sheriff's possession money—the taking care of and feeding cattle—mileage—and all other the sheriff's fees and expenses of execution, and such poundage as the sheriff might be entitled to under the 45th section of ch. 66 of the R.S.O., 1877; for such costs, if any have been incurred by actual seizure, it may with propriety be said that a "lien" would be acquired upon the property levied upon, and a sensible construction to the section would be given by construing it as giving precedence to the assignment for the general benefit of creditors over all judgments and over all executions, subject only to the lien, if any has been acquired, for such costs by reason of an actual seizure having taken place; such costs would be actually costs of the "execution creditor," which is the term used in the section; and this construction would seem also to afford some explanation of the provision that the precedence of the assignment should be subject only to the costs of the creditor whose execution is first placed in the sheriff's hands, when there are more than one in his hands against the same judgment debtor, for it would be under the first writ placed in the sheriff's hands that most of the above costs would be incurred. But the section cannot, in my opinion, apply to the amount recovered by the judgment in the suit of *Ryan* v. *Kidd* even though we must construe the word "costs" as used in the section as applying to the judgment cre-

ditor's "costs" included in his judgment. The term "costs" as used in the section in such case must needs, in my opinion, be held to apply to the costs recovered by the plaintiff as *incident* to the debt or damages recovered by the judgment—those costs which under the old form of entering judgment for a plaintiff it was adjudged that the plaintiff should recover "for his costs of suit by the court here adjudged of increase to the plaintiff which said *monies*, or *debt*, or *damages and costs* in the whole amount to ." The form of entry of judgment is changed by the Judicature Act of 1881 but the substance still remains, and at No. 159 on p. 144 of McLellan's Judicature Act of 1881 the form of entry of judgment in a case similar to that of *Ryan* v. *Kidd* is given as follows:

The questions of account in this action having been referred to and he having found that there is due from the defendant to the plaintiff the sum of $ and directed that the defendant do pay the costs of this action. It is this day adjudged that the plaintiff recover against the said defendant $ and costs to be taxed.

The above costs have been taxed and allowed at $ as appears by a taxing officer's certificate dated the day of .

Now assuming the term "costs" in the 2nd section of 49 Vic. ch. 25 to apply to a plaintiff's costs recovered by a judgment entered in the above form, and not merely to his costs as execution creditor incurred subsequently to his writ of execution being placed in the sheriff's hands, it is to costs which, as in the above form, are recovered by a plaintiff as his taxed costs *incidental* to the recovery of a judgment by him for a debt or damages that the term must in my opinion be construed as applying. There are no such costs recovered by the judgment in *Ryan* v. *Kidd* now under consideration. The only sum recovered by that judgment as a judgment debt is the sum of $498.50; no costs are recovered as *incidental* to the recovery of that judg-

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ment debt. What appears by the judgment is that on the 5th September 1887 there was due from the defendant to the plaintiff the sum of $1,317.55 with interest upon the sum of $522 from the 28th November, 1885, and that on the 15th December, 1887, there remained due in respect of such debt the sum of $498.50 for which sum as his only judgment debt the plaintiff entered judgment, adding without any apparent authority for so doing, "for balance of costs herein." There does not appear to have been any warrant for the insertion of these words, the sole object of doing which would seem to have been to lay a foundation for the contention in the present case; neither does their insertion alter, in my opinion, the fact apparent from what is previously stated in the judgment showing that the amount for which the judgment was entered was in truth a balance of a larger sum alleged to have been previously due from the defendant to the plaintiff for debt, interest and costs, for which as a debt due to the plaintiff the judgment is entered. The insertion of these words in a judgment so entered cannot, in my opinion, make the judgment for such debt to be a judgment for "costs" within the meaning of that term as used in 49 Vic. ch. 25 sec. 2, nor anything else than an ordinary judgment for a debt antecedently due as distinct from a judgment for taxed costs recovered by a judgment as incidental to the recovery of a debt or damages recovered by the same judgment, which I take to be the true construction of the term "costs" as used in 49 Vic. ch. 25 sec. 2.

I am of opinion, therefore, that the appeal should be allowed with costs because, first, I think that the term as used in the above section refers to an execution creditor's costs of his writ after it is placed in the sheriff's hands and in respect of which something had been done giving rise to a lien for the costs "if any"

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so incurred; secondly, because assuming the term to be applicable to "taxed costs" of suit recovered in a judgment whereby a debt or damages is or are recovered, and not to be limited to an execution creditor's costs incurred in virtue of same action taken by a sheriff under a writ of execution placed in his hands, the judgment debt recovered in *Ryan* vs. *Kidd* cannot, in my opinion, be said to be for "costs" within the meaning of that word as used in 49 Vic. ch. 25 sec. 2; and thirdly, because to whatever the term "costs" as used in the section may be applicable, I am of opinion that no "lien" attaches in favor of an execution creditor upon any property of his judgment debtor until a levy or seizure should be made by the sheriff, under an execution placed in his hands to be executed, of some property of the judgment debtor to which the "lien" can attach, and as there has been no such seizure made under the execution placed in the sheriff's hands at the suit of *Ryan* vs. *Kidd*, there has been no "lien" acquired by Ryan for any costs to which the precedence of the assignment for the general benefit of Kidd's creditors is by the statute made "subject."

PATTERSON J.—The judgment of *Ryan* v. *Kidd* for $498.50 must, I think, be considered to be a judgment for costs taxed in that action. It sets out the reference of the question of account in the action, and the award that there was due from the defendant to the plaintiff $522, and that the defendant was to pay the costs of the action; that the costs were taxed at $795.55; that $900 had been paid upon the judgment debt and interest and in reduction of costs, leaving $498.50 due in respect of the action: and adjudges to the plaintiff the sum of $498.50, being for balance of costs therein. The form of this entry may be open to criticism, but I take

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it that we must accept and act on the judgment as we find it.

The question that presents more difficulty to my mind is the proper effect to be given to the enactment R. S. O. (1887) ch. 124 section 9.

Upon the best consideration I have been able to give to the matter, I have come to the conclusion that the view taken by Mr. Justice Burton, who dissented in the court below, and by my brother Gwynne in the judgment just delivered by him, is the correct understanding of the section.

The language of the enactment is satisfied, as I construe it, by giving to the execution creditor the costs incident to his execution when by seizure under it he may have obtained what is called a *lien* for those costs. That construction is, in my judgment, better fitted to the language employed than the construction which would give him also the taxed costs included in his judgment, which are expressly given in other circumstances by the Creditors' Relief Act to the creditor under whose writ the sale takes place for the benefit of all the creditors, while there is no reason, upon any ground of principle apparent to my apprehension, why a preference in respect of the taxed costs should be given to the creditor who happens to have put his *fi. fa.* in the sheriff's hands before the assignment for the general benefit of creditors. For these reasons, as more fully detailed by my brother Gwynne, and in the court below by Mr. Justice Burton, I am of opinion that we should allow the appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Foy & Kelly.*

Solicitors for respondent: *Idington & Palmer.*

WILLIAM SHOOLBRED.... .....APPELLANT,

AND

ALEXANDER STUART CLARKE.....RESPONDENT.

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*Jan. 21, 22, 23.

June 12.

In re UNION FIRE INSURANCE COMPANY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Winding-up Act—R.S.C. s. 129—Application of to provincial company—Winding up proceedings—Reference to master.

A company incorporated by the Legislature of Ontario may be put into compulsory liquidation and wound up under the Dominion Winding-up Act, R.S.C. c. 129.

In assigning to provincial courts or judges certain functions under the Winding-up Act Parliament intended that the same should be performed by means of the ordinary machinery of the court and by its ordinary procedure. It is, therefore, no ground of objection to a winding-up order that the security to be given by the liquidator appointed thereby is not fixed by the order, but is left to be settled by a master.

APPEAL from a decision of the Court of Appeal for Ontario (1) dismissing an appeal from the judgment of Boyd C. (2) who made an order for winding up the Union Fire Insurance Company, under the Dominion Winding-up Act.

On a former appeal to this court (3) a winding-up order made by Mr. Justice Proudfoot in this matter was held defective and remitted to the court below for the petition to wind up the Union Fire Insurance Co., to be dealt with anew. The matter was then brought before the Chancellor, who made an order containing, among others, the following provisions :

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

(1) 16 Ont. App. R. 161. (2) 14 O. R. 618.
(3) 14 Can. S.C.R. 624.

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"1. This court doth declare that the said the Union Fire Insurance Company is an insurance company within the provisions of the said act, and is insolvent under the provisions thereof, and doth order that the business of the said company shall be wound up by this court under the provisions of the said act and the amendments thereto."

"2. And this court doth further order that William Badenach, of the city of Toronto, accountant, the receiver heretofore appointed in the said case of Clarke *v.* Union Fire Insurance Company, be and he is appointed permanent liquidator to the estate and effects of the said company upon his furnishing security to the satisfaction of the master in ordinary of the Supreme Court of judicature for Ontario before he shall intermeddle with the said estate."

"3. And this court doth further order that it be referred to the said master in ordinary to fix the remuneration payable to the said liquidator, to settle the list of contributories, take the accounts of the assets, debts and liabilities and all other necessary accounts, and to make all necessary inquiries and reports and do all necessary acts and give all necessary sanctions to the said liquidator for the winding up of the affairs of the said company under the provisions of the said act and amendments thereto."

Shoolbred, a shareholder of the insolvent company, objected to this order on the grounds, mainly, that the Dominion Winding-up Act was not applicable to a company incorporated by the Ontario Legislature, and, therefore, no order could be made under it in this case; also that if the order could be made it was defective in leaving the security of the liquidator to be settled by the master, as the court could not so delegate the authority conferred on it by the act. Both these objections were overruled by the Court of Appeal and

the order was confirmed. Shoolbred then appealed to the Supreme Court of Canada.

S. *H. Blake* Q.C. and *McLean* for the appellant referred to *Merchant's Bank of Halifax* v. *Gillespie* (1).

Bain Q.C. for the respondents cited *Re Eldorado Union Store Company* (2) and the cases relied on in the courts below.

Sir W. J. RITCHIE C.J.—In this case the majority of the court are of opinion that the appeal should be dismissed. I should have liked more time to consider the matter, but my opinion could not affect the decision and I am not prepared to dissent from the judgment of the court.

FOURNIER J.—I agree that the appeal should be dismissed.

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

GWYNNE J.—I entertain no doubt that the Winding-Up Act of the Dominion Parliament, 45 Vic. ch 23, and the acts in amendment thereof, do apply to the Union Fire Insurance Company, and that so applying those acts are *intra vires* of the Dominion Parliament, and I confess that I cannot understand how it can be doubted that this court was of that opinion when it made the order which was made upon the former appeal between the same parties. It cannot be conceived that after hearing an argument upon this very ground of appeal upon the former occasion, this court would have remitted the case to be dealt with by the court below, under the provisions of the statute, in accordance with the opinion of the majority of the court as to the construc-

(1) 10 Can. S. C. R. 312. (2) 6 Russ. & Geld. 514.

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tion of the statute, if they were of opinion that the act did not apply to the Union Fire Insurance Company. I still am of opinion that proceedings instituted by certain creditors of that company for the purpose of having the proceedings taken by the respondent Clarke to have the assets of the company applied in liquidation of the claims of its creditors brought under the operation of the Dominion statute, 45 Vic. ch. 23, as amended by 47 Vic. ch. 39, were well instituted under the provisions of the 2nd and 3rd sections of the latter act, and I entertain no doubt that the order of the learned Chancellor for Ontario, which is the subject of this appeal, was a good and valid order under these acts as the same are amended by and consolidated in ch. 129 of the Revised Statutes of Canada.

The intention of Parliament in submitting all proceedings instituted for the winding up of insolvent companies under these acts to the jurisdiction of the ordinary courts in the respective Provinces of the Dominion was to leave those proceedings or cases to be dealt with in those courts by the machinery and course of procedure ordinarily in use in those courts *in consimili casu*, and in my opinion this intention was made sufficiently apparent by sec. 77 of ch. 129 of the Revised Statutes of Canada, and the repeal of the sub-section of that section and the substitution therefor of another sub-section by 52 Vic. ch. 32 sec. 20, does not, in my judgment, create any doubt whatever as to such having been the true construction of the said sec. 77 of ch. 129.

The objections taken to the form of the learned Chancellor's order appear to me to be of a purely technical character, affecting only matter of procedure, matters which are not, in my opinion, proper subjects of appeal to this court. To speak of a reference to a master of a matter which, according to the ordinary procedure

of the court, comes within his ordinary duty as a delegation by a judge to a master to do what it was the duty of the judge himself to do, involves, in my judgment, a misuse of the term, a misconception of the intention of Parliament, and a misconstruction of the terms of the act in which that intention is expressed. I concur in the dismissal of the appeal with costs.

Gwynne J.

PATTERSON J.—The Union Fire Insurance Company was incorporated in 1876 by an act of the Legislature of Ontario, 39 Vic. ch. 93.

In November, 1881, the company was insolvent, and its license from the Ontario Government, under R.S.O. (1877,) chap. 160, was suspended.

In the same month of November, 1881, Clarke, one of the present respondents, instituted an action in the High Court of Justice in Ontario, asking on behalf of himself as a creditor of the company and on behalf of the other creditors to have the assets of the company realised and distributed. His position will more fully appear from the following extract from his statement of claim :—

10. By the said act of incorporation a capital stock was provided for, of which a large amount was subscribed for, taken and is now held by a large number of persons, and a portion thereof has been paid up, and the holders of the said stock are too numerous to be made parties defendants, and it would be almost impossible for the plaintiff to proceed with this cause and the expense attending the same would be very great were he compelled to make all the shareholders parties in this action, and in order to realize the amount due to the plaintiff and other creditors from the various stockholders of the said company, it would be necessary to bring a great number of actions, whereas the amount due to the plaintiff and other creditors can be realized herein with less expense and in less time.

11. The plaintiff claims that under the circumstances it would be greatly to the advantage of the creditors of the defendants generally to have the company wound up, and the assets administered under the direction of this court, and that he and the creditors of the defendants

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generally cannot be sufficiently protected in their rights without the benefit and assistance of this court.

12. The defendants have, pursuant to the statute in that behalf, deposited with the treasurer of the Province of Ontario the sum of $26,300, which deposit the plaintiff claims should be made available by order of administration on unearned premiums and on claims by the policy holders in the said company in accordance with the terms of the said statute, and notice of the failure of the said company to pay said claims after the lapse of sixty days from time it became due has been given by the plaintiff to the said Provincial Treasurer.

13. The plaintiff claims to have it declared that the defendants are liable to have their deposit in the hands of the Provincial Treasurer administered in manner provided for in the 21st and 22nd sections of said chapter 160.

14. The plaintiff claims to have it declared that the plaintiff and the other creditors of the company are entitled to have the assets of the company realized to pay its creditors.

15. The plaintiff claims that an account may be taken of what is due to the plaintiff and the other creditors of the said company, and that the assets may be applied in payment of the claims of the said creditors in due course of administration, and that all the unpaid stock and other assets may be called in.

16. The plaintiff further claims that a proper person may be continued as receiver of the property, business and moneys of the said company, with power to collect and get in all the assets of the said company, and to manage and wind up its affairs, and that proper direction may be given to the said receiver.

17. The plaintiff further claims that the said company, its officers, servants and agents, may be restrained by the order of this court from intermeddling in the management of the property of the said company and from receiving any of the moneys or profits thereof.

Judgment was, by consent, entered in that action for the plaintiff on the seventh of January, 1882, giving the full relief asked, and referring it to the master to take an account of the debts and liabilities of the company, to fix the priorities of the creditors, and to take an account of the assets and estate of the company. After a report by the master there was another judgment on further directions which referred it again to the master to continue the accounts and to ascertain and settle who were the stockholders of the company, and order-

ed the company to make calls for enough to pay the debts.

The master entered upon the inquiries, and contests on various matters took place before him, but he made no report.

The reason for this was that proceedings were initiated under the Dominion Winding-up Acts.

Those proceedings have led to the present appeal, which is from the judgment of the Court of Appeal affirming a winding-up order made by the Chancellor of Ontario on the 9th May, 1888.

That order was made six years and a-half after the institution of Clark's action, and it was upwards of eight years from the commencement of the action when this appeal was argued.

There had been a former winding-up order made in January, 1885, from which the present appellant appealed to the Court of Appeal of Ontario (1), where the court being equally divided in opinion the appeal was dismissed, but upon a further appeal to this court the order was vacated and the matter remitted to the High Court (2).

I shall presently notice the ground of that decision. In the meantime I may quote an observation made with equal force and truth by one of the learned judges while expressing his opinion that upon one ground, which he designated as a purely technical and unmeritorious objection, the order ought to be reversed.

"The only practical result of the objection," remarked Mr. Justice Osler, "seems to be that the winding up of this insolvent company has been delayed for more than a year. The delay and expense which have been already incurred are a reproach to the administration of justice, the litigation having been pending for

(1) *Re* Union Fire Ins. Co. 13 Ont. App. R. 268.

(2) *Shoolbred* v. *Union Fire Ins. Co.* 14 Can. S. C. R. 624.

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nearly five years, with the result, as we understand, that between $5,000 and $6,000 of the company's assets have been expended in costs."

The reproach to the administration of justice is now more glaring, for four years more have elapsed and, save as advanced by the recent hearing of this appeal, the litigation is at precisely the same stage, the former order having been replaced by that of the Chancellor, but with an inevitably large addition to the costs.

The Chancellor's order was made under the Winding-up Act, R. S. C., ch. 129, which came into force on the first of March, 1887. The first order was under 45 Vic. ch. 23, as amended by 47 Vic. ch. 39. In the revised statute, section 20 represents the former section 24, but with the important substitution of the word "may" for "must," thus removing the ground on which it was contended that the liquidator must be appointed by the winding-up order, which was the main question on which the judges of appeal differed in opinion. This question, whether the order to wind up the business of the company and the appointment of the liquidator must be written on one paper, or might be written on two, was justly characterised by the learned judges who felt compelled to hold that the section imperatively required the two things to be embraced in the one order, as a purely technical point.

That first winding-up order did not appoint a liquidator, but referred it to the master to appoint one, merely continuing, as liquidator *ad interim*, the same gentleman who was already acting as receiver. No one supposed or contended that a permanent liquidator could be appointed under section 24, either by the winding-up order or by a subsequent order, without the prescribed statutory notice being given to creditors, &c. The objection taken to the order was because it failed to appoint a liquidator, yet, singularly enough,

the case seems to have been presented on the appeal to this court, as would appear from the head note of the report and from some of the judgments delivered, as if the liquidator had been appointed by the order and (as would have been so in that case) without due notice of the intention to appoint him The objection to the absence of the notice, upon the case thus apprehended, was a substantial objection, and was not the technical and unmeritorious one which arose and was dealt with upon the facts as they really existed, and it was upon that apprehension of the case by the majority of the judges that the order was vacated.

The decision cannot give much assistance in settling the disputed construction of the section. The questions now raised are not quite the same as those made under the former order, and some questions raised upon the enactment, under section 24, are excluded by the change made in section 20 of the revised statute.

There are two branches to the present appeal.

First, it is contended that the Dominion Winding-up Act does not apply to the Union Fire Insurance Company because that company was incorporated by Provincial and not Dominion legislation ; and then, assuming the act to apply to the company, it is objected that its provisions do not authorise the order made by the Chancellor.

The interpretation clause of the act, R.S.C. ch. 129, defines the expression "insurance company" as used in the act, as meaning a company carrying on, either as a mutual or a stock company, the business of insurance whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise ; and defines the expression "winding-up order" as meaning an order granted by the court under that act to wind up the business of the company, including any order granted by the court to bring within the provisions of the act

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any company in liquidation or in process of being wound up.

Section 3 declares that the act applies to certain incorporated companies, including incorporated insurance companies, wheresoever incorporated, and

(*a*) Which are insolvent; or

(*b*) Which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of the act.

No language could be more general and comprehensive or less calculated to suggest the exclusion of any class of incorporated companies, nor has any good reason been given for thinking such exclusion can have been intended.

The Provincial Legislatures have under section 92 of the B. N. A. Act exclusive power to make laws in relation to the incorporation of companies with provincial objects; but the body politic created by any such act of incorporation becomes, like a natural body, subject to the laws of the land. There are a number of the subjects over which exclusive legislative jurisdiction is given to the Parliament of Canada, as well as others in relation to which the Parliament may make laws for the peace, order and good government of Canada, the legislation on which must govern all corporate bodies as well as natural bodies; for example—interest, legal tender, currency, taxation, the criminal law, and bankruptcy and insolvency.

In its compulsory operation upon incorporated companies the Winding-up Act is an insolvency law. Companies that are not insolvent, as well as those that are, may be brought under its operation by the effect of the second part of section 3 when they are already in liquidation or in process of being wound up. This may be on petition of creditors or assignees as well as of shareholders or liquidators; but original proceedings

under the Winding-up Act can be instituted only by creditors and only when the company is insolvent.

A wider power now exists under the Winding-up Amendment Act 1889, 52 Vic. ch. 32 (D). That act authorises voluntary winding-up proceedings at the instance of the company or a shareholder, following in this respect the 129th section of the English Companies Act, 1862, which is also followed by the Ontario Winding-up Act, R.S.O. (1887) ch. 183. But that provision for voluntary winding-up is not extended, like the winding-up act, to all corporations. It is confined by section 2 to companies incorporated "by or under the authority of an act of the Parliament of Canada, or by or under the authority of any act of the late Province of Canada, or of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island or British Columbia, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada."

This obviously is intended to exclude companies incorporated by provincial legislation since confederation under the exclusive legislative jurisdiction given to the Provinces. Ontario, Quebec and Manitoba, are not named, and misapprehention as to the four provinces which have retained their anti-confederation names is shut out by the reference to the legislative authority of the Parliament of Canada. Thus, the provision for voluntary winding-up is expressly confined to a class of corporations in which the Union Fire Insurance Company is not included, and the unlimited application of the Winding-up Act to the compulsory liquidation of the affairs of all insolvent corporations is made more clear.

It was argued that the third section of the act of 1889, which I have just quoted, went to show, by the omission of the name of the Province of Ontario, that

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the Winding-up Act did not apply to this Ontario company. This court may be said to have in effect decided that it did so apply when it remitted the matter to the High Court after the former appeal; and the leave to bring forward the present appeal was granted partly, if not principally, to give an opportunity to discuss the effect of the amendment act as a legislative explanation of the Winding-up Act.

It is clear that the act of 1889 bears on the question in no other way than to make the unlimited extent of the principal act more manifest.

It is, it is true, to be read with and construed as forming part of the Winding-up Act; but that is by the introduction into the statute of a set of provisions for the voluntary winding up of a limited class of corporations, to which provisions the expressions in section 3 "this act applies," &c, must be referred. The section does not qualify or supersede section 3 of the principal act. The term "this act," means and will continue to mean the amendment act, and not the whole Winding-up Act.

There are, in this act of 1889, specific amendments of several sections of the Winding-up Act. Those sections as amended must continue to apply to the same companies as before, although the amendments are made by an act which is declared to apply to a more limited class of companies. There is, doubtless, a want of precision in this particular, but the act can be read according to its evident intent without violence even to the literal wording. There are no restrictive words in section 3, such as "shall only apply," and yet the newly introduced powers touching voluntary liquidation will be confined to the class of companies specified in section 3 because, being newly created, they have only the extent expressly assigned to them.

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There is, in my opinion, no reasonable doubt that the Union Fire Insurance Company is subject to the provisions of the Winding-up Act.

Then, is the Chancellor's order authorised by the act?

The order declares that the company is an insurance company within the provisions of the act, and is insolvent, and then proceeds to order:

(1.) That the business of the company be wound up.

(2.) That Wm. Badenach, the receiver appointed in the case of *Clarke* v. *The Company*, be permanent liquidator of the estate and effects of the company *upon his furnishing security to the satisfaction of the master in ordinary* before he shall intermeddle with the estate.

(3.) That it be referred to the master to fix the renumeration payable to the liquidator, to settle the list of contributories, etc., etc.

(4.) That costs of petition, &c., be paid by the liquidator out of the assets of the estate.

(5.) That costs ordered to be paid to plaintiff and defendants in Clarke's case, but not paid, be paid out of the assets.

(6.) That accounts, &c., in Clarke's case stand and be incorporated with and used in the winding-up proceedings, so far as applicable.

(7.) That parties who contested their liability in Clarke's case to be settled on list of shareholders shall be at liberty to apply to the court after the settlement of the list of contributories for the payment of such costs in Clarke's case as they may deem themselves entitled to.

We may simplify the consideration of the objections taken to this order by satisfying ourselves of the nature of the jurisdiction conferred on the court by the Winding-up Act.

The starting proposition, to the overlooking of which I attribute much if not all of the difficulty that to some judges has seemed to attend the working of the act, is that by the B.N.A. Act the constitution and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts, is a function of the Provincial Legislature.

There is no *a priori* presumption that the Parliament of Canada in passing an act upon a subject within its exclusive jurisdiction intends to encroach upon the exclusive jurisdiction of the Province.

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If an act is ambiguous in this particular, I take it that the construction to be preferred is that which accords with the declaration of our constitutional charter.

Among the subjects exclusively assigned by section 91 to the Parliament of Canada are interest, bills of exchange and promissory notes, and bankruptcy and insolvency. We should be surprised to find that Parliament assuming to enact that an action on a bill of exchange should always be tried by a judge without a jury, or tried at bar before the full court, or that interest on a promissory note must always be computed by the judge personally and not by a master or referee.

We should be equally unprepared to find it enacted that when a provincial court was administering an insolvency or bankruptcy act the functions and powers of its officers were to be different from those exercised in an administration action or other action within its ordinary jurisdiction.

Such an enactment would amount to the constitution and organization of the court by the Dominion Parliament and not by the Local Legislature.

Yet this is what I understand to be contended is the intention and effect of the Winding-up Act.

In my opinion the act was never so intended, but, on the contrary, the effort of the Parliament has been to leave the court to perform its functions by means of its ordinary machinery and by its ordinary procedure.

I may refer, without repeating what I said, to the opinions on this topic which I expressed at some length in the Court of Appeal when the appeal from the first winding-up order in this matter was heard.(1)

I then alluded to amendments of the statute which seemed to me to be dictated by the desire to make it perfectly clear that the ordinary procedure of the court

(1) 13 Ont. App. R. 283-5.

and the ordinary functions of its officers under the regular constitution and organization of the court, were not intended to be interfered with.

Section 77 of the Revised Statute seemed and still seems to me sufficiently plain on this point. But questions still arose. A reference to the master was considered to be an unauthorised delegation of duties which the statute assigned to the court, and not, as in ordinary cases, the discharge of its functions by the court by its accustomed methods. That opinion found expression in the present litigation, and has, as I venture to think, contributed towards the protracting of the litigation. The term "delegation" is, to my apprehension, inaccurately used in this position. It has, however, been accepted by the legislature which has again interposed to disclaim the intention imputed to it. The Winding-up Amendment Act, 1889, repeals the second sub-section of section 77 and substitutes the following:—

2. After a winding-up order is made the court may, from time to time, by order of reference, refer and delegate, according to the practice and procedure of such court, to any officer of the court any of the powers conferred upon the court by this act or any act amending the same as to such court may seem meet, subject to an appeal according to the practice of the court in like cases.

The repealed sub-section was, as I understand it, quite as explicit as this, but it was confined to Ontario while this is general.

But the amendment act does not stop here. It goes on to declare in terms that :—(1).

The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the court.

One objection to the order is that the approval of the security to be given by the liquidator and the fixing of his remuneration are referred to the master.

(1) Sec. 21.

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Section 24 enacts that "the court may also determine what security shall be given by the liquidator on his appointment;" and section 28 that "the liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs, upon such notice to the creditors, contributories, shareholders or members as the court orders."

The objection is without foundation. The reference is an accordance with the ordinary procedure of the court, and the action of the master, which is always subject to appeal and revision, is the action of the court. This topic has been dealt with in the court below by Mr. Justice Osler to whose remarks it is not necessary to add anything.

The incorporation of the proceedings in Clarke's action was fully discussed in the Court of Appeal under the first winding-up order. I refer to my remarks as reported on that occasion (1).

The position described in section 3 (*b*) is that of this company. It was in liquidation or in process of being wound up in the action of Clarke. That action and the proceedings taken in it are set out in the petition on which both the winding-up orders were made. That petition, by two creditors of the company, asked in substance that the company should be brought under the provisions of the Winding-up Act. Clarke's action, it will be remembered, was commenced in November, 1881, and judgment was entered in it in January, 1882. The company was, therefore, in liquidation or in process of being wound up on the 17th of May, 1882, which was the date of the passing of the Winding-up Act, 45 Vic. ch. 23.

Section 14 of the revised statute declares that:

> Any shareholder, creditor, assignee, receiver or liquidator of any company which was in liquidation or in process of being wound up

(1) 13 Ont. App. R. 285-7.

on the 16 of May, 1882, may apply by petition to the court asking that the company may be brought within and under the provisions of this act, and the court may make such order; and the winding-up of such company shall thereafter be carried on under this act:

(2.) The court in making such order may direct that the assignee, receiver or liquidator of such company, if one has been appointed, shall become the liquidator of the company under this act, or may appoint some other person to be liquidator of the company.

This must mean that in the cases, of which the present is one, to which the section applies the proceedings are to be taken up in the stage at which they are at the date of the order, and continued from that point under the Winding-up Act.

It was perhaps unnecessary to insert the directions in the order. They would have been supplied by the statute. They serve, however, to show that the order was made in view of this provision, and not merely because the company was insolvent.

Section 20 forbids the appointment of a liquidator unless a previous notice is given to the creditors, contributories, shareholders or members in the manner and form prescribed by the court.

It is objected that this order of the 9th of May, 1885, was made without such notice.

Now, setting aside the question whether the notice is required when a receiver appointed under pending proceedings is continued as liquidator under section 14, the short answer to the objection is that it is not supported by any proof of the asserted fact.

Notice was duly given, as appears from the materials before us, for the appointment of a liquidator on the 20th of September, 1887, in pursuance of an order made on the 6th of that month. On the 20th an order was made that the matter of the petition and of the appointment should stand over till the 27th of the same month. How it came to stand further until the 9th of May is not explained. The Chancellor was doubtless

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satisfied that the proceeding had been properly continued or that due notice had been given. There is no reason to assume, nor is it suggested as a fact, that it was not so.

In my opinion the appeal fails on every ground, and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Walker & McLean.*

Solicitors for respondents, petitioners: *Bain, Laidlaw & Co.*

Solicitors for respondents, creditors: *Foster, Clarke & Bowes.*

Solicitor for Union Fire Insurance Co.: *G.F. Shepley.*

THOMAS TURNER AND ALICE TURNER..... } APPELLANTS.

AND

JAMES CHARLES PREVOST AND OTHERS..... } RESPONDENTS.

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*Jan. 23, 24.
*June 12.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Statute of frauds—Contract relating to interest in land—Part performance.

B., a resident of British Columbia, wrote to his sister, in England, that he would like one of her children to come out to him, and in a second letter he said "I want to get some relation here for what property I have, in case of sudden death, would be eat up by outsiders and my relations would get nothing." On hearing the contents of these letters T., a son of B.'s sister and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not, and you had better hurry up and come to me at once, for I want you and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours, answer immediately. (Sgd) B." Under these circumstances T. claimed the farm and stock of B. and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death.

Held, affirming the judgment of the court below, that as there was no agreement in writing for the transfer of the property to T., and the facts shown were not sufficient to constitute a part performance of such agreement, the fourth section of the statute of frauds

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

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was not complied with, and no performance of the contract could be decreed.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment at the trial which refused a decree for specific performance.

In addition to the facts stated in the above headnote it appeared that after the death of Bridges the defendant Prevost was appointed administrator to his estate by the court and, by leave of the court, sold a portion of the real estate to one Power who is a defendant in the suit, and a part of the relief claimed is that the sale may be declared void and the administrator required to repay the purchase money to Power. This was refused but the plaintiff was held entitled to compensation which was fixed at the amount received for the land and the net proceeds of the sale of the stock and farm implements, but out of this sum the plaintiff was to pay the costs of Power and the administrator. The full court varied this judgment by ordering that the plaintiff should pay these costs generally and that he should receive a sum equal to the value of the cattle on the lands sold, a new trial to be had if the parties could not agree upon such value.

From the judgment of the full court the plaintiff, Thomas Turner, and his mother, Alice Turner, one of the defendants, appealed to the Supreme Court of Canada.

S. H. Blake Q.C. for the appellants cited *Alderson* v. *Maddison* (1); *Studds* v. *Watson* (2); *Re Maddever* (3); *McDonald* v. *McKinnon* (4); *Magee* v. *Kane* (5).

Moss Q.C. for the respondent, Prevost, referred to

(1) 7 Q.B.D. 174; 8 App. Cas. 467.
(2) 28 Ch. D. 305.
(3) 27 Ch. D. 527.
(4) 26 Gr. 12.
(5) 9 O.R. 478.

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Caton v. *Caton* (1); *Campbell* v. *McKerricher* (2); *Ridgway* v. *Wharton* (3).

McCarthy Q. C., and *A. F. McIntyre* appeared for the respondent Power, citing *Finch* v. *Finch* (4); *Shaw* v. *Crawford* (5); *Price* v. *Salusbury* (6); *Hope* v. *Hope* (7); *Gervais* v. *Edwards* (8).

SIR W. J. RITCHIE C.J.—As regards the real estate, or the proceeds thereof sought to be recovered in this action, I think the court below was right in holding that the alleged agreement cannot be enforced by reason of the non-compliance with the statute of frauds, there being in this case no writing signed by the party to be charged or his agent, as required by the statute in actions on an agreement concerning lands, nor is the case taken out of the statute by evidence of part performance. As regards so much of the decree as touches the value of the stock and implements on the farm at the death of the intestate, as it has not been appealed against it will stand.

FOURNIER J. concurred.

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

GWYNNE J.—Apart from the judgments in *Alderson* v. *Maddison* in the Court of Appeal (9) and in the House of Lords (10), I should have been of opinion that the present is not at all a case for the application of the doctrine of part performance taking a case out of the operation of the 4th section of the Statute of Frauds; but in view of the above judgments in *Alderson*

(1) 1 Ch. App. 149; L. R. 2 H.L. 127.
(2) 6 O.R. 86.
(3) 3 DeG. M. & G. 677.
(4) 23 Ch. D. 267.
(5) 4 Ont. App. R. 371.
(6) 32 Beav. 446.
(7) 8 DeG. M. & G. 735.
(8) 2 Dr. & War. 80.
(9) 7 Q. B. D. 174.
(10) 8 App. Cas. 467.

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v. *Maddison* (1) it is impossible, without utterly disregarding those judgments, to apply that doctrine to the present case. The arguments on behalf of the plaintiff are based upon the same fallacy as that which Lord Justice Baggallay, in giving judgment in *Humphreys* v. *Green* (2), pronounced the arguments on behalf of the plaintiff in that case to rest, namely, that they relied upon the parol agreement itself to prove that the alleged acts of part performance were referable to that agreement, and I must add that there seems to have been much in the conduct of the plaintiff wholly inconsistent with the particular parol agreement, which he now insists upon, ever having been made. That the plaintiff had reasonable expectation of some benefit from his uncle's will cannot, I think, be doubted and his disappointment, no doubt, has been great, but to hold that he is entitled, upon the equitable doctrine of part performance, to the very benefit which he insists upon would be to extend that doctrine beyond what is warranted by the decided cases upon which the doctrine rests. While we may sympathise with the plaintiff in his disappointment we cannot strain the law beyond its legitimate limits for his benefit. We may, however, I think, while dismissing his appeal do so, under the circumstances, without costs, as was done in *Alderson* v. *Maddison* (1) and direct the costs of the administrator, Prevost, to be paid out of the estate of the intestate. I think, also, that so much of the order of the court below as, in the event of the parties differing upon the "sum to be paid as the value of the cattle and increase," directs a new trial to be had, and all that is in the order subsequent to that direction, should be expunged from the order and that, in lieu thereof, it should be directed that it should be referred to an officer of the court to take evidence as to such value

(1) 8 App. Cas. 467. (2) 10 Q.B.D. 158.

and to report thereon to the court in the ordinary manner.

PATTERSON J. concurred.

Appeal dismissed with costs.

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Solicitor for appellant Thomas Turner: *Theodore Davie.*

Solicitor for appellant Alice Turner: *Gordon E. Corbould.*

Solicitor for respondent Prevost: *Geo Jay, jr.*

Solicitor for respondent Power: *Chas. E. Pooley.*

LAWRENCE G. POWER (PLAINTIFF).....APPELLANT.

AND

NICHOLAS H. MEAGHER (DEFENDANT)..... RESPONDENT.

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*Feby. 22.

*June 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trustees—Commission to—Rule of law.

In the Province of Nova Scotia prior to the passing of 51 V. c. 11 s. 69 the rule of English law relating to commission to trustees was in force, and no such commission could be allowed unless provided by the trust.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favor of the defendant.

The only question raised in this case is: Has a trustee under a will in the Province of Nova Scotia a right

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

(1) 21 N. S. Rep. 184.

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to a commission on the funds of the estate for his services when no provision is made therefor in the will? The court below, affirming the decision of the trial judge, held that the English practice refusing such commission is not in force in Nova Scotia, and gave judgment for the defendant who claimed a commission as such a trustee. The plaintiff, an executor and legatee under the will, appealed from that decision to the Supreme Court of Canada.

The appellant in person. The rule in England refusing such a commission as is claimed in this case is well established; *Robinson* v. *Pett* (1); Williams on Executors (2); Lewin on Trusts (3); *Barrett* v. *Hartley* (4).

In all the cases cited in the judgments delivered in the court below, as forming exceptions to the general rule, the circumstances were peculiar and they cannot be regarded as shaking the rule.

In none of the cases cited from the East Indies was a commission allowed to trustees, though it was allowed to executors. The West India cases were all decided under a local act.

Then in the absence of any legislative provision governing it in Nova Scotia this case must be decided under the rule of the Chancery Court in England.

The application of English law to these colonies has been dealt with in *Uniacke* v. *Dickson* (5); *Doe d. Anderson* v. *Todd* (6); *Kerr* v. *Burns* (7); see also *Kelly* v. *Jones* (8); *Deedes* v. *Graham* (9).

It is contended that the practice has always been to allow these commissions but the law cannot be changed by a mere practice; *Hamilton* v. *Baker* (10). Moreover

(1) 3 P. Wms. 249; 2 White & Tudor's L.C. 6 ed. p. 214.
(2) 8 ed. p. 1860.
(3) 8 ed. c. 24 p. 627 *et seq.*
(4) L. R. 2 Eq. 789.
(5) James 287.
(6) 2 U.C.Q.B. 82.
(7) 4 Allen (N.B.) 604.
(8) 2 Allen (N.B.) 473.
(9) 20 Gr. 258.
(10) 14 App. Cas. 209.

the practice has not been proved. See *Freeman* v. *Fairlie* (1).

Before the passing of the present statute in Ontario these commissions were not allowed; *Wilson* v. *Proudfoot* (2); *Deedes* v. *Graham* (3). And the same has been held in the State of New York; *Green* v *Winter* (4); *Manning* v. *Manning* (5).

Executors and trustees do not stand in the same position in respect to commissions and an executor is not a trustee until he passes his accounts; Perry on Trusts (6); Walker on Executors (7); *Conkey* v. *Dickinson* (8); *Miller* v. *Congdon* (9); *Prior* v. *Talbot* (10).

The will provided a sum as compensation to the trustees and if it was not considered sufficient the defendant should have refused to accept the trust. By accepting it he does so subject to all the provisions of the instrument creating it and the law governing the same.

Henry Q.C. for the respondent. There are numerous exceptions to the English rule; *Brown* v. *Litton* (11); *Forster* v. *Riddley* (12); and the court in England has made a distinction in respect to the colonies, assigning as a reason that it would be difficult to get suitable persons to act as trustees without compensation. See *Chambers* v. *Goldwin* (13); *Denton* v. *Davy* (14); *Chetham* v. *Lord Audley* (15).

The case of *Uniacke* v. *Dickson* (16) is a leading case in Nova Scotia and lays down a rule for the application

(1) 3 Mer. 24.
(2) 15 Gr. 103.
(3) 20 Gr. 258.
(4) 1 Johns. Ch. 26 at p. 36.
(5) 1 Johns. Ch. 527.
(6) 4 Ed. sec. 12, 263.
(7) P. 246.
(8) 13 Met. (Mass.) 51.
(9) 14 Gray 114.
(10) 10 Cush. 1.
(11) 1 P. Wms. 140.
(12) 4 DeG.J. & S. 452.
(13) 9 Ves. 254.
(14) 1 Moo. P.C. 15.
(15) 4 Ves. 72.
(16) James 287.

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of English law to the colonies. See also *Collins* v. *Story* (1); *Caldwell* v. *Kinsman* (2).

The English rule has been held inapplicable in Massachusetts; *Barrell* v. *Joy* (3); *Gibson's Case* (4).

The allowance in the will was to the executors and had no relation to the trusts created. See *Ex parte Dover* (5); *Dix* v. *Burford* (6).

SIR W. J. RITCHIE C. J.—I agree with Mr. Justice Weatherbee that the principle of the law of England that trustees were not allowed for their services when remuneration was not expressly provided for, but that the same should be gratuitous, is clearly established by the authorities, and I think the same principle is as applicable to Nova Scotia as to England, and as there does not appear to be any legislative authority or judicial decision to the contrary it must be held to be the law of Nova Scotia until the same shall be changed by the legislature. The legislature appears, prior to this case, to have dealt with the office of both executors and trustees and to have allowed a commission for his services to the former but only the costs and expenses to the latter; this is a strong confirmation of what the law was, and an equally strong intimation that the legislature did not intend to alter it; that having changed the policy of the law in respect to executors the legislature left the case of trustees untouched until 51 Vic. ch. 11 sec 69, passed in 1888, where compensation was for the first time provided for trustees, and the provision was made applicable to trusts constituted or created either before or after the commencement of the act but not to affect any suit or other legal proceeding pending at the time of its commencement. It is difficult to conceive how the legislature could more

(1) James 141.
(2) James 405.
(3) 16 Mass. 221.
(4) 17 Am. Dec. 266.
(5) 5 Sim. 500.
(6) 19 Beav. 409.

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Ritchie C.J.

clearly have expressed its intention to change the law in relation to the remuneration to trustees.

Under these circumstances I am clearly of opinion that this appeal should be allowed, the judgment of the Supreme Court of Nova Scotia reversed, and the judgment of Mr. Justice Ritchie set aside and judgment entered for the appellant for the amount claimed with costs of the trial and of both appeals.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that the appeal should be allowed with costs and judgment entered for the plaintiff for the reasons given by Weatherbee and Townshend JJ. in the court below.

GWYNNE J.—In my opinion it is apparent upon the will of the testator that the devise of the $700 given to each of the executors therein named for his services was intended to be given to them, and if the trusts of the will should be accepted it was to be taken by them, in full compensation for all the duties of every description imposed upon them by the will in the execution of the trust purposes thereof, including that of paying over to the appellant the whole of the income to arise from the sum directed by the will to be invested for his benefit. The defendant, in my opinion, can make no claim for any sum beyond the seven hundred dollars which it is admitted he has received. This appeal, therefore, should be allowed with costs, and judgment be ordered to be entered in the court below in favor of the plaintiff for the full amount claimed by him, with costs of suit.

PATTERSON J. concurred.

Appeal allowed with costs.

Solicitor for appellant: *C. S. Harrington.*

Solicitor for respondent: *H. McD. Henry.*

19½

1889 SERAPHIN HARDY (PLAINTIFF).....APPELLANT;

*May 10, 11.

AND

1890 CHARLES FILIATRAULT (DEFENDANT) RESPONDENT.

*Mar. 6.

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

Demolition of dam—Transaction—Arts. 1918, 1920 *C.C.—Report of expert—Motion to hear further evidence.—C. S. L. C. c.* 51.

The plaintiff, a riparian proprietor brought an action against one L. to compel him to demolish a dam which L. had erected on the river Mille Isles, and to pay damages for injury caused by said dam. In this action judgment was rendered ordering the demolition of the dam and payment of damages. While this judgment was in appeal an agreement for settlement was arrived at between the parties by which it was agreed that the dam should be demolished by a certain day, failing which, the judgment for demolition should be carried out. The property was subsequetly sold to the defendant who bought with the full knowledge of the agreement in question and agreed to be bound by said agreement and also by the judgment as if he had been a party thereto. The defendant, however, did not completely demolish the dam, but used a portion at one end and the foundation of it throughout for a new dam. The plaintiff then brought the present action against the defendant for the demolition of this second dam and for damages. In this action the Superior Court, after hearing a number of witnesses, appointed as expert an engineer who reported that the dam caused no injury to plaintiff's property. This report the court gave effect to, refusing a motion made by plaintiff asking leave to examine the expert and other witnesses for the purpose of showing the incorrectness of the report and dismissed the action with costs on the ground that the defendant had only exercised the rights given him by c. 51 of the C. S. L. C., (1) and the plaintiff had suffered no damage.

Held:—Per Fournier, Gwynne and Patterson JJ.—That c. 51 of the C. S. L. C. had no application, the rights of the parties being regulated by the agreement for settlement arising out of the first action, which was a "transaction" within the meaning of articles 1918 and 1920 of the Civil Code.

Per Fournier and Gwynne JJ.—On the whole evidence the plaintiff was entitled to judgment and the appeal should be allowed.

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

(1) Now secs. 5535 and 5536 R. S. P. Q.

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Per Ritchie C. J. and Taschereau J.—The appeal should be dismissed, but in any event all the plaintiff could ask was to have the case remitted to the court of first instance to take further evidence, which was the principal ground of his appeal to the Court of Queen's Bench as stated in his factum.

Patterson J., while of opinion the law and evidence would have warranted a judgment for the plaintiff concurred in the view that under the circumstances all the plaintiff could ask was to have the case remitted.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (Appeal side) (1) affirming the judgment of the Superior Court in favor of the defendant.

The plaintiff in his declaration alleged that he was proprietor of a lot of land situated on the river Mille Isles, and one Limoges had, in 1876, erected a mill and dam on the opposite side of the river, which raised the water and caused it to flow back on plaintiff's land; that an action was brought to compel the removal of said dam, which action while pending in appeal was settled by the said Limoges undertaking its removal before a certain day, and agreeing to pay all costs; that the land on which the said mill and dam were erected was subsequently sold to the present defendant (respondent) who, so far from carrying out the undertaking of the former owner, erected another dam on the said land; and this action was brought for the demolition of the last mentioned dam and damages.

The defendant alleged by his pleas that the former dam was removed and that the one erected by him caused no damage to plaintiff's land. After several witnesses had been heard, the Superior Court appointed one Emile Vannier, civil engineer, to ascertain the following facts, viz:

"First, if the dam constructed by the defendant, when the water overflows the dam and the flood-gates are raised, causes the water to flow back on the property of the plaintiff.

(1) 17 Rev. Leg. 27.

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"Secondly, if the dam, with the flood-gates closed, has the effect to raise the level of the water opposite the property of the plaintiff, when the water is on a level with that of the dam.

"Thirdly, if the dam, when the flood-gates are closed, has the effect to raise the level of the water opposite the plaintiff's property when the water does not pass over the dam."

Upon the production of Vannier's report the case was inscribed for evidence and argument, and the plaintiff made several motions, amongst others a motion to be allowed to examine the said Vannier to explain his report, and to examine witnesses and to give further evidence.

The court rejected the motions and, adopting the report of Vannier, gave judgment in favor of the defendant, which judgment was affirmed by the Court of Queen's Bench. The plaintiff then appealed to the Supreme Court of Canada.

Laflamme Q.C. for the appellant contended that he could not be deprived of his right to examine Vannier on his report, and that appellant was entitled to furnish and complete the evidence as to the incorrectness and errors of the expert's report; Dalloz Juris. Gen. (1); he also contended that he was entitled to have the first judgment and the compromise or "transaction" entered into between the parties completely carried out by the total, and not by the partial, demolition of the dam, and that there was ample evidence of damage. Art. 1920 C.C.

Geoffrion Q.C. and *Beaudin* for the respondent, in addition to supporting the judgment on the facts, submitted that the old dam being removed the damage, if any, began anew on the construction of the second dam, and there were no damages when the action began.

(1) 23 vol. p. 256.

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Ritchie J.C.

Sir W. J. RITCHIE C.J. and TASCHEREAU J. were of opinion that the appeal should be dismissed, but that in any case all the appellant could ask was to have the case remitted to the court of first instance to hear further evidence, which was the principal ground of his appeal to the Court of Queen's Bench as stated in his factum before this court.

FOURNIER J.—L'appelant a demandé par son action la démolition d'une chaussée faisant refluer l'eau de la rivière des Mille-Isles, sur sa propriété. Plusieurs actions avaient déjà été prises par différents propriétaires, et entre autre par un nommé Fabien Labelle, contre un nommé Joseph Limoges qui avait aussi construit une chaussée sur la même rivière quelques pieds seulement plus bas que celle dont se plaint l'appelant. La contestation ayant été liée entre Limoges et Labelle, la Cour Supérieure, à Montréal, après enquête et expertise, rendit jugement ordonnant au dit Limoges de démolir la dite chaussée et le condamna à $100.00 de dommages et les frais.

Un appel de ce jugement ayant été interjeté, le dit Limoges fit, le 23 novembre 1879, avec les parties intéressées qui avaient pris des actions semblables contre lui, et entre autres le présent appelant, un acte d'arrangement ou transaction, par lequel il fut convenu que Médore Labelle qui avait acheté du dit Limoges, le moulin, ses dépendances et la chaussée qui avait fait le sujet du procès entre eux,—par lequel arrangement le dit Limoges s'obligea de mettre fin à toutes les difficultés entre eux concernant la dite chaussée et de payer tous les frais encourus,—le dit Médore Labelle s'obligeant de payer une somme de $1,788.30 pour frais et à démolir et enlever la dite chaussée de cette date au premier septembre prochain (1880) et, à défaut par lui de ce faire, il fut convenu que le dit jugement de la Cour

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Supérieure pourrait être exécuté sans délai aux frais et dépens du dit Médore Labelle qui s'y soumit d'avance ; les parties demanderesses de leur côté s'obligeant de discontinuer sans autres dépens, leurs actions sous l'engagement formel du dit Médore Labelle de démolir et enlever la dite digue le premier septembre prochain, et, à défaut par lui d'exécuter la convention, les parties intéressées à la démolition se réservaient le recours en dommage pour l'avenir.

Le même jour, 23 novembre 1879, le dit Médore Labelle vendit au défendeur le terrain où était assis le dit moulin avec digue, terrain et accessoires, y compris le terrain situé dans la paroisse de Terrebonne sur lequel était appuyée la digue en question, savoir la même propriété que celle qui avait fait le sujet du litige entre les demandeurs dans les différentes causes contre le dit Joseph Limoges.

Cette vente fut faite spécialement aux conditions mentionnées dans l'acte d'arrangement ci-haut relaté, particulièrement l'obligation de démolir la digue dans le délai stipulé, lequel accepta le jugement comme s'il eût été rendu contre lui, les parties intéressées, et notamment le demandeur, renonçant aux dommages soufferts et ultérieurs pourvu que l'acheteur, le défendeur, ne fît rien pour aggraver la position des parties intéressées et démolisse la digue en question.

Par son action le demandeur allègue : que le défendeur n'a pas rempli les conditions stipulées au dit acte d'arrangement et n'a pas démoli et enlevé la digue, ainsi qu'il s'y était obligé, mais, au contraire, a fait de nouveaux travaux dont l'effet est le même que le maintien de la chaussée en question et qui, de plus, aggrave la position du demandeur et des autres intéressés, et a fermé la dite digue et par là élevé le niveau de la rivière, et continue à faire subir au demandeur des dommages contre lesquels la transaction en question

devait le sauvegarder, et obstrue le cours de l'eau dans le but d'élever le niveau de la rivière au-dessus de tels travaux et a inondé par là le terrain du demandeur et lui a causé des dommages considérables.

Que le 3 mars 1881, le demandeur, avec plusieurs autres intéressés, savoir les parties à l'acte d'arrangement du 23 novembre 1879, a sommé et requis le défendeur par le ministère de maître Germain, notaire, de se conformer aux actes ci-haut relatés et de démolir la dite chaussée dans les vingt jours après la signification du protêt et de payer immédiatement au demandeur la somme de cent piastres, montant des dommages par lui soufferts à raison de la non-exécution du jugement et dit acte d'arrangment, ce à quoi le défendeur s'est refusé.

Le demandeur allègue dans son action qu'il est fondé à demander la démolition de la dite chaussée ainsi construite par le dit Joseph Limoges ainsi que les travaux additionnels faits par le défendeur, et à ce qu'il soit enjoint à ce dernier de démolir et enlever la dite chaussée et les dits travaux et que défense lui soit faite de faire aucuns travaux additionnels dans la dite rivière à l'endroit ci-haut mentionné et à ce qu'il soit condamné à payer au demandeur la somme de $500.00, à titre de dommages pour la non-exécution des dits actes d'arrangements.

Le demandeur concluait à ce que la cour ordonnât au défendeur de suspendre les travaux commencés et de démolir la chaussée ou toute obstruction par lui faite dans la dite rivière et de remettre les lieux dans l'état où ils étaient avant la construction de la dite chaussée et, à défaut par lui de se conformer au jugement, que la cour ordonne que la chaussée en question soit démolie aux frais et dépens du défendeur et qu'il soit condamné à payer au demandeur la dite somme de $500.00 de dommages.

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L'intimé plaida 1° qu'il avait enlevé la chaussée et fait disparaître les obstructions qui avaient donné lieu à l'action intentée par Fabien Labelle contre Joseph Limoges; 2° qu'il était propriétaire de moulin construit sur la rivière des Mille-Isles et autorisé à utiliser l'eau de la dite rivière pour son moulin; 3° que la chaussée mentionnée dans la déclaration avait été démolie, que les travaux qu'il avait fait faire n'avait pas l'effet d'élever le niveau de l'eau ni de causer des dommages, puis une défense en fait.

L'intimé n'a aucunement attaqué la transaction qui est la base de l'action, mais il prétend que l'appelant n'a aucun droit de demander la démolition de la dite chaussée, que son seul recours serait en dommages, s'il en a souffert, et qu'avant de pouvoir l'exercer, il était tenu de faire constater ces dommages par expert.

Les parties ont procédé à la preuve et fait entendre chacune huit témoins. La cause ayant été soumise à l'hon. juge Rainville, celui-ci trouvant la preuve contradictoire ordonna une expertise à l'effet suivant:

Que les faits en contestation en cette cause soient constatés par expert, lequel expert après avoir vérifié les mesurages faits par M. Beaudry ainsi que constatés au plan fait par lui et produit en cette cause, constatera les faits suivants :—

1. Si la digue, construite par le défendeur lorsque l'eau passe au-dessus de la digue et que les empellements sont soulevés, a pour effet de faire refluer l'eau sur la propriété du demandeur.

2. Si la dite digue, les empellements enlevés, a l'effet de faire hausser le niveau de l'eau vis-à-vis la propriété du demandeur, lorsque l'eau est juste à l'égalité du haut de la digue.

3. Si la dite digue, lorsque les empellements sont mis, a l'effet de faire hausser le niveau de l'eau vis-à-vis la propriété du demandeur, lorsque l'eau ne passe pas au-dessus de la digue.

Il est fort à regretter que le résultat de ce coûteux expertise ait été à peu près nul. Mais la preuve de l'appelant avait déjà suffisamment établi les principaux faits dont il se plaint.

Il est en preuve que le jugement ordonnant la démo-

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lition de la 1ère chaussée, jugement que l'intimé s'est engagé par l'acte d'"Arrangement" du 23 novembre 1879, à exécuter, ne l'a pas été. Non seulement il reste une longueur de 27 pieds de cette chaussée qui n'a pas été touchée, mais il est aussi en preuve par le témoin Fabien Labelle que la digue n'a été que partiellement démolie.

Q.—Vous avez vu comment la dernière digue a été faite, vous les avez vus travailler à cette digue ? R.—Oui, je l'ai toujours vu faire, ils l'ont toujours faite malgré nous.

Q.—Dites-nous ce qui a été fait après l'arrangement ? qu'est-ce que le propriétaire du moulin a fait par rapport à la digue ? R.—Il a déboulé le dessus excepté un bout d'à peu près vingt-cinq pieds qu'il n'a pas démoli ; la nouvelle digue a été prise après le bout qui a resté.

Q.—Ils ont renversé une partie de la digue, mais la base est restée n'est-ce pas ? R.—Oui, le fond a resté.

Q.—Et vingt-cinq pieds de la digue à partir du moulin en allant dans la rivière sont restés ? R.—Oui.

Q.—Ces vingt-cinq pieds de la digue sont demeurés intacts, on n'en a démoli aucune partie ? R.—Non.

La démolition de la digue a été si imparfaite que le moulin a pu, malgré cela continuer à marcher, ainsi qu'il est prouvé par Ephrem Chapleau, témoin de l'intimé et locataire du moulin en question. Voir son témoignage page 13 de l'appendice de l'intimé.

R.—Lorsque la *dame* a été démolie dans le mois de mars mil huit cent quatre-vingt-un, il a resté un certain vestige dans le fond de la rivière, ce vestige nous donnait à peu près douze à quinze pouces de niveau qui nous restait, il y avait six ou sept pouces de niveau sur vingt, il reste onze à douze pouces, c'est avec ce niveau-là que nous avons pu fonctionner dans la crue des eaux, par le remous qu'il y avait derrière le moulin, et lorsque le remous a arrêté nous avons arrêté.

Q.—De sorte qu'il restait donc dix-huit à vingt pouces de niveau ? R.—Non, monsieur, il restait de onze à douze pouces comme j'ai dit, et ceci nous a permis de marcher un peu à la crue des eaux.

Q.—Sans cela, auriez-vous pu marcher ? R.—Non, monsieur.

Q.—Il vous faut une digue ? R.—Certainement.

Puisqu'il restait une partie de cette digue suffisante pour faire marcher le moulin, il est clair que la prétendue démolition qui n'avait consisté qu'à faire débouler, comme le disent les témoins, la partie supé-

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rieure de la chaussée, est une violation du jugement qui en avait ordonné la complète démolition, aussi bien qu'une infraction à l'acte de transaction auquel l'intimé s'était engagé par son contrat d'acquisition à se soumettre et à en remplir toutes les conditions.

Non-seulement l'intimé s'est soustrait à cette obligation de démolir, mais il a de plus positivement violé les engagements qu'il avait pris par l'acte du 23 novembre 1879, en reconstruisant une autre chaussée à quelques pieds de distance de la première, avec cette différence seulement que dans la seconde il a laissé des espaces ouverts de distance en distance, de manière à faire des empellements qu'il pourrait fermer ou laisser ouverts à volonté. L'intimé admet ces faits dans son propre témoignage en ajoutant qu'il a reconstruit cette chaussée d'après l'avis de l'ingénieur Rielle, celui même sur le témoignage duquel la cour Supérieure avait principalement fondé son jugement ordonnant la démolition.

Cette reconstruction un peu modifiée, mais dans le fait produisant absolument les mêmes conséquences que la première, n'a été évidemment faite que dans le but d'éluder l'exécution du jugement de démolition et l'accomplissement des obligations du compromis. Elle forme une obstruction aussi considérable que la première dont la démolition n'a été ordonnée que pour permettre le libre écoulement des eaux.

A cet endroit la rivière des Mille-Isles n'offre, dans la partie au-dessus de la digue, aucune pente perceptible, et à l'endroit où le défendeur a construit son moulin il y a une légère dépression du lit de la rivière qui donne une différence de niveau de vingt pouces sur une longueur d'environ cinquante pieds. La rivière à cet endroit est rétrécie, formant au-dessus un bassin où l'eau est plus profonde qu'à l'endroit où se trouve le rapide en question, lequel est causé principalement par un barrage naturel ou une chaîne de rochers qui forme

obstruction à cet endroit à l'écoulement naturel de l'eau, mais n'offre réellement aucune chute d'eau suffisante pour l'alimentation d'un moulin ou usine sans en exhausser le niveau au moyen d'un barrage, comme l'a fait le défendeur, facile à ériger à cet endroit à raison du peu de profondeur de l'eau et de l'étroitesse de la rivière, dont la largeur à cet endroit n'est que de 1400 pieds seulement.

La construction de cette chaussée a nécessairement pour conséquence l'élévation du niveau de l'eau. C'est aussi le but que voulait atteindre l'intimé par cette construction, afin de créer un pouvoir d'eau pour son moulin.

Les témoins de l'appelant ont complètement établi les différences du niveau de l'eau après la démolition de la première chaussée et constaté une si grande différence, avec le niveau pendant l'existence de cette chaussée, qu'ils ont pu cette année-là cultiver leurs terrains bas, mais aussitôt la nouvelle chaussée construite, l'eau a repris le niveau qu'elle avait lorsque la première chaussée existait.

Quelques extraits de ces témoignages suffisent pour constater ce fait d'une manière irréfutable.

Janvier Hardy :

Q. Je veux savoir quel effet cette digue avait sur le niveau de l'eau ? R. Je pense que la dernière fait autant de dommage que la première.

Q. Je voudrais savoir quelle hauteur de niveau celle qu'il a démolie donnait à l'eau ? R. L'autre était bâtie un peu plus bas, celle-ci, il dit qu'il l'a faite plus basse, mais il l'a bâtie sur le plus haut du galet ; je pense qu'elle nous fait autant de dommage pour le moins que la deuxième.

Q. Avez-vous pris note quand ils ont démoli la seconde digue de la différence du niveau de l'eau ? R. Ça faisait gros de différence, je pense que ça faisait deux pieds passés de différence.

Q. Sur votre terrain ? R. Oui, et sur le terrain du demandeur aussi.

Trefflé Léonard, marchand et propriétaire de Ste.-Rose, aucunement intéressé dans ce procès dit :—

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Q. Veuillez dire si vous avez connaissance de la démolition totale ou partielle de la digue en question et dans quel état était votre propriété avant et après la construction de la nouvelle digue? R. Depuis deux ans j'ai étudié la chose parce que la chose me concernait ; ayant une terre à cet endroit, j'ai dû prendre connaissance quel effet la digue pouvait avoir vis-à-vis de mon terrain. Alors j'ai constaté quand la digue a été démolie en partie, ça eu pour effet de faire baisser l'eau, et quand ils ont construit la nouvelle digue ça eu pour effet de faire refouler l'eau sur ma propriété. Ensuite une chose que j'ai remarqué et qui m'a fait juger que c'était la digue qui faisait refouler l'eau, c'est qu'il n'était pas tombé une goutte d'eau, pas de pluie du tout.

Q. Quand la nouvelle a-t-elle été construite ? R. Dans le mois d'août ou septembre 1881 ; l'été a été très sec et j'ai fait une marque particulière avec mon homme. J'ai planté un bâton sur le bord de l'eau. Un des hommes de M. Chapleau m'avait dit :—Si tu veux marquer l'eau on va boucher la digue aujourd'hui.

(Par la Cour.)

Q. Quel est ce M. Chapleau ? R. C'est l'agent de M. Filiatrault, c'est lui qui gère le moulin. J'ai fait cette marque dont j'ai parlé tout à l'heure et le lendemain je suis allé voir avec mon homme et j'ai constaté que l'eau avait refoulé d'au moins un quart d'arpent sur ma propriété basse.

Q. Sur combien d'épaisseur à peu près ? R. A peu près six pouces ou un pied. J'ai mis le bâton au bord de l'eau vis-à-vis de ma prairie basse pour voir combien de grandeur l'eau viendrait couvrir, parce que je savais que j'étais pour avoir des difficultés avec le défendeur. J'ai constaté que l'eau avait couvert au moins un quart d'arpent de ma propriété sur une épaisseur d'environ un pied. J'ignorais quel dommage la digue pouvait causer à ma propriété et c'est pour cela que j'ai voulu le constater ; l'individu qui m'a vendu cette terre m'a dit qu'il n'aurait jamais vendu si la digue n'avait pas existé. Alors j'ai acheté cette terre parce que je savais qu'il y avait un acte de passé par lequel la digue devait être démolie. J'ai pris arrangement avec le défendeur par acte authentique, il devait me payer cent piastres de dommage par année s'il ne défaisait pas la digue.

Q Vous avez été visiter la digue dans les terres, ce printemps ? R. Oui, j'ai trouvé la digue complète, moins peut-être deux plançons qui n'étaient pas dans une échappe, à part cela elle était complète.

Q. L'eau passait-il pardessus la digue ? R. Oui, le trois avril lorsque j'y suis allé.

Q. L'eau dans la rivière n'est-elle pas étale ? R. Oui, tellement que lorsqu'il vente nord-est on met un madrier dans la rivière et il remonte, ça été essayé dernièrement au pont du chemin de fer à Ste. Rose. Il n'y a presque pas de niveau.

Q. Trouvez-vous qu'il puisse y avoir la moindre différence pour l'élévation de l'eau causée par la digue qui a été démolie et celle qui existe maintenant ? R. Je ne trouve aucune différence, la seule qui peut y avoir est que celle-ci est plus haute.

Q. Il y a une pente sur le galet à cet endroit ? R. Oui la rivière baisse là.

Q. De sorte que vous avez constaté d'après vos observations que la digue se trouve à produire le même effet, parce que ce qu'elle a perdu en hauteur de sa construction, elle l'a augmenté par l'élévation de sa base ? R. Oui.

Q. L'ancienne ne barrait pas toute la rivière ? R. Non, il y avait un chenal.

Q. Aujourd'hui celle qui existe la barre complètement ? R. Oui, l'autre digue avait un chenal.

Ce témoignage est corroboré par Mr. Bélair, propriétaire du pont de St. Rose, après des faits vérifiés et par tous les autres témoins du demandeur.

Mr. Beaudry, ingénieur civil, a fait l'examen spécial des lieux et a constaté les niveaux depuis le barrage jusqu'à la propriété du demandeur, a fait un plan qu'il produit (exhibit D) qui indique les différents niveaux de la rivière au-dessus de la digue jusqu'à la propriété du demandeur ainsi que l'élévation de la digue et de l'eau à différentes époques. La première visite faite par lui, fut le 7 juin 1882.

Q. A la première visite que vous avez faite (7 juin) l'eau déversait-elle sur la digue ? R. Oui, il en déversait pardessus la digue.

Q. De combien l'eau dépassait-elle le niveau de la digue ? R. Il y avait environ quatre pieds et trois pouces d'eau qui passait pardessus la digue à cette époque le 7 de juin.

Q. Et à la seconde visite ? R. Le second jour que j'y suis allé, le 15 août, je n'ai pas mesuré la quantité d'eau qui passait pardessus la digue ; mais je sais que l'eau déversait.

Q. Dans la troisième occasion avez-vous visité la digue et de combien l'eau déversait-elle ? R. Le dix-huit octobre.

Q. Oui, l'eau déversait-elle pardessus la digue ? R. Oui, il passait à peu près trois pouces d'eau pardessus le niveau de la digue.

Q. A cette époque-là quel était le niveau sur le terrain du demandeur ? R. Le niveau de l'eau en face de la propriété du demandeur était de 93.70.

Q. De sorte qu'il n'y avait de différence de niveau entre la propriété du demandeur et la digue que cinq centièmes de pied ? R. Oui, cinq centièmes de pied, c'est-à-dire à peu près un demi-pouce.

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Q. C'était là toute la différence entre le niveau de l'eau à la digue et le niveau de l'eau vis-à-vis la propriété du demandeur ? R. Oui, entre la surface de la digue et le niveau de l'eau vis-à-vis la propriété du demandeur.

(P. 43) Le témoin n'a pu constater le rapide.

Q. Vous avez pris votre point de départ à quel endroit ? R. J'ai pris comme point de comparaison le plancher du moulin à farine comme étant le point 100, et toutes les côtes indiquées sur le plan et la section sont en comparaison de ce point situé au-dessus d'une ligne imaginaire passant dans la terre.

Q. Le plan indique la surface de l'eau aux époques mentionnées ? R. Oui.

Q. Par les lignes bleues ? R. Oui.

Q. Ce que je voudrais savoir, Mr. Beaudry, c'est ceci : lorsque vous avez visité les lieux le 18 octobre, l'eau passait pardessus la digue, n'est-ce pas ? R. Oui.

Q. Maintenant que donnait le niveau de l'eau en face de la propriété du demandeur, n'est-ce pas un demi-pouce au-dessus du niveau de l'eau à la digue. R. Oui, c'est cela.

Q. Dans les hautes eaux l'effet du barrage de la rivière à cet endroit doit être d'augmenter le volume de l'eau au-dessus de ce barrage, n'est-ce pas ? R. Naturellement.

Q. Les échappes maintenant laissent cent vingt-cinq pieds, n'est-ce pas, de libre cours d'eau ? R. Oui, je crois que c'est à peu près la largeur des échappes.

Q. Et la largeur de la rivière, n'est-elle pas de quatorze cents pieds environ en bas de l'Ile ? R. Ça doit être à peu près cela.

De sorte que sur cent vingt-cinq pieds de laissés libres à l'eau pour s'échapper, il faut que l'eau, qui se trouve répandue sur une largeur de quatorze cent pieds à un endroit plus haut, se trouve à passer dans ces échappes de cent vingt-cinq pieds.

M. Rielle, le seul ingénieur ou arpenteur produit comme témoin du défendeur, déclare que les données et les niveaux de M. Beaudry sont exacts.

Ayant lui-même avisé l'intimé dans la construction de cette nouvelle digue, ce témoin fait tout pour éviter de donner des réponses catégoriques, mais il finit par admettre qu'il n'a constaté lors de son premier rapport qu'une différence de niveau entre la digue et la propriété du demandeur de deux à quatre pouces. Il constate également que toute la chute

que prétend utiliser l'intimé n'offre qu'une chute de huit pouces.

De sorte qu'il est constaté tant par la preuve de l'appelant que celle de l'intimé qu'il n'existe pas plus d'un demi-pouce de différence entre le niveau de la digue et la propriété de l'appelant.

Maintenant si on enlève la digue on baisse par conséquent le niveau de toute la hauteur de la digue, soit quatre pieds moins les vingt pouces que le défendeur prétend exister de différence de niveau entre le pied et la tête de ce qu'il veut appeler le rapide, ce qui donne par le fait de construction de la digue un exhaussement d'eau de deux pieds six pouces en face de la propriété de l'appelant

En transquestion on pose à M. Beaudry la question suivante : —

Q. Avez-vous pris le niveau en question d'abord en mesurant la surface de l'eau en bas de la digue et la surface de l'eau en haut de la digue ? R. Je ne me rappelle pas directement si j'ai pris en haut ou en bas en premier lieu ; mais j'ai pris la surface de l'eau en bas de la digue aussi bien qu'en haut. Ensuite j'ai mesuré la profondeur, je l'ai déduite de l'élévation de la surface et j'ai eu l'élévation du lit.

Q. Appert-il à votre plan ou dans votre rapport ou dans aucun autre mesurage de l'eau en bas de la digue quel est le niveau en bas de la digue ? R. Oui.

Q. Où cela, veuiller l'indiquer ? R. Vous pouvez le voir par la seconde côte en rouge à la droite de la seetion produite en cette cause ; cette côte indique la surface de l'eau en bas de la digue le 18 octobre dernier (91.05.)

(Par la cour.)

Q. C'était le niveau de l'eau en bas de la digue ? R. Oui votre Honneur.

Q. Quel était le niveau en haut de la digue ? R. Quatre-vingt-treize soixante-et-cinq (93.65).

Q. Ça faisait une différence de ? R. De deux soixante (2.60) ou deux pieds huit pouces.

Q. Les échappes étaient-elles fermées dans le temps ? R. Je crois qu'elles l'étaient.

Q. Votre impresssion était qu'elles étaient fermées ? R. Pour trois, oui, et une était un peu moins fermée que les autres.

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Il semble que ces témoignages si positifs établissent les faits principaux de l'action, la démolition partielle seulement de la première chaussée, et la reconstruction de la seconde qui élève le niveau de l'eau autant que la première, et qui n'est de fait que la répétition du même fait dommageable dont la cour avait ordonné la suppression. Ce que la cour avait à décider, c'était seulement de savoir si le jugement auquel s'était soumis l'intimé, et qu'il s'était engagé par acte authentique à exécuter doit recevoir son exécution ; et aussi la question de savoir si par la reconstruction de la deuxième chaussée il n'a pas contrevenu au jugement et enfreint les obligations contractées par l'acte d'arrangement du 23 novembre 1879. Ces deux questions ne doivent se résoudre que par la lecture du jugement et par celle de l'acte d'arrangement dont il s'agit de faire application aux faits de la cause. C'est inutilement que l'on cherche à déplacer la question en invoquant le chapitre 51, des Statuts Ref. B.C. Cette cause ne peut donner lieu à aucune question concernant l'interprétation de ce statut. L'action de l'appelant n'est basée que sur un jugement et une convention civile qui n'offre aucune difficulté d'interprétation. Elle ne peut être jugée que par les tribunaux ordinaires et non par le mode indiqué par le ch. 51, Stat. Ref. B.C. Si nous étions appelés à faire l'application de ce chapitre, il est assez probable que nous adopterions l'opinion soutenue par plusieurs jugements, que le mode nouveau, indiqué par le ch. 51 n'exclut pas le recours aux tribunaux ordinaires, mais je ne crois pas que nous devions entrer dans l'examen de cette question, car les parties ont défini leurs droits respectifs par le contrat du 23 novembre 1879, à l'exécution duquel elles sont tenues de se conformer.

Par cet acte, auquel l'appelant et l'intimé étaient parties contractantes avec plusieurs autres propriétaires riverains, le procès, encore pendant en appel au sujet

de la première digue, a été réglé et terminé par une transaction acceptant le jugement qui en avait ordonné la démolition avec de plus une promesse de s'y conformer, tel que rapporté plus haut. Quoique les parties aient désigné leur acte sous le nom d'"arrangement" et que le mot "transaction" n'y soit pas employé, cet acte n'en contient pas moins une véritable transaction à laquelle on doit faire application des articles du Code Civil concernant les transactions.

En effet cet acte a tous les caractères de la transaction, il termine une contestation alors pendante en appel entre les parties, il contient des conventions pour en prévenir le renouvellement, et les parties s'y font respectivement des concessions et des réserves. Toutes ces conditions étant de celles que caractérise la transaction, il n'était pas nécessaire pour les parties de déclarer plus formellement leur intention de transiger. L'article 1918 définit ainsi la transaction:

La transaction est un contrat par lequel les parties terminent un procès déjà commencé, ou préviennent une contestation à naître au moyen de concessions ou de réserves faites par l'une des parties ou par les deux.

L'article 1920 en définit ainsi l'effet:

La transaction a, entre les parties, l'autorité de la chose jugée en dernier ressort.

Article 1921:

L'erreur de droit n'est pas une cause de rescision.

La transaction a, comme on le voit, tout à la fois le caractère et l'autorité d'une convention et la force d'un jugement. Il ne peut donc en conséquence s'élever aucune question, même de droit, qui pourrait avoir l'effet d'attaquer la présente transaction. Elle a l'effet d'un jugement en dernier ressort. C'est en vain que l'on voudrait soulever de nouveau une contestation au sujet des droits concernant l'exploitation des cours d'eau; les parties ont accepté le jugement ordonnant la démolition de la chaussée et se sont obligés à ne plus rien

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aire qui pourrait renouveler la cause des dommages dont l'appelant se plaignait. Il n'y a donc plus qu'une seule question, c'est d'exécuter le jugement et les conditions de la transaction qui ont mis fin à cette cause de contestation entre les parties et leurs ayants cause.

Le motif pour lequel la cour Supérieure, dont le jugement a été confirmé par la cour du Banc de la Reine, a renvoyé l'action de l'appelant est que "le barrage du défendeur (deuxième chaussée) ne peut causer de dommage dans les conditions où l'expert Vannier l'a trouvé, dans et lors de ces quatre visites sur les lieux." C'est la conclusion du rapport de Vannier qui a servi de motif pour bâser le jugement.

La mission de ce dernier n'était pas de donner ses appréciations des faits de la cause, mais de constater les faits précis énoncés dans l'ordre d'expertise afin de combler quelque lacune dans le travail de l'ingénieur Beaudry. Mais si volumineux et si savant en apparence que soit ce rapport, il n'a cependant jeté que fort peu de lumière sur les faits à constater. Il n'a surtout pas établi le point principal qui était de constater si, lorsque l'eau déverse sur la digue, elle s'élève d'autant sur la propriété de l'appelant. Il s'exprime à ce sujet de la manière suivante :—

> Je dois dire à l'honorable cour que le fait de fermer les vannes du barrage du défendeur aura pour effet de faire disparaître le rapide sans que l'eau ne s'élève chez le demandeur, lorsque l'eau affleurera seulement le niveau supérieur du barrage ; mais que pour que l'écoulement nécessaire des eaux de la rivière se produise, il faudra que le niveau des eaux s'élève en amont et, par conséquent, vis-à-vis la propriété du demandeur en cette cause.

Il dit bien que le fait de fermer les vannes du barrage (chaussée), aura pour effet de faire disparaître le rapide sans que l'eau ne s'élève chez l'appelant, lorsque l'eau affleurera seulement le niveau supérieur du barrage. Si le rapide disparaît lorsque l'eau atteint seulement le niveau supérieur du barrage, quel est l'effet

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qui se produirait sur ou vis-à-vis la propriété de l'appelant, s'il passe 6 ou 12 pouces d'eau sur la chaussée. Il aurait dû pousser ses investigations jusque là, puisque la question qui lui est soumise est de savoir si lorsque l'eau passe au-dessus de la digue et que les empellements sont soulevés, la digue a pour effet de faire refluer l'eau sur la propriété du demandeur. Mais non il s'arrête justement en deçà du point principal à éclaicir pour laisser à deviner ce qu'il a voulu dire par la phrase suivante : " Mais que pour que l'écoulement des eaux de la rivière se produise, il faudra que le niveau des eaux s'élève en amont et par conséquent vis-à-vis la propriété du demandeur en cette cause." Si cela veut dire quelque chose, c'est une admission que l'eau doit refluer sur la propriété de l'appelant lorsque le niveau de l'eau dépasse l'affleurement de la digue. Vannier avait à constater si l'eau s'élevait sur la propriété du demandeur, il n'en fait pas mention. De combien de pieds faudra-t-il que le niveau des eaux s'élève pour que l'écoulement nécessaire se produise ? Il n'en dit rien non plus. Cependant c'est un fait constaté par les témoins des deux parties que l'eau passe fréquemment pardessus la digue, et que les empellements ne sont presque jamais fermés.

Frédéric Filion, témoin de l'intimé, dit que l'eau a toujours passé pardessus la digue. François Desjardins en dit autant. L'ingénieur Beaudry a constaté le même fait dans les trois occasions où il a fait la visite des lieux. A sa première visite le 7 juin, l'eau deversait pardessus la digue de quatre pieds et trois pouces ; à sa deuxième, le 15 août, il a vu que l'eau déversait encore pardessus la digue, mais il n'en a pas constaté l'épaisseur ; à sa troisième visite du 18 octobre, l'eau déversait encore de trois pouces. Enfin il s'exprime comme suit au sujet de l'inondation de la propriété de l'appelant :—

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Q. Veuillez nous dire si le terrain du demandeur était inondé à cette époque? R. La partie inondée dans le mois de juin est montrée à l'extrait du plan par une couleur verte.

Q. Quelle était la différence de niveau entre la partie inondée et le niveau de la digue? R. Je viens de le dire, trois pieds et quatre pouces.

Q. Prétendez-vous dire que le terrain qui était inondée était de trois pieds plus élevé que le niveau de la digue? R. Oui.

Q. De sorte que la digue ne pouvait, en aucune manière, causer le reflument des eaux sur la propriété du demandeur? R. Au contraire, lorsqu'il passe quatre pieds d'eau pardessus la digue, ces quatre pieds d'eau se trouve refoulés sur le propriété du demandeur. Ça se trouve un pied audessus de cette partie où j'ai pris le niveau; mais il y a d'autres parties particulièrement en allant vers le nord qui sont plus basses que celles où j'ai pris le coup de niveau.

Il est aussi établi par Fabien Labelle et plusieurs autres témoins que les vannes ne sont jamais levées et qu'il n'y a pas même d'appareil pour les monter ou descendre. Puisqu'il est si bien prouvé que l'eau passe pardessus la digue, pourquoi Vannier n'a-t-il pas essayé de constater l'effet qui doit nécessairement se produire sur la propriété de l'appelant lorsqu'il passe de six à douze pouces et même audelà de quatre pieds d'eau sur la chaussée. Au lieu d'établir un fait aussi important, il se borne à dire d'une manière évasive "que chaque fois que les empellements seront fermés, l'eau devra s'élever en face de la propriété de l'appelant." Puisqu'il est prouvé qu'ils sont toujours fermés, pourquoi n'a-t-il pas constaté l'effet qui en résulte non seulement *en face*, mais sur la propriété même de l'appelant

Malgré son silence à cet égard, l'effet de la digue sur la propriété de l'appelant n'en est pas moins parfaitement constaté par de nombreux témoins qui, sans être ingénieurs civils n'en sont pas moins compétents pour établir les faits qu'ils rapportent. Fabien Labelle dit au sujet de la différence du niveau de l'eau, lorsqu'il n'y avait pas de digue, après la démolition de la première et la reconstruction de la deuxième :

Il y avait bien du changement, en mil huit cent quatre-vingt-un (la digue était démolie) nous avons cultivé nos terrains bas comme avant qu'il y eût une digue ; mais aussitôt la nouvelle digue bâtie, nos terrains ont été inondés, comme en mil huit cent quatre-vingt-deux, nos terrains ont été noyés, nous n'avons pas pu les cultiver.

Il est positif à dire que la dernière digue cause les mêmes dommages que l'autre, d'après lui, elle cause plus de dommages, le printemps dernier il a plus souffert qu'avec l'autre digue.

Quant à l'effet de l'eau refoulée par la digue voir ce qu'il dit :

Q. Avez-vous vu de l'eau autour des bâtiments du demandeur le printemps dernier ? R. Oui.

Q. Et pendant combien de temps le terrain est-il resté humide et impropre à la culture ? R. Le terrain, sur toute la partie des quatorze ou quinze arpents, est resté humide jusqu'au quinze de juillet.

Q. Avez-vous jamais vu cela, dans aucune autre circonstance, avant la digue ? R. Non ; l'eau venait sur le terrain du demandeur, mais pas sur une aussi grande étendue, pas plus de six ou sept arpents, à la fin de mai l'eau s'en allait, ça ne faisait pas de dommage.

Q. Quel est l'effet de ce séjour de l'eau par rapport à la propriété du demandeur, pendant ce temps-là, jusqu'au mois de juillet ? R. Ça fait du dommage, ça rend la terre impropre à la culture.

Q. Quelle était la valeur de ce terrain inondé, par rapport au reste de la terre, avant la digue ? R. C'était le terrain qui avait la plus grande valeur de la terre, parce que l'eau s'en allait vite pour cultiver ce terrain, la terre ne séchait pas trop et on avait du foin en abondance.

Q. Combien croyez-vous que le séjour de l'eau cause de dommage à la terre du demandeur, par année ? combien de dommage, par arpent, pensez-vous ? R. Toujours, au plus bas, cinq piastres par arpent ; s'il ne retirait rien du tout de ces terrains ça vaudrait plus que cela.

Q. L'été dernier, vous dites que l'eau n'a pas été haute ? R. Le printemps dernier, la grande rivière n'a pas monté comme de coutume.

Q- Veuillez dire la hauteur, à peu près, que l'eau avait à l'endroit où se trouve la digue, l'eau passait-elle pardessus les plançons ? R. Elle passait pardessus la digue.

Le témoin Labelle (Fabien) n'est pas le seul à constater des dommages positifs sur une partie de la terre de l'appelant, Janvier Hardy dit que la meilleure partie de sa terre, qu'il appelle le cœur de sa terre, est endommagée. Il estime cette partie à dix ou douze

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arpents. Il constate aussi des dommages à cinq ou six arpents de clôtures estimées à huit ou dix piastres l'arpent, en outre de l'impossibilité d'y tenir une clôture à cause des eaux retenues sur son terrain par la digue. Léon Hardy confirme ces témoignages de la manière suivante :

Q. Vous connaissez bien la propriété du demandeur ? R. Oui.

Q. Avez-vous vu quelle était l'étendue de son terrain qui se trouve inondée ? R. Oui.

Q. Connaissiez-vous ce terrain avant la construction de la digue ? R. Oui, il y a une grande différence pour les produits.

Q. Savez-vous combien d'arpents de terre ont été inondés ? R. Quatorze ou quinze arpents.

Q. Savez-vous qu'il n'est pas capable de tenir de clôture sur son terrain ? Pas moyen.

Q. Il n'y a pas moyen de mettre ses animaux là ? R. Non.

Bruneau Hardy et Toussaint Labelle font aussi une preuve satisfaisante des dommages. D'un autre côté les témoins de l'intimé ne sortent pas des généralités et pour éviter de répondre aux questions sur la hauteur et l'effet des eaux, ils s'en tiennent obstinément à dire qu'il y a les hautes et basses eaux, de temps en temps, et qu'ils n'ont pas aperçu de différence causée par la chaussée avec les années où il n'y en avait point. Ces témoignages sont évidemment insuffisants pour contredire la preuve positive faite par l'appelant à ce sujet.

D'après tout ce qui précède, je suis d'avis que l'appelant a droit à l'exécution complète du jugement et de l'acte d'arrangement qui font la base de son action, et en conséquence jugement doit être rendu en faveur du dit appelant condamnant l'intimé à démolir et enlever la dite digue ou chaussée et toute obstruction par lui faite dans la dite rivière et de remettre la dite rivière libre de toute obstruction résultant de la digue ou chaussée et travaux faits par le dit Joseph Limoges et le défendeur et de remettre les dits lieux tels qu'ils

étaient avant la construction de la dite digue et les travaux faits par le dit Joseph Limoges et le défendeur en cette cause. Et qu'à défaut par le défendeur de se conformer au jugement à être rendu, un ordre émane de cette cour ordonnant que la dite digue ou chaussée soit démolie ou enlevée de manière à ce que le cours de la dite rivière ne soit plus obstrué, et ce aux frais et dépens du défendeur, intimé, et que le dit défendeur intimé soit condamné à payer à l'appelant la somme de $100 dollars de dommages et intérêts pour inexécution du dit jugement et violation des obligations de l'acte de transaction, avec tous les frais et dépens.

GWYNNE J.—I entirely concur with the judgment of my brother Fournier in this case. Chapter 51 of the C.S. of L.C. has, in my opinion, no bearing upon the question in issue in the present case; we are not, therefore, called upon to put a construction upon that act. The question which we have to determine appears to me, to be, whether the new work constructed by the defendant in substitution for the old dam, adjudged to be and agreed to be removed, is a fulfilment of the contract of transaction entered into by the defendant in order to give effect to the judgment of demolition thereof in the former suit; and the evidence, to my mind, clearly establishes that the substituted work is retained to such a height that when the gates are closed it does and must cause waters of the river to flow back upon and to flood the plaintiffs land equally as did the former dam which was adjudged to be demolished.

The expert, Mr. Vannier, has certainly presented to the court a very expensive, and it may be a very able, report upon the cause and effect of eddies on running streams, but the essay which he has produced upon that subject has no reference to the point in issue, for

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it has never been suggested that the eddy which does exist in the river above the dam, which is complained of, ever—before the construction of the dam—caused the waters of the river to flow back upon and to flood the plaintiff's lands as they have been flooded since the erection of the dam. Mr. Vannier's report is, unfortunately, almost wholly upon matter quite irrelevant to the question in issue, which simply is, as to the height of the dam relatively to the level of the river at the plaintiff's land, and the dam's capacity when the gates are closed to pen back the waters of the river; and upon this point Mr. Vannier's report, in answer to the 3rd question submitted to him by the Superior Court, confirms rather than displaces the evidence of all the other witnesses, which clearly establishes that the new work when the gates are closed has the same injurious effect upon the plaintiff's land as had the old dam which was adjudged to be demolished and, which the defendant has contracted with the plaintiff to demolish, at least so far as to make it incapable of penning back water upon his land to his prejudice. I am, therefore, of opinion that the plaintiff is entitled to judgment and to such a demolition of the dam or reduction of its height that it cannot by possibility cause the waters of the river at any time to flow back upon and flood the plaintiff's land, and I concur that there is sufficient evidence before us to justify us not only in determining the rights of the plaintiff but also in awarding to him damages for the injury already sustained.

The jurisdiction of this court must be singularly defective if, with all the evidence taken in this cause, we cannot adjudicate upon the real point in issue between the parties without remitting the case to the Superior Court for the cross-examination of the expert, Mr. Vannier, upon his report, when all that is relevant

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in it a majority of the court deem to be confirmatory of the evidence given on behalf of the plaintiff.

PATTERSON J.—I agree with my brothers Fournier and Gwynne in the views of the law and evidence presented in the judgments which they have delivered. I should also agree in the conclusion to dispose of the action by a judgment for the plaintiff if it was clear to me that that judgment ought to have been given by the court below upon the appeal to that court. What was there asked, at all events as the principal ground of appeal, was to have the action sent back to the court of first instance for further evidence. I am satisfied that the plaintiff was entitled to that relief, and under the circumstances I am disposed to agree with those of my learned brothers who think that we should not assume to do more for the plaintiff.

I agree, therefore, that the appeal be allowed with costs here and in the Queen's Bench, and the case sent back for further evidence.

Appeal allowed with costs and case remitted to the Superior Court for further evidence in support of, or against, the report of the expert, Emile Vannier.

Solicitors for appellant: *Laflamme, Madore & Cross.*

Solicitors for respondent: *Loranger, Beaudin & Cardinal.*

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*Jan. 29.

*June 12.

THE CANADA SOUTHERN RAILWAY COMPANY (DEFENDANTS)... } APPELLANTS;

AND

CHARLES S. JACKSON (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COMMON PLEAS DIVISION OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Railway Co.—Negligence—Accident to employee—Performance of duty—Contributory negligence.

J., a switch-tender of the C.S. Ry. Co., was obliged in the ordinary discharge of his duty to cross a track in the station yard to get to a switch and he walked along the ends of the ties which projected some sixteen inches beyond the rails. While doing so an engine came behind him and knocked him down with his arm under the wheels and it was cut off near the shoulder. On the trial of an action against the company in consequence of such injury the jury found that there was negligence in the management of the engine in not ringing the bell and in going faster than the law allowed. They also found that J. could not have avoided the accident by the exercise of reasonable care.

Held, that The Workmens' Compensation for Injuries Act of Ontario, 49 V. c. 28, applies to the C.S. Ry. Co., notwithstanding it has been brought under the operation of the Government Railways Act of the Dominion.

Held also, Gwynne and Patterson JJ. dissenting, that there was no such negligence on J's. part as would relieve the company from liability for the injury caused by improper conduct of their servants and the judgment of the court below sustaining a verdict for the plaintiff was right, therefore, and should be affirmed.

APPEAL by consent from a decision of the Common Pleas Division of the High Court of Justice for Ontario, sustaining a verdict and for the plaintiff at the trial.

Jackson, the plaintiff in this case, was a switch tender in the employ of defendants, and the action was brought in consequence of injuries caused by an en-

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

gine knocking him down when endeavoring to walk over the track to a switch in the performance of his duties. The accident, the facts of which are not disputed, are related by the plaintiff at the trial as follows:—

I was attending to my daily duties to switch engines from one track to another as was required; I was going to let in engine number 328, which was going east on the east bound main line, and I had about 100 yards to go to where I thought she wanted to get into. I was in the shanty cleaning lamps and came out of the shanty door and walked up the side of the west bound track on the outside of the rail; when I was just about four or five rails length from the shanty an engine came up behind me, a switch engine, without ringing the bell or warning me in any way, and struck me. A man by the name of Hugh McCourt halloed to me and I turned around in time for my feet to be knocked from me and I fell in front of the engine. It was the left hand, and I had no way to catch on, and I had to throw myself off; therefore my right hand went under the wheel and was taken off close to the shoulder

Cross-examination.

Q. How far from the rails did you walk? A. On the end of the ties.

Q. How far do the ties project beyond the rail? A. About fifteen or sixteen inches.

Q. And you kept going on on the ends of these ties until the engine overtook you? A. Until I was going to step off to go to my switch.

Q. The east-bound track was the one next to the shanty? A. The west-bound was the one next to the shanty.

Q. How far is the shanty from the track? A. The shanty is about five or six yards.

Q. Well, don't you think it was a very imprudent

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thing for you to do to walk on the end of the sleepers? A. How could I get across the track unless I walked there?

Q. Were you going across the track? A. I was going to cross the track when I got to my switch.

Q. You said you were going along the track on the outside of the rails? A. Yes.

Q. And walking on the end of the sleepers? A. Yes, and I was going to cross the track, and how could I get to the switch?

Q. I am asking you why you walked on the ends of those sleepers? A. Because I could not walk in any other way without being in more danger.

Q. Why not? A. I never walked in the centre of the track.

Q Was there no other way of your getting to your destination except by walking on the ends of these sleepers? A. Yes; I could have crossed right over from the shanty door, but this other engine was coming along; I was keeping out of that engine's way.

Q. Is there no space between the two tracks? A. Yes.

Q. How wide is the space? A. A little wider than the track.

Q. Why did you not go between the east and the west bound tracks? A. Well, of course, it was a sort of wet weather and it was drier on the ties, and I had wet feet at the time.

Q. And you went on the ends of these sleepers because the ground was drier there? A. Yes.

Q. That is the reason why you went? A. That is the reason.

Q. Did you always walk on the sleepers? A. No, I never picked my way just that way. I went which way was the handiest to get to my switch.

Q Were you accustomed to go any other way?

A. I always took the opposite track from the one I used to let the engine in on.

Q. You took the space between the east-bound track and the west-bound track? A. No, sir, I kept outside of the west-bound track.

Q. Do you mean outside the north side? A. Yes.

Q. You always kept on that side? A. No, not always, for if the engine was ahead of me I would cross over ahead of the shanty right across the tracks and follow the engine on the track it was on.

Q. Then you never walked in the space between the east and the west-bound tracks? A. Yes, I must have done that. I worked there for over a year.

His Lordship.—It is admitted that it is the duty of the servants of the company to have the bell rung while an engine is passing through the yard?

Mr.—German. Yes.

Mr.—Cattanach. Yes.

Mr. German.—Q. Do you know of your own personal knowledge how fast the engine was running? A. I know this that the engine had not started to leave the yard, it had not been coming up the side track when I left the shanty, but I only got five rails length when I was struck; Hugh McCourt hollered to me.

Q. You say you did not see it coming; did you look to see? A. Yes, I looked when I came out of the shanty.

Q. And there was no engine coming up that track? A. No; there was an engine on the east-bound track.

Q. That you went to switch on? A. Yes.

Q Where would the engine that ran you down have to start from? A. Have to start about 200 yards away.

Q. And so the time that you walked three or four rails length this engine came that distance and struck you? A. Yes.

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Certain questions were submitted to the jury which, with their findings thereon, are as follows:—

1. Was there negligence in the management of the engine? A. Yes.

2. If so, what was it? A. By not ringing the bell, and to the best of our belief the engine was moving more than four miles per hour.

3. How did the accident occur? A. Plaintiff was in the act of crossing the track to go to the switch in the performance of his duties.

4. Could the plaintiff have avoided it by the exercise of reasonable care? A. No.

5. Assuming that the plaintiff is entitled to recover, what do you think would be a fair sum for the company to pay him as damages? A. $45 a month, in all $1,620.

Upon these findings judgment was entered for the plaintiff, which was affirmed by the Divisional Court on a motion to set it aside. The defendants then appealed to the Supreme Court of Canada, basing their objection to the judgment on two grounds:—

First, that the injuries being caused by a fellow-servant of plaintiff, he could only recover by virtue of the Workmen's Compensation for Injuries Act, and that act does not apply to the defendant's company, which has been declared a work for the benefit of Canada, and brought under the operation of the Government Railways Act of the Dominion.

Secondly, if the plaintiff could maintain an action, he was guilty of such contributory negligence as would preclude him from recovering damages.

Symons for the appellants. As to contributory negligence see *Woodley* v. *Metropolitan Railway Company* (1); *Ryan* v. *Canada Southern Railway Company* (2).

(1) 2 Ex. D. 384.

(2) 10 O. R. 745.

That the Ontario Act is *ultra vires* as regards this company see *Darling* v. *Midland Railway Company*(1); *Conger* v. *Grand Trunk Railway Company* (2); *Clarkson* v. *Ontario Bank* (3).

S. H. Blake Q.C., for the respondent, referred on the question of negligence to *Bridges* v. *North London Railway Company* (4).

The constitutional question is decided by authority. *Parsons* v. *Citizens Insurance Company* (5); *Dobie* v. *Temporalities Board* (6); *In re Toronto Harbor Commissioners* (7).

Sir W. J. RITCHIE C.J.—(After stating the facts as given in the judgment of Galt C.J. in the Divisional Court His Lordship proceeded as follows:)

On the trial the learned judge submitted certain questions to the jury (8), and on the argument the whole case turned on the fourth question submitted to the jury, namely, "could the plaintiff have avoided the accident by the exercise of reasonable care?" And to which as we have seen they answer "No." The objection to the finding on this question is that it is not supported by any evidence and is against the weight of evidence. At the sitting of the Divisional Court the defendant moved against the verdict, which was sustained. The learned Chief Justice of that court in delivering judgment says :—

As to the contributory negligence of the plaintiff the only ground on which this could be maintained would be if the plaintiff had not taken the trouble to look towards Montrose station before he started on the discharge of his duty; he swears positively that he did, and that when he did so no engine was visible. This question was very clear for the

(1) 11 Ont. P. R. 32.
(2) 13 O. R. 160.
(3) 15 Ont. App. R. 166.
(4) L.R. 7. H.L. 213.
(5) 4 Can. S. C.R. 215; 7 App. Cas. 96.
(6) 7 App. Cas. 136.
(7) 28 Gr. 195; 1 Cartwrights Cons. Cas. 825.
(8) See p. 320.

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jury, for one witness of the name of Francis, called by the defendant who was the fireman of the engine which occasioned the injury, gave evidence which, if believed by the jury, would unquestionably have established the defence. He swore not only that he saw the plaintiff from time to time look towards the engine, but in answer to the question: "Did you see the accident? Yes, What did you see? I saw him jump sideways on the footboard of the engine and catch hold of the rail with his right hand, stepped on with his right foot. Stepped on the footboard? Yes, with his right foot, and stumbled with his left, made the second stumble with his left foot which caused his right foot to slip off the board and he went right along side of the track and threw his arm across the rail." The jury did not believe this witness, and I confess I do not see how it would be possible for the accident to happen as described by this witness. The plaintiff had been so unfortunate as to lose his left arm by a former accident and how he could, after having caught hold of the rail of the engine fall in such a way as to bring his right arm under the wheel of the engine, I do not understand; his own account was as I have stated, namely, that his feet were knocked from under him, and in using his right arm to throw himself off the track his arm was crushed. It was plainly a question for the jury.

It was also urged that it was contributory negligence on the part of the plaintiff that he did not at once, on leaving the shanty, cross the northern track and walk between the two tracks. The jury must have thought that there was no negligence on the part of the plaintiff when in discharge of his duty he availed himself (the ground being wet) of the ends of the ties in approaching the switch which was distant some 100 yards from the shanty, and speaking for myself, considering the nature of the railroad tracks, and that they were built on a narrow embankment, I think it was very natural for him to do so.

The motion was accordingly dismissed. An appeal was, by consent, taken direct to this court under the provisions of section 26, sub-section 2 of R. S. C. c. 135.

Had the bell been rung, as it was admitted at the trial it was the duty of the servants of the company to have the bell rung while the engine is passing through the yard, it is difficult to conceive that the accident could have happened. The plaintiff was in the ordinary discharge of his duty. His duty required him to cross the track and he had about 100 yards to go. He was walking on the ends of the ties intending to cross the track when he got to the switch which

he could not reach without crossing the track. His evidence on the point is this (1).

I know of no rule of law which required the plaintiff to cross opposite the shanties in preference to going down the track and crossing opposite the switch. In either case he would have had to go down the track to reach the switch. It seems to me that the evidence in the case, in connection with the non-ringing of the bell and the rate of speed at which the jury find the engine was moving, could not have been withdrawn from the jury, and they having found that the plaintiff could not have avoided the accident by the exercise of reasonable care, and this finding having been confirmed by the Divisional Court, it should not now, in my opinion, be disturbed.

I concur in the view that the Workmen's Compensation for Injuries Act applies to the appellants' Railway.

FOURNIER J. concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs. On the question of the application of the Workmen's Compensation for Injuries Act to Dominion railways, I am clear that Rowland's case was well determined.

GWYNNE J.—A servant of a railway company is, in my opinion, as liable as a stranger to be found guilty of contributory negligence when an injury occurs to him when unnecessarily walking on the railway track in a station yard, although he does so for the purpose of discharging some duty connected with his employment, which however, as in the present case, did not require him to walk upon the track in order to perform the service in which he was at the time engaged; and I am further of opinion that the doctrine of contributory negligence had better be abolished altogether if it can

(1) See p. 317.

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be held that the plaintiff was not a party contributing by his own culpable negligence to the injury which unfortunately he has received; while we sympathise with him in his misfortune we cannot, in my opinion, acquit him of having himself by his negligence contributed to his misfortune. In my opinion, therefore, this appeal should be allowed and the action in the court below dismissed.

PATTERSON J.—I am of opinion that we should allow this appeal. The real question at issue was whether the injury to the plaintiff had been caused by the negligence of the defendants. It was not simply whether or not the defendants or their servants had been guilty of negligence, because they may have been guilty of negligence without that negligence being the cause of the injury. The plaintiff may have contributed to his own injury, and if he did so he cannot properly ascribe it to the negligence of the defendants. It frequently happens that the proof given of the negligence charged in actions like this will *primâ facie* sustain the charge that that negligence caused the injury, and in those cases the allegation of contributory negligence becomes a separate issue. But if in proving the circumstances under which the injury occurred the plaintiff shows that he contributed to it himself, the result is that he fails to prove the essential fact that it was caused by the negligence of the defendants. In a case of that sort the defendants are entitled to a non-suit or a verdict in their favor upon the plaintiffs own showing (1).

It was palpable from the plaintiff's own evidence in this case that having two routes to choose between to

(1) See Smith on Negligence 237. *Davy* v. *London & S.W. Ry. Co.*, 12 Q. B. D. 70; L. R. 6 Q. B. 377, 394. *Bridges* v. *N. London Ry. Co.*, L. R. 7 H. L. 213. *Peart* v. *Grand Trunk Ry. Co.*, 10 Ont. App. R. 191. *Wright* v. *Midlund Ry. Co.*, 51 L. T. N. S. 539. *Wakelin* v. *London & South-Western Ry. Co.*, 12 App. Cas. 41.

reach the switch, one of which was safe, but somewhat muddy, and the other dangerous, he for his own convenience alone chose the dangerous one. The case might, therefore, properly have been withdrawn from the jury.

The position is not altered by the circumstance that the jury pronounced the opinion that the deceased could not, by the exercise of reasonable care, have avoided the accident. I might adopt, almost literally, the language of Lord Halsbury in *Wakelin* v. *London & S. W. Railway Company* (1) where he said:—

> I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to enquire, because if they have found that the defendant's negligence caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding.

The negligence charged against the defendants was that of a fellow servant of the plaintiff. I do not rest at all upon that fact in holding against the plaintiff's right of action, because I see no reason to doubt the application to this case of the provincial statute, R.S.O. (1887), ch. 141. It is not legislation respecting such local works and undertakings as are excepted from the legislative jurisdiction of the provinces by article 10 of section 92 of the B. N. A. Act. It touches civil rights in the provinces. The rule of law which it alters was a rule of common law in no way dependent on or arising out of Dominion legislation, and the measure is strictly of the same class as Lord Campbell's Act which, as adopted by provincial legislation, has been applied without question to all our railways.

I agree that the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for appellants: *Kingsmill, Cattanach & Symons.*

Solicitor for respondent: *W. M. German.*

(1) 12 App. Cas. 46.

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*Feb. 18.
June 12.

EDGAR K. SPINNEY AND SYLVESTER L. OLIVER (PLAINTIFFS) } APPELLANTS.

AND

THE OCEAN MUTUAL MARINE INSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine Insurance—Delay in prosecuting voyage—Deviation—Enhancement of risk.

There is an implied condition in a contract of marine insurance, not only that the voyage shall be accomplished in the ordinary track or course of navigation but that it shall be commenced and completed with all reasonable and ordinary diligence; any unreasonable or unexcused delay, either in commencing or prosecuting the voyage, alters the risk and absolves the underwriter from liability for subsequent loss.

In case of deviation by delay, as in case of departure from the usual course of navigation, it is not necessary to show that the peril has been enhanced in order to avoid the policy.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment of the trial judge in favor of the defendants.

This was an action upon a policy of marine insurance on the cargo of a coasting vessel, tried before Mr. Justice Townshend without a jury. The voyage was from Pubnico, N.S. to Lunenberg $\frac{\text{and}}{\text{or}}$ Halifax and the policy contained the usual clause allowing the vessel, in case of extremity, to put into and stay at, any port or ports without prejudice to the insurance

The vessel sailed on Dec. 15th, 1886, and on Dec. 21st arrived off Shelburne harbor; the weather indicating

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

(1) 21 N. S. Rep. 244.

a storm, she put in and remained in that harbor until next day when she attempted to proceed but returned to Shelburne; she did not go to sea again until Dec. 27th, when she started and again returned and remained in harbor until Jan. 3rd, when she started at midnight and a snow storm and head wind drove her back; on Jan. 4th she got as far as a place called Gull Rock when a heavy sea came on and she tried to put back, but at the entrance to the harbor in trying to tack she misstayed, and before an anchor would hold she struck on McNutt's Island and eventually went to pieces, the crew managing to get ashore.

The insurance company produced evidence by shipmasters familiar with the coast, and also from the log of a Dominion cutter then cruising in the same waters, to the effect that the vessel could have continued on her voyage at different times during the period of her stay in Shelburne, and it was also shown that other vessels bound on the same course did proceed during that period after seeking shelter in Shelburne.

The defendants had pleaded a number of pleas to the action, two of the defences raised being "barratry of the master and mariners," and "deviation by delay." The trial judge found that the vessel was designedly cast away, and gave judgment for defendants on the issue of barratry. In his judgment, which is published in full in the report of the case in the court below (1), he states that he attached little credit to the evidence of one of the witnesses, Nathan Snow, by whose testimony, mainly, barratry was established. The full court held that without the evidence of this witness the defence as to barratry must fail, but they confirmed the judgment for the defendants on the ground of deviation. From that decision the plaintiff appealed to the Supreme Court of Canada.

(1) 21 N. S. Rep. 244.

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Henry Q.C., and *Bingay* for the appellants. The only question we are called upon to argue is that of deviation, as there is no appeal against the decision of the Supreme Court of Nova Scotia that the defence as to barratry has failed.

The propriety of seeking a port, or sailing from it, at particular times must be left entirely to the discretion of the master, and more especially so in the case of small coasters navigating the dangerous waters of the Bay of Fundy. See *The Sarah* (1); *Turner* v. *Protection Ins. Co.* (2); *The Oregon* (3); Phillips on Insurance (4); *Lawrence* v. *Minturn* (5).

The only question in this case is: Did the master act in good faith? At the worst the facts only show error in judgment. *Turner* v. *Protection Ins. Co.* (2).

Borden for the respondents. The facts have been found in favor of the underwriters by the trial judge and the full court below, and this court has invariably refused to interfere with such findings. *The Picton* (6); *McCall* v *McDonald.* (7).

The judgment on the ground of deviation is fully warranted by authority. Carver on Carriage by Sea (8); Phillips on Insurance (9); Marshall on Insurance (10); *Maryland Ins. Co.* v. *LeRoy* (11).

SIR W. J. RITCHIE C.J. (After stating the substance of the proceedings in the action and the nature of the appeal, His Lordship proceeded as follows): There can be no doubt that the understanding implied in the contract is not only that the voyage shall be accomplished in the track or course of navigation in which it ought to

(1) 2 Spragg's Adm. Dec. (Mass.) 31.
(2) 25 Me. 515.
(3) Newbury's Adm. Rep. 504.
(4) 5 ed. sec.. 1583.
(5) 17 How. 110.
(6) 4 Can. S. C. R. 648.
(7) 13 Can. S. C. R. 247.
(8) Pp. 290-1.
(9) 5 Ed. ss. 931, 1018, 1021.
(10) 5 Ed. pp. 153, 158.
(11) 7 Cranch 26.

be pursued, but also that the voyage shall be commenced and completed with all reasonable expedition, that is, with all reasonable and ordinary diligence, and that any unreasonable or unexcused delay, either in commencing or prosecuting the voyage insured, alters the risk and absolves the underwriter from his liability for any subsequent loss. No doubt it must be an unreasonable or inexcusable delay, that is, a wilful and unnecessary waste of time. In like manner as in the case of a departure from the usual course of navigation it is not necessary to prove that the peril has been enhanced, so it is equally clear that the same principle applies in case of deviation by delay.

I think there was ample evidence to justify the conclusion arrived at by the full court, including Mr. Justice Townshend, the trial judge, who concurred with the other judges on the question of deviation. The court below thus puts the case :

The vessel in question the "Village Belle," was a fishing schooner 40 tons burthen laden with a cargo of dry fish, which cargo was on the 30th November insured on a voyage from Pubnico to Lunenburg and or Halifax. The schooner, which was proved to be seaworthy and had new sails, left Pubnico on the 15th December. That night, although the wind was fair for going through Barrington Passage, she put into Doctor's Cove ; she left there finally on the 20th and that evening put into Shelburne Harbor where she remained until the 4th day of January. The voyage from Shelburne to Lunenberg, to which port she was bound, could according to the evidence be made with a fair wind in seven or eight hours, and in my opinion the delay of 14 days in Shelburne Harbor was altogether unreasonable unless satisfactorily accounted for by the plaintiffs the *onus* being on them to do so. Capt. Lorway proved that a fair wind from Shelburne to Lunenburg would be any wind from south round westerly to north, and this is admitted by Larkin, the Master of the "Village Belle." It was established by the mate of the Government cruiser "L. Houlett" who regularly kept the log of that vessel, that at Shelburne on the 21st, 22nd, 23rd, 26th, 27th and 28th days of December and the 2nd and 3rd days of January the wind and weather were such that the "Village Belle" could have continued her voyage, and it appears that one or

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more schooners bound to the eastward which had put into Shelburne Harbor did proceed during that period.

In answer to this the master of the Village Belle enters into no particulars—admits he cannot remember how the wind and weather on each day of his stay in Shelburne were—he kept no log and contented himself with stating generally that he could not proceed on his voyage, without, as the court below says, attempting to justify the delay between the 27th December and the 3rd of January.

Michael Belliveau, one of the crew of the Village Belle, says on cross-examination "I cannot undertake to say anything as to the wind on different days nor the weather nor as to reasons for not sailing." And John Wiman another of the crew, says "I left vessel 2nd January 1887"; on cross examination he says "I cannot swear wind was unfavorable for our voyage the night we went to Cape Negro. I do not speak of character of wind or weather after I went into Shelburne; and then on his re-examination he says:—

The weather from the time we left Pubnico Harbor till we got to Shelburne was so unfavorable we could not proceed on our voyage.

But he also says:—

Cannot say what weather was on 22nd, or 23rd of Dec. nor on 24th, 25th, or 26th. I know the day before I left, Saturday, there was a heavy south east gale and continued in afternoon more southerly. I left vessel Sunday 26th January. Cannot speak of weather 28th, 29th, 30th or 31st. I remember on January 1st there was bad weather, and on Sunday there was rain all day.

The captain of the Dominion cutter, who was in Shelburne harbor, says that on the 28th December he rendered assistance to the schooner Ospray bound from Boston to La Have which had struck a rock off Baccarot and within a day she proceeded on her voyage, La Have being about sixty miles to eastward of Shelburne in direction of Halifax; and he says—"a fair wind from Shelburne to Lunenburg would be anything

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from south round westerly to north." He describes the wind and weather while in Shelburne from day to day and says, "If vessel was sea-worthy nothing to prevent her proceeding on her voyage."

If such was the case it is evident that the captain's remaining in a harbor when he could have proceeded on his voyage was in this case wholly unjustifiable and amounted to a clear deviation. It is therefore impossible, in my opinion, for this court to say the court below was wrong in so holding.

FOURNIER J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Ritchie in the court below.

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

GWYNNE J.—To an action on a policy of marine insurance the defendants pleaded no less than sixteen pleas, two of which only were rested upon at the trial, and these two are as follows:

"10th. The defendants further say that after the commencement of the said voyage and before the alleged loss, the said vessel deviated from the voyage;" and

"13th. The said loss occurred and was caused by the barratry of the master and mariners on board of the said vessel which was not insured against by the said policy."

The learned judge who tried the case rendered a verdict for the defendants upon this latter plea, although the only direct evidence in support of it was the evidence of one Snow, a hand on board, as to whom the learned judge said that he made an unfavorable impression upon him as to his honesty and truthfulness; but he thought that this man's evidence, not-

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withstanding, taken with other circumstances, such no doubt being the facts relied upon as evidence of voluntary deviation, was worth something; and he added that without any reference to Snow's evidence he came to the conclusion that the vessel was deliberately cast away by the captain, and he therefore found a verdict for the defendants upon the plea of barratry.

The Supreme Court of Nova Scotia on the appeal was of opinion that without the testimony of Snow there was not sufficient evidence to sustain the contention that the loss was occasioned by the barratry of the master; in this opinion I concur. The Supreme Court was further of opinion that the fourteen days delay in Shelburne harbor was altogether unreasonable unless satisfactorily accounted for, and that it was not at all accounted for, and the defendants were therefore entitled to judgment upon the plea of deviation. Upon a careful perusal of the log of the Government schooner L. Houlett, the accuracy of which is testified to, and the evidence in relation to the weather during the period of that delay, the captain of the insured vessel having himself kept no log, I cannot say that the judgment of the Supreme Court upon the plea of deviation is not well founded, and the judgment of that court should, in my opinion, be maintained, and the appeal dismissed with costs.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitor for appellants: *George Bingay.*

Solicitor for respondents: *R. L. Borden.*

ROBERT E. FITZRANDOLPH (PLAINTIFF). ..... } APPELLANT.

AND

THE MUTUAL RELIEF SOCIETY OF NOVA SCOTIA (DEFENDANTS) } RESPONDENTS.

1890
*Feb. 20,21.
*June 12.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life insurance—Application for—Reference to application in policy—Warranty—Mis-statement.

The bond of membership in an insurance society insured the member holding it "in consideration of statements made in the application herefor," &c., and in a declaration annexed to the application the insured agreed that the bond should be void if the statements and answers to questions in the application were untrue.

Held, that the application was a part of the contract for insurance and incorporated with the bond.

The said declaration warranted the truth of the answers to the questions and of the statements therein, and agreed that if any of them were not true, full and complete, the bond should be null and void. One of the questions to be answered was: "Have you ever had any of the following diseases? Answer opposite each, yes, or no." The names of the diseases were given in perpendicular columns and at the head of each column the applicant wrote "no," placing under it, and opposite the diseases named, marks like inverted commas. On the trial of an action to recover the insurance on a bond issued pursuant to this application it was found that the applicant had had a disease opposite to which one of these marks was placed.

Held, affirming the judgment of the court below, that whether the applicant intended this mark to mean "no" and thus to deny that he had had such disease, or intended it as an evasion of the question, the bond was void for want of a true answer to the question.

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

The plaintiff is administrator of one Gibson, formerly

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(1) 21 N.S. Rep. 274.

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of Lawrencetown, N.S., and the action is upon a bond of membership, called in the pleadings a policy of life insurance, in the defendant company. The bond was expressed on its face to be made in consideration of statements made in the application therefor, and the application contained a declaration and warranty that the answers and statements therein were full, complete and true, and that such declaration and warranty formed the basis of the agreement between the insured and the society. The application was not, in terms, made a part of the policy, or bond, and nothing contained in it was in, or indorsed on, the bond.

The action was tried before Mr. Justice Ritchie without a jury, and judgment was given for the defendants on the ground that the assured had misrepresented a material fact, having stated in his application that he never had had certain diseases, and the learned judge holding that he had one of those diseases at the time. On appeal the Supreme Court affirmed this judgment and dismissed the appeal without costs which were refused because it appeared that the defendants set up a number of defences, many of which were speculative, and that the defence was framed to suit any evidence that might be fished up at the trial. Also, that defendants had only succeeded on one of the numerous defences set up.

From the judgment of the full court affirming the judgment of the trial judge the plaintiff appealed to the Supreme Court of Canada.

Borden for the appellant. This society holds a license from the Dominion Government under the Insurance Act, R.S.C. ch. 124, and is, therefore, subject to the provisions of that act. Then the benefit of the application cannot be claimed in this case, as it is not contained in, nor indorsed on, the policy as required by sections 27 and 28 of the statute. The following sec-

tions also bear on the case, namely, sections 2, 3, 29-31 and 36-43.

If the declaration and warranty in the application can be used as a defence it must be shown that the alleged misrepresentation was of a material fact and that it was untrue to the knowledge of the applicant. *Taylor* v. *Etna Ins. Co.* (1); *Fowkes* v. *Manchester & London Life Assurance Association* (2); *Jarvis* v. *Marine and General Life Insurance Co.* (3).

The learned counsel also argued that the misrepresentation was not proved.

Henry Q.C. for the respondent. If the Dominion Insurance Act applies to this company it cannot be held to repeal or abrogate the statute in Nova Scotia making the application a part of the policy.

As to the distribution of legislative powers for purposes of insurance see *Parsons* v *Queen Insurance Co.* (4).

The learned counsel argued at length the point raised on the evidence.

Sir W. J. RITCHIE C.J.—The learned judge who tried this case says in giving judgment:—

It is in evidence that the bond or policy in question in this case was issued on the application of the assured, in which he was required to answer certain questions. One of these was—Have you ever had any of the following diseases? answer opposite each "Yes" or "No." Then follows a list of diseases, arranged in seven columns; opposite the disease at the top of each column the word "No" is written, and below the word "No" opposite the names of the other diseases in each column, two marks are placed thus, —" — which marks are opposite the word "Syphilis."

As I interpret the application, these marks mean "no," and the meaning is the same as if that word had been written after the disease called syphilis. It has been proved to my satisfaction, and I find, that the assured was suffering from the disease of syphilis in 1883, and was

(1) 120 Mass. 254.
(2) 3 B. & S. 917.
(3) 5 Times L.R. 648.
(4) 4 Can. S.C.R. 215; 7 App. Cas. 96.

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treated for it by Dr. Bell. I find that the assured misrepresented that fact to the defendants at the time he applied for the bond or policy in question, and that such misrepresentation was material to the risk, and the fact that he had previously been suffering from the disease of syphilis should, in that view, have been communicated to the defendants at the time of the application for the policy. On these grounds I am of opinion that the plaintiff cannot succeed in this action.

I cannot say that there was not sufficient evidence to justify the learned judge in arriving at the conclusion that Dr. Bell had treated a person by the name of Gibson for syphilis and that the person so treated had at the time of such treatment that disease, nor can I reasonably doubt under the evidence that the person so treated was the insured. The question then simply is: Did the declaration of the applicant and the answers to the questions put to the insured form the basis of the contract? Were they expressly or impliedly incorporated with the policy, that is, did it form a part of the contract that any untrue statements, omissions or suppressions contained in the application and answers should avoid the policy? If so, the authorities clearly establish that the application and policy must be construed together and together form the contract, in which case the truth of the representations and answers becomes a condition precedent to the liability.

I cannot conceive that stronger language could be used to incorporate the application and make it part of the contract. The bond witnesseth that "the company in consideration of statements made in the application herefor, and the payment of $7 and the receipt thereof, etc.;" and the application provides that "all applications must be written plainly in ink. Before forwarding the application to the home office, agents should see that all questions have been properly answered." To which is added this declaration or statement:—

Declaration: It is hereby declared and warranted that the foregoing

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answers and statements are full, complete and true, and it is agreed that this declaration and warranty shall form the basis, and shall be a part of, the contract between the undersigned and the Mutual Relief Society of Nova Scotia, and are offered to said society as a consideration of the contract applied for and subject to all the limitations and requirements of the constitution and by-laws, all of which are hereby made part of the bond of membership, and if any of the statements, representations, or answers made herein are not true, full and complete, and if I or my representatives shall omit or neglect to make any payment as required by the conditions of said bond, then the bond to be issued hereon shall be null and void, and all the money paid thereon shall be forfeited to said society, and it is further agreed that the membership hereby applied for shall be subject to all the conditions and agreements contained in the bond of such membership.

I think the learned judge was right in reading the word "no" as applicable to all the questions even if it was necessary to go so far, because if the answers are not full and complete the bond is to be void. In the examination of the deceased by the medical officer, *inter alia*, one question to that officer is, "Have you carefully read the questions and answers thereto of the person applying for examination as recorded on the reverse side, and have you paid particular attention to any vague terms that may have been used therein?" To which the medical officer's answer is "Yes." To the second question, "Has the person now or has he ever had any of the following diseases or disorders? If yes, state disease, date, duration and severity." Answer, "None." This list includes syphilis, and to this the deceased signed his name, and the declaration signed by the applicant distinctly states that the foregoing answers and statements are full, complete and true, and in the certificate of the medical examiner he states that the applicant stated that the answers given to the questions put by him are correct. All these papers were transmitted to the company and on them he became a member and obtained the instrument on which he now sues. If this is so, any untrue repre-

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sentations, whether material or not, avoid the policy. See *Anderson* v. *Fitzgerald* (1).

The learned judge having found, and I think on sufficient evidence, that the deceased had had the disease syphilis, one of the diseases named, to which in his answer to the question "Have you ever had any of the following diseases (including syphilis)? answer opposite each Yes or no," I think he answered "No" or did not answer at all, in either of which cases if the answer was false or the question was not answered the policy or bond was rendered void; and the correctness of the answer having been warranted by the declaration whether the untrue statement was material or not is quite unimportant as the party must adhere to his warranty.

I therefore think the appeal should be dismissed.

FOURNIER J.—Concurred.

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

GWYNNE J.—(His Lordship referred at some length to the statutes incorporating the defendant company, passed in 1884, and particularly secs. 3, 9, 10 and 11. He then read the declaration in the application for membership (2) and the bond of membership issued thereon and after setting out the pleadings proceeded as follows)—

Now it cannot, I think, be doubted that the learned judge who tried the cause came to a correct conclusion when he found, as matter of fact, that the Alfred Gibson who made the application to the defendant society, upon which the bond of membership sued upon was issued, was the same Alfred Gibson who was proved before him to have had, in an aggravated form,

(1) 4 H. L. Cas. 484, p. 504. (2) See p. 336.

one of the diseases mentioned in the application of a very serious nature and which, in his application, he had declared and warranted that he never had had, and that this constituted a breach of warranty in a very material point. I am of opinion, also, that the learned judge might well have held upon the evidence that Gibson had falsely declared and warranted that no proposal to insure his life had ever previously been made by him, for it was expressly proved that there had been, and that he had been medically examined upon his application to another company, and that no policy had issued thereon ; so, likewise, that he had falsely warranted that he was in good health when he made his application to the defendant company. I can see no reason to doubt the evidence of Mr. Gates because of his being a member of the defendant society and one of their agents, and his evidence leads, I think, to the conclusion that when Gibson applied for membership in the defendant society he was, and that as he well knew, in bad health and remained so in and from the month of July, 1886, until his death. Between the 6th and 9th August, two days after the execution of the bond of membership, he worked for Mr Gates off and on until the 19th of August, 1886. Mr. Gates says that when he first went to work for him, on the 7th of August, he complained very much of pain in his back and side and loss of appetite, and that he got some medicine from Mr. Gates. On the 12th and 13th of August he worked for him again, and then complained of same trouble ; on the 19th he complained of feeling very unwell, and looked so—he seemed to be in great pain and distress—Mr. Gates wanted him to go to bed. He objected, and was afraid he would die ; however, they got him to bed and he got up before night. After he got round, he told Mr. Gates, as he says he thinks, that he had been subject to this kind

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of spells, but not so bad, before. He told Mr. Gates that he had been treated by doctors in Yarmouth and Digby, but that they did not seem to know what was the matter with him and Mr. Gates says that he did not look like a man in good health. Upon the whole there can, I think, be no doubt that the learned judge who tried the case, in the judgment which he rendered for the defendants, came to a sound conclusion.

As to the rectification asked for in the statement of claim no foundation is laid for it, nor in point of fact does any appear to exist. We see that the claim for "rectification" as it is called is rested upon ch. 124 of the Revised Statutes of Canada, but the 3rd section of that act enacts that the provisions of the act shall not apply to any company incorporated by act of the legislature of any Province forming part of Canada which carries on the business of insurance wholly within the limits of that Province by the legislature of which it was incorporated and which is within the exclusive control of the legislature of such Province, but such company carrying on the business of life insurance may, by leave of the Governor in Council, *avail itself of the provisions of this act, and if it so avails itself the provisions of this act shall thereafter apply to it*, and such company shall have the power of transacting its business of insurance throughout Canada; and by the 43rd section it is enacted that:—

Nothing in this act contained shall apply to any society or association of persons for fraternal, benevolent, industrial or religious purposes among which purposes is the insurance of the lives of the members thereof exclusively, or to any association for the purpose of life assurance formed in connection with such society or organisation and exclusively from its members and which insures the lives of such members exclusively.

2. Any society or association which is declared by this section to be exempt from the application of this act may nevertheless apply to the Minister to be allowed to avail itself of the provisions of the seven sections next preceding, and upon such application being assented to such

society or association shall cease to be so exempt by virtue of this section.

The seven next preceding sections here referred to are sections relating to life insurances, by "Mutual or Assessment Life Insurance Companies." Now whether the 3rd section of this act as above extracted applies to any companies other than those incorporated simply for the purpose of carrying on the ordinary business of life insurance, and whether this 43rd section applies at all to fraternal, benevolent, industrial and religious societies incorporated by the legislature of one of the provinces of the Dominion, and if it does, what is the effect of any such company obtaining the allowance of the Minister to its availing itself of the provisions of the seven sections next preceding the 43rd, and whether such allowance would have the effect of doing away with the provisions contained in the local act even within the limits of the Province by the legislature of which the company is incorporated, are matters not necessary to be determined in the present case, for although it appears in evidence that the defendant company, incorporated by an act of the legislature of Nova Scotia, did make application under the above 43rd section of the Dominion act to be allowed to avail itself of the provisions mentioned in that section, yet no allowance to that effect was effectually granted until the assent of the Minister was published in the *Canada Gazette* of the 7th August, 1886, nor was it communicated to the defendant society otherwise than by such publication in the *Gazette*; so that until then it was not competent for the defendant society to avail itself of the provisions of the act referred to in the said 43rd section and the bond of membership now sued upon, having been issued, and the contract therein contained made, upon the 4th of said month of August cannot be subject to the

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provisions of the Dominion act. It is unnecessary for the like reason to consider the point raised in relation to the 27th and 28th sections of the Dominion act, the former of which, however, has application only to conditions subsequent such as those mentioned in the conditions set out on the face of the bond of membership and not to a warranty of the truth of matters upon the faith of which the contract is based; and as to the 28th section, if it applied in the present case, it is obvious that the untrue statements which are relied upon as breaches of the warranty were material to the contract. Upon the whole I am of opinion that the appeal must be dismissed.

PATTERSON J. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Ritchie & Ritchie.*

Solicitor for respondent: *Jas. Wentworth Bingay.*

PATRICK F. DUGGAN (PLAINTIFF).....APPELLANT. 1890

AND *Feby. 24.
*June 13.

PATRICK M. DUGGAN, ASSIGNEE OF JOHANNA DUGGAN, AND OTHERS (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Interest—Contingent interest—Protection against waste.

D. was entitled to a legacy under a will provided he survived the testator's wife, and during her lifetime he brought suit to protect his legacy against dissipation of the estate by the widow.

Held, reversing the judgment of the court below, that D. had more than a possibility or expectation of a future interest; he had an existing contingent interest in the estate and was entitled to have the estate preserved that the legacy might be paid in case of the happening of the contingency on which it depended.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment in favor of the defendants at the trial.

The plaintiff brings his suit to protect his right to a legacy under the will of one John Duggan, of Halifax, claiming that the estate is being dissipated. The two clauses of the will material to the case are the following:

"I give, devise and bequeath unto my dear wife, Johanna, all and singular my real and personal estate, property, monies, goods, chattels and effects, whatsoever and wheresoever, of every kind and description, to have and to hold the same and every part and parcel thereof to my said wife, Johanna, her heirs, executors, administrators and assigns forever."

"And my will is further that, in case there should be

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any child or children of my deceased brother, Maurice, formerly of Dungarven, in Ireland, living at the time of the decease of my said wife, then that such child or children should receive out of the proceeds of my said property, at her decease, the sum of three thousand pounds, Halifax currency."

The plaintiff is the only child of Maurice Duggan named in the second of the above clauses. The wife, Johanna Duggan, who is the executrix of the will, is still alive, but she has mortgaged the real estate of the testator to the respondents (Millers), to secure her personal debts, in consequence of which this suit was brought. On the trial Mr. Justice Townshend decided that the plaintiff could not maintain the suit as he had no present, but only a future and contingent, interest in the estate. The full court, on appeal, affirmed the judgment at the trial.

E. L. Newcombe for the appellant. The cases relied upon to support the judgment in the court below did not deal with contingent interests but only with estates in expectancy depending on mere possibilities. See judgment in *Davis* v. *Angel* on appeal (1).

The learned counsel was stopped by the court.

Borden for the respondent. It is only in exceptional cases that the court will interfere to protect contingent interests. *Dowling* v. *Dowling* (2); *Kevan* v. *Crawford* (3); *Hampton* v. *Holman* (4); Annual Practice 1889–90 (5).

The legacy is only chargeable upon the personal estate. Theobald on Wills (6); *Bentley* v. *Oldfield* (7).

The whole property is given to the wife absolutely, and a later clause in a will does not take effect over

(1) 4 DeG. F. & J. 524.
(2) 1 Ch. App. 612.
(3) 6 Ch. D. 29.
(4) 5 Ch. D. 187.
(5) P. 456.
(6) 3 ed. p. 584.
(7) 19 Beav. 230.

such a paramount devise. The devise to the plaintiff is, therefore, void for repugnancy; *Byng* v. *Lord Strafford* (1), affirmed on appeal to House of Lords *sub nomine*, *Hoare* v. *Byng* (2). In *Howard* v. *Carusi* (3) all the cases on this subject are collected. And see *Percy* v. *Percy* (4).

The learned counsel also referred to *Davidson* v. *Boomer* (5); Theobald on Wills (6).

Newcombe in reply cited *Allan* v. *Gott* (7); *Curtis* v. *Sheffield* (8); Cunningham & Mattinson's Pleadings (9).

Sir W. J. RITCHIE C.J.—I think the plaintiff had more than a possibility or expectation of a future interest, but that he had a present existing contingent interest in the testator's estate and has a right to maintain an action to have his legacies secured. This interest is vested by the testator's will; the enjoyment of it depends on a contingency, but the present interest does not the less exist. His right has come into existence; that right is to receive out of the testator's estate £3,000, in case he survives the defendant, Johanna Duggan; and what he now seeks is simply to have that right declared and his legacy secured, so that it may be paid to him in the event of his surviving the said Johanna Duggan which seems to me to come very clearly within the language of Lord Eldon in *Allan* v. *Allan* (10) where he says:—

> Some things are very clear. First, it is perfectly immaterial how minute the interest may be, how distant the possibility of the possession of that minute interest: if it is a present interest. A present interest the enjoyment of which may depend upon the most remote and improbable contingency is nevertheless a present estate; and as in the case upon Lord Berkeley's will, (*Lord Dursley* v. *Fitzhardinge Berke-*

(1) 5 Beav. 558.
(2) 10 C. & F. 508.
(3) 109 U. S. R. 730.
(4) 24 Ch. D. 616.
(5) 17 Gr. 509; 18 Gr. 475.
(6) 3 ed. p. 582.
(7) 7 Ch. App. 439.
(8) 21 Ch. D. 1.
(9) P. 487.
(10) 15 Ves. 130.

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ley, 6 Ves. 251,) though the interest may with reference to the chance be worth nothing, yet it is in contemplation of the law an estate and interest. On the other hand, though the contingency be ever so proximate and valuable, yet if the party has not by virtue of that an estate, the court does not deal with him.

And on the following page the Lord Chancellor says,

There is no case in which the tenant in tail has not been considered, as between him and his issue, as having the entire interest. The statute *de donis* certainly does say that the estate is to go according to the form of gift, and gives the forms of writs, which are of different sorts; but I cannot find that any Formedon was ever brought by the issue during the life of the tenant in tail. That demonstrates that the estate is in the tenant in tail for the time being himself; and then the reasoning that applies to the tenant in fee, must apply to the tenant in tail.

In the case of Lord Berkeley's will referred to the Lord Chancellor says: (1)

A contingent interest is not the less a present interest.

It would seem very clear that if the appellant is refused the relief he seeks there is but a very small, if any, chance of his realising the legacy if the contingency on which its payment is to be made should happen. I cannot think the law so helpless as to allow an executrix and trustee to waste and dispose of the trust estate for her own purposes as was done in in this case, under, as it were, the very eyes of the court, and that the court should be unable to protect the estate so as to be available, on the happening of the event contemplated, for the purposes of distribution in accordance with the provision of the testator's will.

I therefore think this appeal should be allowed.

FOURNIER J.—I agree in the reasons given by the learned Chief Justice for allowing the appeal.

TASCHEREAU J.—I am of opinion that the appeal should be allowed with costs.

(1) 6 Ves. 260.

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GWYNNE J.—The question in this case turns upon the true construction of the last will and testament of John Duggan, deceased, in his life time the husband of the defendant Johanna Duggan. John Duggan died in the month of November, 1865, having first duly made and published his last will and testament upon and bearing date the 28th day of August, 1865, whereby, after providing for payment of his debts and funeral expenses, he devised as follows:—

2. I give, devise and bequeath unto my dear wife Johanna, all and singular my real and personal estate, property, monies, goods, chattels and effects whatsoever and wheresoever, of every kind and description, to have and to hold the same and every part and parcel thereof to my said wife Johanna, her heirs, executors, administrators and assigns forever.

And my will is further that in case there should be any child or children of my deceased brother Maurice, formerly of Dungarven, in Ireland, living at the time of the decease of my said wife, then such child or children should receive out of the proceeds of my said property at her decease the sum of three thousand pounds, Halifax currency.

Now upon the well established principle that a will must be construed so as to give effect, if possible, to every word a testator has used, I am of opinion that this devise operates as a devise to the testator's wife Johanna and to her heirs, executors, administrators and assigns forever, subject to a charge in favor of such of the children of the testator's deceased brother, Maurice, as should be living at the time of the decease of testator's wife Johanna. It appears that the testator's brother Maurice had died ten years before the testator made his will, as the testator well knew; it appears also that when the testator made his will the plaintiff was the only child of his deceased brother Maurice who was living; so that in effect the devise to Johanna was made subject to a charge of £3,000 in favor of the plaintiff, contingent upon his surviving the devisee

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Johanna his aunt. Now whether his charge be a present bequest vested in interest in the plaintiff subject to be divested in the event of his not surviving Johanna, or a bequest contingent upon his surviving her, there can, I think, be no doubt whatever that he has such an interest under the will as entitles him to the interference of the court to have the property subjected to the charge preserved in such a manner that it shall be forthcoming to be applied in payment of the bequest in his favor in the event of his surviving his aunt Johanna. The appeal therefore must be allowed with costs, and a decree be ordered to be made referring it to the master to enquire into particulars of the property devised, and as to the disposition thereof, and to report to the court in the ordinary manner.

PATTERSON J.—Concurred.

Appeal allowed with costs.

Solicitors for appellant: *Meagher, Drysdale & Newcombe.*

Solicitor for respondent Duggan: *A. G. Troop.*

Solicitor for other respondents: *H. W. C. Boak.*

CHARLES LAWRENCE (PLAINTIFF).....APPELLANT ; 1890

AND

W. CHARLES ANDERSON (DEFENDANT) RESPONDENT. *Feb. 25, 26. *June 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Debtor and Creditor—Assignment in trust—Release by—Authority to sign —Ratification—Estoppel.

To an action by L. against A. the defence was release by deed. On the trial it was proved that A. had executed an assignment for benefit of creditors and received authority by telegram to sign the same for L. The deed was dated 8th October, 1881, and afterwards, with knowledge of it, L. continued to send goods to A., and on 5th November, 1881, he wrote to A. as follows : "I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected and not lose one cent by you. After you get matters adjusted I would like you to send me a cheque for $800" * * *. In April, 1885, A. wrote a letter to L., in which he said : "In one year more I will try again for myself and hope to pay you in full." In November, 1886, the account sued upon was stated.

Held, reversing the judgment of the court below, Taschereau and Patterson JJ. dissenting, that the execution of the deed on his behalf being made without sufficient authority L. was not bound by the release contained therein and never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it.

Held, per Taschereau and Patterson JJ., that though A. had no sufficient authority to sign the deed yet there was an agreement to compound which was binding on L. and the understanding that L. was to be paid in full would be a fraud upon the other creditors of A., who could only receive the dividends realized by the estate.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment at the trial in favor of the plaintiff.

The action in this case was on an account stated and

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the defence that plaintiff had released his claim by deed. On the trial it was shown that defendant executed an assignment for the benefit of his creditors on 8th October, 1881, the plaintiff being a creditor. With knowledge of the assignment plaintiff continued to supply defendant with goods, and on 11th October, 1881, he wrote the following letter :—

"MR. ANDERSON,

"DEAR SIR,—Your letter of the 7th received to-day. I have every confidence in you, and hope you will continue on in business, and I shall be ready to furnish you with all the goods you want in my line. I did not feel like pressing you for funds, although I have been short and hard pushed at times so that I had to hire. I was somewhat astonished to hear the news Saturday morning that you had suspended, but I felt so sure you would not allow me to be injured that I sent the goods last Saturday that I had marked for you just before I received the news. I cannot afford to lose a cent, for I have worked hard for 20 years and just got enough to live on. I shall leave my interest in your hands and know you will see me protected. Let me know what you want me to send on next steamer. If you could get a good lot of sound Early Rose it will be a good thing ; sold to-day at $2.80 per bbl., for fine stock bbls. well filled; Prolific, $2.50 per bbl. ; Damson Plums $3.50 per bushel."

The defendant was authorized by telegram to sign the deed for plaintiff, and on 5th November plaintiff wrote him as follows —

"W. C. ANDERSON, Esq.,

"DEAR SIR—Your letter duly to hand. I have done as you desired by telegraphing you to sign deed for me and I feel confident that you will see that I am protected and not lose one cent by you. After you get

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matters adjusted I would like you to send me a check for $800, as there will be six months before you will have to pay any dividend, and think it will be easier to send me a cheque for that amount. I trust you will be all straight again before next summer, so we will be able to do a large business."

After this nothing appears to have been done in the matter until 1885. On 14th April of that year defendant wrote to plaintiff showing the condition of his affairs, and in that letter he said "in one more year I will try again for myself and hope to pay you in full * * * If the Lord helps me you shall receive every dollar."

In November, 1886, the account sued on was stated between the plaintiff and defendant, and the action was brought in the following year. In a letter to defendant under date of 24th September, 1887, plaintiff stated that he wished to get judgment before the six years' limitation expired and wished to have his claim secured by the judgment in case of accident.

On the trial before Mr. Justice Townshend judgment was given for the plaintiff, the learned judge holding that there was no authority for defendant to sign the deed of assignment in plaintiff's name, and that plaintiff had done nothing since amounting to an adoption or re-delivery of the deed. The full court reversed this decision, the majority being of opinion that there was a sufficient agreement by the plaintiff, *dehors* the assignment, to compromise his debt. The plaintiff then appealed to this court.

Eaton Q.C. for appellant referred to Taylor on Evidence (1); *Tupper* v. *Foulkes* (2); *Hunter* v. *Parker* (3); *Forbes* v. *Limond* (4).

Newcombe for the respondent cited *Field* v. *Lord*

(1) 8 Ed. s. 985.
(2) 9 C. B. N. S. 797.
(3) 7 M. & W. 343.
(4) 4 De G. M. & G. 298.

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Donoughmore (1); Winslow on Private Arrangements (2); *Tupper* v. *Foulkes* (3); *In re Baber's Trusts* (4).

SIR W. J. RITCHIE C.J.—As Mr. Justice Ritchie pertinently remarks in the court below: "The question is not whether the plaintiff executed the deed in accordance with the principles of the common law, but whether after it was executed for him by the defendant on the strength of the telegram from the plaintiff to the defendant, desiring the defendant to sign the deed for him, he so assented to it or recognised or acted under it as to be bound by the release it contained." I must confess the evidence of assenting to it or recognising it appears to me to be extremely slight, and I can discover no evidence whatever of any acting under it. The only evidence of any assent or recognition of the deed is in the letter of the 24th September, 1887, in which the appellant says, "I have written Seeton & Thompson a number of times and got no reply." So that it would appear that Seeton & Thompson did not recognise him as a party having a right to information in reference to the deed, if indeed the letter sought such information; but as these letters were not put in by either party I presume no inference can be drawn from them one way or the other.

It is to be observed, however, that the plaintiff from the first does not appear to have relied on the deed. The deed was dated on 8th October, 1881. On 11th October, 1881, the plaintiff writes this letter (5).

On 5th Nov., 1881, the plaintiff writes another letter, stating that he had done as defendant had desired by telegraphing him to sign the deed (5).

(1) 1 Dr. & War. 228.
(2) Pp. 14 & 15.
(3) 9 C. B. N. S. 797.
(4) L. R. 10 Eq. 554.
(5) See p. 350.

It will be observed in this letter that although he authorizes him to sign the deed he does not look to the deed for his protection, as he says: "I feel confident you will see I am protected and not lose one cent by you." And it is obvious he does not look to the deed or the assignees for payment of dividends under it, because he says: "After you get matters adjusted I would like you to send me a cheque for $800, as there will be six months before you will have to pay any dividend, and I think it will be easier to send me a cheque for that amount."

On 14th April, 1885, defendant writes plaintiff; after stating what he had given up, he says: "In one more year the engagements (which he had referred to) will be given up, and I will try again for myself, and hope to pay you in full;" and again: "If the Lord helps me you shall receive every dollar."

On the trial Joel Lawrence, a son of the plaintiff, gives this testimony:—

Joel Lawrence, sworn:—I am son of plaintiff. Reside in Boston. My father resides there, and I am in his employment. I knew defendant last year. Went to see him respecting matters in dispute last November. I saw him in his store. Showed him statement of account due to my father, and wished him to sign it, so that we might have a combined account of what was due to my father. Mr. Macdonald was there. This is the account I presented to him We looked it over, and he told his clerk, Macdonald, to examine it with his books, and if correct to sign it. We went in, compared it with his books, and Macdonald acknowledged this to be a correct statement, and signed it, "W. C. Anderson, per Macdonald," and I signed my name at the same time as a witness. Macdonald erased one item so as to make it agree with his books. The account as contained in this paper agrees with his books. I was looking over him while he checked it off. This was the first time I saw Anderson.

Cross-examined:—Macdonald and W. C. Anderson were both clerks of Willoughby Anderson at time. He took down Charles Anderson's ledgers. I saw this account in a ledger. Saw some items. In dealings after defendant's suspension, we had overdrawn on him $170, which is the item erased. I remember the time of defendant's suspension. My father knew he had assigned to Seeton & Thomson. I did not go to see Seeton & Thomson.

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The defendant was examined, and does not contradict or explain away in any respect this letter, or deny in any way his liability on this account so stated. Mr. Cathcart Thomson was examined; he merely states that he was one of the assignees with Seeton, and that he was not associated in any other way in business with Seeton; that this was the only transaction; but he does not say one word as to having recognized the plaintiff in any way as a party to the deed of assignment, or that the plaintiff in any way assented to it or recognized it as binding on him.

On the 24th September, 1887, plaintiff writes to defendant that he felt anxious to have defendant's account fixed up, so that in case he, plaintiff, should be taken away, his wife and children should have something to show in case defendant was fortunate and had means to pay in the course of the next ten years. He says: "I thought it would be more secure than the papers I now hold." He then says he has written letters to Seeton & Thomson a number of times and got no reply, and supposed he was doing right to get judgment before the six years limitation expired.

This certainly does not look like an assent to or recognition of the deed, or any idea that he had released the defendant from liability, and having stated the account with the plaintiff after this took place I think he should be bound by it.

I think the judgment appealed from should be reversed and the appeal allowed.

FOURNIER J.—Concurred.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs. I adopt the reasoning of McDonald J. in the court below.

GWYNNE J.—I can not see in the evidence anything sufficient to estop the plaintiff from insisting that the deed of release pleaded to the action by the defendant

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is not his deed, and if he is not estopped from so insisting the judgment must, in my opinion, be in his favor. I am of opinion, therefore, that the appeal should be allowed with costs, and that judgment should be entered for the plaintiff in the court below for the amount of the account stated, with costs.

PATTERSON J.—The plaintiff, who is appellant, is not, in my opinion, entitled to have the judgment disturbed.

I agree that the release cannot be treated as the deed of the defendant, because it was not executed by him nor by any authority given by deed, nor was it afterwards ratified or re-delivered as his deed.

But the transaction evidenced by the instrument was an assignment by the debtor of property for distribution among his creditors or such of them as should become parties to the instrument within a specified time, and by which the parties to the instrument accepted their distributive shares in full satisfaction of their respective debts. That was the operation of the release clause and the transaction was, in effect, a composition between the debtor and the creditors who became parties to the instrument.

The agreement to compound was a binding agreement without deed, and the plaintiff gave express written authority to attach his name as a party to the instrument.

It does not seem to me to admit of doubt that he could have insisted on sharing with the other creditors the dividends under the arrangement. The fact that he did not do so is relied on on his behalf as telling against his being bound by the composition. His letter of the 5th of November, 1881, which repeats the authority to sign his name to the deed, seems to show pretty plainly that he did not claim dividends because he had an understanding that he was to be paid in full, partly before the dividends were, as he understood it, to become payable, and the rest eventually. That agreement strikes me as being a fraud upon

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the other creditors, and the effect now claimed for the forbearance to rank under the composition is very like another way of reaching the same result.

The argument, as I apprehend it, is to this effect: Sign the composition agreement; let the other creditors come in on the faith of your coming in; then don't ask for dividends and you will not be bound.

The defence as amended pleads the execution of the agreement by written authority. It goes on to make other allegations of subsequent acts which may not be borne out by the evidence, though I am not prepared to refuse a good deal of significance to the absence of any repudiation and to the standing by while the other creditors acted on the terms of the agreement which the plaintiff had signed, but I take the plea to be sufficient to admit proof of the agreement by the signature alone.

The view that I take has been so well and so fully expounded in the judgments delivered in the court below by Macdonald, Weatherbee and Ritchie JJ. that it is unnecessary for me to occupy time by going over the same ground, or by examining the authorities which those learned judges discussed and acted upon. But upon the question of the right of this defendant to urge against the plaintiff the fraud upon the creditors to which the defendant was himself a party, I refer to *Geere* v. *Mare* (1), as a case at law in which a security given in pursuance of an agreement in fraud of creditors, not unlike that indicated in the letter of the 5th November, 1881, was held void as founded on an illegal consideration, and to the remarks of Malins, V.C., in *McKewan* v. *Sanderson* (2), where the principle is stated and several decisions referred to.

In my opinion we should dismiss the appeal.

Appeal allowed with costs.

Solicitor for appellant: *Horace L. Beckwith.*

Solicitor for respondent: *E. L. Newcombe.*

(1) 2 H. & C. 339.

(2) L. R. 15 Eq. at p. 234.

ALEXANDER SHAW (PLAINTIFF),.....APPELLANT,

AND

ROBERT L. CADWELL, *et al.* (DEFENDANTS).....RESPONDENTS.

1889

*Mar. 22.

April 30.

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

Loan to Partner—Partnership—Liability—Art. 1867, *C.C.*

Where one member of a partnership borrows money upon his own credit by giving his own promissory note for the sum so borrowed, and he afterwards uses the proceeds of the note in the partnership business of his own free will without being under any obligation to, or contract with, the lender so to do, the partnership is not liable for said loan, under Art. 1867 C.C. *Maguire* v. *Scott*, 7 L. C. R. 451, distinguished.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1), by which the judgment of the Superior Court, in review, which condemned the respondents to pay appellant $2,464.42 with interest and costs was reversed, and the judgment of the Superior Court which dismissed appellant's action was restored.

This was an action brought by the appellant to recover from the respondents, R. L. Cadwell and Henry J. Shaw, carrying on business in co-partnership under the name, style and firm of "The New York Piano Company," the amount of two promissory notes and interest accrued thereon, one dated 20th September, 1881, for $910.50, and the other dated 31st March, 1883, for $1,100, and both signed by Henry J. Shaw alone to the order of the plaintiff; the plaintiff alleging in his declaration that these notes were so

* PRESENT :—Strong, Fournier, Taschereau, Gwynne, and Patterson JJ.

(1) M. L. R. 4 Q. B. 246.

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signed and given to him for money loaned by him to the firm "The New York Piano Company," and of which the said firm had the benefit; to which the defendants pleaded that the said firm did not get or borrow any amount of money from the plaintiff, or ever had any business transaction with him, but that the transaction was entirely between the plaintiff and his brother, Henry J. Shaw, personally, and not the firm.

From the evidence, which is reviewed at length in the judgment and in the report of the case in the court below (1), it appeared that although the money was used by the New York Piano Company, it was advanced to H. J. Shaw, personally, who was also a partner of the appellants' in the firm of Henry J. Shaw & Co., in the furniture business, which firm became insolvent and made an assignment for the benefit of their creditors.

Robertson Q.C., and *Falconer* for appellant.

The respondents would not be liable under the English law, but under article 1867, C.C., they are liable, for it is enough to show that the moneys were "applied to the use of the partnership." *Maguire* v. *Scott*, (2) and Codifiers' Report on Partnership (3). The authorities relied on by respondents in the court below are not applicable, as art. 1867 is not to be found in the French Code.

Geoffrion Q.C., and *Carter* for respondents. Art. 1867 C C., must be read with art. 1855 C.C.

The case of *Maguire* v. *Scott* (2), referred to in the authorities under article 1867, is entirely different from the present one; in that case it was a purchase of goods by one partner in his own name, the seller being

(1) M.L.R. 4 Q.B. pp. 251 et seq. (2) 7 L. C. R. 451.
(3) 3 vol., p. 30, No. 32.

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in ignorance of the partnership, but the goods went into the partnership business at once, and the court held the partnership liable.

At the time of the making of the notes the appellant was aware of the respondents' partnership; he did not give credit to the respondents, but to his brother, Henry J. Shaw, and in such a case the law is very clear. See Pothier (Ed. Paris, 1825), Société (1); Story on Partnership (2); Pont. Société (3); Pardessus (4); Lindley on Partnership (5); Alauzet Soc. Civ. and Com. (6); Duranton (7); Duvergier (8).

Fournier and Taschereau JJ. were of opinion that the appeal should be dismissed for the reasons given by Mr. Justice Cross in the Court of Queen's Bench (9).

GWYNNE J.—I am of opinion that the judgments of the Superior Court and of the Court of Queen's Bench at Montreal, in appeal, should be affirmed, for the reasons given in the judgment of Mr. Justice Cross, and that this appeal should be dismissed with costs. The case is purely one of fact, and the sole question is: To whom and upon whose credit did the plaintiff lend the money for which the two promissory notes sued upon were made? And, in my opinion, the proper conclusion to draw from the evidence is that the loans were made to, and upon the credit of, Henry J. Shaw, the maker of the notes alone, and not at all to, or upon the credit of, the New York Piano Company. The motive for the loan, I think, sufficiently appears upon the evidence of the plaintiff himself to have been an

(1) § 101, p. 489.
(2) 6th Ed., § 135, 137, 140, note 1
(3) Vol. 7, No. 651.
(4) Droit Commercial, 4 vol., 1025
(5) 3rd Ed., Vol. 1, p. 375, 376.
(6) Vol. 1, p. 143, No. 459.
(7) Vol. 17, No. 4.
(8) Vol. 5, § 404.
(9) M. L. R. 4 Q. B. 251.

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interest given to the plaintiff, by Henry J. Shaw, in the firm of Henry J. Shaw & Co. when the first note was given, which interest was increased about the time that the second loan was made and the second note given. The money lent to Henry J. Shaw, or money to the same or nearly the same amount, was, no doubt, put by Henry J. Shaw into the business of the Piano Company, in which firm Henry J. Shaw was a partner, but that was a matter wholly under the control of Henry J. Shaw, who might have done so, or have withheld from doing so, of his own free will and pleasure. The plaintiff's own conduct from the time of the making of the notes until some time after the firm of Henry J. Shaw & Co. became insolvent plainly, I think, shews that he never contemplated having any other security for the loans than Henry J. Shaw himself personally. The first note was made in September, 1881, payable in two months and the second in March, 1883, payable in 30 days. Yet the plaintiff, although, apparently, repeatedly making the most urgent demands upon Henry J. Shaw for payment of the money secured by the notes, as loans made to himself, does not appear to have ever made any demand upon the Piano Company, or in conversation even with any person to have alluded to them as his debtors, until after the failure of the firm of Henry J. Shaw & Co., nor until after he had had presented to him a statement of his account as appearing in the books of that firm purporting to shew him to be largely indebted to Henry J. Shaw, after receiving credit in the books of that firm for the two promissory notes.

The fair inference further to be drawn from the evidence, I think, is that it was subsequently to the receipt by the plaintiff of this statement of his account as appearing in the books of Henry J. Shaw & Co., that the plaintiff's son, who was employed then as

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cashier in the New York Piano Company, gave the plaintiff the information as to the entries in the books of that firm upon which alone this action is based, and that then for the first time the plaintiff conceived the idea of making the Piano Company responsible upon Henry J. Shaw's notes so as aforesaid already credited to him in the books of Henry J. Shaw & Co., in which firm the plaintiff was a partner. But the entries made in the books of the Piano Company, under the circumstances in which they were made as appearing in the evidence, some of them having been made by the plaintiff's son without any apparent authority and, as pointed out by Mr. Justice Cross, corrected by cross-entries made apparently as soon as the entries were perceived by Henry J. Shaw, cannot have the effect of displacing all the other evidence plainly pointing to the conclusion that, in point of fact, the loans when made by the plaintiff were made to, and upon the credit of Henry J. Shaw alone personally, and were so regarded by the plaintiff, himself, for more than three years after the first note, and for nearly two years after the second, became due, and until (after having received, as aforementioned, the statement of his account as appearing in the books of Henry J. Shaw & Co., giving him credit for these notes,) he received from his son the information upon which he rests this action. The fact that Henry J. Shaw put the amounts which he borrowed from the plaintiff. or similar amounts, into the business of the Piano Company, does not, in my opinion, bring this case within article 1867, C.C., and make the Piano Company liable to the plaintiff upon the notes as for loans made to that company. That article, in my opinion, applies only to goods which constitute stock-in-trade of the partnership in the usual course of business and

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dealing of the firm and, as in *Maguire* v. *Scott* (1), to the implements necessary for and used in the carrying on of the partnership business, but not to money which one member of a partnership borrows upon his own credit and which, having so borrowed, he afterwards uses in the partnership business of his own free will, without being under any obligation to, or contract with, the lender so to do. In the English copy of the Code the word used is "objects" which are in the usual course of dealing and business of the partnership. In the French copy the word used is *choses*, &c., &c., &c.; neither of these words seem to be appropriate to cover *loans of money* made to one partner on his own personal credit and which he may or may not at his pleasure use in whole, or in part, for the purposes of the partnership.

STRONG and PATTERSON JJ. dissented.

Appeal dismissed with costs.

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

Solicitors for respondents: *Carter & Goldstein.*

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(1) 7 L. C. R. 451.

FELIX BIGAOUETTE (PLAINTIFF).....APPELLANT,

AND

THE NORTH SHORE RAILWAY COMPANY (DEFENDANTS).....RESPONDENTS.

1888
* Oct. 18.
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*Dec. 14.

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

Expropriation for railway purposes—Award—Validity of—Riparian Rights—Obstruction to accès et sortie—Right of action.

In an award for land expropriated for railway purposes where there is an adequate and sufficient description, with convenient certainty of the land intended to be valued, and of the land actually valued, such award cannot afterwards be set aside on the ground that there is a variation between the description of the land in the notice of expropriation and in the award.

A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of *accès et sortie* and such obstruction without parliamentary authority is an actionable wrong. [*Pion* v. *North Shore Railway Co.* 14 App. Cas. 612 followed] (1).

Taschereau J. was of opinion that the award in this case included compensation for the beach lying in front of plaintiff's property, which belongs to the crown and, for that reason, should be set aside.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) unanimously confirming the judgment of the Superior Court which dismissed the appellant's action.

Under the Quebec Railway Act, 43 & 44 Vic. ch. 43, sec. , the respondents notified the appellant that they were ready to pay him the sum of $202 for the property to be taken by the railway and designated and marked on the railway plan 9 and 11—and arbitrators having been subsequently appointed, they made an award of $3,700 for the value of the land

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

(1) *In Pion* v. *N. S. Ry. Co.* at p. 614 it is stated that Mr. Justice Strong dissented from the judgment of the Court. This is an error, Mr. Justice Strong concurred with the majority of the Court in allowing the appeal.

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taken by the company, and of a further sum of $1,500 to be paid, "should the company refuse or neglect to make an opening through the embankment on which its track is laid, between high and low water mark, to give the plaintiff, riparian owner, free access to the river St. Charles." The company having failed to make this opening, and the $1,500 becoming thus exigible and forming together with the $3,700, $5,200, the appellant brought an action against the respondent company for the amount of the award, alleging also that it was the compensation he was entitled to for the value of the land taken and damages.

To this action the company pleaded the general issue and an exception to the effect that the arbitration had been held over land, a small portion only of which belonged to the plaintiff, that is, over the small portion of the plaintiff's land taken for the road above high water mark, and a large portion below high water mark which did not belong to the plaintiff but to the Quebec Harbour Commission, and that the award gave a lump sum for both lots, without specifying the value of the one which belonged to the plaintiff; that the award was further void, because the arbitrators had no power to impose on the company the obligation to make an opening to give the plaintiff free access to to the river, an easement to which he had no right, nor to condemn it to pay $1500 damages in default of performing the work.

The notice of expropriation and tender were made in the following terms :—

"L'an mil huit cent quatre-vingt-trois, le quatorzième jour de juin, à la réquisition de la compagnie du chemin de fer du Nord, corps politique et incorporé, Je, notaire public, pour la province de Québec, en la Puissance du Canada, résident en la cité de Québec soussigné, me suis exprès transporté au domicile de monsieur Félix Biga-

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ouette, cultivateur, situé en la paroisse de St.-Sauveur de Québec, rue St-Valier, où étant et parlant à monsieur Bigaouette personnellement, j'ai déclaré et signifié au dit Félix Bigaouette, que la dite compagnie du chemin de fer du Nord, requiert pour la construction et le déplacement d'une partie de son chemin autorisé par l'acte quarante-cinq Victoria, 2ème section, chapitre vingt, une portion de terre de un arpent et une perche en superficie, telle que maintenant jalonnée et faisant partie du numéro (2102) deux mille cent deux du cadastre officiel, pour la paroisse de St-Sauveur de Québec, et portant les numéros neuf et onze, sur le plan tracé du chemin de fer déposé suivant la loi.

"Que la dite compagnie du chemin de fer du Nord, agissant par Pierre Benjamin Vanasse, son agent dûment autorisé, offre et qu'elle est prête et disposée à payer pour cette portion de terre une somme de deux cent deux piastres, comme compensation et pour tous dommages causés.

"Qu'au cas de refus de la dite offre, et pour se conformer aux exigences de "l'Acte Refondu des chemins de fer de Québec 1880," la dite Compagnie du chemin de fer du Nord nomme comme son arbitre la personne de monsieur Jean-Baptiste Bertrand, de la paroisse de St-Roch de Québec, marchand de bois.

Fait et signé au lieu susdit, sous le numéro cinq cent dix-sept des minutes de François Eusèbe Blondeau, notaire soussigné, et j'ai laissé au dit Félix Bigaouette, parlant comme susdit, une copie authentique des présentes, ainsi que le certificat d'un arpenteur juré de cette personne, tel que requis par le dit acte.

In testimonium veritatis.

(Signé)

J. E. BLONDEAU, N. P.

Vraie copie de la minute demeurée en mon étude.

J. E. BLONDEAU, N. P."

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CHEMIN DE FER DU NORD.

"Je soussigné, arpenteur juré pour la province de Québec, étant désintéressé dans l'affaire dont il s'agit, certifie par les présentes que le terrain indiqué sur la carte au plan de la section No. un, située en la paroisse de St-Sauveur de Québec, est nécessaire pour le dit chemin de fer du Nord.

Que je connais ce terrain et que la somme de deux cent deux piastres est, dans mon opinion, une compensation équitable pour le terrain et pour les dommages causés.

Signé en duplicata

Ce onzième jour de mai, mil huit cent quatre vingt-trois.

H. B. TOURIGNY, A. P."

The award was as follows:—

"L'an mil huit cent quatre vingt-trois, le vingt-huitième jour de août.

Ont comparu devant le notaire public pour la parvince de Québec, manufacturier, arbitre nommé par Monsieur Félix Bigaouette, de la dite paroisse de St-Sauveur de Québec, cultivateur.

Et monsieur Joseph Grondin, de la paroisse de Charlesbourg, agent d'assurances, tiers-arbitre nommé par messieurs Bell et Bertrand (ce dernier, arbitre de la compagnie du chemin de fer du Nord, s'étant retiré avant la passation du présent acte), le tout conformément aux dispositions de "l'Acte refondu des chemins de fer de Québec, 1880."

Lesquels ont déclaré:

Que sous l'autorité de l'acte 45 Victoria, chap. 20, la dite compagnie du chemin de fer du Nord requiert, pour la construction et le déplacement d'une partie de sa voie ferrée, le terrain suivant, savoir:

"Un certain terrain situé en la paroisse de St-Sauveur de Québec, contenant un arpent et une perche en super-

ficie, borné au nord-ouest, partie par le dit Bigaouette et partie par la rivière St-Charles à basse marée, au sud-est, au sud et au sud-ouest par le dit Bigaouette.

"Lequel terrain fait partie du côté du nord, du lot No. (2102) deux mille cent deux du cadastre pour la dite paroisse de St-Sauveur de Québec et portant les numéros neuf et onze sur le plan du tracé du chemin de fer tel que déposé suivant la loi.

"Qu'après avoir, au préalable, prêté le serment requis par la loi, ainsi qu'il appert par les certificats ci-annexés, ils ont procédé à l'examen du dit terrain et dépendances et pris tous les renseignements nécessaires :

"Et qu'après avoir mûrement délibéré, messieurs David Bell et Joseph Grondin se sont accordés sur le montant de l'indemnité qui doit être constatée par leur sentence arbitrale, et procèdent en conséquence, par les présentes, à la reddition de la dite sentence, les dits arbitres ont fixé à la somme de trois mille sept cents piastres, l'indemnité que la dite compagnie du chemin de fer du Nord aura à payer au dit Félix Bigaouette, pour le terrain sus-décrit.

"A la charge par ce dernier de libérer le terrain précité de toutes rentes constituées, hypothèques, servitudes et autres charges quelconques affectant le dit terrain.

"La compagnie sera tenue de faire une ouverture dans le quai depuis la basse marée jusqu'à marée haute, de vingt pieds de large, sinon, une somme de quinze cents piastres est allouée si le dit passage n'est pas fait immédiatement.

"Ce passage devra être fait dans l'endroit choisi par monsieur Bigaouette."

Langelier Q.C. for appellant :

The respondents contend that the award of the arbitrators in this case should be set aside because the description of the property expropriated is not the same in the deed of the award and in the notice of

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expropriation. Both give the same cadastral number for the property, of which that expropriated is a portion, and the same numbers of the location plan. The only difference is that in the one description, that contained in the notice, the adjoining properties are not mentioned, whereas they are in the description contained in the award. In mentioning the adjoining properties the deed says that the lot expropriated is bounded to the north-west *in part by the River St. Charles at low tide*. The word "*low*" is evidently a slip of the pen made by the notary who has written *low* instead of *high*, because no portion of the railway line on appellant's property touches low tide. A glance at the plan makes that perfectly clear.

The decision of this court in *Beaudet* v. *North Shore Railway Co.* (1) is in our favor on this branch of the case.

As to whether the appellant is entitled to damages for the obstruction to his rights of *accès et sortie* and whether he can claim damages by an action at common law I rely upon the decision of this court in *Pion* v. *The North Shore Railway Co.* (2).

Lacoste Q.C. for respondent:

There can be no doubt that the plaintiff was not, and never had been, the owner of the beach in front of his property. Art. 2213 C.C. Through a mistake on the part of the officers of the company he had been dealt with as such, and the expropriation notice served upon him included both the beach and his dry land. Availing himself of this mistake he proceeded with the arbitration provided by the statute to settle the indemnity to be awarded for both pieces of land and afterwards the company, having been sued by the Harbor Commission for the value of the same beach lot, and condemned to pay it to them, saw the

(1) 15 Can. S. C. R. 44. (2) 14 Can. S. C. R. 677.

error and declined to make a second payment of the price to the plaintiff. If the award had discriminated between the two lots and had settled their value severally ; if it had even fixed an amount for damages sustained, the plaintiff would stand in a different position, but it is of a lump sum for the whole land and it is impossible to say how much of it represents the value of the beach lot and how much the plaintiff's property.

Nor did the plaintiff establish in evidence these different values and there is nothing in the record to show what the land taken from him was worth, nor what damage he may have sustained.

The court was therefore bound to dismiss his claim, first because he sought to recover what did not belong to him and, in the next place, because no one could tell the value of the land which belonged to him.

Though the courts may have allowed owners of lands conterminous with a railway, to bring action directly for damages caused by the building of the railway along or near such lands, no such action lies to recover the value of any land actually taken.

The second reason for which the defendant demands that the award be declared void is because the arbitrators by their award declared that the company should open a passage through the embankment, on which its road is laid, on the beach between high and low water, to give the plaintiff free access to the river St. Charles ; that this opening was to be made forthwith, at any point to be fixed by the plaintiff, that in default of doing so, the company should pay the plaintiff a sum of $1,500.

In this the arbitrators exceeded their powers, and the award is in so far void.

Their only charge was to fix the amount of indemnity the company had to pay, and they could not order it to perform any works.

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Langelier Q.C. in reply—The $1500 were awarded to appellant as damages for being deprived of free access to the river, and both under the Railway Act and under the common law the appellant is entitled to recover the amount claimed by his action.

SIR W. J. RITCHIE, C.J.—Did the arbitrators include in the award damages for any land taken by the railway other than the land of the plaintiff?

It is clear that the land valued was part of No. 2102 of the official cadastre for the parish of St. Sauveur of Quebec, and being the Nos. 9 and 11 upon the plan of the railway deposited according to law.

It is true the award says

Que sous l'autorité de l'Acte 45 Vic. chap. XX, la dite Compagnie du chemin fer du Nord requiert, pour la construction et le déplacement d'une partie de sa voie ferrée, le terrain suivant, savoir :

Un certain terrain situé en la paroisse de St. Sauveur de Québec, contenant un arpent et une perche en superficie, borné au nord-ouest, par le dit Bigaouette et partie par la rivière St. Charles à basse marée, au sud-est, au sud et sud-ouest par le dit Bigaouette.

It is true that this makes the boundary "part by the river St Charles at low water" which is evidently a mere mistake, for the award goes on to show unmistakeably the land for which damages were awarded, viz.:

Lequel terrain fait partie du côté du nord, du lot No. (2102) deux mille cent deux du cadastre pour la dite paroisse de St. Sauveur de Quebec et portant les numéros neuf et onze sur le plan du tracé du chemin de fer tel que déposé suivant la loi.

This tallies with the Railway Company's notice which describes the land required,

Une portion de terre de un arpent et une perche en superficie, telle que maintenant jalonnée et faisant partie du numéro (2102) deux mille cent deux du cadastre officiel, pour la paroisse de St. Sauveur de Québec et portant les numéros neuf et onze, sur le plan du tracé du chemin de fer déposé suivant la loi.

And this is the same as in the award, and that this

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only was the land appraised, is very clear, I think, from the award itself, for immediately following the specific description the award says that the arbitrators

Qu'après avoir au préalable prêté le serment requis par la loi, ainsi qu'il appert par les certificats ci-annexés, ils ont procédé à l'examen du dit terrain et dépendances et pris tous les renseignements nécessaires.

This can have been no other than that portion of lot No. (2102) numbered 9 and 11 on the plan filed by the Railway Company. Notwithstanding the error in the description as stated in the award and in the quantity as stated in the notice and award, there was an adequate and sufficient description with convenient certainty of the land intended to be valued and of the land actually valued and to which the maxim *falsa demonstratio non nocet* clearly applies.

As to the objection that the arbitrators order the Railway Co. to make the opening this is not so; if no opening was made they assessed the damages at $1,500 for excluding the plaintiff from access to the land, but give the Railway Co. the privilege of making an opening, so affording the plaintiff access, a provision entirely in the defendant's interest, and if they did not choose to avail themselves of this privilege they must pay the full amount awarded, viz., $5,200.

Since the decision in the *North Shore Railway Co.* and *Pion* (1) there can be no doubt the appellant is entitled to receive the damages awarded in this case.

STRONG J. concurred with FOURNIER J.

FOURNIER, J.—Par son action l'appelant réclamait la somme de $5,200, valeur d'un certain terrain lui appartenant, dans la paroisse de St-Sauveur de Québec, et au sujet duquel, l'intimée qui en avait besoin pour l'usage de son chemin de fer, avait adopté les procédés ordinaires d'expropriation. Les arbitres qui avaient été nommés

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pour en faire l'évaluation rendirent une sentence arbitrale en vertu de laquelle ils accordèrent à l'appelant $3,700, à condition que la compagnie lui ouvrit un passage de 20 pieds de largeur pour communiquer librement, à travers le chemin de fer, entre son terrain et la rivière St-Charles. Ils accordèrent aussi $1,500, de plus dans le cas où le passage ne serait pas immédiatement ouvert.

L'intimée ayant refusé et négligé de se conformer à cette sentence, l'appelant par protêt notarié du 28 août 1883, la somma d'exécuter la décision des arbitres, et prit ensuite une action pour la somme totale de $5,200.

L'intimée plaida que l'arbitrage avait eu lieu sur une petite partie du terrain situé au-dessus du chemin de fer, et sur une autre plus grande située au-dessous de la ligne de la haute marée qui n'appartenait pas à l'appelant, et que la sentence n'avait pas fixé la valeur de la partie appartenant à l'appelant. Que la sentence était encore nulle parce que les arbitres n'avaient aucun pouvoir d'accorder à l'appelant qui n'y avait aucun droit, un libre accès à la rivière, ni de lui accorder $1,500 pour la construction du passage accordé.

L'appelant a allègué dans sa déclaration que la juste valeur du dit terrain et des dommages causés au demandeur, (l'appelant) par les travaux de la defenderesse) (l'intimée) est la somme de $5,200, qu'il réclame.

Cette action contient deux obligations différentes, l'une basée sur la sentence arbitrale en vertu de la loi des chemins de fer, et l'autre sur le droit commun.

Après enquête et audition de cette cause devant l'honorable juge Casault, l'action de l'appelant fut renvoyée avec dépens. Ce jugement a été confirmé par la cour du Banc de la Reine.

Le jugement de la cour Supérieure prononçant la nullité de la sentence arbitrale sur le principe que la propriété pour laquelle les arbitres ont accordé l'in-

demnité de $5,200 n'est pas la même que celle décrite dans l'avis d'expropriation, n'est fondé que sur une erreur cléricale. Il est incorrect de dire que la propriété décrite dans la sentence est beaucoup plus grande que celle décrite dans l'avis, et qu'elle contient même une partie de la grève de la rivière St.-Charles qui n'appartient pas à l'appelant. Il suffit de comparer les deux descriptions pour voir que cette allégation n'est pas fondée. Dans les deux descriptions le même numéro cadastral est mentionné pour la propriété dont celle expropriée fait partie, ainsi que les mêmes numéros du plan de localisation.

La seule différence est que dans la description donnée dans l'avis, les propriétés voisines ne sont pas désignées tandis qu'elles le sont dans la sentence. C'est dans cette dernière description que le notaire a commis une erreur cléricale en disant que le lot exproprié est borné au nord-ouest par la rivière St.-Charles à marée basse. C'est à marée haute qu'il aurait dû dire, car aucune partie du chemin de fer ne se rend à marée basse. C'est ce qui a fait dire que la sentence avait accordé plus de terrain qu'il n'en était demandé. On ne peut adopter cette manière de voir qu'en se bâsant sur l'erreur de plume, qui fait dire au notaire le contraire du contenu de ses deux documents, car dans l'un et l'autre il mentionne la même étendue et les mêmes numéros du plan de localisation. Il est évident que les arbitres n'ont pas voulu comprendre la grève dans les limites du terrain décrit dans leur sentence, puisqu'ils n'ont assigné à ce terrain qu'une superficie de 101 perches, tandis que la grève à elle seule en a 129.

La prétention que la sentence fait payer 21 perches de terrain de plus qu'il n'y en a n'est pas fondée. Les arpenteurs Sewell et Lefrançois qui ont mesuré ce terrain en 1886 disent bien que l'intimée n'occupe que 80 perches. Mais il ne s'agit pas ici de la quantité occupée, si l'intimée n'a pas pris tout son terrain,

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c'est sans doute qu'elle n'en avait pas besoin de plus, mais cela ne prouve nullement que c'est l'appelant qui en a la possession. Lorsque l'avis lui a été signifié, l'intimée requérait cent une perches telles que jalonnées sur le terrain. Cet avis basé sur le rapport de l'arpenteur Tourigny, qui avait visité et fait l'évaluation du terrain en question doit être correct. C'est sur son rapport que l'expropriation a été faite en 1883, accordant la quantité demandée.

On a aussi fait contre cette sentence l'objection que les arbitres ont outrepassé leur juridiction en ordonnant à la compagnie de construire un passage pour donner à l'appelant l'accès à la rivière St.-Charles. La sentence ne contient pas réellement un ordre à cet effet. C'est plutôt en substance une condamnation à payer à l'appelant la somme de $5,200, avec l'option de ne payer que $3,200, si on lui accorde le passage mentionné; car dans ce cas il y aura à faire déduction de $1,500.

C'est moins un ordre qu'une faculté laissée à la compagnie. Les témoignages de Grondin et de Bell expliquent ce fait bien clairement. D'ailleurs en payant les $5,200, la compagnie peut se soustraire à cette condition qui se trouve plutôt en sa faveur.

Dans cette cause comme dans celle de *Pion et al* contre l'intimée, décidée l'été dernier au Conseil privé de Sa Majesté(1),l'intimée a nié à l'appelant, propriétaire riverain de la rivière St-Charles,le droit à l'accés à la dite rivière, et à des dommages dans le cas où il en serait privé et lui a aussi nié le droit de réclamer par action en vertu du droit commun la valeur du terrain que la compagnie avait prise pour son usage, prétendant qu'il ne pouvait agir contre elle pour en réclamer la valeur, qu'en vertu de l'Acte des chemins de fer règlant les procédés d'expropriation pour l'utilité des chemins de fer.

Quoique ces deux questions soient importantes, il serait tout-à-fait inutile de les discuter maintenant, car

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elles ont été, le 1er août 1889, toutes deux jugées par le conseil privé, dans la cause de *Pion et al* contre la dite intimée, (1) et dans un sens favorable aux prétentions de l'appelant. Je me contente de référer au jugement où ces deux questions sont longuement et savamment traitées.

Par tous ces motifs je suis d'avis que l'appel doit être alloué, et les deux jugements de la cour du Banc de la Reine et de la cour Supérieure, infirmés—et jugement rendu en faveur de l'appelant pour le montant de sa demande contre l'intimée, avec dépens dans toutes les cours.

TASCHEREAU J.—I am of opinion to dismiss this appeal. The plaintiff clearly claims from the company the payment of the value of the beach lying in front of his property. He admits it in his evidence. Now, that beach does not belong to him but to the Crown, and the Company has paid for it to the Crown or its trustees, the Harbour Commissioners, and the arbitrators had not the power in an arbitration between the plaintiff and the defendant to estimate the value of lands belonging to the Crown. They erroneously did do, and the fact that the company induced them into that error cannot validate the arbitration, and this arbitration cannot stand.

The Superior Court dismissed the action. The Court of Appeal unanimously confirmed that judgment. I do not see how any other judgment could have been given. Nor can I see what application to this case the case of *Pion* v. *The North Shore Railway Co.* (1) can have.

GWYNNE J.—Was of opinion to allow the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Montambault, Langelier & Langelier.*

Solicitor for respondent: *Joseph C. Bossé.*

(1) 14 App. Cas. 612. (2) 14 Can. S. C. R. 677.

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CHARLES A. CLARK AND OTHERS (PLAINTIFFS)..... } APPELLANTS;

AND

HANNAH CLARK AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Construction of—Devise—Joint tenancy or tenancy in common—Evidence to establish—Admissibility of.

A will devised certain property to the testator's two sons, their heirs, etc., and provided that the devisees should jointly and in equal shares pay testator's debts and the legacies in the will. There were six legacies of £50 each to other children of the testator, and these were to be paid by the devisees at the expiration of 2, 3, 4, 5, 6 and 7 years respectively. The estate vested before the statute abolishing joint tenancies in Nova Scotia came into operation.

Held, reversing the decision of the court below, Taschereau and Gwynne JJ. dissenting, that these provisions for payment of debts and legacies indicated an intention on the testator's part to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants. *Fisher* v. *Anderson* (4 Can. S. C. R. 406) followed.

On the trial of a suit between persons claiming through the respective devisees to partition the real estate so devised evidence of a conversation between the devisees, which plaintiff claimed would show that a severance was made after the estate vested, was tendered and rejected as being evidence to assist in construing the will.

Held, Gwynne J. dissenting, that it was properly rejected.

Held, per Gwynne and Patterson JJ. that the evidence might have been received as evidence of a severance between the devisees themselves, if a joint tenancy had existed.

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

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

(1) 21 N.S. Rep. 378.

The plaintiffs and defendants are the representatives respectively of Joseph and James Clark, devisees under the will of one Robert Clark. The estate under the will vested before the statute abolishing joint tenancies in Nova Scotia came into operation and that statute does not affect it.

The clauses of the will on which the contentions raised in this case are based are the following:—

"To my two sons, Joseph Clark and James Clark, their heirs, executors, and assigns, I give and bequeath the farm on which I now live, saving and excepting that portion of it which I shall hereinafter dispose of, together with the western half of the lot of marsh on Belle Isle which I now own, and likewise the lot of land which I lately purchased, the same being formerly a part of the estate of the late Henry Ricketson, and which I now own, together with all my right, title and interest in all the said mentioned lands. I also give and bequeath to them, my two said sons, their heirs, executors, and assigns, all the live stock which I am or may be in possession of at my decease, saving and excepting the two cows before mentioned bequeathed to my wife, together with all my farming utensils, and monies which may be due to me by note or account, and all goods and chattels of whatsoever kind which is not hereinbefore disposed of, and which I shall or may be in possession of at my decease. And I further will and ordain that my two said sons, Joseph Clark and James Clark, their heirs, executors, and assigns, shall jointly and in equal shares pay all my just debts, and likewise such legacies, as I shall hereafter appoint, will, or ordain them to pay."

"To my son Charles Clark I give and bequeath the sum of fifty pounds, to be paid to him by my sons, Joseph Clark and James Clark, at the expiration of two years after my decease, one-half to be paid in cash

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and the remaining half to be paid in neat stock at the market price, the same to be delivered at the barn of the said Joseph and James Clark."

And similar legacies to five other children of the testator payable at the expiration of 3, 4, 5, 6 and 7 years respectively.

The plaintiffs, who claim as devisees of James Clark one of the two sons named in the first of the above clauses, contend that the estate created thereby was a tenancy in common, and they bring their action for a partition of the real estate and an account of the rents. The defendants, claiming through Joseph, contend that it was a joint tenancy and James having died before Joseph the latter took the real estate by right of survivorship. The court below give effect to this latter contention and have decided in favor of defendants.

In the minutes of the trial the following appears :— " Mr. Ritchie offers evidence of a conversation between James and Joseph in 1848 to assist in construction of Robert's will made in 1842. Objected to on several grounds and rejected." The full court, on appeal, held it was properly rejected.

Harrington Q.C. for the appellants. The courts in modern times lean against joint tenancies, and will lay hold of the slightest expressions as evidencing an intent to sever. See *Kew* v. *Rouse* (1), *Milward* v. *Milward* cited in *Beauclerk* v. *Dormer* (2).

This court has dealt with the matter in *Fisher* v. *Anderson* (3), where the authorities are fully considered.

As to the use of the word " jointly " and its effect on the construction of the will, see *Booth* v. *Arlington* (4), *Miller* v. *Miller* (5).

(1) 1 Vern. 353.
(2) 2 Atk. 309.
(3) 4 Can. S. C. R. 406.
(4) 3 Jur. N. S. 49.
(5) 16 Mass. 60.

The learned counsel also cited the following cases on this point: *Oakley* v. *Wood* (1), *Ettricke* v. *Ettricke* (2), *Joliffe* v. *East* (3), *Fleming* v. *Fleming* (4).

There should, at all events, be a new trial for improper rejection of evidence to show how they treated their tenancy, and that they agreed to regard themselves as joint tenants. *Harrison* v. *Barton* (5), *Williams* v. *Hensman* (6).

Borden for the respondents cited *Cooke v. De Vandes* (7), *Boughton* v. *Boughton* (8).

Sir W. J. RITCHIE C.J.—I think the evidence offered of a conversation between James and Joseph to assist in the construction of Robert's Will made in 1842 was properly rejected.

The question whether James and Joseph took the estate devised to them as joint tenants or as tenants in common turns on the last clause of the devise which is as follows (9).

It does not appear what amount of debts, if any, the testator owed at the time of his death; judging from the whole tenor of the will one might fairly infer that they could not have been to a very large amount.

The legacies of £50 each amounted to £350 payable half in cash in 2, 3, 4, 5, 6 and 7 years; half in cash and half in neat stock at the market price to be delivered at the barn of Joseph and James Clark. The bequests are in this form respectively (10).

It is difficult to understand that the testator could have intended the estate to be used by Joseph and James as joint tenants, whereby the one brother on the death of the other before the expiration of the respec-

(1) 37 L. J. (Ch.) 28.
(2) 2 Amb. 656.
(3) 3 Brown C. C. 25.
(4) 5 Ir. Ch. 129.
(5) 1 J. & H. 287.
(6) 1 J. & H. 546.
(7) 9 Ves. 197.
(8) 1 H. L. Cas. 406 at p. 437.
(9) See p. 377.
(10) See p. 377.

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tive times fixed for the payment of the legacies would take all the property devised and the estate of the deceased brother be trusted with the burthen of the payment of his equal share of the debts or legacies unpaid at the time of his decease, or having paid the debts and legacies the property, on his death, should survive to his brother. These provisions for the payment of debts and legacies appear to me to indicate an intention of severance sufficient to justify the conclusion that a tenancy in common and not a joint tenancy was created. Having discussed the question at length in the case of *Fisher* v. *Anderson* (1) I do not feel it necessary now to discuss the matter at greater length as I have no reason to doubt the accuracy of the conclusion at which the court arrived in that case.

FOURNIER J.—Concurred.

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

GWYNNE J.—One Robert Clark departed this life on the 21st of October, 1842, having first duly made and published his last will and testament, whereby amongst things he devised as follows (2).

The testator then devised and bequeathed as follows:

To my son Charles Clark I give and bequeath the sum of fifty pounds, to be paid to him by my sons Joseph Clark and James Clark at the expiration of two years after my decease, one-half to be paid in cash, and the remaining half to be paid in neat stock at the market price, the same to be delivered at the barn of the said Joseph and James Clark.

The testator then bequeathed like sums of fifty pounds to be paid to five others of his children respectively, in precisely similar terms as in the bequest to his son Charles, save only that the bequests to these

(1) 4 Can. S.C.R. 406. (2) See p. 377.

five others were made payable respectively at the expiration of three, four, five, six and seven years after the testator's decease.

The question now is whether the estate in the land devised to Joseph and James Clark was an estate in joint tenancy or a tenancy in common, the defendants insisting that it was the former, and the plaintiffs, who are the appellants, that it was the latter. The Supreme Court of Nova Scotia, in which the land devised lies, have maintained the contention of the defendants.

Apart from the provision in the will as to the payment of the testator's debts and legacies by his two sons, Joseph and James, there can be no doubt that the devise to Joseph and James of the chattel property as well as of the land, was in joint tenancy. The only question, therefore, is whether or not the clause as to the payment of the debts and legacies has the effect of converting a devise otherwise in joint tenancy into a tenancy in common. It cannot be doubted that the court will lay hold of any, even a very slight, expression in a devise as indicative of a testator's intention to create a tenancy in common rather than a joint tenancy. Sir Richard Pepper Arden, in *Morley* v. *Bird* (1), lays down the rule as it is still applied. He says there :—

Unless there are some words to sever the interest taken it is at this moment a joint tenancy, notwithstanding the leaning of the courts lately in favor of a tenancy in common. A legacy of a specific chattle, a grant of an estate, is a joint tenancy. It is true, the courts seeing the inconvenience of that, have been desirous wherever they could find any intention of severance to avail themselves of it, and their successive determinations have laid hold of any words for that purpose: "Equally o tbe divided," "equally," "among," "between," even in law, I believe, certainly in equity, create a tenancy in common, but without those words it is a joint tenancy.

And Lord Hatherly, in *Robertson* v. *Fraser* (2), says :

Anything which in the slightest degree indicates an intention to

(1) 3 Ves. 628. (2) 6 Ch. App. 696.

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divide the property must be held to abrogate the idea of a joint tenancy and to create a tenancy in common.

Kew v. *Rouse* (1), is strongly relied upon by the appellants. There Elizabeth Wise devised a term of years of which she was possessed to her two daughters, "they paying yearly to her son £25 by quartly payments, viz., each of them £12.10*s* yearly out of the rents of the premises during his life if the term so long continued" but by this devise each was to pay £12 10*s* yearly, and out of the rents accruing from the term devised, and such payments would be out of the share of each in the rents and, therefore, it was held to be a tenancy in common; but in the will under consideration the devise is that the testator's two sons, Joseph and James, to whom the real and personal property of the testator had just been devised, in language which standing alone clearly was a joint tenancy, "shall jointly and in equal shares pay all the testator's debts and legacies, the latter in manner following, that is to say—at the expiration of two years from testator's death to one son the sum of £50 one half in cash and the remaining half in neat stock, at the market price, to be delivered at the barn of the said Joseph and James, and a like legacy to be paid in like manner to other children, respectively, of the testator, at the expiration of three, four, five, six and seven years after the testator's death. I cannot say that the language used in giving these bequests, so to be paid by the testator's sons, Joseph and James, indicates an intention upon the part of the testator that the previous devise of the personalty to his said sons, Joseph and James, in language which constituted a joint tenancy, should be, nevertheless, taken as a tenancy in common, and as to the realty which was devised in joint tenancy, and with which alone we are concerned, the

(1) 1 Vern. 352.

language in which those bequests are given has, in my judgment, no effect. Indeed, the language, to my mind, seems rather to imply that the testator contemplated that his two sons, Joseph and James, would work the farm, and enjoy the benefit of the stock thereon, devised to them, in partnership together for, at least, the period of seven years after his death. But although this intention may not sufficiently appear upon the testator's will it was quite competent for the devisees to have entered into an agreement to that effect, and if they had and continued working the farm in partnership together until the death of James in 1848, then would arise a question, which is made and insisted on by the appellants, that a severance had taken place in the lifetime of James upon the authority of *Jackson* v. *Jackson* (1) and *Williams* v. *Henseman* (2). In this latter case it was laid down by W. P. Wood, V.-C., as well recognized law, that a joint tenancy may be severed by mutual agreement, or by any course of dealing sufficient to intimate that the interests were mutually treated as constituting a tenancy in common, and that this was so in the present case was expressly pleaded by the plaintiffs' eleventh replication. The evidence which was offered upon this point should have been received. It was, I am satisfied, a mistake to treat it as having been offered for the purpose of construing the testator's will; from its nature it could not have had that effect, but might have been abundantly sufficient to establish the fact of severance of the joint tenancy by the joint tenants themselves The eleventh replication above referred to further pleaded that the life estate devised by James in his realty, to his brother Joseph in 1848, was so devised at the express request of Joseph. If this should be

(1) 9 Ves. 591.

(2) 1 J. & H. 557; 7 Jur. N.S. 773.

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established, as perhaps it might have been by the evidence which was rejected, then a further question might arise, quite independently of any severance having previously taken place by agreement and conduct of the parties, whether under such circumstances persons claiming under Joseph would not be estopped from disputing the estate in remainder devised by James in the real estate which he had so devised to Joseph for life.

I am of opinion that the appeal should be allowed with costs, but that the case should be sent down for a new trial to have the above points dealt with.

PATTERSON J.—I concur with his Lordship the Chief Justice in construing the will of Robert Clark as making his sons Joseph and James tenants in common of the real and personal property devised and bequeathed to them.

The general terms of the direct gift would, it is true, create a joint tenancy if uncontrolled by any other indication of the intention of the testator, but we have, in my opinion, a reasonably clear indication of his understanding that he was giving separate interests to the devisees. The debts and legacies are clearly charged upon the property by the direction that they shall be paid by the devisees, and when it is added that the two devisees shall pay them in equal shares we have in effect the charge imposed half on the interest of Joseph and half on the interest of James, or an expression of the testator's intention and understanding that the two brothers were to take the property in equal shares.

There would be no difficulty in the way of this construction were it not for the word "jointly." Joseph and James, their heirs, executors and assigns, are to pay the debts and legacies "jointly and in equal shares."

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I think more stress was laid on this word "jointly" in the court below than can have been contemplated by the testator. He evidently had in his mind that the two sons would, for a time at all events, occupy and work the farm together. This appears not only by the use of the word "jointly," but by the directions in respect of the six legacies of £50 each, payable respectively in two, three, four, five, six and seven years after his decease, that one-half should be payable in neat stock delivered at the barn of the said Joseph and James Clark. But if we credit the testator with having in view the technical effect of the language he was using, which is not very likely, he must have known that a joint tenancy could be severed at any time, and that he was not providing for a continued joint occupation. while at the same time a joint occupation was not inconsistent with a tenancy in common; and these very provisions for payment out of the produce of the farm recognise separate interest in the profits, interests "in equal shares," which comes very close to an express recognition of interest in equal shares in the farm itself. The use of the words "jointly" is thus explained without weakening the force of the expression "in equal shares."

Nor must we overlook the fact that the payments, jointly and in equal shares, are to be made, not only by James and Joseph. but by "their heirs, executors and assigns." Operation for these words might perhaps be found even if the estate were a joint tenancy in the first place and were afterwards severed by the tenants, but they do not seem to be used in that view by the testator. They rather go to negative the contemplation of either devisee taking the whole estate by survivorship.

On the point as to the rejection of evidence I shall merely say that while it cannot be for a moment main-

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tained that conversations between the devisees could be used to aid in construing the will, which is noted as the ostensible object in offering the evidence, it may be regretted that the evidence was not received. It might have been evidence of a severance if a joint tenancy had existed, and it strikes one as possible that the short note that the evidence was offered to assist in the construction of the will may not fully express the object in offering the evidence which is said to have been "objected to on several grounds and rejected," the grounds not being specified.

The point is, however, unimportant in view of the construction of the will on which our judgment proceeds.

I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitor for appellants : *C. Sidney Harrington.*

Solicitors for respondents : *T. D. Ruggles & Sons.*

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AND

GEORGE W. GEROW (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Marine insurance—Construction of policy—Deviation—Loading port on west coast of South America—Guano Islands—Commercial usage.

The voyage specified in a marine policy included "a loading port on the western coast of South America," and payment of a loss under the policy was resisted on the ground of deviation, the vessel having loaded at Lobos, one of the Guano Islands, from twenty-five to forty miles off the coast. On the trial of an action to recover the insurance, evidence was given by shipowners and mariners to the effect that, according to commercial usage, the said description in the policy would include the Guano Islands, and there was evidence that when the insurance was effected a reduction of premium was offered for an undertaking that the vessel would load guano. The jury found, on an express direction by the court, that the island where the vessel loaded was on the western coast of South America within the meaning of the policy,

Held, affirming the judgment of the court below, that the words in the policy must be taken to have been used in a commercial sense and as understood by shippers, shipowners and underwriters; and the jury having based their verdict on the evidence of what such understanding would be, and the company being aware of a guano freight being contemplated, the finding should not be disturbed.

APPEAL from a decision of the Supreme Court of New Brunswick sustaining the verdict at the trial for the plaintiff and refusing a new trial.

The action in this case was upon a marine policy, insuring the "Minnie H. Gerow" in the sum of $5,000 for a voyage from Melbourne to Valparaiso for orders,

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

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thence to a loading port on the western coast of South America or San Francisco, thence to a port of call and discharge in the United Kingdom * * *. The vessel sailed to Valparaiso in ballast and went from there to Lobos de Afuera, one of the Guano Islands on the western coast of South America, where she loaded with guano and sailed for Falmouth. Having encountered very severe weather soon after sailing the captain took the vessel to Valparaiso where a survey was ordered and, according to the surveyor's report, it would have cost more to repair her than she would be worth when repaired. The plaintiff, thereupon, gave notice of abandonment and claimed from defendant company payment under the policy for a constructive total loss.

The company resisted payment on a number of grounds, but the only one urged on this appeal was that of deviation from the voyage insured, it being contended that loading at an island some miles from the mainland of South America was not complying with the policy, which specified a loading port on the coast.

The action was twice tried. On the first trial the jury were directed, as a matter of law, that Lobos de Afuera was a port on the western coast of South America within the meaning of the policy. A verdict having been given for the plaintiff at that trial, and sustained by the full court in New Brunswick, the company appealed to the Supreme Court of Canada and obtained a new trial on the ground of misdirection in withdrawing from the jury whether or not the policy was complied with by the vessel loading at Lobos (1). On the second trial the matter was left to the jury by the following question being asked them: Is Lobos, a guano island, a loading port on the

(1) 14 Can. S.C.R. 731.

western coast of South America? To which they answered "yes." Evidence was given at this trial by shipowners and mariners to the effect that the policy would be understood, in the shipping trade, to allow loading at the guano islands, and the plaintiff swore that when the insurance was effected the company's agent offered to make the premium $\frac{1}{8}$ or $\frac{1}{4}$ less if he was assured that the vessel would load guano at one of the islands.

The second jury found a verdict for the plaintiff which was again sustained by the Supreme Court of New Brunswick. The company then brought this appeal.

Straton for the appellant. It is not sufficient in a case like this, to prove the usage of shipowners and charterers. It must be shown that the usage among underwriters would justify the voyage taken by plaintiff's vessel. *McGivern* v. *Provincial Ins. Co.* (1).

As to the proof of custom required see *Hall* v. *Benson* (2).

Weldon Q.C. for the respondent referred to *Robertson* v. *Clarke* (3).

SIR W. J. RITCHIE C.J.—This cause was before this court on a former occasion when a new trial was ordered on the ground that the only material question in the case, namely, whether Lobos, an island from 25 to 40 miles distant from the mainland of South America, was a loading port on the western coast of South America, under the policy which insured the vessel for a voyage from Melbourne to Valparaiso for orders, thence to a leading port on the western coast of South America or San Francisco, and then to a port of discharge in the United Kingdom, had been withdrawn from the jury.

(1) 4 All. (N.B.) 64. (2) 7 C. & P. 714.
(3) 1 Bing. 445.

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Ritchie C.J.

On the second trial this question was distinctly left to the jury in these words "Is Lobos, a guano island, a loading port on the western coast of South America?" To which the jury answered, "Yes."

I think there can be no doubt that the evidence established that Lobos was a loading port, though an open roadstead where the loading of ships with guano cargoes took place, and to which vessels frequently resorted and used for the purpose of loading. The cases cited by Mr. Justice Fraser in his very able and exhaustive judgment clearly established this.

Then, was this a loading port on the west coast of South America within the terms of the policy? There was evidence given to show that in a commercial sense the terms a "loading port on the western coast of South America" would include the guano islands; the contention appears to have been that no island whatever could be such a loading port; that the terms used could only mean the mainland of South America. This was certainly a question to be determined by the usages of trade and the meaning put on them by the mercantile world, and in this case evidence was admitted to show that in mercantile acceptation "a loading port on the western coast of South America" included the loading ports at the guano islands, which formed a part of the territorial possessions of Peru or Chili, a portion of territory comprised under the general words South America.

There was the evidence of Captain Lordly, who says: "From Valparaiso we went to Lobos de Afuera, a port on the western coast of South America." Captain Thompson who had been twice at different guano islands says: "I think Lobos was a loading port on the western coast of South America." Captain Moran, who had loaded several times at the guano islands, considered the guano islands as loading ports on the

western coast of South America. Then there was the evidence of a member of the firm of Troop & Son and of George F. Smith, large shipowners and charterers, who very clearly showed that, in a commercial point of view, a loading port on the west coast of South America would include the mainland and islands, and that the principal cargoes shipped were nitrate and guano, nitrate from the mainland and guano from the islands; and the evidence that Ranney, when the policy was effected, said to Gerow that if he would assure him that the cargo to be carried was guano instead of nitrate he would do the insurance an eighth or a quarter less, clearly showing that Ranney fully understood that the vessel had the right to load guano which could only be done at one of the guano islands.

I know of no persons more competent to speak on this subject than experienced ship-owners and charterers and ship masters. Mr. Justice Fraser shows very clearly that there was a constructive total loss. There is nothing in the objection as to want of preliminary proof and if there was it was clearly waived.

Mr. Justice Fraser's very able and exhaustive judgment relieves me from the necessity of discussing at greater length this case. I quite agree with the court below that the verdict should not be disturbed.

FOURNIER and TASCHEREAU JJ. concurred.

GWYNNE J.—The only question remaining on this action, which is one upon a policy of marine insurance for the loss of a ship of the plaintiff insured by the appellants, (a point as to whether there was a constructive total loss having been abandoned by the appellants at the hearing), is whether or not the Island of Lobos, which is a guano island, lying west of the Peruvian Coast, in South America, is a "loading port on

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the west coast of South America," and whether the loading of the ship with guano there would be a deviation from the voyage for which the vessel was insured, namely, "from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America or San Francisco, then and thence to a port of call and discharge in the United Kingdom, &c.

The question thus raised is one of fact merely, and the rule to be applied is that in construing such a contract its terms must be taken to have been used "in their business sense," as is the expression of some judges, or "in their common and ordinary sense," in relation to the subject matter, as is the expression of others, or, "in their popular and commercial sense," which is the expression of others, all of which Brett, Master of the Rolls, in *Sailing Ship Garston Co.* v. *Hickey* (1), deemed to be equivalent phrases. The language of Lord Herschell in *Hunter* v. *Northern Marine Insurance Co.* (2), as applied to the term "port," is precisely applicable to the present—and as so applied will read:

> I agree with the view which has been more than once expressed by learned judges that in construing such a contract as that with which we are dealing the [words] must be taken to have been used in [their] popular or commercial sense, that is to say, as [they] would be understood by shippers, shipowners and underwriters. Where there is a common understanding among such persons as to the [application of the terms used] the matter is free from difficulty.

Now, the evidence is abundant, that among such persons there is such a common understanding which (founded apparently upon the fact that guano is one of the chief articles of export from the west coast of South America, and that it is got only upon islands such as Lobos), is that the terms used in the policy sued upon do cover a voyage to Lobos for guano and loading there. In the present case there is this further

(1) 15 Q. B. D. 586. (2) 13 App. Cas. 726.

evidence, that at the time of the insurance being effected the guano islands were spoken of by the plaintiff as places to which the vessel he was insuring might be sent for guano, and that the defendants offered to insure him for a less premium than he paid if he would limit the vessel to loading with guano alone, which he could not undertake to do for she was going to Valparaiso for orders. It must, therefore, be held that the going from Valparaiso to Lobos and loading there with guano, did not constitute a deviation from the voyage for which the vessel was insured; the plaintiff, therefore, is entitled to retain his verdict, and this appeal must be dismissed with costs.

PATTERSON J.—I agree that this appeal should be dismissed and the judgment affirmed on the grounds fully and ably discussed in the judgment of Mr. Justice Fraser in the court below, and expressed in that now delivered by my brother Gwynne.

Appeal dismissed with costs.

Solicitors for appellants: *Gilbert & Straton.*

Solicitors for respondent: *Weldon & McLean.*

1889 WILLIAM VENNER.....APPELLANT;

*Nov. 14, 15.

AND

1890 SUN LIFE INSURANCE COMPANY, RESPONDENT.

*Mar. 10.

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

Life Insurance—Unconditional Policy—Misrepresentations—Effect of—Indication of payment—Return of premium—Additional parties to a suit—R.S.C., ch. 124, secs. 27 and 28—Arts. 2487, 2488, 2585 C. C.

An unconditional life policy of insurance was issued in favour of a third party, creditor of the assured, "upon the representations, agreements and stipulations" contained in the application for the policy signed by the assured, one of which was that if any misrepresentation was made by the applicant or untrue answers given by him to the medical examiner of the company, then in such a case the premiums paid would become forfeited and the policy be null and void. Upon the death of the assured the person to whom the policy was made payable sued the company, and at the trial it was proved that the answers given by the applicant as to his health were untrue, the insurer's own medical attendant stating that insured's was a life not insurable.

Held, 1st, that the policy was thereby made void *ab initio*, and the insurer could invoke such nullity against the person in whose favour the policy was made payable and was not obliged to return any part of the premium paid.

2nd, That the statements constituting the misrepresentations being referred to in express terms in the body of the policy, the provisions of secs. 27 and 28 R.S.C., ch. 134, could not be relied on to validate the policy, assuming such enactments to be *intra vires* of the Parliament of Canada, which point it was not necessary to decide.

3rd, That the indication by the assured of the person to whom the policy should be paid in case of death, and the consent by the company to pay such person, did not effect novation; Art. 1174 C. C., and the provisions contained in Art. 1180 C.C. are not applicable in such a case.

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

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It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to the cause.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side), reversing a judgment of the Superior Court, which condemned the respondent company to pay to the appellant $2,000, amount of a policy.

This was an action brought by the appellant Venner against the respondent, the Sun Life Insurance Company, claiming to recover $2,000, the amount of a policy on the life of Jean Langlois, an advocate of Quebec, alleged to have been effected by Langlois for the benefit of his creditor Venner, the appellant, as his interest might appear.

The policy, dated the 19th of January, 1886, was issued " without conditions." Langlois died the 8th March, 1886, and the present action was instituted on the 24th day of August, 1886.

The pleas were: 1st, a general denial; 2nd, an exception alleging fraud and misrepresentation in obtaining the policy. At the trial the misrepresentations proved to have been practised to obtain the policy were, that Langlois' answers to the questions put to him were untrue, especially as regards his state of health and his having applied to other insurance offices to procure a policy; that the answers as given were consistent with Langlois' life being a first-class life whilst Dr. Lemieux, a witness, and Langlois' own medical attendant, stated that Langlois' was not a life insurable as the term is generally understood.

Amyot Q C. and *Geoffrion* Q.C. for appellant.

This was an unconditional policy issued since the Dominion statute ch. 124, sec. 27, came into force. If this Statute is *intra vires* of the Dominion Parliament then all the precedents contrary to the new law and all

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the commentators of the laws of other countries are not applicable. Henceforth no policy can be impaired for reasons other than those printed on the policy itself.

Under art. 2480 C.C. once the policy is issued it becomes the contract between the parties and in this case the contract which is binding is the policy issued by the company in favour of the appellant, and not the application of Langlois. See also art. 2587 C.C.

The company in this case have accepted the appellant as their creditor and under art. 1180 C C., they cannot now oppose to him the exceptions which they might have set up against Langlois. If a policy without conditions is made payable *ab initio* to a third party in good faith it cannot afterwards be annulled by reason of the false and fraudulent statements of the person whose life is insured. Clark Law of Insurance (1), Roscoe's Digest of Law of Evidence (2); and moreover, the company, perfectly knowing by its officers Langlois' state of health, cannot take advantage of false statements which he made in regard to it. Bigelow (3).

We also contend that in accepting the premium from its agent when fully knowing Langlois' state of health, the company has waived all objection as to Langlois' health.

Porter (4); Angell (5); Herbault, Assurances sur la vie (6); Samson Digest Law of Insurance (7); Bigelow (8).

A policy cannot be annulled against a third party, in good faith, to whom it has been made payable *ab initio*. Clark, Law of Insurance (9). Roscoe's digest of law of evidence (10). And in *Wheelton* v. *Hardisty* (11)

(1) P. 209.
(2) 4th ed., p. 413.
(3) 5th vol., p. 458.
(4) P. 86.
(5) P. 410.
(6) P. 252-3.
(7) P. 683.
(8) 1st vol., 327, 375, 497.
(9) Page 209.
(10) P. 410.
(11) 8 E. & B. 232.

it was held by the Exchequer Chamber that the false and fraudulent statements of the person whose life is insured and of the medical referee will not vitiate the policy, as against an innocent person who effected insurance, there being no condition that the untruth of the statement contained in the policy should avoid the policy.

To decide otherwise would be an act against the common law and the principles of a most elementary justice.

The 1180th article of the Civil Code of L.C. says :—

The debtor consenting to be delegated cannot oppose to his new creditor the exceptions which he might have set up against the party delegating him, although at the time of the delegation he were ignorant of such exceptions.

Applied to this case, that article would read as follows: "The company consenting to be delegated to Venner, by making the policy payable to him, cannot oppose to Venner the exceptions which it might have set up against Langlois."

Then, finally, we contend that the court below declared the policy void because the legal representatives are not parties to this contestation.

Now that Langlois is dead, that Venner has no recourse against him, can the company plead its own act, its own error, to deprive him of a legitimate claim ? Be it in good or in bad faith, the company is responsible for its own deeds, arts. 1053, 1065 C.C. The company is bound to warrant Venner a third party in good faith and make good towards him the terms of its policy. Different it might be had the policy been made payable to Langlois and by him transferred to Venner.

Langelier Q.C. for respondents.

Upon the facts as proved there can be no doubt that a gross fraud had been committed in effecting this assurance. If so, that vitiates the policy, and Venner

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has no more rights than the legal representatives of the assured would have. R.S.C., ch. 124, has no application, because the policy itself declares it is issued upon the statements contained in the application, and the provisions of art. 1180 C.C. are only applicable when there is novation. Art. 1174 C.C. is the article which is applicable to the facts of this case.

As to return of premium. The case of *Parent* v. *N. Y. L. Ins.* (1) has settled the jurisprudence of our courts on this point, and if a policy is null on account of being obtained by fraud, such nullity may be invoked by the insurer without any return of premium paid. It is too late now to raise an objection as to whom should be parties to this contestation.

Sir W. J. RITCHIE C.J. and STRONG and PATTERSON JJ. concurred in dismissing the appeal.

TASCHEREAU J.—This is an appeal from the judgment of the Court of Queen's Bench, which reversing the judgment of the Superior Court, dismissed the appellant's action against the company.

The action is one claiming from this company the sum of $2,000, being the amount of a policy on the life of one Jean Langlois effected on 19th January, 1886, by said Langlois for the benefit of and made payable to his creditor, the present appellant, said Langlois having died on the 8th of March, 1886.

The company pleaded to this action that the said policy had been obtained by fraud and false representations, and the judgment appealed from dismissed the action on that plea.

As to the falsity of the representations made by Langlois in his answers on the most material particulars to the questions put to him on the application

(1) 3 Q. L. R. 163.

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for this policy, the evidence leaves no room for doubt. The appellant himself could not but admit it, and concede that if the action had been instituted by Langlois' representatives it could clearly not have been maintained.

Now, this being so, how can the present plaintiff have more rights than Langlois himself or his representatives would have had? It is sound law (though not without exceptions to which I need not here refer) that, as a general rule *nemo plus juris transferre potest quam ipse habet.* Now, if, as conceded by the appellant, Langlois himself or his representatives could not have recovered upon this policy, it is because this policy, as held by the Court of Appeal, is null and void from its inception, or to be more correct, I should say, must be avoided with retroactive effect to its inception. It was agreed to by the company, in express words "sur les réprésentations, conventions et stipulations contenues dans la demande pour cette police." These representations being proved to have being utterly false in the most material particulars, it follows that the company never became bound under this policy. They agreed to pay to the present appellant the sum of $2,000 at Langlois' death, but upon the express condition that if Langlois' answers, on the application were later proved to have been false, the policy would then be null and void. Such are the express terms of the application signed by Langlois.

Nous, soussignés, déclarons que la personne dont l'assurance sur la vie est demandée, est à présent en bonne santé et n'est pas affligée d'aucune maladie ou maux internes; et que les réponses aux questions précédentes sont vraies et exactes. Il est de plus convenu et stipulé, que cette déclaration formera la base du contrat entre nous et la Compagnie d'Assurance Mutuelle sur la Vie, Le Soleil, de Montréal; et nous nous engageons aussi à payer la prime de la première année et à accepter la police quand elle sera émise par la dite compagnie; et si quelques fausses réprésentations ont été faites dans cette déclaration ou

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dans les réponses à être données au médecin examinateur en rapport avec la dite application, toutes les valeurs qui auront été données à la dite compagnie, pour le compte de l'assurance accordée, seront confisquées et la police deviendra nulle et sans effet.

This is plain enough, it seems to me, and, as I have before remarked, this stipulation is in express terms referred to in the body of the policy, so that the appellant cannot invoke against the company section 27, chapter 124 R. S. C., assuming this enactment to be *intra vires* of Parliament and otherwise applicable, two points upon which it is not here necessary to pass.

The following are the articles of the code bearing on the case :—

2485. The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or effect the rate of premium.

2487. Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a case of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

2488. Fraudulent misrepresentations or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity of the contract in favour of the innocent party.

2490. Warranties and conditions are a part of the contract, and must be true, if affirmative—otherwise the contract may be annulled, notwithstanding the good faith of the insured.

The foregoing general provisions are declared, by article 2585 to be applicable to life insurance :

2588. The declaration in the policy of the age and condition of health of the person upon whose life the insurance is made, constitutes a warranty upon the correctness of which the contract depends. Nevertheless, in absence of fraud the warranty that the person is in good health is to be construed liberally, and not as meaning that he is free from infirmity or disorder.

I refer to *Hartigan* v. *The International L. Ass -Society* (1), also to five cases in France (2), where it was held that :

(1) 8 L.C.J. 206. (2) Sirey, 80, 2, 225.

Il y a lieu d'annuler le contrat d'assurance dans l'intéret de l'assureur lorsque l'assuré a, de mauvaise foi, par ses réticences ou fausses déclarations, dénaturé à son profit l'opinion du risque servant de base au contrat. Ainsi, il y a fausse déclaration de nature à rendre l'assurance annulable lorsque l'assuré a déclaré qu'aucune compagnie n'avait refusé de proprositions d'assurance sur sa vie, tandis que sur une demande d'assurance par lui faite antérieurement, il avait été répondu que l'affaire était ajournée, ce qu'il avait interprété lui-même comme un refus. Peu importe qu'en ne mentionnant pas cette circonstance, l'assuré n'ait fait que suivre le conseil d'un agent de la compagnie (1).

and note thereto, also note to report of same cases in Dalloz (2).

I refer also to Merger, Assurances (3); Blin, Assurances (4); Grün & Joliat (5) and Bédarride Dol. & Fraude (6). All of the last author's commentaries on art. 348 of the French Code de Commerce, on marine insurance, are clearly applicable with us to life insurance, as our code re-enacts in arts. 2485 to 2492 said art. 348 of the Code de Commerce and makes the rules as to misrepresentations or concealment applicable to all kinds of insurance. Arts. 2503, 2504, 2585.

It was urged for the appellant that the company should have, with their plea, offered to return him the premium they have received. But there are three conclusive answers to that contention. First, in the in the agreement I have cited signed by Langlois, at the foot of his application, it is expressly stipulated that if any of his answers to the questions put to him are false, the policy shall be null and all premiums paid shall be confiscated.

Secondly, in law even in the absence of such an agreement it has been held that—

En cas d'annulation du contrat d'assurance pour réticence ou fausse déclaration accomplie de mauvaise foi par l'assuré, l'assureur n'est pas tenu de restituer les primes payées, Paris, 1878. Sirey. 80, 2,225, *re Dominique.*

(1) Sirey 80, 2,225.
(2) 81, 2, 235.
(3) Nos. 101, 182 *seq.*
(4) 37.
(5) 405.
(6) Nos. 188, 192, 193, 225.

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Thirdly, the receipt for the premium is from Langlois himself, not from Venner. Venner, it is true, is proved to have actually paid it. But he, by doing so, lent so much to Langlois, or acted as his agent. So that this premium, should the company be bound to return it, must be returned, not to the appellant, but to Langlois' representatives.

Another objection involved by the appellant is that Langlois' legal representatives should have been made parties to this contestation. It would certainly have been more regular so to do. But what interest has the appellant to raise this point? Is not that invoking *jus tertii*? Then, what prevented him from himself calling in Langlois' heirs, either in the first instance, upon his action, or subsequently when the company fyled their plea? He never took this objection before the courts below. There is not even a word of it in his factum before this court. It is only at the last moment of the case, at its final hearing, that he raises it for the first time. He has fought this company before three courts, and, at the last moment complains of not having had the proper parties *en cause*. Now, this cannot be done. I refer to the cases of *Richer* v. *Voyer* (1) in the Privy Council, and *Guyon* v. *Lionais* (2) in the Superior Court which I cited in *Russell* v. *Lefrançois* (3) before this court on this point.

The appellant further contends that, though Langlois' representatives could have no action against the company yet he, the appellant is in a better position as the company cannot as against him invoke Langlois' fraud. In support of this contention the appellant relies on art. 1180 C.C. which enacts that

The debtor consenting to be delegated cannot oppose to his new creditor the exceptions which he might have set up against the party delegating him.

(1) 5 Rev. Leg. 591. (2) 2 Rev. Leg. 333.
(3) 8 Can. S. C. R. 361.

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This article, though not in the Code Napoleon in express terms, is the law in France to the present day. I refer for the jurisprudence to the cases cited Nos. 21, 25, under art. 1277 (1). The article however has no application to the present case. It applies only to a *délégation parfaite*, and no such delegation took place between Langlois, Venner and the company. There was no novation. Venner was not for the company "a new creditor," as required by article 1180. This article moreover does not apply to a conditional obligation, such as the company agreed to towards Venner. They agreed to pay Venner, as I have already remarked, upon the representations, conventions and stipulations contained in the application for the policy? These representations were false and fraudulent; there consequently has never existed a binding contract upon the company. It seems to be settled now in France by the *Cour de Cassation* that the stipulations by a insured that the insurance should be payable to a third party is nothing else but the stipulation for the benefit of a third party, mentioned in Art. 1029 of the Code (2). It had been likewise previously determined *in re Dominique*, (3) that the nullity of a policy consequent upon false representations *est opposable au cessionnaire et à tous autres ayants droit comme elle le serait à l'assuré lui-même.* In the *Lesay* case also, (4) a policy was annulled as against an assignee for false representations by the insured.

The fact relied upon by the appellant that Langlois died from the consequence of a fall, and not from any previous disease, cannot affect the result of the case. for doubt. The commentators, in France, are not unanimous on this point, but with us, art. 2487 C. C. leaves

(1) 2 Sirey, Codes Annotés and in Dalloz Codes Annotés, under art. 1276.

(2) Dalloz 88, 1, 77; 88, 1, 193.

(3) Dalloz 78, 2, 58.

(4) Dalloz 81, 2, 236.

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no room. And even in France, in one of the most recent cases on the question, it was held that :

Doit être annulé pour réticence le contrat d'assurance dans lequel l'assuré a déclaré n'avoir jamais eu de maladie grave alors qu'il se savait atteint d'une maladie de la moelle épinière et qu'il avait été affecté de la syphilis ; peu importe que la maladie cachée par l'assuré ait influé ou non sur son décès, et peu importe aussi que le medecin délégué par l'assureur ait constaté la bonne santé de l'assuré (1).

I refer also to *re Syndic Lemoine* v. *La Caisse Paternelle* (2), where it was held that:

Le fait par l'assuré d'avoir répondu négativement à la question de savoir s'il avait eu une maladie assez grave pour nécessiter les soins d'un médecin, tandis qu'il avait été dans l'année précédente soigné par un médecin pour une fluxion de poitrine et pour une phlébite, est une cause de nullité du contrat surtout si la maladie derniére cause la mort de l'assuré, et se rattache pathologiquement aux maladies intérieures non déclarées. La dissimulation par l'assuré relativement à un fait de nature à modifier l'opinion du risque, est une cause de nullité alors même qu'elle a été commise par ignorance ou de bonne foi.

Under our code, by arts. 2487 and 2490, misrepresentation either by error or by design is expressly declared to be a cause of nullity. So that these decisions have a direct application to the present case.

I am of opinion to dismiss the appeal with costs.

GWYNNE J.—The appeal must, in my opinion, be dismissed. The policy is effected by Langlois and is expressly made " upon the representations, agreements and stipulations" contained in the application for policy signed by him. Divers of these representations are admitted to be absolutely false, so that if the personal representatives of Langlois, who was the assured, were the plaintiffs, they must have been declared to be void as obtained by the fraud and falsehood of the assured. The fact that by the policy the money payable thereunder is to be paid to Venner according to

(1) Dev. 78, 2, 337 and note thereto, also note on same case in Dalloz 77, 2, 126.

(2) Dev. 83, 2, 25.

his rights thereto as a creditor of Langlois does not make Venner to be the person with whom the contract contained in the policy was made. The contract is with Langlois, the assured, and Venner can claim in no other right than as his assignee and as in his right and as the personal representatives of Langlois could not recover by reason of Langlois' fraud attending the procuring of the policy, neither can Venner.

Appeal dismissed with costs.

Solicitors for appellant: *Amyot, Pelletier & Fontaine.*

Solicitors for respondent: *Montambault, Langelier, Langelier & Taschereau.*

1889
*Oct. 5.
1890
*Mar. 10.

CORPORATION OF THE COUNTY OF PONTIAC ..... } APPELLANT;

AND

THE HONORABLE JAMES G. ROSS, RESPONDENT.

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

Municipal Aid to Railway Company—Debentures—Signed by Warden de facto—44 and 45 Vic., ch. 2, sec. 19 P. Q.—Completion of railway line—Evidence of—Onus probandi on defendant.

A municipal corporation, under the authority of a by-law, issued and handed to the Treasurer of the Province of Quebec $50,000 of its debentures as a subsidy to a railway company, the same to be paid over to the company in the manner and subject to the same conditions in which the Government provincial subsidy was payable under 44 and 45 Vic. ch. 2, sec. 19, viz., "when the road was completed and in good running order to the satisfaction of the Lieutenant-Governor in Council."

The debentures were signed by S. M. who was elected Warden and took and held possession of the office after the former Warden had verbally resigned the position.

In an action brought by the railway company to recover from the Treasurer of the Province the $50,000 debentures after the Government bonus had been paid and in which action the municipal corporation was *mise en cause* as a co-defendant, the Provincial Treasurer pleaded by demurrer only, which was overruled, and the County of Pontiac pleaded general denial and that the debentures were illegally signed.

Held,—1st, affirming the judgment of the court below, that the debentures signed by the Warden *de facto* were perfectly legal.

2nd. That as the Provincial Treasurer had admitted by his pleadings that the road had been completed to the satisfaction of the Lieutenant-Governor in Council, the onus was on the municipal corporation, *mise en cause*, to prove that the Government had not acted in conformity with the statute. Strong J. dissenting.

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

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

The respondent's action was to recover from the Treasurer of the Province of Quebec $50,000 worth of municipal debentures of the appellant, which, it is alleged, had been deposited with the said Treasurer as trustee both for appellant and a certain railway company known as the Pontiac Pacific Junction Railway Company. The debentures had been granted to the company under a by-law passed the 14th September, 1881, and were to be handed over to the company as the construction of the road progressed in the County of Pontiac, to wit, at the rate of $2,500 per mile, at the completion of every ten miles of road, "and in the manner and subject to the same conditions in which the bonus payable under the Act passed at the last Session of the Legislature of the Province of Quebec (1880-81) is to be paid to the said company":—The company transferred the right to obtain the bonus from the Treasurer to plaintiff, who alleged in his declaration that the said railway company had conformed with the conditions of the by-law and had built within the County of Pontiac more than twenty miles of said railway, which have been completed and "admitted to be in good running order, to the satisfaction of the Lieutenant-Governor in Council."

Appellant's pleas to the action were as follows:—

1. Défense en faits.

2. An exception setting forth that the said debentures are and have always been illegal, null and void, as not having been issued in conformity with the said by-law or the municipal code, and because, amongst other reasons, at the time they were issued and handed to the Treasurer of the Province, Simon McNally, who

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signed them, was not Warden of the County of Pontiac and had no authority to sign them, that W. J. Poupore was then such Warden, and alone had authority or power to sign such debentures, and, although *in fact* McNally appears to have acted, Poupore was the real Warden and in possession of the office as such.

The Provincial Treasurer pleaded to the action by demurrer only, which was overruled.

At the trial it appeared by the minutes of the council that at a special session of the council Warden Poupore refused to sign the debentures and verbally tendered his resignation, "in order to let some other gentleman carry out the behest of the council in signing the debentures," and that at a subsequent special session of the council Warden Poupore's resignation was accepted, and Mayor McNally was elected to sign the debentures, which he did.

The Government Engineer Light was examined as a witness and proved that he had made a report upon the completion of the road, and that he had given a certificate that the road was complete and in good running order, so far as the specifications of the Province would require.

The Government subsidies were paid.

F. Langelier, Q.C., and *McDougall* for appellant.

The appellant was only bound to hand over its debentures when the road or certain sections of it shall have been completed and in good running order to the satisfaction of the Lieutenant-Governor in Council. Plaintiff admits this to be so, as it forms the subject matter of one of the allegations of his declaration.

Now the only legal manner in which such proof could have been adduced, would have been by the production of an Order in Council establishing the "satisfaction of the Lieutenant Governor in Council," but no Order in Council is produced. On the contrary, plain-

tiff relies solely upon the testimony of Mr. Light, engineer acting for the Government of the Province of Quebec, who swears that he gave a certificate to the effect that twenty miles of said road had been completed, &c., &c., after an inspection he made of it. In cross-examination, he admits that a small portion was, at the time, uncompleted, but that should be set off by work of another kind not called for, but which had been performed.

Could the company receive any amount of the bonus (subsidy) from the Government until the Lieutenant-Governor in Council be satisfied? Certainly not, according to the statute. The appellant, being in the same position as the Government in that respect, is not yet bound, and the plaintiff's action is not only unproved, but premature, as it is to be inferred that the non-production of an Order in Council means that no such order exists. *Stadacona Ins. Co.* v. *Trudel* (1); *Pacquet* v. *Gaspard* (2).

Besides, under our law, if the county, *mise en cause*, or the defendant had not filed an appearance when sued, and let the case go by default, the plaintiff could not have obtained judgment without proving by production of the Order in Council, that the portions of the road involved in the action had been duly completed, &c., to the satisfaction of the Lieutenant-Governor. But the Court below rules that, having appeared and filed a defence in which all the matters set forth in the plaintiff's claim are expressly denied, appellant by such fact is placed in a worse position than if it had made default. Appellant respectfully urges that the holding is erroneous and subversive of our notions of procedure and evidence.

Art. 144 of the Code of Procedure relied on by the

(1) 6 Q.L.R. 31.

(2) Stuarts L.C.R. 100, see footnote.

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Court of Queen's Bench will hardly bear the interpretation put upon it. It simply requires an express denial of the facts, and in this instance appellant could assuredly not make a stronger denegation than by alleging that "all and every, &c., the facts, matters and things set forth in the declaration are false," which naturally includes the allegation that the road was complete "to the satisfaction, &c., &c." Would the denegation be any stronger by singling out some special fact set up, and stating that such fact "is specially and expressly false?" Appellant believes not, and maintains that its general denial is the proper and sufficient pleading, and that special averments are only required in affirmative pleadings.

One of the learned judges (Mr. Justice Cross) states, however, in his reasons or notes, that this point is a new issue, and was raised in appeal only.

The learned judge is manifestly in error here, as a reference to Mr. Justice Caron's remarks and judgment in the court of original jurisdiction will show that the point was there raised, and passed upon by the tribunal. The plaintiff, at the hearing in the Superior Court, could have applied for a re-opening of the case, in order to produce the Order in Council, but did not do so, and argued that the case was proved without it. So that he cannot now complain that this is a new issue.

We also contend that the bonds are worthless and never could or should legally issue. W. J. Poupore was, on the 14th Septemper, 1881, Warden of Pontiac. By the Municipal Code, Wardens are elected annually, to wit, in March of each year (1).

His signature is subscribed to the by-law of the 14th September, 1881. The bonds purport to have been signed and delivered on or about the 13th February, 1882.

(1) See Mun. Code L. C. Art. 248.

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Therefore, it would be an unmistakeable fact to any one reading the by-law that W. J. Poupore would still be Warden on the 13th February, 1882, and the only legally qualified functionary who could validly sign bonds, unless in the meantime the office of Warden had become vacant by death, resignation or other valid cause, and a successor appointed.

In the present instance Poupore did not resign. It was held that there is evidence of Poupore's resignation as Warden, but we claim that he did not resign and that it is not shown in the record. The only presumable reason the courts below could have for reaching the conclusion that Poupore had relinquished the office would appear because of what purports to be the minutes of two special sessions of the County Council of Pontiac, at the first of which, held on the 18th January, 1882, Poupore is stated to have said that "he would rather resign than sign the debentures," but at which he did not actually resign, and this is not sufficient Art. 126, Mun. Code C. L.; *Pattison* v. *Corporation of Bryson* (1); *Paris* v. *Couture* (2), etc.

But respondent meets appellant's argument by a special answer, affirming that McNally was at all events the *de facto* officer and agent of the Corporation, appellant, and that his act, that of signing the bonds, would make them binding upon the county.

But such pretensions can hardly avail against the fact that there was no vacancy in the Wardenship, and that there could be but one Warden, to wit, W. J. Poupore. How could McNally be a *de facto* officer at a period when there existed a real, a *de jure* officer? Poupore's refusal to sign the bonds, if that were in issue, would not give a right to appoint McNally. He, Poupore, could be compelled by action to sign such bonds, or under art. 251 he could regularly be removed

(1) 9 L. N. 169.

(2) 10 Q. L. R. 1.

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from office, and somebody else legally appointed to sign them.

If there was no vacancy there could be no valid election, and all the proceedings surrounding McNally's pretended appointment are bad.

Grant on the Law of Corporations (1); Dillon's Municipal Corporations (2).

Irvine Q.C. and *D. Ross* Q.C. for respondent.

The proceedings of the council show that Poupore, who had been the warden, voluntarily resigned his office, and that his resignation was accepted, and that a regularly convened meeting for the purpose of electing his successor having been called, McNally was duly elected in his place, and took and held possession of the office without any objection, until the expiration of the term, when he was re-elected and has been Warden ever since.

Even if there were any technical defect in the election of McNally, he being in the possession of the office of Warden, and recognized as such by the council, his acts in that capacity would bind the corporation towards third parties.

The corporation of Pontiac have no interest in urging this objection now. They themselves placed these bonds in the hands of the treasurer to be handed to the company on the fulfilment of the conditions imposed by the by-law. These conditions have been complied with and the company are entitled to have them. If they are null by reason of any irregularity it will be time enough for the county corporation to urge it when they are called upon to pay them.

It was urged at the hearing before the Court of Appeals that there was no evidence of an Order of the Lieutenant-Governor in Council accepting the road.

(1) P. 213, Ed. 1850. (2) P. 293, sec. 276.

This pretension was overruled by the court, on the ground that the fact of the adoption of such Order in Council was not specially put in issue. (Art. 144, C. C.P.) Moreover, there is ample evidence that the road is completed, and it was for the appellant to prove that the Government had not complied with the statute.

STRONG J.—I am of opinion that the debentures were perfectly valid, even assuming that they were signed by a warden who was merely such *de facto*, and had not a strictly legal right to the office, and consequently that the peremptory exemption pleaded by the *mise en cause* was ill-founded and therefore properly dismissed.

Upon the other point in the case I think the appellants' contention must be sustained, and that the appeal must be allowed.

The debentures were, according to the express provisions of the by-law, under which they were issued, to be deposited in the hands of the Provincial Treasurer, who was to hold them as trustee for the appellants and for the railway company, and was to hand the same to the company as the work of construction of the railway should progress within the limits of the appellants' county "in the manner and subject to the same conditions in which the bonus payable under the act passed at the last session of the legislature of the Province of Quebec was to be paid to the said company."

By the Provincial Statute of Quebec, 44 and 45 Vic., ch. 2, sec. 19, the Government bonus was only to be paid when certain sections of the railway had been completed, and were in good running order to the satisfaction of the Lieutenant Governor in Council.

The respondent in his declaration has distinctly alleged a compliance with the terms of the condition

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Strong J.

upon which alone the principal defendant in the action, the Provincial Treasurer, who held the bonds upon the trusts mentioned could have been warranted in handing them over to the railway company or its cessionaries, namely, the completion of the prescribed section of the railway to the satisfaction of the Lieutenant Governor in Council. The allegation in the declaration is in these words: "That the said Pacific Junction Railway have conformed with the condition of the said by-law, and have built within the said county of Pontiac more than twenty miles of the said railway which has been completed and admitted to be in good running order to the satisfaction of the Lieutenant Governor in Council."

The appellants having pleaded the general issue (*defense au fonds en fait*) have thereby put every material allegation to be found in the action in issue and this allegation of completion to the Lieutenant Governor's satisfaction amongst others.

It was therefore incumbent on the respondent to prove his allegations and amongst others this allegation of the performance of a condition which was an essential preliminary of his right to demand the delivery of the debentures.

I am unable to assent to the respondent's contention that it was for the appellants to prove that the approval of the Lieutenant Governor in Council never was in fact obtained. The burden of proof in this, as in all cases where it is expressly stipulated that liability to payment for work done under a contract, is not to arise until a third person has expressed approval of the works, as in the common cases of architects and engineers' certificates under railway construction or building contracts, was on the person claiming to be entitled to payment, and I can see no difference in this respect between this case and those referred to. It is true

that the direct relief sought by the action is against the treasurer, but inasmuch as the latter is a mere trustee, depositor or shareholder, and as the parties substantially interested are the appellants, there is no reason why the ordinary rules as to the burden of proof should not apply in their favour. Further, I cannot agree that any admission by the treasurer should prejudice or in any way affect the appellants who have been properly put in cause as the parties really interested.

Mr. Justice Cross as appears from the judgment delivered by him in the Court of Appeals, seems to have considered that this point of the defect in the respondent's case arising from the absence of proof that the Lieutenant Governor in Council had expressed satisfaction with the work, had not been taken in the court of first instance, but from the judgment of Mr. Justice Caron, before whom the cause was originally heard, it is apparent that this was a misapprehension for the latter learned judge expressly mentions this point as having been insisted upon before him.

It is therefore reduced to a single question, does this record contain evidence that the Lieutenant Governor in Council had (in the words of the statute which were referentially introduced into the by-law) expressed his satisfaction that the portion of the railway in the County of Pontiac had been completed and that the same was in good running order ?

The only evidence adduced in any way bearing on this question of the Lieutenant Governor's approval, is the report of Mr. Light, the government engineer, and his deposition confirmatory of what is there stated, and the fact that the Government bonus was paid over to the railway company. It is manifest that the engineer's approval cannot be substituted for that of the Lieutenant Governor in Council, to do this would be to alter the contract of the parties. As regards the fact that

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Strong J.

the Government bonus was paid over, it does not appear that this payment was made in pursuance of any order in council or other formal act of the Lieutenant Governor in Council. The essential fact that the railway had been completed and was in running order to the satisfaction of the Lieutenant Governor should, in order to comply with the terms of the contract, have been proved in some other way than by mere presumption or inference. What the appellants contracted for was a formal expression of satisfaction, for this is indicated by the requirement that it was to be by the Lieutenant Governor in Council, and the proper way of establishing this would have been by showing that it was embodied in some order or declaration in council or other appropriate act of state. To imply an approval of the Lieutenant Governor in Council from other facts and circumstances is not sufficient, inasmuch as the contract requires an express and formal executive act for which no equivalent can be substituted without imposing upon the appellants terms which they never agreed to. Had there been any actual approval in council it would have been susceptible of the easiest kind of proof by merely putting in a copy of the order certified by the clerk of the Executive Council, and in the absence of such proof it is therefore reasonable to infer that the sanction of the Lieutenant Governor was never obtained. It has been suggested that this is a mere formal and technical objection, but I cannot regard it as such ; the appellants are only insisting on the fulfilment of the terms for which they stipulated as a condition of the grant made by them in aid of the railway, and experience has shown that public bodies such as the appellants cannot be too careful in guarding the interests of their constituents by clauses such as that contained in this by-law, and in exacting a strict compliance with

the conditions on which they grant pecuniary aid to railways.

Therefore, concurring in the opinion expressed by Mr. Justice Tessier in the Court of Queen's Bench, my judgment must be for allowing this appeal.

The judgment of the majority of the court was delivered by

TASCHEREAU J.:—As to the second plea that the debentures were illegal, we are unanimously of opinion that it is altogether unfounded in law. The proceedings of the council show that Poupore, who had been the Warden, voluntarily resigned his office, and that his resignation was accepted, and that a regularly convened meeting for the purpose of electing his successor having been called, McNally was duly elected in his place, and took and held possession of the office without any objection, until the expiration of the term, when he was re-elected and has been Warden ever since. The debentures signed by the warden *de facto* are perfectly legal, and the two judgments of the courts below declaring them to be so are unassailable.

The appellant, at the hearing, strongly urged the objection that the respondent, not having proved that by an Order in Council this road had been admitted to be in good running order, the action should on that ground alone be dismissed, on the general issue.

I do not see anything in this contention. First, the statute does not mention an Order in Council. The fact that the Government bonus has been paid is, it seems to me, sufficient evidence that the road must have been completed to the satisfaction of the Lieutenant-Governor in Council. That bonus was payable only when the road was so completed, and we must assume, in the absence of any evidence to the contrary,

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that the Government acted in conformity with the statute.

Secondly, it is in evidence that at a meeting of the municipal council held on the 8th September, 1886, they passed a resolution containing in effect the following :—

"Whereas, this Council has always considered and still considers the said pretended debentures to be worthless, illegal, null, void, and in no way binding upon this corporation, and that they should be quashed and annulled by the courts, the Warden be and he is immediately authorised to retain counsel and to instruct them to take such steps as may be necessary to have said pretended debentures set aside and declared null; that the Treasurer of this Province be requested by the Warden not to hand over to the said company any portion of the said pretended debentures until their legality shall have been decided upon by the courts.

Now, this resolution, which was served on the Provincial Treasurer, contains an implied admission by the appellant that the only objection against the transfer of these debentures by the Provincial Treasurer to the company was the illegality of the said debentures, and that the road must then have been completed to the satisfaction of the Lieutenant-Goveenor in Council.

Thirdly.—On this record itself, the Provincial Treasurer, a co-defendant with the appellant, has unequivocally admitted that the road had been completed to the satisfaction of the Lieutenant-Governor in Council, by the fact that his only plea to the respondents' action was a demurrer, which has been overruled. So that judgment must now necessarily go against him, ordering him to deliver over the said debentures to the respondent.

I do not lose sight of the fact that this is an admission

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Taschereau J.

by another party to the case on a separate issue, but the corporation here is not in the position of an ordinary co-defendant, but only a *mise en cause*. No condemnation whatever can go against the said corporation. They, as *mise en cause*, could have been admitted to prove that the admissions of the Provincial Treasurer had been erroneously or fraudulently given, and that it was not true that this railway had been completed to the satisfaction of the Lieutenant-Governor in Council. With these admissions of the only real defendant on the record, on them, the *mise en cause*, laid the burden of proving their contentions. It is wrong for the corporation to say that if they had not appeared and pleaded to the action the plaintiff would have had to prove the completion of the road to the satisfaction of the Lieutenant-Governor in Council. If the Corporation had not appeared and pleaded to the action, judgment on the merits would have gone against the Treasurer immediately on the overruling of his demurrer.

Appeal dismissed with costs.

Solicitor for appellants: *J. M. McDougall.*

Solicitor for respondent: *David Ross.*

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*Oct. 22,23.
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*June 12.

MICHAEL O'BRIEN AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

CHARLES COGSWELL (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assessments and taxes—Lien—Priority of mortgage made before statute—Construction of act—Healing clauses—Effect and application of.

The Halifax City Assessment Act, 1888, made the taxes assessed on real estate in said city a first lien thereon except as against the crown.

Held, affirming the judgment of the court below, that such lien attached on a lot assessed under the act in preference to a mortgage made before the act was passed.

The act provided that in case of non-payment of taxes assessed upon any lands thereunder the City Collector should submit to the mayor a statement in duplicate of lands liable to be sold for such non-payment, to which statements the mayor should affix his signature and the seal of the corporation; one of such statements should then be filed with the city clerk and the other returned to the collector with a warrant annexed thereto, and in any suit or other proceeding relating to the assessment on any real estate therein mentioned, any statements or lists so signed and sealed should be received as conclusive evidence of the legality of the assessment, &c. In a suit to foreclosure a mortgage on land which had been sold for taxes under this act the legality of the assessment and sale was attacked.

Held, per Strong, Taschereau and Gwynne JJ., that to make this provision operative to cure a defect in the assessment caused by failure to give a notice required by a previous section it was necessary for the defendants to show, affirmatively, that the statements had been signed and sealed in duplicate and filed as required by the act, and the production and proof of one of such statements was not sufficient.

Per Ritchie C.J. and Patterson J., that it was sufficient to produce the statement returned to the collector signed and sealed as required,

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

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O'BRIEN v. COGSWELL.

and with the necessary warrant annexed, and in the absence of evidence to the contrary it must be assumed that all the proceedings were regular and that the provisions of the statute requiring duplicate statements had been complied with.

The act also provided that the deed to a purchaser of lands sold for taxes should be conclusive evidence that all the provisions with reference to the sale had been complied with.

Held, per Strong, Taschereau and Gwynne JJ., that this provision could only operate to make the deed available to cure defects in the proceedings connected with the sale and would not cover the failure to give notice of assessment required before the taxes could be imposed.

Held, per Ritchie C.J. and Patterson J., that the deed could not be invoked in the present case to cure any defects in the proceedings as it was not delivered to the purchaser until after the suit commenced; therefore a failure to give notice that the land was liable to be sold for taxes, which notice was required by the act, rendered the sale void.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming a judgment in favor of the plaintiff for a decree of foreclosure and an injunction restraining the defendants from interfering with the lands described in the mortgage foreclosed.

The facts of the case, which are more fully stated in the judgments hereinafter given, are as follows:

The action in this case was one for foreclosure of a mortgage made by the defendant John Holland to the plaintiff. After the mortgage was executed an act was passed by the legislature of Nova Scotia (46 Vic. ch. 28) relating to assessments on property in the City of Halifax where the land was situated. Section 13 of that act provided that "the rates and taxes levied * * on real estate shall be a special lien on said real estate, having preference over any claim, lien, privileges or incumbrances of any party except the crown," etc.

Under this act the property described in the mortgage was sold for unpaid taxes, and one John Meagher became the purchaser at such sale. The defendants

(1) 21 N. S. Rep. 155, 279 *sub nomine Cogswell* v. *Holland*.

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O'BRIEN v. COGSWELL.

O'Brien and Brooks are the administrators for said Meagher, who died pending the action, and the defendant Theakston is the collector of rates and taxes for the City of Halifax.

In the foreclosure suit the plaintiff claimed that the sale for taxes only operated as a sale of the equity of redemption; that the act, having been passed after the mortgage was made, could not affect his rights; that if it could the act must be followed strictly, and there were irregularities in the assessment that made the sale void as against the mortgagees.

On the first trial of the cause judgment was given for the plaintiff, the trial judge holding that the lien created by the assessment act did not take precedence of the mortgage (1). The full court, on appeal, held that it did, but on the ground that a regular assessment had not been proved, or any justification for the sale, a new trial was ordered. On the second trial, judgment was given for the plaintiff and affirmed by the full court, on the ground that the proceedings under the act were irregular and void. The defendants appealed to the Supreme Court of Canada.

Sedgewick Q.C. and *Lyons* for the appellants.

The court below styles this "unheard of legislation" but the "Encumbered Estates Act, Ireland," (12–13 V. c. 77) contains a similar provision, and Lord Cranworth speaks of it with approval. *Rorke* v. *Errington* (2).

Lash Q.C and *Macdonald* for the respondent referred to *McKay* v. *Chrysler* (3) as to the effect of irregularities in tax sales and *Mills* v. *McKay* (4) as to necessity of the City of Halifax being a party to the action.

The sale was void for want of registry of the deed in the time limited by the statute; *Hazeley* v. *Somers*

(1) 21 N. S. Rep. 155. And see judgment of Mr. Justice Gwynne *post*.

(2) 7 H. L. Cas. 617.

(3) 3 Can. S. C. R. 449.

(4) 14 Gr. 602.

(1); Blackwell on Tax Titles (2); and that the mortgagees acted in good faith, see *Goodnight* v. *Moses* (3).

The deed being made *pendente lite* it could not affect the rights of the plaintiff. *Winchester* v. *Payne* (4); *Bellamy* v. *Sabine* (5); *Turner* v. *Wight* (6).

SIR W. J. RITCHIE C.J.—I entirely agree with the judgment prepared by Mr. Justice Patterson in this case and think the appeal should be dismissed.

STRONG J.—This action as originally framed was brought by the present respondent Charles Cogswell and Francis Duncan, trustees under the will of Isabella Cogswell, deceased, as mortgagees, against John Holland their mortgagor, John Meagher who assumed to be the purchaser of the mortgaged property at a sale for taxes claimed to be due to the City of Halifax, and William C. Hamilton the collector of the city who had made the sale; and it sought to have the plaintiffs declared entitled to priority over the city in respect of the lien for taxes, and over the purchaser at the tax sale, by reason of the prior date of the plaintiff's mortgage, and prayed for an injunction restraining the city from completing the sale, and for foreclosure. All the defendants, except Holland the mortgagor (who has taken no part in any of the proceedings), having filed statements of defence the action came on for trial befor Mr. Justice Weatherbee, without a jury, who gave judgment for the plaintiffs, holding that the mortgage had priority over the city's lien for taxes and that the plaintiffs were entitled to an injunction and to foreclosure as prayed. This judgment was, on appeal to the Supreme Court in banc, set aside and a new trial was ordered. Pending the proceedings, Francis Dun-

(1) 13 O. R. 600.
(2) 4 Ed. p. 314.
(3) 2 W. Bl. 1019.
(4) 11 Ves. 194.
(5) 1 De G. & J. 566.
(6) 4 Beav. 40.

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can, one of the plaintiffs, and the original defendants, John Meagher and William C. Hamilton, had all died. On the 19th October, 1888, the Chief Justice made an order in chambers permitting the surviving plaintiff Cogswell to amend the statement of claim, which he did by adding as defendants the appellants O'Brien and Brooks, the executors and devisees in trust of Meagher, as representing any interest which he might have acquired under the tax sale, also by substituting Theakston, who had succeeded Hamilton as city collector, as a defendant in his stead, and by making an entirely new case impeaching the validity of the assessment and the sale for taxes, and insisting upon the consequent nullity of the deed carrying out the sale which had been executed by the mayor and city collector on the 13th of October, 1888, before the leave to amend was given. To this amended statement of claim defences were put in by the new defendants, to which replies were filed, and the action was again tried before the Chief Justice, who found a verdict and entered judgment for the plaintiff upon the ground that the assessment of the tax and the sale were both void by reason of failure to comply with the requirements of the statutes governing those proceedings. From this judgment there was a second appeal to the Supreme Court of Nova Scotia in banc, and that court composed of five judges unanimously sustained the judgment pronounced at the trial. From this latter judgment the defendants the trustees of Meagher and the collector of the city, have now appealed to this court.

The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise

that construction is to be adopted which is most favorable to the subject. Further, all steps prescribed by the statute to be taken in the process either of imposing or levying the tax are to be considered essential and indispensable unless the statute expressly provides that their omission shall not be fatal to the legal validity of the proceedings; in other words, the provisions requiring notices to be given and other formalities to be observed are to be construed as imperative, and not as merely directory, unless the contrary is explicitly declared.

The statute under which the city officers assumed to act in making the assessment and sale now called in question is the statute of Nova Scotia entitled "The Halifax City Assessment Act of 1883" as amended by an act passed in May, 1886.

This statute conforming to the scheme generally followed in legislation of this kind, provides for two distinct processes in the imposition and enforcement of the tax to be carried out by two distinct sets of officers—the assessors and the collectors. Applying the principles already referred to it is plain that if any of the formalities or requirements prescribed by the act have been omitted by any of the officers in question the sale and the deed executed for the purpose of carrying it out are absolute nullities, unless it is indicated in the statute itself that the step which has been omitted is to be regarded as a non-essential proceeding, or unless the case comes within the terms of some provision enacted for the purpose of covering defects caused by failure to observe the procedure laid down by the statute.

The defects in the proceedings which are relied on as vitiating the sale are the omission by the assessor and Board of Assessors to give the notices required by sections 37 and 93 respectively, and the neglect

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of the collector to give the notice prescribed by section 57. It may at once be said that nothing is to be found in the statute which would warrant us in holding that the provisions requiring these three notices to be given are to be regarded as directory, or otherwise than as imperative. Failure to give any one of them must therefore be regarded as fatal to the sale, unless some healing clause can be pointed out sufficient to cover such an omission.

Section 37 is as follows:

As soon as the whole amount of real and personal property, on which any person, company or corporation is to be assessed within any ward of the city, is determined, the chief assessor shall serve, or cause to be served, a notice of such valuation upon the person assessed, or his agent, or on the company or corporation, their officer, clerk or agent, by delivering the same personally, or by leaving it on the property so assessed, or by mailing the said notice through the post office duly registered. This notice shall be in the following form, in print, or ink, or both:

Ward No.	Name, No. and Description of Property.	Value of Real Estate.	Value of Personal Property.	Total Amount on which Assessm't is to be Levied.

I hereby give you notice that the Board of City Assessors, to the best of their judgment, have made the above valuation of your real and personal estate within Ward No. —, of the City of Halifax, on which assessment for the year 18— is to be levied. If you wish to object thereto you are hereby notified to furnish me at my office, in the City Court House, within fourteen days from this date, with a written statement, under oath, according to the form herewith served upon you.

To Mr. ———

Chief Assessor.

Dated at Halifax, day of 188

These notices are to bear date on the days on which they are respectively served or mailed.

The material importance of the notice thus required

is shown by the following section (38) which is in these words:

After service of the notice, fourteen days shall be allowed to the parties, to be rated, or their agents, to furnish the Board of City Assessors with a written statement, under oath, of the real and personal estate in the following form:

The Chief Justice before whom the action was tried has found that the notice thus required by section 37 was not served, and the court in banc have concurred in that finding. That the attempt to prove the service of this notice by the witness Brown was, for the reasons given by the learned Chief Justice in his judgment, entirely abortive, is so clear that I consider it sufficient to refer to what he says (which I entirely adopt), without any further examination of the evidence.

It is said, however, that the omission to serve this notice is covered by the provisions of section 95 as amended. Sec. 94 and sec. 95 as amended are as follows:

94. In case the taxes upon any of the lands mentioned in said list have not been paid to the City Collector, with interest from the time they were due, before the 1st day of September following the delivery of said list by the Board of City Assessors to the City Collector of Rates and Taxes, the City Collector shall submit to the Mayor a statement in duplicate of all the lands liable, under the provisions of this Act, to be sold for taxes, which shall contain a definite description of each lot, with the amount of arrears of taxes set opposite to the same, and the Mayor shall authenticate each of said statements by affixing thereunto the Seal of the Corporation and his signature, and one of said statements shall be deposited with the City Clerk, and the other shall be returned to the Collector, with a warrant thereto annexed under the hand of the Mayor and the seal of the City in the following form:

Sec. 95.—Any statements or lists so signed by the Mayor and sealed with the Seal of the City, or a copy thereof, or of any portion thereof, certified under the hand of the City Clerk, shall in any suit or other proceeding relating to the assessment on the real estate therein mentioned, or at which it may be questioned, be received in any Court in this Province as conclusive evidence of the legality of the assessment, and that the same is due and unpaid, and that each lot of land in said

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statement mentioned is legally liable for the amount of taxes set opposite the same, with interest and expenses, and that said amount forms a lien on said land.

It is obvious that it is a condition precedent to the applicability of this section 95 for the purpose of covering defects in the assessment proceedings, such as the want of the notice required by section 37, that the lists provided for by section 94 shall be in duplicate and authenticated by the mayor affixing to each of such duplicates his signature and the city seal. This was not found to have been done. The Chief Justice as to this finds that "no evidence was adduced on the trial that any such statement was so authenticated in duplicate by the mayor, nor was there any evidence that a copy of the list or statement annexed to the warrant to the collector was ever filed in the office of the city clerk." This is an incontrovertible conclusion from the evidence—and it thus appears that sec. 95 is wholly ineffectual for the purpose for which it was relied on by the defendants. It is said, however, that sec. 110 (as amended) covers the want of notice required by sec. 37. As this amended sec. 110, is also relied on as an answer to the objections raised for non-compliance with sec. 57 and 93, I defer the consideration of it until I have stated the secs. last mentioned.

Sec. 57 is in these words:

As soon as the assessment book shall be deposited with the Collector, he shall cause each person or company rated, or their agents, to be served with a notice in the following form, the said notice to be made out by the Board of City Assessors, as provided by the preceding section:—

And sec. 93 is as follows:—

It shall be the duty of the City Board of Assessors carefully to examine said list and ascertain if the lands therein mentioned are properly described, and they shall notify the occupants of said lands, if any, and the owners thereof, if known, upon their respective assessment notice for the current year, that the land is liable to be sold for arrears of taxes, and said Board of Assessors shall, before the 31st day

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of May in each year, return said list, or a corrected copy thereof in case any error is discovered therein, to the City Collector, signed by the City Assessors, or any two of them, and said list shall be filed in the office of the City Collector for public use.

There is no proof whatever that either of the two notices required by these sections 57 and 93 was served.

The case is therefore narrowed down to the single question: Is the want of all these essential preliminaries covered by section 110 as amended? That amended section is to be read as follows:—

The deed shall be under the seal of the city in the form or to the same effect as in schedule A to this Act, and shall particularly and fully describe the land conveyed. Said deed shall be conclusive evidence that all the provisions of this Act with reference to the sale of the land therein described have been fully complied with, and every act and thing necessary for the legal perfecting of such sale have been duly performed, and shall have the effect of vesting said land in the grantee or purchaser, his heirs or assigns, in fee simple, free and discharged from all incumbrances whatsoever, whether registered or not; except in the case of land in which the fee is in the city of Halifax, when the deed shall give the purchaser the same rights in respect of the land as the original lessee.

And except as aforesaid, any deed in the form or to the same effect as in the said schedule, purporting to be executed under the Seal of the City of Halifax, by the Mayor and City Collector, shall vest in the grantee therein named, his heirs and assigns, a full, absolute and indefeasible estate in fee simple to the land therein described.

I am of opinion that in order to give effect to this section 110 we must hold that the omission to give the notices required by sections 57 and 93 was covered by it upon the deed being executed. These notices are preliminaries required by the act with reference to the sale and have nothing to do with the imposition or assessment of the tax. They come, therefore, within the words of the 110th section which provide that "the deed shall be conclusive evidence that all the provisions of the act with reference to the sale of the land have been complied with," and, in my judgment,

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cover the objections to the title which have been rested on the failure of the City Collector to comply with the requirements of section 57 and with the failure of the Board of Assessors to give the notice required by section 93, the notices mentioned in both these sections being provided for as preliminaries of the sale and not of the assessment. This, however, leaves the objection founded on section 37, which relates not to the sale but to the assessment and imposition of the tax, wholly untouched. I have already pointed out that there is no proof that this very important notice required by section 37 was given and that the Chief Justice expressly found that the attempt to prove it wholly failed. I have further shown that the objection founded on this omission was not covered by sections 94 and 95 inasmuch as the defendants had not shown that the conditions precedent required to make these sections operative had been complied with. The consequence must be that the court below were perfectly right in adjudicating as they did that the alleged assessment was a nullity, rendering all subsequent proceedings void unless this radical defect in the proceedings is covered by the 110th section. This is, indeed, the cardinal point in the case. Does then the 110th section cure defects and omissions in the assessments and make the deed a cover for all such, as well as for failures to comply with the provisions relating to the enforcement of the tax? First, it is to be observed that there is a very great difference between the relative importance of the two sets of objections—those relating to the sale and those relating to the assessment. As regards the latter, the omission to give all notices such as that called for by section 37 renders all the proceedings *ex parte* and is equivalent to an omission to serve any process in the case of an ordinary action at law.

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The very first principles of justice such as that embodied in the maxim "*audi alteram partem*" require a most rigorous performance by the city officers of the duty to give this notice of section 37. The omission to observe the requirements as to preliminaries of sale either as to the notices or as to the advertisements does not go to the legality of the tax itself but merely relates to proceedings for its enforcement. It is obvious that between these two objects there is a very wide difference. If the legislature has in unequivocal words said that a man's property may be sold for taxes and his title divested, although the tax for which it was sold was illegally imposed, and although the owner never had any notice of its imposition, the courts are bound to give effect to what the lawgiver has so enacted, and the gross hardship and flagrant injustice of such a law is no answer to an action invoking its judicial enforcement and application. These considerations do, however, constitute grounds for very carefully and strictly construing an enactment relied upon as warranting such a harsh and unreasonable conclusion and for so restricting its operation as to avoid injustice, if the language will possibly admit of such a construction.

I am prepared to concede that the deed was properly in evidence and that the case must be dealt with entirely on the effect which we can attribute to it upon the facts in evidence according to the true construction of the terms of the 110th section. Then to come to the language of that section—I am clear that the words "said deed shall be conclusive evidence that all the particulars of the act with reference to the sale of the land therein described have been fully complied with and every act and thing necessary for the legal perfecting of such sale have been fully performed," are according to the *primâ facie* meaning of the words themselves confined to proceedings preliminary to the sale not to

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proceedings relating to the assessment or levying of the tax, that is to proceedings which are to be taken after the roll goes into the hands of the executive officer, the collector, for the collection and enforcement of the tax—and not to proceedings connected with the quasi adjudication which according to the machinery of the act is the result of the act of the assessors and the omission of the party rated to object to it. The words "legally perfecting of the sale, "obviously relate to proceedings after the sale and intervening between that act and the actual execution of the deed. The results so far indicated follow as the plain natural construction of the words used according to their primary meaning. The words immediately following "shall have the effect of vesting said land in the grantee or purchaser his heirs or assigns in fee simple free and discharged from all encumbrances whatsoever" are obviously added to indicate that the sale and conveyance shall pass not only the interest of the land owner whose property has been sold but (as is said in so many words) shall pass that interest and confer a title paramount to any incumbrances created by the landowner whether prior or subsequent to the imposition of the tax.

There remain however the concluding words of the section "any deed in the form or to the same effect as in the said schedule purporting to be executed under the seal of the City of Halifax by the Mayor and City Collector shall vest in the grantee therein named his heirs and assigns, a full absolute and indefeasible estate, in fee simple to the land therein described."

In the first place it is to be remarked that we are bound, by well settled principles governing the construction of statutes already adverted to, to construe these words if possible in such a way as not to give them the violent and unjust operation contended for,

according to which land which may have been illegally assessed for taxes might be sold and conveyed behind the back of the owner without the slightest notice having been given to him. If it is possible then to find any reasonable application of the language used which will avoid this the court is bound to adopt it, and it is also bound to be astute to find such an alternative construction and thus avoid doing a great wrong and violating the first principles of natural justice under a form of law. I am of opinion that keeping in mind these guiding principles it is not difficult to find an explanation of this clause which will avoid doing injustice to any one. Adverting to the context we find that the conclusive effect which the prior words, according to the exposition of them already given, were designed to give to the deed only applied to cure defects in the preliminaries of the sale; it is reasonable, therefore, that we should read these words "full, absolute and indefeasible estate," as subservient to the preceding part of the section and not as intended to give any enlarged operation to the deed beyond that which the legislature manifestly intended to attribute to it when declaring and defining its "conclusive effect;" therefore we are to read this latter part of the section in connection with the preceding one, and thus to read the words "all the provisions of the act with reference to the sale of land," as governing the whole section, in which way a reasonable interpretation of this last clause is reached, and one by which the great injustice of the violent construction contended for is avoided. Further, these words "a full, absolute and indefeasible estate in fee simple," may well be construed as only intended to indicate the quantity of estate to be taken by the grantee in a tax deed, and as declaring that the land is from thenceforth irredeemable; and, therefore, to be only applicable to the case of a regular sale and

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a legal deed, and not as having any reference at all to the effect of a deed following a void sale made upon a void or irregular assessment. For such a purpose much stronger and more apposite and precise terms would have been indispensable.

The conclusion is, that the appeal fails and the judgment of the Supreme Court of Nova Scotia must be sustained as regards the question principally involved. I am of opinion, however, that the City Collector is not, on any recognized rule as to parties, a proper party defendant to the action, and as to him the appeal should be allowed and the action dismissed with costs in both courts; in other respects the appeal should be dismissed with costs.

TASCHEREAU J.—I agree with my brother Gwynne, and for the reasons by him given I think this appeal should be dismissed with costs.

GWYNNE J.—On the 15th of August, 1882, one John Holland, being then seized in fee of a piece of land in the city of Halifax. in the Province of Nova Scotia, by an indenture of mortgage of that date conveyed to Charles Cogswell and Francis Duncan in fee simple, as trustees by way of security for payment of the sum of $3,000, the said piece of land by the following description:—

All that certain piece or parcel of land, situate in the City of Halifax, being a certain proportion of property belonging to or known as Doctor Jennings' field, joining fields situate on the Studley or Cobourg Road and Oxford Street, being three lots numbered five, six and seven on a plan of said field, made on the 16th of June, 1870, and filed in the office of Registry of Deeds for the County of Halifax, which said lots are bounded, &c.

This indenture of mortgage was recorded in the office for the registry of deeds on the 26th day of September, 1882.

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The monies secured by this indenture of mortgage being unpaid, contrary to the terms and conditions of the said indenture, the mortgagees upon the 6th day of April, 1887, commenced an action in the Supreme Court for Nova Scotia against the mortgagor, John Holland, for foreclosure of the said indenture of mortgage. In this action one Alexander C. Hamilton, as collector of taxes for the City of Halifax, and one John Meagher, were made parties, defendants, upon the ground that the defendant Hamilton as such collector of taxes, claiming to have a lien on the said land for certain alleged arrears of taxes, had wrongfully, upon the 21st December, 1886, offered for sale, and assumed to sell to the defendant Meagher, the said land as for such arrears of taxes, but that no deed had as yet been executed; and the plaintiffs prayed, among other things, that it might be declared that the defendant Meagher had no right in or to the said mortgaged land and premises, or to any part thereof, in priority to the plaintiffs' claim for the principal and interest comprised in the said indenture of mortgage and secured thereby but that the rights of the said Meagher, if any he had, are subject to the rights of the plaintiffs. And they further prayed that the defendant Hamilton might be enjoined and restrained, as such collector of taxes, from signing, executing, or delivering to the said defendant Meagher or to any other person or persons any deed which should convey, or purport to convey, the said mortgaged lands and premises in priority to the said mortgage debt thereon, unless or until the said mortgage debt should have been first duly paid to the plaintiffs. And the plaintiffs charged and claimed that any right or interest which the said defendants, or either of them, have or hold in the said mortgaged lands and premises, if any such there be, are not prior to the said indenture

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of mortgage made to the said plaintiffs, and the registry thereof in the office for the registry of deeds in the County of Halifax. And the plaintiffs prayed for payment of their said mortgage debt or, in default, for foreclosure or sale of the said mortgaged lands and premises; and that the plaintiffs should have such other and further relief in the premises as to right and justice appertains. Now this action was simply an action for foreclosure of the mortgage and to which the defendants, Hamilton and Meagher, were made parties as being persons who claimed to have an interest or estate in the mortgaged lands and premises, which interest or estate if they, or either of them, had any, the plaintiffs did not admit, but insisted was an interest in the equity of redemption and that, therefore, they were necessary parties to the action for foreclosure of the mortgaged premises.

To this action, the defendant Holland offered no defence. The defendant Meagher filed a statement of defence, and therein insisted that the said mortgaged lands and premises, after the date of the said alleged mortgage, and while in the possession and occupation of the said John Holland, having been duly assessed and rated for taxes and rates due by law to the City of Halifax for the civic years 1883 and 1884, and for subsequent years, such rates and taxes remaining unpaid became a special lien and charge on said land under the Halifax City Assessment Act of 1883, and that proceedings were duly taken under the said act by the City of Halifax to enforce said lien, and that on the 21st day of December, 1886, the said land and premises were duly sold at public auction by the city collector under said act, and in compliance with the provisions of said act and amending acts, to satisfy said taxes so in arrear and interest and expenses, and that the said defendant (Meagher) became the purchaser at the said sale

for $290, and that the defendant thereupon paid said sum to the city collector and obtained a certificate of said sale from said collector under said act, by virtue of which the defendant claims to hold said land, and to receive the rents and profits free and clear from the plaintiffs alleged mortgage and all other incumbrances. And the defendant (Meagher) further claimed to have a title to the said land in priority to the plaintiffs' alleged mortgage under the provisions of the Halifax City Assessment Act of 1883, and as holder of a certificate from the city collector, made and given to the defendant on the 21st day of December, 1886, under the 101st section of said act. The defendant Hamilton also filed a statement of defence, in which he insisted that the sale of the said land to the defendant Meagher and the certificate thereof were good and valid under the Halifax City Assessment Acts of 1883 and 1886, but it is unnecessary to set out at large the matters pleaded by him, because all that is material to the case is comprised in the above extracts from the defence of the defendant Meagher. To the defence of the defendant Meagher the plaintiffs, besides joining issue with him upon the allegations in his defence contained, replied, among other things, that the said lands were not assessed to the said John Holland, and that none of the notices of assessment and liability for taxes in respect of said lands were served upon or given to the said John Holland, as by law required, and no notices of said assessment or liability for taxes in respect of said land were given to any one liable therefor, and the said rates and taxes did not become a special lien and a charge on said lands under the City of Halifax Assessment Act of 1883, as alleged, in preference and in priority to the previously vested rights therein of the plaintiffs, and by virtue of the mortgages thereon in the statement of claim mentioned, and further, that

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the said lands were not duly assessed and rated for taxes due by the said John Holland as alleged, and further, that the certificate of the city collector, under which the said defendant Meagher claims to hold the said lands free and clear from the plaintiffs' mortgage, is illegal and void; and further, that the City Assessment Act of 1883, and chapter 60 of the acts of 1886, in amendment thereof, are not retrospective so as to deprive the plaintiffs of their previously registered and vested rights in the said lands referred to in the plaintiffs' claim which the said John Meagher alleges that he purchased at said tax sale.

This special replication to the defence of the defendant Meagher does not appear to have been at all necessary, for the plaintiffs' joinder in issue to the defendant's statement of defence put in issue everything that was material, and cast upon Meagher the whole onus of proving everything necessary to his establishing the title pleaded by him and upon which he relied, and sufficiently raised all questions of law which might present themselves upon the facts which should be proved for the purpose of establishing the title which he had pleaded. The whole onus of proving such title rested upon him; the plaintiffs had nothing to do but produce and prove their mortgage.

Issue having been in like manner joined upon the statement of defence of the defendant Hamilton, the case came down for trial in the month of December, 1887, before Mr. Justice Weatherbe, without a jury.

The learned judge was of opinion that the Halifax Assessment Act of 1883 did not operate against mortgagees out of possession at the date of the act and, moreover, that if it did still the defence authorising a sale of the lands in question had not been made out—that no justification of the tax sale had been established, and that so the defendant Meagher had failed to

establish the title he had pleaded; and he therefore gave judgment for the plaintiffs and pronounced a decree for foreclosure and sale, with a declaration that no lien exists upon the lands for taxes, and awarding an injunction to issue to restrain the defendants as prayed for in the plaintiffs' statement of claim. In the month of December, 1887, the defendant Hamilton died, and in the month of February, 1888, the defendant Meagher died. On the 31st day of March, 1888, Robert Theakston, the successor in office of the said Hamilton, as collector of the City of Halifax was, by an order of the Supreme Court, substituted and made a party defendant in the place of the said Hamilton deceased, and by an order of the court of the same date Michael O'Brien and James Brooks, as executors and devisees under the last will and testament of the said John Meagher, deceased, were substituted and made parties defendants in the place and stead of the said Meagher deceased.

Thereupon, the defendants upon the record so constituted appealed from the judgment and decree of Mr. Justice Weatherbe to the Supreme Court of Nova Scotia. That court differed from Mr. Justice Weatherbe as to the effect of the Halifax Assessment Act, holding that the liability for taxes upon real estate thereby created took precedence of mortgages although made before the passing of the act, but they agreed with Mr. Justice Weatherbe in the opinion that no proof had been given of any assessment upon the lands in mortgage, or of any justification of the sale to Meagher, as set up by him, and upon which the defendants O'Brien and Brooks, as representing him, relied; the court was, however, of opinion that the plaintiffs' replication, although putting in issue the matters alleged by Meagher in support of the title upon which he relied and upon which such title as set up by him

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was rested, amounted to a new case set up by the plaintiffs, which, in the opinion of the court, should have been pleaded in the statement of claim, and they held, therefore, that the matters which had been decided, invalidating the sale, were not properly in issue before the court, and they, therefore, in the month of July, 1888, gave judgment setting aside the judgment and decree pronounced by Mr. Justice Weatherbe and granted a rule for a new trial to enable the plaintiffs to set out in their statement of claim the matters stated in their replication by way of negation of the facts upon which the title as set up by Meagher rested.

In arriving at this conclusion the Supreme Court of Nova Scotia, in my opinion, wholly misconceived the nature of the case, and the matters put in issue upon the record. The action, as I have already pointed out, was simply one for the foreclosure of a mortgage to which certain persons were made defendants who claimed to have an interest in the mortgaged lands, which interest, if the said defendants had any, which the plaintiffs did not admit, the plaintiffs insisted was an interest only in the equity of redemption in the mortgaged premises, and that, therefore, these defendants were proper parties to be brought before the court in a foreclosure suit to enable them to assert whatever title, if any, they had.

Now, the defendants so made parties having pleaded their title, and the facts upon which they relied as supporting it, and having insisted that it was a title superior to that of the plaintiffs, the latter, by joining issue upon the facts upon the existence of which the title, as so set up, rested, had, in a perfectly sufficient and in the customary mode of pleading, put in issue everything which was material to the final determination of the case, and cast upon the defendants the burthen of proving the existence of every single thing

necessary to exist in order to support the title as set up by the defendants, and the Supreme Court of Nova Scotia having concurred with Mr. Justice Weatherbe that the defendants had failed to adduce the necessary proof, should have confirmed his judgment and decree. In pronouncing the judgment which they did the Supreme Court proceeded upon their view of the judgment in the case of *Hall* v. *Eve* (1), but that case, in reality, instead of supporting is adverse to the above conclusion as arrived at by the Supreme Court.

The plaintiff there claimed specific performance of an agreement for the sale of certain lands entered into between the defendants Eve and Whiffin, with one Lane who was also made a defendant, and who has assigned his interest in the land under the agreement and in the agreement to the plaintiff; the defendants Eve and Whiffin, in their statement of defence, alleged that before the transfer of the agreement to the plaintiff the defendant Lane had committed certain breaches of his contract, which gave the defendants Eve and Whiffin a right to put an end to the agreement which they had accordingly done.

The plaintiff in his reply admitted some of the paragraphs in the statement of defence and denied others. He, moreover, pleaded that if, which he did not admit but denied, there had been any breach of the agreement on the part of Lane the defendants Eve and Whiffin had waived it; and as to the provision which was alleged to have been broken by Lane, that the defendants Eve and Whiffin were not entitled by reason of such breach to determine the agreement for reasons which he stated. The defendants Eve and Whiffin moved before V. C. Bacon that the reply of the plaintiffs might be set aside as irregular and erroneous in form and pleading. That learned judge was of opinion

(1) 4 Ch. D. 341.

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that the new matter set up in the reply should have appeared in the statement of claim, and he accordingly made an order setting aside the reply and giving leave to the plaintiff to amend his statement of claim.

Now, first, it is to be observed that the reply contained new matter setting up a new case which the plaintiff relied upon as entitling him to the relief prayed, whereas in the present case the special matter replied was nothing but a negation of the existence of matters the onus of proving the existence of which already rested on the defendants by the joinder in issue — thus disputing simply the validity of the title in Meagher which was pleaded by the defendants, and upon which they relied as defeating the plaintiffs' claim to the relief prayed by them, and

2nd. That the question was raised upon a motion made by the defendants before trial to strike out the reply not upon the suggestion of a Court of Appeal after the issues raised by the pleadings had been fully entered upon and tried and judgment thereon pronounced and a decree made. However, upon appeal to the Court of Appeal the learned Vice Chancellor's order was set aside, and the pleading reinstated, Lord Justice James saying that he could see no limit as to what might be said in reply, except that it must not be scandalous or irrelevant, and that in the case before him the reply was the proper place to meet the defence set up by the defendants, and Lord Justice Bramwell said that, in his opinion, a plaintiff might traverse allegations made in a defence or confess and avoid them or both.

In accordance, however, with the judgment of the Supreme Court of Nova Scotia the plaintiffs inserted in their statement of claim the matters which had been set out in their reply.

In the statement of claim as so altered the defen-

dant Theakston, with very unnecessary prolixity, repeated the defence which had been pleaded by Hamilton deceased, and the defendants, O'Brien and Brooks, with like prolixity, repeated the defence which had been pleaded by Meagher deceased, with this addition that they set up a deed executed to them by the mayor for the time being of the City of Halifax, and the defendant Theakston, as collector, during the pendency of the suit, and after two courts had pronounced the sale, in pursuance of which the deed purports to have been executed, to have been illegal and void, their object being to set up a contention that, by reason of a clause in the statute, however illegal and void the sale may have been a deed so executed had the effect of making the void sale perfectly good and free from objection.

If the statute in question could have such an effect the court below were well justified in characterising such legislation as extraordinary in the extreme, and without parallel in any country in which legislation is conducted upon the principles of justice as understood in legislatures deriving their authority from the British Constitution, and it is not surprising that the court refused to receive in evidence a deed so executed *pendente lite*, and after the sale, the validity of which was the material question in issue, had been pronounced to be invalid.

The case accordingly was tried again upon precisely the same issues as had been tried before, and upon precisely the same evidence, from which latter circumstance it may justly be concluded that the defects in the sale which had been pointed out could not be removed, and judgment accordingly, as before, was rendered in favor of the plaintiffs, from which this appeal is taken.

In view of what appears to me to be the very

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extraordinary construction of two of the clauses of the statute insisted upon by the learned counsel for the defendants in his argument before us, I propose now to consider the act not in the light alone of the two clauses in question but, regarding the whole scope and object of the act in connection with such matters as appeared in evidence as well as those which did not so appear, endeavor to ascertain whether a construction cannot be put upon the two clauses particularly relied upon by the defendants which will be more in accordance with what is just and rational than that insisted upon; for if a statute is open to two constructions, one of which accords with common sense and justice and the other is an outrage upon both, the former must be accepted and the latter rejected.

By the 4th section of the statute under consideration it is enacted that

All property real and personal within the city of Halifax not expressly exempted by law shall be subject to taxation as hereinafter provided by this act.

By the 5th section that

The city of Halifax shall have a permanent Board of Assessors consisting of a chief assessor and two assistant assessors.

By the 8th section

The Board of Assessors shall as soon as possible make a complete register for each ward of all real estate within the city, giving a description of each property sufficient to designate it, and the street or locality in which it is situated and the number thereof if any, and the names of the owner or owners if the same can be ascertained, and the same can be filed as a permanent record in the office of the Board of City Assessors but the same shall be amended and corrected from time to time as occasion requires.

There was no evidence that any such register had been provided for the purposes of an assessment of the assessable property in the city for the year 1884.

By the 10th section it was enacted that

The Board of City Assessors, as hereinafter directed, shall proceed to make an assessment upon the respective wards of the city.

By the 11th Section.

The assessment shall be rated on the owners of real property.

And it was enacted by this section that mortgagees in possession should, for the purposes of the act, be deemed to be the owners of the lands mortgaged, but that when the mortgagee of real estate is not in possession the person entitled to the equity of redemption shall be deemed the owner.

It was enacted by the 12th section that

All real estate shall be assessed at its actual value at the time of the assessment, so far as the same can be ascertained.

The manner referred to in the 10th section in which the assessments authorized by the act should be effected is provided for in the sections numbering from 35 to 42 both inclusive.

It was by the 35th section enacted that

The Board of City Assessors, before proceeding to the assessment of the respective wards, shall be provided by the city with a sufficient number of blanks to form valuation books, ruled in four columns, headed as in the act is provided.

By the 36th section,

The Board of Assessors shall enter the name of each person to be assessed with a description of the property on the first or left hand column—the value of real estate in the next column—of the personal property in the third—and the sum total on which the assessment is to be levied in the last column opposite to each name.

By the 37th section.

As soon as the whole amount of real and personal property on which any person is to be assessed within any ward is determined, the chief assessor shall serve, or cause to be served, a notice of such valuation upon the person assessed, or his agent, by delivering the same personally, or by leaving it on the property so assessed, or by mailing the notice in the form prescribed in the act, through the post office, duly registered.

The prescribed notice contains a copy of the form filled in as prescribed in the 35th section with the following added :

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I hereby give you notice that the Board of City Assessors, to the best of their judgment, have made the above valuation of your real and personal estate within Ward No. ———, of the City of Halifax, on which assessment for the year 18—, is to be levied. If you wish to object thereto, you are hereby notified to furnish me, at my office, in the City Court House, within fourteen days from this date, with a written statement, under oath, according to the form herewith served upon you.

To Mr. ———,

———————,
Chief Assessor.

Dated at Halifax, day of 188

The 38th section provided a form of a statement to be made under oath by any person served with one of the above notices objecting to the valuation made on him

By the 39th section it is enacted that

The Board of City Assessors shall complete the valuation annually within one hundred and twenty days from the date of commencement, and having duly delivered the notices of valuation above directed, and the 14 days allowed for the affidavits having expired, shall then proceed without delay to make up one general book of assessment for the city, in which there shall be distinctly shown the amount of the rate upon each individual, firm, estate, or company, and the assessment book being so made up and signed by the Board of City Assessors shall be handed to the City Collector of rates and taxes.

By the 40th section:

The members of the Board of City Assessors, or any two of them shall, after they have completed the assessment, each subscribe and take an oath.

In the form set out in the section verifying the list containing the assessment, and declaring that

The real and personal estate contained in said list and assessed upon each individual in said list, is a full and accurate assessment upon all property of each individual liable to taxation, at its full and fair cash value, according to our best knowledge and belief.

Then the 41st and 42nd sections provided a court of appeals, whose decisions should be final, authorized to

Hear all objections of ratepayers who shall have duly appealed, to the valuations, rates or assessments which have been made upon such

ratepayers and their properties, and such court shall finally determine and decide the rates and assessments to be paid, by each person who appears before the court ; and the decision of the court shall be final.

Provision is also made in other sections, not necessary to be set forth, for enabling the court of appeals to correct errors, whether of omission or commission, or purely clerical errors, made by the board of City assessors in making up the assessment or valuation book.

Now, from the above sections it is, I think, very apparent that the object of the legislature in enacting them was to prescribe the manner in which alone a legal assessment, binding upon the owners of real property, and upon such their property, should be made, and that the intention of the legislature was, that a legal assessment of real property could only be effected by assessing the owners of realty in respect of such realty owned by them, and that no person or his real property could be held to be assessed within the meaning of the act, or chargeable with any amount by way of tax or rate in any year unless the owner's name should be inserted in the assessment or valuation book made as prescribed by the act for that year, set opposite to the property in respect of which such owner is assessed, sufficiently described so as to designate it; nor unless notice of such assessment should be served upon the person so assessed in the manner prescribed in the act.

By the 64th section it is enacted that

> The lien mentioned in this act on all real and personal property shall attach and operate on the same from the date of the oath subscribed on the completion of the assessment for the city as hereinbefore provided.

That is in the 40th section; the lien here referred to is that mentioned in the 13th section, which enacts that

> The rates and taxes levied on said assessment on real estate shall be a special lien on said real estate, &c.

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Now the words, "said assessment on real estate," in this section, can only refer to the only assessment which was authorized by the act, namely, the assessment rated on the owners of real estate as provided for in the 11th section. From these sections taken together it clearly, I think, appears that there is no lien created by the act upon any real estate not legally assessed as directed in the act, and entered in the assessment or valuation book, verified as required by the 40th section. There is no lien declared except upon real estate assessed to the owner thereof; there is no other assessment recognized by the act; so that in order to establish a lien upon any particular piece of land for a certain amount as for rates and taxes in a particular year, it is essentially necessary to prove that the land upon which it is sought to attach a lien for the amount was legally assessed as directed by the act.

Then by the 28th section it was enacted that

> No error, informality or irregularity, on the part of the City Council, the Board of City Assessors, or other civic officers, has affected, or shall affect, or prejudice the validity of any general assessment made, or hereafter to be made and levied in such city; and no individual rate or assessment has been, or shall be, prejudiced or affected by any error or irregularity which does not affect the amount of such rate. The invalidity, illegality or irregularity of any individual rate or assessment has not extended to and shall not extend or affect the general assessment, or any other individual rate or assessment.

The first part of this section seems to be for the purpose of providing (whether it was necessary or not we need not enquire,) that no error, informality or irregularity on the part of the City Council, as for example their neglecting to prepare and pass the estimates for the year by the 31st December in each year, as directed in the 9th section, or any mistake or informality in the valuation blanks directed to be furnished by the 33rd section; nor any error, informality or irregularity on the part of the Board of City Assess-

ors, as for example, in relation to the register to be made by them as directed in the 8th section; or any error, informality or irregularity as to the times when, or the manner in which, the matters directed by 39th and 56th sections to be done should be done, or as to the time and manner of making the assessments—of giving the notices required, or the like, should have the effect of invalidating the general assessment in any year. Then the second part of this section seems to have been inserted with the object of providing against any individual assessed under the act being able to defeat the assessment made upon him and his property, by reason of any error or irregularity in such assessment, not affecting the amount of the rate assessed upon him; the 42nd section seems to be supplemental to this second part of the 28th section for it prescribes how and before what court, namely, the court of appeal on assessments, all objections of persons assessed to the amount of the rate assessed upon them respectively shall be made and finally disposed of. It is only in the court of appeal on assessments that an objection as to the amount assessed can be taken; and the only person who can take such objection is the person assessed; so that it seems clear that this second part of the 28th section refers to such an objection. The section clearly does not profess to say that an assessment can not be avoided as illegal and invalid for the last clause of the section provides, rather unnecessarily it would seem, that neither the illegality, invalidity or irregularity of an individual assessment (clearly implying that an individual assessment may be illegal and invalid apart from any objection as to irregularity) shall extend to or affect the general assessment or any other individual rate or assessment. The section does not affect to restrict the rights of property vested in

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any person not assessed at all or who has not been legally assessed.

Upon the valuation book being completed and verified and handed to the city collector as provided in the 39th section, it is enacted by the 57th section that the collector, before any property assessed shall be liable to be sold for the purpose of realizing thereby any rates assessed thereon, shall cause each person rated to be served with a notice made out by the Board of Assessors as directed in the 56th section in the following form.

You are hereby notified that you are rated and assessed for the year 18— to pay the sum of ——— dollars and —— cents for city, county school and poor rates. Unless the amount be paid within thirty days from the 1st day of May next, proceedings will be taken to enforce payment, together with all charges and costs of collection.

To ——— A ——— B ———

Chief Assessor.

Then by the 65th it is enacted that

All rates and taxes shall become due the 31st day of May in each year. It shall be the duty of the City Collector immediately thereafter to take proceedings to recover the amounts due for city, county school rates and poll tax, and to enforce the payment thereof either by the issue of warrants of distress or by action at law, or both (the action to be in the name of the city as in case of debt), the City Collector's certificate in writing shall in all cases be presumptive evidence of the rate being due and unpaid, and shall be sufficient to entitle the city to a judgment without further proofs unless a good and just defence can be made thereto.

From this section it would seem to have been the intention of the act that the action directed in this section to be brought against the person assessed should be brought and should fail to realize the amount of the rates assessed upon such person before ever the real estate assessed therefor should be liable to be sold. In the present case no such action could have been brought, but that was because there was no valid assessment—no person assessed could have been sued;

the particular lots in question, if ever entered upon the assessment or valuation book at all, not having been assessed to any person, but erroneously entered, by what description does not clearly appear but would seem to have been simply "property situate on the Cobourg road," set opposite the words "estate of William Holland," the said William Holland being dead. But it is apparent from this section that no such injustice was contemplated as that to an action brought under the section the defendant should not be permitted to show, either

1. That the certificate of the city collector was untrue, for that the defendant had, in point of fact, paid to him the amount of rates sued for and held his receipt therefor; or,

2. That the property assessed to the defendant belonged, not to the defendant but to another person not assessed for it; or,

3. That the land assessed to the defendant was, in reality, land exempt from taxation. If a defendant sued in an action brought under the above section should obtain judgment therein for any of the above reasons, it surely could not be contended upon any principle of justice, and could not be held by any court that the land for which such defendant had been so assessed could become liable to be sold under the provisions of the statute, and could be legally sold for the same rates and taxes, so as to transfer the estate absolutely to a purchaser by the city collector, either intentionally or by mistake, signing under the 94th section, and procuring to be signed by the mayor of the city, with the city seal attached, statements in duplicate of lands which the city collector declared to be liable under the provisions of the act to be sold, which statements should contain therein the lands so assessed to the defendant.

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Yet the contention of the learned counsel for the defendants is, that a sale in such case and a deed executed in pursuance thereof would pass absolutely to the purchaser named in the deed the fee simple estate in such land.

We come, therefore, to the considerations of sections 92, 93, 94 and 95 of the act to which, in the interest of the defendants, a construction is pressed upon us which is utterly subversive of every principle of justice.

The 92nd section enacts that

> The City Collector of Rates and taxes shall, on or before the 31st day of December, in each year, furnish to the City Board of Assessors a list and description, sufficient to identify the same, of all the lands in the City of Halifax in respect of which any taxes have been due and unpaid since the first day of June in the year preceding with the amount of taxes payable in respect of each, which list shall be headed "List of lands in the City of Halifax liable to be sold for arrears of taxes for the year 188—.
>
> 93. It shall be the duty of the City Board of Assessors carefully to examine said list and ascertain if the lands therein mentioned are properly described, and they shall notify the occupants of said lands, if any, and the owners thereof, if known, upon their respective assessment notice for the current year, that the land is liable to be sold for arrears of taxes, and said Board of Assessors shall, before the 31st day of May, in each year, return said list, or a corrected copy thereof in case any error is discovered therein, to the City Collector, signed by the City Assessors or any two of them, and said list shall be filed in the office of the City Collector for public use.

The provisions of this section do not appear to have been complied with.

John Holland, who, as owner of the equity of redemption in the lots 5, 6 and 7 in the registered plan of 1870, mentioned in the mortgage to the plaintiffs, was the person liable to be assessed, was not assessed therefor. In the spring of 1886 John Holland was confined as a patient in an insane asylum; his wife did not live upon the mortgaged premises, but a family named Murphy did. A witness named Laidlaw

was called, who swore that in May, 1886, he served upon John Holland's wife, at her residence, which, as already said, was not on the premises in question, and while John Holland was so, as aforesaid, confined in the insane asylum, a notice of which he kept no copy or original, so that its precise contents could not be determined. This notice, he said, however, was to the effect that certain property mentioned therein was liable to be sold for the taxes of 1884. The land was not described in the notice otherwise than, as I understand his evidence, as "property situate on the Cobourg road," and he would not undertake to say that it was not entered as belonging to "the estate of William Holland." There was also property on Argyle street mentioned in the notice. This notice, whatever may have been its precise contents, so served on Mrs. Holland was the only attempt made, so far as appeared, to comply with the provisions of the 93rd section. Neither Murphy, who lived upon the premises, nor the plaintiffs, who, although not "owners" for the purposes of assessment, were the registered owners of the legal estate in fee subject to redemption and deeply interested in knowing whether the land was liable to be sold for taxes, had any notice whatever served on them. Whatever were the contents of the notice, there was no sufficient evidence that it related to the lots 5, 6 and 7, mortgaged to the plaintiffs. It is obvious, therefore, that there was no sufficient legal evidence of the provisions of this 93rd section having been complied with.

94th section:

In case the taxes upon any of the lands mentioned in the said list have not been paid to the city collector with interest from the time they were due before the 1st day of September following the delivery of the said list by the board of City Assessors to the city collector of rates and taxes the city collector shall submit to the mayor a statement in duplicate of all the lands liable under the provisions of this act to

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be sold for taxes which shall contain a definite description of each lot with the amount of arrears of taxes set opposite the same, and the Mayor shall authenticate each of said statements by affixing thereunto the seal of the Corporation and his signature, and one of said statements shall be deposited with the City Clerk, and the other shall be returned to the collector with a warrant thereto annexed under the hand of the mayor and the seal of the city.

95. Any statements or lists so signed by the mayor and signed with the seal of the city, or a copy thereof, or of any portion thereof, certified under the hand of the city clerk, shall in any suit or other proceeding relating to the assessment on the real estate therein mentioned, or at which it may be questioned, be received in any court in this Province as conclusive evidence of the legality of the assessment, and that the same is due and unpaid; and that each lot of land in said statement mentioned is legally liable for the amount of taxes set opposite the same, with interest and expenses, and that said amount forms a lien on said land.

Sections to which is attributed a construction so unjust and arbitrary as that insisted upon by the defendants, the effect of which is to work a forfeiture of the title of persons seized of real estate as for default in the payment of taxes which may never have been imposed at all according to the provisions of law in that behalf, or of the imposition of which, if attempted to be imposed, they may never have had any of the notices required by law to be given, should be criticised with the utmost possible acumen, so as to prevent such a construction being given to them, and to find a construction more conformable to justice. With this view it is important to state precisely what is the construction insisted upon by the defendants and its necessary effect, namely, that if the city collector, as directed in the 94th section, should prepare a statement in duplicate of lands as liable under the provisions of law to be sold for taxes, and in such statements or lists should, through ignorance, negligence, or the merest accident and mistake insert therein — 1st a lot of land which by the 18th section of the act was exempt from taxation but was by error assessed to some person as

owner who knowing that he did not own the land did not trouble himself to take any notice of the error, or 2nd a lot of land which, in truth, belonged to A., but was assessed to B. who took no notice of assessment papers served upon him, or, 3rd, a lot of land not on the assessment books at all as assessed to any one but which the city collector by mistake inserted in his statements instead of a lot which was assessed and was on the assessment book; and if the collector should submit these erroneous statements to the mayor and if he should affix his signature and the seal of the city thereto without taking any steps to satisfy himself, by reference to the assessment book as verified by the board of city assessors, or otherwise, of the correctness of the statements submitted to him by the collector, such erroneous statements when so signed and sealed with the city seal by the mayor must nevertheless, under the provisions of the 95th section, be received and taken as containing absolute verity and as conclusive evidence that all the lots of land mentioned therein have been duly assessed under the provisions of the law to the owners thereof, and are liable to be sold for taxes duly rated thereon, and that a sale of them by the city collector under a warrant signed by the mayor, and to which the seal of the city is affixed, will be a good and valid sale of the fee simple estate therein, although the owner of the piece of land so sold may never have been assessed therefor and may have been perfectly ignorant of the sale so purported to be effected of his land; in short, that such statements of the city collector, when so signed and sealed by the mayor, must be accepted as conclusive evidence of the truth of a lie.

Now, what is to be taken as meant in the 94th section by the mayor authenticating the statements

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prepared by the city collector, reasonably, I think should be that he shall, by comparison of the lists submitted to him with the authentic list prepared by the board of city assessors, and mentioned in the 93rd section, and with the original assessment or valuation book for the year (the taxes of which are alleged to be in default) verified as is provided in the 40th section, satisfy himself that the lands mentioned in the lists submitted by the city collector were duly assessed according to the provisions of the law before he should set his name and the seal of the city to documents of such serious import as to be conclusive evidence that the lands therein mentioned were all duly assessed, and were liable to be sold for arrears of taxes, and that the owners were liable to be divested of their estates therein. The intention of the legislature could scarcely, I think, have been that the mayor should, in the formal manner prescribed, simply certify that the lists to which the mayor should set the seal of the city and his own signature were the same lists which the city collector had submitted to him; and which is substantially the utmost professed to be done in the present case although, in other respects, not done in accordance with the requirements of the 94th section, as the courts below upon both trials have expressly found; what the legislature intended was, as it appears to me, that the mayor should verify the statements submitted by the collector and authenticate them as true, a thing which has not been done or attempted to be done in the present case; moreover the intention of the legislature, I think, must have been that the statements required by the 94th section should be verified by the mayor before ever a warrant for sale of the lands mentioned therein should be executed, for the warrant, which in order to effect a sale of the lands therein mentioned he is required to execute

under his hand and the seal of the city, contains an averment that by a rate of assessment made in conformity with law the lots of land and premises mentioned in the statement annexed to the warrant, which is one of the duplicate statements required by the 94th section to be made, have become liable to pay the several sums set opposite thereto, &c.

Before signing and executing under the seal of the city a warrant containing this averment it is but reasonable to infer that he should first have satisfied himself of its truth. Nothing of the kind appears to have been done in the present case; all that appears to have been done was, that a warrant for the sale of lands mentioned in a list annexed thereto was, upon the 9th day of November, 1886, presented to the mayor for his signature; the warrant with the list attached thereto contained about 120 pages; on the first page was the warrant; the list had a heading upon a page between the warrant and the first page of the list, all being got up in book shape as follows:—

List of lands in the City of Halifax liable to be sold for arrears of taxes for the year 1884, under provisions of the Halifax City Assessment Act, 1883.

On the last page of the book was written a certificate prepared for signature by the mayor, to the effect that

The foregoing statement of all the lands liable to be sold for taxes in respect of such lands for the year commencing on the first day of May, A.D. 1884, pursuant to the provisions of the Halifax Assessment Act of 1883, and the amendments thereto, was, on the ninth day of November, 1886, submitted to me by William C. Hamilton, City Collector of the City of Halifax, and I hereby, in pursuance of section 94 of said Act, authenticate the said statement and a duplicate thereof by affixing thereunto the seal of the City of Halifax and my signature, the day and year first aforesaid.

The warrant and the list with this form of certificate prepared for execution by the mayor were all presented to him together for his signature on the 9th day of

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November, 1886. Whether the seal of the city was attached to the warrant and certificate before they were presented to the mayor for his signature, or after they had been signed by him, did not appear, but the mayor did not appear to have had anything to do with the affixing of the seal, either to the warrant or the certificate on the list attached thereto, or even to have been present when it was so affixed.

A clerk in the collector's office where the warrant and the list and certificate would seem to have been prepared says that he was present and saw the city clerk affix the city seal to both the warrant and the list attached thereto at the same time, and the mayor appears to have set his signature to both warrant and certificate without any verification of the correctness of the list. Although the certificate on the list attached to the warrant purports to represent that a duplicate of the list was, at the same time, and in the same manner, authenticated, the court upon both trials found that in point of fact no duplicate ever was authenticated, even in the manner that the list attached to the warrant purports to have been. However, I am of opinion that even if certificates had been signed in duplicate in the manner that the one attached to the warrant appears to have been, that would not have been the authentication contemplated by the legislature as competent to make the statements conclusive evidence of the liability of persons to be divested of their estates. The signing of his name by the mayor to the certificates in such a very perfunctory manner cannot, I think, have been what the legislature had in contemplation as the authentication of documents intended to have such an incontrovertible effect as purports to be given by the 95th section to the documents, which, as appears by the 94th section, the legislature had in view.

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However, the main point still remains, and, to my mind, it is conclusive against the 95th section having any application in the present case. The whole scope and object of the act is solely to make persons assessed under the provisions of the act, and the lands in respect of which they, as the owners thereof, are so assessed, liable for the amounts for which such persons should be respectively assessed on the valuation book in each year, and subject to the provisions of the act as to the realization of such amounts.

The act subjects the lands mentioned in such book, if they be the lands of the persons assessed therefor as owners and the lands be sufficiently designated in the book, to a lien, to operate from the date of the verification of the book as provided in the 40th section, for the amount assessed upon such owners in respect of such lands, and makes such lands of persons so assessed liable to be sold to realize such amounts if the amounts should not be otherwise paid. It is only with such persons so assessed that the act professes to deal at all. It does not either in the 95th section nor in any other section profess to prejudice or affect any person not assessed under the provisions of the act, or to divest of their estates any such person. The provisions of the law as to the mode of assessing the persons to be charged, and as to the mode of fixing them with a liability to be divested of their estates for default in payment of the amounts assessed upon them, are so very precise that the legislature having made such careful provision that the persons assessed should have abundant notice of the assessment made upon them, no doubt thought that provision having been made that the persons assessed, in order to be assessed under the provisions of the law, should receive the notice provided in the 36th and 37th sections, and after the opportunity thus given of appealing to the court

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of appeal under the 42nd section, and provision having been made also for their receiving the notices mentioned in the 57th and 93rd sections, if the parties so assessed should still remain in default, it was not unreasonable to provide that statements such as are required to be prepared by the 94th section should be sufficient evidence of the legality of the assessment as against the assessed person in any suit relating to the assessment on his real estate, or at which such assessment should be questioned. The assessed person was the only person competent to call in question the assessment in any suit or other proceeding. By construing the 95th section (consistently with all the other clauses of the act) as having application only to persons assessed under the provisions of the act, and to the properties in respect of which they are so assessed, we can give a construction to the section consistent with the rest of the act, and more consonant with justice and common sense than the construction insisted upon by the defendants, which is to the effect that the 95th section makes the statements prepared by the city collector, when authenticated in the manner required by the 94th section, however erroneous they may in point of fact be, conclusive evidence of the liability of a person who is an utter stranger to the assessment to be divested of his estate at the caprice of the city collector and mayor, or through their carelessness or misconduct, by a sale by them as for arrears of taxes which never had been assessed on such person. Before, then, the 95th section can be appealed to in the case of assertion of title to land made by a person claiming under a sale by civic authorities as for arrears of taxes, if it can be at all appealed to in such a case, it must appear that the person whose lands are claimed to have been sold is not a stranger to the assessment for default in payment of which the lands were sold, but on the

contrary is the person who was assessed for the taxes alleged to have been in arrear, and to realize which the sale took place, or a person claiming title under the person so assessed.

In the *Caledonian Railway Co.* v. *North British Railway Co.* (1), Lord Blackburn, as to the construction of statutes says:

> The matter turns upon the construction of an Act of Parliament, which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing we are to consider what the facts were in respect of which it was framed, and the object as appearing from the instrument, and taking all these together we are to see what is the intention appearing from the language when used with reference to such facts, and with such an object.

Applying this test to the act under consideration it is impossible to hold that anything in the act authorizes or confirms the sale of the land of any person who had not been duly assessed under the provisions of the act in respect of such land. This is a point as to which evidence can never be excluded. In the present case the evidence of the defendants shows that the land in question never had been so assessed.

But further it is only

> In a suit or other proceeding relating to the assessment on the real estate mentioned in the statements prepared by the city collector under the 94th section, or at which it may be questioned

that the collector's statements are rendered admissible as evidence. Now the word "assessment" as used in the 95th section plainly, as it appears to me, is used to represent the amount of taxes rated to the person assessed; the context seems to show this—the section provides that the statements shall be received as conclusive evidence of the legality of the "assessment" and "that the same is due and unpaid." Now the amount or rate charged to the person who is assessed is the only thing which can be said to be "due and

(1) 6 App. Cas. at p. 126.

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unpaid" and this the section declares to be the same thing as the "assessment" as the latter word is used in the section. This word is used in a precisely similar sense in other sections of the act. Thus in the 36th section "the sum total on which the assessment is to be levied" shall be inserted in the last column of the valuation forms. In the 42nd section it is used as identical with the word "rate" where it is provided that the court of appeal shall hear all objections of ratepayers to the valuations, rates or assessments which have been made on such ratepayers; and shall have power to reduce or increase the valuations, and to alter the rates and assessments of any ratepayer—and finally determine the rates and assessments to be paid by each person—so, likewise, in the 59th section where it is provided that any such assessment or taxes may be recovered as a debt in an action at suit of the city—so, likewise in the 68th section "in case an individual from whom assessment or taxes are due to the city" &c., and, again in the 69th section, "the assessments annually levied thereon shall"—and again "and taxes and assessment due on such estates, if not duly paid, may be sued for as a debt in the name of the city," &c.

Now when a purchaser at a tax sale brings an action to recover possession of the lands purported to be sold to him against the person who is seized of an estate in fee simple in the land unless divested thereof by the tax sale, it is necessary for him to prove his title in order to succeed; the defendant in such an action has nothing to do but rest upon his title until it is displaced by legal evidence of the title asserted by the plaintiff—the defendant simply rests upon his title and questions nothing. He simply leaves the plaintiff to proof of title in himself. Such an action cannot, I think, be said to be within the meaning of the 95th section one

"relating to the assessment on the real estate therein mentioned or at which it may be questioned." The 95th section, therefore, in my opinion, has no application to such an action. A plaintiff's failure to prove what he has undertaken to prove, and it is necessary for him to prove in order to establish his title, namely, a valid assessment made under the provisions of law, because of there never having been any such, is a very different thing from the questioning, within the meaning of the 95th section, the assessment which has been made "in a suit, or other proceeding, relating to the assessment on the lands therein mentioned, or at which it may be questioned."

So, likewise, if a person seized in fee bring an action of trespass against a defendant for entering upon plaintiff's land and the defendant justifies as the real owner in fee of the land in question and, at the trial, proceeds to establish his defence under a sale made to him as for arrears of taxes assessed upon the plaintiff in respect of the land, the plaintiff has nothing to do—nothing to prove—nothing to question. He has simply to rest upon his title, which entitles him to judgment unless the defendant prove the title which he has undertaken to prove, which he can only do by showing that the plaintiff was assessed according to the provisions of the law for the year in respect of which the taxes for which the land was sold were claimed. Such an action cannot, in my opinion, be said to be one relating to the assessment on the real estate, for trespass on which the action is brought or at which it is questioned, and the 95th section, therefore, has no application to such an action; and so for the reasons already given, as well as for that relied upon in the courts below, namely, that the requirements of the 94th section as to authenticating the collector's statements were not complied with, I am of opinion that

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the defendants cannot appeal to the 95th section as removing the defects apparent in the title which they have pleaded and undertaken to prove. And as the defendants have not only failed to prove that John Holland, the plaintiff's mortgagor of the lands in question, who was the only person assessable under the provisions of the law in that behalf for the year 1884, was ever so assessed for that year, but on the contrary have proved, by the list annexed to the warrant to sell under which the defendants claim, that he was not, the sale under which Meagher, and the defendants O'Brien and Brooks as his devisees, claim was absolutely illegal, null, and void; the appeal must, therefore be dismissed and the judgment of the Chief Justice of the Supreme Court of Nova Scotia, made at the last trial, affirmed in every particular. As John Holland, the mortgagor, was not assessed in the year 1884, in respect of the lands, no sum of money as for rates of that year could be a lien upon his lands.

As to the 110th section I concur with the Chief Justice of the Supreme Court of Nova Scotia that it only refers to acts done subsequently to the issuing of the warrants towards effecting the sale under it, and that it has not the extraordinary effect contended for by the defendants, namely, to make good a sale absolutely null and void by reason of the non-fulfilment of conditions precedent to the coming into existence of any right to issue a warrant to sell the particular lands in question. It is only to a deed executed in pursuance of a valid sale that the section can be regarded as referring.

PATTERSON J.—Cogswell, the plaintiff, who is respondent in this appeal, brings this action for the foreclosure of a mortgage made to him and another, on the 15th of August, 1882, by one John Holland, upon three

building lots in the City of Halifax, numbered 5, 6 and 7, in a plan filed in the registry office for the city, to secure the sum of $3,600. The action was brought against John Holland the mortgagor, against John Meagher who had bought the lands at a sale for taxes in December, 1886, and against William C. Hamilton the collector of taxes for Halifax. Meagher died, and his executors, O'Brien and Brooks, were made defendants in his place. Hamilton also died, and Theakstone, his successor in the office of collector, was substituted on the record for him.

The plaintiff had judgment in the court below, and this appeal is by O'Brien and Brooks, and by Theakston.

The contest relates to the validity and the effect of the sale for taxes.

The Assessment Act under which the sale took place was passed by the legislature of Nova Scotia on the 19th of April, 1883. It is chapter 28 of the acts of that year. Some amendments to it, made by an act (ch. 60) passed on the 11th of May, 1886, will have to be noticed.

The action was commenced on the 6th of April, 1887.

The plaintiff contends that the tax sale is not operative by reason of failure to comply with certain requirements of the statute, and he takes the further ground that, inasmuch as his charge upon the land was created before the assessment, and in fact before the passing of the act, he has a title superior to that of the purchaser; in other words, that the equity of redemption only, and not the corpus of the land, passed by the sale.

Those points, together with others, will be noticed as we proceed with an examination of the history of what was done in connection with some of the provisions of the statute.

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Section 4 contains the general provision that all property, real and personal, within the city of Halifax, not expressly exempted by law, shall be subject to taxation as provided by the act.

By section 11 the assessment shall be rated on the owners of real and personal property by an equal dollar rate upon the value; and amongst those to be deemed owners are persons entitled to the equity of redemption of mortgaged lands when the mortgagee is not in possession. If the mortgagee is in possession he is deemed to be the owner.

Then section 13 makes the rates and taxes levied on an assessment of real estate a special lien on the real estate having preference over any claims, lien, privileges or incumbrances of any party except the crown.

It is apparent from these provisions that the land itself and not any particular estate or interest in it is what is taxed, and that the plaintiff must rely upon his objections to the proceedings under the statute and not upon the priority in date of his mortgage to the assessment, or even upon the fact that the mortgage was made before the assessment act was passed.

That was the view acted upon by the Supreme Court of Nova Scotia, and although it is now formally questioned the objections urged against it are not supported by any arguments that require further discussion.

The taxes for which the land was sold amounted to no more than $22, and with interest and costs added the amount was still under $50.

The property is variously estimated by witnesses at values running from under $1,000 to upwards of $2,000.

It is plain that the purchase price of $290 was very much below the real value, though probably not more so than in numberless cases of sales in the United States and in Ontario under similar statutes.

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The disproportion so frequently, and perhaps as a rule, found between the value of land sold for taxes and the price brought at the sale is apt to shock one's sense of justice, yet I cannot say that in the present case I should pity the plaintiff on that score.

He knew all about the sale. He had a notice given warning purchasers that he objected, not to the right to sell for the taxes, but to the power under the statute to sell more than the equity of redemption. The act gave a year after the sale to redeem the land but the plaintiff began his action within four months, preferring to litigate the equity of redemption question, which was all he seems at that time to have thought of, to paying $50 or thereabouts for taxes and charges which, as he was then advised, the city was entitled to receive from some one.

During the progress of the action the plaintiff obtained leave to attack the validity of the tax sale in addition to advancing his untenable claim to a superior title by virtue of his mortgage over the statutable lien given to the city for the taxes, and the question for determination is whether his attack, which has been upheld in the court below, ought to succeed.

Great reliance is placed by the defendants on sections 95 and 110 of the statute, which seem to be intended to make it difficult, if not impossible, to question sales for taxes on the ground of failure to follow the statutory directions concerning assessments, &c.

The sections preceding section 95 prescribe, amongst other things, what the officers who have to make the assessments and collect the taxes are to do. One duty of the collector is (by section 92) to furnish on or before the 31st December in each year, to the City Board of Assessors, a list of all lands in the city in respect of which taxes have been due and unpaid since the first of June in the preceding year, with certain

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particulars; then the board of assessors, after examining the list and giving certain notices, are (by section 93), on or before the 31st of May, to return the list or a corrected copy, signed by them, to the collector, and the list is to be filed in the collector's office for public use. If the taxes are not paid before the first of September the collector is (by section 94) to submit to the mayor a statement in duplicate of all the lands liable under the provisions of the act to be sold for taxes. The statement is to contain a definite description of each lot, with the amount of taxes set opposite the same, "and the mayor shall authenticate each of said statements by affixing thereunto the seal of the corporation and his signature, and one of said statements shall be deposited with the city clerk, and the other shall be returned to the collector, with a warrant thereto annexed under the hand of the mayor and the seal of the city in following form:"

Then comes section 95, which reads thus:

95.—Any statements or lists so signed by the mayor and sealed with the seal of the city, or a copy thereof, or of any portion thereof, certified under the hand of the city clerk, shall in any suit or other proceeding relating to the assessment on the real estate therein mentioned, or at which it may be questioned, be received in any court in this Province as [conclusive] evidence of the legality of the assessment, and that the same is due and unpaid, and that each lot of land in said statement mentioned is legally liable for the amount of taxes set opposite the same, with interest and expenses, and that said amount forms a lien on said land.

The word "conclusive" was introduced as an amendment by the act of 1886.

This section makes something, whatever it is, conclusive evidence of certain things which are essential to the liability of the land to be sold for taxes, but something further remains to be done before the land can be sold. Those further proceedings, together with the mode of conducting the sale, the right to redeem

within a year, and the giving of a deed of the land in case it is not redeemed, are the subjects of various sections on to section 109 and including or partly including section 93. Then section 110 provides as follows:

110.—The deed shall be under the seal of the city in the form or to the same effect as in schedule A to this act, and shall particularly and fully describe the land conveyed. Said deed shall be [conclusive] evidence that all the provisions of this act with reference to the sale of the land therein described have been fully complied with, and every act and thing necessary for the legal perfecting of such sale have been duly performed, and shall have the effect of vesting said land in the grantee or purchaser, his heirs or assigns, in fee simple, free and discharged from all incumbrances whatsoever, whether registered or not; except in the case of land in which the fee is in the city of Halifax, when the deed shall give the purchaser the same rights in respect of the land as the original lessee.

The word "conclusive" in this section, as in section 95, comes from the amending act of 1886. It takes the place of "presumptive" which was the original expression.

The legislation goes a long way, in cases that come within it, towards making tax sales in Halifax unimpeachable. I shall say nothing by way of criticism of the policy indicated, which may doubtless be supported as well as attacked by forcible arguments. But far as the legislation goes, it does not go so far as the defendants ask us to carry its effect. Section 110 is plainly the complement of section 95—the one saying how the liability of the land to the lien for taxes may be proved, but stopping short of the sale itself; the other taking up the thread and assuming to provide a short and easy method of proving that the sale was properly conducted, or rather of dispensing with proof of the steps by which the sale was effected.

The language of the first half of the section makes this plain, and affords one clear ground of distinction between its provisions and those of the Encumbered

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Estates Act on which the case of *Rooke* v. *Errington* (1) was decided.

The second part of the section which declares the effect of the deed as a conveyance in fee is explanatory of the point, already touched upon, that the purchaser acquires the land itself and not any estate in it less than a fee simple, unless the land is the property of the city.

There are two particulars in which the defendants might hope to be aided by section 110 if that section could properly enter into the discussion. The plaintiff objects to the absence of a notice required to be given by section 93, informing the tax payer that his land is liable to be sold, and he also contends that more land was sold than was necessary for the payment of the taxes. These are two of the steps connected with the sale which are to be taken as conclusively proved by the deed, under section 110. The other objections are touched by section 95 and not by section 110.

But the deed was not in existence until a year and a half after this action was in progress. It was made on the 13th of October, 1888; the earliest date at which the purchaser could have demanded the deed, or the mayor and collector have made it, was the 21st of December, 1887, a year after the sale, and that was three weeks after the first trial of the action. Under these circumstances the decision of the court below that the deed was not properly receivable in this action as evidence against the plaintiff must be held to be correct, and the validity of the sale must be tested without respect to section 110.

The proof offered by the defendants under section 95 consisted of one of the statements submitted, in pursuance of section 94, by the city collector to the

(1) 7 H. L. Cas. 617.

mayor. It was authenticated by the mayor by affixing thereunto the seal of the corporation and his signature, and had annexed to it a warrant as directed by section 94, being the warrant under which the land had been sold. The section requires that the statement shall be in duplicate; that the mayor shall authenticate each of the statements by annexing thereto the seal of the corporation and his signature; and that one of the statements shall be deposited with the city clerk, and the other returned to the collector with the warrant annexed. The latter, which was the one put in evidence, followed the directions of the section both in form and substance, but it was not proved that a duplicate had been deposited with the city clerk authenticated as required. I do not understand that the existence of a regular and sufficient duplicate was disproved, I understand merely that, as stated by the learned Chief Justice in his judgment after the trial, "no evidence was adduced on the trial that any such statement was so authenticated in duplicate by the mayor, nor was there any evidence that a copy of the list or statement annexed to the warrant to the collector was ever filed in the office of the city clerk."

I am of opinion that sufficient proof was given at the trial to give full operation to section 95. It is true that the language being put in the plural form—"any statements or lists so signed"—may suggest the idea that more than one statement or list is intended to be proved, and the expression "so signed" may easily be understood to mean signed in duplicate; but to hold that the production of one of the duplicates is insufficient without formal proof of the other, when nothing appears to create any doubt of the due making, authentication, and deposit in the city clerk's office of the other, is, in my judgment, to apply to this section a strict rule of interpretation that could not be applied

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to statutes in general without occasioning embarrassment. Nor do I perceive anything in the purpose of the enactment to require us so to construe it.

The statement submitted to the mayor by the city collector under section 94 is made in duplicate in order that one part may be deposited as a record, or to be accessible for reference, in the office of the city clerk, and that the other may go to the collector with the warrant to authorize the sale of such lands as have not the taxes ultimately paid. The statement is one statement though made in duplicate. If it should appear that no duplicate was deposited with the city clerk, or that the one deposited was not properly authenticated, the question whether the omission vitiated every sale made under the warrant, or whether the requirement was not directory only, might require careful consideration; but nothing appearing to suggest any such omission I do not see why the due performance of their duty by the officials concerned should not be presumed. *Omnia presumuntur rite esse acta donec probetur in contrarium.* The city clerk was a witness at the trial. He deposed to having attached the corporate seal to the statement produced and to the warrant annexed to it, by direction of the city collector.

Another witness was a clerk of the city collector who had been present when the seal was affixed to the warrant and the annexed list. If there were any doubt about the duplicate in the city clerk's office a word from one of these witnesses would have cleared it away. But nothing was asked either of them about it, and counsel for the defendants, when he objected to certain things in connection with the warrant and list, is not reported to have made any allusion to the absence of specific proof of the duplicate. We may safely assume that the solicitors for the parties informed themselves on the subject of all the formalities essential to the

regular sale for taxes, and that the presumption of regularity with respect to the duplicate accorded with the knowledge of all parties concerned at the trial. It would, in my opinion, be proper to find as a fact, as well from the conduct of the trial as from the presumption of *omnia rite esse acta*, that the duplicate was duly made, authenticated and deposited in the office of the city clerk. At the same time I do not think it essential to the operation of section 95 to do more than prove one of the statements, or in place of it a copy of the statement or of a portion, (which must mean so much as relates to the particular land or tax in controversy), certified by the city clerk. The phrase with which the section commences: "any statements or lists so signed," I take to be equivalent to "any of the statements or lists so signed," or "any one of the statements, &c."

With great respect, therefore, for the opinions of the learned Chief Justice of the court below, and of the judges who concurred with him, I am compelled to hold that by the effect of section 95 it is conclusively established that the taxes in question were a lien on the land.

The section thus construed is, no doubt, capable of leading to some startling results, and, in supposable cases, of working injustice. This has been forcibly pointed out by my brother Gwynne. I do not enter upon a discussion of these possibilities which may or may not have been foreseen when the clause was framed in the act of 1883, and when the policy was emphatically affirmed in 1886 by the amendment which introduced the word "conclusive." I take the declaration that the statements shall be conclusive evidence of the four things: the legality of the assessment; that it is due and unpaid; that each lot of land mentioned is legally liable for the amount of taxes

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noted against it; and that the amount forms a lien on the land; to be too precise to leave room for qualification by reference to the possibly unexpected consequences which may seem calculated to produce hardship in certain situations.

It is objected that the city is not a party to the action. How does that circumstance concern the present defendants? If the sale is held to be valid, the action must be dismissed, and no question of parties can arise. If held to be invalid the plaintiff will succeed against the purchaser, though his judgment may not technically bind the city. If the city's lien has not lapsed by the three years' limitation under section 112, it may perhaps remain as a charge which has a statutory precedence over the plaintiff's mortgage, but we are not required to discuss these matters at the instance of the present defendants.

Two objections are urged against the validity of the sale, viz.: that a notice required by section 93 was not duly given, and that more land was sold than was necessary.

Section 93 makes it the duty of the City Board of Assessors to notify the occupants, if any, of lands which the collector includes in his report of 31st December as lands in respect of which any taxes have been due and unpaid since the first of June in the year preceding, and the owners thereof, if known, upon their respective assessment notices for the current year, that the land is liable to be sold for arrears of taxes.

John Holland, the mortgagor, is proved to have acquired the land by deed from the sheriff of Halifax, dated the 29th July, 1882, and he made the mortgage to the plaintiff on the 26th of September in the same year.

He lived on the land and had a tenant on part of it.

Section 2 of the Assessment Act provided that the assessment shall be rated on the owners of real and personal property, and that when the mortgagee of real estate is not in possession the person entitled to the equity of redemption shall be deemed the owner of such land.

The taxes in question are those for 1884, and the notice under section 93 was therefore to be given with the assessment notice for 1886.

At that time John Holland was in a lunatic asylum, but his family were on the land. He was, for the purposes of the statute, both owner and occupant.

The land had belonged to William Holland a brother of John. William died in 1882, before the month of July. The assessors seem to have treated the land as belonging to William's estate, and it is alleged in the pleadings of the defendants, but is not proved, that John held as trustee for the estate of William.

The title shown by the evidence is the title in fee taken by John under the sheriff's deed of July, 1882.

The land was assessed in 1884, and at least one year after that, as owned by the estate of William Holland, and in the transactions of the city officials, including the list attached to the warrant for sale, the taxes are put down as due by the estate of William Holland. John's name does not appear.

The evidence on the subject of the notice under section 93 is that of James Laidlaw, which is thus noted:

James Laidlaw, sworn:—I am one of the sub-collectors of the city in the office since 1883; in the spring of 1886 I served tax notices with notice of lien that the property charged would be sold for arrears of taxes. I know John Holland, of Halifax, a brother of William Holland, deceased. I had a notice for John Holland in the spring of 1886, which I served on his wife at his residence on Argyle Street. Served this 18th May, 1886. This is the book in which I made the memorandum of service. There was a notice for the amount of taxes

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for 1886, and also the notice of lien that the property was liable to be sold. There were two properties mentioned in the notice. This notice of sale was for the taxes for 1884.

Cross-examined—I understood John Holland was confined in the insane asylum at this time as a patient. I have no copy of the notice which I made at the time. The land was not described in the notice except where the property was situate. It stated that the property was situate at the Cobourg Road. Also the Argyle Street property. It also stated the property was liable to be sold for arrears. John Holland's name was on it. I would not undertake to say it was not Holland estate of William. My duty principally was to collect water rates. A family named Murphy was living on a part of the Holland property, Cobourg Road, 1886.

I see no escape from the conclusion that the notice under section 93 is essential to the right and power to sell lands for taxes.

The warrant issues under section 94 only for the sale of the lands mentioned in the list returned by the assessors to the collector before the last day of May, on which the taxes remain unpaid on the 1st September. It will be remembered that the duty of the Board of Assessors, under section 93, after receiving from the collector on or before the 31st December a list and description of the lands in respect of which taxes are overdue since the 1st June in the preceding year, *e.g.*, a list in December, 1885, of the unpaid taxes due at the first of June, 1884, is to ascertain if the lands are properly described on the list and to notify the occupants, if any, and the owners, if known, upon their respective assessment notices for the current year, that the land is liable to be sold for arrears of taxes, and then before the 31st of May to return the list to the collector. Thus in September, 1886, a warrant may issue to levy the taxes due on the 1st of June, 1884, after the Board of Assessors have, in May, 1886, served the notice under section 93. At least four months' time is given for the payment of the taxes after service of the notice and before the warrant can issue. The notice

is clearly a condition precedent to the right to sell, and it is particularly important to hold to the statutory prescription respecting it in a case like that before us, where the person chiefly interested receives no direct notice of the assessment of the land or its liability to be sold, but is bound by notices given to and even by acts done or omitted by his mortgagor, if the mortgagor continues in possession of the land. We must be careful, also, when adjudicating upon the extent to which a mortgagee out of possession is affected by a notice said to have been given to his mortgagor, to see exactly what is proved to have been done, adding nothing by inferences that do not necessarily arise from the facts proved.

The facts, then, to be gathered from Mr. Laidlaw's evidence are that in May, 1886, when serving John Holland's notice of assessment for that year, he served with it, on John Holland's wife, a notice that some property at the Cobourg Road, assessed against the estate of William Holland, was liable to be sold for taxes. The notice did not describe the property as it was described in the list by the collector and the assessors, where there was a detailed description. I am not prepared to say that the full description from the list must of necessity be inserted in the notice. A shorter description would, in most cases, convey to the owner all the necessary information. We may surmise that the fact conveyed was that the same property mentioned in the new assessment notice for 1886 was liable to be sold for arrears; but we have no right to speculate about it. One would think it not improbable that with a little fuller investigation of the assessment rolls, or in some other way, more precise information could have been furnished, but taking the evidence as we find it it cannot be said that the learned Chief Justice at the trial, or the court in banc, ought

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to have found as a fact that a sufficient notice to satisfy section 93 had been given.

The onus of establishing a valid sale was clearly upon the defendants. There is no presumption in its favor.

The other objection to the sale, founded on the allegation that the officer did not obey section 98 by selling only so much of the land as would have been sufficient to pay the taxes with interest and expenses, raises a question of fact which has not been pronounced upon by the court below, and which I am not disposed to find in the plaintiff's favor. He attended at the sale, either in person or by his agent, and gave a formal notice which, if paid attention to, would have deterred purchasers from bidding, even for the whole property, any substantial sum, and he gave no warning that too much land was being offered for sale.

His action was originally only in assertion of the claim put forward by his notice, that his mortgage was a prior charge to the city's lien for taxes. It is only by crediting him with having had faith in that claim that his plunging into litigation in place of paying the small sum demanded for the taxes and expenses can be excused.

On the one ground of insufficient notice under section 93 I think the appeal should be dismissed, and I do not see sufficient reason to depart from the general rule to dismiss it with costs.

Appeal dismissed with costs.

Solicitor for appellant Theakston: *James A. Sedgewick.*

Solicitor for other appellants: *P. C. C. Mooney.*

Solicitor for respondent: *Wallace MacDonald.*

ROBERT HISLOP (PLAINTIFF).....APPELLANT ; 1889

AND *Nov. 28.

THE CORPORATION OF THE TOWNSHIP OF McGILLIVRAY (DEFENDANTS)..... RESPONDENTS. 1890 *June 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipality—Duty of—Road allowance—Obligation to open—Substitution in lieu thereof—Jurisdiction of court over municipality—C. S. U. C. c. 54.—R. S. O. (1887) *c.* 184 *ss.* 524, 531.

H. was owner of, and resided on, a lot in the eighth concession of the Township of McG. and under the provisions of C.S.U.C., c. 54, an allowance was granted by the Township for a road in front of said lot. This road was, however, never opened owing to the difficulties caused by the formation of the land, and a by-law was passed authorising a new road in substitution thereof. Some years after H. brought a suit to compel the township to open the original road or, in the alternative, to provide him with access to his lot, and also to keep said road in repair and pay damages for injuries caused by the road not having been opened.

Held, affirming the judgment of the court below, that the provisions of the act, C.S.U.C., c. 54, requiring a township to maintain and keep in repair roads, etc., and prohibiting the closing or alteration of roads, only applied to roads which had been formally opened and used and not to those which a township, in its discretion, has considered it inadvisable to open.

Held also, that the courts of Ontario have no jurisdiction to compel a municipality, at the suit of a private individual, to open an original road allowance and make it fit for public travel.

APPEAL from the Court of Appeal for Ontario (1) affirming the judgment of the Queen's Bench Division (2) in favor of the township.

This suit was instituted in 1885, and in his statement of claim the plaintiff alleges, in substance, that

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

(1) 15 Ont. App. R. 687. (2) 12 O. R. 749.

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he has been for many years owner in fee of lot number eight in the sixth concession of the township of McGillivray,—that the original allowance for road in that concession was in front of his lot and that he had no access to his lot over any other public road—that defendants had stopped up said road and prevented him from having access to his lot by means thereof—that he has been excluded from such access for many years without any compensation therefor or being supplied with other means of access to his land—that defendants have not maintained said road, as was their duty—that they from time to time promised to maintain and repair it but have always neglected so to do—that they frequently promised him compensation for closing said road but he has never received the same; and he prayed

1. Compensation and damages.

2. An injunction compelling defendants to open said road or provide other means of access to his land.

3. An injunction compelling defendants to repair said road; and

4. General relief.

By the statement of defence it was alleged that plaintiff was owner of the east half of lot seven in the seventh concession of the township—that the road in front of plaintiff's lot had never been opened in consequence of natural and physical difficulties rendering it impossible or, at all events, practically impossible from the great expense it would have involved—that it would not have been an honest exercise of their discretion to open the road under the circumstances—that another road was opened in lieu of the said road which is available to plaintiff in going to and from his lot—that plaintiff acquiesced in the substitution of the new road and accepted the same in lieu of any right he might have in respect to the original allowance—that

plaintiff has other means of access to his lot—that defendants have offered to construct a roadway from the new road to plaintiff's lot which he refused to accept—and defendants submitted that it was entirely in their discretion whether the road should have been opened or not and the exercise, in good faith, of such discretion could not be reviewed by the court.

By his reply the plaintiff admitted that he had means of access to his land, but averred a large expenditure in order to procure the same. He also admitted defendant's offer to provide him a roadway, but alleged that they always neglected to do so. Subject to these admission issue was joined.

On the trial of the action the jury found that defendants had the financial ability to open the original road and that it could have been made fit for travel without encroaching on adjoining lands—that it would have been a reasonable expenditure of public money to make it fit for travel—that from default of defendants the plaintiff had not a convenient means of access to his lot—that defendants should have opened the road, but they acted in good faith in determining not to do so; and they awarded plaintiff $1. damages.

Judgment was entered for the plaintiff, but was set aside on motion to the Divisional Court (1), Wilson C. J. being of opinion that the plaintiff had not made out a case for the relief he asked, and Armour J. that the discretion of a municipal council in such a case could not be interfered with and that, under any circumstances, plaintiff's only remedy would be by indictment of the council. The Court of Appeal affirmed the judgment of the Divisional Court, and the plaintiff appealed to the Supreme Court of Canada.

R. M. Meredith for the appellant, as to the right of the plaintiff to have the road opened and maintained,

(1) 12 O. R. 749.

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cited *Re McArthur and Corporation of Southwold* (1), *Cubitt* v. *Lady Maxse* (2), *Dovaston* v. *Payne* (3). On the construction of the statute *Eastern Counties Railway Co.* v. *Marriage* (4), *Wood* v. *Hurl* (5). That the municipality should open the whole road, *Reg.* v. *Eastern Counties Railway Co.* (6), *Rex* v. *Severn and Wye Railway Co.* (7), *Reg.* v. *French* (8).

Meredith Q.C. for the respondents. As to rights of landowners see *Fritz* v. *Hobson* (9), *Yeomans* v. *County of Wellington* (10).

An action will not lie for the injury complained of. *Burton* v. *Dougherty* (11).

Nor is mandamus an apt remedy in such case. *Brooks* v. *County of Haldimand* (12); and see *Slattery* v. *Naylor* (13).

SIR W. J. RITCHIE C.J.—For the reasons given by the Court of Appeal I am of opinion that this appeal should be dismissed.

STRONG J.—Concurred in the reasons given by Mr. Justice Gwynne for his decision.

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

GWYNNE J.—The plaintiff in the year 1850 entered into possession of lot No. 8, in the 6th concession of the township of McGillivray as the owner thereof in fee simple. At the time of his so entering into posses-

(1) 29 U.C.C.P. 216.
(2) L. R. 8 C. P. 715.
(3) 2 Sm. L. C. 8 ed. 142.
(4) 9 H. L. Cas. 32.
(5) 28 Gr. 146.
(6) 10 A. & E. 531.
(7) 2 B. & Al. 648.
(8) 4 Q. B. D. 512.
(9) 14 Ch. D. 542.
(10) 43 U. C. Q. B. 522; 4 Ont. App. R. 301.
(11) 19 N. B. Rep. (3 P. & B) 51.
(12) 3 Ont. App. R. 73.
(13) 13 App. Cas. 446.

sion of the lot the road allowance between the 6th and 7th concessions in front of the adjoining lot No. 7, by reason of a steep hill in that part of the said road allowance, was and still is utterly impassable except on foot, and no work has ever been done upon it. In front of lot No. 9, also, there was and still is another steep hill. The plaintiff and his brother, who owns lot No. 9, prior to 1862 constructed for their own convenience, with some rough timbers, what is called a corduroy bridge, across a stream which crosses the road allowance in front of lot No. 9, so as to make a footpath across the stream, and they also cut away a little piece of the hill on the east side so that a person could walk up and down the hill. The road allowance between those two hills in front of plaintiff's lot, No. 8, is comparatively level, so that if the two hills should be cut down, and the lowlands at their base filled up to the level of the road allowance in front of lot No. 8, a reasonably fair road could be made which would give free access to the plaintiff's lot; but the execution of such work would have been so difficult and expensive that the municipal council of the township, in the year eighteen hundred and sixty-two, because of the great difficulty and expense attending the making the road allowance in front of those lots fit for travel passed a by-law in virtue of which they constructed a road across part of the east half of lot No. 7 and across lots Nos. 8 and 9 and part of lot No. 10 in the seventh concession of the said township, and which is described in the by-law by metes and bounds and is stated to be in place of the original allowance for road between the sixth and seventh concessions, that is, in place of that part of such road allowance which lies between the terminal points of the new road.

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(His Lordship then set out the substance of the pleadings (1) and proceeded as follows).

Now, by the issues thus joined, the plaintiff's case appears to be reduced to a claim by him for compensation in damages for monies alleged to have been expended by him in providing himself with means of access between his said lot No. 8 and the new road opened by the defendants by by-law as alleged in their statement of defence, or as alternative relief in lieu of such compensation, or to speak more correctly, by way of compelling the defendants to render to the plaintiff such compensation, that the defendants may be com pelled (for the sole convenience of the plaintiff, and as the plaintiff insists that the defendants, notwithstanding the opening of the new road, are still in law bound) to open, and to maintain fit for travel, that part of the said original road allowance which lies between the terminal points of the new road, so as to give *thereby* access to the plaintiff's lot No. 8, which he could not have along such original road allowance so long as that part of it is left in its natural state. At the trial a large field of enquiry was entered upon, and questions were submitted to the jury by the learned judge who tried the case which, in the view which I take, appear to me to be not very material to the determination of the case. It did, however, appear upon the evidence of the plaintiff himself that very shortly after the opening of the new road under the by-law of 1862 he purchased the east half of the adjoining lot No. 7, for the purpose of obtaining thereby access between his lot No. 8 and the original allowance for road between the 6th and 7th concessions of the township, close to the place where the new road is made, to diverge from the original road allowance and enter upon the east half of lot No. 7, in the 7th concession. It also appeared that about the same time the council

(1) See p. 280.

of the township offered to acquire and give to the plaintiff a road from the new road across lot No. 8, in the 7th concession, to his lot No. 8 in the 6th concession, near the place where the north-westerly extremity of that lot abuts on the original allowance for road between the said 6th and 7th concessions. The witnesses for the defendant allege that the plaintiff at first agreed, and afterwards refused, to accept this road. The plaintiff admits that the offer was made to him, but says that he insisted upon having given to him also a road along the length of his lot No. 8, and the lot to the south of him to the next concession allowance for road to the south, which I understand to be the road between the 4th and 5th concessions. Being asked if the township did not afterwards offer to give him, as he was not satisfied with the road offered to him through lot No. 8 in the 7th concession, a road along the rear of lots Nos. 9 and 10, to a side line running along lot 10, he answered "yes;" and being asked if he had agreed to take that road, he answered "yes." Lot No. 9 belonged to plaintiff's brother, lot 10 to one Charlton. It appeared also in evidence that the township council agreed with Charlton for a road three rods in width across his lot for $46, and a deed of the land to the municipality was prepared for execution by him, but the plaintiff prevented the execution thereof by intervening and purchasing from Charlton a road of two rods in width, which the plaintiff and his brother have ever since used. Now, as to this road, the clearest evidence was given that the plaintiff had agreed to accept it, and afterwards intervened to prevent its being acquired for him by the municipality.

Having been asked, "if he did not, after agreeing with the township to take a road through Charlton's lot, go and buy the road himself behind the township's back," he answered, "yes." And being asked,

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"whether that was not done by him in order to prevent the township giving him that road," he answered, "yes, to be sure it was, it was not much of a road, any how." But the question having been repeated, if he had not agreed to take it, he answered, "yes."

It is then abundantly clear that the plaintiff has provided himself with access to his lot No. 8, which the township were willing and offered to give him at their expense, and which, after having agreed to accept, he himself intervened to prevent their acquiring and giving to him.

The question now is whether, under these circumstances, the plaintiff is entitled to the relief prayed for in his statement of claim or to any relief. The answer to this question must depend upon the provisions of the Municipal Institutions Act, ch 54 of the Consolidated Statutes of Upper Canada, the statute which was in force affecting the matters in issue when the new road was opened under the by-law of the municipality passed in 1862. Under the 315th section of this act the municipal council of the township of McGillivray had jurisdiction over the original road allowances within the municipality, subject to certain provisions in the act contained.

The only provisions affecting the case now under consideration are those mentioned in the 318th and 321st sections, by the former of which it was enacted that no council should close up any original road allowance (or other roads) whereby any person should be excluded from ingress and egress to and from his lands and place of residence over such road, but that all such roads should remain open for the use of the persons who require the same. This section, as its language, plainly as it appears to me, intimates, refers only to original road allowances, or other roads which had

already been opened, and which, therefore, should remain open for the use of the person whose lands abutted thereon.

By the 321st section it was enacted that no council should pass a by-law for the stopping up, widening, diverting or selling any original road allowance, or for establishing, opening, stopping up, &c., &c., or selling any other public highway, road, &c, &c., until certain notices of the intended by-law should be published in a manner prescribed in the act. By the 330th and 331st sections the council of every township municipality was empowered to pass by-laws, among other things, for enforcing the performance of statute labor, or a commutation in money in lieu thereof—for regulating the manner and the divisions in which statute labor or commutation money should be performed or expended—for opening, making, preserving, improving, repairing, &c., &c., roads, &c., &c., within the jurisdiction of the council, subject to certain restrictions in the act contained—for selling an original road allowance to the parties next adjoining whose lands the same is situated when a public road has been opened in lieu of the original road allowance, and for the site or line of which compensation has been paid—and for selling, in like manner, to the owners of any adjoining land any road legally stopped up or altered by the council; and in case such persons respectively should refuse to become the purchasers at such price as the council should think reasonable then for the sale thereof to any other person for the same or a greater price. The first part of this sub-section appears to refer to the case of a new road opened by the municipality in lieu of an original road allowance or a part of an original road allowance, which had never been opened and made fit for public travel, and the second part to roads which

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had been opened but which should be legally stopped up or altered by the council; then by the 333rd section it was enacted that in case a person is in possession of any part of a Government allowance for road laid out adjoining his lot and enclosed by a lawful fence and which has not been opened for public use by reason of another road being used in lieu thereof, or is in possession of any Government allowance for road parallel or near to which a road has been established by law in lieu thereof, such person shall be deemed to be legally possessed thereof, as against any private person until a by-law has been passed for opening such allowance for road by the council having jurisdiction over the same; but by the 334th section no such by-law should be passed until notice in writing should be given to the person in possession, at least eight days before the meeting of the council, that an application will be made for opening such allowance. Then by the 337th section it was enacted that every public road, street, bridge and highway in a municipality shall be kept in repair by the corporation, and that the default of the corporation so to keep in repair shall be a misdemeanor punishable by fine in the discretion of the court, and that the corporation shall be further civilly responsible for all damages sustained by any person by reason of such default but the action must be brought within three months after the damages have been sustained. Then by the 343rd section it was enacted that the council of every township might pass by-laws for the stopping up and sale of any original allowance for road or any part thereof within the municipality and for fixing and declaring therein the terms upon which the same may be sold and conveyed, but no such by-law shall have any force unless passed in accordance with the three hundred and twenty-first section of the act, nor until confirmed by a by-law of

the council of the county in which the township is situate, at an ordinary session of the county council, but no sooner than three months nor later than one year after the passing thereof.

These are the only sections of the act affecting the plaintiff's rights as they stood when the new road was opened under the by-law of 1862, and from them it sufficiently, I think, appears that after the opening of the new road under the by-law of 1862, in substitution for the impracticable part of the original concession road allowance in front of lots 7, 8 and 9, which had never been opened, the municipality could not have been compelled at the suit of the plaintiff to pass a by-law for the opening of, or to open, the said piece of the said original road allowance in lieu of which the new road had been opened.

If any direct injury resulted to a private individual from any obstruction placed in a public travelled highway, whether on land or on water, which injury was other and greater than that occasioned to, or suffered by, the general public, the person so injured had his remedy by action at common law for damages, and in equity by injunction to restrain the continuance of the obstruction causing the injury. There is no lack of cases which establish this proposition. But that is a jurisdiction very different from that of a court assuming to dictate to a municipality established under the Municipal Institutions Acts from time to time in force in that part of Canada, formerly constituting the Province of Upper Canada, now the Province of Ontario, the times when, the places where, and the manner in which the council of the municipality should exercise its legislative jurisdiction over the original road allowances placed under their control. Hitherto no jurisdiction has ever been asserted by any court in that part of Canada now constituting the Province of

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Ontario to compel any one of the municipalities existing therein, at the suit of a private individual, to open an original road allowance, and to make it fit for being travelled upon as a public highway, and, in my opinion, no such jurisdiction exists in any court save under and in virtue of the jurisdiction conferred by ch. 23 of the Consolidated Statutes of Upper Canada, and which is now exercised by the High Court of Justice for Ontario, whereby a plaintiff may obtain a judgment, in an action instituted at his suit, for a writ of mandamus to issue commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested.

When the council of the municipality of the Township of McGillivray passed the by-law of 1862, and opened thereunder the new road which was substituted for that part of the original road allowance which was, in the opinion of the council, impracticable and unsuitable for a public highway, they were acting in the legitimate exercise of the jurisdiction vested in them by statute, and thereupon the new road so opened assumed the place of the piece of the original road allowance in lieu of which it was opened, and the municipality became subjected to the duty of maintaining and repairing it in the place and stead of the piece of the original road allowance for which the new road was substituted, and was authorized by the statute to sell, by a by-law to be passed for the purpose, the piece of the original road allowance to the owners of the adjoining lands of which the plaintiff was one; such owners, moreover, might have enclosed the half opposite to their respective lots, and have retained possession thereof against all persons, unless and until a by-law should be passed by the council for opening the same, which by-law could not be passed without notice to the persons in possession. I have already said that,

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in my opinion, an original road allowance which never had been opened did not come within the above 318th sec. of chapter 54 of the Consolidated Statutes of Upper Canada—that such section applied only to roads which had been opened and by which a person had had access to his land, of which access the section enacted that he should not be deprived, but that, notwithstanding the opening of a new road in the place of the old, the latter by which any person had had access to his lands should remain open for the like purpose ; but assuming that section to apply to the case of a part of an original road allowance, like that in question here, which never had been opened, but in substitution for which, because of its unsuitability for a public highway by reason of natural obstacles existing there, a new road had been opened under a by-law, the council never has as yet assumed to exercise any jurisdiction or right to close it. It remains still in its former condition unless it has been taken possession of and enclosed by the respective owners of land fronting upon it, as it might have been under the statute which, it is moreover to be observed, imposed no obligation upon the municipality to provide other access for the plaintiff to his lot. This want of such a provision in the statute appears to have been considered a defect for the legislature in 1873, in the Consolidated Municipal Institutions Act of that year, 36 Vic., ch. 48, imposed a restriction upon the right of the municipality to close up any public road or highway by the 422nd section of that act by which it was enacted as follows :—

No council shall close up any public road or highway whether an original allowance or a road opened by the Quarter Sessions or any municipal council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such road, unless the council, in addition to compensation, shall also provide for the use of such person some other convenient road or way of access to his said lands or residence.

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And this section has been further amended by sec. 544 of ch. 184 of the Revised Statutes of Ontario of 1887 which, in addition to the above re-enacted verbatim, enacts as follows :—

> If the compensation offered by the council to the owner of the lands, or the road provided for the owner in lieu of the original road as a means of ingress or regress, is not mutually agreed upon between the council and the owner or owners, as the case may be, then in such case the matters in dispute shall be referred to arbitration under the provisions of this act respecting arbitration.

Now, the only duty or obligation owed by a municipality in respect of these road allowances within its jurisdiction is such duty and obligation as has been imposed and is regulated by the Municipal Institutions Acts for the time being in force, and that duty or obligation is owed to the general public. It may be admitted that the plaintiff in the present case, as the owner of a lot of land fronting on the piece in question of the original concession road allowance, has a personal interest in the fulfilment of whatever duty, if any, still remains imposed by statute upon the municipality of the township of McGillivray in relation to such part of the said original road allowance in the interest of the general public; but apart from such duty, if any, so imposed, the township municipality owes no duty to the plaintiff or to any one in respect of such road allowance. The plain result, as it appears to me, of what has been done by the municipality under statutory authority is, that upon the opening of the new road under the by-law of 1862, in lieu of that piece of the original concession road allowance between the 6th and 7th concession of the township of McGillivray which, in the opinion of the council of the municipality, was wholly unsuitable for being opened as a public highway, the municipality ceased to owe and does not now owe any duty to any person to open that part of the said original road

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allowance for which they have provided a new road by way of substitution; and as the statute, under which the municipality proceeded, imposed no obligation upon them to render any compensation to the plaintiff under the circumstances he is not in a position to maintain an action for damages or any other relief against the municipality. The piece of road allowance in question, although it never has been opened, has never been closed by the municipality; it remains still in the condition it always has been, and if sec. 544 of ch. 184 of the Revised Statutes of Ontario, of 1887, applies to an original road allowance which never has been opened, and if the council of the municipality should ever pass a by-law to close the piece in question, the plaintiff may perhaps then be able to claim "compensation and also some other convenient road or way of access to his said lands and residence" in the words of that section; but in such case in the event of any difference arising between the plaintiff and the municipality upon the matter it would have to be settled by arbitration under the provisions of the act, ch. 184, and not by action; the relief provided by sec. 544 is incidental only to the closing of a public road or highway by a municipality which can be done only by a by-law to be passed for the purpose under the provisions of the statute in that behalf.

It was suggested, but hardly argued and, indeed, it could not well be contended, that the injury to his land of which the plaintiff complains comes within the 531st sec. of the above ch. 184, which enacts that

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

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But if the municipality is, under the circumstances above set forth, under no obligation to open the piece of road allowance in question, the latter cannot be a piece of road or highway which, under this section, they are bound to keep in repair.

Whether an indictment could be sustained in any case against a municipality under this section as for default in keeping in repair an original road allowance which had never been opened for travel it is unnecessary to determine, for it appears, I think, to be clear that the damage of which the plaintiff complains is not damage within the meaning of this section, namely, "damage sustained by reason of such default." The damage to the plaintiff's land of which he complains has always existed,—it arises from the natural conformation of the land at the place in question, and is attributable to that cause, whereas damages sustained by reason of the default of a municipality within the meaning of the 531st sec. of ch. 184 Revised Statutes of Ontario must, as it seems to me, be damages directly attributable to a cause of damage occasioned by the default of the corporation and for the existence of which cause they are therefore responsible.

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

Appeal dismissed with costs.

Solicitors for appellant: *Meredith & Meredith.*

Solicitors for respondent: *Meredith & Cox.*

LAURENT PIGEON (PETITIONER).....APPELLANT; 1889

*Nov. 18.

AND

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THE RECORDER'S COURT AND THE CITY OF MONTREAL.... } RESPONDENTS. *Mar. 10.

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

Prohibition—By-law respecting sale of meat in private stalls—Validity of—37 V. c. 51, s. 123, sub-secs. 27 and 31 (P.Q.)—Power of Provincial Legislature to pass—B. N. A. Act, sub-sec. 9 of s. 92—"Other licenses."

The Council of the City of Montreal is authorized by sub-secs. 27 and 31 of s. 123 of 37 V., c. 51, to regulate and license the sale, in any private stall or shop in the city outside of the public meat markets, of any meat, fish, vegetables or provisions usually sold in markets.

Held, affirming the judgments of the courts below, that the sub-secs. in question are *intra vires* of the Provincial Legislature. Also that a by-law passed by the city council under the authority of the above-named sub-secs fixing the license to sell in a private stall at $200 in addition to the 7½ per cent. business tax, levied upon all traders under another by-law and which the appellant had paid, is not invalid.

Per Strong J.—That the words "other licenses" in sub-sec. 9 of sec. 92 of the B. N. A. Act include such a license as the Provincial Legislature have empowered the City of Montreal to impose by the terms of the statute now under consideration. *Lamb* v. *Bank of Toronto* (12 App. Cas. 575) *and Severn* v. *The Queen* (12 Can. S.C.R. 70,) distinguished.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) confirming a judgment of the Superior Court which had dismissed the appellant's petition for a writ of prohibition.

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

(1) 33 L.C.J. 221.

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The petition had for its object the obtaining of a writ of prohibition enjoining the recorder's court and the city of Montreal from proceeding in the case before the said recorder's court, wherein the city of Montreal was complainant and the said appellant defendant. The complaint was to the effect that appellant, a butcher, had illegally exposed for sale on a private stall, outside of the public meat markets, meat ordinarily bought and sold on public meat markets, without having obtained a license from the city council, the whole in violation of by-law No. 131, intituled, "By-law Concerning Markets" then in force in the city of Montreal; the petition, praying for the writ of prohibition, alleged that the by-law, in virtue of which the city of Montreal was proceeding against the appellant, was *ultra vires* and, consequently, had no legal existence. The Corporation of Montreal answered the petition by pleading that the by-law and the statute upon which it rests are legal and constitutional and valid to all intents and purposes.

The by-law and the statute in question are referred to at length in the judgments of the court hereafter given.

Geoffrion Q.C. and *Madore* for appellant.

Even if the statute is *intra vires* of the legislature the by-law is *ultra vires* and not authorised by the statute: 1st, because by sec 78 of 39 Vic. ch. 52, the business tax upon butchers is limited to 7½ per cent. and if it had been the intention to impose a tax over and above this business tax the legislature would have said so in special terms; 2nd, because the words "such sum as may be fixed by such by-law," 37 Vic.. ch. 51, sec. 123, must be understood as only giving authorisation to impose such fee as will cover the necessary expenses for issuing the license and that fee has been fixed by sec. 49 of the by-law at $2.00; 3rd, because it

imposes upon a certain class of the community a burden of taxation heavier than that of other citizens.

The learned counsel cited Dillon (1); *Walker* v. *City of Montreal* (2), Cooley on Taxation (3); Cooley on Constitutional Limitations (4); 39 Vic. ch. 52, (P. Q.)

Ethier for respondent.

There can be no question now as to the constitutionality of the statute.

As to the second point raised by the appellant that having paid the 7½ per cent. business tax levied under 39 Vic., ch. 52, he is not bound to pay another tax as a butcher; this tax of 7½ per cent. is a business tax levied on all traders, and the other is a specific duty levied on private butchers' stalls, and the Legislature has conferred in plain terms on the corporation the privilege of exacting and collecting both.

The doctrine of inequality of taxation or unreasonableness of taxation has taken rise in England, where unincorporated bodies were recognised by the courts when they had held and exercised privileges from time immemorial and their by-laws were acknowledged as binding on the corporators, provided such by-laws were reasonable, uniform and not oppressive. In the United States' constitution there are to be found provisions which have induced the American courts to declare null and void by-laws considered as unequal, unreasonable or unjust. On the contrary, in the Provinces of Ontario and Quebec, the Local Legislatures have the whole municipal system under their control, and it cannot be presumed by the courts that they exercise that control unreasonably or unjustly. *Attorney General* v. *The City of Montreal* (5); *Mallette* v. *City of*

(1) 3 Ed. 1 Vol. pp. 115, 116, 357.
(2) 5 Leg. News 201; 1 M. L. R. Q.B. 469
(3) P. 408.
(4) No. 495.
(5) 24 L.C.J. 259.

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Montreal (1); *Corporation of Three Rivers* v. *Major* (2); Dillon on Corporations (3).

Sir W. J. RITCHIE C. J. concurred with TASCHEREAU J.

STRONG J.—This was a proceeding in prohibition to restrain the recorder's court from proceeding to hear and determine an action instituted by the city of Montreal against the present appellant to recover the fine imposed for an infraction of a by-law of the city, which required all persons exposing meat for sale in any private stall or shop outside of the public meat markets to take out a license, for which license the sum of two hundred dollars was, by the same by-law, required to be paid. The appellant who was, at the time of the action being brought, keeping a private stall for the sale of butcher's meat at the corner of St. Denis and St. Catherine streets, in the city of Montreal, refused to submit to the by-law and to pay the license fee of $200 for the year from May 1886 to May, 1887.

Thereupon, the city instituted an action in the recorder's court to recover the fine prescribed for breach of the by-law, upon which the appellant took proceedings in Prohibition, making the recorder's court and the city both parties, defendants. A writ to appear and answer having been granted by the Superior Court, the city pleaded thereto, first, a peremptory exception insisting that the appellant was precluded from raising any objection to the by-law imposing the fee for the license, inasmuch as the city was entitled to the benefit of the prescription enacted by sec. 12 of 42 and 43 Vic. ch. 53, the period of three months from the date of the passing of the by-law having elapsed before the commencement of the action. Secondly, the city

(1) 24 L.C.J. 263. (2) 8 Q.L.R. 187.
(3) 1 Vol. p. 440, No. 353.

pleaded a general defence on the merits insisting on the validity of the by-law and on the constitutionality of the statute pursuant to which it was passed.

The appellant having filed an answer and replication the parties went to proof, and the cause was subsequently heard before Mr. Justice Mathieu, in the Superior Court, who dismissed it, and the appellant having taken an appeal to the Court of Queen's Bench that court affirmed the judgment of the Superior Court. The present appeal was then taken to this court.

By the Provincial Statute, 37 Vic. ch. 21, sec. 123, sub-sec. 27, the city of Montreal is authorized

To establish and regulate public markets and private butchers' or hucksters' stalls, and to regulate license or restrain the sale of fresh meats, vegetables, fish or other articles usually sold in markets.

By sub-sec. 31 of the same section it is enacted that the city shall have power

To order that all kinds of live stock, and all kinds of provisions and provender, whatsoever, usually bought and sold in public markets that may be brought to the said city for sale, shall be taken to the public markets of the said city, and there exposed, and that neither the said live stock, nor the said provisions or provender, shall be offered or exposed for sale, or to be sold or purchased elsewhere in the said city than on the said public markets; but the city Council may, if they deem it advantageous, by a by-law to be passed for that purpose, empower any person to sell, offer or expose for sale in any place beyond the limits of said markets or market stalls of the said city meat, vegetables and provisions usually bought and sold on public markets upon such person obtaining a license for that purpose from the said council for which he shall pay to the city Treasurer such sum as may be fixed by such by-law, and by conforming with the rules and regulations contained in the said by-law.

And by sub. sec. 32 of the same section further power was given to the city

To impose a duty on all private marts in the said city or that may hereafter be established therein for the sale of cattle, provisions or provender or of anything else whatsoever that is usually sold on public markets with power to regulate and fix the said duty as regards each particular mart as the said council may see fit.

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On the 9th of June 1882 the city Council of Montreal passed a by-law which contained amongst others the following provisions. By section 44 it was enacted that :—

No person shall sell or expose for sale in any private stall or shop in the city outside of the public meat markets aforesaid any meat, fish, vegetables or provisions usually bought and sold on public meat markets, unless he shall have obtained a license from the said council as before provided.

Section 45 ;

The said council upon the recommendation of the market committee may from time to time issue license under the hand of the mayor to persons who desire to sell or expose for sale in such private stalls or shops outside of the said public meat markets as shall be designated in such licenses any such meat, fish, vegetables or provisions : provided the place so designated be not less than five hundred yards distant from the centre of any of the said public meat markets.

Section 46 ;

For each and every such license there shall be paid to the city Treasurer by the person applying for the same at the time of his making such application, the sum of $200.

Section 47 ;

All licenses so issued shall expire on the first day of May after the date thereof unless sooner revoked and shall be renewable every year at the discretion of the said council.

And section 95 of the same by-law was in the words following :—

Any person violating and contravening any of the provisions of this by-law, for which a penalty is not hereinbefore provided, shall for each offence be liable to a fine and, in default of immediate payment of said fine and costs, to an imprisonment, the amount of said fine and the term of said imprisonment to be fixed by the Recorder's Court at its discretion, and any person who shall violate any such provision of the said by-law shall moreover be liable to the penalty mentioned in this section for each and every day that such violation or contravention shall last which shall be held to be a distinct and separate offence for each and every day as aforesaid ; provided that such fine shall not exceed forty dollars and the imprisonment shall not be for a longer period than two calendar months for each and every offence as

aforesaid ; the said imprisonment, however, to cease at any time before the expiration of the term fixed by the said Recorder's Court upon payment of the said fine and costs.

The first pretension of the appellant is that sec. 46 of the by-law requiring the payment of $200.00 for a license to sell meat outside the public markets is not authorized by the statute, and is therefore in excess of the powers of the council and absolutely null and void. The argument in support of this proposition is that sub.-sec. 31 of sec. 123 of the statute is to be interpreted as conferring powers of police regulations only and not taxing powers ; that the sum to be fixed by the by-law as that to be paid for the license is not intended as a tax or impost for revenue purposes, but merely as an indemnity for the expense and trouble of issuing the license ; and that the sum of $200 is for that purpose excessive in amount. There is no force whatever in this argument. Had the city council only possessed the police power (and it would have been restricted to that if the mere power to regulate, and for that end to license, had been conferred without any express provision authorizing the exaction of a sum to be paid for the license) there might have been some color for this contention ; but when we find the legislature authorizing the city council to impose such charge for the license as it should think reasonable, without any reference to the payment being by way of indemnity, as a fee for the trouble and expense involved in issuing the license an interpretation which would restrict the words in which the statute is expressed in the way contended for would be nothing short of legislation and is therefore entirely inadmissible.

The language of the statute being such as it is it would be impossible for any court, without arrogating to itself the power of revising and controlling the acts of the council, a jurisdiction for which no authority

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can be derived either from statute or common law, to say that the fee to be paid must be limited in amount to a sum which should appear to the court to be reasonable as a mere remuneration for the labor and expense of issuing the license. Such a construction of the statute is not only not warranted by its language, but would moreover be most objectionable as conferring on a court of justice an unusual and inconvenient jurisdiction which it could never satisfactorily exercise. If, however, the Legislature had itself no authority to confer upon the city council other than police powers, such an interpretation as that just referred to might have been unavoidable, but, as it will appear when we come to consider the constitutional validity of the statute, the Legislature did possess the power not only to authorize the city to regulate, and indeed to prohibit altogether, the sale of meat out of market as an exercise of the police power, but also the power to impose a tax in aid of a revenue for municipal purposes by means of licenses issued to persons upon whom privileges in this respect might be conferred. These considerations lead to the conclusion that it is impossible to say that the words "for which he shall pay such sum as may be fixed by the by-law," are not to be construed in their ordinary, primary meaning as conferring on the city council absolute and unrestricted power and discretion as regards the amount to be paid for the issue of any licenses they may think fit, by a by-law duly passed, to sanction.

As regards the objection that the amount required to be paid is so excessive as to be prohibitory the plain answer is, in the first place, that it has not been made to appear that it is prohibitory, that there is nothing to show that the advantage to be derived from the privilege of selling out of market may not be such that this license fee is relatively moderate and fair; and

in the next place even if the charge were exorbitant and prohibitory the council have power, if they should think it advantageous to the city so to do, to prohibit sales out of market altogether, and having this power they may, if for any reason they choose to do so, exercise it by imposing a license fee so large in amount as to be in effect a prohibition. Further, it may be answered that although it might be an objection to the exercise of a mere power to regulate, excluding all powers not only to prohibit the sale out of market but also to tax by means of licenses for revenue purposes, yet when the power of taxing is conferred it never can be objected to an instance of its exercise that the tax imposed is prohibitory in its operation; in all such cases the amount of the tax must rest exclusively in the discretion of the body possessing the power to impose it.

On the whole, upon the only admissible interpretation of the statute I conclude that the city Council were by it invested with all the powers they assumed to exercise by the by-law.

Next it is pretended that the 31st sub-sec., to which the authority of the council to pass the by-law must be ascribed, is itself *ultra vires* of the Provincial Legislature. It is said that the 92nd section of the British North America Act does not confer on the Provinces the right to invest a municipal council with powers of taxation such as this enactment assumes to confer upon the city of Montreal. The answers to this relied upon by the learned advocates for the city are, I think, clear and conclusive. For myself I prefer to select one of these grounds and to rest my judgment exclusively upon that.

It may be that since the decision of the Judicial Committee in the case of *Lamb* v. *The Bank of Toronto*

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(1), a tax for municipal purposes, to be collected by means of a license imposed upon a person carrying on a specific retail trade as a condition of being permitted to carry it on in a particular manner, or in a particular place as in the present case, is not to be regarded as an instance of indirect taxation. If this is so it would, of course, be conclusive of the question of legislative authority which has been raised in the present case but, without in the slightest degree presuming to depart from any decision of the Privy Council, I am prepared for the purposes of the present judgment to assume the correctness of the appellant's contention that this is an indirect tax and to deal with the case upon that basis.

Then looking at the case in this way I have no hesitation in ascribing the authority of the Legislature of the Province of Quebec to pass the provision of the statute now impugned to the 9th sub-section of section 92 of the British North America Act. The words of that section are as follows, "Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising a revenue for provincial, local, or municipal purposes." If it were necessary to do so I should be prepared to hold that the words "other licenses" include such licenses as the Legislature have empowered the city of Montreal to impose by the terms of the statutes now under consideration. It never has been decided by any court of appeal that the words "other licenses" are to have no meaning whatever, and that the clause is to be restricted to the four named but incongruous cases of "shops, saloons, taverns and auctioneers." The case of *Severn* v. *The Queen* (2) did not decide this but merely determined that a construction which would include licenses to brewers under the words "other licenses" was inadmissible for the reason that

(1) 12 App. Cas. 575. (2) 2 Can. S.C.R. 70.

it would conflict with the exclusive power to regulate trade and commerce which was vested in the Dominion. And even as regards this construction of the 9th sub-sec., if the decision in *Severn* v. *The Queen* (1) has not been over-ruled observations not in accordance with it are certainly to be found in the later decisions of the Privy Council. I do not, however, base my opinion on these words "other licenses" being comprehensive of a license tax such as this, but on what appears to me to be the indisputable ground, that this is a shop license power to authorize the imposition of which is in so many words conferred on the Provincial Legislatures by sub-sec. 9 of sec. 92. There is nothing in the context restraining the meaning of the word "shop" to any particular species of shop, or to a shop in which any specific commodity is dealt in, and that being so, there is nothing whatever to exclude from its operation a shop such as that kept by the appellant for the sale of butchers' meat. This seems, by itself, conclusive of the question of constitutional validity, and to preclude all objections to the statute.

As to the point that the by-law imposes double taxation inasmuch as the appellant was, in addition to this license tax, liable to pay the general business tax of 7½ per cent. on the annual value of the premises in which he carried on his business, there is manifestly no weight in it either as an independent ground for attacking the validity of the by-law, or as having incidentally an influence on the construction which ought to be put upon the statute. The two taxes are imposed on entirely different subjects; one is a personal tax payable for the right to exercise a particular privilege by way of exemption from a general law, the other is a general tax in respect of the property upon which any trade or occupation is carried on. The two taxes

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are, therefore, not identical, and the imposition of both can in no sense be regarded as double taxation.

It seems to be extremely doubtful, to say the least, if the writ of prohibition was the appropriate remedy in the present case. That writ is only applicable to restrain an excess of jurisdiction by inferior courts. The recorder's court would not, however, have exceeded its jurisdiction even though the by-law might have been bad, or the statute *extra vires*, if it had proceeded to hear and determine the action instituted by the city. If any court had jurisdiction the recorder's court had it; the appellant's defences therefore, that the by-law and statute were invalid, did not, strictly speaking, constitute objections to the jurisdiction, but were, rather, objections on the merits to the foundation of the action in point of law.

The appeal must be dismissed with costs.

TASCHEREAU J.—By its charter the city of Montreal is authorized by section 123, sub-sec. 27, to "establish "and regulate public markets and private butchers' or "hucksters' stalls; and to regulate, license, or restrain "the sale of fresh meats, vegetables, fish or other "articles usually sold on markets;"—Then, by sub-sec. 31: "To order that all kinds of live stock and "all kinds of provisions and provender whatsoever, "usually bought and sold in public markets, that may "be brought to the said city for sale, shall be taken to "the public markets of the said city and there exposed; "and that neither the said live stock nor the said pro-"visions nor provender, shall be offered or exposed for "sale or to be sold or purchased elsewhere in the said "city, than on the said public markets; but the city "council may, if they deem it advantageous, by a by-"law to be passed for that purpose, empower any "person to sell, offer or expose for sale, in any place

" beyond the limits of said markets or market stalls of
" the said city, meat, vegetables and provisions usually
" bought and sold on public markets, upon such person
" obtaining a license for that purpose from the said
" council, for which he shall pay to the city treasurer
" such sum as may be fixed by such by-law, and by
" conforming with the rules and regulations contained
" in the said by-law."

Relying on these dispositions, the council of the city of Montreal passed, on the 9th of June, 1882, a by-law called "by-law concerning markets" bearing No. 131, which, among other dispositions, enacts as follows:—

Article V. Private Stalls.

Sec. 44. No person shall sell or expose for sale in any private stall or shop in the city, outside of the public meat markets aforesaid, any meat, fish, vegetable, or provisions usually bought and sold on public meat markets, unless he shall have obtained a license from the said council, as hereinafter provided.

Pigeon, the appellant, having been sued before the recorder's court, in Montreal, for having exposed meat for sale in a private stall, without a license, in violation of the dispositions of the aforesaid by-law, took out a writ of prohibition to enjoin the said court from further proceeding in the cause on the ground that the said by-law was null and void, and that the court had no jurisdiction. The two courts below unanimously quashed the writ of prohibition, and the appellant now asks the reversal of these judgments. I am of opinion that his appeal should be dismissed. His contentions are altogether unfounded.

As to the constitutionality of the sections above referred to in the city of Montreal's charter there is no room for controversy, and the appellant himself, though he had alleged in his declaration that these sections were unconstitutional, very properly, in his factum and at the hearing before us, abandoned that ground of his action. He contends now, not that the

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statute is *ultra vires* of the Quebec legislature, but that the by-law under that statute and upon which he was sued before the recorder's court is *ultra vires* and not authorized by this statute.

He attempts to support that contention on two grounds, in the following words which I take from his factum:—

> Our contention is, that the part of the above by-law concerning private stalls is *ultra vires*, inasmuch as the city charter does not authorise the city of Montreal to impose upon private stalls a tax for revenue purposes, but only gives it the power, as mentioned in sub-sec. 27 of sec. 123, to regulate, license or restrain the sale of fresh meats, vegetables, fish, or other articles usually sold on markets.
>
> We claim that the words "such sum as may be fixed by such by-law" in sub-sec. 31, must be understood as giving an authorisation to impose such fee as will cover the necessary expenses for issuing the license; and that it is not such an authorisation as is required to give to a municipal corporation the power of taxing.
>
> The last reason which we urged against the by-law and for which we claim it must be declared void, is that it imposes upon a certain class of the community a burden of taxation heavier than that of the other citizens. After having paid seven and a-half per cent. of the value of his premises, Pigeon might have carried on any trade or business, corner of St. Denis and St. Catharine streets; but so soon as he wants to keep a butcher stall he has to pay, if the by-law is valid, a further sum of two hundred dollars.

The first ground is based upon the fact that the sum fixed by the council for a license to sell in a private stall amounts to $200. The council, argues the appellant, has taken undue advantage of its power to license and regulate, and has illegally, under pretence of licensing and regulating, imposed a tax. But sub-sec. 31 expressly gives to the council unlimited powers as to the amount of the license to sell outside of the public market, "such sum as may be fixed by such by-law." How could we, in face of these words, declare the by-law illegal because the sum fixed is too high?

The city council, under these sections, has the exclusive power to grant or refuse and fix the amount of

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these licenses, and the exercise of this power cannot be controlled in any way by courts of justice.

The second ground of objection taken by the appellant against the validity of this by-law is also untenable. The seven and a-half per cent. of the annual value of his premises he paid as a business tax under another by-law, which is a tax imposed on all business men generally. The $200 for a license for a private stall is the price of a privilege, the privilege of selling meat outside of the public markets.

Had the appellant succeeded in having this section of the by-law relating to private stalls declared illegal, this would not have given him the right to sell meat in his private stall. The only consequence would be that no one at all could legally get a license in Montreal to sell outside of the public markets under sec. 13 of the by-law, which enacts that:

Sec. 13. No person shall sell or offer, or expose for sale, in or upon any street, lane, yard, or in any store, shop, dwelling, or other place in the city than one of the meat markets (public or private) established by this by-law, any kind of butchers' meat, fresh pork, turkeys, geese, ducks, poultry, fish, fruits, grain, produce or effects usually brought to and sold on public markets.

I am of opinion we should dismiss the appeal.

GWYNNE J.—The case appears to me to be free from doubt, and the judgment of the court appealed from to be quite correct. Whether there is or is not a double tax levied by the city of Montreal in the present case does not seem to me to be before us, although I do not see any objection to the corporation charging a business tax of 7½ per cent on the value of the rental of the premises, where, under a license to sell meat outside of the public market, a butcher carries on his trade, in addition to the sum paid for the privilege of selling outside of the public market, and for which privilege the statute authorizes the municipality to charge a

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license fee of any amount they think fit. The appellant in the proceeding in the recorder's court, which is sought to be prohibited, is charged with selling meat outside of the public market of the city of Montreal without having obtained the leave of the corporation to do so; that such an act can be prohibited by by-law under a penalty, in case of breach, and that a suit for the recovery of such penalty is within the jurisdiction of the recorder's court to adjudicate upon, cannot be doubted.

The appeal must therefore be dismissed.

PATTERSON J. concurred with TASCHEREAU J.

Appeal dismissed with costs.

Solicitors for appellant: *Laflamme, Madore & Cross.*

Solicitor for respondents: *Roüer Roy.*

THE NORTH SHORE RAILWAY COMPANY, (DEFENDANT)..... } APPELLANT ;

AND

JOHN McWILLIE *et al.*, (PLAINTIFFS)...RESPONDENTS.

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*Mar. 4.
*June 13.

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

Railway — Damages caused by sparks from locomotive — Responsibility of company—R.S.C. c. 109 sec. 27—51 Vic. ch. 29 s. 287—Limitation of actions for damages.

Running a train too heavily laden on an up-grade, when there was a strong wind, caused an unusual quantity of sparks to escape from the locomotive, whereby the respondents' barn, situated in close proximity to the railway track, was set on fire and destroyed.

Held, affirming the judgments of the courts below, that there was sufficient evidence of negligence to make the railway company liable for the damage caused by the fire.

Per Gwynne J.—That the "damage" referred to in sec. 27, of chap. 109, R.S.C, and sec. 287 of 51 Vic., ch. 29, is "damage" done by the railway itself, and not by reason of the default or neglect of the company running the railway, or of a company having running powers over it, and therefore the prescription of six months referred to in said sections is not available in an action like the present.

APPEAL from the judgment of the Court of Queen's Bench (Appeal side) confirming a judgment of the Superior Court, District of Montreal.

The action in the court of first instance was to recover the value of houses, barns and other buildings, on a farm in the parish of St. Laurent, and their contents, destroyed by fire caused by an engine of the company appellant.

To this action the company pleaded:

1. Prescription of six months enacted by c. 109. sec. 27 R.S.C.

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

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2. Besides the general issue a special denial that the fire had been set by their engine, and that even if said fire was caused by sparks from the engine the defendants were guilty of no negligence but, on the contrary, had used every precaution and diligence possible in the running of said engine.

From the evidence it appeared that the train was composed of fifteen loaded cars and that when the train was passing respondents' buildings, situated within fifty feet from the line of rails, there was an unusual quantity of sparks emitted by the engine, because there was too heavy a load for the engine to draw on such an up-grade and that the sparks set fire to respondents' buildings. It also appeared by the evidence that at this particular part of the railroad, the railroad is narrowed in order to save the expense of expropriating and paying for the building, through parts of which the railway boundary line would have passed had it been at its full width.

Brosseau for appellant and *Robinson* Q.C., and *Geoffrion* Q.C. for respondents.

On the argument counsel for the appellant did not insist on the plea of prescription, but argued at some length that the appellant company were not liable having used every precaution and diligence possible in the running of the engine.

SIR W. J RITCHIE C.J.—The question raised in this case was a pure question of fact and there was, in my opinion, ample evidence to justify the respective courts in coming to the conclusion at which they have arrived. I do not see how they could have come to any other conclusion. Therefore I think this appeal should be dismissed.

FOURNIER J.—I am of opinion that the appeal

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should be dismissed. It is very evident from the evidence that the fire was set by sparks, which were emitted from the appellant company's locomotive, several witnesses, who were present saw the sparks and state that the fire broke out immediately. On this question of fact there can be no doubt that the judgments appealed from should be confirmed.

There was another question raised by the pleadings, viz.: prescription, but on the present appeal the counsel for appellant did not rely upon that. I will only add that I concur fully in the judgment of Mr. Justice Cimon on this point, whose judgment was concurred in by the Court of Queen's Bench.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed for the reasons given by the judges of the Court of Appeal.

GWYNNE J.—In the argument before us this case resolved itself into a mere question of fact, namely, whether certain premises of the plaintiff, at St. Laurent, which were burned down on the 24th August, 1883, were set fire to by an engine of the defendants, running upon that part of the Canadian Pacific Railway which lies between St. Martin's and Montreal, the learned judge who tried the case found the fact in the affirmative in favour of the plaintiff and certainly the evidence was abundantly sufficient to support that judgment. There was a plea of prescription upon the record as to which, although the point raised by it was not pressed before us, it may perhaps be as well to say that, in my opinion, neither sec. 27 of ch. 109 of the Revised Statutes of Canada, nor sec. 287 of 51 Vic. ch. 29, have any reference to an action like the present, which is for damage, not occasioned by reason of the railway, but by reason of sparks being suffered

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to escape from an engine running upon it, by the default and neglect of the company whose engine causes the damage which, as in the present case, may not be the company owning the railway. The provision in those sections that the defendants charged with having *caused damage by reason of the railway* may prove that what was done in pursuance of and by the authority of the act, or of the special act, shows that what is meant is damage done by the railway itself and not by reason of the default or neglect of the company owning the railway, or of a company having running powers over it, by reason of insufficiency in the construction of the engines used, or of negligence in the manner of running them upon the railway. This latter damage is no more damage "sustained by reason of the railway" than damage to goods being carried upon the railway by reason of negligence in the manner of running a train is. I concur that the appeal must be dismissed with costs.

PATTERSON J.—The only question argued was one of fact, and it is only on that question that I give any opinion.

I agree that the appeal must be dismissed. Indeed, I noted my opinion at the argument that it might properly have been dismissed on Mr. Brosseau's statement of the evidence.

Appeal dismissed with costs.

Solicitors for appellant: *Lacoste, Bisaillon, Brosseau & Lajoie.*

Solicitors for respondents: *Lunn & Cramp.*

RICHARD A. A. JONES (DEFENDANT).....APPELLANT; 1890

AND *Mar. 6, 7.

SIDNEY A. FISHER (PLAINTIFF).....RESPONDENT. *June 13.

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

Damage to land by construction of dam—Servitude—Arts. 503, 549, 2193 *C.C.—C.S.L.C., ch.* 51—*Improvement of water courses.*

Where a proprietor, for the purpose of improving the value of a water power, has built a dam over a water course running through his property and has not constructed any mill or manufactory in connection with the dam, he cannot, in an action of damages brought by a riparian proprietor whose land has been overflowed by reason of the construction of the dam, justify under the provisions of ch. 51, C.S.L.C.

Nor can he acquire by prescription a right to maintain the dam in question; Arts. 503, 549, C.C.; nor can he claim title by possession to the land overflowed without proving the requirements of Art. 2193, C. C.

APPEAL from a judgment of the Court of Queen's Bench (Appeal Side) for Lower Canada, affirming a judgment of the Superior Court condemning the appellant to pay the respondent five hundred dollars damages and ordering the demolition of a dam.

The plaintiff brought an action against the defendant, in the Superior Court, at Bedford, alleging that by deed of sale dated 30th October, 1873, before Lefebvre, notary, Luke Holland Knowlton sold him a certain piece of land described in the declaration at full length, supposed to contain about 200 acres of land, including such parts as may be covered by the waters of Brome Lake, being lot number 18 in the 7th

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range of the said township, and the residue of lot number 17 in the eleventh range.

That by another deed of the 30th October, 1873, passed before Lefebvre, notary, Thomas A. Knowlton sold to the plaintiff a certain piece of land in the said township, parts of lots number 16 and 17 in the eleventh range therein described.

That the defendant is and was proprietor of several lots of land described in a deed of sale, amongst others lot number 24 in the 10th range of lots in the township of Brome, as having acquired the same on the 27th day of August, 1878, at a sale under the authority of justice, at the office of the Registrar of the County of Brome, under a writ of execution issued out of the Superior Court, in which The Trust and Loan Company were plaintiffs, and one Charles G. Jones defendant. That the only outlet by which the waters of Brome Lake flow passes through said lot number 24 owned by the defendant, bordering upon said lake, through which outlet flows a large stream. That when the flow of the water of the said lake is not obstructed, and the water is allowed to assume its natural level, the same does not rise sufficiently to overflow or to saturate any of plaintiff's property.

That during the year 1881 the defendant, under the pretence that he was improving said outlet, and in order to construct mills, built and caused to be built across said outlet, where the same passes through his said lot, a dam of such height and strength as to dam up and stop the flow of the waters of the said outlet and of the said lake, causing the waters to rise above their ordinary and natural level, and to overflow a large tract of land surrounding the said lake. That in consequence of the increased rise of the water caused by the dam so erected by the defendant, the water overflows a large quantity, to wit: 40 acres of plaintiff's

farm which borders the said lake, rendering the same useless and unfit for agriculture, and this since the year 1881, causing damages to the amount of $1,200,00, with additional damages to the walks and grounds of the plaintiff to an amount of $200,00, and to the wood lands so overflowed to an amount of $200,00; total amount of damages, $1,600.00. The plaintiff further alleged that defendant has failed to erect any mill or manufacture in connection with said dam, the same having been put up for the malicious purpose of impeding the flow of the waters and to damage plaintiff's property.

Plaintiff fyled with his action a plan showing the extent of the injury caused to this property by such overflow of water. Plaintiff concluded that the defendant be condemned to demolish and lower said dam so as to reduce the level to its natural course, and be prohibited in future from impeding the natural plan of the water, and to pay the amount of damages claimed.

The defendant pleaded to the action, first, by a general denegation; secondly, the defendant specially alleged that the dam referred to in plaintiff's declaration was erected and constructed upon the water-course, running through and across defendant's land, and constructed for the purpose of turning the water power to account for the operation of mills and manufactures, and for working and operating machinery.

That a dam was constructed for that purpose to the height and of the dimension of the existing dam more than 50 years ago, and long prior to the acquisition by the said plaintiff of the lands and tenements described in his declaration, and during all that time, to wit, for 40 years and upwards, the said defendant, both by himself and his *auteurs*, occupied, possessed, and enjoyed openly, peaceably and publicly the right to

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use and enjoy the said water-course as improved by the said dam, and the dam which it replaced, whereby he acquired a prescriptive right thereto, which prescription the defendant invokes.

After issue joined, the parties proceeded to their evidence, and the two courts below, upon the weight of evidence, found that the appellant's dam caused a considerable rise in the waters of the lake, which overflowed a portion of the respondent's property, and that the appellant had not put up any mill or machinery to utilize the waters of the lake in connection with the dam he had built, and condemned the appellant to pay $500 damages and to remove the dam, if not used within a year.

Laflamme, Q. C., for appellant, relied on Consolidated Statutes of Lower Canada, Ch. 51, and contended that respondent never had actual possession of the land overflowed except as it then stood, covered by water, and that the dam with its appurtenances was the absolute property of the appellant for over thirty years. Art. 2242, C.C.

Geoffrion, Q.C., and *Duffy*, for respondent, contended that defendant's rights are restricted to those of an ordinary owner under a sheriff's deed of sale, and that there is no proof of any title as a connecting link between him and his predecessors respecting their alleged rights in plaintiff's land. That as there are no mills, machinery or works to be operated by the dam the servitude has ceased, and the dam cannot be maintained independently. That by Article 501 C C., plaintiff is entitled to ask the demolition of the dam. That so long as there are no mills, works or machinery operated by this dam it is not within the provisions of Ch. 51 C.S.L.C., and that statute cannot be opposed to the demolition of the dam.

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Sir W. J. RITCHIE C.J.—I can see no reason for interfering with the judgment of the Court of Appeal for the Province of Quebec, and am of opinion the same should be confirmed, and the appeal dismissed.

FOURNIER J.—Le 30 octobre 1873, l'intimé a acheté par acte notarié, de Luke Holland Knowlton et Thomas A. Knowlton, les immeubles décrits dans sa déclaration en cette cause, savoir : tout le lot n° 18 et parties des lots 17 et 16 dans le 11e rang du township de Brome, avec les bâtisses y érigées et les dépendances, et aussi cette partie du dit lot 18 qui pouvait alors être recouverte par les eaux du lac de Brome.

L'intimé allègue avoir fait à cette propriété de nombreuses et importantes améliorations de cultures et d'embellissements, avoir augmenté la partie défrichée, en laissant une certaine réserve de bois sur le bord du lac pour se protéger contre le vent et pour le confort et l'ornementation de sa propriété, dont il a toujours eu possession depuis son acquisition.

Le 27 août 1878, l'appelant a acheté du shérif du district de Bedford, par décret, à la poursuite de la "Trust and Loan Company of Canada," contre Charles Jones, ès-qualité, le lot n° 24 dans le 10e rang du township de Brome, à travers lequel coule la décharge du dit lac de Brome, et qu'il est depuis la date de son acquisition en possession de ce lot.

L'intimé allègue encore que l'appelant sous prétexte de construire des moulins, a fait malicieusement et illégalement, sur sa propriété en 1881, un barrage élevé et solide à travers la décharge ou cours d'eau, par où se déverse le trop plein des eaux du dit lac et fait refluer l'eau sur les dites propriétés de l'intimé d'au moins deux pieds d'épaisseur au-dessus du niveau naturel du lac de manière à inonder 40 acres de terre et troubler l'intimé dans sa possession, et à causer douze

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cent piastres de dommages à son bois réservé et deux cent piastres à ses embellissements et promenades, faisant en tout seize cent piastres qu'il réclame par son action.

Depuis la construction de ce barrage l'appelant n'a encore construit aucun moulin pour utiliser le pouvoir d'eau créé par ce barrage, dont l'intimé demande la démolition ou son abaissement de manière à laisser l'eau du lac à son niveau naturel, en concluant à ce qu'il lui soit fait défense de récidiver et de troubler l'intimé à l'avenir.

L'appelant a plaidé à cette action par une dénégation générale, en ajoutant que l'intimé ne pouvait obtenir le but de sa poursuite par le procédé qu'il avait adopté.

Il a de plus plaidé, par une autre défense, que la digue ou barrage en question a été construit sur un cours d'eau traversant sa propriété, et dans le but d'utiliser ce cours d'eau en y faisant mouvoir des moulins, manufactures et machineries ; que ce barrage a été fait sur le même site et de la même hauteur, il y a plus de cinquante ans, pour le même but, et longtemps avant l'acquisition par l'intimé de ses dites propriétés ; que durant toute cette période de temps, l'appelant, par lui-même, par ses auteurs, a toujours possédé publiquement et paisiblement le droit de jouir et user du dit cours d'eau, tel qu'amélioré par le présent barrage et celui qui l'a remplacé ; et que l'appelant a aussi acquis par la prescription plus que trentenaire qu'il invoque, le droit de continuer de l'utiliser et d'en jouir.

La contestation ainsi liée, les parties procédèrent à la preuve et produisirent leurs titres respectifs aux propriétés dont il s'agit. L'intimé a examiné seize témoins pour établir les faits de sa déclaration. Il résulte clairement de cette preuve que le barrage en question a été construit vers 1832 pour la création d'un pouvoir d'eau qui a servi à faire mouvoir des

moulins de diverses espèces construits par les auteurs de l'appelant. Quelques années avant 1887, les moulins qui étaient alors en opération furent détruits, et le barrage laissé dans un état de grande détérioration exigeant des réparations dispendieuses lorsque l'appelant acheta cette propriété à la vente faite par le shérif de Bedford. Cette question de fait concernant l'existence du barrage et l'exploitation des moulins pendant un grand nombre d'années ne souffre aucune difficulté. Les faits sont trop positivement prouvés pour essayer de les contredire. Mais l'appelant se fondant sur son occupation du barrage et du site des moulins pendant au delà de 50 ans, pendant lesquels le niveau de l'eau a demeuré à la même hauteur, prétend par cette possession avoir acquis le droit de continuer sa jouissance de ce pouvoir d'eau, à l'exclusion des propriétaires dont les fonds sont couverts par l'eau, et avoir éteint par la prescription leur droit de recouvrer des dommages résultant de l'élévation du niveau de l'eau; ou, en d'autres mots, après avoir admis l'état de chose actuel pendant plus de cinquante ans, ne s'être jamais servi de leur propriété, en avoir été même virtuellement dépossédé durant toute cette période, un acquéreur subséquent peut-il demander la démolition du barrage ou réclamer des dommages pour sa reconstruction ?

Il est vrai que l'état dans lequel se trouvait ces propriétés a toujours été le même depuis la construction du premier barrage en 1832, à l'exception du fait rapporté par James Davis, un témoin de l'intimé. Il rapporte que Knowlton qui a possédé la propriété de l'intimé avant que celui-ci en ait fait l'acquisition, s'étant plaint de la hauteur du barrage, Jones l'avait réduite, et qu'elle n'avait jamais été, depuis, élevée à sa hauteur actuelle.

Ce témoin est le seul à faire mention de ce fait et se

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trouve contredit par tous les autres témoins appelés par l'appelant qui prouve que la hauteur du barrage a toujours été la même.

Il est à remarquer que l'appelant n'a allégué dans son plaidoyer aucun titre, et qu'il base la prescription qu'il invoque, uniquement sur le fait que lui et ses auteurs ont possédé la propriété du barrage en question pendant plus de trente ans, et que pendant—à peu près—tout ce temps le terrain de l'intimé a été couvert par l'eau comme il l'est aujourd'hui. Lorsqu'il en a fait l'acquisition du shérif en 1873, le terrain est décrit dans son titre comme étant couvert par l'eau dans une grande partie de sa surface.

Mais sur ce terrain, ainsi couvert d'eau, l'appelant n'a jamais fait aucun acte de possession à titre de propriétaire. Seulement la construction de son barrage faisant élever le niveau de l'eau dans le lac, la surface s'en trouvait submergée, mais ceci n'était que la conséquence non d'un acte commis par l'appelant sur le terrain de l'intimé, mais de la construction du barrage élevé sur son propre terrain. Pour avoir droit de maintenir ce barrage il lui faut absolument un titre suivant l'article 549 C.C. "Nulle servitude ne peut s'établir sans titre ; la possession même immémoriale, ne suffit pas à cet effet." Cependant l'appelant prétend que le ch. 51 C S. B. C., dérogeant au droit commuble, en permettant au propriétaire des terrains que traverse des cours d'eau d'y construire pour l'usage de moulins, de manufactures et d'usines, des écluses ou barrages ou autres travaux qui font refluer les eaux sur les terrains voisins, constitue pour lui un titre suffisant pour lui donner le droit de maintenir son barrage et de faire refluer les eaux du lac sur le terrain de l'intimé. En effet ce statut a toujours été considéré par les tribunaux comme ayant établi cette servitude légale en faveur du dévoloppement de l'industrie manufacturière. Mais d'un autre

côté ce statut pourvoit aux moyens d'indemniser les propriétaires des terrains submergés par les travaux faits en vertu de cette autorisation. Il établit même un mode de procéder à l'évaluation des dommages causés et oblige, dans le délai de six mois, le propriétaire des travaux à payer les dommages au voisin dont la propriété souffre par le refoulement des eaux, sous peine d'être condamné à démolir ces travaux. Nul doute que si l'appelant eut allégué et prouvé qu'il avait adopté des procédés pour faire fixer l'indemnité, il aurait pu invoquer le statut, comme étant la base de son droit et comme suffisant pour justifier son plaidoyer de prescription. Mais il ne s'est nullement prévalu des dispositions du statut pour faire fixer l'indemnité, il ne peut en conséquence en réclamer le bénéfice à moins d'avoir accompli les conditions qui y sont attachées. Il est vrai que les dispositions de ce statut ont été considérés comme impossible d'exécution, par suite d'une omission dans la loi municipale qui n'a pas pourvu à la nomination des experts qui doivent faire l'évaluation; mais si le mode indiqué ne pouvait être employé, rien n'empêchait le recours ordinaire aux tribunaux. L'appelant aurait pu faire des offres de la valeur des dommages et s'adresser aux tribunaux pour les faire déclarer suffisantes. Mais loin de là, l'appelant ne semble aucunement s'être occupé de la question d'indemnité; le barrage ayant été construit depuis si longtemps, il a cru qu'il en avait acquis le droit par sa longue possession. C'est une erreur; la possession immémoriale ne suffisait pas pour cela. Sur ce point la jurisprudence est conforme à la loi (1).

Dans son factum en appel, l'appelant semble avoir abandonné le plaidoyer de prescription invoqué pour maintenir son droit de servitude. Il le transforme en plaidoyer de prescription de la propriété du sol de

(1) *Roy* v. *Beaulieu* 9 Q.L. R. 97; *Parent* v. *Daigle*, 4 Q. L. R., p. 160.

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l'intimé recouvert par l'eau que son barrage y fait refouler. Il déclare:

It is not a question of servitude, requiring a title for its maintenance, but it is a question of property.

Ce changement de terrain n'améliore nullement sa position; il se met par là dans une position contradictoire. Après avoir invoqué une servitude sur la propriété de l'intimé, il prétend maintenant qu'il en a acquis la propriété par prescription. Mais sa prétention d'être le propriétaire du terrain recouvert par l'eau n'est pas mieux établie que son droit de servitude.

Est-ce en vertu d'un titre qu'il est devenu propriétaire de ce terrain? Non, il n'en produit pas. Est-ce par prescription trentenaire? Avant de répondre à cette dernière question, il faut d'abord faire remarquer que la procédure ne lui donne pas le droit de modifier sa position comme il veut le faire; il n'a point plaidé qu'il a acquis la propriété du terrain de l'intimé par prescription et la loi ne lui permet pas d'en invoquer le bénéfice sans l'avoir plaidé spécialement. C.C., art. 2188.

Mais en admettant même que son plaidoyer de prescription qu'il a plaidé pour soutenir son droit de servitude peut lui servir pour établir une prescription de la propriété de l'intimé recouverte par l'eau que son barrage y fait refluer, il lui faut au moins prouver qu'il était dans les conditions nécessaires pour acquérir la prescription. Pour cela il lui aurait fallu prouver conformément à l'art. 2193 qu'il avait eu une possession continue de ce terrain, non interrompue, paisible, publique, non équivoque et à titre de propriétaire. Mais loin delà, l'appelant ou ses auteurs n'ont jamais eu aucune possession quelconque de ce terrain, et l'intimé ni ses auteurs n'en ont jamais été dépossédés. Cette prétention de l'appelant est absolument sans fondement. Il n'a pas plus prescrit la propriété de l'intimé qu'il n'a

acquis de servitude sur son terrain. Sa défense est tout à fait mal fondée.

L'intimé a fait la preuve de son dommage que la cour a fixé à la somme de $500. Cette preuve est suffisante pour justifier le montant qui a été accordé par la Cour Supérieure dont le jugement a été confirmé par celui de la Cour du Banc de la Reine. Je suis d'avis que l'appel doit être renvoyé avec dépens.

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

As to the respondent's right of action, I am of opinion that the appellant having no mill or machinery operated by this dam he cannot invoke the provisions of ch. 51 C.S.L.C. It must be understood that we express no opinion as to whether, in a proper case, the right of action is taken away or not by that statutory enactment.

As to the facts of the case, the two courts below having, upon the weight of evidence, found in favour of the respondent, we cannot interfere. There is nothing in this case to take it out of the well settled rule on such appeals. The facts so found are that the appellant's dam causes a considerable rise in the waters of the lake and thereby the overflow and saturation with moisture of a portion of the respondent's farm. Now, the appellant cannot base his claim to the right of so overflowing the respondent's farm on a right of servitude, as he has no title (and he now admits it), but contends that he has the actual right of property in the overflowing of the respondent's farm as incidental to his property of the dam. I fail to see anything in this case to support such a view of the facts, and of the law applicable to the facts. The appellant is claiming nothing else than a right of servitude on the respondent's farm. It was nothing else at its origin,

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and has not been changed into anything else by length of time. The respondent is full owner of his farm, and of every foot of it, and the claim to a right to overflow any part of it is nothing but a claim to a right of servitude. The formal judgment of the Court of Queen's Bench is elaborately drawn, and utterly unassailable.

GWYNNE and PATTERSON JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Laflamme, Madore & Cross.*

Solicitors for respondent: *O'Halloran & Duffy.*

ROBERT E. FERGUSON (PLAINTIFF).....APPELLANT. 1889

AND *Oct. 25,26.

HOWARD D. TROOP (DEFENDANT).....RESPONDENT. 1890

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. *June 12.

Lessor and lessee—Eviction—Entry by lessor to repair—Intent—Suspension of rent—Construction of lease.

A lease of business premises provided that the lessor could enter upon the premises for the purpose of making certain repairs and alterations at any time within two months after the beginning of the term, but not after except with the consent of the lessee. An action for rent under the lease was resisted on the ground that the lessor had been in possession of part of the premises after the specified time without the necessary consent whereby the tenant had been deprived of the beneficial use of the property and had been evicted therefrom. On the trial the jury found that no consent had been given by the lessee for such occupation and that the lessee had no beneficial use of the premises while it lasted.

Held, per Taschereau, Gwynne and Patterson JJ., reversing the judgment of the court below, 1. that the evidence did not justify the finding of no assent; that an express consent was not required, but it could be inferred from the acts and conduct of the lessee.

2. The two months' limitation in the lease had reference to the entry by the lessor to commence the repairs and not to his subsequent occupation of the premises, and the lessor having entered upon the premises within the prescribed period he had a reasonable time to complete the work and his subsequent occupation was not wrongful.

Per Taschereau and Gwynne JJ. that assuming assent was necessary the evidence clearly showed that the lessor was on the premises after the 1st of July with the assent of the lessee; he had a right, therefore, to remain until such assent was revoked which was never done.

Per Patterson J., that interference by a landlord with his tenant's enjoyment of demised premises, even to the extent of depriving

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

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the tenant of the use of a portion, does not necessarily work an eviction; a tenant may be deprived of the beneficial occupation of the premises for port of his term, by an act of the landlord, which is wrongful as against him, but unless the act was done with the intention of producing that result it would not work an eviction.

Per Ritchie C. J. and Strong J., approving the judgment of the court below, that the jury having negatived consent by the lessee, and the evidence showing that the acts of the landlord were of such a grave and permanent character, as to indicate an intention to deprive the tenant of the beneficial enjoyment of a substantial part of the premises, they amounted to an eviction of the tenant which operated as a suspension of the rent.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict for the defendant and order a new trial.

By an indenture under seal made by and between Robert E. Ferguson and Alfred B. Sheraton, dated the 6th of May, 1882, Ferguson leased to Sheraton certain land in the city of St. John, with all buildings thereon, then occupied by one Warwick and T. and A. Likely, to hold for ten years, commencing on the 1st of May, 1883, that is, at the termination of the leases of said Likely and Warwick, for the sum of $2,800 for each and every year and after the same rate for every part of a year, in four equal quarterly payments in each year, the first payment to be made on the 1st of August, 1883. The material part of this lease, so far as the present enquiry is concerned, is as follows:

"It is also hereby mutually agreed upon by and between the parties hereto that the said Robert E. Ferguson and his legal representatives, agents and servants, if he or they should think proper or expedient, may enter upon the said land and premises herein demised for the purpose of repairing, altering or improving the same or any part thereof, at any time either between the date of this indenture and the first day of May, one thousand eight hundred and eighty-three, and for

two months thereafter, but not after that time except with the approbation or consent of the said party of the second part or his legal representatives. It is also to be fully and clearly understood by and between the parties hereto that the nature and extent of any repairs, alterations or improvements which the said Robert E. Ferguson or his legal representatives may make upon the said land and premises is to be left and is left entirely and unreservedly to the judgment and decision of the said Robert E. Ferguson and his legal representatives. (But the said Robert E. Ferguson may here state in outline [in parenthesis] what his present intentions are as to said alterations, repairs and improvements, namely, that he intends removing the structures in the rear of the front or main building on the said land and replace the same with a brick structure, with stone foundation, to connect with said main building, and that in the interior, floors may be laid and the walls and ceilings of shop flat, and the two flats over the shops, may be plastered or sheathed with boards in the said addition to the said main building. That stairways may be constructed from one flat to another on all the floors. That an elevator or hoist may be placed on the premises That drain may be re-cut or new drain made from a point in said proposed addition through the said main building, under the floor of one of the shops in the same, to the front on said street, thence to the sewer leading to the 'main' on said street. And also, that the floor in premises occupied by said Warwick as aforesaid, in the shop part, may be renewed. And also, plumbing may be re-done and gas pipes put in said addition.) It is to be understood also that the said Alfred B. Sheraton and his legal representatives are to make at his and their own expense and risks any and all improvements and repairs which he or they may require during the term of this lease

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in or upon the said demised premises, over and above what the said Robert E. Ferguson and his legal representatives may make, as above indicated, and to keep the said premises, after such improvements are made, both those of said Robert E. Ferguson and his representatives, and Alfred B. Sheraton and his representatives, in good and sufficient repairs and condition during the term of this lease."

The defendant Troop and one H. C. Lawton, by an instrument under their respective hands and seals on and annexed to said lease, agreed with plaintiff as follows:—

"In consideration of the letting of the premises above described and of the sum of one dollar, to me in hand paid, the receipt whereof I, H. D. Troop, and I, H. C. Lawton, hereby acknowledge, I do hereby become surety for the punctual payment of the rent and performance of the covenants in the above written agreement mentioned to be paid and performed by the said Alfred B. Sheraton for himself, his heirs, executors, administrators and assigns, in the manner of above agreement, and if any default shall be made therein, I do hereby promise and agree to pay unto the said Robert E. Ferguson, his heirs, executors, administrators and assigns, such sum or sums of money as will be sufficient to make up such deficiency and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment or proof of demand being made. Given under my hand and seal this sixth day of May, one thousand eight hundred and eighty-two."

On this last instrument the present action is brought against the defendant Troop, the plaintiff alleging that Sheraton entered into and occupied the premises under the lease and became tenant of the plaintiff under the terms of the said lease, and then avers default in pay-

ment of rent, and that at the commencement of the suit there was due to the plaintiff $1,400 for two quarters rent. To recover this amount the action was brought.

To this defendant pleaded a number of pleas substantially that the tenant was evicted by the landlord from a portion of the demised premises, and the case turns upon whether or not there was an eviction.

The repairs were not completed by the first of July and the plaintiff claimed that the delay was caused by the tenant asking for additional improvements. The tenant, in giving evidence at the trial, denied that he ever verbally consented to plaintiff remaining after the 1st of July, but it was sworn that he had insisted upon everything being finished by October, in time for an exhibition which was to be held then.

The jury found that the property was not fit to be occupied up to the first of November and that no consent was given by the tenant or his surety for the plaintiff remaining in possession after the time stipulated. The tenant left the premises in September. On these findings of the jury a verdict was entered for the defendant and affirmed by the full court of New Brunswick.

There was a former trial of this case, the verdict in which was set aside and a new trial ordered (1).

Gilbert Q.C. for the appellant. There can be no eviction of a tenant unless it appears that the landlord had an intention to evict. *Upton* v. *Townend* (2); *Saner* v. *Bilton* (3).

Weldon Q.C. and *Barker* Q.C. for the respondent referred to the report of the case in the court below (1) and to the following cases. *Upton* v. *Townend* (2);

(1) 25 N.B. Rep. 440.

(2) 17 C.B. 30.

(3) 7 Ch. D. 815.

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Smith v. *Raleigh* (1); *Reeve* v. *Bird* (2); *Morrison* v. *Chadwick* (3); *Neale* v. *McKenzie* (4); *Egerton* v. *Page* (5); *Sherman* v. *Williams* (6).

SIR W. J. RITCHIE C.J.—It is clear beyond all doubt that by the acts of the landlord the tenant was deprived of the enjoyment of a considerable portion of the premises demised to him, and that in consequence thereof the lessee, after notice that he considered himself evicted, abandoned the premises. The question then is: Did the acts amount to an eviction of this part of the demised premises so as to operate as a suspension of the rent?

Williams J. in *Upton* v. *Townend* (7) says:—

Considering how frequently transactions of this sort are taking place it is somewhat remarkable that so little is to be found in the books upon the subject of eviction. There clearly are some acts of interference by the landlord with the tenant's enjoyment of the premises which do not amount to an eviction, but which may be either mere acts of trespass or eviction according to the intention with which they are done. If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises they would constitute an eviction.

Chancellor Kent, in a note to the 3rd vol. of the Commentaries (8) says:—

Any act of a grave and permanent nature done by the landlord with the intention and effect of depriving the tenant of the enjoyment of any portion of the demised premises is an eviction in the modern sense which suspends the entire rent while it lasts, and there cannot be a doubt that the question whether the act is of that character and done with that intent is for the jury.

Citing *Upton* v. *Townend & Greenlees* (9); *Royce* v. *Guggenheim* (10); *Skally* v. *Shute* (11). And he goes on

(1) 3 Camp. 513.
(2) 1 C.M. & R. 36.
(3) 7 C.B. 283.
(4) 1 M. & W. 747.
(5) 1 Hilton (N.Y.) 329.
(6) 113 Mass. 481.
(7) 17 C.B. p. 67.
(8) 13th edition p. 464.
(9) 17 C.B. 30.
(10) 106 Mass. 201.
(11) 132 Mass. 367.

to say, there can be no doubt that the eviction by the landlord of his tenant from a part of the premises creates a suspension of the entire rent (1).

It is clear that the entry by the landlord up to the 1st of July was not with any such intention because it was under the express terms of the lease, so that we have to ascertain whether the acts subsequent to the 1st of July by the landlord were not of such a grave and permanent nature as to amount to an eviction.

If the subsequent acts of interference with the tenant's rights rendered it incompatible for him to hold according to the terms of his demise, and those acts were done with the intention of not permitting the tenant to enjoy for the time being the premises as he was entitled to enjoy them, and they were of a serious and continuous character, or as Chancellor Kent expresses it of a grave and permanent nature, then they would, in my opinion, amount to an eviction because the tenant would be thereby deprived of the occupation of the thing demised, and there would be a substantial interference in the enjoyment of the premises by the tenant whereby he would be deprived of the perfect and convenient use of the subject matter of the demise so as to entitle him to say he had not had the enjoyment of that to which he was entitled.

The plaintiff claims the right to continue in possession after the first of July by and with the consent of Sheraton and contended that he was to have four months from the first of May to make and complete his improvements; in fact he says that October was fixed upon though he was not to be bound at all as to time. This was unequivocally denied by the tenant and, as the learned Chief Justice in his charge says, the important question the jury had to decide was whether or not Sheraton gave permission to con-

(1) See the authorities cited in 1 William Saunders 208, note 2.

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tinue the work after the first of July 1883. So the great and material question was whether or not after the first of July 1883 Ferguson had the right to continue and make the improvements on the property. On this point the learned Chief Justice says:—

The parties are as far apart as can well be. Sheraton tells you that he gave no consent of that kind whatever; that during the period when Ferguson had a perfect right to be there—that is before the first of July—he remonstrated with him on the slow way in which he was carrying on the work, that he had not sufficient men employed to do the work within the time, and could not do it within the time, but Ferguson always said there was plenty of time and that he would have it done in time.

The learned Chief Justice goes on to say:—

That is the contention on the part of Sheraton. If there is any part of the evidence you desire read to you I will read it or cause it to be read for you. On the other hand Ferguson says that on or about the first of May, when Sheraton's term commenced, and when he had the right to go in as tenant, they had a conversation, that it was then spoken of that it would require at least four months to do the work instead of two—that is the work Ferguson desired to do there—and the first of October was spoken of, and Sheraton said he would like it done because the Exhibition would take place shortly after that time, and he says more, he says that he told him he could take his own time and did not confine him down to the first of October, and that it might require longer, and that he could take what time he liked. (Reads evidence of Sheraton from record.) (The stenographer reads direct examination of Ferguson from record and part of cross-examination from short-hand notes).

This question was left distinctly to the jury and the conclusion to be arrived at depended solely on whether the jury believed the plaintiff or the tenant, and the learned Chief Justice then goes on to say:—

3. Did the plaintiff continue his work on the property after the 1st July with the consent of Sheraton?

This is the important question; they are directly opposed in their testimony to each other, and you must judge between them which is the most likely to be correct. By the terms of the lease I think the fair inference is that two months were supposed to be long enough to make these intended improvements, and he gave himself that power,

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but then he reserved another right conditionally, if Sheraton would give him permission to continue afterwards, after the 1st of July. It appears to me that putting that term there indicated that he rather thought he would get through his work during that time. They are directly opposed to each other on that, and you must consider which has given the most reasonable kind of evidence. It is always a hard matter to do, but you must find against one party or the other—see which is the most probable. It would seem to be a wild agreement for Sheraton to make, that he would allow the property to be occupied by his landlord for the period of five months to make these improvements, he having no beneficial use of the property at that time, and pay $700 a quarter; and then on the other hand there was one expression of Sheraton's which did strike me as being a little singular, and which seemed to bear out Ferguson, that is about having it in time for the exhibition, and he stated that he was anxious to have it ready for October for the exhibition; you must weigh all these things. Then as to anything said by Sheraton after the 14th of August, you will bear in mind that after that notice he was acting under advice of counsel; he had consulted Dr. Barker, or at all events he was advised as to what his rights were, and it would be very singular that being in that position and coming fresh from Dr. Barker's with that notice in his hand, that he would make any admissions to cut down his rights in the matter; it is, however, for you to decide between these parties.

To this question, No 3 the jury say he did not. Then the question is put: 4. Did Sheraton agree that plaintiff might have until the 1st of October to complete his work? To which the jury replied: he did not.

No. 6. Did Sheraton consent after giving notice of the 14th of August that the plaintiff should continue on and do the work? To which the jury replied, no.

The jury were also asked to find:—

1. Was the property fit to be occupied for the purpose for which Sheraton leased it between the 1st August and the 1st November, 1883? It was not.

2. Was the property fit to be so occupied between the 1st November 1883, and 1st February, 1884? It was not.

5. Did the defendant (Troop) in August, 1883, assent to, or request the plaintiff to remain and finish the work? No.

This question was left to the jury at the request of

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plaintiff's counsel and the plaintiff was expressly contradicted by Troop. This, perhaps, is more important in reference to the credit to be given to the plaintiff's evidence than as bearing on the case directly.

The Chief Justice says:—

> You will bear in mind that there is no contradiction to the fact that he did remain after the 15th September, but there is evidence that although he did go out—it is contended on the part of Sheraton that even down so late as the former trial it was almost in the same condition as when Sheraton left on the 29th of October, and that it was not in a position for beneficial occupation—that is the front shop; that is one of the claims set up.

Upon these findings the Chief Justice ordered judgment to be entered for the defendant.

Under the lease it is my opinion that the landlord was bound to enter and finish the improvements before the first of July unless he could show a clear and express consent of the tenant that he should longer occupy; I think it would be quite unsafe and improper to allow the express terms of the lease, a sealed instrument, to be altered by any such loose conversations as plaintiff relies on; but when the jury have found in direct opposition to his testimony, and had the witnesses before them, and were, no doubt, well acquainted with both parties and chose to believe the tenant in preference to the landlord, it would be against all precedent to disturb their finding. The landlord relying on his claim of right to continue in possession until October, after the letter of the 14th of August, and doing so, and thus keeping the tenant intentionally out of possession from the 1st of July, or certainly from the 14th of August, until October, was in my opinion more than a mere trespasser and his acts were of such a permanent and continuous character as to show an intention of depriving the tenant of the beneficial and perfect enjoyment of a substantial part of the premises, at least for a time, and this was

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such a wrongful dealing with the property that it could not be beneficially occupied by the tenant, and doing this under a claim of right, what intention could he have had but to deprive the tenant of the beneficial use, enjoyment and occupation of the property from the 1st of July to October as he claims he had a right to do? Sheraton might have chosen to rest on his rights but it certainly cannot be said that he did so after the letter of the 14th of August when he was acting under legal advice. If Sheraton had the right to leave the premises when he did we have no right to speculate on the motives which may have prompted him to remain quiescent until the 14th of August. The jury disbelieved the evidence of the plaintiff and believed the evidence of the tenant, and that evidence very clearly shows that Sheraton was deprived by the wrongful acts of the landlord of the beneficial occupation of a portion of the premises, and as the landlord had no right to occupy or continue to occupy after the first of July for the purpose of repairs, his acts amounted to an exclusion of Sheraton from the possession of the premises under a claim of right; such acts being of a grave and permanent nature can it be said that they do not clearly indicate an intention that the tenant should no longer continue to hold those portions of the premises of which the landlord was in possession because the tenant could have no beneficial enjoyment of them during the time he was occupying, as the jury found, wrongfully?

I think, therefore, the tenant having been intentionally deprived of the possession of a part of the premises by the landlord the rent was suspended and the obligation to pay the rent ceased until the tenancy was restored.

The case was before the court on demurrer, has been twice tried and I should not be willing to send it

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to another trial unless I was satisfied there had been clear misdirection, or that there was no evidence to justify the verdict of the jury, of which, accepting the evidence of the tenant, there was ample. In my opinion there was been litigation enough. The charge of the learned Chief Justice on the second trial was entirely satisfactory.

STRONG J.—Concurred in the judgment of the court below.

TASCHEREAU J.—For the reasons given by my brother Gwynne I am of opinion that this appeal should be allowed with costs.

GWYNNE J.—The issues were brought down for trial at the circuit court for the city of St. John, in January, 1885, before Mr. Justice Fraser, who charged the jury that under the terms of the lease the plaintiff had a right to enter upon the demised premises to make repairs and alterations, and that it was not material whether the work took two months or four months, as with Sheraton's consent the plaintiff could remain after the 1st of July, and that it was for them to say whether down to the 14th of August he had this consent. He directed them that if the plaintiff began to make improvements he must continue to complete them, and he said that what the defendant claimed was that there had been an eviction of Sheraton, and he left it to the jury to say whether the plaintiff remained on the premises after the 1st day of July for the temporary purpose of making repairs or with the intention of permanently depriving Sheraton of the enjoyment of the whole or any part of the leased premises; and he directed them that in the latter case there had been an eviction but otherwise that it was

only a trespass. The jury upon this charge rendered a verdict for the plaintiff. Upon a motion to set aside this verdict and for a new trial the Supreme Court of New Brunswick set aside the verdict and granted the new trial upon the ground of misdirection in the above charge and held that, under the terms of the lease, the plaintiff had no right after the 1st of July, 1883, to enter at all upon the demised premises or to make any repairs thereon, and that if he did so, and in doing so excluded Sheraton from the beneficial occupation of any part of the premises, it would be an eviction to that extent—and that, in fact he had no right to undertake the making of any repairs unless he should finish them by the 1st of July—that this agreement in the lease might be altered as between Sheraton and the plaintiff so as to release the plaintiff from its terms, but that if this was done without the defendant's consent he would be discharged, and that, as to the defendant, the court was obliged to act solely on the written agreement (in the lease) as the defendant never consented to any alteration of it. The case accordingly came down again for trial at the St. John March Circuit of 1888, when the defendant claimed the right and was permitted to begin, which he did, by calling the tenant, Sheraton, as a witness on his behalf, for the purpose of establishing by him that he was evicted from a part of the premises by the plaintiff, whereby the rent reserved as issuing out of the whole of the demised premises became suspended. Upon this allegation of eviction the defence was wholly rested.

Sheraton testified that upon the 1st and 2nd of May, 1883, he entered into possession of the demised premises, and that their condition at that time was very bad. It will be convenient now, bearing in mind this statement, before proceeding further with his evidence,

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to draw attention to the terms of the lease under which he entered upon possession of the premises which, at the time of his entry, he admits to have been in a very bad condition. He was informed by the lease that one Likely was tenant of one part, and one Warwick was tenant of another part, of the premises until the 1st of May, 1883, when Sheraton's term was to commence, and it appears by Sheraton's lease that the leases, under which Likely and Warwick respectively held possession, were placed in Sheraton's hands for his perusal before he executed and accepted the lease to himself, and that he was informed that Warwick was the owner of all the shelving in the shop leased to and occupied by him, and of part of that which was in the rooms on the floors above that shop; and that he, as such owner, had a right to remove and take away that shelving. The demising clause in the lease to Sheraton witnesseth :—

That the said Robert E. Ferguson, for the consideration hereinafter mentioned, does hereby lease, demise, and let unto the said Alfred B. Sheraton, a certain parcel of land, situate on King street in the said city, known and distinguished on the map or plan of the city as lot No. 389, with all the buildings thereon standing, excepting as hereinafter specified, in regard to propositions for improvements, and a clause in the lease of one Warwick, now in possession of part of said demised premises, namely, that he is owner of all the shelving in the shop, and part of same in floors above said shop, (the fixtures belonging to and now found in that part of said demised premises, occupied at present by T. & H. Likely, belong to the said Robert E. Ferguson) to hold for the term of ten years, commencing the 1st day of May, 1883, (that is at the termination of the lease of the said Likely and Warwick) the said Alfred B. Sheraton agreeing to the terms and conditions of this the within lease, subject to the said existing leases and tenancies, (the said Warwick's and Likely's leases having been handed to the said Alfred B. Sheraton by the said Robert E. Ferguson to read and if he should think proper to copy the same previous to the execution and delivery of this indenture).

Now, with respect to the above words, " with all buildings thereon standing, excepting as hereinafter

specified, in regard to propositions for improvements," it is to be observed that subsequent provisions in the lease leave it quite optional with the plaintiff, whether he should or not make any of the improvements which are outlined, as the expression is, in the lease. Sheraton enters into a covenant that he will at the expiration of the lease peaceably yield up to the plaintiff

all and singular the premises, and all future erections, additions and improvements that may be made to and upon the same during the term of this agreement in as good order and condition, in all respects, (damage by fire and other unavoidable casualties alone excepted) as the same now are, or may be put into by the said Robert E. Ferguson or his legal representatives provided the said Robert E. Ferguson or his legal representatives do actually make the improvements hereinafter outlined.

Then the clause in which they are outlined is as follows (1) :

This clause in the lease seems in very plain language to have left it entirely and unreservedly to the judgment and decision of the plaintiff, whether he should or should not make all or any of the suggested alterations and improvements thus outlined, and in case the plaintiff should eventually resolve not to make some or any of them there is no provision in the lease for any reduction in the rent, so that if the plaintiff should conclude not to make any of them, or some of them, the lessee would still be liable for the whole rent, and, in addition to furnishing the premises which had been occupied by Warwick with fixtures in lieu of those which he should remove under the clause in his lease in that behalf, would be obliged to make at his own expense such of the outlined alterations and improvements as the plaintiff should conclude not to make, and as should be necessary for the complete beneficial enjoyment of the demised premises by the lessee. Bearing in mind then, the statement of Sheraton, that at the time of his entering into possession of the demis-

(1) See p. 529.

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ed premises, on the 1st or 2nd May, 1883, they were in a very bad state of repair, and in view of the nature of the proposed alterations as outlined in the lease, we may safely conclude that such alterations, or some of them, were actually necessary, and that it was manifestly of the utmost importance to the lessee, and wholly in his interest, that the plaintiff should make the outlined alterations, and that to induce him to do so, and to enable him to complete them, the utmost facilities should be given to him by Sheraton, whatever length of time might reasonably be necessary for that purpose. These considerations afford, I think, some assistance in enabling us to construe the clause in the lease giving to the plaintiff license of entry upon the demised premises for the purpose of making the suggested alterations and improvements. That clause is as follows:

It is also hereby mutually agreed upon by and between the parties hereto, that the said Robert E. Ferguson and his legal representatives, agents and servants, if he or they should think proper or expedient, may enter upon the land and premises herein demised for the purpose of repairing, altering or improving the same, or any part thereof, at any time, either between the date of this indenture and the first day of May, 1883, or for two months thereafter, but not after that time except with the approbation or consent of the said party of the second part, or his legal representatives.

Now, the words in this clause,

at any time between the date of this indenture and the first day of May, 1883,

are wholly irrelevant and insensible, because during all that time the premises were under lease to Likely and Warwick, so that Sheraton could not, during that period, grant any license to the plaintiff to enter upon the premises for any purpose. We must, therefore, in order to construe the clause, leave out of it this period and these words; and as the license purported to be granted by Sheraton could only operate from and after

the first day of May, 1883, we must read the clause as providing only from that day, and by a slight transposition and appropriate collocation of its members it will read thus:

It is also hereby mutually agreed upon by and between the parties hereto, that the said Robert E. Ferguson and his legal representatives, servants and agents, if he or they should think proper or expedient, may, at any time within two months after the first day of May, 1883, but not after that time except with the approbation or consent of the said party of the second part or his legal representatives, enter upon the said land and premises herein demised, for the purpose of repairing, altering or improving the same or any part thereof.

Now, there is not a word in the clause prescribing any time within which the repairs, alterations or improvements which should be commenced should be completed. The clause does not say that the plaintiff may, within two months after the 1st May, 1883, enter and complete such repairs, alterations or improvements as he may make on the demised premises, but that within the period named he may enter upon the demised premises; for what purpose? solely for the purpose of repairing, altering and improving the premises. The license does not authorize an entry for any other purpose; but whether the repairs, alterations or improvements to be undertaken consequential upon such entry would require six months or any lesser period for their completion, the lease does not profess to prescribe. The period within which the license to enter should operate (unless supplemented by further approbation or consent of the lessee) is limited, and the sole purpose for which such entry is permitted is defined, namely, for the purpose of repairing, altering or improving the demised premises; but what these repairs, alterations or improvements should be is undefined, and necessarily so, for they are left to the sole judgment and will of the plaintiff; and these being undefined and left to the judgment and will of the

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plaintiff, the time within which such as the plaintiff might resolve to undertake should be completed, must necessarily be undefined also; and must, therefore, extend to such time as might be reasonably necessary for the completion of such repairs, alterations and improvements as should be undertaken. And this appears to me to be the true construction of the lease—namely, that the plaintiff could, after the 1st day of July, 1883, continue to enter upon the demised premises for the completion of repairs, alterations and improvements commenced within two months after the 1st day of May, 1883, and for such length of time as might be reasonably necessary for such completion without any further "approbation or consent" of the lessee beyond what was implied in the license granted by the lease.

Now Sheraton's evidence was adduced by the defendant for the purpose of establishing the eviction which the defendant had pleaded, and his examination-in-chief proceeded wholly upon the assumption that the plaintiff had no right whatever to enter upon the demised premises after the 1st July, 1883, or to make any repairs or improvements whatever thereon after that day, although for the purpose of completing work begun before the 1st day July, unless he should obtain the consent of Sheraton expressly given for that purpose and Sheraton swore that he never did give such consent. It may be said that every day that the plaintiff was occupied in executing repairs and improvements commenced by him he necessarily made a distinct entry upon the demised premises, but, as I have already said, the true construction of the lease appears to me to be that there was an implied license already granted by the lease without any further approbation or consent of the lessee to enter from day to day so long as was reasonably necessary for the completion

of repairs and improvements commenced within two months after the 1st of May, 1883; however, whatever may be the true construction of the lease in this respect, the words of the lease are

> But not after that time except with the approbation or consent of the said party of the second part (the lessee).

Now, such approbation or consent may be implied as well as expressed, and it may be implied from divers circumstances without a word being said for the purpose of conveying in express terms such approbation or consent, as for example, if during the progress of the work by the plaintiff, after the first of July, the lessee should make suggestions as to the mode in which he would like certain of the repairs and improvements (in progress of being made by the plaintiff) executed; or if he should, while repairs contemplated by the plaintiff were in progress of execution, request the plaintiff to undertake for the benefit of the lessee an improvement which the plaintiff had not contemplated, and which the plaintiff, upon such request of the lessee, should undertake to do, the completion of which would delay for an undefined period the completion of the works which the plaintiff had in progress of execution; or if, during the progress of the repairs and improvements by the plaintiff, the lessee should be urging him to expedite his work in order that the lessee might have the full enjoyment of the demised premises with the repairs and improvements completed by a distant specified day; or if the lessee was himself continuing to make repairs and improvements not within the improvements contemplated by the plaintiff during the same time, and after the 1st of July, as the plaintiff was proceeding with the repairs and improvements he was making; from all these and the like circumstances a jury might well imply that the plaintiff had the approbation of the lessee to continue with

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his work to completion after the first day of July, equally as if he had the lessee's express consent to that effect given verbally or in writing.

Now, Sheraton in his examination in chief says that the plaintiff continued working on the premises until the middle of August, when he applied for the rent due the 1st August, and that he, Sheraton, sent the rent and a letter dated the 14th August, which had been framed for him by counsel, and to which I shall have occasion to refer by and bye; he also said that he told the plaintiff several times after the first day of July that it would be worth a great deal to him, Sheraton, to have the place completed at the time of the exhibition in October, and that he impressed this upon the plaintiff, and that it would not be done at the rate the plaintiff was going on.

Being then asked if he ever assented to the plaintiff remaining in or on the premises for the purpose of making the repairs beyond the 1st of July, he answered "I do not know what you mean by assent; do you mean a verbal assent?" to which the counsel for the defendant, who was examining him, saying "yes" he answered "then I never did." Being then asked, "did he consent to it in any other way? he answered, "the only way is that I did work myself after the 1st July, and I don't know how you would construe that."

Upon cross-examination he repeated that he was anxious to have all the work done in time for the exhibition in October and that he urged the plaintiff to get it done by that time—that he did so several times, and that the plaintiff repeatedly told him he would have the work done in time. He said further that it was in the month of July that he urged the plaintiff about getting the work done and that he was not prepared to say that he did not do so, also, in August. Being then asked again if he did not in any

way assent to the plaintiff staying on the premises after the 1st day of July he answered—"I explained that before; I distinctly deny ever giving him a verbal consent." Being then asked "if that is true what is the sense or meaning of wanting him to have the work done before the exhibition in October" he answered "You will have to draw your own inference from that, I cannot say;" and being asked, whether it was not in the month of August when a Mr. John Ferguson was working on the Likely building for Sheraton that he spoke to the plaintiff about getting done by exhibition time he answered:

I cannot say, I do not know that I went to work in August, with the view of getting it done by that time but with the view of getting my work done; up to that time I had no idea of quitting the premises.

Sheraton also said that immediately after he had entered into possession under the lease the plaintiff began to make the repairs and improvements indicated in the lease, and that he commenced by taking down the wooden building in the rear, fronting on Market Street, that he took out the windows on the King Street front of the "Likely" building and cut down the work underneath the window so as to make an opening down to the level of the street, to enable cars to go in and out, which did go in and out, carting out the materials from the excavation under the new building to be erected in lieu of the wooden one taken down.

This work was done in order to make the excavation under the new building, which eventually, was excavated to the depth of 14 or 15 feet below the level of Market Street, upon which the new building fronted; in doing this work the fixtures in the "Likely" shop were taken down. These fixtures, including shelves, counters and certain show windows taken out of the

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Likely building to let the carts get through to the rear, Sheraton asked for and received the plaintiff's permission to take away to the Warwick shop, and to use them for the purpose of fitting up that shop which Sheraton was fitting up himself. With the fitting up of that shop the plaintiff had nothing to do, and, consequently, Sheraton would have to supply for fitting up the Likely shop, when it should be in a condition to be fitted up, such articles as he had been thus permitted to remove to the Warwick shop.

As to the upper window taken out of the front of the Likely shop by the plaintiff Sheraton contemplated having it put in differently from what it had been; his proposed alteration in that window required a difference in the glass.

Sheraton says that he asked the plaintiff if he should make the alteration whether the order could be included in an order of the plaintiff's, and he said he did not go down to one Thorne and cancel the plaintiff's order for glass, but he admitted that he did go to Thorne about the glass he intended to put in himself, but that he found his estimate too high and could not do it; he said, further, that he did not think he spoke to the plaintiff about altering that glass until after the first of July. Being asked if he did not offer to pay the plaintiff ten per cent. on the cost of the glass if the plaintiff should get it he answered, "I said if he spent $1,000 on such improvements as I would indicate I would pay ten per cent, and that glass was part of it. I forget what else there was, but there was something about shelving, about the vault there was a separate understanding." It thus appears that Sheraton in the month of July contemplated, as necessary to the complete enjoyment of the demised premises for his purposes, certain improvements in addition to those then in progress of being made by the plaintiff requir-

ing an outlay of about $1,000, upon which he expressed himself to be willing to pay 10 per cent. in addition to the rent, but he said that he and the plaintiff came to no conclusion about the $1,000, as the plaintiff refused to do it. He admits that there was a separate understanding about a vault, what it was he did not state. He admitted also that at his request the plaintiff agreed to put in water closets, and that he thinks there was an agreement as to the cellar, but what it was either he does not state; neither vault, water closets or cellar are indicated in the lease. He also said that he was not prepared to swear that it was not at his request that the back wall of the front building was pulled down, but that he did not think it was.

It appeared that the excavation to put in the water closets was in rock which had to be blasted, and he admitted that no one could deny that it would take more time and more expense to excavate the cellar and put in the water closets than if the foundation of the new building had been put on the rock. It is to be observed that to have placed the foundation on the rock would have been a compliance with the improvements as indicated in the lease, while the building of the water closets necessitated a deep drain from them.

Sheraton also said that both he himself and the plaintiff went on working until August; that about the 14th August, the date of the letter he sent to the plaintiff, he Sheraton, was working at the Likely buildings, fixing the ceiling—putting in joists—and that up to that time he did not know that he made any objection to the plaintiff remaining carrying on the works he was executing, beyond remonstrating about the time he was taking—that up to that time he had no idea of quitting the premises. He had already said, as we have seen, that during the month of July he was repeatedly urging the plaintiff to expedite his

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work, so that the alterations and improvements in progress of being made might be completed by the time of the exhibition in October. Now the suggestion of the plaintiff is, that in truth it was not any delay on the part of the plaintiff in proceeding with the repairs and improvements he was making that was the cause of Sheraton's sudden change of mind and conduct and of the letter of the 14th of August, but that Sheraton's failure in his business, by reason of his having been unable to negotiate an arrangement with his English creditors, was the sole cause of the letter of the 14th of August and of Sheraton from that date ceasing to execute the work which he himself had to execute and, until then, was executing, and of his finally, two days before the next quarter's rent becoming due, abandoning the demised premises as no longer of any use to him by reason of his failure in his business.

Up to that time he had no idea, as he himself admitted, of quitting the premises; and he said that he would not swear whether or not it had ever occurred to him that he was not going to stay on the demised premises until he found that his negotiations in England had failed. Being asked whether the whole cause of the difficulty with the plaintiff was not that if he could have gone on straight with his business there would have been no difficulty and that he would not have left his answer was "I would have sued him for damages." Being then asked what remained to be done on the 14th of August, that is which the plaintiff had to do except the furnishing of the stairways his answer was "all the stairs had to be built," but whether the stairs in the lower store were or were not almost finished on the 14th of August he could not remember.

Now, from the above, it may reasonably be inferred

that Sheraton's failure to come to an arrangement with his creditors, and the writing of the letter of the 14th of August, which was framed by counsel for Sheraton, were contemporaneous occurrences.

Being then asked whether, after the letter of the 14th August, he did not on that day or the day after meet the plaintiff and have a conversation with him in relation to its contents he answered, "I do not remember." Being pressed with a repetition of the question whether he did not meet the plaintiff on King street and speak about the letter he answered still, "I do not remember." Being still pressed whether the plaintiff did not then ask him if he wanted him to quit work, he answered that he did not think he replied anything to him, as he was then acting under the advise of his counsel and held his tongue.

In this answer there is something which certainly seems to give great weight to the suggestion of the plaintiff as to the real cause of the difficulty being the fact of Sheraton's failure to arrange with his creditors, and his consequent determination as an unavoidable necessity that he should leave the premises, in which but for that failure he would have carried on his business, and not any wrong committed by the plaintiff, whether of the nature of eviction or of any other nature. We find Sheraton and the plaintiff working upon the premises during the whole of the month of July, Sheraton, as he himself says, repeatedly, during that period, urging the plaintiff to expedite his work so that the premises might be completed by the time of the exhibition in October. We find the plaintiff during this month executing at Sheraton's request or suggestion some work which the plaintiff had not undertaken to execute or contemplated executing himself, and which necessarily delayed the completion of the work he had contemplated executing, and was in progress for a

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period of time not specified. In the month of August they continue working, each at his own part of the work, which was in progress, and all that passes between Sheraton and the plaintiff was this urgency on the part of the former upon the latter to expedite his work when suddenly, and contemporaneously with Sheraton finding that he can make no arrangement with his English creditors, and that his failure in his business is inevitable, he consults counsel who drafts for him this letter of the 14th of August, and gives him advice as to his future conduct towards the plaintiff, which would seem to have been to the effect that he should be guarded as to having any conversation with the plaintiff upon the subject of the letter, for this, I think, is the fair inference to be drawn from Sheraton's last answer above stated.

The letter, which was written by Sheraton's counsel for his signature and signed by him, was in the shape of a notice addressed to the plaintiff in the terms following—and this is the first time that any idea of anything in the nature of an eviction had taken place appears to have occurred to Sheraton.

> I hereby notify you that as you have not finished the improvements to the premises as you were to do, and thus kept me out of the possession of the premises, and evicted me from them, I pay the quarter's rent due the first August instant under protest, not waiving my rights, to avoid distress. I give you notice that I now claim your conduct amounts to an eviction, and that the rent is suspended and that I shall hold you liable for all damage which I have sustained or may by reason of my not being permitted to occupy the premises. I wish to inform you that the damage is serious and that you will be held responsible.

The first sentence in this letter would have been disingenuous in the extreme, it would have been unfounded in point of fact, if the language had proceeded from Sheraton himself, who had knowledge of the fact that all that had passed between himself and

the plaintiff up to the day upon which the notice was written was that Sheraton was repeatedly urging the plaintiff to expedite his work so that all that had to be done might be completed by the time of the exhibition in October, for that he was most anxious to have it all done in time for that exhibition, as he himself has sworn in his evidence, but it appears that the language was merely that of counsel putting a legal construction upon the terms of the lease apart from anything which had taken place between Sheraton and the plaintiff; while the notice insists that Sheraton had already been evicted, whereby the rent became suspended, it proceeds to say that he, nevertheless, pays the quarter's rent which fell due on the 1st of August although, by the eviction, if any such had taken place, the rent having thereby become suspended none was due or payable. Whether there had been an eviction, as insisted upon in that notice, is still the question in this action; for the determination of that question, we have, however, the light which has since been thrown upon the case by the evidence given by Sheraton himself in this action, from which the above passages have been extracted.

Now the plaintiff in most express terms contradicted the evidence of Sheraton as to there having been no express agreement between them as to the time the plaintiff should have for completion of his work. He said that prior to the month of May it was talked of between them that it would take four months to complete the contemplated work, and that in the month of May, when the work was first begun, they had another conversation upon the subject, which resulted in an agreement, that in consideration that Sheraton intended occupying the upper shop, as his doing so would make a longer time necessary, the plaintiff should have an additional month, namely, to the 1st of October.

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This, he said, came about in this way: in conversation Sheraton said that plaintiff would have plenty of time to do the work as he, Sheraton, had taken the Foster store for another year. He said that it would be better and easier to do the work in the summer, that this would go to the 1st of September; then he spoke about occupying the upper store for gents' furnishing goods which he said were on the way. Plaintiff thereupon said that would naturally retard the work, which could not be carried on so well if Sheraton should occupy the upper store. They then named another month, namely, until the 1st October, and thereupon plaintiff said that he would try to get done by the 1st of October, but that he did not like to be bound down to anytime as something might occur to prevent him, and that he then asked Sheraton if he was satisfied to that, and that he replied yes, he was satisfied. He said that this was their arrangement as to time, and that there was no other in reference to time except about the exhibition which he said came up.

This is the substance of so much of the plaintiff's evidence as was in direct contradiction to that of Sheraton. His original intention, he said, as to the rear building, was to lay its foundation on the rock, that is about eight feet below the level of Market street, and he proceeded to do so, but while he was excavating a trench for this purpose Sheraton requested him to excavate a cellar and to put in water closets, which he did; this necessitated an excavation under the building of a further depth of seven feet, and a deepening of the drain from the building, and as the excavation was all in rock it took until the 21st July to complete it. Sheraton also asked the plaintiff to build a vault which he agreed to do if Sheraton would supply the doors, which he agreed to do, but failing to do so the plain-

tiff did not build the vault. He said further that it was after the middle of July that Sheraton made to him the proposition of which he spoke as to certain improvements to be indicated by him to cost about $1,000, and that plaintiff declined to make the advance for him. He said, further, that they both went on with their respective work upon the premises, Sheraton continually making suggestions to the plaintiff, until the 13th of August, on which day news came of Sheraton's failure to make arrangements with his creditors, and Sheraton knocked off his work as soon as he heard this news and never did any more, and the next day, namely, the 14th August, served plaintiff with the notice of that date. The plaintiff further said that at the time of his receipt of this notice the rear building was finished with the exception of some windows which had not yet been all put in, and that all plaintiff's work was completed except the stairs, which were not yet put up, and some other matters of a very trifling nature, and he said that upon receipt of the notice he went the next day to Sheraton and asked him what he meant by the notice; he said,

> I said to him, Sheraton, that note you wrote I can hardly tell what the meaning is, and I have taken it to my lawyer, and he advised me to come up and ask you if you want me to go on with the work or knock off, and he said, "I do not want to stop work," and I was going off with that, and then I asked him if he wanted me to go on with the work, and then he would not say anything one way or the other, and I went away.

The plaintiff, however, resolved to go on with the work. One Wetmore, who had a contract for the stairs, went on with them, and the plaintiff with the little trifling things of which he spoke, and which were additional to what he had outlined in the lease. Substantially, all was completed on the 14th of August except the stairs and the windows in the rear building on Market Street. In the middle of September the stairs

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and everything were completed except the windows in one row on the lower flat of the building on Market Street, which were not put in because Sheraton wanted to have doors there instead but had not gotten a permit from the city, which was necessary for the purpose, so plaintiff securely boarded up the spaces and finally, in the middle of September, left the premises and Sheraton in exclusive occupation thereof, which he did not leave until the 29th of October, when, as he himself said, "I then went out taking everything with me."

I have thus extracted the whole of the evidence which appears to me to have been at all material.

At the close of the evidence the learned counsel for the plaintiff contended, among other things, that under the terms of the lease the plaintiff had a right to enter for the purpose of making the contemplated improvements at any time before the first day of July, 1883, and that he was entitled to a reasonable time to make the improvements, taking into consideration the nature and character of the improvements.

This contention was overruled, as it needs must have been by the judge presiding at the trial upon the authority of the judgment of the Supreme Court granting the new trial; the question is, however, now open before us upon this appeal. Then he contended that if not entitled to the rent for the two quarters ending on first November, 1883, and the first of February, 1884, he was, at all events, entitled to the latter; and, further, that the evidence was uncontradicted that the plaintiff was continuing his work with Sheraton's consent from the 1st of July until the 14th of August, and that being so he was entitled to remain, if necessary, for the completion of his work, or at least until Sheraton should require him to leave; and that his offering to leave on receiving the letter of the 14th of August,

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if Sheraton desired it, was all that was required; and he insisted that there was no intention on the part of the plaintiff to deprive Sheraton of the use of any portion of the premises; that the plaintiff was remaining merely to complete work he had undertaken; that Sheraton did not complain of his being there, and did not seek to make any beneficial use of the premises on which plaintiff was working until such work should be completed; that when the entry is lawful the mere remaining beyond a specified time for the purpose of completing work, to perform which the entry was made, is no eviction and that the non-completion of work by a landlord within a specified time agreed upon is no answer to a claim for rent reserved, but is the subject only of a cross-action; and he asked the learned judge to charge the jury that to constitute eviction there must be something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

The learned judge charged the jury that after the 1st of July the plaintiff had no right to set a foot upon the property, and continue upon it, without the consent of Sheraton; that the right which he had under the terms of the lease was a right reserved to go in between the 1st of May and the 1st of July and make improvements; but that they had to be done by the 1st of July, and that if they were not completed, then he had no right to continue making them after the 1st of July without the consent of Sheraton, and upon this point, he said (1):

And he left it to the jury to say whether or not the occupation the plaintiff had, after the 1st of July, was with the consent of Sheraton or without his consent, and that if he did not consent, and the plaintiff went

(1) See p. 534.

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on doing the acts he did after the 1st of July, claiming he had a right to do it, then that would amount to an eviction; and he added that according to the view Mr. Gilbert, the plaintiff's counsel, took of the law, it would have to be done with the intention of depriving the tenant of the enjoyment of the property, but the learned judge said:—

That necessarily follows if a landlord claims a right to go in and make improvements, and his going in deprives the tenant of the benefical use and occupation of the property, it seems to me that satisfies all the law requires to make out an eviction.

He then submitted certain questions to the jury upon their answers to which he would enter the verdict reserving leave to plaintiff's counsel to move to enter a verdict for the plaintiff, so that he might have an opportunity of moving the court upon all his points, and that the right of the parties should be reserved for the consideration of the court, and the verdict properly entered accordingly. The questions submitted the jury were as follows:—

1. Was the property fit to be occupied for the purpose for which Sheraton leased it between the 1st of August, and the 1st of November, 1883?

2. Was the property fit to be occupied between the 1st November, 1883, and the 1st February, 1884?

3. Did the plaintiff continue his work on the property after the 1st of July with the consent of Sheraton?

In submitting this question, he said:—

This is the important question, they (that is Sheraton and the plaintiff) are directly opposed to each other, and you must judge between them which is the most likely to be correct. It is always a hard matter to do, but you must find against one party or the other—see which is most probable.

4. Did Sheraton agree that the plaintiff might have till the 1st of October to complete his work on the property?

5. Did the defendant, in August, 1883, assent to or request the plaintiff to remain and finish the work?

After submitting these questions to the jury the

learned counsel for the defendant asked that the following question might be submitted to the jury, and the learned judge submitted it without any further comment or directions in addition to what he had already said in his charge to the jury.

6. Did Sheraton consent, after giving the notice of the 14th August, that the plaintiff should continue on and do the work?

Every one of these questions, the jury answered in the negative, whereupon a verdict was entered by direction of the learned judge for the defendant, reserving leave to the plaintiff to move the court to have a verdict entered for the plaintiff for the whole amount claimed, or for such part, if any, as the court above should think fit, as had been agreed between the parties.

In pursuance of the case so reserved the plaintiff's counsel moved the Supreme Court of New Brunswick in the following term to enter a verdict for the plaintiff for the full amount claimed, namely, $1,400, being two quarters rent, or at least for $700, being the quarter's rent from the 1st of August to the 1st of November, on the ground that the tenancy being admitted, and the amount of rent also, and the non-payment thereof, and the defence being "eviction" by the landlord, the acts of the landlord relied on by the defendant as constituting an eviction are not such acts as in law amount to an eviction, and, therefore, the pleas are not sustained; or, for a new trial for misdirection, and that the verdict is against law and evidence, and the weight of evidence.

Upon that motion, the Supreme Court of New Brunswick made the rule following:

On hearing Mr. Gilbert Q.C. in support of an application for a rule to set aside the verdict for the defendant in this cause, and enter a verdict for the plaintiff pursuant to leave reserved, or for a new trial, and Mr. Gregory on the same side, and upon hearing Mr. F. E. Barker Q.C. contra, and Mr. Gilbert in reply, and the court having taken

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time to consider, it is ordered that the rule to set aside the verdict for the defendant, and to enter a verdict for the plaintiff, or for a new trial be refused.

It is from this rule of the court that the present appeal is taken. In the view of the points specially submitted to the court by the learned counsel for the plaintiff at the trial, and in view of the leave reserved upon the agreement of the parties that the whole case should be reserved, so that the rights of the parties might be determined by the court, and the verdict entered accordingly, the whole of the matters in controversy, including those specified in the motion in relation to a new trial, arise and are involved in the motion made upon the leave reserved.

Now there can be no doubt, I think, that the contention of the learned counsel for the plaintiff at the trial was well founded, namely, that the evidence was uncontradicted, and, in fact, was that of Sheraton himself, that between the 1st July and the 14th August the plaintiff was doing the work he was engaged in on the demised premises with the approbation or consent of Sheraton, within the meaning of the clause in the lease in that respect, even assuming the true construction of the lease to be that put upon it by the Supreme Court of New Brunswick when granting the new trial, and which was also the construction which the learned Chief Justice, who tried the case, put upon the terms of the lease.

Sheraton, it is true, denied having given any "verbal consent," but the manner in which he gave that evidence, and the stress which he always laid upon the word "verbal," when denying having given his consent to the plaintiff remaining at his work on the premises, showed a manifest intention to qualify his denial, and seemed to convey the impression that he himself well knew that the plaintiff's so remaining

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was not against the will of Sheraton, but was with his approbation and implied consent. A slight consideration of some of the evidence thus given by Sheraton will show that the only inference possible to be deduced from facts of which he gave evidence was, that in remaining on the premises continuing to carry on the work in which he was engaged the plaintiff was doing so with the approbation and consent of Sheraton, although he may have been dissatisfied with the progress the plaintiff was making ; and that, in fact, the plaintiff's so continuing with his work was so much in the interest, and for the benefit, of Sheraton that if he had not done so Sheraton would have had just ground of complaint against the plaintiff, and it might be for very heavy damages.

Sheraton says that some time in the month of July he told the plaintiff, while the latter was carrying on his work on the demised premises, that it would be worth a great deal of money to him to have the premises completed at the time of an exhibition which was to take place in the following October; that he told the plaintiff several times in the month of July that he was most anxious that all should be done in time for this exhibition ; that he impressed this repeatedly on the plaintiff, and that it never would be done at the rate plaintiff was going on ; and to this language of his, he said, the plaintiff repeatedly said he would have it done in time; and Sheraton was not prepared to say that something of the like was not said in August also. Then, again, it was while the plaintiff's work was in progress in July that Sheraton told the plaintiff of an alteration he, Sheraton, proposed making in the front window which the plaintiff had taken out in order to get at the rear to erect the rear building in lieu of the old wooden one; and that he asked the plaintiff if his, Sheraton's, order for the glass which

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would be required for that alteration could be included in an order of plaintiff's. It was in July also while the plaintiff's work was in progress (both that indicated in the lease, and other work, namely, the water closets which Sheraton admitted the plaintiff had undertaken at his request, and the deepening of the drain necessary therefor, and the excavation of the cellar which, although he denied in one place that it was executed at his request, yet says in another, "I think there was an agreement as to the cellars, there was as to the water closets), that Sheraton made the proposition to the plaintiff that if the plaintiff would spend $1,000 on such improvements as Sheraton should indicate he would pay the plaintiff 10 per cent. thereon.

Sheraton further said that he himself, at work which he had to do, and the plaintiff at the work he was doing, went on executing their respective work throughout July and into the month of August, until, in fact, about the 14th of August, when first he conceived the idea of leaving the premises and sent to plaintiff the notice of that date, and during all this time he said that he could not say he had ever made any objection to plaintiff remaining on the premises at the work he had in progress save remonstrating with him on the time he was taking, in other words, remonstrating with him on what appeared to Sheraton to be the slow progress he was making, and urging him to use greater expedition in order to have the premises completed at the time of the exhibition in October, and being asked what remained to be done on the 14th August (when the idea of leaving the premises first occurred to him), of the work the plaintiff was doing, all that he could specify was that the stairs had to be built.

Now, upon this evidence, it is very clear that the case did not turn simply upon the question whether Sherat-

on or the plaintiff was telling the truth, the former in asserting that he had never given his verbal consent to the plaintiff continuing with his work after the first of July or the latter in asserting that express verbal consent was given by Sheraton, first for four months, that is to the 1st September which was afterwards extended to the 1st October, and the learned Chief Justice, who tried the case, therefore erred in so submitting the case to the jury, and resting it as he did in very distinct terms upon the view the jury might take of the veracity of Sheraton and the plaintiff respectively upon this single point. He should, in my opinion, have drawn the attention of the jury in a marked manner to the above points which I have extracted from Sheraton's evidence, and have told them that his "approbation or consent" within the terms of the lease could be implied from Sheraton's acts and conduct equally as if an express verbal consent had undoubtedly been given as sworn to by the plaintiff; and that the acts and conduct of Sheraton above referred to, and admitted and testified by himself, were abundantly sufficient to establish such approbation and consent. It is, in my opinion, inconceivable that upon such a charge any jury could be found to render a verdict that the plaintiff had remained at his work subsequently to the first of July tortiously and against the will of Sheraton, or otherwise than with his approbation and consent. No jury could be so obtuse as to pronounce the plaintiff to have been continuing with his work all through the month of July and into the month of August tortiously to Sheraton and against his will, when the latter was, as he admits he was, during that period, repeatedly telling the plaintiff that he, Sheraton, was most anxious to have all done in time for the exhibition in October, and urging the plaintiff to go on more expeditiously than he appeared to Sheraton to be doing in order that

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all should be done by that time, and when, during the same period while the plaintiff's work was in progress, Sheraton was asking the plaintiff to do for him, at a cost of $1,000, other work which Sheraton himself wanted to have done but which the plaintiff had not contemplated doing or undertaken to do; and when the plaintiff, also during the same period, was at Sheraton's request doing other work upon the premises than that indicated in the lease, which increased the cost to the plaintiff and caused delay in the progress of his work; for this is the substance of Sheraton's evidence as I have extracted it. A verdict rendered upon such evidence, pronouncing the continuance of the plaintiff at his work to have been, at any time subsequently to the 1st July, against the will of Sheraton, and tortious to him, could not possibly be permitted to stand. The contention of the learned counsel for the plaintiff was therefore well founded, to the effect that it was established by uncontradicted evidence, and that the evidence of Sheraton himself, that during all the time between the 1st of July and the fourteenth of August the continuance of the plaintiff on the demised premises, carrying on the works in which he was there engaged, was beyond all question with the approbation and consent of Sheraton. Under these circumstances it was quite irrelevant whether or not Sheraton after the 14th of August gave any further consent, for the learned Chief Justice stated his opinion to be, in which opinion I entirely concur, that if the plaintiff was working at the demised premises after the 1st of July, with the permission of Sheraton, that permission would continue and the plaintiff would be entitled to proceed with his work until the permission should be revoked and so countermanded. And this does not appear to have been ever done. The notice of the 14th August certainly did

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not do so; that notice simply insists upon an eviction of Sheraton having been already committed by the plaintiff. for which contention there was not in reality, as I have already shown, any foundation. Sheraton's complaints up to that time had not taken the shape of any objection to the plaintiff being upon the demised premises carrying on his work but were pointed solely to what Sheraton considered to be the "very slow and dilatory manner," as he called it in his evidence, in which the plaintiff had been proceeding with his work; and he asserts in the notice that the non-completion of the work had already caused him great damage for which he would hold the plaintiff responsible. This intimation, instead of amounting to a prohibition to the plaintiff completing his work, would seem rather to be given by way of urging the plaintiff to expedite the completion of his work, further delay in which would naturally be calculated to enhance any claim for damages which Sheraton might have against the plaintiff by reason of delay in the completion by him of his work; all of which that then remained unfinished, as specified by Sheraton himself was, as we have seen, the stairs. Again, Sheraton said that he could not remember whether or not he had had a conversation with the plaintiff in relation to the contents of the notice upon the 14th of August or the next day. After that time he said "I was acting under the advice of counsel and held my tongue," and he did not remember the plaintiff asking him if he wanted the plaintiff to stop working, adding " for the place would not be of much use to me if he stopped work;" and the question being repeated and pressed whether he had not some conversation with the plaintiff in relation to the notice of the 14th August within a day or two after that date his only answer was, "I do not remember," and "I do not think I replied anything to him

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at all, as I was then acting under the advice of my counsel." The plaintiff, in his evidence, says that he had a conversation with Sheraton, which he detailed, within a day after the receipt by him of the notice, and that in that conversation he asked Sheraton if he wished him (the plaintiff) to knock off work, and that Sheraton replied he did not want to stop work, and that plaintiff asked him if he wished the plaintiff to go on with the work. This is the time probably which is alluded to by Sheraton when he said, "I was acting under the advice of counsel and held my tongue," for the plaintiff says that to that question Sheraton would not say anything one way or other. But laying aside the plaintiff's statement of the occurrence, and resting wholly upon Sheraton's evidence as I have done as to the work done in July, it is quite clear that Sheraton never did direct, or apparently wish, the plaintiff to proceed no further with his work after the 14th of August, or at any time; and that he entertained the opinion that not his proceeding with his work to completion, but his ceasing to do so, or delay in doing so, would have the effect of doing injury to him, for, as he himself observed, "the place would not be of much use to me if plaintiff stopped his work." The plaintiff accordingly did proceed with his work, and according to his own evidence, which is not in any respect disputed, he completed all that he intended doing by the middle of September, and left Sheraton in exclusive possession of the whole of the demised premises, and it is not pretended that from that time the plaintiff entered upon any part of the demised premises, or in any manner interfered with Sheraton's exclusive occupation of any part thereof during any part of the period for which the rent which is the subject of this action accrued due.

It was also quite irrelevant to the issue between the

parties whether or not the property was fit to be occupied for the purpose for which Sheraton leased it between the 1st of August and 1st of Nov., 1883, and between the 1st of Nov., 1883, and the 1st of February, 1884. There can be no doubt that the premises could not have been wholly occupied for the purpose for which Sheraton had leased them while the necessary repairs and improvements were in progress, both those which the plaintiff was engaged in making and those which Sheraton himself had to do in order to put the premises into that condition which was necessary for the complete enjoyment by Sheraton of the whole of the demised premises, but the plaintiff could not in any form of action be made responsible for any defect in the condition of the premises which could be attributed to the default of Sheraton himself, and that he had himself been in default in respect of the repairs and improvements he had to make, and was making, in order to put the premises into such a condition that he could beneficially enjoy them, there can be no doubt; for, from the 14th August, he ceased proceeding with the work in which he was then engaged and never did any more, having then conceived the idea, which he subsequently carried into effect, of wholly abandoning the premises. Moreover, the mere fact of the premises being in a bad condition during the period named could not itself afford any evidence of the plaintiff having evicted Sheraton from any part of the demised premises and having kept him evicted therefrom during the whole of the period named, all which is averred by the defendant in his pleas of eviction, and all is necessary to be proved in order to afford any defence to this action, for in the case of an eviction from a part of demised premises if that part be restored to the tenant before the falling due of the current rent at the time of eviction the rent as reserv-

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ed by the lease is payable. In the present case it is undisputed that the plaintiff, by the middle of September, 1883, completed all the repairs and improvements he contemplated making, the nature and extent of which was by the express terms of the lease left entirely and unreservedly to his judgment and decision, and that he then wholly abandoned any occupation which he ever had of any part of the demised premises, and thenceforward Sheraton had uninterrupted occupation of the whole of the said premises without any let or hindrance of the plaintiff. By abandoning such occupation Sheraton could not determine the tenancy or get rid of his obligation under his covenant to pay rent and to keep the premises, after the improvements should be made, both those of the said plaintiff and of Sheraton himself, in good and sufficient repair and condition. The defendant, therefore, has wholly failed to establish that he is discharged from liability as to any part of the rent sued for by reason of the defence of eviction set up in his pleas. It was argued before us that even though there was no eviction, nevertheless, the defendant was released and discharged from his guarantee by reason of the matters pleaded in the third of the pleas above set out, but such a case does not appear to have been urged at the trial, where the whole case was rested upon the alleged eviction; and indeed, in point of law there is no foundation for the contention before us that the defendant could be released and discharged from his guarantee by the matters therein alleged, assuming them to be true, for the defendant's guarantee is to pay the rent covenanted to be paid by the tenant during the continuance of the term demised by the lease, or so much thereof as the tenant should make default in paying, and nothing can discharge or release the defendant from this his covenant unless it be an actual release

executed to himself, or such acts and conduct of the lessor towards his tenant as should constitute a discharge or suspension of the rent as regards him, and the plea avers nothing which constitutes a determination of the tenancy or a discharge or suspension of the rent as reserved by the lease and payable by the tenant. If there was no eviction, there was no suspension of rent and no discharge of the liability of the defendant under his covenant to pay so much of the rent reserved by the lease as the tenant should make default in paying. So that in fact the whole case rested, as it was treated at the trial to rest, upon the question of eviction.

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In the view which I have taken it may be unnecessary to determine whether or not the judgment of the Supreme Court of New Brunswick is well founded, which, as I understand it, in substance declares the continuance by the plaintiff upon the demised premises after the 1st of July without Sheraton's consent, although for the sole and actual purpose of continuing to completion the repairs and improvements outlined in the lease and already commenced, would constitute an eviction in law and suspension of the rent. But I am of opinion that judgment cannot be supported. The judgment seems to me to go farther than any case hitherto decided, and I do not think that the court has given sufficient consideration to the fact that the plaintiff had really no more possession of the demised premises, or of any part thereof, than he would have had if he had been a mere stranger executing the work he was engaged in under a contract with Sheraton and, in such case, such possession could hardly be held to be sufficient to be the basis upon which eviction could be rested; so, likewise, I think it did not receive sufficient consideration that Sheraton was himself equally in possession of the same part of

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the demised premises as was the plaintiff, and for the like purpose of making repairs and improvements equally necessary for the beneficial enjoyment by him of the demised premises as were those which the plaintiff was making, so that it appears to me to be difficult to conceive what particular act of the plaintiff constituted an eviction of Sheraton from premises upon which and upon the same part of which he was himself making necessary repairs and improvements, equally as was the plaintiff.

For the above reasons I am of opinion that the appeal should be allowed with costs and a rule be ordered to issue in the court below setting aside the verdict for the defendant and directing a verdict and judgment to be entered for the plaintiff for the full amount of the two quarters rent claimed, namely, $1,400, together with interest thereon from the commencement of action, and costs of suit.

PATTERSON J.—Robert E. Ferguson, the plaintiff, made a lease to Alfred B. Sheraton, dated the sixth of May, 1882, demising premises in the City of St. John for a term of ten years to commence on the first of May, 1883, at the yearly rent of $2,800, payable in quarterly instalments of $700. The defendant became surety for Sheraton. This action is brought to recover from the defendant, as such surety, two quarters' rent which fell due, according to the terms of the lease, on the first of November, 1883, and the first of February, 1884.

The defence relied on is that before either of these gales of rent became due the plaintiff evicted Sheraton from the demised premises, or that he evicted him from a part of the premises and Sheraton gave up possession of the rest.

At the trial of the action certain questions were given in writing to the jury and were answered in

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writing. The learned Chief Justice who presided at the trial directed a verdict for the defendant with leave to move. The plaintiff moved to have the verdict entered for him or for a new trial. His grounds are fully set out in his notice of motion which I shall refer to by and by. The motion was refused, and this appeal is from that decision.

There are some provisions in the lease to Sheraton which I find by no means easy to understand. They have been the occasion of much of the difficulties that have led to this litigation. There is a covenant by the lessee to yield up at the expiration of the lease—

> All and singular the premises and all future erections, additions and improvements that may be made to and upon the same during the term of this agreement in as good order and condition in all respects—damage by fire and other unavoidable casualties alone excepted—as the same now are or may be put into by the said Robert E. Ferguson or his legal representatives, provided the said Robert E. Ferguson or his legal representatives do actually make the improvements hereinafter outlined.

Nothing turns directly on this proviso which, as expressed, would seem to qualify the whole covenant. It would probably have to be read as touching only the subject immediately preceding it, viz., improvements made by the lessor, and it might be necessary so to understand it to make it consistent with the covenant to repair which comes farther on in the deed.

Following the proviso there is this remarkable stipulation :—

> It is hereby mutually agreed upon by and between the parties hereto that the said Robert E. Ferguson and his legal representatives, agents and servants, if he or they should think proper or expedient, may enter upon the said land and premises herein demised for the purpose of repairing, altering or improving the same or any part thereof, at any time either between the date of this indenture and the 1st day of May, 1883, and for two months thereafter, but not after that time except with the approbation or consent of the said party of the second part

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or his legal representatives. It is also to be fully and clearly understood by and between the parties hereto that the nature and extent of any repairs, alterations or improvements which the said Robert E. Ferguson or his legal representatives may make upon the said land and premises is to be left and is left entirely and unreservedly to the judgment and decision of the said Robert E. Ferguson and his legal representatives. (But the said Robert E. Ferguson may here state in outline (in parenthesis) what his present intentions are as to said alterations, repairs and improvements, namely, that he intends—)

going on to specify works of considerable extent in removing structures, building others, altering, draining, &c., &c., and adding the following, which is what I have spoken of as the covenant to repair :

It is to be understood also that the said Alfred B. Sheraton and his legal representatives are to make at his and their own expense and risk any and all improvements and repairs which he or they may require during the term of this lease in or upon the said demised premises, over and above what the said Robert E. Ferguson and his legal representatives may make, as above indicated, and to keep the said premises, after such improvements are made, both those of said Robert E. Ferguson and his representatives, and Alfred B. Sheraton and his representatives, in good and sufficient repairs and condition during the term of this lease.

When the lease was made the premises, on which were two shops, were let to other tenants, T. & H. Likely having one shop and one Warwick the other. The terms expired only on the 1st May, 1883, when Sheraton's term was to begin. The parties to the lease apparently contemplated the possibility of the lessor doing part or the whole of his projected work on the premises during the existing terms of Likely and Warwick. The provision which, in form, imports a consent by Sheraton to his lessor entering upon the other tenants looks rather anomalous, but probably takes that aspect only from being inartificially expressed. Its purpose may have been to preclude any objection on Sheraton's part to the alteration of the premises between the execution of the deed and the

commencement of the term, as well as for at least two months longer.

For the plaintiff it has been argued that the limit of the two months from the first of May, 1883, was only in respect of the entry to commence the improvements, and that, having entered within that time, or afterwards with the consent of the lessee, the lessor was authorized to remain in occupation as long as might be reasonably necessary to carry the works to completion. There is, to my mind, a good deal in favor of that reading of the deed. The language employed—"if he or they should think proper or expedient to enter upon," &c., "at any time either between," &c.—bears strongly in that direction. It would have been easy to say that whatever works the lessor decided upon must be completed within the limited time, if that was what was meant. I see no good reason for inferring that a joint occupation by the lessor and lessee was contemplated.

The lessee could not well occupy the premises for the purpose of his business while the outlined improvements, or, at all events, while some of them, were in progress. The entry permitted by the agreement I should take to be practically, or for business purposes, an exclusion of the lessee, and I do not take the entry to be repeated from day to day while the improvements were going on. The lessor was at liberty to enter for the purpose of making the improvements. When they were made he would, of course, withdraw, but in the meantime there would not be repeated entries—the entry was once for all. One is inclined to ask: Why, if the tenant is excluded from the use of the premises while the landlord is making his improvements, should he continue to pay rent? The question does not touch the point of the construction of the permission to enter. Rent was to be paid for the whole term. Some part

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of the term, be it two months or more, was to be, or might be, occupied by the works done by the landlord. The tenant would enjoy the advantage of the improvements without increase of rent, but he was to pay rent for the whole term.

The plaintiff lost no time in beginning his building operations as soon as the tenancy of Likely and Warwick expired, but he did not finish them within the two months. I understand the evidence to be that he had not completed all that he had proposed to do even in February, 1884, but there is evidence that he had ceased work on the premises sometime in September, 1883.

The quarter's rent due on the 1st of August, 1883, was paid on the fourteenth of that month, the tenant giving at the same time the written notice that he claimed that the conduct of the plaintiff amounted to an eviction and that the rent was suspended; but the tenant, who had himself been making some alterations, did not retire from the premises until the end of October, two or three days before the November quarter's rent fell due.

The facts found by the jury, upon which the verdict for the defendant was directed, appear by the following questions put by the learned Chief Justice, and the answers appended by the jury.

1. Was the property fit to be occupied for the purpose for which Sheraton leased it between the 1st August and the 1st November, 1883? It was not.

2. Was the property fit to be so occupied between the 1st November, 1883, and 1st February, 1884? It was not.

3. Did the plaintiff continue his work on the property after the 1st July with the consent of Sheraton? He did not.

4. Did Sheraton agree that the plaintiff might have till the 1st October to complete his work on the property? He did not.

5. Did the defendant (Troop) in August, 1883, assent to, or request the plaintiff to remain and finish the work? No.

6. Did Sheraton consent, after giving the notice of the 14th August, that the plaintiff should continue on and do the work? No.

Some of these answers are palpably contrary to the evidence. No. 3 in particular is irreconcilable, to my mind, with the evidence of Sheraton himself, who was careful to say only that he gave no verbal consent. He seems to me to have given his testimony with fairness and candor, not attempting to disguise his consciousness that he was proving a very distinct consent at dates later than the 1st of July though he may not have given it in so many words, or, as he puts it, giving no verbal consent. I shall not, however, take up time by discussing the findings, but shall, for the purpose of this argument, accept them as they appear, because they stop short, in my judgment, of establishing the eviction on which the defence is based.

The plaintiff's notice of motion was in these terms:—

TAKE NOTICE, that the plaintiff will move the court, on the first day of Easter Term next, or as soon after as counsel can be heard, as by leave reserved, to enter a verdict for the plaintiff for the full amount claimed, *i.e.*, $1,400, being two quarters' rent, or at least for $700, being the quarter's rent from the 1st of August to the 1st November, 1883.

On the ground—

The tenancy being admitted and the amount of rent also and the non-payment thereof, and the defence being "eviction" by the landlord, the acts of the landlord relied on by the defendant as constituting an eviction, are not such acts as in law amount to an eviction, and therefore the pleas are not sustained.

Failing above mentioned motion, motion will be made for a new trial, on the following grounds:

1st. Misdirection.

(*a.*) That the great and material question was: Whether or not after the 1st July, 1883, Mr. Ferguson had the right to continue and make improvements on the property.

(*b.*) In directing that Ferguson was bound to have the improvements he indicated completed before the 1st July unless Sheraton consented to an extension of time.

(*c.*) In not directing the jury that to constitute an eviction there must be something of a grave and permanent character done by the

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landlord with the intention of depriving the tenant of the enjoyment of the demised premises.

(*d.*) In not directing the jury, that Ferguson having entered lawfully on the premises for the purpose of completing the indicated improvements, the mere remaining there for a longer period than the time contemplated for the purpose of completing the work he had commenced would not amount to an eviction, unless such remaining in was done with the intention of depriving the tenant of the enjoyment of the demised premises.

(*e.*) In not directing the jury, that Ferguson having lawfully entered for the purpose of making the indicated improvements, if he merely remained there for a longer period solely for the purpose of completing the work he had commenced, and with no other ulterior view, such remaining beyond such time would not amount to an eviction.

(*f.*) In not directing the jury, that as Ferguson had left the premises by the middle of September, Sheraton occupying a portion and noways hindered from occupying the whole from that time out, there could not be any eviction during the quarter from the 1st November to 1st February.

(*g.*) In not directing the jury, that Ferguson having lawfully entered for the purpose of making the improvements he had indicated, the fact of his remaining longer than he contemplated was no answer to an action to recover the rent, but that if Sheraton had sustained damage thereby he had his remedy in an action for damages.

(*h.*) In leaving to the jury the first and second questions, they being immaterial to the issues and tending to lead the jury to the conclusion that Ferguson was bound to complete all he had indicated, and to have them completed by the 1st July.

(*i.*) In not leaving to the jury the question : "Did Ferguson remain in contrary to Sheraton's wish after the 15th September ?"

I am strongly inclined to the opinion that the plaintiff is entitled to succeed upon all the grounds here taken. I do not propose to discuss them at any length, and I am sensible of the difficulties attending some of them, particularly as regards the construction of the two months limitation. If my view of that clause is correct no further question can be made on this record, whether Sheraton would or would not have any claim for damages or other relief by reason of any inconvenience or loss he may have been put to from the length of time taken up by the plaintiff's work. That time

may or may not have been unreasonable. No question of fact on that subject was submitted to the jury.

But setting aside for the moment this disputed question of construction, and adopting the findings of the jury that negative any consent by Sheraton or by the defendant to the occupation of any part of the premises by the plaintiff after the first of July, I am unable to see that an eviction, working a suspension of the rent, is established.

The doctrines settled by the most recent decisions may be taken from Wm. Saunders (1), under *Salmon* v. *Smith*, where it is said:

> It is now well settled that that sort of eviction [i.e., expulsion by title paramount or by process of law] is not necessary to constitute a suspension of the rent, because it is established that if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord the whole rent is thereby suspended. An eviction may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the whole or of a portion of the demised premises. Therefore, the question of eviction or no eviction depends on the circumstances, and is in all cases to be decided by the jury.

The whole of this language is that of Jervis C.J. in *Upton* v. *Townend* (2) where the importance of the intent, as a fact found, is emphasized, as e.g.:

> If that may, in law, amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character, and done with that intention.

There is no finding of this crucial fact in the present case. It is not involved in any of the facts found, and if I correctly apprehend the charge of the learned Chief Justice as reported to us I think the necessity for it cannot have been present to his mind. After quoting from the judgment delivered by Mr. Justice Palmer at a former stage of the case the learned Chief Justice went on to remark:—

(1) 1 Vol. p. 209 (f).

(2) 17 C.B. at pp. 64-65

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Now when he says permanent I do not understand that to mean permanent in this sense that it was to last as long as the lease lasted and put an end to it, but something that would deprive the tenant for a considerable time of the use and occupation of the property leased. If that was the effect of what Ferguson did, and it was done without the consent of Sheraton, well I should say that would amount in law to an eviction, because the tenant does not get what he was paying his rent for, because he does not get the beneficial occupation of the property for the term, let it be a quarter or less, or a month, and that would justify a jury in finding there was an eviction.

Now, I take it to be indisputable that a tenant may be deprived of the beneficial occupation of demised property for some part of his term by an act of the landlord which is wrongful as against his tenant but which does not necessarily amount to an eviction. Such an act may be what is spoken of in the passage quoted from the judgment of Jervis C.J. as a mere trespass. It may be an act which is not technically a trespass, as in the case of an entry to do repairs of the nature, *e.g.*, of those in *Saner* v. *Bilton* (1), but where, from the repairs occupying more time than anticipated, the tenant is kept out for an unreasonable time. The charge fails to distinguish such cases from acts which are not only of a grave and permanent character but which are also done with the intention of depriving the tenant of the enjoyment of the whole or of a portion of the demised premises. This oversight reappears in the judgment of the court in *banc* delivered by Mr. Justice Tuck, but there the fallacy is more in the application of the law than in the statement of the rule. After alluding to the former decision in the case which compelled the court to hold that the repairs and alterations were, by the terms of the lease, to be completed before the 1st of July, 1883, he said:

That being so, the next important question to determine is whether the plaintiff did upon the premises, after the first of July, what amounted to an eviction. That, in my opinion, was for the jury, with

(1) 7 Ch. D. 815.

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proper direction as to what in law would constitute an eviction. If by the lease the plaintiff was bound to have the improvements completed and the premises tenantable by the first of July, and he failed in this and continued to occupy and make repairs, so that Sheraton, without his consent, and as the inevitable result of the plaintiff's action, was deprived of the beneficial use and occupation of the whole or some part of the demised premises, this would be evidence upon which a jury would be warranted in finding an eviction. Such acts would be evidence of an intention to evict, for a person is presumed to intend what must be the natural result of his own action.

The cogent fact that the jury did not find, and were not asked to find, viz. whether or not there was an eviction, seems to be overlooked in these observations. The fact that the tenant was deprived of the enjoyment of the premises or of some part of them by the act of the landlord would, no doubt, be a fact admissible in evidence on the issue as to the intent with which the act was done, but it would be only one fact to be considered by the jury along with all the other evidence that bore on the issue.

There is no conclusive presumption from a certain effect following an act, or even necessarily following it, that the act was done with the intention to produce that effect. In this case, if the question had been left to the jury, with a proper direction as to the importance of the motive or intention, I should not anticipate a finding that the alleged acts were done with the intention of depriving the tenant of the enjoyment of the premises. The motive in entering on the first or second of May cannot be said to be in controversy. It was obviously for the purpose provided by the lease; and while one cannot say that the jury might not see or suppose there were reasons for attributing the delay in completing the works to a design to keep the tenant out, and not to accidental or unforeseen causes or honest miscalculations, or to the extension of the works in some respects at the instance of the tenant, of which

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there is evidence, I should not expect the former view to be taken. The evidence, as I read it, taking even that of Mr. Sheraton by itself, greatly preponderates in favor of the latter conclusion. I go so far as to consider that the issue of eviction or no eviction might properly have been withdrawn from the jury on the ground that the entry was in accordance with the terms of the lease, and that there was not, under the circumstances, evidence on which they could reasonably find that the prolonged occupation of the premises by the plaintiff was with the intention of depriving the tenant of the enjoyment of them.

It is only repeating what I have already said to remark that this holding does not touch the right of the tenant to compensation for loss or inconvenience which the landlord may have caused and may be unable to justify. Even in case of an eviction the tenant has that remedy in addition to the suspension of the rent, as was pointed out by Coltman J. in *Morrison* v. *Chadwick* (1).

Some proceedings on the part of the tenant Sheraton which have been proved in evidence have no bearing that I can perceive on the issue in the action, at least in favor of the defendant. The payment of the August rent when, if the finding of the jury has the effect attributed to it, the eviction took place in July certainly does not help the defence. The first inference from it, an inference pretty clearly indicated by direct evidence, that of Sheraton as well as others, is that Sheraton assented to what is now called an entry after the 1st July. I do not understand on what principle the contention which runs through the defence is based that a consent to exceed the time relied on as the limit under the lease, and not itself limited to any definite time, could be recalled at the will of the

(1) 7 C. B. 283.

tenant so as to make the continuance of the operations an eviction. Nor do I appreciate the importance attached by the defence to the fact of Sheraton having quitted the premises in October, 1883. The suspension of the rent, if there was any eviction from part of the premises, was anterior to and irrespective of the abandonment of the premises by the tenant, while at the same time the lease continued to subsist after the abandonment as well as before it. *Morrison* v. *Chadwick* (1). I should be disposed to ascribe these proceedings rather to the business difficulties that are said to have occurred to Sheraton in or about the month of August, 1883, than to any apprehension of their advantage with regard to the lease from the plaintiff. Those are, however, matters aside from the questions before us.

On the grounds that on the correct construction of the lease the continuance of the plaintiff's occupation of the premises for the purpose of the additions and alterations for a reasonable time after the 1st July, 1883, was not wrongful; and that even if that be not the correct construction of the document, there has been no eviction shown or found by the jury; I am of opinion that the rule asked for by the plaintiff ought to have been granted and judgment given him for the amount claimed with costs, and that we should allow the appeal with costs.

Appeal allowed with costs.

Solicitor for appellant: *A. H. DeMill.*

Solicitors for respondent: *Weldon, McLean & Devlin.*

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(1) 7 C. B. 266.

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*Oct. 25, 26.
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*Mar. 18.

THE KINGSTON & PEMBROKE RAILWAY COMPANY (DEFENDANTS)..... APPELLANTS.

AND

CATHERINE BAKER MURPHY AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Company—Expropriation of land—Description in map or plan filed—42 Vic. ch. 9.

A company built its line to the termini mentioned in the charter and then wished to extend it less than a mile in the same direction. The time limited for the completion of the road had not expired but the company had terminated the representation on the board of directors which, by statute, was to continue during construction and had claimed and obtained from the City of K. exemption from taxation on the ground of completion of the road. To effect the desired extension it was sought to expropriate lands which were not marked or referred to on the map or plan filed under the statute.

Held, affirming the judgment of the court below, that the statutory provisions that land required for a railway shall be indicated on a map or plan filed in the Department of Railways before it can be expropriated applies as well to a deviation from the original line as to the line itself, and the company, having failed to show any statutory authority therefor, could not take the said land against the owner's consent.

Held, also, that the proposed extension was not a deviation within the meaning of the statute 42 Vic. ch. 9 sec. 8, sub-sec. 11 (D).

Per Ritchie C.J., Strong, Fournier and Taschereau JJ., that the road authorized was completed as shown by the acts of the company, and upon such completion the compulsory power to expropriate ceased.

Per Gwynne J., that the time limited by the charter for the completion of the road not having expired the company could still file a map or plan showing the lands in question, and acquire the land under sec. 7, sub-sec. 19. of the act 42 Vic. ch. 9.

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

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THE KINGSTON AND PEMBROKE RAILWAY COMPANY v. MURPHY.

APPEAL from a decision of the Court of Appeal for Ontario affirming a judgment in the Chancery Division for the plaintiffs (1) by which the defendant company were restrained from expropriating plaintiffs' land.

There were two actions in in this case which were tried and argued together in the court below and in this court. In the one action it was alleged that the defendants were taking proceedings before a County Court Judge to be put in possession of plaintiffs' land; in the other, that the defendants had been making application to different judges in Toronto for the same purpose.

The defendants had completed and were running their road when they obtained additional powers from Parliament as to the land they could hold in Kingston; they then obtained a lease of Government land from the Province of Ontario and wishing to build a new station and freight house proceeded to expropriate plaintiffs' land adjoining the land so leased. Plaintiffs' land was not in the maps and plans filed in the Railway Department under the Consolidated Railway Act.

The plaintiffs claim that under these circumstances the defendants could not expropriate such land without their consent. The Court of Appeal upheld this contention, affirming the Chancellor's judgment to that effect and maintaining the injunction to restrain the defendants from proceeding with the expropriation. From the decision of the Court of Appeal the defendants have appealed to the Supreme Court of Canada.

Robinson Q.C. and *Cattanach* for the appellants.

S. H. Blake Q.C. and *Britton* Q.C. for the respondents.

SIR W. J. RITCHIE C.J.—It appears very clear that the road was constructed and completed before the

(1) 11 O. R. 320, 582.

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Ritchie C.J.

company sought to expropriate the land in question. This having been established by two courts, and such a conclusion justified by the evidence, this court ought not to disturb the finding. Indeed it is hard to conceive how the company, having claimed and obtained from the City of Kingston a certain stipulated exemption from taxation from the 1st of January, 1885, on the ground of the completion of the road, and having in consequence terminated the representation on the board of directors which, by 34 Vic. ch. 49, was to continue during the construction of the road, can now with a view to the expropriation in this case set up its non-completion. The company's map or plan shows the terminus of the property in Kingston and the evidence shows that the road was constructed from that terminus and operated for several years, but the plan did not show the land now sought to be expropriated, and the company have failed to show any statutory authority for taking land not shown on the map or plan.

I am also of opinion that having completed the road as authorized by the charter the ordinary compulsory powers of the company ceased, and their remedy, if any, must be left to the special powers to be exercised under the sanction of the Minister of Public Works on a proper case being made out.

I think the appeal should be dismissed.

STRONG J.—For a statement of the facts which have given rise to the action now under appeal I refer to the reports of this and another case relating to the same question and between the same parties to be found in the 11th volume of the Ontario Reports (1).

The present appeal appears to me to be quite unfounded and at the conclusion of the argument I

(1) Pp. 302 and 582.

had formed the opinion that it ought to be dismissed; a careful examination of the pleadings and evidence, the several judgments pronounced in the courts below and the well considered arguments of counsel on the hearing of the appeal in this court, have tended rather to confirm than to shake this original opinion.

I so fully adopt the reasons given by the learned judges in the Court of Appeal that to state at length the considerations which have led me to the conclusions I have arrived at would only be to reiterate what has already been well said in judgments in which I entirely agree. It is, therefore, sufficient to say that for the reasons given by the learned Chief Justice of Ontario and Mr. Justice Osler I am of opinion that the power to expropriate lands as here claimed only existed during the construction and ceased upon the completion of the railway, and that the fact of the completion is conclusively shown by the appellants' own acts in claiming the payment of money granted to them by way of bonus and which was only payable upon the completion of the undertaking.

I also agree that this proposed extension of the railway was not a deviation at all, or at least not such a deviation as was contemplated by the statute.

And further, that the statutory preliminaries which authorized lands to be taken on a deviation to be shown on the plan had not been complied with.

Lastly, in addition to the foregoing reasons, which are all set forth in the judgments in the court below, I would add that it appears to me that however convenient and advantageous to the railway company the acquisition of this land of the respondent might be, it is not "necessary" in the sense in which land required for a work like this must under the provisions of the Railway Act be requisite before a railway com-

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pany is empowered to exercise the right of expropriation as regards it.

The appeal must be dismissed with costs.

FOURNIER J. concurred.

TASCHEREAU J.—I would dismiss this appeal. The company's road was completed before they attempted to expropriate the plaintiff's land, and what they propose is not a deviation within the meaning of the statute. It is conceded that the plaintiff's land is not laid out, marked out, or referred to in the plan and books of reference filed by the company in conformity with the requirements of the statute.

The appellants contend that even if the respondents were entitled to an injunction in this case the order goes too far in restraining them from taking any steps or doing anything for the purpose of expropriating said land—notwithstanding that the appellants can expropriate the land by proceeding under sections 10 to 14, 42 Vic. ch. 9, and the judgment and order appealed from should be amended accordingly to permit such steps being taken.

If necessary this amendment may be ordered. The respondents, however, do not contend that the order goes further than to stop proceedings under secs. 8–9, 42 Vic. ch. 9.

GWYNNE J.—I concur in the view which was pressed upon us by the learned counsel for the respondents—that the 11th sub-section of section 8 of the Railway Act, 42 Vic. ch. 9, is not an enabling clause, but is a clause enacted for the purpose of imposing restrictions upon the powers of the railway company to make a deviation from the line of railway as originally shown on the map or plan of survey

required to be made and deposited in the office of the clerk of the peace of the several counties through which the railway is to pass, and that, therefore, authority to make any deviation from such line must be sought for in some other section of the act; and this authority is found under the head of "powers" in section 7, sub-sections 5 and 19, the former of which enacts that, "the company" (authorised by the special act to construct the railway)

shall have power and authority to make the railway across or upon the lands of any corporation or person on the line of the railway, or within the distance from such line stated in the special act, although through error or other cause, the name of such party has not been entered in the book of reference hereinafter mentioned, or although some other party has been erroneously mentioned as the owner of or entitled to convey or is interested in such lands.

And sub-section 19 enacts that

any railway company desiring at any time to change the location of its line of railway in any particular part, for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting such line of railway, or for any other purpose of public advantage, may make such change: and all and every the clauses of this act shall refer as fully to the part of such line of railway so at any time changed or proposed to be changed as to the original line; but no railway company shall have any right to extend its line of railway beyond the termini mentioned in the special act.

Now this latter subsection in express terms prescribes that a railway company in making a deviation from the original location of its line under this section must not only do so within the termini mentioned in the special act, but that all the clauses in 42 Vic. ch. 9 as to plans and surveys prescribed in relation to the original line must be complied with in relation to any such deviation. Now for the purpose of determining the precise location of the railway and works by the special act, section 5, sub-section 16, authorised to be constructed, provision is made, under the head "Plans and Surveys," by section 8, which enacts as follows:—

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Subsec. 1. Surveys and levels shall be taken and made of the lands through which the railway is to pass, together with a map or plan thereof and of its course and direction and of the lands intended to be passed over and taken therefor, so far as then ascertained, and also a book of reference for the railway in which shall be set forth :

(*a*) A general description of such lands ;

that is of the lands intended to be passed over and taken ;

(*b*) The names of the owners and occupiers thereof

that is of the lands intended to be taken

so far as they

that is such owners and occupiers

can be ascertained ;

(*c*) Everything necessary for the right understanding of such map or plan.

Sub-section 2. The map or plan and book of reference shall be examined and certified by the Minister of Public Works or his Deputy, and a duplicate thereof so examined and certified shall be deposited in the office of the Department of Public Works, and the company shall be bound to furnish copies of such map or plan and book of reference or of such parts thereof as relate to each district or county through which the railway is to pass, to be deposited in the offices of the Clerks of the Peace for such districts or counties respectively.

Sub-section 3. Any person may resort to such copies and make extracts therefrom or copies thereof, as occasion requires, paying to the Clerks of the Peace at the rate of ten cents for every hundred words.

Sub-section 4. Such map or plan and book of reference so certified or a true copy thereof certified by the Minister of Public Works or by the Clerks of the Peace, shall be good evidence in any court of law and elsewhere.

Sub-section 5. Any omission, mis-statement or erroneous description of such lands or of the owners or occupiers thereof in any map or plan or book of reference may, after giving ten days notice to the owners of such lands, be corrected by two justices on application made to them for that purpose, and if it appears to them that such omission, mis-statement or erroneous description arose from mistake the justices shall certify the same accordingly.

Sub-section 6. The certificate shall state the particulars of any such omission and the manner thereof, and shall be deposited with the clerks of the peace of the districts or counties respectively in which such lands are situate, and be kept by them along with the other documents to which they relate ; and thereupon such map or plan or book of refer-

ence shall be deemed to be corrected according to such certificate, and the company may make the railway according to the certificate.

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Now from these provisions it appears to me to be very obvious that the line of the railway which is authorised by the special act to be constructed must be correctly shown on such map or plan, and that no lands can be taken for the railway unless they are shown as intended to be taken upon the map or plan as originally registered or as corrected under the provisions contained in the above sub-sections 5 and 6 or upon a map or plan prepared and registered under sub-section 19, and the company are, by the sub-section 6, only authorised to make the railway in accordance with the original or corrected map or plan and book of reference; and as no map or plan can be registered until the location of the line as shown thereon has been adopted, it is also obvious that any deviation from the line which may be authorised by the special act, equally as one made under sub-section 19, can only be made after the original map or plan showing the line of railway at the place where the deviation is intended to take place is registered; and such deviation must be by way of substitution for some part of the line as originally located and not by way of addition to such line, although such proposed addition should be within the extreme points designated as the termini of the railway as authorized by the special act.

The policy of the act is that all lands intended to be taken shall be shown on a map or plan made and registered as required by the statute, and this policy is as applicable to the case of lands proposed to be taken by way of deviation from the line as originally located as to lands proposed to have been taken for the original line itself; accordingly, and, as it appears to me, for the express purpose of providing for the case of a deviation, if authorised by the special act, being proposed to be

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substituted for any part of the line as originally located and shown upon a registered plan, the 7th sub-section of section 8 was enacted, which provides that :—

If any alterations from the original plan or survey are intended to be made in the line or course of the railway, a plan and section of such alterations as have been approved of by Parliament, on the same scale and containing the same particulars as the original plan and survey, shall be deposited in the same manner as the original plan, and copies of or extracts from such plan or section so far as they relate to the several districts or counties in or through which such alterations have been authorised to be made, shall be deposited with the Clerks of the Peace of such districts or counties.

And sub-section 8 provides that :

Until such original map or plan and book of reference or the plans and sections of the alterations have been so deposited, the execution of the railway, or of the part thereof affected by the alterations as the case may be, shall not be proceeded with.

The provision in this sub-section that a plan or section of such alterations as have been approved by Parliament shall be deposited with the Clerk of the Peace of the several counties through which such alterations have been authorised to be made can, in my judgment, have reference only to the provision in section 7, sub-section 5, empowering the company to make their railway across or upon the lands of any person on the line of railway or within the distance from such line stated in the special act and, therefore, relate to such deviations, if any, which may have been authorised by the special act, while sub-section 19 makes like provision as to plans and surveys for any deviation from the original line by that sub-section authorised ; thus establishing beyond all doubt, as it appears to me, that no land can be taken for a line of railway as originally located, or for any deviation therefrom at any point therein, until the provisions as to plans and surveys prescribed as to the original line are complied with as to every such deviation.

Now, deviations being authorised only under these

sub-sections of section 7 in which are comprised the "powers" of the company by the special act authorised to construct the railway, sub-sections 11 and 12 of section 8 are introduced by way of restriction and qualification of the powers of deviation so as aforesaid conferred; they are as follows:—

Sub-section 11. No deviation of more than one mile from the line of the railway or from the places assigned thereto in the said map or plan and book of reference or plans and sections shall be made into, through, across, under or over any part of the lands not shown in such map or plan and book of reference or plans, or within one mile of the said line and place, save in such instances as are provided for in the special act.

Sub-section 12. The railway may be carried across or upon the lands of any person on the line or within the distance from such line as aforesaid, although the name of such person has not been entered in the book of reference through error or any other cause, or though some other person is erroneously mentioned as the owner of, or entitled to convey, or is interested in such lands.

The provisions of the above sub-sections are taken from the Consolidated Statutes of Canada, 22 Vic. ch. 66, section 10, sub-sections 11 and 12 which omitted from the 11th sub-section the word "nor" as it appeared in the original statute, 14–15 Vic. ch. 51, section 10, sub-section 7, which ran thus:—

No deviation of more than one mile from the line of the railway or from the places assigned thereto in the said map or plan and book of reference of plans and sections shall be made "nor" into, through, &c.

making a contrast between the lands outside of, and those inside of, one mile from the line of railway as originally located, namely, that no deviation should be made outside of a mile from the line of railway as originally located, (although authorised by the special act) and that within a mile they should only be made as authorised by the special act—as for example, if by the special act they should only be authorised to be made within a quarter of a mile from the line as

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originally located or, in one place within a quarter of a mile and, at another or other places, at different distances within the one mile, then they should be made only within the respective distances, at such points, prescribed by the special act. The consolidators of the Statutes of Canada carelessly and unintentionally, as I have no doubt, omitted the word "nor" from the consolidated statute, 22 Vic. ch. 66, section 10, sub-section 11, from which sub-section 11, of section 8, of 42 Vic. ch. 9, as well as the corresponding section of the Railway Act of 1868, have been taken. If the whole of the two sub-sections after the words "shall be made" had been omitted it would have been much better, for then the redundancy, tautology, and confusion which the residue creates would have been avoided. The 12th sub-section is but an unnecessary repetition of the provision contained in section 7, sub-section 5, and the insertion of the words

> into, through, across, under or over any part of the lands not shown on such map or plan and book of reference, or plans or sections,

whether with or without the word "nor" prefixed, is equally redundant and unnecessary, for, as already shown, no line, whether original or by way of deviation from (or alteration of) a line as originally located, can be made across any lands not shown on a map or plan and book of reference, registered as required by the act; and the last words of sub-section 11

> or within a mile of such line or place save in such instances as provided for in the special act

if construed literally are calculated to create a doubt whether they might not have the effect of neutralising sub-section 19 of section 7.

The only intelligent construction, as it appears to me, which can be put upon these sub-sections, 11 and 12, of section 8, is obtained by reading them in immediate connection with the provision as to deviation contained

in section 7, sub-section 5, omitting what is redundant and unnecessarily repeated, thus:—

> The company shall have power and authority to make carry or place the railway across or upon the lands of any corporation on the line of the railway or within the distance from such line stated in the special act although, through error or other cause, the name of such party has not been entered in the book of reference hereinafter mentioned as the owner, or entitled to convey or as interested in such lands, provided that no deviation of more than one mile from the line of railway or from the places assigned thereto on the map or plan and books of reference by this act required to be registered shall be made; or within one mile of the said line save as provided for in the special act, when deviation is provided for in such act,

leaving sub-section 19 to have the operation which, as it appears to me, it was originally designed to have, namely, to make provision for deviation in cases where none should be provided for in the special act, qualified only by the restriction that no deviation could be made under sub-section 19 outside of one mile from the line of railway as originally located; and for extension of the line as originally located provided that such extension be made within the termini mentioned in the special act. Sub-section 12 of section 9, which prescribes a form of notice to be served upon an owner when his land is required to be taken for the railway, also supports the view already expressed as being established by the other sections already alluded to, namely, that no land can be taken from any person by process of expropriation unless it be shown as intended to be taken on a map or plan and book of reference registered under the act. Section 9, sub-section 11, provides, first that the deposit of a map or plan and book of reference as required by the act and a notice of such deposit published in the manner directed by sub-section 10 shall be deemed a general notice to all parties of the lands which will be required for the railway and works; then by sub-section 12 it is provided that a notice shall be served upon the party whose land is proposed to be taken which shall contain:

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(*a*) A description of the lands to be taken ; (*b*) a declaration of readiness to pay a certain sum as compensation for such lands ; (*c*) the name of a person to be appointed as arbitrator of the company if their offer should not be accepted ; and such notice shall be accompanied by the certificate of a sworn disinterested provincial surveyor that the land shown on the said map or plan (that is the map or plan deposited as requried by the statute and referred to in sub-section 11) is required for the railway or is within the limits of deviation hereby allowed.

These latter words "or is within &c.," appear to be quite redundant for no lands, whether lands upon which the line has been originally located, or lands intended to be substituted for any part of such line within the limits of deviation allowed by the act, can be taken unless required for the railway, which word "Railway" as is declared by the interpretation clause, section 5, sub-section 16 :

"Shall mean the railway and works by the special act authorised to be constructed.

All, therefore, that is or can be substantially necessary to be established in any case to entitle the company to acquire land sought to be expropriated, whether such lands be lands shown as intended to be taken on the map or plan registered of the line as originally located or land shown on a map or plan registered for the purpose of designating a deviation from such line, and the lands intended to be taken for such deviation, is that the land of the person for the time being dealt with, and on whom notice is served, is shown on a registered map or plan under which the company are proceeding to construct the railway, and that the lands shown on such registered map or plan are required for the railway and works which the company are authorised to construct. I am of opinion, therefore, that in the absence of such a map or plan registered and showing the lands sought to be expropriated in the present case it was not competent for the company to acquire the land by process of expropriation by arbitration ; but I am also of opinion that inasmuch as the time given by their act for completion of their

railway had not and has not yet expired it was competent for them, upon registering a map or plan under the act, to have expropriated the land under the 19th sub-section of section 7, the proposed extension (which the contemplated alteration is, and not a deviation) being within the termini mentioned in the special act; and that what has taken place in relation to the acquiring lands for station grounds at Barracks street, or the fact that the road had been some years in operation from that station, offers no impediment to the company acquiring better and more convenient and suitable station grounds which, in fact, they have acquired between Brock and Clarence streets in the city of Kingston, or to their acquiring the piece of land sought to be acquired by expropriation process under sub-section 19 of section 7 if the piece of land be necessary for, or be conducive to, the more beneficial and perfect enjoyment of such their new station, and as the decree as framed perpetually restrains the company from taking possession of the land in question

and from taking any steps and from doing anything whatsoever for the purpose of expropriating the said lands, or any part thereof,

and so in effect restrains them from acting under the above sub-section 19, this appeal should be dismissed but the decree should be varied so as to declare simply that under the circumstances appearing, namely, that the company have never registered, as required by the act, a map or plan showing their intention to construct any part of their railway across the land in question, they are not entitled to proceed to acquire the same by process of expropriation by arbitration and restraining them merely from taking any further proceeding under the notice already served.

Appeal dismissed with costs.

Solicitors for appellants: *Kirkpatrick & Rogers.*

Solicitors for respondents: *Britton & Whiting.*

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*April 8, 9.

*Dec. 14.

EUGENE O'KEEFE AND WIDMER HAWKE (DEFENDANTS)..... } APPELLANTS.

AND

GEORGIANNE CURRAN AND JOSEPH H. MEAD (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Terms of—Breach of conditions—Expulsion of one partner—Notice—Waiver—Goodwill.

Partnership articles for a firm of three persons provided that if any partner should violate certain conditions of the terms of partnership the others could compel him to retire by giving three months' notice of their intention so to do, and a partner so retiring should forfeit his claim to a share of the goodwill of the business. One of the partners having broken such conditions of partnership the others verbally notified him that he must leave the firm and to avoid publicity he consented to an immediate dissolution which was advertised as "a dissolution by mutual consent." After the dissolution the retiring partner made an assignment of his goodwill and interest in the business and the assignee brought an action against the remaining partners for the value of the same.

Held, reversing the judgment of the court below, Fournier J. dissenting, that the action of the defendants in advertising that the dissolution was "by mutual consent" did not preclude them from showing that it took place in consequence of the misconduct of the retiring partner; that the forfeiture of the goodwill was caused by the improper conduct which led to the expulsion of the partner in fault and not by the mode in which such expulsion was effected; and, therefore, the want of notice required by the articles of intention to expel could not be relied on as taking the retirement out of that provision of the articles by which the goodwill was forfeited.

Held also, that if it was a dissolution by one partner voluntarily retiring no claim could be made by the retiring partner in respect to goodwill, as the account to be taken under the partnership articles in such cases does not provide therefor.

*PRESENT: Strong, Fournier, Taschereau and Gwynne JJ.

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Semble, that the goodwill consisted wholly of the trade name of the firm.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favor of the plaintiffs.

The facts are stated quite fully in the judgment of Mr. Justice Gwynne as well as in the reports of the Ontario Courts. They may be briefly summed up as follows:

The defendant and the plaintiff Mead were partners in the brewing business, and among the articles of partnership were the following:

"Third—That if any of the said partners shall be guilty of any breach or non-observance of any of the stipulations contained in the fourteenth, fifteenth, sixteenth and seventeenth articles hereinafter mentioned, the other or others of the said partners shall be at liberty, if he or they shall think fit, within three calendar months after the same shall have become known to him or them, to dissolve the said partnership by giving to the partner who shall so offend, or leaving in the counting house of the place where the business shall then be carried on, notice in writing declaring the said partnership to be dissolved and determined; and the said partnership shall from the time of giving or leaving such notice, or from any other time to be therein appointed for the purpose, absolutely cease and determine accordingly, without prejudice nevertheless to the remedies of the respective partners for the breach or non-observance of all or any of the covenants or agreements contained in these presents at any time or times before the determination of the said partnership. And the partner to whom the said notice shall be given shall be considered as

(1) 15 Ont. App. R. 103. (2) 15 O.R. 84.

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quitting the business for the benefit of the other partners who shall give the said notice."

"Twenty-nine.—In the event of either of them, the said Widmer Hawke or Joseph Hooper Mead, retiring from the said firm hereby formed under article number two, or being compelled to leave the same firm under article number three, the partner so retiring or being compelled to leave the said firm shall not be entitled to receive, and shall not receive from the other of them, or from any new firm which may be formed to carry on the said business, any sum of money whatever for or in respect of his goodwill in the said business"

The plaintiff, Mead, having violated articles 14 and 17, was verbally notified by his partners that he must quit the firm, and to avoid publicity he consented to an immediate dissolution. Notice was given by advertisement that the firm was dissolved by mutual consent and the business was afterwards carried on by the defendants. At the same time Mead assigned to his mother all his right and title in the real and personal estate, stock-in-trade, plant, rights and credits of the firm, and the assignee brought an action against the defendants in which she claimed, among other things, Mead's share of the goodwill. This claim was dismissed at the hearing before the Chancellor, after which Mead executed another instrument in favor of his mother confirming the previous assignment and expressly conveying all his right and title to the goodwill and interest in the business, and another action was instituted against the defendants in which was claimed an account to be taken of Mead's share in the goodwill and payment of the same to the plaintiff.

The action was tried before Cameron C.J., who held that Mead was expelled from the firm under article 3, and he dismissed the action with costs. The Division-

al Court reversed this judgment and ordered judgment to be entered for the plaintiff for the value of the goodwill and costs. On appeal to the Court of Appeal the judges of that court were equally divided and the judgment for the plaintiff was affirmed. The defendants then appealed to the Supreme Court of Canada.

Pending the present action the original plaintiff died and the action was revived in the name of the plaintiff Curran, devisee of her estate.

Christopher Robinson Q.C. and *Moss* Q.C. for the appellants. The partnership was in a position to be dissolved by the misconduct of Mead, and the three month's notice was only a mode of effecting the dissolution and could be waived. *Hall* v. *Hall* (1).

The partnership agreement amounts to a renunciation of the right to the goodwill in the events which actually happened. *Pearson* v. *Pearson* (2). And see Lindley on Partnership (3); Tudor's Leading Cases on Mercantile Law (4).

Mead was expelled under article three of the partnership agreement, and thereby forfeited his claim to goodwill. See *Atwood* v. *Maude* (5); *Mellerish* v. *Keen* (6).

McCarthy Q.C. and *Morrell* for the respondents. It cannot be held that the retirement of Mead was effected under article three unless the mode provided by that article was followed. *Smith* v. *Mules* (7); *Blisset* v. *Daniel* (8); *Clarke* v. *Harte* (9); *Wood* v. *Woad* (10).

The most satisfactory case on the right to goodwill is *Steuart* v. *Gladstone* (11).

(1) 20 Beav. 139.
(2) 27 Ch. D. 145.
(3) 5 ed. p. 444.
(4) 3 ed. pp. 553-4.
(5) 3 Ch. App. 369.
(6) 28 Beav. 453.
(7) 9 Hare 556.
(8) 10 Hare 493.
(9) 6 H.L. Cas. 633.
(10) L.R. 9 Ex. 190.
(11) 10 Ch. D. 626.

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As to what goodwill is see Pollock on Partnership (1); Lindley on Partnership (2); *Levy* v. *Walker* (3); *Pawsey* v. *Armstrong* (4).

As to the three months' notice being waived see *Selwyn* v. *Garfit* (5); *Mason* v. *Andes Insurance Co.* (6).

STRONG J.—I concur in the judgment of Mr. Justice Gwynne.

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

TASCHEREAU J.—I would allow this appeal and dismiss the action for the reasons given by Cameron C.J. at the trial and in the Divisional Court.

GWYNNE J.—That the plaintiff Mead was guilty of such breach of certain of the stipulations of the partnership articles that his co-partners, the defendants, were justified in determining the partnership under the provisions of the 3rd article cannot, in my opinion, admit of a doubt. His overdrawing the partnership account at the bank for the purpose of applying the monies so drawn to his own use was, in my opinion, a borrowing or taking of money from the bank, not on account of the partnership but for his own unauthorized use within the meaning of the article, and so a clear violation of it. So in like manner the constant cheques from time to time drawn by him on the partnership account at the bank, whether such account was overdrawn or not, and his applying the proceeds partly to his own use, partly to the use of his brother, partly to the use of Gillespie, Mead & Co., in which

(1) Art. 57.
(2) 5 ed. p. 439.
(3) 10 Ch. D. 436.
(4) 18 Ch. D. 698.
(5) 38 Ch. D. 283
(6) 23 U.C.C.P. 44.

firm his brother was a partner, was also, in my opinion, a taking up of money from the bank as on account of the partnership, without the consent of his co-partners, within the meaning of that article. Then, again, his fraudulent conduct in respect of the $900, drawn by him from the bank, which was the immediate cause of his expulsion, and his not having made or caused to be made any entry in the books of the partnership in relation to such sum by which his dealings therewith could be traced was, in my opinion, a clear breach of the 14th and 17th articles of the partnership articles.

I am of opinion, further, that it was clearly established by the evidence that, in point of fact, Mead was removed from the partnership and that it was dissolved and determined solely because of Mead's misconduct and, as Mead well knew, in virtue of the authority deemed to be vested in his co-partners by the third article of the partnership articles, although the form pointed out in that article of giving to Mead notice in writing was not pursued. He was informed verbally, though not in writing, that the partnership was dissolved and determined for such his misconduct.

The substance of the article was complied with to which Mead, after vainly endeavoring to persuade his co-partners to alter their determination submitted; the form only of giving notice in writing to Mead was omitted. There can, I think, be no doubt that the form of the notice of dissolution, which was signed by all the parties for publication, was adopted for the purpose of sparing the feelings of Mead and his relatives. That notice cannot estop the defendants from proving that Mead's misconduct was the sole cause of the dissolution, nor can Mead or his assignees, in my opinion, be heard to invoke that notice in support of their claim to have an account taken in the present

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action of the value of the interest which he once had in the good will of the business, of which interest he was, by the express terms of the partnership, declared to be divested in the event of his voluntarily retiring from the partnership, or of its being dissolved by his co-partners, under the third article, for his misconduct; nor in whatever light the circumstances attending the dissolution may be viewed, is there, in my opinion, anything in the terms of the notice of dissolution which, in view of all the actual circumstances of the case, can be construed as giving to Mead any right to have any allowance made to him as for the value of the interest which he had under the articles of partnership in the good will of the business.

The circumstances of the case are as follows: The defendant O'Keefe had for many years carried on the business of brewer and maltster in the City of Toronto, for some time alone and afterwards in partnership with, and upon premises belonging to, the father of the defendant Hawke, under the name, style and firm of "O'Keefe & Co.," in which name the business had acquired a considerable reputation. In 1881 the defendant Hawke's father, on retiring from the business, was desirous that his son, the defendant Hawke, then a young man who knew nothing of the business, should be taken into the business by O'Keefe. The plaintiff Mead and his friends were at the same time very desirous that the plaintiff Mead, who was also a young man wholly ignorant of the business, should also be taken by O'Keefe into the business. The interest of O'Keefe in his partnership with the defendant Hawke's father had been, in round numbers, $53,397.00 and that of the defendant Hawke's father $14,071.00; an agreement was thereupon come to between O'Keefe, the defendant Hawke's father, the defendant Hawke and the plaintiff Mead respectively, that the defendant Hawke

should acquire the share his father had held to the amount of $14,071.00, and that Mead should bring a like sum into the business; and inasmuch as the defendant Hawke and the plaintiff Mead knew nothing of the business, and would require three years to acquire a thorough knowledge of it, it was agreed that they should form a partnership for three years, and that the defendant Hawke's father should execute a lease to the new firm of the premises wherein the business of "O'Keefe & Co." had been carried on for such period of three years, and that the defendant Hawke and the plaintiff Mead, in addition to the sums of $14,071.00 brought by them respectively into the business, should each pay to O'Keefe the sum of $12,500.00 in consideration of which payment O'Keefe agreed with each of them respectively to teach them the business during the said period of three years, and to sell and transfer absolutely to them jointly the whole interest in the good-will of the business as then already acquired, or as should thereafter be acquired, and to conduct the business as general manager during the three years partnership for the sum of $2,000.00 per annum over and above his share in the net profits of the business, which was agreed to be one half of the whole and that of the defendant Hawke and the plaintiff Mead one-fourth each. Accordingly a partnership was entered into between O'Keefe, the defendant Hawke and Mead, for the term of three years from the 1st September, 1881, and the partnership articles were executed in the month of April following whereby, among other things, after reciting the payment of the sum of $25,000.00 in equal shares by the defendant Hawke and the plaintiff Mead to O'Keefe, and his agreement to fully initiate and instruct them in the business of brewing, the said O'Keefe for himself, his heirs, executors and administrators, did grant, trans-

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fer and deliver to the said Hawke and Mead and the survivor of them, all the interest of him, the said O'Keefe, in the good-will of the business and partnership theretofore existing between him and the defendant Hawke's father, and also of the business to be carried on under the partnership then formed between O'Keefe, Hawke & Mead, and for the consideration aforesaid, that is in consideration of the payment of the said sum of $25,000.00, the said O'Keefe did thereby covenant with the said Hawke and Mead and the survivor of them at the expiration of the new partnership to be formed, if formed as thereinafter mentioned, to execute to the said Hawke and Mead, or to the survivor of them, a good and sufficient deed assigning and transferring to them all his right, title and interest in the said goodwill as aforesaid but that:

In the event of the said Widmer Hawke and the said Joseph Hooper Mead, or in the event of either of them, desiring it he, the said Eugene O'Keefe, will, if living at the expiration of the partnership hereby formed, enter into a fresh partnership with the said Hawke and Mead, if they both desire it, or in the event of only one of them desiring it, or being then alive, with the one so desiring, or with the survivor for the term of three years after the expiration of the partnership hereby formed, on the terms and conditions that the capital brought into such new partnership and business shall be not less than $75,000 if the three partners be then alive and desirous to continue in business together or not less than $50,000 if two only are alive and desirous to continue in business together, and shall be contributed by the partners therein in equal shares; and he, the said Eugene O'Keefe, shall only be entitled to receive out of the profits of the said co-partnership during the said further period of three years, an equal share with each of the other partners, instead of the one-half share to be received by him during the aforesaid first period of three years; and the salary, as chief brewer, agreed to be paid to the said Eugene O'Keefe during the said first period of three years shall cease and determine at the expiration of the said first period, and shall not be payable to him during the said second period of three years if the said partnership extend so long; and he will accept one-half share in such net profits, if either of the said Hawke or Mead be then dead or unwilling to continue said partnership. In the event of no such new partnership being formed, or at the expiration of such

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new partnership if the same shall be formed, he, the said Eugene O'Keefe, will retire from the present partnership, or such future partnership, as the case may be, and shall only call for and be entitled to receive whatever his share in the capital stock of the said firm may then be, and his share of the net profits up to the time of his retiring from the said firm, but shall receive nothing for the good will of the business at that date, and whether he, the said Eugene O'Keefe, shall retire from the partnership hereby formed at the expiration of the same, or shall enter upon such new partnership as hereby agreed, and shall retire therefrom at the expiration thereof as hereinbefore mentioned, he doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with the said Hawke and Mead and the survivor of them, that he, the said Eugene O'Keefe, shall not, nor will at any time or times, during the period of twenty-five years from and after the time he shall have retired from the partnership hereby formed, or such new partnership as the case may be, either on his own account, or for or on account of any other person or persons whomsoever, corporation or corporations, either directly or indirectly, engage in or carry on within the provinces of Ontario, Quebec, Manitoba and the North-west Territories, or any province or provinces which hereafter may be formed out of any part thereof, the business of maltster or brewer of ale, porter or lager beer, and shall not nor will directly or indirectly, on his own account or on account of his wife for the time being, or on account of one or more or any of his children, invest any money in any such malting or brewing business within the limits above prescribed, nor shall either directly or indirectly participate in the earnings of any such malting or brewing business within the limits above described; or manufacture within any part of the United States of America malt, ale, beer, porter, or lager beer, to be sold afterwards within the limits above prescribed, unless duly authorized in writing so to do by the said Hawke and Mead, or the survivor of them. And the said O'Keefe, for himself, his executors and administrators, doth hereby promise and agree with the said Hawke and Mead and the survivor of them, that he, the said O'Keefe, shall and will, during the partnership hereby formed, and also during such new partnership if the same shall be formed, to the best of his knowledge and ability, teach and instruct the said Hawke and Mead and the survivor of them, the business of malting and brewing ale, beer, porter and lager beer, and shall and will to the best of his knowledge and ability, fully, particularly, and without reserve, initiate and instruct the said Hawke and Mead and the survivor of them in such malting and brewing business, imparting to them and the survivor of them, and instructing them in all the trade secrets in connection with

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the said malting or brewing business, with which the said O'Keefe may now or hereafter be acquainted.

Now this right to the use of the trade name of "O'Keefe & Co.," which is a right more in the nature of a trade mark than a "goodwill" is the only thing which came under the name of "goodwill" of the business thus transferred by O'Keefe to Hawke and Mead. It is apparent also from the above article extracted from the partnership articles, and also from the 23rd, that from the moment the articles of partnership were signed O'Keefe retained no right, title, interest or benefit whatever in the "goodwill" so transferred, other than such benefit as he might incidentally derive during the continuance of his partnership with Hawke and Mead or with one of them under the provisions of the articles in that behalf. He had nothing in the nature of "goodwill" to transfer to any one. The right and title to, and interest in, the use of the name of "O'Keefe & Co." as maltsters and brewers belonged under the articles wholly to Hawke and Mead as joint owners with benefit of survivorship.

In case after the expiration of the first partnership term of three years either Hawke or Mead should die the "goodwill" would be vested in the survivor, and in case they should both be living but one of them should be unwilling to continue carrying on the business and that the other should be willing, no provision being made in the articles for compensation to the one unwilling to continue the business, the one continuing the business, in the absence of a special provision to be made between him and the one ceasing to carry on the business, would retain the right to the use of the trade name, and nothing could be recovered from him by the other party in such a case. In effect the right to the use of the trade name of "O'Keefe & Co." belonged to Hawke and Mead so long as they should jointly carry on

the business, and upon either of them ceasing to carry on the business for any cause would belong to the other continuing to carry on the business without any compensation unless such was provided in the above articles of partnership or should be provided in an agreement to be entered into between them either on dissolution of the partnership or otherwise. Now by the partnership articles it is agreed that neither O'Keefe, Hawke or Mead should either by himself or with any other person or persons whomsoever, either directly or indirectly, engage in the business of brewers or maltsters, or in any business except the business of the said partnership and upon account thereof; provision is also made enabling either of the partners Hawke or Mead to retire from the business before the expiration of the partnership term formed by the articles without the consent of his partners by giving to them three months' notice in writing of his intent; and also for the removal from the partnership of such one of them as should be guilty of a breach or non-observance of certain specified articles by giving to or leaving for the one guilty of such breach or non-observance a notice dissolving the partnership for such cause. Then provision is made between the defendant Hawke and the plaintiff Mead as the sole owners of the "goodwill" for three events and only for three events, namely:—

1. The event of one or other of them voluntarily retiring from the business before the expiration of the three years for which the partnership was formed; 2, the event of one or other of them being compelled to leave the firm because of his being guilty of any breach or non-observance of any of the stipulations contained in the specified articles; and 3, the event of one or either of them dying before the expiration of the said partnership term of three years; and it was specially agreed that in the event of either the defend-

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ant Hawke or the plaintiff Mead retiring from the said firm, or being compelled to leave the said firm for a breach or non-observance of any of the stipulations of the specified articles, the one so retiring or being compelled to leave the said firm shall not be entitled to receive, and shall not receive from the other of them, or from any new firm which may be formed to carry on the business, any sum of money whatsoever for, or in respect of, his "goodwill" in the business; but that in the event of the death of one of them before the expiration of the partnership formed by the articles the survivor should and would pay to the personal representatives of the deceased one the sum of $12,500, which should, among other things, be taken to be payment in full of the "goodwill" of the business which the partner so dying had bought from the said Eugène O'Keefe, and the same should therefore be considered to have been transferred to, and to have become the property of, the party making such payment.

Then the 18th article made provision for an account being taken every year of all the assets of the firm to participate in which the three partners were interested. It is obvious that the "goodwill" which belonged to Hawke and Mead jointly, and in which O'Keefe had no interest, formed no part of the account by this article prescribed to be taken.

Then the 19th article made provision for the account to be taken after the expiration of the partnership, or in the event of its sooner determination for any cause other than death, for the 21st article made provision for the case of death. That the "goodwill" formed no part of the account by the 19th article prescribed to be taken is apparent from this, that after the payment of all the debts of the partnership the balance arising from every particular in respect of which the account is directed to be taken is made divisible between the

three partners in the following proportions, namely, one-half share to O'Keefe and one-quarter share to Hawke and Mead respectively. Then the 21st article makes provision for the case of death, namely, that an account shall be taken of the stock in trade, monies, credits and things belonging to the said partnership as provided in the 18th article hereinbefore contained, so that the interest of such deceased partner in the capital stock in trade, monies, credits and things, and the net profits of the said firm up to the time of the decease of such deceased partner, may be ascertained, for payment of which by the surviving partners provision is made. Then inasmuch as this account had nothing to do with the "goodwill" of the business provision is made for it in the 26th article, namely, that:

in the event of either the said Hawke or Mead departing this life before the expiration of the partnership hereby formed, in addition to the amount which the executors or administrators of the partner so dying would be entitled to receive, under article 21 hereinbefore contained, they shall be entitled to receive from the survivor of such of the two last mentioned partners, and such survivor hereby agrees to pay to the executors or administrators of the partner so dying, the sum of $12,500 as aforesaid.

The articles, therefore, seem to provide for every possible contingency affecting the "goodwill." If Hawke or Mead voluntarily retires from the firm, or is compelled to leave for breach or non-observance of the specified articles, he is not to receive anything for interest in the "goodwill;" if either of them should die before the expiration of the term of the partnership the personal representative of the one so dying is to receive from the survivor a specified sum in full satisfaction of all interest of the deceased one in the goodwill; if both should live until the expiration of the partnership formed by the articles they are left to deal with the good will as they should think fit.

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The non-compliance by Hawke or Mead with the form pointed out in the 2nd article to enable a partner voluntarily to retire from the firm against the will of his co-partners would not, in my opinion, if his co-partners should waive compliance with the form, remove the case of the one retiring from the operation of the clause depriving him of his interest in the goodwill in the event of his retiring from the firm before the expiration of the partnership formed by the articles; nor would the expulsion of either the one or the other for breach or non-observance of the stipulations of the specified articles, to which expulsion the party guilty of such breach has submitted although he has not been served with a notice in writing terminating the partnership for such cause, remove the case from the operation of the clause divesting the expelled party of all his interest in the goodwill; it is to the substance of the acts that the forfeiture of interest in the goodwill is annexed, namely, in the one case to the fact of retirement and in the other to the fact of the expulsion for breach of the specified articles, and not to the form pursued for effecting such retirement or expulsion.

But we have in the notice of dissolution which was signed by Mead the terms of the dissolution, namely,

> The partnership is dissolved by mutual consent, and that Messrs. O'Keefe and Hawke will continue the business, and are authorized to collect all debts due to the firm, and meet all the engagements thereof.

This agreement, as I have already said, does not, in my opinion, operate as having any effect to prevent the defendants showing the true state of the case to be that in point of fact Mead was expelled from the firm for breach of the specified articles, and that this form of notice was adopted to spare the feelings of Mead and his friends: but, however this may be, it is plain that under such terms of dissolution as above specified, Hawke must be entitled to continue using

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the trade name of "O'Keefe & Co.," in which alone the "good will" consists. Of this right Hawke cannot be deprived, nor can he be compelled to pay anything to Mead for the enjoyment of such right in the absence of a special contract to that effect. As already shown, the only account which is provided by the articles of partnership to be taken in the events which have happened is that prescribed by the 19th article, which excludes any estimate of any interest of Mead in the "good will." The appeal must, therefore, in my opinion, be allowed with costs, and the action in the court below dismissed with costs.

Appeal allowed with costs and action dismissed.

Solicitors for appellants: *Gordon & Sampson.*

Solicitors for respondents: *Crombie, Morrell & Gwynne.*

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*Feb. 8,9,11.
*June 14.

WILLIAM GOMEZ FONSECA AND JOHN C. SCHULTZ (DEFENDANTS) } APPELLANTS;

AND

THE ATTORNEY GENERAL OF CANADA ON RELATION OF ELIZA MERCER (PLAINTIFF) } RESPONDENT.

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

Crown lands—Letters patent for—Setting aside—Error and improvidence—Superior title—Evidence—Res judicata—Estoppel by, as against the crown.

Letters patent having been issued to F. of certain lands claimed by him under The Manitoba Act (35 Vic. ch. 3, as amended by 35 Vic. ch. 52), and an information having been filed under R. S. C. c. 54 s. 57 at the instance of a relator claiming part of said lands to set aside said letters patent as issued in error or improvidence.

Held, 1. That a judgment avoiding letters patent upon such an information could only be justified and supported upon the same grounds being established in evidence as would be necessary if the proceedings were by *scire facias*.

2. The term "improvidence," as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are injuriously affected by the letters patent; and F.'s title having been recognized by the government as good and valid under the Manitoba Act, and the lands granted to him in recognition of that right, the letters patent could not be set aside as having been issued improvidently except upon the ground that some other person had a superior title also valid under the act.

3. Letters patent cannot be judicially pronounced to have been issued in error or improvidently when lands have been granted upon which a trespasser, having no color of right in law, has entered and was in possession without the knowledge of the government officials upon whom rests the duty of executing and issuing the letters patent, and of investigating and passing judgment upon the claims therefor; or when such trespasser, or any person claiming under him, has not made any application for letters patent;

or when such an application has been made and refused without any express determination of the officials refusing the application, or any record having been made of the application having been made and rejected.

4. Per Patterson J.—That in the construction of the statute effect must be given to the term improvidence as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the court to form a definite opinion as to the relative strength of opposing claims.

5. *Semble* per Gwynne J.—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1), reversing the judgment at the hearing by which the information was dismissed.

The facts of this case may be found in the report of the decision of the court below and in the judgment of Mr. Justice Gwynne herein.

J. S. Tupper and *Glass* for the appellants. The evidence shows that the facts were misrepresented to the Attorney-General when he granted his *fiat* for the information in this case.

Fonseca acted in entire good faith, and his patent will not be set aside except on the clearest evidence. *Attorney-General* v. *McNulty* (2); *Attorney-General* v. *Garbutt* (3); *Martyn* v. *Kennedy* (4).

The learned counsel also referre to *Lake* v. *Bailey* (5); *Farmer* v. *Livingston* (6); *Barnes* v. *Boomer* (7).

(1) 5 Man. L. R. 173.
(2) 8 Gr. 324; 11 Gr. 282.
(3) 5 Gr. 186.
(4) 4 Gr. 99.
(5) 5 U. C. Q. B. 136.
(6) 5 Can. S. C. R. 221; 8 Can. S. C. R. 140.
(7) 10 Gr. 538.

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Ewart Q.C. for the respondent.

STRONG J. concurred in the judgment of Mr. Justice Gwynne.

FOURNIER J.—I am in favor of allowing this appeal for the reasons stated by the late Chief Justice Wallbridge and also for reasons given by Mr. Justice Gwynne in his judgment.

TASCHEREAU J.—I concur with my brother Gwynne and for the reasons by him given I think this appeal should be allowed.

GWYNNE J.—In 1861 the defendant Fonseca settled in Rupert's Land, upon part of a piece of land known as lot No 244 of the Hudson Bay Company's survey, now known as lot No. 35, in the parish of St. John, in the city of Winnipeg. From the time of his entry he occupied about three or four acres as a homestead, and in 1862 erected a dwelling house in which he thenceforth lived. The piece so occupied by him extended the distance of ten chains, measured in a direction from north to south, or nearly the fourth part of the width of the lot 244, its length being in the direction from east to west. The piece so enclosed and occupied as his homestead was of a triangular shape, the eastern extremity of which was a line ten chains in length from north to south, and which separated the piece occupied by Fonseca from a lot owned and occupied by one Neil McDonald, which was one of a number of lots laid out on a bend of the Red River and known as the Point Douglas lots. In 1864 Fonseca purchased from Neil McDonald a triangular piece of about two acres of this point, immediately adjoining Fonseca's homestead enclosure which, added to the piece, made

his homestead a rectangular piece of land of about 5 or 6 acres. He also purchased three of those Point Douglas or river lots, comprising among them from 50 to 55 acres. In 1869 Fonseca took possession also of two other small pieces of said lot 244 on the west side of a road or highway crossing said lot about 300 yards to the west of his homestead, on which he also erected buildings, consisting of stores and dwelling houses; the pieces so taken possession of are now known as two town lots on the west side of Main street, in the City of Winnipeg. In or about the month of November, 1870, one Sinclair, a surveyor, laid out a portion of the said lot No. 244 into town lots upon the employment of Fonseca and of certain others of the holders of Point Douglas lots. The piece so surveyed comprehends what are now known as lots C, D, E and F, on block 14, according to the official plan of the City of Winnipeg. The owners of these Point lots appear to have claimed to have had some interest in the lot No. 244 as a common prior to the surrender of Rupert's Land to the crown, but under what title such claim was asserted does not clearly appear. After the surrender of Rupert's land to the crown one William Logan, who is a brother-in-law of the defendant Fonseca, and who was not an owner of any of the Point Douglas or river lots, without any claim of title entered upon a part of the said lot 244, apparently just before the above-mentioned survey made by Sinclair; and as it is in virtue of this his entry that the present information is filed upon the relation of, and in the interest of, Eliza Mercer, and in the interest also of one T. Gray, who severally claim only by title derived from Logan, it will be convenient to state from the information the grounds upon which the relief asked by the information is based. The information, commencing at its 14th paragraph, alleges that:

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In or about the year of our Lord, 1870, (in paragraph 21 it is stated to have been after the 15th July of that year), one William Logan, who was one of the said Point Douglas holders, in respect of his ownership of the lot of land on the river known as the Hupé lot, and afterwards as lot No. 24 of the Dominion Government Survey of the Parish of St. Johns, as one of the persons interested in the Point Douglas Common, took possession of said southerly ten chains of said lot thirty-five which portion may be more familiarly known and described as follows, that is to say: Lots C, D, E and F in block number fourteen according to the official plan of the City of Winnipeg made by George McPhillips, D.L.S., and filed in the Registry Office in and for the County of Selkirk.

Afterwards the said Logan conveyed to various persons various portions of the said lots C, D, E and F, and some of those persons conveyed to others, and there are now various persons in possession of the said lots claiming to be entitled thereto, and to receive patents therefor by virtue of long possession and improvements placed upon the property. Among such persons *the relator claims to be entitled to:*

First.—A portion of said lot D having a frontage of about ninety-two feet on Main street and running back along Fonseca street, with a uniform width of ninety-two feet to a depth of one hundred and sixty-five feet.

Second.—A portion of said lot E having a frontage of ninety-two feet on Austin street and running back along Fonseca street the same width to a depth of one hundred and thirty feet more or less. And the said Thomas Simon Gray claims to be entitled to parts of the lots C and F in the plan hereinafter mentioned, and more particularly described as follows:

Here follows a description which it is not necessary to set out at large. Then the information proceeds:—

The relator and the said Thomas Simon Gray each claim title to their respective portions of the said lands through the said William Logan and they and those through whom they claim were for many years prior to the issue of the said patent, (that is a patent granting the land to Fonseca previously mentioned in the information), continuously in possession of the said portions of the said lands, claiming to be entitled thereto by reason of such possession and in the absence of title in any person or persons other than the crown.

The information then prays that the letters patent to Fonseca for the lands in question may be declared to have issued, in respect of these lands, improvidently and through error and in ignorance of the rights of

the several persons aforesaid, and that the said letters patent may be set aside as far as they affect the said lands, and be declared absolutely null and void and of no effect so far as regards these lands. That an agreement of the 12th November, 1879, mentioned in the information, made between the defendants Fonseca and Schultz for the sale and conveyance by the former to the latter of one undivided half share in the lands on the said common for which Fonseca should obtain letters patent from the Government, be declared null and void as to the lands in question, and

that all the conveyances of the said lands and premises through which the said relator claims title to the said lands and premises may be confirmed.

The object of this latter clause is not very apparent. It could scarcely have been supposed that the court could rectify any defect there might be in the relator's title. It was inserted, perhaps, with the view of obtaining the judgment of the court to the effect that her claim and title to have the land she claims granted to her is preferable to any claim that Fonseca had, so as to justify the court in acceding to the prayer of the information by granting a decree avoiding the letters patent issued in favor of Fonseca. This appears to me to be the only purpose contemplated by the insertion of this clause in the prayer; but whatever may have been the object of its insertion, it plainly appears by the information that it was filed, and thereby the present suit was instituted, in assertion of a claim and right in the relator, Eliza Mercer and in Thomas Simon Gray severally to certain parts of the land in question, to have such parts granted to them respectively preferably to the claim of Fonseca in right of which the lands were granted to him; and it is for this reason only that a decree is asked that the letters patent granting the lands to him may be declared to be null

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and void as issued improvidently, in error and in ignorance of the rights of the several parties aforesaid; and the present Deputy Minister of the Interior, upon whose suggestion alone the information appears to have been authorized to be filed by the Attorney-General, says in his evidence that in point of fact the suit is prosecuted for the benefit of Eliza Mercer who is the sole relator, making no mention of Thomas Simon Gray. Gray's claim is mentioned in the information, but the evidence of the Deputy Minister is as above—that the suit is prosecuted for the benefit of Eliza Mercer—and she is the person at whose sole expense the suit has been instituted. There can, therefore, be no doubt that the suit is founded upon a claim of right in the relator Eliza Mercer and Thomas Simon Gray respectively, which is asserted to be preferable to any right or claim Fonseca had, to obtain a grant of the lands in question, and not upon any suggestion or complaint made by the Attorney-General that the letters patent granting the lands to Fonseca were issued either improvidently or in error, otherwise than in so far as they may have been, if they were, issued in ignorance of some superior right which the relator and Gray respectively had, or have, if any such they have, in the pieces claimed by them respectively, through Logan, to obtain a decree annulling the letters patent to Fonseca, in order that letters patent may be issued to them respectively in recognition of such their claims as preferable to any Fonseca had.

Now, the allegation in the information as to the right in virtue of which Logan is said to have entered upon the lands in question, upon which right alone is now rested the preferable claim asserted on behalf of the relator and Gray, as claiming through Logan, to have the letters patent issued to Fonseca annulled as to the

lands in question, and those lands granted to them respectively, is not supported by the evidence. On the contrary, it is shown by the evidence to be an allegation not founded on facts, and this is the second time in which this allegation has been made in a legal proceeding, for a bill was filed by the relator Eliza Mercer against the present defendants and the Attorney-General of the Dominion, which prayed for the same relief as that which is prayed for in this information founded upon the same allegation coupled with another, namely, that Logan's possession of the lands in question had commenced prior to the 15th July, 1870, and that bill was dismissed upon the ground that the allegations upon which the then plaintiff—the present relator—based her claim to the relief prayed for were disproved. It is now claimed upon behalf of the relator that the Attorney-General, as representing the Government of the Dominion, although a defendant in the former suit, as representing the Government, cannot in the present suit be affected by the judgment in the former. I can see no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General as representing the Government was a party defendant equally as any individual defendant would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit; and I am not prepared to admit the proposition that, in such case, the Government would not be affected by the judgment in the former suit to be well founded in law. It is not, however, I think, necessary to decide the point in the present suit. The question now is not so much whether the Government as represented by the Attorney-General is or is not estopped by the judgment in the former suit, as whether a court

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of justice should, in the interest of the relator, in whose interest and in assertion of whose title the present suit has been instituted, entertain as sufficient ground upon which to grant the relief prayed, namely, to avoid letters patent, a claim of the relator's, which in the former suit, (in which the same relief was prayed for and could have been granted if a right thereto had been established, as is prayed for and could be granted in the present suit), was adjudged to have been not only not proved, but to have been disproved.

Gray, however, in whose interest also, as well as in the interest of the relator, the information shows the present suit to have been instituted, was not a party to the former suit. I propose, therefore, to deal with the case upon the evidence taken in the case as we have it before us. In some respects it is not perhaps quite as full as was the evidence in the former case, but the conclusion which should be arrived at seems to me to be the same.

Logan, in his evidence in the present case, although he said on his examination-in-chief that he put up a log building on the land in question in the spring of 1870, and another in the fall of that year, was obliged to admit, upon his cross-examination, that the first log building he ever put upon any part of the land was in the month of September, 1870.

The log building he then put up was of the dimensions of 14 x 16 feet. He brought it from some other place; it did not take quite a week to put it up. In 1871 he put an addition to it and built a small stable. Whether he went to reside upon the lot prior to 1872 is not perhaps quite clear; but this is immaterial. Then, as to the right in virtue of which he says he entered upon the land. He took possession, he says, in right of his being the owner of a Point Douglas river lot, then known as the Hupé lot, now

lot 24. He took possession without the authority of or consultation with any one. His right so to take possession he explains in this manner: He bought, he says, the Hupé lot, and having bought it that, he says, gave him a right to the common, that is, to some part of it, and to the particular part in question, "simply because he located it," that is to say entered upon it and took possession of it, his right to do so being, as he says, solely in virtue of his having been the owner of the Hupé river lot at Point Douglas. Now, in point of fact, it appears by the evidence which was given of certain deeds upon registry in the registry office at Winnipeg that Logan did not own the Hupé lot until the month of October, 1872. Hupé by a deed upon the 17th October, 1872, conveyed the lot to Logan by the description following, that is to say: as situate at Point Douglas, in the county of Selkirk, measuring four and one-half chains in width by all the depth between the Red River by which it is bounded in front and the road leading from the Point Douglas ferry, which road forms the rear boundary. The lot belonging to John Sutherland bounds the said land on one side, and E. L. Barber's lot bounds it on the other. The whole of this lot Logan, upon the 26th June, 1873, by deed of that date, sold and conveyed to one David H. Thomas. It is obvious, therefore, that the possession taken of the lands in question, as part of the common, by Logan, in September, 1870, was not in virtue of his having been the owner of the Hupé river lot; indeed he admits that he did not at the time claim possession in virtue of title as owner of any river lot; this is an idea which he must have first entertained at some subsequent period, but when does not appear. Now, it is in evidence that Fonseca always entertained the idea of acquiring title, if and when he could, for a strip of this lot 244, ten chains in width—that is, running

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north and south, by the length of the lot measured from the east rn extremity where his house was built to the western extremity. It would seem also that there were other persons who had like possession of other parts, subject always to the common rights claimed by the owners of the Point lots. Dr. Schultz in his evidence says that at the time of the transfer of Rupert's Land to the crown, on the 15th July, 1870, the persons having actual possession of parts of lot 244 were himself, John McTavish, Eli Barber, the defendant Fonseca, and the Hon. John Sutherland; and he says that for seven or eight years prior to 1870 Fonseca's possession of this southern ten chains of the lot measured as aforesaid was so far recognized by the persons claiming common rights in virtue of their being owners of Point lots that these common rights were exercised over the portion of the said southern ten chains in width by the length of the lot from east to west lying outside of Fonseca's homestead enclosure with the consent of Fonseca. In 1870 the owners of the Point lots had a survey made of a small portion of the lot 244 adjoining a road then called the Highway, now Main street, in the City of Winnipeg, into town lots, with the view of selling the lots for the benefit of the owners of the Point lots. The piece so surveyed comprised within it a portion of the southern ten chains of the lot adjoining Fonseca's homestead enclosure, and the erections he had made in 1869, about 300 yards west thereof, including the lots now known as lots C, D, E, and F, on the Government survey made some years subsequent. A meeting of the owners of the Point Douglas river lots was held on the 24th July, 1872, at which an agreement was come to as to the action of the claimants to common rights in the lot 244. This agreement was reduced into the shape of a deed executed by the several owners, seventeen in

number, of whom the defendant Fonseca was one, and the defendant Schultz another, and bearing date the 15th October, 1872, by which five of their number, of whom Fonseca was one, became trustees under and for the purposes of the deed. The deed purported to convey to the trustees the lot No. 244 known as the reserve in common belonging to the owners, occupiers and possessors of Point Douglas, and the trust purpose was declared to be to sell the town lots laid out on the survey made by the owners of Point lots in 1870, for the benefit of the several parties interested in proportion to their interests. The trustees made sales of some of the town lots to certain persons who purchased from them, and to enable them to make good those sales, and to obtain title to the whole lot in order that it might be sub-divided by them in accordance with their knowledge of the proportions to be allotted to each person entitled, they applied to the Government for letters patent granting the lot to them. The grounds upon which they based their application will sufficiently appear when we come to see the action taken by Government thereon in 1877, after several years taken for the consideration of the claim. Now, upon the 12th May, 1870, the act 35 Vic. ch. 3, to establish and provide for the government of Manitoba, was passed. That act was passed in anticipation of the transfer of Rupert's land from the Hudson Bay Company to the crown being shortly thereafter perfected, and it enacted, among other things, as follows :—

Sec. 32. For the quieting of titles and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows :—

1. All grants of land in freehold made by the Hudson's Bay Company up to the 8th day of March, 1869, shall, if required by the owner, be confirmed by grant from the Crown.

2. All grants of estates less than freehold in land made by the Hudson's Bay Company up to the 8th day of March aforesaid shall, if re-

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quired by the owner, be converted into an estate in freehold by grant from the Crown.

3. All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the 8th day of March aforesaid, of land in that part of the Province in which the Indian title has been extinguished shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

4. All persons in peaceable possession of tracts of land at the time of the transfer to Canada in those parts of the Province in which the Indian title has not been extinguished shall have the right of pre-emption of the same on such terms and conditions as may be determined by the Governor in Council.

5. The Lieutenant Governor is hereby authorised under regulations to be made from time to time by the Governor in Council, to make all such provisions for ascertaining and adjusting on fair and equitable terms the rights of common and the rights of cutting hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

The transfer of Rupert's Land to the crown became perfected on the 15th July, 1870. It is now obvious that Logan never acquired any right or claim whatever to have had any part of the land now in question granted to him under the provisions of the above act. Evidence was given at the trial that a notice which was issued from the office of the Surveyor General of the Dominion, then kept in Winnipeg, and signed by the Surveyor General, and bearing date the 21st March, 1873, was at that time very extensively circulated in Winnipeg and throughout the Province, in the terms following :—

Notice is hereby given that claims, by squatting on, or otherwise, to any Government lands within the settlements of the Red River and the Assiniboine River without the authority of this Department previously obtained will not be recognised by the Government. Persons are hereby required to govern themselves accordingly.

(Signed) J. S. DENNIS,
Surveyor General.

It appeared in evidence by abstracts of, and extracts from, deeds on registry in the registry office at Winnipeg (for this is the only way, as far as I can see upon

the appeal case laid before us, the deeds upon which the relator and Gray rest their respective claims were proved), that on the 26th June, 1873, after the publication and circulation of the notice of the 21st March, 1873, Logan executed a deed purporting to convey to one David H. Thomas a piece of land in the City of Winnipeg, described as being:

One chain frontage on Main street, Winnipeg, by which it is bounded on one side, *i.e.*, the west side running eastward four chains, and bounded by the common or reserve on Point Douglas, on which said lot of land is situate, and on the north by an adjoining lot and property of said William Logan, where he resides, and on the south by the property of E. L. Barber, on which his store or place of business is.

This deed is relied upon as the foundation of Gray's claim. At the time of its execution Thomas must be taken to have been aware of the notice of the 21st March previous, and to have been aware that the deed would pass nothing more than Logan's possession, which was that of a squatter only. In like manner, it appears that upon the 13th October, 1874, Thomas executed a deed of that date by which he purported to convey to one John Freeman a part of the piece conveyed by Logan to Thomas by the following description:

Commencing at the north-west point of letter B in the survey of said Point Douglas Common made by Douglas Sinclair, Esquire, Provincial Land Surveyor, on the east side of Main street in said city, which said survey, by a plan or map thereof, has been duly registered, thence northerly forty feet, thence in a line parallel with the boundary line of said lot B and lot letter C—in the same survey in an easterly direction to Austin street, thence southerly along the front of lot letter F, where the same fronts on Austin street forty feet, thence along the southern boundary line of lots letters C and F in said survey to the place of beginning.

Then, upon the 7th December, 1875, Logan executed a deed of that date by which he purported to convey to the said David H. Thomas the whole of lots D and

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E, extending from Main street along Fonseca street to Austin street.

Then, upon the 22nd March, 1876, the said David Thomas executed a deed of that date, by which he purported to re-convey to the said Logan a portion of the said lots D and E by the following description:

Commencing at the north-west angle of lot D, fronting on Main street and Fonseca street, thence in an easterly direction along Fonseca street four chains, thence in a southerly direction at right angles 92 feet, thence in a westerly direction parallel with Fonseca street to Main street, thence along Main street 92 feet to the place of beginning.

Then on the 20th June, 1876, Logan executed a deed of that date, by which he purported to convey the same piece, by the same description, to one Frederick C. Mercer. Upon the 19th June, 1876, David Thomas executed a deed of that date by which he purported to convey to the said Frederick C. Mercer a portion of the said lot E in block 14, by the following description.

Commencing at a point on the south side of Fonseca street, distant four chains in a course S. 50° 30' 50" from the intersection of the south side of Fonseca street with the east side of Main street; thence southerly at right angles to Fonseca street 92 feet; thence easterly parallel to Fonseca street one chain more or less to the west side of Austin street, thence northerly along the west side of Austin Street 92 feet to the south side of Fonseca street thence N. 50° 30' 50" W. along the south side of Fonseca street one chain, more or less, to the place of beginning.

On the 28th March, 1876, by a deed of that date, the said David Thomas purported to convey to the said Logan that portion of lots F and E in block 14, described as follows,

Commencing at a point on the west side of Austin street forty-one feet northerly from the line between lots F and G, thence in a westerly direction parallel to the line between lots F and G, 90 feet, thence at right angles northerly 30 feet, thence easterly parallel to the said line between lots F and G to the line defining the westerly side of Austin street, thence southerly along the said westerly side of Austin street 30 feet, more or less, to the place of beginning.

Then, on 31st March, 1876, by deed of that date Logan purported to convey this lastly described piece of land to two persons of the name of McLean and McDonald. And, on the 20th September, 1876, the said David Thomas executed a deed of that date, by which he purported to convey to one Thomas Manley a piece of land which, by the abstract, appears to be a small piece of lot E, which lay between the south-easterly angle of that lot on Austin street and the boundary of the piece described in the deed from Thomas to Mercer, dated the 19th June, 1876. Then by deed, dated the 19th December, 1876, executed by the said David Thomas, he purported to convey to the defendant Schultz a portion of the said lots C, D, E and F. by the following description,

Commencing at a point forty feet in a northerly direction along Main street from the line dividing lots B and C, thence in an easterly direction 260 feet, more or less, running along the line and property of one John Freeman, thence at right angles in a northerly direction one hundred and thirty-five feet, more or less, running along the lines and property of one Thomas Manley, tradesman, and Messrs. McLean and McDonald to the line and property of Frederick Mercer, thence in a westerly direction 300 feet, more or less, running along the line and property of the said Frederick C. Mercer to Main street, thence in a southerly direction 42 feet, more or less, along Main street to the place of beginning.

The piece here described covered all the remaining portions of the lots C, D, E and F. not covered by the descriptions in the deeds to Freeman, Mercer, Manley, McLean and McDonald and from this time forth Logan had no possession. so far as appears, of any part of these lots C, D, E, or F.

Now, upon the 8th of April, 1875, the act 38 Vic. ch. 52 was passed in which it was enacted as follows:

Whereas it is expedient to afford facilities to parties claiming land under the third and fourth sub-sections of the thirty-second section of the Act thirty-third Victoria chapter three, to obtain letters patent for the same: Be it enacted that persons satisfactorily establishing

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undisturbed occupancy of any lands within the Province prior to, and being by themselves or their servants, tenants or agents or those through whom they claim in actual peaceable possession thereof on the fifteenth day of July 1870 shall be entitled to receive letters patent therefor granting the same absolutely to them respectively in fee simple.

Upon the passing of this act the trustees of the Point Douglas Common seem to have appealed to it in support of their application to the Government for letters patent granting the lot No. 244 to them. Upon the 10th May, 1877, an Order in Council was passed adopting a report of the Minister of the Interior upon the application of the trustees. In that report the Minister submitted for the approval of His Excellency in Council:—

The land claimed consists of lot No. 35 Dominion Land Surveys, or No. 244 according to the Hudson's Bay Company's Survey and Registry Book situate formerly in the parish of St. John now included within the limits of the city of Winnipeg and contains $667\frac{2}{10}$ acres. Its precise boundaries are indicated on the diagram A herewith which also shows its position in relation to the small holdings embracing the frontage on the Red River at Point Douglas owned severally by the applicants by virtue of which ownership they claim the lands in question as tenants in common.

The claimants apply for a patent for this land and support their application by certain allegations as follows:—

1. That the late Lord Selkirk at or about the time he founded the Red River settlement laid out on the river lots on Point Douglas and gave the same to certain of his servants or retainers marking off the large tract in rear to be held as a common by and for the benefit of the Point owners. Two of the claimants have stated their belief that Lord Selkirk actually conveyed this land to the settlers at the same time that he granted them the small lots.

2. That they have always asserted their claim thereto, and have with slight interruption enjoyed the continuous and exclusive right of way and common over the same, and that the latter right has always been recognized in the surrounding community.

3. That the right so claimed and enjoyed by them is superior in all respects to that conceded by the law of the Assiniboia council to the owners of the river lots, between the two mile and the four mile lines.

5. They further claim a patent for the land under the provisions of the act 38 Vic. ch. 52.

The report then states, among other things, as follows :—

On an attentive perusal of all the evidence adduced and the voluminous papers in the case, it appears to the undersigned ;

1. It may be conceded that the claimants had, for many years previous to the transfer, enjoyed a right of common and of cutting hay over the land, but the enjoyment of such right can only be regarded as having been exclusive in the same light as the hay and common right in the outer two miles enjoyed by settlers on farm lots in the old parishes was exclusive.

2. As regards the right of the claimants to a patent under the act 38 Vic. ch. 52, it is clear to the undersigned that the "undisturbed occupancy" and "actual peaceable possession" of the common either at the time of, or previous to, the transfer by the Point holders, was not of a character contemplated by the statute and, therefore, not such as would entitle the claimants to a grant of the land. The undersigned is of opinion that the claimants were at the time of, and previous to, the transfer in the enjoyment of a right of common and of cutting hay over the land in question, and generally in the Province, the ascertaining and adjusting which is provided for in the act 33 Vic. ch. 3, and that the same should be commuted by a grant of land from the crown. He is of opinion, however, that the applicants are unreasonable in their demands.

Upon a full and earnest consideration of all the circumstances, the undersigned is of opinion that the applicants would be fairly, indeed liberally, dealt with, were they to receive in commutation of their rights a grant of acre for acre out of that part of the common next toward the river which is the most valuable part of the property.

The total acreage of the small holdings embracing the Point is 226·07 acres.

The undersigned recommends that a patent for an equal quantity issue to such persons as may be indicated with that view by the claimants, in trust for the benefit of the several owners of the Point lots. The land so patented should be bounded next to the river by the rear of the lots as originally laid out (the lot owned by the family of the late Neil McDonald to be considered as one of such lots), but not to be held to include any land for which a right to a patent may be established under the Manitoba act or the act 38 Vic. ch. 52, on the said property.

It should be understood, further, that the Government is to be entirely relieved from any trouble or responsibility connected with the division of the grant among the claimants, and finally the patent not to issue to the trustees until the written consent to such step shall

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have been filed in the Dominion Lands office of the several parties to whom the Point holders or any of them may have sold lots on the common.

This latter clause was inserted, as it would seem, for the protection of the parties to whom the trustees of the Point holders may have sold lots under the trust deed of the 15th October, 1872. Upon the adoption of that report by His Excellency in Council, the order in council passed for that purpose had plainly the effect, as it appears to me, of setting apart, for the benefit solely of the owners of Point lots, that part of lot 244, now lot 35, next adjoining the Point Douglas lots (including the lots now in question), to which no right to a patent could be established under the Manitoba act, or 38 Vic. ch. 52, to the extent of 226 acres. If a right to a patent could be established either under the Manitoba act or 38 Vic. ch. 52, to any part of lot 35 next adjoining the Point lots, such part was excluded from the computation of the 226 acres reserved for the benefit of the owners of Point lots; but if no such right could be established then the 226 acres next adjoining the Point lots were reserved for the benefit of the owners of such lots.

Upon this report and order in council becoming known, Fonseca, apparently regarding himself as one of the persons therein alluded to as having a claim under the Manitoba act, as amended by 38 Vic. ch. 52, in the month of July, 1877, presented a petition addressed to the Minister of the Interior for a grant of the southern part of lot 244, now 35, measured from the eastern extremity of the common where his homestead enclosure was to the western extremity, and ten chains in width. The petition is as follows:—

The petition of the undersigned respectfully sheweth that prior to and on the 15th day of July, 1870, he was by himself and through his servants, tenants and agents in actual peaceable possession of a portion of lot No. 35, in the parish of St. John, according to the Dominion

survey of river lots to wit: the southern ten chains of said lot, commencing in the rear of the land or lot owned by the late Neil McDonald, and thence running back the usual distance to the two mile limit, and therefore prays that letters patent therefor may issue to him for the same.

This petition was accompanied with Fonseca's declaration, as follows:—

I, William Gomez Fonseca, of the City of Winnipeg, in the county of Selkirk, gentleman, do solemnly declare:

1. That in the year one thousand eight hundred and sixty-one I, with the permission of the Hudson's Bay Company, through the late Governor McTavish, located and settled on part of now lot number thirty-five, according to the Dominion survey of river lots, immediately in rear of that portion of land then occupied by the late Neil McDonald, having a width of ten chains, and bounded on the southerly side by the land of Alexander Logan, Esquire; and, within a few years thereafter, not exceeding four, I fenced in a portion of said lot on the east side of the highway, and built thereon a dwelling-house, which I have ever since lived in, and occupied and cultivated, and I also, in the year 1869, built a store and outhouses on a portion of said lot, within the range of ten chains, aforesaid, extending back from the river on the west side of the highway, which I used for a store until about four years ago, and the same has since been occupied and is now occupied by my tenants.

That my occupancy of said ten chains has been peaceable and without interruption, and that, to the best of my knowledge and belief my claim to the crown patent for that portion of said lot thirty-five, in the rear of the late Neil McDonald's holding, having a width of ten chains and extending back to the two mile limit, is just and well founded.

That in the year 1867 I employed Herbert L. Sabine, an authorized surveyor under the Assiniboian Government, to survey for myself and others the whole of the lot 35, aforesaid, and I assisted in such survey, and planted the pickets, and we surveyed to the whole extent of the outer two mile limit, and I paid him therefor my proportion, equal to the ten chains in width aforesaid; and I make this solemn declaration, believing it to be true, and by virtue of the act passed in the 37th year of Her Majesty's reign, for the suppression of voluntary and extra-judicial oaths.

Herbert L. Sabine, the surveyor therein referred to, also made a like declaration, affirming in every particular the statements in Fonseca's declaration; and

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one Alexander Dubé also made a similar declaration, affirming Fonseca's declaration in every particular, save only that in relation to the survey of the lot in 1867, as to which Dubé said nothing. With these declarations accompanying the petition, it was presented to the Government.

At this time the Government was recognizing the right of persons settled on land in Rupert's Land, prior to the 15th of July, 1870, to letters patent granting to them the land extending back from their actual location to the extent of what was called the two mile limit; and upon the strength of this action of the Government Fonseca and others similarly situated with him upon this lot 244, now 35, made application for letters patent to be granted to them respectively.

We now see that when Fonseca's petition was presented asking for letters patent to be issued granting to him the southerly ten chains of lot 244, which included the whole of the lots now in question, Logan was not in apparent or actual possession of any part of the lots now in question. He himself admits that he knew of Fonseca's application, and that it covered lots C, D, E and F, and that he never did make any application himself until the month of May, 1882, more than three years after the letters patent to Fonseca had been issued; and in that application he based his claim under the Manitoba act, as amended by 38 Vic. ch. 52, upon the allegation that he was in actual peaceable possession prior to and upon the 15th July, 1870, and that he had been in possession of a part as far back as 1863. We have already seen that there was no foundation whatever for such an allegation, and that its falsity has been established in part from his own lips, and by other means. All claim in him based upon any such foundation has been disproved, not only by the evidence given in the present case, but by that given in the case

instituted by the present relator against the present defendants and the Attorney General, in which judgment has been rendered against the relator; but whether Logan had or had not any pretence of claim, he never made any claim to the Government or took any steps whatever to interfere with Fonseca's application for letters patent granting to him land including, as Logan knew, these very lots C, D, E and F, while that application was before the Government, a period of about 18 months; neither did any person assert any claim to the land now claimed by the relator, either in virtue of a transfer derived from Logan of any claim or possession which Logan had or was supposed to have, or otherwise. The present relator only acquired the interest under which she claims in 1882, long after the letters patent to Fonseca were issued; but her husband, Frederick C. Mercer, in and from the month of June, 1876, until the month of November, 1880, as to part, and until the month of October, 1882, as to other part, was possessed of whatever claim or possession or right of possession Logan ever had in those parts of lots D and E, which are now claimed by the relator. Her claim rests upon three deeds, the first of which is dated the 8th November, 1880, executed by the relator's husband, whereby he purported to convey to one Charles H. Pattison parts of lots D and E in block 14, described as follows:—

First, commencing at the north-west corner of lot D, at the intersection of Main and Fonseca streets, thence easterly along the northern boundary of said lot D 132 feet, thence southerly and at right angles to the northerly boundary of said lot D 92 feet, thence westerly and parrallel with the northerly boundary of said lot D 132 feet, more or less, to Main street; thence along the westerly boundary of said lot D 92 feet to the place of beginning; and,

Secondly, commencing at a point on the southern boundary of Fonseca street at the distance of 198 feet easterly from the north-west corner of lot D, thence easterly and along the northerly boundary of lot E 132 feet, more or less, to Austin street; thence southerly along

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the easterly boundary of said lot E 92 feet, thence westerly and parallel with the northerly boundary of lot E 132 feet; thence northerly 92 feet to the place of beginning.

This description left on lots D and E still unaffected by this deed 35 feet on lot D, measured on Fonseca street, at the eastern extremity of lot D, by 92 feet back at right angles with Fonseca street, and 35 feet on lot E, measured on Fonseca street, at the western extremity of that lot by 92 feet back. The second deed is dated the 31st January, 1882, whereby Pattison purported to convey to the relator the pieces of land above described in the deed of the 8th November, 1880, and the third is dated the 9th of October, 1882, whereby Frederick C. Mercer purported to convey to his wife, the relator in the present proceeding, that portion of lot D having a frontage on Fonseca street of 35 feet by 92 feet back at right angles with Fonseca street, not included in the deed of the 8th November, 1880, leaving thus 35 feet on Fonseca street by 92 feet back at the western extremity of lot E still unaffected. Now, Frederick C. Mercer, who was the only person who had any claim as derived from Logan in the land now claimed by his wife, the relator in the present case, never made any claim for letters patent to be granted to him, nor has any reason been given or suggested why he did not if he supposed that he had any. For all that appears, he may have known that Logan's possession consisted merely in his having squatted, as it is called, without any authority or color of right, and subsequently to the 15th July, 1870. He may, for all that appears, have had knowledge of the publication of the notice of the 21st March, 1873, and have thereby or otherwise known that he could not substantiate any right to have letters patent issued to him in virtue of any possession derived from Logan; but, however this may be, the fact remains that he never made any claim or application for let-

ters patent to be granted to him. If he had any claim he had it from the moment of his getting his deeds in June, 1876. Yet he never asserted it, and he does not appear to have been prevented from doing so by Fonseca, who, so far as appears, may have been utterly ignorant of his having obtained any interest derived from Logan, and in point of fact it is now clear beyond question that he never had any claim, the recognition of which is sanctioned and directed by the Manitoba act, 33 Vic. ch. 3, as amended by 38 Vic. ch. 52, to be recognized. Nor does the evidence afford any reason for concluding that he ever believed or supposed that he had any such or any claim to have letters patent issued granting the land in question to him.

Now as to Fonseca's application, that it was made in assertion of the existence of a right under the Manitoba act as amended there can be no doubt, neither do I think there can be any doubt that it was entertained as such, or that the letters patent issued to Fonseca were issued in recognition of such right, although not to the actual extent which, in the case of country lots away from towns, was then the practice. At this time the Government was in the habit, in recognition of claims under the act, of making grants to persons who, prior to the 15th July, 1870, were in peaceable possession of lands in country places which constituted parts of lots as subsequently surveyed by the Government, back to the extent of what was called the two mile limit, and Fonseca and others similarly situated with him upon the lot 244 made their applications founded upon a knowledge of this practice. Now that Fonseca's claim was recognized by the Minister of Justice (whose office it appears to have been to pronounce first upon the validity of the claim) as being valid under the act, appears from a reference to the opinion of the Deputy Minister of Justice upon that point in a memorandum

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signed by the then Surveyor General, in February, 1879. The Department of Justice, and not that of the Surveyor General, or any other department, would seem to be the department to pronounce upon the validity of the claim, and this is what the Department of Justice appears to have done in the case of Fonseca, submitting to the Department of the Interior a question as to the *quantum* of the demand. The memorandum of the Surveyor General contains what appear to be some strange mistakes as to some matters of fact, and some opinions upon questions of law seemingly at variance with the view taken by the Department of Justice, and the expression of which opinions cannot, I think, be appealed to or adopted to the prejudice of the defendants. In that memorandum he says :—

In the matter of the claim preferred by Mr. W. G. Fonseca for a grant to him under the Manitoba act of a certain portion of Point Douglas common, the undersigned has the honor to report that the Deputy Minister of Justice has, on the evidence submitted to him, approved the recognition of the claim, but gives the opinion that the extent of land to be granted is a matter for the decision of the Right Honourable the Minister of this department.

In common with others making similar claims, Mr. Fonseca applies for the full depth of the "inner two mile" belt remaining in rear of the Neil McDonald property, and a width throughout of ten chains from the outline of the river lot next adjoining to the westward.

It is to be observed that the Point Douglas common lot was not surveyed either by the Hudson's Bay Company, or subsequently by the Dominion Lands.

Under these circumstances the possession of Mr. Fonseca under the Manitoba Act could not be affirmed to include any greater extent than his own actual enclosures, and did not therefore carry with it the occupation of any definite one of a system of lots.

If, therefore, anything beyond the ground actually enclosed by him be granted to Mr. Fonseca, such concession will be purely an act of grace on the part of the Minister ; and in view of the relatively great value of the land in question, the undersigned is of the opinion that Mr. Fonseca would be most liberally treated were he given such an additional area to that actually occupied as would make the whole 25 acres.

As it will be advisable in public interest to recognise the private surveys which have been registered in the registry office at Winnipeg, subdividing certain portions of the common into building lots and laying out streets thereon ; and furthermore, that already action has been taken upon them by the department in giving patents to individuals who bought building lots from the trustees for the Point holders; therefore it would be well that the grant to Mr. Fonseca should be described to conform to the outline of certain streets to include certain blocks so laid out, and in doing this it may be necessary to depart slightly in defect or in excess from the area of 25 acres above specified.

It should be borne in mind in estimating the consideration that Mr. Fonseca would so receive, that it is but comparatively lately that he has preferred a claim on the present basis ; that he had with others, for a long time, advanced an antagonistic claim to this same piece of ground as one of the original Point holders, and therefore necessarily has himself to a certain extent weakened the force of the claim for consideration which he now advances. The information in this office is not yet sufficiently detailed and complete to enable the undersigned to know what parts of the common covered by this claim have already been disposed of to other parties, either by Fonseca acting for himself alone and receiving the equivalent therefor or by the trustees for the Point holders. In the latter case a proportionate additional extent in the rear would require to be added to make up for any such land sold for which Fonseca received no equivalent.

The allegation that the Point Douglas common had not been surveyed either by the Hudson Bay Company or the Dominion Government appears to be quite erroneous, as appears by the report of the Minister of the Interior, adopted in Council in May, 1877, where the common is referred to as being called lot 244 in the Hudson's Bay Company's survey and registry book, and the Dominion survey is referred to in the letters patent to Fonseca as of record in that branch of the Department of the Interior, known as the Dominion Lands Office, where the lot is designated as No. 35 on a plan signed by John Stoughten Dennis, Surveyor General of Dominion Lands, and dated 1st January, 1875. The allegation upon which the Surveyor General rested his opinion that Fonseca had no claim under the Manitoba act for any more than his actual home-

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stead enclosure, and that if anything beyond that should be given to him, it should be a mere act of grace on the part of the Minister, being erroneous, the opinion based upon such material cannot be entitled to much consideration, and the opinion of the Minister of Justice may, I think, be allowed to prevail, namely, that Fonseca's claim was valid and should be recognized, but that it was for the Minister of the Interior to determine the quantity of land to be granted in recognition of it. So, likewise, not much weight can be attached to the opinion that the claim by Fonseca and co-trustees reported on by a former Minister of the Interior, in May, 1877, was so antagonistic to Fonseca's claim for a grant to himself under the Manitoba act that his claim under the act was weakened thereby. Weakened it might be, without being reduced to the condition of a mere petition for the exercise of the grace and favor of the Minister. However, the Surveyor General does not appear to me to have appreciated accurately the object of the parties to the trust deed. Their intention was to sell the town lots as surveyed by the trustees in 1870 ; and as to the residue their object, as testified by Dr. Schultz, was to obtain a grant, in order that the parties interested might be in a position to apportion the land among themselves in an equitable manner, according to their knowledge of the proportion that should be allotted to each. When the Government refused to recognize the application of the trustees, as they did by the order in council of May, 1877, by which, at the same time, they reserved the rights of all persons having exclusive claims under the Manitoba act, it was natural that Fonseca and such others as were similarly situated should have made the applications they did ; and their having made the former application cannot in fairness be said to prejudice their rights under the act.

The Surveyor General, however, appears to have touched the material point when he suggested that to recognize the practice as to what was called "the inner two mile" belt as applicable to a case affecting property in the town of Winnipeg, where it was very valuable, would be unreasonable, and it may be admitted that the 25 acres as suggested by him as sufficient would be to the full as liberal as, if not more so than, a grant in a country lot up to the two mile belt would be. The quantity suggested may have been very liberal but it was no less a grant in recognition of Fonseca's claim under the act; and so, indeed, it is in most express terms shown to be in the letters patent, where the Government speaks as of record in well considered language. That Fonseca's grant, then, was in recognition of a claim valid under the act cannot, in my opinion, admit now of question.

The Surveyor General's memorandum, however, shows that when he was not expressing a legal opinion he knew thoroughly what he was about, and what his suggestion was as to the position of the land to make up the 25 acres he has not left in obscurity. The land to be granted was plainly to be adjoining to the homestead enclosure—it was to cover all the land now in question. It was to comprehend all the land surveyed into town lots by the trustees, except such as they had sold, or any, if any there was, that Fonseca had himself sold on his own account and received the benefit, which, it may be observed, he could only have done as a person in actual possession under circumstances recognized by the act, and it may be further observed that no trespasser could substantiate a claim against a claim valid under the act. He had before him the plan as registered by the trustees as well as the plan of the Government official survey of the town lots, He had also the abstracts of all deeds on the registry.

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including those under which the relator's husband had, whatever title he ever had; with these documents his department, under his supervision, if not he himself personally, inserts in Fonseca's grant these four lots C, D, E and F.

After the letters patent issued it appeared, however, that some few of the lots sold by the trustees were, by mistake, included in the grant. This mistake Fonseca immediately pointed out, and had rectified, he confirming the purchasers' titles and receiving other lots from the Government. It was contended that Fonseca in a letter addressed by him in October, 1878, to Mr. Dennis, the then Surveyor General, had admitted Logan's claim to lots C, D and E. The force of the argument founded on this letter I have not been able to see. It would seem to have been urged in the nature of an estoppel against his now denying it, but there is no question here of estoppel, and notwithstanding anything in that letter it appears conclusively, by abundant evidence, that in point of fact Logan had not the title which Fonseca in that letter attributed to him, nor any title. There appears to be no doubt that Fonseca was trying to serve Logan, who was his brother-in-law. If the Government, upon the strength of Fonseca's letter, had withheld the lots C, D and E from Fonseca's grant he could not have complained, although, perhaps, others who had an interest in the common could; but the Government having included these lots in his patent, and Logan not having had any title to the lots, as now appears beyond all question, I do not see how Fonseca, having said in that letter that Logan had a title to those lots, when in truth he had not, and Fonseca was mistaken upon that point, can affect the letters patent with the infirmity of having been granted in error or improvidently and in ignorance of a right which did not exist. In so far, then, as

this letter is concerned, it seems to me, instead of being prejudicial to Fonseca in the present case, to remove all possibility of any deceit or concealment of facts to the prejudice either of the public or of any individual, or malpractice of any kind being imputed to him.

Now, as to Gray's case: he claims under a deed executed by a Mr. Belch, dated the 2nd August, 1881, or a year and seven months after the letters patent to Fonseca were issued. At the time of Gray's purchase there were no improvements on the piece in question. Belch, with full knowledge of the imperfection of his claim, refused to give anything but a quit claim deed, and Gray, with like knowledge it may be presumed, was content with such a deed. When Gray proceeded to make improvements on the lot he was expressly forbidden to do so by Fonseca, claiming under his letters patent, so that whatever improvements Gray made he made them at his own peril with full notice of Fonseca's title. This Mr. Belch, from whom Gray purchased, obtained a deed from one Freeman, under whom he claimed, upon the 13th of August, 1877. Freeman had never made any claim for letters patent to be issued granting the land to him, and for all that appears he may have well known that he had no claim whatever for such grant. Mr. Belch, however, at the time of his purchase and for some time previously, but for how long does not appear, was a clerk in that branch of the Department of the Interior known as the Dominion Lands Office, at Winnipeg. He, at least, must be held to have had full knowledge that no clerk in the Lands' Office could be permitted to traffic in doubtful land claims, squatters' claims, &c. He must be charged with knowledge of the circulation of notices, such as that of the 21st March, 1873. He must have known that squatters' claims upon the land in question would not be recognized by

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the departments having charge of the duty of issuing letters patent therefor, and that, in fact, none but claims under the Manitoba act could be entertained. He never made application for letters patent until the month of July, 1879, and when he did he based his claim on the Manitoba act, well knowing, doubtless, that this was the only way by which he could get it to be recognized. He succeeded in procuring Fonseca to support his application. Fonseca could not truly say and, in point of fact, did not say in his declaration, that Logan, from whom Belch traced the origin of his title, had been in occupation on the 15th July, 1870, but, willing to assist Belch, he did say that he was in occupation in 1870, and he added that he knew of no claim adverse except one of his own, as to which he said :—

> Which I release and forego as to the said portions of lots.

Fonseca's declaration, in fact, upon its face, would convey to the experienced mind that Logan's possession had not existed on the 15th July, for if he had been then in possession his claim would have been valid under the act, and Fonseca would have had no claim to release and forego ; this could not well have escaped the notice of the Government officials having to deal with the application, who appeared to be the Minister of Justice, the Surveyor General and the Minister of the Interior, and that it did not escape them may fairly be concluded, I think, from a letter produced from the Surveyor General's Department in July, 1881, to Mr. Belch's solicitors, when his application was then renewed under circumstances which shall shortly appear. In that letter Mr. Belch's solicitors are informed that the Surveyor General regrets :—

> That looking through the evidences they fail to establish any title, under the Manitoba act, on the part of Mr. Belch's assignors.

And after pointing out the defect in Fonseca's declaration the letter concludes :—

> Under the circumstances that the evidences filed, where they are to the point, are informal--and that, when they are in proper form, they are either not to the point, or clash with each other—I could not, consistently with my duty, report the case to the Minister as one in fit shape for decision as to the right of the claimants.

The defect alluded to has never since been and never could be removed, for it related to the want of proof that Logan had possession on the 15th July, 1870, so as to establish a claim under the Manitoba act, which in a passage in the letter is referred to "as the all-important point."

Now, I do not think it can be doubted that the Surveyor-General had come to the same conclusion in 1879, when the selection of the lots for Fonseca's patent was proceeding in his department, under his supervision. And here it may be observed that the Surveyor General, to whom chiefly any mistake or improvidence in the matter, if there has been any, is imputed, and who could have testified clearly upon this point, and who could also, perhaps, if pressed, have said that he never could have sanctioned or recognized a traffic in land claims of this nature by a clerk in his department, was not called; so that in fact, as to this point, we are asked on behalf of the Government to render a solemn judgment declaring these letters patent to have been issued in error and improvidently, not upon the production of the best evidence to establish the charge of error and improvidence, namely, that of the officer of the land department upon whom devolved the duty of selecting the lots to be mentioned in the letters patent, but we are asked, in the absence of his evidence, to impute to the officer and his department the error and improvidence necessary to be established by the informant (upon

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whom the whole burthen of proving the error and improvidence rests) in order to justify our judgment.

In the case of Mercer against these defendants and the Attorney-General Mr. Dennis, who had been Surveyor General part of the time that Fonseca's application was before the Government, was examined as a witness, and he being dead his evidence then given was read in the present case, and is before us. As to it I may say that it is clear to my mind it must be read as having relation to the claim then made before the court, namely, that Logan had a claim which was valid under the Manitoba act, as a person who had been in actual possession peaceably on the 15th July, 1870 as to which Mr. Dennis repeatedly says that if such a claim had been presented, and was true, then the letters patent to Fonseca were issued in error. The mass of his evidence has little bearing in the present case, but in the view which I take there is a portion of it which has a very important bearing. He says that it was the duty of a Mr. Lang (then an officer of the department), in connection with the Surveyor General, to classify and to look into all claims; that when he (Col. Dennis) was Deputy Minister he would not go into details himself, that they would be entered into by Lang and the Surveyor General; that Lang was sent up to Manitoba to investigate all claims, and that he thought that after his return he (Lang) at Mr. Dennis's instance, made out a list of the lots that should go to Fonseca, Sutherland, Schultz, and so on, parties whose rights were to be commuted. Again, that Mr. Lang was the person with whom he had most intercourse; that his (Lang's) duty was to ascertain what lots the Government were in a position to grant. In that case Lang's evidence also was taken, but this is not brought before us except in so far as some questions were put to Mr. Dennis on

cross-examination in relation to it. For example, this passage occurs: The examining counsel says:—

I am reading now from Mr. Lang's examination:—

Fonseca never asked me to select any particular lots. Col. Dennis gave me instructions as to selecting.

Then he goes on to say:

Was Col. Dennis personally acquainted with the holdings on the Point Douglas common? Yes; Col. Dennis told me he was. I think I got instructions to draw the references for patents from Col. Dennis. I had no written instructions. I was also directed to select an area of land as near to the land actually in occupation of Fonseca as possible, not including any land sold by Fonseca or the Point Douglas trustees to make up the quantity to be granted to Fonseca.

This portion of Lang's examination having been read to Col. Dennis, and he having been asked if what Lang had there stated was correct, replied in effect it was—his exact answer was, "precisely so." Then he says that both he and Mr. Lash, who was then Deputy Minister of Justice, spent until two or three o'clock in the morning for weeks together, weighing and considering all the different claims, and that before letters patent issued the Department of Justice had to approve the fiat. Col. Dennis does not appear to have been asked any questions about Belch's claim; in his examination the whole inquiry was as to Logan's claim, which was alleged to be prior to the 15th July, 1870, but which in that case was disproved. Now, there is a point to which I desire to draw particular notice in this connection, and it is one which I can only conceive to have arisen by reason of the relator having had, as I think she must have had, the control of the conduct of the case upon behalf of the informant. It is this; this Mr. Lang, who appears to have had such important duties to discharge, and to have known so much in relation to the lands in question and to the including them in Fonseca's patent, appears to have been examined in the former case of Mercer against these defendants and

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the Attorney General, and to have been able to give very important evidence in the matters now under discussion, and judging from the above extract from his examination read to Col. Dennis seems to have given very important evidence. He seems to have been in a most favorable position to supply evidence as to points in relation to which the present Deputy Minister of the Interior says he cannot find what he calls "a record" in the department. Notice of intention to read Lang's evidence as well as Col. Dennis's (Lang having since his former examination left the country as is believed), was served on the defendants, yet Lang's evidence has not been read by or on behalf of the Attorney General, although from a report made by him upon Logan's claim, when made in 1882, and which does appear to be in possession of the department if it cannot be said to be "on record," the following extract is supplied :—

Memo.—*Re* claim of Wm. Logan to part of lot 35, St. John.

DEPARTMENT OF THE INTERIOR,

OTTAWA, 13th September, 1883.

The land referred to herein was patented to W. G. Fonseca as part of his claim under the Manitoba Act on the 3rd December, 1879. It was known in the department at the time that there were others who had squatted upon the land patented to Fonseca, but Fonseca's claim was considered to be the one which should prevail over all the others.

(Signed) R. LANG.

There is just one other point which I cannot refrain from referring to. The Deputy Minister of the Interior has said in his evidence that by a record in his department it appears that Belch's application was received in the Department of the Interior on the 30th July, 1879, and that on the 13th August, 1879, it was transmitted to the Inspector of Surveys at Winnipeg, to be dealt with in the usual course which was to make a report upon the claim, and he said that it was not received back until the 18th June, 1881. No evidence

of any kind was offered as to what was done with the papers at Winnipeg, or how they come to have been put away where they were said to have been found. If Mr Belch was, in August, 1879, still in the Winnipeg Lands Office he could probably have thrown some light upon the subject. Neither was any evidence given as to who found them, or how them came to be found. The only information on the subject is contained in a telegram received in Ottawa the 13th June, 1881, from Winnipeg, from a Mr. E. M. Wood, who was not called as a witness to give any information upon the subject. The telegram is addressed to Lindsay Russell (who was Surveyer General), and is as follows :—

Re Belch.—Point Douglas common papers found accidentally here in Land Office to-day. Will forward. E. M. WOOD.

Now Mr. Lang, to whom, as would seem from Col. Dennis' evidence, the papers were most probably given to report upon in pursuance of the duty imposed on him, if he had been consulted upon the point could probably have given a satisfactory explanation. So, no doubt, could Mr. Lindsay Russell, for from a letter addressed to him, dated the 19th July, 1881, as well as from the letter addressed from his department to Mr. Belch's solicitors shortly previously, I think it very probable that in addition to explaining that he had in 1879 found that the claim could not be entertained he could have added a most excellent reason why the papers should have been relegated to, and suffered to remain in, the pigeon-holes of the department at Winnipeg, where they are said but not proved to have been found accidently, namely, that the public interests forbid the possibility of the department recognising the improper traffic by a clerk in the department in land speculations of the character of the one under consideration. The following is the material part of Mr.

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Belch's letter of the 19th July, 1881, and this was before he executed the deed of quit claim in favor of Gray:

DOMINION LANDS,

BIRTLE, MAN., July 19th, 1881.

DEAR SIR,—On my return from Winnipeg in February last I wrote you a note in which, I think, I stated I had reached that point on my return to resume my official work at Birtle, not having, however, succeeded in the business object of my visit to Winnipeg, which was principally to dispose of certain property on Point Douglas common I purchased from one John Freeman.

After the transaction was closed I discovered the chain of title was imperfect, having no responsible beginning, William Logan and wife having conveyed without first obtaining title from the crown. I then made application by myself and wife to the department for these lots, together with another property on McWilliam street where my family reside. This application was made by Messrs. Aikins & Monkman, barristers, on 23rd July, 1879, and by them forwarded to Ottawa. The papers were duly received at the H. O. and returned to the office in Winnipeg, in order that they might be dealt with in the ordinary way.

Mr. Whitcher acknowledged the receipt of them. In the letter register it is noted that the papers were handed to Mr. Lang, but such is not the fact, as they were found accidentally on the 11th ultimo, stored in an out of-the-way place in the vault upstairs in the Winnipeg office. In consequence of the state of things I have described, is it unreasonable for me to ask the department to interfere to make my title marketable? What is required is a quit claim deed from Fonseca and one from Schultz. * * * *

In the meantime I have sold the Point Douglas property for a little over $3,000.00 and make title clear. Will the Department help me to do so?

(Signed) A. J. BELCH.

Upon this letter it is to be observed that Gray's claim is, in fact, made on behalf of Belch, and in order to try and get his title made good which was known to the department not only to be defective in respect of its origin derived from Logan, but as an improper traffic by a clerk of the department in squatters' titles.

It appears, moreover, that there is a record in this department that Mr. Lang was instructed to investi-

gate this claim. Mr. Belch, for a very insufficient reason, asserts this record to be false. It certainly is a very unfortunate state of things if the records of the department are not only imperfect in not being preserved so as to be produced when required to show that the officials of a time past were not guilty of error and improvidence in the discharge of their duties, but also that those which are preserved cannot be relied upon as correct.

These imputations only serve to show the greater importance of Mr. Lang's evidence being produced by the informant, upon whom the whole burthen rests in this case. It is not improbable that he may have made a verbal report in this case, as he appears by Col. Dennis' evidence to have done in other cases ; or that he relegated the papers, not, perhaps, without Belch's knowledge, to the place where they are suggested to have been accidentally found because it was clear that the claim could not be entertained. If Lang had, as it now appears he had, these papers to report on, and if he had investigated it as directed (and that he did not do so cannot be assumed), then it is clear that Lang, whose duty it was, in conjunction with the Surveyor General, to select the lots to be inserted in Fonseca's patent, had the fullest information on the subject, and cannot be assumed to have been guilty of error or improvidence in inserting in it the land now claimed on behalf of Belch through the intervention of Gray.

Now, I think it is free from doubt that a judgment avoiding letters patent upon an information of this nature can only be justified and supported upon the same grounds being established in evidence as would be necessary to be established if the proceeding were by *scire facias*, namely, either 1st, for the misrecitals in the letters patent (1), or 2, for false suggestions or mis-

(1) Moore 318 ; Hob. 224.

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information by which the Queen has been deceived (1); or

3. Where there has been granted more than lawfully might be (2); or

4. When the grant may be to the prejudice of the commonwealth, or to the general injury of the public (3); or

5. Where the same thing has been granted to others. All of these grounds are comprehended under the terms fraud, error and improvidence. In the present case there is no suggestion of fraud; as to error, there is none in point of law suggested.

What is the distinction between "error" and "improvidence" it is difficult to say with preciseness. That these letters patent were granted in error and improvidently, and in ignorance of the right of others, is what the information alleges as the grounds upon which the letters patent are sought to be avoided by a judicial decision. If the letters patent were granted "improvidently" they may, in a certain sense, be said to have been granted "in error," but not in the same sense as where the same thing has been granted to other persons or where more has been granted than lawfully might be. The term "improvidence," in so far as it is distinguishable from "error," as applied to letters patent which are sought to be avoided and set aside as issued "improvidently," seems to me to apply to cases coming within the 4th of the above grounds in the enumeration of the grounds of objection open in a proceeding by *scire facias* by the crown to revoke letters patent, namely, where the grant has been made to the prejudice of the commonwealth or to the general

(1) Com. Dig. Grant G. 8-9, Patent F. 2; 11 Co.9 A; 4 Inst.88; 1 Co. 52 A.

(2) Com. Dig. Grant G. 8; 1 Co. 49 b; Hindmarch Patents 39–48.

(3) Com. Dig. Patent F. 4; 11 Co. 86 b; 1 Stra. 43; Dyer 276 b; Hindm. Patents 62.

injury of the public, with this superaded—or of any individual having any rights in the thing granted which are injuriously affected by the letters patent. It is difficult to define affirmatively all the acts or defaults that will constitute "improvidence" in the issuing of letters patent granting land so as to justify the avoidance of the letters patent. It is easier to say what will not, and even to attempt to do that, so as to include all cases, would be difficult. It is sufficient for us to consider only the acts and defaults which are suggested by the information as existing in the present case; and first, I think we must regard Fonseca's right to the lands granted as having been recognized by the Government as good and valid under the Manitoba act, and that the lands granted to him were so granted in recognition of that right; and this being so, I think it follows as a proper, if not a necessary, conclusion that those letters patent cannot be assailed by the Government that issued them in recognition of such a valid and statutory right as having been issued in error or improvidently as to any of the land thereby granted, except upon the ground that some other person had a better title—that is to say, one which was also valid under the act, and superior to that of the patentee. It is upon this ground alone, as it appears to me, that adjudication in support of the prayer of the information would be justifiable.

Secondly,—When lands have been granted upon which an intruder and trespasser having no color of right in law has entered and was in possession, of whose possession the Government officials, upon whom rests the duty of executing and issuing letters patent and of investigating, and passing their judgment upon, the claims therefor, were ignorant, or when such intruder and trespasser has not, nor has any person as

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claiming under him, made application for letters patent to be issued granting any part of the land to him or her; or, when the possession of the intruder and trespasser, or some person under him or her, was known to such officials, and the intruder and trespasser, or some person claiming under him or her has made application for a grant of some part of the land upon which the trespasser had so intruded and entered, and notwithstanding letters patent have been issued granting the land so applied for to another, without any express determination of the officials refusing the application of the intruder and trespasser, or of the person claiming under him or her, or without any record having been made of the application having been made and rejected; the letters patent which have been issued granting the land to another cannot, at the instance of the Government, be judicially pronounced to have been issued in error or improvidently in any of the above instances, or because the officials did not make an express decision refusing the application of the trespasser or of the person claiming under him. For the determination of the present case it is sufficient, in my opinion, to say that the burden of proving by clear testimony, of an unquestionable character, that the letters patent, as regards the lots in question, were granted in error and improvidently rested wholly upon the Attorney General, and that for the reasons already hereinabove indicated such evidence has not been given.

From the evidence which has been given sufficient, I think, appears to show that Lang's evidence, which, although taken in the case of Mercer, the present relator, against these defendants, was suppressed in the present case, and the evidence of the Surveyor General and of the material upon which the Department of Justice proceeded when the Minister signed the fiat for the letters patent to issue, were most

material, and should have been produced and given if the prayer of the information could have been thereby supported, before a court of justice would be justified in adjudicating that letters patent, in which is recorded the declaration that the claim of the patentee to the lands granted under the Manitoba act had been duly investigated, and that he had been found entitled thereto, were issued in error and improvidently. Such a declaration manifested by matter of record cannot be so easily avoided. It is impossible that the letters patent in the present case should be adjudged to be avoided as issued in error and improvidently upon the suggestion, eight or ten years afterwards, that in one of the departments of the Government whose duty it was to take part in investigating and determining upon the validity of the claim of the patentee to the lands granted, and of issuing letters patent to him if his claim should be recognised as valid, there is said to be no "record" showing that the officials, upon whose authority the letters patent were issued, had given due consideration to all the matters which should have been considered by them. The charge of error and improvidence must be proved, and clearly proved, by positive affirmative evidence; notwithstanding the statement that the records of the Department of the Interior are defective, inasmuch as they do not show what was done in respect of Logan's possession, or of that of those claiming under him, sufficient does, I think, appear to show that the officials who authorised the issue of the letters patent to Fonseca had knowledge of the character of Logan's possession and of that of those claiming under him, and that it was only that of squatters, without any legal right—and that they had knowledge also of the fact that neither Logan nor any person claiming under him had made any application for letters patent in assertion of such

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possession, and that the letters patent to Fonseca were authorized to be issued for the lands therein intentionally and deliberately, and with the intent of treating such possession as not having attached to it any right whatever to recognition, or entitling Logan or any person claiming under him to be maintained in such possession. There is, therefore, enough to show that the letters patent were not issued in error or improvidently.

In so far as the claim of Gray is concerned, representing as he does simply that of Belch, it would be a public scandal if these letters patent should be avoided in the interest and for the benefit of a clerk in the Lands Department who had speculated in squatters' claims. As to Mrs. Mercer, the Government has it in its power to indemnify her equally as it would have had to indemnify Fonseca if the letters patent to him had been avoided in the interest and for the benefit of Mrs. Mercer.

For the reasons given I think the appeal must be allowed with costs, and the information be dismissed in the court below with costs.

PATTERSON J.—I am not disposed to quarrel with the conclusion arrived at by the other members of the court, though I cannot take credit for having assisted in reaching it.

The reasoning of the present learned Chief Justice of Manitoba on which the judgment proceeded seems to me to be correct, and the judgment of the late Chief Justice to be influenced by what I think a somewhat erroneous reading of the clause R.S.C. ch. 54 sec. 57, which reading appears to overlook the word "improvidence" and to give it no effect in the operation of the clause. Instruments may, under that clause, be adjudged void if issued through fraud, error, or impro-

vidence. Fraud needs no definition. Error exists when something not intended is done, as if a patent were issued for Blackacre when Whiteacre was meant to be granted, or where, as in *Stevens* v. *Cook* (1), land to which one person is entitled is by inadvertence granted to another. It would be only consonant with sound principles of construction to understand "improvidence" to denote something which is not necessarily covered by the terms fraud or error, as if a patent is ordered to be issued without facts being present to the minds of those who deal with the matter which, if known and considered, might have affected the decision to advise the making of the grant. This is the force given to the term by Esten V.-C. and Spragge V.-C. in the cases cited to us of *Attorney-General* v. *McNulty* (2) and *Attorney-General* v. *Contois* (3).

The assertion here is that conflicting claims existed and were traceable by documents in the department, but that they were not considered or adjudicated upon.

In ordinary affairs it may be, and is, often proper to treat one as knowing what he has the means of knowing or what he is proved to have once known. But that is not a rule of universal application. In the well known case of *Raphael* v. *The Bank of England* (4) the bank was held to have taken a bill without notice of the invalidity of the title of a previous holder, notwithstanding that a formal notice of the facts invalidating the title had been given to the bank a year before. I do not understand the question before us to be a question of title. The grant might, even if the present patent were avoided, be again made to Fonseca, but whether made to him or to any one claiming under Logan or Belch, it would still be made by the grace of the crown and not necessarily as a recognition of any legal title. The determination is for the department and is not appealable to this court.

(1) 10 Gr. 410.
(2) 11 Gr. 281.
(3) 25 Gr. 346.
(4) 17 C. B. 161.

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On the question of improvidence, considered apart from fraud and error, it is not our duty, as I apprehend, to form a definite opinion as to the relative strength of opposing claims.

In this case I entertain no doubt of the admissibility of the evidence of Col. Dennis given in the action of *Mercer* v. *Fonseca*, and the conclusion to be drawn from his evidence and that of Mr. Burgess seems plainly to be that the parts of lots C, D, E, and F now in question would not have been included in the patent to Fonseca without further inquiry, and possibly would not have been granted to him if the conflicting claims had been present for consideration.

For these general reasons I should have been inclined to hold that the patent was issued by improvidence as far as those lands are concerned, and should, to that extent, be declared void.

My opinion would, of course, have assumed that there were really conflicting claims for consideration, and claims which, whether sustainable or not, were advanced in good faith and were not entirely frivolous.

It is not quite clear that the claims in respect of which the Attorney-General has allowed this information to be filed in his name are of that character, or, if they were, that they can properly be said to have been overlooked; and under the circumstances I do not apprehend that the decision now arrived at involves, in strictness, a construction of the statute different from that given to the cognate statute in the Upper Canada cases which have been cited.

I do not say that the opinions expressed in those cases will not bear reconsideration. The true effect of the statute may be found to be a question open for discussion in some case where the facts are more distinct.

With this explanation of my views I do not dissent from the judgment of the court allowing the appeal.

Appeal allowed with costs.

Solicitors for appellants: *McDonald, Tupper & Phippin.*
Solicitors for respondent: *Patterson & Baker.*

THE LIQUIDATORS OF THE MARITIME BANK..... ..... } APPELLANTS.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

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*Nov. 20, 21.

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Dec. 14.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Insolvent Bank—Assets—R. S. C. c. 120—Prerogative of crown—Deposit by insurance company—Priority of note holders.

The prerogatives of the crown exist in British Colonies to the same extent as in the United Kingdom. *The Queen* v. *The Bank of Nova Scotia* (11 Can. S.C.R. 1) followed.

The Queen is the head of the Constitutional Government of Canada, and in matters affecting the Dominion at large Her prerogatives are exercised by the Dominion Government.

The crown prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors is not interfered with by the provision of the Bank Act (R.S.C. c. 120, s. 79) giving note holders a first lien on such assets, the crown not being named in such enactment. Gwynne and Patterson JJ. *contra.*

Held, per Gwynne J., that under legislation of the old Province of Canada, left unrepealed by the B. N. A. Act, no such prerogative could be claimed in the Provinces of Ontario and Quebec; the court would not, therefore, be justified in holding that such a right attached, under the B. N. A. Act, in one Province of Canada which does not exist in them all.

An insurance company, in order to deposit $50,000 with the Minister of Finance and receive a license to do business in Canada according to the provisions of the Insurance Act (R.S.C. c. 124), deposited the money in a bank and forwarded the deposit receipt to the Minister. The money in the bank drew interest which, by arrangement, was received by the company. The bank having failed the government claimed payment in full of this money as money deposited by the crown.

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

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THE MARITIME BANK v. THE QUEEN.

Held, reversing the judgment of the court below, Strong J. dissenting, that it was not the money of the crown but was held by the Finance Minister in trust for the company; it was not, therefore, subject to the prerogative of payment in full in priority to other creditors.

APPEAL from a decision of the Supreme Court of New Brunswick (1) allowing an appeal from a *pro formâ* judgment of the Chief Justice in favor of the liquidators of the Maritime Bank.

The Maritime Bank having become insolvent a claim was made by the Dominion Government for payment in priority to other creditors of two sums on deposit, one amount being placed in the bank by the Receiver General to his own credit and subject to his order, the other having been deposited under the following circumstances.

The Dominion Safety Fund Life Association, a life insurance society doing business in St John, N.B., on the assessment plan, was obliged to deposit $50,000 with the Minister of Finance for a license. $45,000 of this amount was deposited by the association in the Maritime Bank and a deposit receipt forwarded to the Minister. This receipt stated that the amount was payable to the Minister of Finance in trust for the association. The balance of the $50,000 being deposited the receipt was accepted as a deposit of the $45,000, and a license issued to the company which was renewed from year to year. The bank failed in September, 1887, and a demand was afterwards made upon the association for securities to replace the $45,000. Up to 1888 the name of the association was among the companies mentioned in the yearly returns published in the "Canada Gazette" as licensed to do business.

The Government filed a claim against the liquidators

(1) 27 N.B. Rep. 351.

of the bank for the two amounts and two questions were raised and contested before the New Brunswick courts, namely, 1. Is the Dominion Government entitled by virtue of the royal prerogative to claim payment of money due from the bank in priority to other creditors? 2. Was the said sum of $45,000 the money of the Government and subject to the prerogative right, or was it the money of the association?

The Supreme Court of New Brunswick decided that the crown was entitled to priority of payment in respect to both sums. The liquidators appealed from such decision to the Supreme Court of Canada.

A. A. Stockton and *C. A. Palmer* for the appellants.

It is not necessary for the crown to be expressly named in order to take away the royal prerogative. If the intention is evident from irresistible inference it is sufficient. Chitty on Prerogatives (1); *In re Henley* (2); *The Mayor, &c., of Weymouth* v. *Nugent* (3).

It is submitted that there is such irresistible inference in this case. Interpretation Act, R.S.C. c. 1, s. 7; Bank Act R.S.C. c. 120, s. 79.

As to the second question we claim that the money was never deposited with the crown, but if it was it was still the money of the company and the crown holds it only as a bailee.

In the cases relied on by the crown and in the judgment of the court below there was no question that the money belonged to the crown. *Ex parte Usher* (4) is an authority in support of our contention.

Weldon Q.C. and *Barker* Q.C. for the respondent. The effect of the appellants' contention is to put the crown in a worse position under the Bank Act than under the Winding-up Act although not expressly named in either.

(1) P. 383.
(2) 9 C D. 482.
(3) 6 B. & S. 22.
(4) 1 Rose 366.

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The crown has always represented to the policy holders that this money is held for their benefit and cannot now be heard to say that they never had it.

The following authorities were referred to: *The King* v. *Bennett* (1); *Salkeld* v. *Abbott* (2); *Citizens Insurance Co.* v. *Parsons* (3); *The Queen* v. *Patton* (4); *Wildes* v. *The Attorney General* (5); *In re Smith* (6); *The Queen* v. *Daly* (7).

SIR W. J. RITCHIE C.J.—The Maritime Bank of the Dominion of Canada, previous to March 7, 1887 carried on business as bankers at the city of St. John, under the Bank Act. Having become insolvent they, on that day, stopped payment and ceased to do business, and proceedings were afterwards taken for winding up the Bank's affairs under the provisions of "The Winding-up Act." At the time of the bank's failure they had on deposit to the credit of the Receiver General of Canada two sums of money: one of $15,197.57 and the other of $45,000. The first sum represented public moneys of the Government of Canada, deposited in the bank and lying there to the credit of the Receiver General and subject to his order. The other sum of $45,000 was deposited in the bank by the Dominion Safety Fund Life Association to the credit of the Minister of Finance.

As to the sum of $15,197.57 this was unquestionably a crown debt as to which I think the claim of the crown to priority must prevail. In Bacon's Abr. (8) it is said

> Where a statute is general and thereby any prerogative, right, title or interest is divested or taken from the King, in such case the King

(1) Wightwick Rep. 1.
(2) Hayes Ir. Ex. Rep. 576.
(3) 4 Can. S.C.R. 215.
(4) 7 U.C.Q.B. 83.
(5) 3 Moo. P.C. at p. 214.
(6) 2 Ex. D. 47.
(7) 1 Ir. L.R. 381.
(8) Prerogative E. 5 (c).

shall not be bound unless the statute is made by express words to extend to him.

This has been repeatedly recognised and adopted as a correct exposition of the law; and the Interpretation Act (1) emphasises this principle by enacting (2)

That no provision or enactment in any act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

It is, to my mind, abundantly clear, therefore, that the prerogatives of the crown cannot be affected except by clear, legislative enactment, and it is equally clear that the prerogative of the crown runs in the Colonies to the same extent as in England.

But it is said this priority right of the crown to be preferred before other creditors is taken away by the Bank Act, which by section 79 enacts that

The payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency.

But not a word is said indicating an intention to interfere with or take away the rights of the crown. The first charge here referred to is, in my opinion, the first charge as between the ordinary creditors of the bank, but subject where the crown is a creditor to the prerogative rights of Her Majesty, and the section must be read as if the words "save and except the prerogative rights of the crown" had been added, but which were, in fact, wholly unnecessary, as the crown not being named expressly or by implication the law saved and excepted those rights.

In the case of *In re Oriental Bank Corporation* (3) Chitty J. says:

It is settled law that on the construction of the Companies Act, 1862, the Crown is not bound, the Crown not being named and there being

(1) R.S.C. ch. 1. (2) Sec. 7 sub-sec. 46.

(3) 28 Ch. D. 647.

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no necessary implication arising from the Act itself by which the Crown's prerogative is affected or taken away. That is the short statement of the decision of the Court of Appeal in the case of *In re Henley & Co.* (1).

No distinction was drawn in the argument, and very properly so, between the rights and prerogatives of the crown in respect of imperial rights and the rights of the crown with regard to the Colonies. I entirely agree with the court below that the crown is not bound either by the Bank or Winding-up Act, and therefore, with respect to the sum of $15,197.57, being public monies of the Government of Canada deposited in the bank and, therefore, unquestionably a debt due to the crown, Her Majesty's claim to priority over the note holders and other creditors of the bank in equal degree must prevail, and as regards this amount the appeal must be dismissed.

The second sum of $45,000, for which the court below held the crown was entitled to the like priority, raises a very different and much more difficult question.

It cannot be denied that whoever receives money of the crown becomes the immediate debtor of the crown, but it appears to me that the real question in this case in reference to this sum of $45,000 is: Was this money received by the bank as the money of the crown or did it ever cease to be the money of the association? In other words: Did it ever become a crown debt so as to be entitled to priority?

The Insurance Act provides that no person shall accept any risk or issue any policy in Canada without first obtaining a license from the Minister of Finance and Receiver General. By the 5th section the license is to expire on the 31st March in each year and shall be renewable from year to year. By section 6 the Minister, as soon as the company has deposited in his

(1) 9 Ch. D. 469.

hands the securities hereinafter mentioned, and otherwise conformed to the requirements of the act, shall issue such license.

Sec. 7. Every company carrying on the business of life insurance * * * shall before the issue of such license deposit with the Minister in such securities as are hereinafter mentioned the sum of $50,000.

Sec. 8. Such deposits may be made in securities of the Dominion of Canada, or in securities of any of the provinces of Canada and by any company incorporated in the United Kingdom in securities of the United Kingdom; and by any company incorporated in the United States in securities of the United States; the value to be estimated at the market value at the time deposited,

Sub-sec. 2. If any other securities are offered they may be accepted at such valuation and on such conditions as the Treasury Board directs.

3. If the market value of any of the securities deposited declines below that at which they were deposited the Minister may notify the company to make a further deposit so that the market value of all the securities deposited shall be equal to the amount required by the Act to be deposited, and on failure to make such further deposit within 60 days after being called upon so to do the Minister may withdraw its license.

4. A company may deposit any further sums of money or securities beyond the sum required to be deposited; such further sums or securities shall be held and dealt with according to the provisions of the Act in respect to the original deposit and as if part thereof, and shall not be withdrawn unless with the sanction of the Governor in Council on report of the Treasury Board.

And sections 10, 11 and 33 very clearly show that the securities or moneys after such deposit remain the assets of the company.

The deposit is in these words:

The Maritime Bank of the Dominion of Canada.

$45,000. Saint John, N.B., 27th January, 1882.

The Dominion Safety Fund Life Association, of Saint John, New Brunswick, have deposited in this bank the sum of forty-five thousand dollars, payable to the order of the honorable the Minister of Finance of the Dominion of Canada, in trust for the Dominion Safety Fund Life Association, of Saint John, N.B., on the return of this certificate properly endorsed.

(Sg.) A. S. MURRAY, Accountant

(Sg.) ALF. RAY, Cashier.

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It is very clear that this $45,000 forms no part of the revenues of the crown, nor is it a part of the public moneys of Canada, nor did it become such by the deposit by the association, but was, and is, an asset of and belonging to the association by the terms of the statute. This deposit was not received on behalf of the public, but for and on behalf of the company and those who dealt with it. The crown never became interested in nor responsible for the deposit of the association; the money was the private property of the company, and was, in fact, only deposited with the Minister of Finance for safe custody for the benefit of the company to enable it to do business throughout Canada, and in case of insolvency for the benefit of those dealing with the company, and cannot, that I can perceive, stand in any other or better position than bonds deposited under the statute or the other assets of the association. The deposit in this case thus continued to be part of the assets of the company; upon such deposit being made the company was enabled to transact business throughout the Dominion of Canada, and such deposit was to be held not for the use and benefit of the crown, but for distribution among the creditors of the company in the event of its insolvency, but never was, and never was intended, in any way, to belong to or be the property of the crown. Therefore, I cannot at all agree with Mr. Justice Tuck, "that from the evidence it is clear this $45,000 was paid into the bank as crown money." On the contrary, from the evidence read in the light of the statute I think it is abundantly clear that it was paid in as part of the assets of the company, and that notwithstanding the deposit it was held by the Finance Minister as an asset of the company and in trust for the association; in fact, the deposit certificate distinctly shows such to have been the case.

I have carefully examined all the cases which have been cited, and cannot discover that they establish this to be a crown debt entitled to priority in winding up the affairs of the bank. The case of *Rex* v. *Wrangham* (1) was decided on the ground that he who receives money of the crown (in that case duties) becomes the immediate debtor of the crown.

In *re West London Commercial Bank* (2), there was no dispute that the bank knew from time to time that moneys were paid in by debtors to the crown, and that moneys so paid in were crown moneys.

Per Chitty J.:

> The law, I take it, is now quite settled, and the case is covered by the authorities referred to: *Rex* v. *Wrangham* (3), *Rex* v. *Ward* (4), and *Regina* v. *Adams* (5). In *Rex* v. *Wrangham*, Lord Lyndhurst laid it down that whoever receives money of the Crown becomes an immediate debtor of the Crown.

In re Arthur Heavens Smith (6) was the case of a recognizance. The recognizance was to the crown direct and was held clearly a crown debt in law, and I do not see how it could be held otherwise, for a recognizance is clearly the acknowledgment of a debt owing to the crown and is a debt of record; it matters not what the condition may be, it is a crown debt in every sense of the word, to which, unquestionably, the prerogative of the crown to claim priority for its debts before all other creditors clearly extends, and in the case just cited Lord Coleridge C. J. says:

> I think this is clearly a Crown debt of law.

Reg. v. *Bayly* (7) was likewise on a recognizance.

When the bank failed and the security became impaired the Minister of Finance called for a further deposit and refused to renew the certificate; this he certainly

(1) 1 C. & J. 408.
(2) 38 Ch. D. 367.
(3) 1 C. & J. 408.
(4) 2 Ex. 301 n.
(5) 2 Ex. 299.
(6) 2 Ex. D. 47.
(7) 1 Dr. & War. 213.

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had a perfect right to do. What then was the position of the parties? Why, if the company wished to continue doing business throughout the Dominion it should have given a deposit satisfactory to the Finance Minister and obtained a new certificate. Instead of that the president of the association on February 14th, 1888, writes :—

> On return of the $45,000 cash deposited with the Receiver General the association will comply with the request of the treasury board and make a deposit in bonds, &c.

But we have seen there never was any cash deposited with the Receiver General; the cash was deposited by the association in the bank payable to the order of the Finance Minister in trust for the association. It seems to me that the proper answer of the association would have been not "on return of the $45,000 cash," but "on return of the certificate of deposit" the association will, &c. What right had the association to ask a return of the $45,000 cash or anything other than what they had deposited with the Finance Minister? If they got this back what more could they require? The crown merely held it for what it was worth, and when the security became depreciated the association was bound to make it good. What right had it to ask to have it made good through the instrumentality of the crown at the expense of the other creditors of the bank? It will be noticed that this receipt does not make the amount deposited payable to the crown, but to the order of the Minister of Finance in trust for the Dominion Safety Fund Life Association. If this amount was the property of the association, and continued from and after its deposit an asset of the association, when and by what operation of law did it become a crown debt entitled to priority? And if an asset of the company, I can see no reason why it should be protected by the prerogative of the crown. It was

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deposited to serve the ends of the company, and why should the mere depositing of it as an asset of the company give it a preference to which it would not be otherwise entitled to? I do not think it by any means clear, as the learned Chief Justice suggests, that "if it became necessary to take any proceedings to recover the money from the bank, such proceedings would necessarily be taken in the name of the Queen," or that, "in other words, the funds having been deposited in the bank by the Minister of Finance, it became a debt due by the bank to the crown." The receipt shows, as we have seen, that the funds were not deposited by the Finance Minister, but by the Dominion Safety Fund Life Association, and made payable by the association to the order of the Finance Minister in trust for the association. I can see no reason why, if it had been necessary to recover this money from the bank, it might not have been done in the name of the Finance Minister, the statutory trustee. When the bank failed and the company received notice to make the security good, had the association done so the certificate, properly endorsed, would have been returned, and all the company would have had to do would be to make their claim on the bank, and their position would have been the same as the other creditors of the bank, and this is the position in which I think they should now stand.

Therefore, in my opinion, this appeal should be allowed; but as the appeal has partially failed and been partially allowed there will be no costs.

STRONG J.—The facts of this case sufficiently appear from the statements contained in the judgments delivered in the court below and in this court upon the present appeal, and I need not repeat them.

As regards the general question of the right of the

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crown, claiming in the administration of assets under bankruptcy, insolvency or winding-up proceedings in respect of a simple contract debt to priority over other simple contract creditors, I have already stated my opinion in a judgment delivered in the case of *The Bank of Nova Scotia* v. *The Queen* (1), and as I adhere to that judgment it will be sufficient for me to refer to it for the reasons and authorities upon which the conclusion now arrived at is founded. I have heard nothing in the argument of this appeal in any way impeaching the authority of the three late cases of *The Oriental Bank Corporation* (2), *Re Henley* (3), *Re Bateman* (4), upon which my opinion in the case of *The Bank of Nova Scotia* v. *The Queen* (1) was based, and no new argument against the general right of the crown to priority has been put forward in the present case. The argument founded upon the enactment which now forms sec. 79 of the Banking Act was urged in the former case, and although it is not noticed in my judgment was then duly considered. It then appeared to me that the section in question did not take away or in any way interfere with the common law right of the crown to priority, and after further consideration I still retain that opinion. This 79th section is in these words :

> The payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency.

It is to be observed that this section does not give the holders of notes any charge upon the property or assets of the bank *ab initio*, but only a first charge "in case of its insolvency." In the administration of assets whether in bankruptcy, insolvency or winding-up proceedings, as also in the case of the administration of the

(1) 11 Can. S. C. R. 1.
(2) 28 Ch. D. 646.
(3) 9 Ch. D. 469.
(4) L. R. 15 Eq. 361.

estate of a deceased debtor, all debts form a charge upon the assets according to their priorities. This section is, therefore, only equivalent to a declaration that the note holders should be entitled to priority of payment out of the assets, if indeed it is as strong as an expressed declaration to that effect would have been. Then, for the reasons and upon the authorities stated by me in my former judgment before referred to, it seems clear that such an expressed declaration, the crown not being named, would have been insufficient to have taken away the right of the crown to be paid in priority to all other simple contract creditors.

I am therefore of opinion that in respect of the sum of $15,197.57, the money of the crown deposited in the bank by the Finance Minister, this appeal is wholly unfounded.

If the foregoing conclusion is correct I fail to see that the crown is not also entitled to priority in respect to the $45.000. It appears from the evidence that this amount was deposited by the Dominion Safety Fund Life Association, a Life Insurance Company coming within the provisions of the Consolidated Insurance Act, 1877 (40 Vic. ch 42), to the credit of the Receiver General or Minister of Finance, as a deposit to meet the requirements of sections 5 and 6 of the act referred to, and that a deposit receipt in favor of the Minister of Finance was signed by the cashier and forwarded to the proper officers at Ottawa. It further appears that such deposit was accepted by the proper officers of the crown as a sufficient deposit entitling the company to a license pursuant to the terms of the act in question.

The crown could at any time after the acceptance of the deposit to its credit, according to the tenor of the receipt, have demanded payment from the bank of the sum deposited, and the bank could not have discharged itself by any payment other than the one in the hands

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of the crown. The Insurance Company had, therefore, no right to call for payment, and all privity between itself and the bank was at an end so soon as the deposit was accepted by the Finance Minister. This being clearly so it would appear to me that this sum of $45,000, although in a sense a trust fund to be held and administered by the crown, was nevertheless a debt due by the bank to the crown which was, as between itself and the bank, the sole creditor. There was, it is true, an ultimate trust of the sum deposited in favor of the Insurance Company, but there were primary trusts in favor of policy holders, whose rights the crown was bound to protect and whom it could not properly protect unless it was entitled to the absolute possession or control and disposition of the fund. In a general and popular sense the crown may be said to be a trustee of all public moneys which come to its hands to be applied to public uses, but still it is entitled to priority of payment over other creditors when it seeks to recover money which, when received, would be applicable to public uses. In the present case although the crown would not, if it had called upon the bank for actual payment of this deposit fund into the hands of its own officer, the Finance Minister, have been a trustee of it for the general public, yet it would still be a trustee, not for ascertained persons but for a portion and an indeterminate portion of the general public, namely, for those persons who might, in case of the insolvency of the Insurance Company, prove to be holders of policies at the date of the insolvency.

There does not appear, therefore, to be grounds for any legal distinction in respect of the right of priority between the debt due to the crown by the bank in the present case, and any ordinary debt due to the crown unaffected by any color of trust, statutory or other-

wise, except such as is always incidental to public monies held by the crown.

These considerations, and others pointed out in the learned judgments delivered in the court below, have convinced me that this $45,000 constitutes a debt on simple contract—for money had and received—due by the bank to the crown for which the latter has been properly held entitled to its prerogative priority of payment. Indeed, it would seem from the authorities referred to by the learned judges in the court below, and especially from the case of *Re Smith* (1), that wherever a legal right of action to receive money is vested in the crown the crown is entitled to be paid such debt in priority to other creditors of equal degree irrespective altogether of the ultimate destination of the money, and that it makes no difference that the money when recovered will be for the use and benefit of a subject.

For these reasons I also concur in the judment appealed from as to the amount of $45,000.

The appeal should be dismissed with costs.

TASCHEREAU J.—As to the $45,000 I would allow this appeal on the ground that these monies do not belong to the crown.

First.—The Insurance Act requires the deposit to be made in securities of a particular description. The Minister of Finance has no authority to take part of the amount in money.

Secondly.—The license granted to an insurance company, under ch. 124 R. S. C., is not a license by the crown but a license by the Minister of Finance; and the deposits required by the act are also made into the hands of the Minister of Finance, as *persona designata*. They are not deposited with the crown as crown monies.

(1) 2 Ex. D. 47.

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This very sum was not deposited to the credit of the crown. They do not and cannot form part of the consolidated revenue of the country. This very contestation fully demonstrates it. In whose interest is it carried on? Clearly in the interest of the insurance company alone. The crown has no interest whatever in the result of the case. I agree for these reasons and those given by my brother Patterson that the appeal should be allowed on this ground.

As to the item of $15,000 I agree that this appeal should be dismissed for the reasons given by His Lordship the Chief Justice. The crown is not mentioned in the Banking Act. consequently, under the Interpretation Act, the prerogative right of priority remains unaffected thereby.

GWYNNE J.—As to the deposit receipt for $45,000 issued by the Maritime Bank of the Dominion of Canada of the date of the 27th January, 1882, I am of opinion that it is not open to the construction that it constituted a debt due to the Dominion Government. The monies represented by that deposit receipt continued, in my opinion, to be the property of the Dominion Safety Fund Life Association, remaining in the bank at the risk of the association for the benefit of the policy holders of the association under the provisions of the Act respecting insurance, and by the Dominion Bank Act, 43 Vic. Ch. 22 sec. 4, passed on the 7th May, 1880, all deposits held by any bank of the nature of that under consideration are required to be entered in the monthly returns of liabilities required to be made by all banks to the Dominion Government under a distinct heading from that directed for deposits of Government monies, namely, under the heading of

Deposits held as security for the execution of Dominion Government Contracts and "for Insurance Companies."

In the reasoning of my brother Patterson upon this point, in the judgment which will be read by him, I concur.

As to the sum of $15,197.57 of the public monies of the Dominion of Canada, deposited in the bank to the credit of the Receiver General of Canada, I am of opinion that the clause of the Dominion Bank Act, which enacts that payment of the notes issued by a bank and intended for circulation shall be the first charge upon the assets of the bank in case of its insolvency, necessarily excludes all claim of the Dominion Government by way of preference to have a debt due to that Government paid before payment of the notes of the Bank in circulation, even if, but for such enactment, the Dominion Government would have had a preferable claim over the other creditors of the insolvent bank which it could enforce in Her Majesty's name in virtue of Her royal prerogative, upon the assumption that a debt due to the Dominion Government is, without any statutory enactment, a debt due to Her Majesty.

By the Bank Act, 34 Vic. ch 5, passed on the 14th April, 1871, it was enacted, among other things, that the amount of notes intended for circulation issued by a bank and outstanding at any time should never exceed the amount of its unimpaired paid-up capital, and that if any paid-up capital should be lost the loss should be supplied by calls upon all subscribed capital not then paid up, and that such loss should be mentioned in the then next monthly report required by the act to be made to the Government, and moreover, that whenever the capital of any bank should be impaired by loss all net profits should be applied to make good such loss. The act required monthly returns to be made to the Government by the bank signed by the president or vice-president, and by the manager, cashier

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or other chief officer of the bank at its chief seat of business, exhibiting the condition of the bank on the last judicial day of the preceding month in a prescribed form, showing all the liabilities and assets of the bank, in which returns under the head of "liabilities," the amount of "notes in circulation" is prescribed to be the first item. The act also enacted that the bank should always hold, as nearly as might be practicable, one-half of its cash reserves in Dominion notes, and that the proportion of such reserves held in Dominion notes should never be less than one-third thereof, and further, that no division of profits, either by way of dividends or bonus, or both combined, or in any other way, exceeding the rate of eight per centum per annum, should be paid by the bank unless, after paying the same, it should have a rest or reserved fund equal to at least 20 per cent. of the paid-up capital, deducting all bad and doubtful debts before calculating the amount of such rest.

Now, the Maritime Bank of the Dominion of Canada was incorporated by the Dominion Act 35 Vic. ch. 58, passed on the 14th June, 1872, and was, thereby, expressly made subject to all the provisions of the above act, 34 Vic. ch. 5. It was also, by the Dominion Acts 43 Vic. ch. 22, and 46 Vic. ch. 20, subjected to all the provisions of the former of these last mentioned acts as amended by the latter, by which it was, among other things, enacted that certified lists of the shareholders (or of the principal partners if the bank be *en commandite*), with their additions and residences, and the number of shares they respectively hold, and the par value of the said shares, should be transmitted every year to the Minister of Finance before the day appointed for the opening of the session of parliament, to be by him laid before parliament within fifteen days after the opening of the session, and that any

bank neglecting to transmit to the Minister of Finance such lists within the time limited thereby should incur and pay a penalty of fifty dollars for each and every day during which such neglect should continue; and further, that if it should appear by any monthly statement to be made by the bank under the section of the Bank Act (34 Vic. ch. 5, and the Act 43 Vic. ch. 22,) that the amount of notes in circulation during the month to which such statement should relate exceeded the amount authorized by the Bank Act such bank should incur and pay certain pecuniary penalties therein mentioned proportionate to the amount by which the notes in circulation should in any month exceed the authorized amount; and further, that any bank holding at any time a less amount of cash reserves in Dominion notes than is prescribed by the Bank Act, as amended by 43 Vic. ch. 22, should incur and pay a penalty of two hundred and fifty dollars for each and every time that such contravention should occur, but that nothing in the act should be construed to prevent any contravention of the Bank Act, (34 Vic. ch. 5) or of any act amending it, from being punished as a misdemeanor, or by forfeiture of its charter, if without the act it would be so punishable. By this act, 43 Vic. ch. 22, as amended by 46 Vic. ch. 20 and consolidated now in ch. 120 of the Revised Statutes of Canada, it was further enacted that the monthly returns should be made to the Government in a prescribed form, showing all and singular the several liabilities of the bank (under which heading the first item is "notes in circulation") and all the assets of the bank of every description with a preciseness and particularity calculated to enable the Government to see the first appearance of approaching insolvency and to interfere with its authority in the interest of the public to prevent the insolvency taking place; and it

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enacts in express terms that in case insolvency should take place payment of the notes issued by a bank should be the first charges upon the assets of the bank. The true construction of this enactment, in my opinion, is that all notes issued by a bank for circulation upon the instant of their being issued have, for the purpose of securing their free circulation, this quality attached to them as an inseparable condition to their being issued at all, that they are in reality as well as in name a first charge upon all the assets of the bank in case of insolvency until all the notes so issued shall be paid and redeemed by the bank, and that to the necessary exclusion of any right of preference, if any there be, which the Dominion Government could claim to have any debt due to it first paid. I cannot doubt that the monthly returns required to be made by the bank to the Dominion Government were so required, and the quality of being a first charge upon all the assets of the bank in case of insolvency was attached to the notes, for the express purpose of securing a free circulation of the notes and of inspiring the public with a perfect confidence in their value and that they should in case of insolvency be redeemed and paid in preference to all other claims of all other descriptions whatever they might be. That the Dominion Government should now have the right to invoke a royal prerogative to enable them to recover a debt due to themselves first as having a preference over the holders of the notes issued by this bank now in insolvency would, as it appears to me, be little short of a fraud upon the note holders and upon the act of parliament upon the faith of which the notes obtained circulation.

I am of opinion, therefore, for the above reasons, that such a right is necessarily excluded by the terms of the bank acts even if, in the absence of the clause which makes the notes issued by a bank a first charge upon

its assets in the case of insolvency, the Dominion Government would have the right to invoke the royal prerogative to have all debts due to them paid first.

This view seems also to me to be supported by section 103 of the Winding-up Act, 49 Vic. ch. 129, which imposes upon the liquidators of an insolvent bank the obligation, as the first duty they have to discharge, to ascertain as nearly as possible the amount of the notes of the bank actually outstanding in circulation, and to reserve until the expiration of two years at least after the date of the winding-up order, or until the last dividend if that is not made until after the expiration of said two years, dividends upon such parts of such amount reserved in respect of which claims should not have been made in the liquidation, at the expiration of which time, and not until then, the amount reserved in respect of outstanding notes and for which no claim should then have been made, becomes applicable to other purposes of the liquidation I am, however, of opinion that the recognition of such a right in the Dominion Government as the exercise by it of the particular prerogative relied upon is not warranted by the letter or spirit of the British North America Act. By the special ordinance of the old Province of Lower Canada, passed in 1840, 4 Vic. ch. 30, consolidated in ch. 37 of the Consolidated Statutes of Lower Canada, all preferential lien of the crown upon any lands and tenements situate within the limits of the said province, whether arising out of any deed, judgment, recognizance, judicial act or proceeding, or any instrument or document, and every privileged right, claim, or charge from whatever cause resulting whereby any real estate in Lower Canada should be affected or charged, was wholly done away with, save only such preference as the crown in like manner as all other persons should obtain by priority of registration under

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the provisions of the act; and upon the 1st August, 1866, the Civil Code of Lower Canada became law in virtue of 29 Vic. ch. 41. By art. 1994 of this code it was enacted as follows:—

Art. 1994, C. C.—The claims which carry a privilege upon movable property are the following, and when several of them come together, they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom.

1. Law costs and all expenses incurred in the interest of the mass of the creditors.
2. Tithes.
3. The claim of the vendor.
4. The claims of creditors who have a right of pledge or of retention.
5. Funeral expenses.
6. The expenses of the last illness.
7. Municipal taxes.
8. The claim of the lessor.
9. Servants wages and sums due for supplies of provisions.
10. The claims of the Crown against persons accountable for its monies.

The privileges specified under numbers 5, 6, 7, 9 and 10 extend to all the moveable property of the debtor, the others are special and affect only some particular objects.

This article is entered in the code as having been the old law of the Province of Lower Canada, not as new law; at the time, therefore, of the passing of the B.N.A. Act, which is the sole constitutional charter of the Dominion of Canada, there did not exist, nor did there ever exist within that part of the late Province of Canada formerly constituting the Province of Lower Canada, any preferential right in the crown to have such a claim as that of the Dominion of Canada now under consideration paid in priority to the claims of any other creditor of an insolvent debtor, and to this effect is the judgment in *The Exchange Bank* v. *The Queen* (1).

By an act of the Parliament of the late Province of Canada passed in 1851, 14 & 15 Vic. ch. 9, all preferential lien of the crown upon lands of its debtors,

(1) 11 App. Cas. 157.

situate in that part of the late Province of Canada formerly constituting the Province of Upper Canada, was abolished, save only such preference as should be obtained by priority of registration under the provisions for that purpose contained in the act. And by another act of the Parliament of the Province of Canada passed in 1866, 29 & 30 Vic. ch. 43, intituled "An act to amend the law of Upper Canada relating to crown debtors," after reciting among other things that it was desirable that all bonds or covenants made, and debts due by, a subject to the crown should be placed on the same footing as if they were made or due from a subject to a subject, it was enacted :—1. That no bond, covenant, or other security thereafter to be made or entered into by any person to Her Majesty, her heirs or successors, or to any person on behalf of, or in trust for, Her Majesty, her heirs or successors, should bind the real or personal property of such person so making or entering into such bond, covenant or other security, to any further, other or greater extent than if such bond, covenant or other security had been made or entered into between subject and subject of Her Majesty, and

2nd. That the real and personal property of any debtor to Her Majesty, her heirs or successors, for any debt thereafter contracted should be bound only to the same extent and in the same manner as the real and personal property of any debtor where a debt is due from any subject of Her Majesty.

At the time, then, of the passing of the B. N. A. Act Her Majesty had not, in virtue of her royal prerogative, any preferential claim for payment of the debts due to the crown in Upper Canada, in priority to the claims against the same debtor of any of Her Majesty's subjects, all of whom were placed on the same footing with the crown in respect of the debts due to them

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respectively; and in that part of the Province of Canada formerly constituting the Province of Lower Canada no prerogative right existed to have payment made of ordinary crown debts in priority to the claims of other creditors of the same debtor, nor any right save only the limited statutory right vested in the crown in virtue of the law as it is expressed in Art. 1994 of the Civil Code, against persons accountable to the crown for its monies—that is to say, as explained in the *Exchange Bank* v. *The Queen* (1), against persons employed in the collection of the revenue and bound to account for the monies collected by them and not to apply them to their own use.

Now, the B. N. A. Act has not repealed or annulled the above provisions of the statute law of the late Province of Canada. There is nothing in that act which can be construed as having, either expressly or by implication, any reference to any prerogative right being vested in or exercisable by the Dominion Government enabling it to recover and enforce payment of debts due to it in priority of the claims of, and debts due to, other creditors of the same debtor. It is clear, therefore, that the Dominion Government is not invested with, and has not, any right in virtue of Her Majesty's royal prerogative, or otherwise, to have a debt due to it paid in priority of debts due by the same debtor to other creditors where such debt accrued due to the Dominion Government within either of those provinces of the Dominion of Canada which formerly constituted the Province of Canada. Now, the fact that the debt of $15,197.57 due to the Dominion Government by the Maritime Bank of the Dominion of Canada arises by reason of a deposit made in the bank at its place of business in St. John, in the Province of New Bruns-

(1) 11 App. Cas. 157.

wick, can, in my opinion, make no difference. The chief seat of business of the bank, it is true, is declared by the act of incorporation to be the said city of St. John, but the bank has its corporate existence, and the power to transact banking business, in every Province of the Dominion. It has no limited existence, if that would make any difference. The debt due by the bank to the Dominion Government is as much due at the seat of Government of the Dominion at Ottawa, where no such prerogative as that relied upon exists, as it is due at the chief seat of business of the bank. The prerogative right of claiming priority in payment of debts due to the Dominion Government must, in my opinion, exist throughout the whole of the Dominion, if it exist at all. There is nothing in the letter of the British North America Act which warrants the contention, nor are we, in my opinion, required by the spirit of the act to hold, nor should we be justified in holding, that the Dominion Government can invoke and exercise the royal perogative relied upon to enable it to recover deposits made by it in a banking institution at its place of business in one of the provinces of the Dominion when it could not invoke or exercise the like prerogative in respect of deposits made in the same bank at its places of business in others of the provinces. But that the royal prerogative insisted upon can be invoked and exercised by the Dominion Government is rested upon a claim of right, which is relied upon as above, and *dehors*, the constitutional charter of the Dominion of Canada, namely, that all monies due to the Dominion Government are debts due to Her Majesty, and that the royal prerogative relied upon attaches at common law in respect of all debts due to Her Majesty. Now, I do not at all question the authority of *in re Bateman's Trusts* (1), or

(1) L. R. 15 Eq. 361.

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any like case, but I must say that, in my opinion, we make a very great mistake if we treat the Dominion of Canada, constituted as it is, as a mere colony. The aspirations of the founders of the scheme of confederation will, I fear, prove to be a mere delusion if the constitution given to the Dominion has not elevated it to a condition much more exalted than, and different from, the condition of a colony, which is a term that, in my opinion, never should be used as designative of the Dominion of Canada.

However, the question now before us simply is, whether such incongruity exists in the B. N. A. Act, which is the constitutional charter of the Dominion, as that the Dominion Government can invoke and exercise what, as regards the circumstances and conditions of this Dominion, may be said to be a most unjust and obnoxious privilege in one of the provinces of the Dominion which it cannot exercise in all the others. In view of the fact that at the time of the passing of the B. N. A. Act the particular prerogative right insisted upon did not exist in the late Province of Canada, and in view of the fact that there is no provision in the act annexing the right to the constitution of the Dominion, and of the fact that the prerogative does not under, or since the passing of, the B. N. A. Act exist in those parts of the Dominion consisting of the Provinces of Quebec and Ontario, and lastly, in view of the fact that there is nothing in the act requiring or justifying the conclusion that such an incongruity exists in the constitutional charter of the Dominion as that the Dominion Government should have a right to invoke and exercise a royal prerogative in one of its provinces which it could not exercise in all the others, the necessary implication, in my opinion, arises that the Dominion Government has no right to invoke or exercise the particular prerogative relied upon in any part of the

Dominion. By so holding we shall be acting more in harmony with the ideas prevailing at the present day —with the spirit of the age—and, in my opinion, with the letter and spirit of the constitutional charter of the Dominion. The Dominion Parliament itself, by an act passed in its very first session, 31 Vic. ch. 37, intituled, "An Act respecting the security to be given by officers of Canada," seems to have entertained the opinion in conformity with the opinion of the Parliament of the late Province of Canada as expressed in the statutes of that province above referred to, that the Dominion Government should not have the privilege insisted upon in any part of the Dominion, even in the case of the persons who alone are those who are designated in art. 1994, C. C., as accountable to the Government for its revenue collected by them.

By this act, which was passed for the purpose of requiring every person appointed upon or after the 1st day of July, 1867, to any civil office or employment of public trust, or concerned in the collection, receipt, disbursement, or expenditure of any public money under the Government of Canada, to give bonds executed by themselves with such sureties for the due performances of the trusts reposed in them, and for the due accounting for the public money entrusted to them respectively, it was expressly provided that no such bond or security, given under the act, to Her Majesty, her heirs and successors, should constitute any other or greater lien or claim upon the lands or tenements, goods or chattels of such person than if such bond had been given to one of Her Majesty's subjects. Debts accrued by bonds given by persons employed in the collection and receipt of the public funds of the Dominion being thus placed on the same footing as debts secured by bonds executed by a subject to a subject, the Dominion Government cannot, in my opinion,

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consistently with the spirit of the act, claim priority in respect of an ordinary debt accrued due by deposit in a bank to secure which no bond is taken or required. For all the above reasons I am of opinion that the appeal should be allowed and with costs.

PATTERSON J.—The general rule of English law which gives the crown, when claiming as a creditor, priority over other creditors of equal degree is not questioned on this appeal, nor is it contended that there is anything in the Winding-up Act of the Dominion (1) to restrict the operation of that rule in the distribution of the assets of an insolvent corporation.

There may be practical force in the suggestion that the law would be more in consonance with the real life and spirit of the time if the public in the aggregate, nominally represented by the crown, and the public as individuals, were made to stand in this particular on the same footing. I understand it to be so in the Province of Quebec (2), and it may perhaps be so in Ontario under the legislation of the old Province of Canada (3). But the general rule, to the extent to which it was in question before this court in *The Queen* v. *The Bank of Nova Scotia* (4), does not strike me as being, since that decision, open to controversy in this court. The important questions in this appeal did not arise in that case.

The first is whether, in the winding-up of one of the incorporated banks to which the Bank Act (5) applies, the notes of the bank are a first charge on the assets as against the crown as well as against the other creditors. This question affects both the claims of $15.000 and $45,000.

(1) R. S. C. ch. 129.
(2) *Exchange Bank* v. *The Queen*, (11 App. Cas. 157.)
(3) 29-30 Vic. ch. 43; R. S. O. 1887, ch. 94.
(4) 11 Can. S. C. R. 1.
(5) R. S. C. ch. 120.

The second question affects only the $4,5000 claim, and it is whether that is properly a crown debt. The solution will depend on a consideration of the Insurance Act (1).

Both questions have been answered in the court below in favor of the crown, the arguments for that view being presented in able judgments by the learned Chief Justice and Mr. Justice Tuck.

It is impossible to deny the force of the views presented by those learned judges. I have hesitated a long time before venturing to differ from them, and I do not now adopt a different conclusion without some lingering distrust of its soundness, particularly with regard to the second point.

On the first point the controversy mainly centres on section 79, which declares that the payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency. On one side it is asserted, and on the other it is denied, that this provision binds the crown which is nowhere named in the statute.

My first impression was that the negative proposition was unanswerable. The clause struck me as dealing with the general assets of the bank, and creating a preference, in relation to those assets, in favor of one class of creditors, namely, the note holders, and depriving the crown of its common law priority. On further reflection, however, I do not think that the correct way of looking at this statute.

I think the search, which in ordinary cases we institute for the purpose of discovering whether the crown is indicated, either in terms or by necessary implication, tends in this instance to lead us away from the real question.

(1) R. S. C. ch. 124.

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The proper inquiry I consider to be: What are the assets of the bank with which the section deals? The answer, in my view, is that they owe their existence to this statute. They represent the capital which is subscribed under regulations beginning with section 5, governed by rules laid down with detail and minuteness running through the following sections down to section 23, and required to be periodically accounted for to the stockholders and to the Government in elaborate returns which are made public. There are various provisions touching the acquisition and holding of property either by direct purchases or by taking it in the first place as security for loans or debts—see sections 45 to 60. There are many other departments of the business of the bank dealt with in various sections; and we have the issue of notes and regulations touching them in sections 40 to 44, the first provision being a limitation of the amount by reference to the unimpaired paid up capital. The whole of these enactments are but parts of the one system in which the affairs of the bank, including the notes issued and the capital paid up into whatever form of assets it becomes converted, are inextricably mingled together.

The charge created by section 79 thus differs essentially from a burden imposed on property which had previously been free from it. It is in principle not unlike the pledge of a railway enterprise for the security of bondholders. That very usual security may or may not be effected through the medium of a formal mortgage, but it derives its efficacy from special legislation.

The crown may retain its common law priority in the distribution of the assets of this bank, but it is a priority in respect of such assets as remain after the

notes are paid, or, as it were, in respect of the value of the equity of redemption after satisfying the charge.

This view finds full scope and a reasonable effect for the statute without trenching upon the rights of the crown, while it avoids the injustice that would be suffered if the inducement offered by the statute, to take the notes of a bank by the security of a first charge on the assets in the event of the insolvency of the bank, turned out to be delusive and unreal whenever the crown happened to be a creditor of the bank.

Now let us turn to the Insurance Act.

Before an insurance company can obtain a license, securities must be deposited with the Minister of Finance and Receiver General, to the value of at least $50,000 (1).

All such deposits may be by public securities (2).

Other securities may be accepted as a deposit (3).

If the market value of any of the securities deposited falls below that at which they were deposited the company must make a further equivalent deposit, or lose its license (4).

So far, it will be observed that the only securities authorised are of the class of marketable securities. Not a word of handing money to the minister, nor is money mentioned except in connection with a power given to a licensed company (5) (not a company applying for a license), to

> deposit in the hands of the minister any further sum of money or securities beyond the sum herein required to be deposited.

The deposits are always reckoned among the assets of the company. They are several times so referred to in sections 9 and 10.

Section 11 provides that

(1) R. S. C. c. 124. s. 7, &c.
(2) Sec. 8.
(3) Sec. 8 sub-sec. 2.
(4) Sec. 8 sub-sec. 3.
(5) Sec. 8 sub-sec. 4.

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So long as any company's deposit is unimpaired, and the conditions of this act are satisfied, and no notice of any final judgment against the company, or order made in that behalf for the winding-up of the company or the distribution of its assets, is served upon the minister, the interest upon *the securities forming the deposit* shall be handed over to the company as it becomes due.

In a later part of the statute (1) provision is made for the release of the securities, or their application in indemnifying policy holders, when a company ceases, either voluntarily or by withdrawal of its license, to do business.

The Dominion Safety Fund Life Association applied for a license in January, 1882.

The president of the company inquired by letter to the superintendent of insurance concerning the securities to be deposited, and was told, amongst other things, that

a deposit receipt in some bank to the credit of the Receiver General in trust for the company is accepted (subject to the approval of the treasury board) as a temporary deposit. In this case the company makes its own arrangement with the bank as to the interest to be allowed, and the Receiver General instructs the bank to pay the interest to the company as it falls due.

The company then arranged with the Maritime Bank for a credit on the books of the bank of $45,000, and obtained the following deposit receipt which was transmitted to the Receiver General's department, and now forms the foundation of the claim for priority.

Number 22,161. CERTIFICATE OF DEPOSIT. Payable on demand.

THE MARITIME BANK OF THE DOMINION OF CANADA.

$45,000. ST. JOHN, N.B., 27th January, 1882.

The Dominion Safety Fund Life Association, of St. John, New Brunswick, have deposited in this bank the sum of forty-five thousand dollars, payable to the order of the Honourable the Minister of Finance of the Dominion of Canada, in trust for the Dominion Safety Fund Life Association, of Saint John, N.B., on the return of this certificate properly endorsed.

A. S. MURRAY, Accountant.

ALF. RAY, Cashier.

(1) Sec. 47.

The effect as well as the intention, of this transaction was that the security given and accepted was the credit of the bank, as it might have been the credit of a Municipality or of the Dominion or a provincial government if bonds or public securities had been deposited. There was no intention to hand over money to the Receiver General, nor was what was done equivalent to handing over money. The terms of the Insurance Act, to which I have referred, do not permit the deposit of money under the circumstances, while the rule that the securities must be kept up to their original value applies alike to all kinds of security given on application for license, a deposit receipt as well as a municipal bond. I see no more power under the Insurance Act in theReceiver General to handle the money now than there was in 1882 when the receipt was given. It has not become necessary to realise the security in order to pay off or reinsure any risks of the company, and I do not know that even in that case the realisation is to be by the minister.

The security having become depreciated by the failure of the bank it was the duty of the company to replace it by good security. The statute required that, and it was called for by the Treasury Board in January, 1888.

In connection with this part of our subject I may notice what seems to me a fallacious application of an indisputable proposition into which the learned Chief Justice in the court below appears to have inadvertently fallen. I refer to the following passage from his judgment:

An objection was taken that as the Insurance Act required the deposit to be made in securities of a particular description, the Minister of Finance had no authority to take part of the amount in money. Admitting that such may be the construction of section 5, I do not see what right the bank has to raise the objection after admitting the receipt of $45,000 from the Minister of Finance. If the minister exceeded

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his authority, that will not authorise the bank to keep the money. Whether the deposit was in public securities or in money, the bank in which the deposit was made cannot raise the objection that the minister had no right to take anything but securities.

The fallacy is in treating the objection as one raised by the bank against the existence of the debt. The debt is not disputed. The contest is on the part of the creditors, and is over the competition between this debt and the other debts of the bank.

A more important consideration is suggested by some observations of Mr. Justice Tuck, which I quote from his judgment :—

> Here, in order to protect the public who effect insurance with the company, the statute requires that a deposit should be made with the Government. Suppose the company failed to-morrow, would not the policy-holders have a right to call upon the Government to make good their losses to the extent of fifty thousand dollars? Undoubtedly they would. As trustee the Government is responsible, and it would be no answer to say "your money was lost by the failure of the Maritime Bank." To such an answer the reply would be at once made, if the money was deposited in bank, it became a crown debt, and a first charge upon the assets of the company.

I see no reason to doubt that if money were received by the government and lost the government would be answerable for it, just as the learned judge here assumes. It may not be safe to say *ex cathedrâ* that it would be so, because the question is not before us for decision, but the logical connection between the acceptance of money and responsibility for its safety unavoidably crops up. The crown is responsible, I understand the learned judge to argue, therefore the crown must have priority. The converse proposition is the crown has priority because the money belongs to the crown, therefore the crown is responsible to the company and its policy-holders for the money. The conclusion may or may not be irresistible in either case, but it is evident that to accede to the present contention for the crown would be to open up a question

of considerable gravity. The responsibility of the government for more than the safe custody of the securities is certainly not contemplated by the Insurance Act, and it would probably be a matter of pardonable surprise to find that it was extended by the effect of taking a deposit receipt so as to be a guarantee of the solvency of the bank which the company found it convenient to deal with.

It must further be noticed that the contention for the crown, when it treats the transaction as in effect a deposit of money by the crown with the bank, goes beyond the evidence—not merely beyond the evidence that no money was handled either by the government or by the company, but beyond what the deposit receipt imports.

That document states that the money has been deposited in the bank by the company, payable to the order of the minister in trust for the company. That trust must be within the terms of the Insurance Act. The minister cannot represent the crown outside of the authority conferred by the act, and nothing in the act empowers him to convert this security into cash.

I think that the proper conclusion is that this debt is not a debt for which priority can be claimed on the part of the crown, and that on both questions the appeal should be allowed.

Appeal dismissed as to the sum of $15,197.57 *and allowed as to the sum of* $45,000.00 *without costs to either party.*

Solicitor for appellants : *C. A. Palmer.*

Solicitor for respondent : *L. R. Harrison.*

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*Feb. 5, 8.

THE MANITOBA MORTGAGE COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE BANK OF MONTREAL (DEFENDANTS)..... } RESPONDENTS.

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

Banker—Payment of cheque—Joint payees—Endorsement by one—Acquiescence in payment—Monthly receipts—Partnership—Buying and selling land—Stock-in-trade.

When a partnership is entered into for the purpose of buying and selling lands, the lands acquired in the business of such partnership are, in equity, considered as personalty, and may be dealt with by one partner as freely as if they constituted the stock-in-trade of a commercial partnership.

The active partner in such business has an implied authority to borrow money on the security of mortgages acquired by the sale of partnership lands.

An amount so borrowed was paid by a cheque made payable to the order of all the partners by name. The active partner had authority, by power of attorney, to sign his partners' names to all deeds and conveyances necessary for carrying on the business but had no express authority to endorse cheques.

Held, that having authority to effect the loan and receive the amount in cash he could endorse his partners' names on the cheque, and the drawee had a right to assume that he did it for partnership purposes and were justified in paying it on such endorsement.

Held also, that if the payment by the drawees was not warranted the drawers having, for two years after, received monthly statements of their account with the drawees, and given receipts acknowledging the correctness of the same, they must be held to have acquiesced in the payment.

APPEAL from a decision of the Court of Queen's Bench, Manitoba, affirming the judgment at the trial for the defendant.

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*PRESENT: Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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The action was to recover from the defendants the amount of an unpaid balance of plaintiffs' deposit in the bank. The issue tried was whether or not a cheque for the amount of such balance had been properly paid by the bank.

The cheque was drawn by the plaintiffs in 1882, under the following circumstances: Three persons named Ross, Kennedy and McMillan, were engaged in the business of buying and selling lands on speculation in Manitoba. Ross was the active man in the business, and he held a power of attorney from the others authorizing him to sign their names to all deeds and conveyances necessary for carrying on the business. In the course of one transaction Ross acquired certain mortgages on land which he had sold and needing money he assigned these mortgages to the plaintiffs, signing the necessary transfers for his associates under the power of attorney. The amount of the loan was paid to Ross by the plaintiffs' cheque drawn payable to the order of Ross, Kennedy and McMillan, and Ross endorsed this cheque in his own name and in the names of his associates as their attorney and received the money from the defendants' bank. This cheque represented the balance claimed in the action.

The plaintiffs brought an action against Ross, Kennedy and McMillan on the covenants in the mortgages assigned to them as security for the loan, and this action was successfully defended by McMillan on the ground that Ross had no authority to execute the assignment for him, the power of attorney not covering the case of borrowing money. The present action was then brought against the bank and the defendants succeeded in the court below on the ground that McMillan was shown to have got the benefit of the money and the cheque was, therefore, properly paid. The plaintiffs appealed.

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Ewart Q.C. for the appellants. If Ross, Kennedy and McMillan were partners the partnership was of a special nature and not governed by general partnership rules. The acts of Ross, therefore, would not bind the other partners. *Morrison* v. *Earls* (1); Walker on Banking (2); *Saderquist* v. *Ontario Bank* (3).

Land partners have no power to borrow on behalf of the firm. *Dickinson* v. *Valpy* (4); *Ricketts* v. *Bennett* (5); *Barmester* v *Norris* (6.)

The endorsement of all the payees was necessary to justify the bank in paying the cheque. See *Carrick* v. *Vickery* (7); *Innes* v. *Stephenson* (8); *Stone* v. *Marsh* (9).

Christopher Robinson Q.C. for the respondents referred to *Brandon* v. *Scott* (10); *Charles* v. *Blackwell* (11); *Smith* v. *Johnson* (12).

STRONG J.—I am of opinion that the cheque in this case was properly paid by the bank.

The payment was a good payment inasmuch as the cheque was properly endorsed by Ross in the name of McMillan. There was, undoubtedly, a partnership for the purpose of land speculations between Ross, Kennedy and McMillan; the land mortgaged to the appellants was part of the stock-in trade of that partnership. When a partnership is entered into for the purpose of buying and selling lands it is well established that, in equity, the lands acquired for the purpose of being so dealt with are, by the doctrine of conversion, considered as personalty (13), just as much personalty as goods forming the stock-in-

(1) 5 O. R. 440.
(2) 2 ed. p. 116.
(3) 14 O. R. 586.
(4) 10 B. & C. 128.
(5) 4 C. B. 686.
(6) 6 Ex. 796.
(7) Note to *Whitcomb* v. *Whiting*, 2 Doug. 653.
(8) Moo. & Rob. 145.
(9) Ry. & Moo. 364.
(10) 7 E. & B. 234.
(11) 1 C. P. D. 548.
(12) 3 H. & N. 222.
(13) *Wylie* v. *Wylie*, 4 Gr. 278. *Darby* v. *Darby*, 3 Drew. 495. *Waterer* v. *Waterer*, L.R. 15 Eq. 402.

trade of a mercantile partnership are, and being so can, in equity, be dealt with by one partner just as freely as one partner in a commercial partnership can deal with goods forming the stock of the firm for partnership purposes. Then Ross could assign, and did assign, a good equitable title to the mortgages transferred to the plaintiffs, irrespective of the power of attorney altogether, and he had a perfect right to do so, and a right to receive payment in cash and apply the cash to the purposes of the partnership business or liabilities. It is true he could only confer an equitable title (irrespective of the power of attorney) but aside altogether from the power of attorney he could confer an equitable title which a court of equity would compel the other partners to clothe with the legal estate.

Then, having a right to receive cash, and having taken instead a cheque payable to the partners, he had a perfect right to use his partners' names in endorsing that cheque, and the bank having a right to assume he did it for partnership purposes was justified in paying the cheque on that endorsement.

We all agree in this last ground, and Mr. Justice Patterson will state the reasons for it more fully in a written judgment which I have read and in which I concur.

This is a question with which the appellants have really nothing to do. They gave a cheque on their bankers, and this cheque the bank accepted, and there ended all right to dispute the payment so far as the appellants are concerned. So soon as the bank engaged to pay the cheque their contract with the appellants as depositors was performed, and a new contract with the persons entitled to receive payment, and with which the appellants had nothing to do, sprung into existence. If this latter contract has not been properly

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performed by the bank, in consequence of payment to a person not entitled to receive it, the proper person to sue for such breach of contract is McMillan, the person said to be prejudiced by payment to Ross.

Lastly, at all events the appellants must be held to be estopped by their acquiescence in the bank account as entered in their pass-book, and by their monthly receipts. The position of the bank has been changed since the payment. Assuming it to have been a bad payment, of which the appellants could have taken advantage if they had complained promptly, yet they are now too late to do so after Ross, from whom the bank might have reclaimed the funds, has become insolvent.

For these reasons the appeal must, in my opinion, be dismissed with costs.

FOURNIER J.—Concurred.

TASCHEREAU J.—I am also of opinion that the appeal should be dismissed. That the only person who could maintain an action is McMillan seems to me perfectly plain. Certainly the mortgage company could have no action on the facts of the case as presented to us.

I concur also in the opinion expressed as to *laches*. The company received monthly statements from the bank after payment of this cheque and gave receipts acknowledging their correctness. They cannot recede from that now when Ross is insolvent and the position of the bank is changed.

I agree with the remarks of my brother Patterson as to the authority of Ross to indorse the cheque.

GWYNNE J.—Mr McMillan admits in his evidence that the whole management of the speculation in which he and Ross and W. N. Kennedy were jointly

interested was confided to Ross, who had authority to sell the lands which were the subject of the speculation in such parcels and upon such terms as he should think fit, and that the whole financial administration of the speculation was confided to him. As part of the financial administration confided to him he had to make arrangements to meet from $75,000 to $80,000 balance of purchase money of the lands placed in his hands for sale. The better to enable him to dispose of the property a power of attorney was executed by McMillan to him whereby he was authorised, as McMillan's attorney and in his name, to grant, sell, convey, transfer and mortgage all and singular (the lands jointly purchased) and for this purpose to sign, seal, execute and deliver the necessary deeds, papers, writings and conveyances, either in parcels or in block, and upon such terms and conditions as to the said Ross might seem meet, and, for that purpose, McMillan gave and granted to him full and absolute power and authority to do, perform and execute all and every such acts, deeds, matters and things as might be requisite and necessary, or expedient to be done in and about the premises as he, the said McMillan, if personally present and acting in the premises, could do. If, in order to execute these powers effectually, it should be necessary to effect a loan upon the security of a mortgage of any part of the joint estate it was competent for Ross to execute such mortgage in the name of McMillan, and of the necessity for effecting the loan and executing the mortgage Ross was made by McMillan sole judge. So, likewise, Ross had power to sign in McMillan's name, and for McMillan, all necessary receipts for the money and, in fact, to do in McMillan's name and for McMillan, every act, matter, and thing necessary for the completion of the loan transaction. There can, I think, be no doubt that

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he had power to effect the loan which he did effect with the plaintiffs upon the assignment to them of the mortgage which had been executed to the three, Ross, McMillan and W. N. Kennedy, by a purchaser of a portion of the joint estate to secure the purchase money, and also to receive the money advanced by the plaintiffs upon such security, and as necessary to the completion of that transaction to endorse in McMillan's name the cheque given by the plaintiffs as the mode adopted by them of advancing the money lent upon the security of the mortgage assigned to them by way of mortgage. McMillan, indeed, admits that if the money was applied by Ross for the purpose of the joint speculation he has nothing to complain of, and that it was so applied Ross swears and both courts below have found, as matter of fact, it was. But whether it was, or not, is no concern of the present plaintiffs or defendants. In order, however, to so apply it it was necessary that Ross should receive it and the only question here is whether in order to receive it he had authority to endorse the cheque made in favor of himself, W .N. Kennedy and McMillan in McMillan's name, and I am of opinion, for the above reasons, that he had, and that this appeal should be dismissed with costs.

PATTERSON J.—I am satisfied, notwithstanding the learned and able argument of Mr. Ewart for the plaintiffs, that we ought not to disturb the judgment appealed from.

The matter seems to me very simple. McMillan, Kennedy and Ross engaged in joint speculations in the purchase and sale of lands, the entire financial management being left with Ross, as McMillan very clearly explains in his evidence. They were co-partners to all intents and purposes, Ross being the managing partner.

The position is exactly described in the passage in Lindley on partnership to which we were referred (1);

> If persons who are not partners agree to share the profit and loss or the profits of one particular transation or adventure, they become partners as to that transaction or adventure, but not as to anything else. In all such cases as these, the rights and liabilities of the partners are governed by the same principles as those which apply to ordinary partnerships ; but such rights and liabilities are necessarily less extensive than those of persons who have entered into less limited contracts. The extent to which persons can be considered as partners depends entirely on the agreement into which they have entered and upon their conduct.

McMillan gave Ross a power of attorney to grant, sell, convey transfer and mortgage all his lands, tenements, right, title and estate, in and to certain specified lots of land, with certain general powers, but it is a mistake to say, as the plaintiffs do in their factum, that Ross's authority was limited by the terms of that instrument. He required, no doubt, to resort to it for authority to execute deeds in the name of McMillan, just as in ordinary partnership, but the power to buy and manage lands for the three partners, and to do all things incident to the prosecution of the joint enterprise, did not depend on the power of attorney. Debts were incurred by the partners and Ross was depended upon to find money to pay them. He may have received from sales of lands much more than enough for the purpose, and may have been blamable, as between himself and his partners, for raising money in any other way. That was, however, a matter between him and his partners. The present dispute arises from his having borrowed money from the plaintiffs' company by pledging certain mortgages which he had taken for the purchase money of lands sold to one J. H. Kennedy—not the partner who is called Col. Kennedy. His legal power to assign these

(1) 5 ed. p. 49.

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mortgages is questioned. I am not disposed to regard the objection as serious, but I think it is outside of the matter with which we are concerned. The plaintiffs, in fact, got the mortgages and gave their cheque on the defendants for the amount of the loan. They might as well have paid the cash and no question of the right of Ross to receive it could have been seriously raised. It is laid down in Story on Agency (1), that an authority to sell lands for cash includes the authority to receive the purchase money. In section 59 the author says :—

> Upon the same ground an agent who is employed to procure a note or bill to be discounted may, unless expressly restricted, endorse it in the name of his employee, and bind him by the endorsement, for he may well be deemed as incidentally clothed with this authority as a means of effectuating the discount.

Nothing so serious as binding one's principal by the contract of endorsement is involved in what Ross did when he endorsed the cheque for McMillan for the purpose merely of negotiating it. The distinction between endorsing for one purpose and the other is explained in *Denton* v. *Peters* (2) and other cases.

In Grant on Banking (3) there is this exposition of the rule :

> An agent, though unauthorized to draw or endorse cheques in the name of his principal, can, nevertheless, bind his principal by doing so, provided the drawing and indorsing of cheques is incidental to the business he is deputed to transact, and provided the party dealing with him has no notice of want of authority.

Among the cases cited for this proposition is *Edmunds* v. *Bushell* (4) the head note of which reads as follows :

> A employed B to manage his business and to carry it on in the name of B & Co. The drawing and accepting of bills of exchange was incidental to the carrying on of such a business, but it was stipulated between them that B should not draw or accept bills. B having accepted a bill in the name of B & Co., *Held*, that A was liable on the

(1) 5 ed. sec. 58.
(2) L. R. 5 Q. B. 475.
(3) 4 ed. p. 27.
(4) L. R. 1 Q. B. 97.

bill in the hands of an endorsee who took it without any knowledge of A and B or the business.

We may also note the rule as expressed in Chalmers on Bills (1), that

an authority to sign bills on behalf of another may be either express (verbal or written) or implied from circumstances.

Having here the character of the business in which Ross, McMillan and Kennedy were engaged as explained by McMillan; the unlimited power confided to Ross to manage it for the joint adventures; the uncontrolled discretion committed to him, which McMillan clearly informs us of; the fact that what Ross was doing was raising money on assets of the concern by pledging them to the lenders; and the fact that the cheque was merely an order to the bank to pay what the plaintiffs might themselves have paid in cash; having regard also to the express power to "mortgage," which, though we do not require to pronounce upon its effect as bearing on the title to the securities acquired by the plaintiffs, yet implies authority to pledge assets of McMillan in security for debts, a general authority not in terms restricted to securing unpaid purchase money, but as wide as the discretion reposed in Ross for the conduct of the adventure; I do not see any reason to hesitate in holding that he could properly endorse the cheque, as he did, in the name of McMillan, for the purpose of procuring the cash upon it, and that the payment of it was a good discharge to the defendants as against the plaintiffs.

Upon this ground I am of opinion that the appellants must fail in their appeal, and I do not enter upon the other matters discussed before us. I do not examine, as the appellants invite us to do, the details bearing on the question of what Ross did with the money. It would require a very clear demonstration of the incorrectness of the conclusion of the court below upon

(1) 2 ed. p. 65.

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that question of fact to warrant us in disturbing it, and I form no opinion respecting it.

Nor do I discuss other questions which have been debated. One of them is whether, assuming that the endorsement was invalid and that Ross mis-applied the money, any action at law would lie against the defendants after they had paid the money to two of the three persons jointly entitled to it, and, in case an action would lie, it would not be at the suit of McMillan only, and not of the plaintiffs. Another question is the effect of the acquiesence of the plaintiffs by the confirmation of the statements of account rendered them from time to time by the defendants.

But while I do not discuss these questions I agree with the opinions expressed upon them by my brothers Strong and Taschereau.

I am of opinion that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for Appellants: *Richards, Brophy & Bradshaw.*

Solicitors for respondents: *Perdue & Robinson.*

HANNAH VAUGHAN & CLARENCE AUBREY VAUGHAN, EXCEUTRIX, ETC., OF HENRY VAUGHAN, DECEASED (DEFENDANTS)..... } APPELLANTS;

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*Nov. 4.

AND

EDWARD C. RICHARDSON AND JAMES W. BARNARD, JUNIOR, (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM TRE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Jurisdiction—R. S. C. c. 135 *s.* 41*—Judgment on motion for non-suit or new trial—Notice of appeal—Extension of time for giving—Application after time has expired—Effect of order on.*

The Supreme Court of Canada has no jurisdiction to hear an appeal "from a judgment on a motion for a new trial on the ground that the judge has not ruled according to law," unless the notice required by s. 41 of the Supreme Court Act has been given. An order made by a judge of the court appealed from giving defendants "leave to appeal to the Supreme Court of Canada leaving it to plaintiffs to dispute the right of appeal in the Supreme Court," even if considered as an enlargement of the time for giving notice, will not give the court jurisdiction if no notice is given pursuant to such enlargement.

The time for giving notice under s. 41 can be extended as well after as before the twenty days have elapsed.

Held per Strong J.—In s. 42 of the act, providing that under special circumstances the court appealed from or a judge thereof may "allow an appeal" although the time limited therefor by previous sections has expired, the expression "allow an appeal" means only that the court or judge may settle the case and approve the security.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict of the plaintiffs and order a non-suit or new trial.

This was an action originally brought against one Henry Vaughan which was tried at a circuit court in New Brunswick, and resulted in a verdict for the plaintiffs. The defendant moved to have the verdict set

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aside and a non-suit or new trial ordered. In May, 1889, judgment was pronounced refusing the motion. The defendant had died in October, 1888, and probate of his will was granted in the same month, but no suggestion of his death being entered upon the record the judgment on defendant's motion was ordered to be entered as of a date prior to October, 1888. The solicitor for the defendant did not obtain authority from the executors to appeal from the judgment on his motion in time to give notice of appeal within twenty days from the time that judgment was pronounced. When the authority was obtained he applied to a judge of the Supreme Court of New Brunswick, not for an extension of the time to give notice, but for leave to appeal, and the following order was made :—

" I do order that the defendants have leave to appeal to the Supreme Court of Canada in this cause leaving it to the plaintiffs to dispute the right of appeal in the Supreme Court of Canada."

No notice of appeal was given under this order though some time before it was made a notice was given in the name of the original defendant.

The cause was inscribed for hearing before the Supreme Court of Canada, and the plaintiffs having given notice of their intention to do so, moved to have the appeal quashed for want of notice under sections 41 of the Supreme Court Act (1).

Weldon Q.C. and *Hazen* supported the motion.

C. A. Palmer contra.

Sir W. C. RITCHIE C. J.—I am sorry that I cannot agree with the view of my brother Patterson. This is a question of our jurisdiction under the statute, and we have always been very particular before hearing an appeal to satisfy ourselves that we have a right to hear it. In this case I think the jurisdiction is entirely

(1) R. S. C. ch. 135.

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wanting, for notwithstanding all my brother Patterson says, in respect to the order being in effect an extension of the time, and even supposing that it is so, the very ingredient is wanting to give us jurisdiction, namely, the notice itself. Can we say that an appeal will lie in this case in direct opposition to the statute which expressly declares that no such appeal shall lie unless the notice provided for is given ? We are without jurisdiction for want of notice, not for want of the time being extended. The extension that should have been asked for was an extension of the time to give the notice, not of time to appeal.

I do not agree with the Supreme Court of New Brunswick that notice cannot be given under section 41 of the act after the twenty days' have expired, for this court has held the contrary ; but in all cases it is necessary that the notice shall be given. It must be given in a case such as this within twenty days from the time that judgment is pronounced, for we have held that in common law cases the time runs from the pronouncing of the judgment. A different rule prevails in equity causes where the minutes have to be settled before judgment can be entered.

This judgment was pronounced in May, 1889; the original defendant died and his will was proved in October, 1888 ; no suggestion of his death was entered for some months after which was not the fault of the attorney, but of his clients, who had ample time to consider as to whether they should wish to appeal or not in case judgment was given against them, but who took no steps for two months after it was pronounced. From the first of June, 1889, they had an opportunity to apply to extend the time but did not do so. When the application was made Mr. Justice Tuck made the following order :—

I do order that the said defendants have leave to appeal to the Supreme Court of Canada in this cause, leaving it to the plaintiffs to dispute the rights of appeal in the Supreme Court of Canada.

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I read that order differently from the way it was read by my brother Patterson ; I read it that Judge Tuck gave leave to appeal and left it to this court to say whether due notice was given and the appeal thereby perfected or not, and left it entirely open to the respondents to show that the necessary steps had not been taken, that is, that notice had not been given under section 41 nor the time extended for giving it.

I therefore think we have no jurisdiction to entertain this appeal. I should have preferred to allow the matter to stand over to enable the appellant to make an application to the court below to extend the time he paying the costs of the motion, but the majority of the court think that the appeal must be quashed and doing so will work no particular injury to the appellants who will not be prevented thereby from still making the application.

STRONG J.—I agree in what has been said by the Chief Justice. It is incumbent on the appellants to bring themselves within the provisions of section 41 of the statute, and nothing done by a judge of the court below can preclude the respondent from objecting that notice was not given, as required by that section, within twenty days after the decision appealed from or such further time as the court or a judge may allow. Mr Palmer has not insisted, and could not upon the affidavits before us have insisted, that the provision referred to has been complied with. Not only was no notice given within the prescribed time of twenty days, but even if we were to consider the allowance of the security to operate as an enlargement of time (which, however, I am of opinion it was not) no notice of appeal was given pursuant to such enlargement.

I am clearly of opinion that this objection is open in this court inasmuch as it is a matter for us to deal with as affecting our jurisdiction, and nothing that has

been done by the court below can preclude us from entertaining it.

The 42nd section of the act authorises the court below under special circumstances, to "allow an appeal" though the time limited by the other provisions of the act has expired. I understand the expression "allow an appeal" simply to mean the settlement of the case and the approval of the security.

The appeal must be quashed, but as there is, according to decisions in this court and analogous English authorities, power to extend the time after the twenty days have elapsed, it would, if I may say so, seem to me not unreasonable that it should be done in this case; and I venture to express the hope that the court in New Brunswick, or a judge thereof, will see their way clear to granting an extension.

FOURNIER J. concurred in the judgment quashing the appeal.

TASCHEREAU J.—It seems to me that the interpretation given to sec. 42 by my brother Patterson, though there is much force in it, would involve the repeal of that part of section 41 which says that notice shall be given. It appears by the order of the judge in the court below, and it is admitted, that no notice was given, and I cannot agree that section 42 does away with the necessity.

So far as appears before us from the order of the court below I think there is no jurisdiction, and I cannot see that under the circumstances the appellants are deserving of a great deal of consideration. In my opinion the only thing that we can do is to quash the appeal with costs.

PATTERSON J.—It seems to me that the time has been extended in effect by the court below, and that the appeal is properly before this court. The objection

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made is a technical one which I do not think should prevail. The circumstances of the case were very peculiar. Judgment was pronounced two years after the argument of the rule. The defendant had then been dead for six or seven months, and the plaintiffs could not avail themselves of their judgment, there being no defendant, except by obtaining leave to enter judgment *nunc pro tunc*. If the time for giving notice were to count from the nominal time of entering the judgment there could have been no appeal. There is no question of surprise. Two notices of appeal were, in fact, given, but were ineffective because the executors had not been made parties to the record. By sec. 41 of the Supreme and Exchequer Court Act the court appealed from, or a judge thereof, may extend the time for giving notice. Here we have the judge's order approving of the security containing these words: "I do order that the defendants have leave to appeal to the Supreme Court of Canada in this cause." I take that to be a sufficient extension of the time; no form of order is prescribed. It is true, the judge adds, "leaving it to the plaintiffs to dispute the right of appeal in the Supreme Court of Canada," but this, if not entirely nugatory as I think it is, may serve to allow this court to say that the appeal is before it. Section 42 gives power to allow an appeal under special circumstances after the time limited by the statute. It may not, in strictness, apply to this case, but the circumstances are certainly special, and would call for the exercise of the power under section 42, if it applied. I am not sure that it would not apply, but I think that there has been a sufficient extension under section 41.

Appeal quashed with costs.

Solicitor for appellants: *C. A. Palmer.*

Solicitors for respondents: *Hazen & Straton.*

THE HALIFAX STREET RAILWAY COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

THOMAS JOYCE (PLAINTIFF).....RESPONDENT.

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*Oct. 30.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Judgment on motion for new trial—R.S.C. c. 135 s. 24 (d)—Construction of—Non-jury case.

Section 24 (d) of the Supreme Court Act (R.S.C. c. 135) allowing an appeal "from the judgment on a motion for a new trial upon the ground that the judge has not ruled according to law," is applicable to jury cases only. Gwynne J. *dubitante.*

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a judgment for the defendant and ordering a new trial.

The action is for damages alleged to be caused by plaintiff's horse having caught his foot in the groove of a rail laid on defendant's road in Halifax, N.S.

The negligence of defendants alleged in the declaration was:

1. In not keeping the rails level with the street.

2. In using grooved rails and allowing them to project above the level of the street.

3. In using rails of a pattern not approved by the city engineer as required by the act incorporating defendants company.

The amount of damages claimed was $30 and the action was tried by the Chief Justice without a jury, and judgment was given for the defendants on the ground that no negligence had been proved. This judgment was set aside by the full court and a new trial ordered, one judge being of opinion that the certi-

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ficate of the city engineer approving of the pattern of the rails used was necessary and had not been proved, and two other judges dissenting from that but holding that it had not been shown that the charter had been complied with as to keeping the rails level with the street. The defendants appealed.

Newcombe for the respondent took a preliminary objection that the court had no jurisdiction to hear the appeal.

Russell Q. C. contra.

The majority of the court were of opinion that sec. 24 (d), the section of the Supreme Court Act which provides for an appeal from a judgment ordering a new trial, only applies to cases which have been tried by a jury, and that no appeal would lie under that section from an order granting a new trial in a non-jury case, the expression " that a judge has not ruled according to law " having reference to the directions given by a judge to the jury.

Mr. Justice Gwynne said that he was not satisfied that an appeal would not lie, but as the majority of the court were of that opinion he would not delay the judgment.

Appeal quashed with costs.

Solicitor for appellants: *F. G. Forbes.*

Solicitor for respondent: *E. L. Newcombe.*

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