REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

C. H. MASTERS, K.C.

ASSISTANT REPORTER

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

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1902.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir Henry Strong, Knight, C. J.

The Hon. Henri Elzéar Taschereau J.

" John Wellington Gwynne J.

" Robert Sedgewick J.

" George Edwin King J.

" Désiré Girouard J.

" Sir Louis Henry Davies J., K. C. M. G.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Hon. David Mills, K.C.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA:

The Hon. Charles Fitzpatrick, K.C.

ERRATA AND ADDENDA.

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

Page 2, line 8, insert "land" after "plaintiff's."

Page 128, line 9, for "1896" read "1895."

Page 129, line 18, insert "at" after "quash."

Page 224, line 21, for "without" read "with."

Page 320, line 16, for "exception" read "addition."

Page 344, line 21, for "note" read "cheque."

Page 408, line 19, insert "IV" after "Wm."

Page 484, line 18, for "indorsee" read "indorser" and at line 19 for "required" read "requiring."

Page 545, line 3 from bottom, insert the letter "B" after "river."

Page 636, line 7 for "containing" read "contained" and at line 25, for "lessor" read "lessee."

MEMORANDA.

On the 8th day of May, 1901, the Honourable George Edwin King, one of the Puisne Judges of the Supreme Court of Canada, died at the City of Ottawa.

On the 25th day of September, 1901, the Honourable Sir Louis Henry Davies, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, a member of the King's Privy Council for Canada and one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Honourable George Edwin King, deceased.

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APPEALS TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE 24TH FEBRUARY, 1899, (Date of Appendix "B," Coutlée's Digest.)

Association Pharmaceutique de Québec v. *Livernois* (31 Can. S. C. R. 43). Leave to appeal refused, August, 1901.

Cadieux v. *The Montreal Gas Co.* (28 Can. S. C. R. 382). Reversed, July, 1899.

Carroll v *The Erie County Natural Gas and Fuel Co. et al.* (29 Can. S. C. R. 591). Leave to appeal refused. (Canadian Gazette, vol. 34, p. 272.)

City of Montreal v. *Bélanger* (30 Can. S. C. R. 574) Leave to appeal refused, March, 1901.

City of Montreal v. *Cadieux* (29 Can. S. C. R. 616). Dismissed, non pros., March, 1901.

Hobbs v. *The Esquimault and Nanaimo Railway Co* (29 Can. S. C. R. 450.) Appeal dismissed upon settlement between parties, February, 1900.

London Assurance Corporation v. *Great Northern Transit Co.* (29 Can. S. C. R. 577.) Leave to appeal refused, July, 1899.

Manufacturers Life Insurance Co. v. *Anctil* (28 Can. S. C. R. 103) affirmed. Canadian Gazette, vol. 33, pp. 419, 442.

North-west Electric Co. v. *Walsh* (29 Can. S. C.R. 33.) Leave to appeal refused.

The Queen v. *Yule* (30 Can. S. C. R. 24). Leave to appeal refused. (Canadian Gazette, vol. 34, p. 272.)

White v. *City of Montreal* (29 Can. S. C. R. 677.) Leave to appeal refused, May, 1900.

IN MEMORIAM.

Victoria:

QUEEN AND EMPRESS.

Died, January 22nd, 1901.

GOD SAVE THE KING!

MINUTES OF THE PROCEEDINGS AT THE OPENING OF THE WINTER SESSION OF THE SUPREME COURT OF CANADA, 1901.

The Supreme Court of Canada opened at eleven o'clock in the forenoon on Tuesday, the nineteenth day of February, A.D. 1901, all the members of the court being present except His Lordship the Chief Justice.

His Excellency the Governor General of Canada having taken a seat on the Bench, the Acting Chief Justice, the Honourable Mr. Justice Taschereau, after expressing his regret that owing to the illness of His Lordship the Chief Justice the court would be deprived of his valuable assistance during this session, made the following observations:—

"Our first duty this morning is to take the oath of "allegiance to His Majesty King Edward the Seventh "which His Excellency the Governor General will "graciously be pleased to himself solemnly administer "to us in open court. His Excellency will please "accept our most sincere thanks for having consented "to so honour the court, those who are entrusted with "the grave functions of presiding over it, and the Bar. "In addition to the formal words of the oath required "by the statute, we need hardly assure His Excellency "that no where in His vast empire has His Majesty "King Edward the Seventh more true and more loyal "subjects than His Majesty's Judges of the Supreme "Court of Canada."

A Roll of the Supreme Court was thereupon presented by the Registrar to the Acting Chief Justice containing the oath of allegiance to His Majesty King Edward the Seventh, which was duly administered by His Excellency to the five judges present, in the presence of Her Excellency the Countess of Minto, the Countess of Antrim, the Honourable R. W. Scott, K.C., the Honourable A. G. Blair, K.C., the Honourable J. I. Tarte, the Honourable Sir Louis Davies, K.C., and the Honourable Sir Charles Hibbert Tupper, K.C., Privy Councillors, the Honourable L. G. Power, Speaker of the Senate, and the Honourable L. P. Brodeur, K.C., Speaker of the House of Commons, and others.

After judgment had been pronounced in the six cases standing for judgment, His Lordship proceeded as follows:

"I have now to announce that as this is the first "occasion that we meet in the discharge of our judi- "cial functions since the death of our late beloved "Sovereign, the illustrious Victoria, Queen and Em- "press, in whose name, by Her Royal mandate, we "have hitherto administered justice in this the highest "tribunal of the Dominion, we have deemed it incum- "bent upon us to put upon our records the deep respect "we entertain, with the rest of our fellow citizens, for "her memory, and at the same time, superfluous "though it be, to tell how sincerely we share the sen- "timents of profound sorrow and sympathy that her "death has awakened throughout the vast Empire "whereof all Canadians are so proud to form part. "The futility of any attempt to add many more words "on this occasion suggests itself not only perhaps "because so much has been said heretofore on the

" brilliant qualities of the noble departed, the prestige
" of her personality and the splendour of her reign,
" but also because of the difficulty of finding expres-
" sions where exaggeration appears almost impossible.

" That the Victorian Era which came to an end on
" the 22nd day of January last in that solemn
" brief moment which marked the passing
" of a royal soul out of a noble career must forever
" remain a notable epoch in the world's history has
" since so often been said and is a proposition so
" universally conceded that it may be treated as a
" truism and needs at our hands no facts to support it.

" Though a review of the civilised progress which
" is linked with Victoria's name is not to be expected
" here, an exception may be allowed for an allusion to
" the great improvements in the laws more imme-
" diately connected with the administration of justice
" and the courts entrusted therewith which during
" Victoria's glorious reign have been, at various times,
" enacted in her name by the Imperial Parliament,
" and re-enacted in Canada by our legislative authori-
" ties. A detailed history or even a simple enumeration
" of that beneficial legislation would be too long, but
" the subject, suffice it to say at present, is one that
" should not, in the future, escape the attention of
" those who will undertake to recall the remarkable
" traits of that remarkable reign. It is to Victoria
" herself, however, to her own revered memory, to
" Victoria whose name as a Queen, as a wife and as a
" mother will ever stand for the most exquisite ideals
" in human life, to Victoria whose entire life both
" private and public stands forth as a mirror, clear as
" crystal, reflecting naught else but the beautiful and
" ennobling, to Victoria 'whose queenliness as a

" woman and womanliness as a Queen clothed both " her throne and her home with untarnished purity and " honour,' to Victoria the mightiest of Monarchs, yet " the slave of the law of the realm, and the brightest " example of constant devotion to duty that, where " words and the emblems of mourning that surround " us must fail to convey our feelings, the adjournment " of the court will be ordered as an act of respect and " a tribute of grief and sorrow."

On behalf of the Bar and at its request the Honourable Charles Fitzpatrick, K.C., Solicitor General of Canada, made the following observations :

" With the permission of Your Lordships and the " consent of my learned brethren I will take leave to " say how sincerely we agree in all that has fallen " from the lips of the Acting Chief Justice with respect " to her late Majesty. In other places we have heard " Her Majesty spoken of as a great constitutional " monarch and her reign has been described as the " last stage in the complete development of our free " institutions. I may venture to say that to us of the " Bar our Sovereign stood for something more. She " was the *fons et origo justitiæ*, and if the waters of the " stream of justice ran so pure and undefiled through- " out her long and glorious reign it was because the " source from which they sprang was so absolutely " pure and without taint. She made her Kingdom " a Kingdom of the law, and paraphrasing Sydney " Smith, I may say she guaranteed equal rights to " unequal possessions, she gave equal justice to rich " and poor alike. Of the many benefits for which " we are indebted to Victoria the Good, not the least " is the judicial Bench of which we are so justly " proud. Of that Bench as of her throne it has been

" truly said that a fierce light beat constantly upon it " blackening every spot and the dignity and honour " of our judges have remained untarnished and unim- " paired. The abiding sentiment of her life was for " peace. Peace for her people to live industrious lives, " and to be at rest with mankind, and now that she " has gone to the great beyond, to that unknown land " over whose boundaries it is not given to man to " catch even a glimpse, might we not use these lines " of Kingsley's to express the message of her life:

Let us be good and let who will be clever,
Do noble deeds, not dream them all day long,
And so make life, death and the vast forever,
One grand sweet song.

" May I ask Your Lordships to direct that the " remarks of the Acting Chief Justice be made part of " the records of this court."

The court ordered accordingly that the proceedings should be placed upon the records of the court, and at the suggestion of the Honourable Mr. Justice Gwynne, the remarks of the Honourable the Solicitor General were also directed to be added to the records of the court.

The Acting Chief Justice then announced that out of respect for Her Majesty, and to-morrow being Ash Wednesday, the court would be adjourned until Thursday the 21st instant.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

THE CITY OF MONTREAL (DEFENDANT)..... APPELLANT;

AND

HENRY HOGAN (PLAINTIFF).....RESPONDENT.

1900
*May 14,
*Oct. 22.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Practice on appeal—Supplementary evidence—Objections not taken at trial—Amendment of pleadings—Abandonment of expropriation—Measure of damages—Costs.

On the hearing of the appeal, objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question.

Held, following *The Exchange Bank of Canada* v. *Gilman* (17 Can. S. C. R. 108), that the court must refuse to receive the document as fresh evidence can not be admitted upon appeal.

Held, also, that the defendant could not raise the question as to the sufficiency of the plaintiff's title, for the first time, on appeal.

In this case it appeared that the allegations and conclusions of the plaintiff's declaration were deficient and the court, under sec. 63

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

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of the Supreme and Exchequer Courts Act, ordered all necessary amendments to be made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence. *Piché* v. *City of Quebec* (Cass. Dig. (2 ed.) 497); *Gorman* v. *Dixon* (26 Can. S. C. R. 87) followed.

The city commenced expropriation proceedings and forthwith took possession of plaintiff's constructed works thereon and incorporated it with a public street. Subsequently, in virtue of a statute granting permission to do so, the city abandoned the expropriation proceedings without paying indemnity or returning the lands so occupied and used.

Held, that the plaintiff had been illegally dispossessed of his property and was entitled to have it returned to him in the state in which it was at the time it had been so taken possession of and also to recover compensation for the illegal detention.

Held further, that, in the present case, the measure of damages, as representing the rents, issues and profits of the lands usurped by the city, should be the interest upon the value of the property during the period of its illegal detention.

APPEAL from the judgment of the Court of Queen's Bench, Province of Quebec, appeal side (1), affirming the judgment of the Superior Court, District of Montreal maintaining the plaintiff's action with costs.

The plaintiff is the owner of the lands abutting upon Notre-Dame Street, in the City of Montreal. The city, pursuant to powers under 52 Vict. ch. 79, (Que.) for widening the street in front of the plaintiff's land, prepared a plan showing the lands required according to sec. 207 of the Act, which was confirmed by the court, and the corporation thereupon became entitled, upon compliance with the provisions of sec. 213 and paying indemnity, to obtain possession of the property and have it vested in the city without observing the formalities provided by the statute. The officers of the corporation forthwith took possession of

(1) Q. R. 8 Q. B. 534.

the land, made a macadamized roadway over it, removed sidewalks, electric light poles, etc., back to the new line of the street, and opened it to public traffic and since then, 1894, retained possession of the property, but the city abandoned the expropriation proceedings, which had been instituted, upon the passing of the Act, 59 Vict. ch. 49, s. 17, and offered to return the property to the plaintiff in the condition in which it then existed.

The plaintiff then instituted this action to recover the value of his property as having been illegally usurped by the city and for damages, and obtained judgment in the Superior Court, District of Montreal, for $3,436.60 with interest and costs. The appeal is from the judgment of the Court of Queen's Bench, appeal side, by which the trial court judgment was affirmed; Hall and Ouimet JJ. dissenting.

Atwater Q.C. and *J. L. Archambault Q.C.* for the appellant. The city is not responsible for acts of its officers prematurely done pending expropriation. The abandonment of the proceedings was not the voluntary act of the appellant; it was done in obedience to the directions of an Act of the legislature and plaintiff is entitled to no damages, but only to have his property returned to him. See Dillon, Municipal Corporations, par. 474. This has been tendered by the city. In any case the plaintiff has not proved title to the sole ownership of the land and his proceedings and proof of title are insufficient to entitle him alone to maintain the action. He is not entitled to damages as his land was subject to the servitude exercised as a matter of public utility; he has not suffered in any greater degree than other owners affected by the improvements and cannot complain.

Fitzpatrick Q.C. (Solicitor-General), *Archer* with him, for the respondent. Our claims rest on arts. 407 and

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1053 C. C. We refer also to the discussion of the question of liability of corporations in Mignault's Droit Civil Canadien, vol. 2, pp. 343 *et seq.* and to *Doyon* v. *La Paroisse de St. Joseph* (1); *Soulard* v. *City of St. Louis* (2); *Watson* v. *Bennett* (3). The proper measure of damages is the value of the land taken; *Mueller* v. *St. Louis and Iron Mountain Rd. Co.* (4); *Jones* v. *Gooday* (5); *Thayer* v. *City of Boston* (6).

As to the question of title the respondent now tenders an absolute deed of the interest of the other grantee (Beaufort) to him which was not put in at the trial, the defendant having admitted the title by the pleas offering to give back the lands to plaintiff, *Chavigny de La Chevrotière* v. *City of Montreal* (7); *Childs* v. *City of Montreal* (8); *Leveillé* v. *City of Montreal* (9).

The judgment of the court was delivered by:

TASCHEREAU J.—The contention was put forward by the appellants at the hearing of this appeal that as by the deed of ownership of the property in question filed at the trial by the respondent as his title thereto, the sale thereof appears to have been made not to him alone but to him and one Beaufort jointly, he, the respondent, could not alone bring this action as he has done. To meet this objection, the respondent thereupon tendered a deed of assignment by Beaufort to him of all his rights in the property. We could not, however, allow the production of this document, as it has been the constant jurisprudence of this court not to receive here any new evidence whatever. *Exchange*

(1) 17 L. C. Jur. 193.
(2) 36 Mo. 546.
(3) 12 Barb. 196.
(4) 31 Mo. 262.
(5) 8 M. & W. 146.
(6) 19 Pick. (Mass.) 511.
(7) 10 Legal News 41.
(8) M. L. R. 6 S. C. 393.
(9) Q. R. 1 S. C. 410.

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Bank of Canada v. *Gilman* (1). But the appellants cannot now avail themselves of an objection of this nature that was not taken at the trial, where, upon the necessary amendment of the declaration, the evidence to meet such objection could have been brought. They, by their pleas, acknowledge the respondent's title to the property by offering to return it to him. And for them at this stage of the case to turn round and ask, for the first time, the dismissal of his action on the ground that he has not proved his title is what cannot be allowed.

Now as to the merits of the appeal.

That the respondent has been illegally dispossessed of this property and that he is entitled to revendicate it cannot now be controverted by the appellants. A municipal corporation, it is needless to say, has no right to acquire real property except in the cases and in the manner provided by the statute from which it derives it powers. The allegations and conclusions of the declaration, as it reads now, are undoubtedly deficient, but we order such amendments to be made thereto "as are necessary" (to use the express words of sec. 63 of the Supreme Court Act) "for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence." *Piché* v. *City of Quebec* (2); *Ferrier* v. *Trépannier* (3); *Gorman* v. *Dixon* (4); *Williams* v. *Leonard & Sons* (5); *Lumbers* v. *Gold Medal Furniture Manufacturing Co.* (6).

And upon such amendments being now considered as having been made, we order judgment to be entered declaring the respondent proprietor of the property in question, and ordering the appellants to put him, the respondent, in due possession thereof in the same state

(1) 17 Can. S. C. R. 108.
(2) Cass. Dig. (2 ed.) 497.
(3) 24 Can. S. C. R. 86.
(4) 26 Can. S. C. R. 87.
(5) 26 Can. S. C. R. 406.
(6) 30 Can. S. C. R. 55.

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as it was when they took possession of it, within fifteen days after the signification of this judgment.

This aforesaid part of the judgment may be unnecessary, as it appears that since the case was heard the appellants, upon the suggestion of the majority of the court, have, on the 21st day of September last, put the respondent in possession. However, there can be no objection to its being entered.

There remains the question of the amount which the respondent is entitled to as compensation for the illegal detention of his property. Upon the amendment made and on the evidence of record, we think that interest on the uncontradicted value of the property, $3,436, from the time the appellants illegally entered into possession thereof, 1st September, 1894, to the 21st September last, if they then did give it up to the respondent, or to the date when they will give it up, if that has not yet been done, is, under the circumstances, the proper measure of damages, as representing the *fruits et revenus* thereof, the appellants having detained it in bad faith, with interest on the amount of the aforesaid interest now accrued from this date till payment.

As to costs, considering the tyrannical conduct of the appellants and the flagrant illegality of their doings in the matter, we order that all the costs in all the courts be paid by them to the said respondent.

Judgment reformed, with costs against appellants.

THE CHIEF JUSTICE was prevented by illness from taking part in the judgment.

Appeal allowed in part with costs.

Solicitors for the appellant: *Ethier & Archambault.*

Solicitor for the respondent: *Charles Archer.*

THE CORPORATION OF THE CITY OF OTTAWA (DEFENDANT)..... } APPELLANT;

AND

ALEXANDER HUNTER (PLAINTIFF) ...RESPONDENT.

1900
*Oct. 22.
*Oct. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Amount in controversy—60 & 61 V. c. 34 (c) and (f).

Sec. 1 sub-sec. (*f*) of 60 & 61 Vict. ch. 34, providing that in appeals from the Court of Appeal for Ontario "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different," is inoperative, being repugnant to sub-sec. (*c*).

The fact that sub-sec. (*f*) is placed last in point of order in the section does not require the court to construe it as indicating the latest mind of Parliament as the whole section came into force at the one time.

APPEAL from the decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court which reduced the amount of damages recovered at the trial, $261, to $60, and restoring the judgment for the larger sum.

The plaintiff's action was to recover the sum of $1,325.21 for the use by the city of certain weigh scales on the public markets for weighing materials belonging to the city under an agreement between the parties, and for services rendered by plaintiff in weighing said materials. At the trial plaintiff recovered $265. On appeal by the city to the Divisional Court the damages were reduced to $60, but the judgment at the trial for $265 was restored on further appeal by the plaintiff to the Court of Appeal. The city then appealed to the Supreme Court.

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

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Latchford Q.C. moved on behalf of the respondent, after notice, to quash the appeal for want of jurisdiction, claiming that only $265 was in dispute and citing *Bain* v. *Anderson* (1); *Jermyn* v. *Tew* (2), as authorities for the position that the sum demanded in the action does not govern the amount in dispute.

McVeity, contra. The Act 60 & 61 Vict. ch 34 (*f*) is in precisely the same terms as R. S. C. ch 135, sec. 29, sub-sec. 4 relating to Quebec appeals, and the latter sub-section has always been acted upon. *Laberge* v. *Equitable Life Insurauce Society.* (1).

If the two sub-sections of sec. 1 are repugnant sub-sec. (*f*) should be the one upheld as it is placed later in the section than (*c*).

The judgment of the court was delivered by :

TASCHEREAU J.—The respondent's action was for $1,325. Judgment was given at the trial in his favour for $261. He was satisfied with that amount and no motion was made on his behalf against the said judgment.

The appellant however appealed from it, claiming that the amount of $261 was too large, and such appeal was heard before the Queen's Bench Division, where judgment was given reducing the amount of the respondent's verdict to the sum of $60.

The respondent thereupon appealed from the last mentioned judgment to the Court of Appeal for Ontario, seeking to have the judgment of the trial judge restored, and that the amount of the judgment as awarded by the trial judge, namely, $261, should be maintained.

Upon that appeal the respondent did not ask that the amount of the judgment, as pronounced by the

(1) 28 Can. S. C. R. 481. (2) 28 Can. S. C. R. 497.
(1) 24 Can. S. C. R. 59.

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trial judge, should be increased, but was content that the judgment should remain at that amount.

The appeal was duly heard before the Court of Appeal and the judgment of that court was pronounced on the 29th of June, 1900, allowing the said appeal of the respondent and ordering that the judgment of the trial judge for the sum of $261 should be restored.

The present appeal has now been brought by the appellant to this court against the judgment of the Court of Appeal, awarding the respondent the said sum of $261, the amount of the original verdict in his favour at the trial.

The respondent moved to quash on the ground that under 60 & 61 Vict. ch. 34, sec. 1 (*c*) (*D*), this court has now no jurisdiction in Ontario cases wherein the amount in controversy does not exceed one thousand dollars. The appellant in answer to that motion, rests his right to appeal on paragraph (*f*) of the same section of the Act, the original demand being for over one thousand dollars.

The same point has been determined as to Quebec appeals in *Laberge* v. *Equitable Life Assurance Society* (1). We there held that it is the amount originally claimed, not the amount claimed by the appeal, or in controversy before this court, that must govern in cases where our jurisdiction depends upon the pecuniary amount; and the appellant here contends that the construction we gave to the statute in that case should be now given to the Ontario appeals under 60 & 61 Vict. ch. 34

That co ention however cannot prevail, for the simple reason that the enactments relating to Quebec appeals are different from those relating to Ontario appeals. It is true that paragraph (*f*) relating to

(1) 24 Can. S. C. R. 59.

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Ontario appeals is in the same words as paragraph 4, of sec. 29 of the Supreme Court Act, relating to Quebec appeals, under which *Laberge* v. *The Equitable Life Assurance Society* (1) was determined. But then in paragraph 1 of the section relating to Quebec appeals, it is where the amount in controversy does not amount to two thousand dollars that the case is not appealable, whilst for the Ontario appeals, the words "in the appeal" have been added after the words "the amount in controversy," making it read that it is only when the amount in controversy *in the appeal* exceeds the sum of one thousand dollars that the case is appealable.

Now when we see in statutes *in pari materiâ*, by the very same legislature, additional words of that nature to a prior enactment, we would be setting at naught the very clear intention of the legislature if we gave to the last enactment the same construction that had been judicially given to the prior one, as the appellant asks us to do. We cannot so read out of a statute expressions that must be held to have deliberately been inserted so as to make the new statute different from the prior one.

It is upon the appeal before this court, in Ontario appeals, that the matter in controversy must exceed one thousand dollars. Vide *Bain* v. *Anderson & Co.* (2); *Jermyn* v. *Tew* (3). Parliament has clearly intended, for Ontario appeals, not to re-enact the anomaly that exists in Quebec cases of allowing appeals where the only amount in controversy before this court may be of $100, $50, $20, or even a less amount.

By construing paragraph (*f*) as if the words "by the appeal" were inserted after the word "demanded," there is no repugnancy between it and the prior paragraph

(1) 24 Can. S. C. R. 59. (2) 28 Can. S. C. R. 481.
(3) 28 Can. S. C. R. 497.

(*c*). By that construction, the two enactments are reconciled. And that we have to do, if at all possible.

The rule that a prior enactment is superseded by a later one incompatible with it cannot be applied here. These two paragraphs became law at one and the same moment. They no doubt cannot but be read one after the other, but Parliament's will as to both was expressed by simultaneous enactments; and these enactments cannot together be construed as meaning that it is and that it is not the amount in controversy in the appeal bofore this court that will govern the right of appeal, or as saying at the same breath, yes and no.

It would be so irrational for a legislative body to enact a law, and at the very same time to repeal it, that it cannot be contended that paragraph (*f*) of the Act in question repealed the words "in the appeal" that are tc be found in paragraph (*c*). No statute ever concluded by a repeal clause or an amending clause of its own enactments, and no construction involving impliedly such a repeal or amendment can be admitted.

Motion allowed with costs.

Appeal quashed with costs.

Solicitor for the appellant: *Taylor McVeity.*

Solicitors for the respondent: *Latchford, McDougall & Daly.*

1900

*Oct. 10.

*Oct. 26.

JAMES FRÉCHETTE (PLAINTIFF).....APPELLANT;

AND

AUGUSTIN SIMMONEAU (DEFENDANT) ..... } RESPONDENT.

APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Appeal—Jurisdiction—Amount in dispute—R. S. C. c. 135, *s.* 29 *(b).*

In an action by the lessee of lands leased for 4 years and 9 months at a rental of $250 per annum, to have the lease cancelled as being simulated as he was, at the time of the lease, owner of the property leased:

Held, that no amount of $2,000 or upwards was in dispute, and that as the appeal did not relate to any title to land or tenements nor to annual rents within the meaning of sec. 29 (*b*) of R. S. C. c. 135, it could not be entertained by the Supreme Court of Canada.

APPEAL from the judgment of the Court of Queen's Bench, Province of Quebec, appeal side, reversing the judgment of the Superior Court, District of Quebec, which maintained the plaintiff's action with costs.

The nature of the action is stated in the judgment of the court delivered by His Lordship Mr. Justice Taschereau. On the hearing of the appeal:—

L. P. Pelletier Q.C. for the respondents, moved to quash the appeal on the ground that the action did not involve a sufficient amount nor raise questions of a nature to give the Supreme Court of Canada jurisdiction to entertain the appeal.

Fitzpatrick Q. C. (Solicitor-General), and *L. A. Taschereau* for the appellants *contra*, contended that

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

the action affected the title to the lands leased which the lessee, now appellant, claimed as purchaser.

The judgment of the court was delivered by:

TASCHEREAU J.—The plaintiff, appellant, is the lessee, and the respondent is the lessor in an authentic deed of lease, dated the 14th of October, 1895, for four years and nine months at $250 a year. This action is to set aside that lease on the ground that it was a simulated deed and that the appellant was then, and is now, the owner of the property mentioned in that deed. The Superior Court granted his conclusions, and annulled the lease. The Court of Appeal reversed that judgment, and dismissed the action. The plaintiff now appeals.

The respondent moves to quash for want of jurisdiction. It is on the appellant to shew that the Court has jurisdiction; *Dugger* v. *Bocock* (1); and he has failed to do so. The motion must be granted with costs as if made on the first day of this term.

There is no pecuniary amount in controversy between the parties amounting to the sum or value of two thousand dollars. There is no constitutional point involved, and the matter in controversy does not relate to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents or other matters or things where the rights in future might be bound. The word "annual rents" we have held to mean "*rentes foncières*." And the title to the ownership of the property leased is not the matter directly in controversy; there is no *res judicata* thereupon by the judgment of the Court of Appeal; the matter actually in dispute governs; the collateral effect of the judg-

(1) 104 U. S. R. 596.

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FRÉCHETTE v. SIMMONEAU.

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ment is not to be taken into account. *Elgin* v. *Marshall* (1); "*The Jessie Williamson, Jr.*" (2); *New Jersey Zinc Co.* v. *Trotter* (3); *Rodier* v. *Lapierre* (4); *Lachance* v. *La Société de Prêts et de Placements de Québec* (5).

The motion is allowed with costs.

Appeal quashed with costs.

Solicitors for the appellant: *Fitzpatrick, Parent, Taschereau & Roy.*

Solicitor for the respondent: *Pierre Cantin.*

1900

*Oct. 11, 12.
*Oct. 31.

THE VILLAGE OF GRANBY (DEFENDANT)..... ..... } APPELLANT;

AND

JULIE MÉNARD *ès qualite* (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Negligence—Trial by judge without a jury—Findings of fact—Evidence—Reversal by Appellate Court.

In an action for damages for personal injuries, the trial judge, who heard the case without a jury, and before whom the witnesses were examined, held that the evidence of the witnesses for the defence was best entitled to credit and dismissed the action. The judgment was reversed in the Court of Review and its decision affirmed on further appeal by the Court of Queen's Bench. On appeal to the Supreme Court:—

Held, that as the judgment at the trial was supported by evidence, it should not have been disturbed.

Judgment appealed from reversed and judgment of the trial judge restored.

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

(1) 106 U. S. R. 578.
(2) 108 U. S. R. 305.
(3) 108 U. S. R. 564.
(4) 21 Can. S. C. R. 69.
(5) 26 Can. S. C. R. 200.

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THE VILLAGE OF GRANBY v. MÉNARD.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, affirming a judgment of the Court of Review, at Montreal, which reversed the judgment of the Superior Court, District of Bedford, and maintained the plaintiff's action with costs.

A statement of the case will be found in the judgment of His Lordship Mr. Justice Girouard now reported.

Fitzpatrick Q.C. and *Duffy Q.C.* for the appellant. The findings of fact by the trial court judge, who saw and heard the witnesses, ought not to have been disturbed. His judgment is in this case equivalent to the verdict of a jury. Either one of these parties could have demanded trial by jury but they mutually decided to abide by the decision of the judge alone. We refer to *Gingras* v. *Desilets* (1); *North British and Mercantile Insurance Co.* v. *Tourville* (2); *Lefeuntéum* v. *Beaudoin* (3); *City of Montreal* v. *Cadieux* (4); *Home Life Insurance Co.* v. *Randall* (5); *Phœnix Insurance Co.* v. *McGhee* (6); arts. 498, 501, C. P. Q.

Lafleur Q.C. and *Giroux* for the respondent. The unanimous opinions of both the Court of Queen's Bench and the Court of Review, (eight judges), are with us as against the trial judge and their views are amply supported by the weight of evidence of record and their concurrent findings ought to stand in this court. See *Montreal Gas Co.* v. *St. Laurent* (7); *Sénésac* v. *Central Vermont Railway Co.* (8); *Demers* v. *Montreal Steam Laundry Co.* (9); *George Matthews Co.* v. *Bouchard* (10); *Paradis* v. *Municipality of Limoilou* (11).

(1) Cass. Dig. (2 ed.) 213.
(2) 25 S. C. R. 177.
(3) 28 S. C. R. 89.
(4) 29 S. C. R. 616.
(5) 30 S. C. R. 97.
(6) 18 S. C. R. 61.
(7) 26 S. C. R. 176.
(8) 26 S. C. R. 641.
(9) 27 S. C. R. 537.
(10) 28 S. C. R. 580.
(11) 30 S. C. R. 405.

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TASCHEREAU J.—The appeal is allowed with costs and the action dismissed with costs for the reasons stated by His Lordship Mr. Justice Girouard in the judgment of the court to be delivered by him in which I concur.

GWYNNE J.—While I concur in the judgment of my brother Girouard, I desire to add a few words.

In a case like the present where the trial judge, who has heard all the witnesses give their evidence before him and who has thus had an opportunity which no court of appeal can have of estimating the credibility of the several witnesses and the value of all their evidence, has rendered his judgment, no judge sitting in review of, or in appeal from that judgment, upon matters of fact, ought to reverse that judgment, unless it is shown to be clearly wrong upon the evidence so taken; and, when an appeal is taken to this court from a judgment reversing such judgment of the trial judge (as in the present case), I must repeat an opinion I have expressed upon other occasions, that inasmuch as the statute which gives to this court its jurisdiction prescribes in express terms that this court shall hear the appeal and pronounce the judgment which, in our opinion, the court whose judgment is appealed from should have given, it seems to to me that in order to do so a duty is imposed upon us to exercise our judgment upon the evidence and, upon this question, namely, whether it discloses sufficient to show that the Court of Review was justified in pronouncing the judgment of the trial judge, upon the facts in issue, to be wrong, and in substituting in its stead the judgment pronounced by them. And, in the best exercise of my judgment, I must say, upon the evidence, that I think they were not. Had I been sitting in review, I could not have concurred in that

judgment and I am bound by the statute to give here the judgment which, in my opinion, that court should have given.

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Girouard J.

SEDGEWICK and KING JJ. concurred in the judgment allowing the appeal and dismissing the action with costs, for the reasons stated by His Lordship Mr. Justice Girouard.

GIROUARD J.—This is an action of damages brought by the respondents, the widow and children of the late Joseph Coté, who met his death while engaged by the appellant as a common labourer in the excavation of a drain, in the Village of Granby, by the fault and negligence, it is alleged, of the appellant, in not using the necessary means to brace the trench where Coté was working. The corporation pleaded, among other things, that every precaution was taken to secure the safety of the workmen, and that the death of Coté was purely accidental, a fortuitous event which could not have been, and was not foreseen, inasmuch as at the spot where Coté was killed, the soil was hard-pan and did not require bracing.

It is admitted that the evidence is contradictory, four or five witnesses, principally co-workmen of Coté, testifying one way, and as many, chiefly the officers in charge and experts, flatly contradicting them. The trial was held before a judge without a jury, the parties not having exercised the option both had for a trial by jury. The learned judge saw and heard all the witnesses. True, he throws no suspicion, in words, upon the character or credibility of either of them in particular; in fact he makes no remark upon their competency, manner or demeanour, although his formal judgment is accompanied by a full and elaborate opinion. He finally comes to the conclusion that the

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witnesses for the defendant must be believed, rather than those for the plaintiff, and dismissed the latter's action with costs :

Considering that it is established that the men employed by the defendant to direct and superintend said work were well trained, experienced and competent, and that they were provided with the requisite materials to brace said walls of the trench had they deemed it necessary to have done so.

Considering that it is established that bracing is the usual and the ordinary means employed to prevent the caving in of the side of such trenches, and that it is not usual or necessary to resort to bracing when the soil of the sides of the trench is composed of hard-pan.

Considering that it is established that bracing was not used in the trench, at the place where Coté was killed, because in the opinion of the directors and superintendents of said work it was not necessarsy to do so, owing to the nature of the soil.

Considering that it is established that the cause of said accident was unexpected, unforeseen and extraordinary.

Considering that the defendant took all reasonable precautions and such as are usually employed on work of that kind, to prevent the occurrence of accidents, and that in consequence the death of Coté was due to causes which it could not reasonably be expected to foresee and provide against, doth, in consequence, dismiss plaintiff's action with costs

And in his notes, the learned judge remarks :

Were they, (the sides of the trench) reasonably, and according to the judgment and experience of men competent to judge, likely to cave in? For if they were, then the defendant was bound to take the usual precaution to prevent such an occurrence, which it is admitted was bracing. That such an eventuality was contemplated is apparent; the engineer in charge was informed by the consulting engineers that the foreman who had charge of the pipe laying would, among other things, have the direction of the bracing ; and it is explained that this refers to bracing whenever it was thought necessary in the opinion of the foreman. The defendant had provided within easy reach the requisite material for bracing ; and bracing had already been resorted to in a place where, from the nature of the soil, it had been judged necessary. The foreman says he did not brace at the place where the accident occurred because the soil there was what is known as "hard-pan," and that it is not necessary to brace in such soil, because from his experience hard-pan does not cave in. He is supported in this view by Mr. Horner, who lives near by, and who dug a well through

the same kind of soil, and by Mr. Robertson, superintendent of municipal works of the Town of Westmount, who has had a large experience in connection with such work, who speaks very highly of the qualifications of the foreman, and who says he never does any bracing in a soil composed of hard-pan. With this evidence, and it has not been contradicted by plaintiff, can I say that defendant did not make use of the precautions ordinarily employed in such work? If, while working such soil, science, experience and judgment unite in saying that bracing is not necessary, can I say and ought I to say that defendant was imprudent and neglectful of its duty because it did not brace, and therefore responsible for the death of the unfortunate Cote? I cannot say so.

The respondent having appealed to the Court of Review these findings were set aside, and new ones, based upon the evidence of her witnesses, were entered against the appellants, who were condemned to pay $3,200 and all costs:

Considérant qu'il ressort de la preuve que la tranchée dans laquelle le dit Coté travaillait au moment de l'accident, avait une profondeur *de plus de* 15 *pieds;* que bien que cette tranchée eût été ouverte à travers un sol durci, on avait jugé nécessaire d'en boiser les parois à différents endroits; que cependant l'endroit où le dit Coté travaillait avait été laissé sans boisage sur une distance 70 pieds; que la veille de l'accident (un dimanche) il était tombé une pluie abondante et la terre avait été détrempée, ce qui détermina la chute de quelques morceaux de terre durant l'avant-midi du lundi; que le dit Coté a averti le contre-maître de la défenderesse de ce fait en lui exprimant des craintes pour sa propre sûreté, et celui-ci ne prit aucun souci de ces observations.

Considérant que durant l'après midi du même jour, un morceau de terre, dans lequel se trouvait une lourde roche se détacha de l'ouverture de la tranchée et tomba sur le dit Coté dont la tête fut broyée, renversant en outre le nommé Coiteux qui travaillait à ses côtés et qui perdit pendant quelques temps l'usage de ses sens.

Considérant que le dit accident est dû au fait que la défenderesse n'a pas suffisamment protégé le dit Coté et ses autres employés dans l'exécution des travaux qu'elle leur avait confiérs, etc.

The appellant then appealed to the Court of Appeal, but without success; the judgment of the Court of Review was unanimously maintained. Mr. Justice White, speaking for the whole court, observed in conclusion:

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We must hold that the evidence of these disinterested witnesses (for plaintiffs) must outweigh, upon that point, any evidence coming from either Grecco or Bradford, (witnesses for the defendants).

We are asked to restore the judgment of the trial judge. The respondent submits, on the contrary, that we should not disturb the findings of two courts upon mere questions of fact, supported by evidence, as undoubtedly they are in this instance, at least to a certain extent. Respondent refers to *Montreal Gas Co.* v. *St. Laurent* (1); *Sénésac* v. *Central Vermont Railway Co.* (2); *The George Matthews Co.* v. *Bouchard* (3); *Paradis* v. *Municipality of Limoilou* (4). But in every one of these cases the judgment of the first court was upheld. True, in *Demers* v. *Montreal Steam Laundry* (5), we dismissed an appeal from the Court of Appeal, which had reversed the judgment of the Superior Court, but it was because there was no evidence whatever to support it. For the same reason, this court, having to deal with the facts as well as the law involved in each case, and to render the judgment which should have been rendered in the first court, did not hesitate, on a few occasions, to reverse the judgments of both the trial judge and of the Court of Appeal, but it was only when they were clearly against the evidence adduced. *North British and Mercantile Ins. Co.* v. *Tourville* (6); *Lefeuntéum* v. *Beaudoin* (7); *City of Montreal* v. *Cadieux* (8). See also *Allen* v. *Quebec Warehouse Co.* (9).

The present case, however, differs from any of the cases above quoted, and I believe we never before had occasion to adjudicate upon a similar one. The two appellate courts proceeded as if they had to deal with an ordinary *enquête* case, where the witnesses are not

(1) 26 S. C. R. 176.
(2) 26 S. C. R. 641.
(3) 28 S. C. R. 580.
(4) 30 S. C. R. 405.
(5) 27 S. C. R. 537.
(6) 25 S. C. R. 177.
(7) 28 S. C. R. 89.
(8) 29 S. C. R. 616.
(9) 12 App. Cas. 101.

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seen by the trial judge, and where the judges in appeal are in just as good a position as he was to weigh the evidence of record and arrive at a conclusion. Here, the trial judge alone saw and heard the witnesses ; he tells us, both in his formal judgment and in his notes, that the witnesses for the appellant are to be believed, and gives judgment accordingly, entirely ignoring the witnesses against the appellant, evidently because, in his own opinion at least, they were unsatisfactory either from interest, prejudice, incompetence, ignorance, or other cause, not specified, but nevertheless clearly implied from the judgment he pronounces. The learned judge names the witnesses upon whom he relies. It is not pretended that the evidence is clearly against his findings. Both parties before this court, as well as the appellate courts, treated it as contradictory, and all proceeded to discuss it *pro* and *con*. We think that the judgment of the first court ought to prevail. The Court of Review should not, under the circumstances of the case, have interfered with it, and the judgment of the Court of Appeal refusing to restore it is clearly erroneous. See *Cook* v. *Patterson* (1).

I do not propose to apply to a case like this the principles which govern jury trials. It is a well established rule that no court would disturb the verdict of a jury, unless it be clearly against the weight of evidence, and that a verdict is not considered against the weight of evidence, unless it is one which the jury, viewing the whole of the evidence, could not reasonably find. (C. P. Q. Arts. 498, 501.)

So far, the courts of England and of this country have not given to the findings of a trial judge the effect of a verdict by a jury, because, it is argued, the latter is the result of a supposed agreement between the parties that the facts shall be decided by a jury. *Jones* v.

(1) 10 Ont. App. R. 645.

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Hough (1); *Metropolitan Railway Co.* v. *Wright* (2); *Phœnix Ins. Co.* v. *McGee* (3). I must confess that I fail to appreciate the force of this reasoning. Is it not likewise in consequence of such a presumed agreement that, as in the present instance especially, both parties waived their right to a trial by jury and instead elected to submit their differences, both of law and of fact, to a judge sitting also as a jury? Probably, we have not heard the last word from the English courts. Trials of actions at law by a judge without a jury are yet in their infancy, and it will not be surprising if, at no distant day, we see the rule—which has been adopted in all countries where findings of fact are left to the trial judge, as France and nearly all the States of the American Union, namely, that such findings stand in the place of the verdict of a jury—prevail likewise in England and in this country, as the most logical and practical. (Am. & Eng. Ency. of Pleading, 2 ed. vol. 2, p. 396). It is not without interest to observe the advance of the English jurisprudence in this regard within the last twenty years.

In *Jones* v. *Hough*, in 1879 (1), quoted with approbation by our learned Chief Justice in *Phœnix Insurance Co.* v. *McGhee* (3), Lord Bramwell said:

> A great difference exists between a finding by a judge and a finding by a jury. Where the jury find the facts, the court cannot be substituted for them because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like.

But Lord Cotton added:

> Of course I need not say in all questions of fact, especially where there has been *vivâ voce* evidence before the judge in the court below, the Court of Appeal ought to be most unwilling to interfere with the

(1) 5 Ex. D. 115. (2) 11 App. Cas. 152.
(3) 18 Can. S. C. R. 61.

conclusion which the judge has arrived at when he has had the opportunity, which the court have not, of seeing the witnesses, and judging of their demeanour.

In *Colonial Securities Trust Co.* v. *Massey* (1) which was an appeal from the judgment of a trial judge sitting without a jury, it was admitted that there was a con flict of evidence. Lord Esher M. R., speaking for the court, said:

I am of opinion that this appeal should be dismissed. We must see first of all what is the rule of conduct of the Court of Appeal when hearing an appeal on a question of fact from the judgment of a judge trying a case without a jury. It cannot be shaped according to the rule of conduct of the Courts of Common Law before the Judicature Acts, but must follow that adopted by the Courts of Appeal in Chancery, because before that court only could an appeal from a judge sitting without a jury have then come. In the Courts of Equity the matter appealed against was the decision of a judge, and for that reason such an appeal was called a rehearing, since the court could set aside the decree or judgment of the judge who had tried the case, and pronounce another decree or judgment. The Court of Appeal in Chancery acted upon this rule, that they would not allow an appeal unless they were satisfied that the judge was wrong. If they were in doubt at the end of the argument whether the judge was right or wrong, since the burden of proof was on the appellant and he had not satisfied them that the judge was wrong, they dismissed the appeal. That is the rule of conduct which we ought now to apply in this court. The judge in the court below may have heard witnesses; and if so the Court of Appeal would be more unwilling to set aside his judgment, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit. Where witnesses are not examined before the judge, but the case is determined on evidence taken on affidavit, or examination not before the judge, or partly on one and partly on the other, the Court of Appeal is not hampered by the consideration that the judge in the court below has seen the witnesses, whilst the Court of Appeal has not, and the rule of conduct would not apply so strongly, but still this court would not reverse the judgment and give a different one, unless satisfied that the judge was wrong.

(1) [1896] 1 Q. B. 38.

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In a still more recent case, *Coghlan* v. *Cumberland* (1), Lord Lindley said:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge even on a question of fact turning on the credibility of witnesses whom the court has not seen.

Finally, in the case of *The Home Life Association* v. *Randall* (2) which was decided by this court during the last October term, our learned Chief Justice, speaking for the whole court, said:

> It is true that the question as to the cause of death is entirely one of fact and that there was contradictory expert evidence, but having regard to the deliberate statement in the declaration of the medical attendant, the absence of any attempt to explain and correct this until the trial, and other surrounding circumstances, we are all of opinion that it would have been very difficult to come to any other conclusion than one at variance with the finding of the learned Chief Justice. And we should not have been precluded from entering upon an examination of the evidence upon this head by the rule that a second court of appeal will not interfere with the concurrent finding of two preceding courts on a question of fact, a rule well established and often acted upon here as well as in the Privy Council, and also in some late cases in the Supreme Court of the United States.

(1) [1898] 1 Ch. 704.

(2) 30 S. C. R. 97.

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In order to apply the rule referred to, it must appear however that the question of evidence has undergone consideration in both the court of first instance and the first court of appeal. That does not appear to have been the case since the learned judges of the Court of Appeal did not deal with the question of evidence but decided on other grounds. We are therefore in the position as regards this question of a first court of appeal and as the court was in the case of *Jones* v. *Hough* (1), which authority establishes generally the right of an appellant if the question is open to have the evidence taken on a trial without a jury reviewed on appeal.

If it all depended on the credit to be given to witnesses I should be of the same opinion as Mr. Justice Osler, but it is not a case altogether dependent on such consideration, but rather on the inference to be drawn from surrounding facts not disputed and from documents, in other words a question of circumstantial evidence complicated with the opinions of experts. Although all the learned brothers agree on this view, we decide the appeal upon the first point.

For the purposes of this appeal, it is not necessary to dwell any longer upon this point of procedure, however important it may be. It is sufficient to say that there is ample evidence to warrant the findings of the trial court. Employers are not the insurers of the lives of their employees; they are only bound to take all and every means of precaution and protection generally used in similar establishments or occupations. *Brown* v. *Leclerc* (2); *Tooke* v. *Bergeron* (3); *George Matthews Co.* v. *Bouchard* (4): Cass. 5th April, 1894, P. F., '95, 1, 90; Cass. 13th June, 1899, P. F., '99, 1, 20.

We are therefore of opinion that the appeal should be allowed and the respondent's action dismissed with costs before all the courts.

Appeal allowed with costs.

Solicitors for the appellant: *Amyrault & Duffy.*

Solicitor for the respondent: *F. X. A. Giroux.*

(1) 5 Ex. D. 115.
(2) 22 S. C. R. 53.
(3) 27 S. C. R. 567.
(4) 28 S. C. R. 580.

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*Oct. 8,9,10.

*Nov. 12.

THOMAS MIGNER (DEFENDANT).....APPELLANT;

AND

ONEZIME GOULET (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Répétition de l'indu—Actio condictio indebiti — Duress — Transaction—Payment under threat of criminal prosecution—Error—Ratification.—Arts. 1047, 1049, 1140 *C. C.*

About the time a dissolution of partnership was imminent one of the partners was accused of embezzlement of funds and, supposing that he was liable for an alleged shortage and under threat of criminal prosecution, he signed a consent that the amount should be deducted from his share as a member of the firm He was denied access to the books and vouchers and, some weeks afterwards, upon settlement of the affairs of the partnership, the amount so charged to him was paid over to the other partners. It was subsequently shewn that this partner had made his returns correctly and had not appropriated any part of the missing funds.

Held, that he was entitled to recover back the amount so paid in an action *condictio indebiti* as both the consent and the payment had been made under duress and in error and, further, that there had been no ratification of the consent to the deduction of the amount by the subsequent payment, because the denial of access to the books and vouchers caused him to continue in the same error which vitiated his consent in the first place, and, further, that, even if the consent given could be regarded as amounting to transaction, it would be voidable on account of error as to fact.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and maintaining the plaintiff's action with costs.

The plaintiff, the defendant and another person carried on business together in partnership as manu-

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

facturers in the City of Quebec and, shortly before dissolution of the firm, the other partners became suspicious in respect to the plaintiff's method of paying the factory hands and accused him of having appropriated about $9,000 of the partnership funds to his own use; criminal proceedings were threatened and the plaintiff was prevented by the other partners from making an examination of the books or vouchers. Under fear of this prosecution and its consequences to himself and family and erroneously supposing that shortages were chargeable to him, the plaintiff consented that $6,000 should be deducted from his share in the firm's property and, upon the division of the assets, a short time afterwards, the money was deducted from his account and $3,000 credited and paid to each of his partners.

Upon subsequent examination of the books and vouchers the plaintiff discovered that he was not indebted, and, upon being convinced of the mistake which had been made, one of the partners returned the $3,000 he so received from the plaintiff, but defendant insisted upon retaining the $3,000 which had been paid to him. In an action, *condictio indebiti*, to recover the latter amount as having been paid in error and under duress the trial court judge dismissed the plaintiff's *demande* on the grounds that there had been no duress, and that there was consideration for the payment as a shortage had not been accounted for. On appeal this judgment was reversed and judgment ordered to be entered for the plaintiff, the Court of Queen's Bench considering that he had proved that his consent to the payment had been given under duress and through threats and artifice. The defendant now appeals.

Fitzpatrick Q.C. (Solicitor-General), and *L. A. Cannon* for the appellant. The payment was upon trans-

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action and to avoid a lawsuit which was good and sufficient consideration. Admitting (what appellant denies) that the agreement constituted "compounding of felony," money paid under such an illegal contract cannot be recovered back. There was no duress, or error and, even admitting that the contract was entered into through threats and compulsion, it was ratified by the respondent consenting, some months afterwards, that the amount charged against him should be paid to the appellant on the settlement of the partnership affairs. Arts. 1012, 1918 C. C.; *Fisher & Co.* v. *Apollinaris Co.* (1); *Ward* v. *Lloyd* (2) But even if the transaction was really stifling a prosecution, neither of the parties has any *locus standi* and the action must be dismissed. He who has paid the price of an illegal convention has no right to "*condictio indebiti.*" *McKibbin* v. *McCone* (3); *Wilson* v. *Strugnell* (4); *Herman* v. *Jeuchner* (5); *Munt* v. *Stokes* (6); *Collins* v. *Blantern* (7), per Wilmot L. C. J. at page 360; *Scott* v. *Brown* (8); *Taylor* v. *Bowers* (9); *Goodall* v. *Lowndes* (10). Plaintiff could not have had any reasonable fear, under the circumstances; arts. 994-1000 C.C.; *Hilborn* v. *Bucknam* (11); *Schultz* v. *Culbertson* (12); 4 Aubry & Rau pp. 299-300; Pothier, Obligations, no. 26; 10 Duranton, nos. 144-145; 15 Laurent, no. 517; *Miguet* v. *Guyon* (13); 9 Rep. Gen. J. du P. *vo.* "Obligation," no. 144; *Gassiot* v. *Courrége* (14); *Pissard* v. *Maury* (15): *Boddy* v. *Finley* (16).

Goulet assisted in keeping the books and was in the best position to know exactly how the matter stood.

(1) 10 Ch. App. 297.
(2) 6 M. & Gr. 785.
(3) Q. R. 16 S. C. 126.
(4) 7 Q. B. D. 548.
(5) 15 Q. B. D. 561.
(6) 4 T. R. 561.
(7) 1 Sm. L. C. (10 ed.) 355.
(8) [1892] 2 Q. B. 724.
(9) 1 Q. B. D. 291.
(10) 6 Q. B. 464.
(11) 78 Me. 482.
(12) 49 Wis. 122.
(13) [1854] 1 J. du P. 512.
(14) S. V. 36, 1, 948.
(15) Dal. 79, 1, 158.
(16) 9 Gr. 162.

His assent to the correctness of the charge of wrongfully dealing with the moneys of the partnership must be implied from his voluntary offer to compromise: *Clarke* v. *Dutcher* (1). Error of law is not a cause for annulling transaction; art. 1921 C. C. As to ratification and acquiescence see Addison Contracts (9 ed.) p. 118; *Ormes* v. *Beadel* (2); *Petit* v. *Martin* (3). In August he voluntarily executed the undertaking made in May; *Ewing* v. *Hogue* (4); *Piper* v. *Harris Mfg. Co.* (5).

As to the *onus probandi*, see Dal. Rep. Supp. v. Obligation no. 2325; *Leclerc* v. *Leclerc* (6); *McClatchie* v. *Haslam* (7); *Jones* v. *Merionethshire P. B. Building Society* (8). Money stolen is a good consideration. *Thorn* v. *Pinkham* (9). See also *North British and Mercantile Insurance Co.* v. *Tourville* (10); *Colonial Securities Trust Co.* v. *Massey* (11), as to the weight to be given to the decision at the trial.

L. P. Pelletier Q.C. for the respondent. The appellant extorted this money by threats and the *onus probandi* is upon him to show reasons for retaining it. Against the suspicions which at first existed the fuller investigation has cleared the respondent from fault of any kind; he has been honourably acquitted. He is in the position of a surety entitled to a full and final discharge; *Paquette* v. *Bruneau* (12); *Peoples Bank of Halifax* v. *Johnson* (13). The obligation supposed to exist when he bound himself has been shewn to have been null and void and non-existent. The duress was of continuing character for he

(1) 9 Cowen (N.Y.) 673.
(2) 30 L. J. Ch. 1.
(3) Q. R. 14 S. C. 128.
(4) Q. R. 4 S. C. 494.
(5) 15 Ont. App. R. 642.
(6) Q. R. 6 Q. B. 325.
(7) 65 L. T. N. S. 691.
(8) 65 L. T. N. S. 685.
(9) 84 Maine 101.
(10) 25 Can. S. C. R. 177.
(11) [1896] 1 Q. B. 38.
(12) M. L. R. 6 S. C. 96.
(13) 20 Can. S. C. R. 541.

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was kept in jeopardy all the time and forcibly prevented from making an examination of the books and vouchers.

We cite as authorities in support of the judgment appealed from, Arts. 982, 988, 991, 994, 995, 996, 1047, 1048, 1140, 1921-1925 C. C.; *Dugrenier* v. *Dugrenier* (1); *City of Quebec* v. *Caron* (2); 10 Duranton, p. 140; *Banque de St. Hyacinthe* v *Sarrazin* (3); *Kerr* v. *Davis* (4); *Ewing* v. *Hogue* (5); 16 Laurent, Nos. 112, 116. Larombière, Art. 1376 C. N. par. 13. *Couture* v. *Marois* (6); *Macfarlane* v. *Dewey* (7), and authorities cited. Marbeau, "Transactions," *nn.* 162, 168; Fuzier-Herman, Codes ann, Art 2053, *nn.* 1, 3, 4; Art. 2055, *nn.* 1, 3. Dal. Sup. Vo. Transaction, *nn.* 93, 97, 99-102, 106, 109 *et seq.*; Dal. Rep. Vo. Transaction, *nn.* 148, 162 *et seq.*; Vo. Obligation, *nn.* 152 *et seq.*, 528 *et seq.*; Dal. Dict. Dr. 1897. Tables Vo. Transaction, col. 576, No. 3. Dal. 95-2-423; Baudry-Lacantinerie "Transactions," No. 1262.

The judgment of the court was delivered by:

TASCHEREAU J.—Si les faits de cette cause sont nombreux, comme le démontre la revue approfondie qu'en a faite Monsieur le Juge Ouimet en Cour d'Appel, les questions de droit qu'ils soulèvent ne me paraissent ni compliquées ni difficiles à résoudre

D'abord, comme fait principal et sur lequel suivant moi dépend toute la cause, l'intimé, Goulet, a-t-il prouvé qu'il ne devait pas les trois mille piastres en question, lorsqu'il a signé le document par lequel il promit les payer?

Toute ardue que soit toujours la tâche de celui sur qui, par exception, la loi met en certains cas le fardeau

(1) 6 Legal News, 234.
(2) 10 L. C. Jur. 317.
(3) Q. R. 2 S. C. 96.
(4) 18 R. L. 194: M. L. R. 5 Q. B. 156; 17 Can. S. C. R. 235.
(5) Q. R. 4 S. C. 494.
(6) 5 Q. L. R. 96.
(7) 15 L. C. Jur. 85.

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d'une preuve négative, il est rare de rencontrer un litige où elle puisse l'être plus qu'elle l'a été pour l'intimé dans l'espèce. Et cependant, il a réussi.

Je vois au dossier la preuve convaincante qu'il ne devait rien à l'appelant lors de la dissolution de leur société, pas même d'après son témoignage auquel je donne croyance, les quelques piastres que le comptable Blouin aurait crû être *primâ facie* dues d'après un examen, *ex parte*, des livres et des documents produits. Il n'y avait donc pas, à la date du document en question, de dette pré-existante, que l'intimé était obligé de payer, Arts. 1047, 1140 C C., et l'appelant a par conséquent reçu ce qui ne lui était pas dû. Ceci étant résolu comme question de fait, l'obligation de prouver qu'il a fait ce paiement par erreur devenait pour l'intimé aussi facile que la preuve négative, sur laquelle repose la base de son action, lui avait été difficile. Car ici, tout était à présumer en sa faveur. Il répugnerait au bon sens de supposer, sous les circonstances de la cause, qu'il ait voulu, dans l'occasion en question, faire de plein gré un cadeau de trois mille piastres à l'appelant. Il n'a consenti à payer que parce qu'il croyait devoir; et il ne devait pas. Il a donc droit de répéter ce quil a payé.

Que l'appelant ait été de bonne foi ou non, qu'il ait cru lui-même ou non, que l'intimé était réellement son débiteur, ne peut affecter en rien l'obligation que la loi lui impose de restituer intégralement à l'intimé ce qu'il en a indûment reçu. Art. 1049 C. C.

La prétension de l'appelant que l'intimé aurait ratifié sa promesse de payer, en payant de fait quelques semaines plus tard ne peut prévaloir. Ce paiement est entaché du même vice que la promesse de payer elle-même, l'erreur où était l'intimé qu'il était le débiteur de l'appelant, et l'impossibilité où l'appelant lui-même l'avait mis de pouvoir s'assurer du contraire en lui

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refusant arbitrairement tout accès aux livres de leur société. Ce n'est que quand il a pu voir ces livres, et constater la fausseté des prétensions de l'appelant, qu'il a été en état de faire sa réclamation. Et si cet écrit pouvait être envisagé comme comportant une transaction tel que l'a soutenu l'appelant, alors cette transaction serait nulle pour la même cause, parce que l'intimé n'y a consenti que par erreur de fait.

Ce point de vue du litige diffère un peu de celui de la Cour d'Appel, mais pour les motifs ci-dessus, nous sommes d'avis que la conclusion à laquelle elle en est venue, de maintenir l'action de l'intimé, est inattaquable, et nous renvoyons l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Fitzpatrick, Parent, Taschereau & Roy.*

Solicitors for the respondent: *Drouin, Pelletier & Fiset.*

MATTHEW RYAN (PLAINTIFF).....APPELLANT; 1900

AND *Oct. 31, Nov. 2.

WILLIAM WILLOUGHBY (DEFENDANT).....RESPONDENT. *Nov. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Municipal work—Condition as to sub-letting—Consent of council.

Where a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation it is incumbent on the contractor to obtain such consent before sub-letting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do.

In an action against the sub-contractor the latter pleaded the want of assent by the council whereupon the plaintiff replied that the assent was withheld at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract. Issue was joined on this replication.

Held, that the only issue raised by the pleadings was whether or not the defendant had wrongfully caused the consent to be withheld and that the plaintiff had failed to prove his case on that issue.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) which affirmed the verdict for the plaintiff at the trial.

In 1895 the plaintiff, Ryan, entered into a contract with the Town Council of Carleton Place, County of Lanark, whereby he undertook to erect a town and fire hall for the sum of $23,320, the contract containing the following condition: "The contractor shall not sub-let the works, or any part thereof, without

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

(1) 27 Ont. App. R. 135. (2) 30 O. R. 411.

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the consent, in writing, of the architect and corporation."

In the spring of 1896 the plaintiff and defendant entered into a sub-contract by which the defendant agreed to do the mason and brick work of the building for $3,700. The defendant was at the time a member of the town council. The sub-contract contained the following provision: "It is understood and agreed that this agreement, save as herein otherwise provided, is made subject to all the terms and conditions made and entered into by and between the said party hereto of the second part and the town of Carleton Place."

The plaintiff made no application to the council for its consent to the sub-contract but the defendant tendered his resignation as a member which was refused by resolution as follows:

"Moved by Mr. Begley, seconded by Mr. Cram, that this council decline to accept Mr. Willoughby as a sub-contractor under Mr. Ryan for the mason work of the town and fire hall, as we believe that his many years of practical experience will be of great benefit to the building committee in seeing that this contract is faithfully executed, and that being a member of this council he is disqualified to take such contract and that the clerk is hereby authorized to notify Mr. Ryan."

A copy of this resolution was sent to the defendant who thereupon notified the plaintiff that he would be unable to perform the work for which he had agreed The plaintiff therefore completed the construction of the building and brought action against the defendant for the cost of the mason and brick work in excess of the sum for which defendant had agreed to do it. In this action he charged defendant with having wrongfully procured the passage of the above resolution.

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The pleadings are set out in the judgment of Mr. Justice Gwynne on this appeal.

At the trial the plaintiff obtained a verdict which was affirmed by a divisional court. The Court of Appeal, however, reversed the latter judgment and dismissed the action whereupon the plaintiff appealed to the Supreme Court.

Shepley Q.C. for the appellant. Defendant had an interest in the contract within the meaning of the Municipal Act; *Reg.* v. *Francis* (1); and had forfeited his seat in the council. *Nutton* v. *Wilson* (2); *Barnacle* v. *Clark* (3); *Prince Election Case* (4).

As to the obligation on plaintiff to obtain the assent of the council see *Mackay* v. *Dick* (5).

Watson Q.C. for the respondent referred to *Rashleigh* v. *South Eastern Railway Co.* (6); *Day* v. *Singleton* (7); *Le Feuvre* v. *Lankester* (8).

GWYNNE J.—The plaintiff in his statement of claim alleges that prior to the 1st of May, 1896, he had entered into a contract with the Town of Carleton Place to erect and complete a town and fire hall for the corporation according to plans and specifications referred to in the contract. That on the 1st of May, 1896, he had entered into a sub-contract with the defendant for the performance by him of a portion of the said work. The statement of claim then avers performance by the plaintiff of all things necessary upon his part but that the defendant wholly neglected to perform his part though frequently requested so to do, whereby the plaintiff was obliged to perform the work himself at a cost double the price for which the

(1) 18 Q. B. 526.
(2) 22 Q. B. D. 744.
(3) [1900] 1 Q. B. 279.
(4) 14 S. C. R. 265.
(5) 6 App. Cas. 251.
(6) 10 C. B. 612.
(7) [1899] 2 Ch. 320.
(8) 3 E. & B. 530.

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defendant had contracted. This is the whole substance of the statement of claim. By way of defence the defendant pleaded in short substance as follows: That the plaintiff had entered into a contract with the corporation dated the 24th of October, 1895, for the erection and completion of a town and fire hall at Carleton Place. That it was made a term and condition of the said contract that the plaintiff should not sub-let the said work or any portion thereof without the consent in writing of the architect and the corporation. He admits that on the 1st May, 1896, he entered into an agreement with the plaintiff for the performance of a portion of the work subject to the terms and conditions contained in plaintiff's contract with the corporation and to complete such portion within three months after he should be, within one month from said 1st of May, notified by the plaintiff to proceed with the work. That defendant has always been ready and willing to proceed with the work, but that the plaintiff never did obtain the consent in writing of the architect and corporation to the sub-letting to the defendant of the said portion of the work, but that on the contrary the corporation refused to assent to the subletting to the defendant or to allow the defendant to proceed with the said work. To this statement of defence the plaintiff replied that the said corporation refused their consent to the sub-letting of the works in the statement of claim mentioned

at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him if possible to repudiate and abandon the contract made between him and the said plaintiff.

Upon this replication the defendant joined issue, and upon the issue so joined the case went down for trial, the whole burthen of proving the issue being upon the plaintiff.

At the trial the plaintiff produced the agreement of the 1st of May, 1896, between him and the defendant and he also proved that on the 16th May he had called upon the defendant to proceed with the portion of the work mentioned in the agreement of the 1st of May, and that on the 22nd May he had informed the defendant by letter that, as he had not proceeded with such portion, he, the plaintiff, would himself proceed with it and charge all extra cost to the defendant. Upon this the plaintiff rested his case without offering any evidence whatever upon his replication upon which the sole material issue to be tried was taken, and the burthen of proving which rested wholly on the plaintiff.

The plaintiff not having produced his contract with the corporation, a copy of it produced by the defendant's counsel was accepted as correct. A resolution of the council of the 11th May, 1896, and a copy of a letter enclosing the same addressed by the town clerk to the plaintiff, also a letter dated the 6th May, 1896, and a further letter dated the 13th May from the plaintiff to the architect were put in by defendant's counsel and read.

The resolution of the 11th May was as follows:

Moved by Mr. Begley, seconded by Mr. Crain, that the council refuses to accept Mr. W. Willoughby as a sub-contractor under Mr. Ryan for the mason work of the town and fire hall as we believe that by his many years of practical experience his services will be of great benefit on the building committee in seeing that this contract is faithfully executed, and that he being a member of this council is disqualified to take such contract and that the clerk is hereby authorized to notify Mr. Ryan.

This the clerk did by enclosing a copy of the resolution to the plaintiff in a letter dated the 12th May. Now the plaintiff never having offered any evidence of his having made any application whatever to the town council for the purpose of obtaining their con-

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sent to the plaintiff sub-letting to the defendant the portion mentioned in the agreement and having offered no evidence in support of his replication it does not appear why it should have been thought necessary to proceed any further with the case, or why judgment should not have been rendered for the defendant. The defendant however was called by his counsel on his own behalf and naturally had nothing of any importance to say upon his examination by his counsel, but the plaintiff's counsel was permitted as by way of cross-examination to subject the defendant to a very rigorous examination in the endeavour to obtain some admission from him in support of the matters alleged in the plaintiff's replication which constituted the sole issue in the case. The learned counsel for the plaintiff failed however to extract any thing from the defendant in support of the replication (as indeed the learned counsel for the appellant in his argument before us freely admitted) but he extracted from him that he was elected a councillor of the town of Carleton Place in January, 1896, and that he was on the building committee of that council, and that in the month of April, when plaintiff was dealing with him about taking the sub-contract, he had said that he should resign if he went into the contract; that on the 1st of May, when the agreement of that day was signed, he did not know it was a condition of the plaintiff's contract with the corporation that the plaintiff should not sub-let without the consent of the corporation—that he learned that afterwards from one of the councillors—that the matter was a subject of conversation on the streets—that the councillors told defendant they would not let him go—that he should not leave the council.

Mr. Begley, the mayor of Carleton Place in 1896, was called as a witness for the defence and he testified

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that the resolution of the 11th May, 1896, was passed upon his motion. The learned counsel for the defendant proceeded to examine him for the purpose of eliciting how the resolution came to be moved and passed with the view plainly of shewing that the defendant had nothing to do with it, and it may be also of shewing that the plaintiff had never applied to the council for their consent to the sub-letting contract, and of showing also how the council had acquired knowledge of the contract between the plaintiff and the defendant having been entered into. This inquiry bore very materially upon the issue joined upon the plaintiff's replication, but it was persistently objected to by the plaintiff's counsel who insisted that no explanation should be given of the circumstances under which the resolution came to be moved and passed, and this objection was acceded to by the learned judge who refused to receive the evidence as irrelevant; and the testimony of seven others of the councillors offered upon the same point was objected to and rejected.

The only ground upon which such evidence could have been rejected appears to me to have been that as the onus to prove the affirmative of the issue joined upon the plaintiff's replication rested upon the plaintiff, and as he had offered no evidence in support of his replication it was quite unnecessary for the defendant to adduce evidence which should have the effect of proving the negative side of the issue, but it was not upon this ground that the evidence was rejected for upon the defendant's counsel offering no further evidence, judgment was immediately rendered for the plaintiff. But although the defendant was thus prevented from proving how the resolution came to be passed there is some evidence on the record before us from which we may gather grounds for a reasonable

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assumption of what were the circumstances occasioning the passing of the resolution. It was not passed in answer to any application by the plaintiff for the consent of the council to his sub-contract—no such application was ever made by him—that is admitted in the argument before us. The plaintiff's counsel had also objected to the defendant's counsel asking the defendant whether he had anything to do with it—that objection was also acceeded to by the learned judge.—How then could the council have had knowledge of the agreement of the first of May having been entered into? An answer to this question may perhaps be found in the plaintiff's letter of the 6th May, 1896, to the architect of the corporation wherein occurs this sentence:

> I have let the contract of the mason work to one of the building committee; the committee is willing he should get it. I will have them write you to that effect. This is a good move because he was one of the principal kickers.

It is not too much to suppose that this letter addressed to and received by the architect was communicated by him to the mayor and some one or more of the councillors which might account for the defendant having in his evidence stated that the fact of the plaintiff's contract containing a condition prohibiting sub-letting without consent of the corporation was first communicated to him by a member of the council and that the members of the council said they would not let him leave the council. It might account also for the objection taken by the plaintiff's counsel to the evidence of the mayor and the seven councillors who might possibly have given evidence that this passage in the plaintiff's letter had opened their eyes to the importance of retaining the services of the defendant and of refusing their assent to the sub-letting contract in advance of any application by the plaintiff for their assent to it.

We quite agree with the views expressed by the Court of Appeal for Ontario to the effect that the defendant's verbal promise to resign if he should go into the contract, evidence of which promise was got in the manner above stated, has nothing whatever to do with the issue joined in the present action. If the plaintiff had been advised that he had a good cause of action founded upon that promise and a breach of it, he should have asked leave to amend in the court in which this action was instituted. Whether or not, in view of the plaintiff's failure to prove the matter alleged in his replication, he could state a case founded upon that promise in which he would have better success than in the present action we are not called upon to express an opinion. But as to the argument pressed upon us upon a question whether the contract of the 1st of May being signed by the parties thereto, did or not constitute an avoidance of the defendant's seat in the council that is a matter quite irrelevant to the issue joined in the present action. For whether it had or had not such effect the plaintiff knew that the contract of the 1st of May did not constitute a binding agreement unless nor until the plaintiff should obtain the consent of the council, necessary to its validity, and the fact that he made no application for such consent, and the fact that in the present action he has failed to prove the truth of the matter pleaded by him in his replication would need have to be given their due weight in whatever form action might be instituted by the plaintiff in the premises.

The appeal must be dismissed with costs.

KING J.—(Oral).—I agree to the dismissal of the appeal but I wish to confine the reasons to a single ground. It was a condition precedent of the contract which the plaintiff seeks to enforce that he should

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obtain the consent in writing of the architect and of the corporation to the sub-contract, and in this he wholly failed. This went to his capacity to enter into the contract. The consent of the corporation could be effectually given without the necessity of Willoughby taking part in it, and, therefore, the observations at page 263 in *Mackie* v. *Dick* (1), are not applicable. The reasons given by the corporation are not material. They were not bound to give any reasons, and whatever may be surmised, it is not proved that Willoughby was instrumental in procuring their refusal or took any part in the proceedings of the corporation in respect thereto. Although he was present at the council meeting he sat amongst the spectators.

TASCHEREAU, SEDGEWICK and GIROUARD JJ. concurred in the dismissal of the appeal for the above reasons.

Appeal dismissed with costs.

Solicitors for the appellant: *Lavell, Farrell & Lavell.*

Solicitor for the respondent: *Colin McIntosh.*

(1) 6 App. Cas. 251.

L'ASSOCIATION PHARMACEUTIQUE DE QUÉBEC (PLAINTIFF).. } APPELLANT,

AND

J. E. LIVERNOIS (DEFENDANT).....RESPONDENT.

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*Oct. 11,
*Nov. 13.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Appeal—Jurisdiction—Withdrawal of defence raising constitutional question—R. S. C. c. 135, s. 29 (a)—"Quebec Pharmacy Act"—Retroactive legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs—50 V. c. 5, s. 7—*R. S. Q. Arts.* 11, 4035, 4039*b*, 4040, 4046, 4052.

Where a motion to quash an appeal has been refused on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal.

The amendment to the "Quebec Pharmacy Act" by 62 Vict. c. 35, s. 2 (Que.) adding Art. 4039 (*b*), Revised Statutes of Quebec, has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. 50 V. c. 5, s. 7. (Que) ; Art. 11 R.S.Q.

Penalties for several offences under the said Act may be joined in one action and, when the aggregate amount is sufficiently large, the action may be brought in the Superior Court as a court of competent jurisdiction under the statute. Such action may properly be taken in the name of the Pharmaceutical Association of the Province of Quebec.

It is improper in such an action to describe the subsequently charged offences as second offences under the statute, as a second offence cannot arise until there has been a condemnation for a penalty upon a first offence charged.

The sale in the Province of Quebec, by an unlicensed person, of drugs by retail, whether or not such drugs be poisonous, or partially composed of poison, or absolutely free from poison, is a violation of the prohibition contained in Art. 4035, Revised

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

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Statutes of Quebec, whether or not the articles sold be enumerated in the "Quebec Pharmacy Act" as poisonous or as containing an enumerated poison.

Judgment of the Court of Queen's Bench (Q. R. 9 Q. B. 243) reversed. Taschereau and Gwynne JJ. dissenting.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (1), affirming the judgment of the Superior Court, district of Quebec (2), dismissing the plaintiff's action with costs.

On a motion to quash the appeal during the session of the Supreme Court, in May, 1900, it was held that the court had jurisdiction to hear the appeal on the ground that a question had been raised in the pleadings as to the constitutionality of an Act of the Quebec Legislature (3), but when the appeal came on for hearing, counsel for the respondent declared that this plea was abandoned, and the question arose, whether or not, in view of the fact that the case was not otherwise appealable under the provisions of the Supreme and Exchequer Courts Act, there still remained any right of appeal, and whether there remained in the court any jurisdiction to entertain the appeal upon the other issues raised.

Fitzpatrick Q.C. (Solicitor-General), and *Robitaille Q.C.* for the respondent.

L. P. Pelletier Q.C. and *Brosseau Q.C.* for the appellant.

The judgment of the court ordering the hearing to proceed was delivered by:

TASCHEREAU J.—(Oral).—The mere fact of a constitutional question having been raised in the pleadings entitled the appellant to enter his appeal, and that appeal having been properly brought, the whole case

(1) Q. R. 9 Q. B. 243. (2) Q. R. 16 S. C. 536.
(3) 30 Can. S. C. R. 400.

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on the appeal remains at large and within the jurisdiction of this court. The appellant cannot be deprived of his right to appeal by the withdrawal of the plea of *ultra vires*. The hearing upon the merits is ordered to proceed.

The circumstances of the case and questions at issue upon the merits of the appeal are stated in the judgments reported.

L. P. Pelletier Q.C. and *Brosseau* Q.C. for the appellant. The amending Act passed pending this litigation cannot affect the proceedings, it cannot be construed retrospectively; Maxwell, Statutes (3ed.) pp. 588, 589; 50 Vict. ch. 5, s. 7 (Que.); R. S. Q. Art. 11; *Couture* v. *Bouchard* (1); *Williams* v. *Irvine* (2).

The penalties imposed constitute debts due the association and may be joined and sued for together. They are in no sense fines to be sued for by *qui tam* action and as the united sums form an amount within the jurisdiction of the Superior Court, it is a competent tribunal in which the plaintiff may sue in its own name, as in an action for debt. See Dal. Rep. vo. "Peine" nn. 162, 750; *Larivière* v. *Choquet* (3); Pand. Fr. Rep. vo. "Amendes," nn. 12, 127, 258, 326, 327; vo. "Cumul des Peines" n. 12; S. V. 33, 1, 458. We refer also to 27 Merlin *vo.* "Récidive"; Dal. 64, 1, 200; '89, 1, 217; '90, 2, 196; S. V. '99, 1, 361; *Pharmaceutical Society* v. *Armson* (4); *Pharmaceutical Society* v. *Piper & Co.* (5); *Pharmaceutical Society* v. *Delve* (6); *Jeffrey* v. *Weaver* (7); *Ward* v. *Snell* (8); *College of Physicians* v. *Harrison* (9); *Creswell* v. *Hoghton* (10); Retailing Definition, 21 Am. & Eng. Encycl. 296; Wholesale Definition, 29 Am. & Eng. Encycl.

(1) 21 Can. S. C. R. 281.
(2) 22 Can. S. C. R. 108.
(3) M. L. R. 1 S. C. 461.
(4) [1894] 2 Q. B. 720.
(5) (1893) 1 Q. B. 686.
(6) [1894 1 Q. B. 71.
(7) [1889] 2 Q. B. 449
(8) 1 H. Bl. 10.
(9) 9 B. & C. 524.
(10) 6 T. R. 355.

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108; Definition and Continuation of Penal Acts, Hardcastle Part 3, chap. 1, pages 472, 3, 4; Trade-Marks Definition, 26 Am. & Eng. Encyl. 241: Art. 113 C. P. Q.

Fitzpatrick Q.C. (Solicitor General) and *Robitaille Q.C.* for the respondent. There can be no recovery of penalties for second offences as there has not been a conviction or condemnation for any first offence under the Act; R. S. Q. art. 4046; Endlich on Statutes, § 388; Bishop, Statutory Crimes, § 240; Dal. Rep. *vo.* "Peine," n. 257. There is no proof that the respondent:—(*a*) Keeps an establishment for retailing, dispensing or compounding drugs or poisons enumerated in schedule A; (*b*) Nor that he sold drugs or poisons enumerated in schedule A; (*c*) Nor that he dispensed prescriptions; (*d*) Nor that he has assumed to act as a chemist and druggist. On the other hand the respondent has proved that he carries on a wholesale drug business, and has in his employ a licenciate of pharmacy. He neither retails drugs nor fills prescriptions. The sales made were in the course of his wholesale business. We invoke the amending Act, 62 Vict. ch. 35, as retroactive and a bar to the action; 1 Demolombe, nn. 64, 65; Dal. Rep. *vo* "Peine," n. 112; Dal. Supp. *vo.* "Lois," n. 224; 1 Mourlon, n. 73; Endlich, Statutes, § 486; 1 Beaudry-Lacantinèrie Dr. Civ, n. 65; 1 Duranton, n. 74. In any case the proof can only justify a condemnation for one first offence, but the patent or proprietary medicines sold, although containing morphia and strychnine had them in such minute quantity that they are not poisonous, and consequently do not come within the scope of art. 4035 R. S. Q., and being patented and not dangerous to health or to human life, their sale is permitted by 62 Vict. ch. 35, s. 2, and a conviction cannot be now had under the statute as amended.

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TASCHEREAU J. (dissenting.)—I would dismiss this appeal. I concur in the views expressed by Mr. Justice Bossé in the court appealed from.

GWYNNE J. (dissenting.)—This is a civil action commenced in the Superior Court of the District of Quebec at the suit of the appellants who, by the conclusions in their declaration filed on the 20th of October, 1898, claim the right

to recover from the defendant the sum of three hundred and twenty-five dollars with interest and costs, including costs of exhibits, plaintiff's moreover specially reserving the right to take any further conclusions as they may be entitled to by law.

The premises from which this conclusion is drawn as stated in the declaration are that, as is there alleged,

the defendant illegally and without right, he not being a licentiate of pharmacy, nor a physician duly inscribed as a member of the College of Physicians and Surgeons of this province, keeps open a shop for the retailing, dispensing and compounding of drugs and of the poisons enumerated in schedule A annexed to section 4035 of the Quebec Pharmacy Act and especially during the month of August, 1898, to wit, on the 2nd, 3rd, 4th, 5th and 6th of said month and year, did exercise said profession in his shop and has illegally, he not being a licentiate of pharmacy nor a physician duly inscribed as a member of the College of Physicians and Surgeons of this province, sold drugs and medicinal preparations containing poisons mentioned in the above schedule A, to wit, on the 2nd of August last during the forenoon a bottle of Gray's Syrup ; *and* on the *same day during the afternoon* a bottle of Wampole's Cod Liver Oil ; *subsequently on the 3rd of August,* an ounce of Tincture of Gentian Compound ; *subsequently,* on the 4th of August a bottle of Fowler's Extract of Wild Strawberry ; *subsequently* on the 5th of August, a bottle of Cherry Pectoral and an ounce of Bromide of Potash ; *subsequently* on the 6th of August *at about noon,* an ounce of Tincture of rhubarb and an ounce of Bismuth Lozenges ; *and* the same day *in the afternoon* a bottle of Hypo-bromic Compound (Wampole's) ; this bottle of Hypo-bromic Compound (Wampole's) was supplied on presentation of a prescription written and given by Doctor Elliott, of Quebec ; *forming altogether seven offences for which defendant has incurred a penalty of* $25 *for the first offence* and of $50 for the *second* and *each subsequent* offence, forming a total of $325.

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To this action the defendant pleaded a denial of the allegations in the declaration and put upon the plaintiffs the onus of proving their case as alleged. He also pleaded a plea insisting that the Act 53 Vict. ch. 46, Que., amending the Quebec Pharmacy Act upon which the action was based, was *ultra vires* of the Provincial Legislature. The case was tried in the Superior Court of the District of Quebec before Sir L. N. Casault C.J. That court received evidence in relation to the several grounds of complaint mentioned in the declaration and having come to the conclusion that it was not proved that the defendant filled up any prescriptions or made, compounded or prepared any drugs or medicines, and, as to the articles alleged to have been sold by the defendant, that "tincture of Gentian," "Bromide of Potash," "Tincture of Rhubarb" and "Bismuth Lozenges" are not mentioned in schedule A of 53 Vict. ch. 46, and that "Gray's Syrup," "Wampole's Cod Liver Oil," "Cherry Pectoral," "Fowler's Extract of Wild Strawberry" and "Wampole's Hypo-Bromic Compound" were all proprietary medicines, all of which, except Fowler's Extract of Wild Strawberry, were proved to contain a minute portion of a poison mentioned in schedule A, but in such small proportion as to be not only innocuous but beneficial medicines, and thereupon the court, upon the ground that by force of an Act of the Legislature of Quebec, 62 Vict. ch. 35, the sale of the proprietary medicines was not prohibited, dismissed the plaintiff's action with costs. No judgment was pronounced by the court upon the plea of *ultra vires*, which in so far as appears was not relied upon or argued. The judgment of the Superior Court upon appeal by the plaintiffs, was affirmed by the Court of Queen's Bench in Appeal, and from that judgment the present appeal is taken. Upon a motion to quash this

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appeal for want of jurisdiction to entertain it, a majority of this court was of opinion that, notwithstanding that the amount claimed in the conclusions of the declaration was only $325, still the plea of *ultra vires* being on the record, an appeal at the suit of the plaintiffs to this court well lay.

Accordingly, the case came for hearing before us, when the question as to *ultra vires* of the statute was not only not argued, but the learned counsel for the respondent abandoned all reliance on the plea which raised that question, but such abandonment of the plea cannot divest the court of its duty to decline to interfere, if satisfied that the legislature had no jurisdiction in the matter. But there can be no doubt that the legislature had by sub-sec. 15 of sec. 92 of the British North America Act jurisdiction to legislate for the imposition of fines, penalties or imprisonment for enforcing any law of the province made in relation to any matter within any of the classes of subjects enumerated in sec. 92.

The case was argued wholly upon the grounds upon which the Superior Court proceeded, and upon the frame of the declaration itself it is apparent that no conviction can be obtained or fine be imposed under the statute declared upon for any second or subsequent offence when no conviction for the first offence has been stated in the declaration and proved, and up to the present moment no conviction for a first offence against the provisions of the statute has been obtained. Whether an offence has or has not been committed which warrants a conviction and the imposition of the penalty prescribed by the statute for a first offence is the question now under consideration, and that in point of fact is the only question which is, if any be, open upon the record and with which we have to deal. The Act relied upon by the learned counsel for

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the appellants in their argument before us selected as a first offence against the provisions of the statute, the sale of a bottle of "Gray's Syrup." It matters not which of the sales enumerated in the declaration should be selected inasmuch as all the articles sold, with the exception of "Tincture of Gentian," "Bromide of Potash" and "Tincture of Rhubarb," which are not in the list of prohibitions, consisted of proprietary medicines, so that we may deal with the case as if the sale of "Gray's Syrup," the article relied upon by the appellants themselves as constituting the first offence for conviction of which this action has been instituted, was the sole complaint stated in the declaration. For the determination of the present appeal, I do not think it necessary to consider whether or not in a procedure like the present, to impose a penalty for an offence committed against the provisions of the statute it is sufficient to aver merely the sale of a bottle of "Gray's Syrup" without alleging that it contained some one or more of the prohibited poisons mentioned in the schedule A, so as to admit evidence upon that point; but dealing with the case apart from any such consideration, as it was dealt with in the courts below, we find by reference to article 4035 of the Revised Statutes of Quebec, that it is simply a repetition in consolidation of sec. 20 of 48 Vict. c. 36 (Que.), and is as follows:

> 4035. No person shall keep open a shop for retailing, dispensing or compounding of drugs or of the poisons enumerated in schedule A annexed to this section, or sell or attempt to sell any drug or poison mantioned in the said schedule, or any medicinal preparation containing any of the said poisons, or engage in the dispensing of prescriptions, or use or assume the title of chemist and druggist, or chemist or druggist, or apothecary or pharmacist, or pharmeceutist, or dispensing or pharmaceutical chemist, or any other title bearing a similar interpretation, within this province, *unless* he be a physician inscribed as a member of the College of Physicians and Surgeons of

this province, or be registered in accordance with the provisions of this section as a licentiate of pharmacy.

Then followed articles 4036, 4037, 4038 and 4039 which are simple repetitions in consolidation of secs. 21, 22, 23 and 24 of 48 Vict. ch. 36, the latter article being as follows:

The provisions of the four preceding articles shall not prevent the sale of the articles mentioned in schedule B. annexed to this section—provided that patent medicines be sold without their wrappers being opened, and that the other articles be sold in closed packets with the name of the substance contained in such packet labelled thereon.

Now in the above mentioned schedule A are enumerated twelve drugs almost all of which, if not all, are well known "poisons" which word as used in the statute is by Art. 4019, paragraph 9, which is but a repetition in consolidation of sec. 2, paragraph "i," of 48 Vict. ch. 36, declared to mean "such drugs or chemicals as are dangerous to human life." Then in schedule B are enumerated twenty-six items, the first of which is "all patent medicines," and of the twenty-five not one is enumerated in and prohibited in schedule A, although two of them at least "carbolic acid crude," and "Paris green" are well know powerful poisons.

The enactment therefore that a clause which does not prohibit the sale of any of those substances "*shall not prevent*" their sale does not seem to be a felicitous mode of expression in an act of the legislature, but it is with the item "All Patent Medicines," that we have to deal, and this expression so used in this penal statute comprehended, I think "proprietary medicines," that is to say, medicines which some person or persons have an exclusive right to make and sell.

We have it thus established by legislative authority that the sale of patent medicines, which term includes proprietary medicines by a person other than a druggist, chemist, physician or licentiate of pharmacy, was

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not prohibited by 48 Vict. ch. 36, and that thereafter, as before the passing of the Act, it was competent for any person to sell such medicines; and this was consonant with common sense and with the whole spirit and intent of the Act which was passed to prevent the practice of the profession or business of physicians, chemists and druggists by incompetent persons, and the preparation and sale by such persons of poisons, or medicinal preparations containing poisons injurious to human life which proprietary medicines are known to be, as those at least mentioned in the present case have been proved to be, not harmless only, but beneficial. Now, while it had been always and still was quite competent for any person to sell patent or proprietary medicines without any interference whatever, an Act was passed in 1890, 53 Vict. ch. 46, intituled "An Act to amend the Quebec Pharmacy Act." That Act made no alteration whatever in the article 4035, save by adding to it three sub-sections which have no relevancy in the present case, and by the last or seventeenth section of the Act enacting as follows:

> The schedules A and B, after article 4052 of the said Revised Statutes, are replaced by the following schedule A, and the schedule C shall be known as schedule B.

This schedule C which was annexed to 48 Vict. ch. 36, was a "Poison Sales Register" which *all persons having authority to sell poisons* in the Province of Quebec were required to keep by sec. 19 of 48 Vict. ch. 36 consolidated as article 4034 in the Revised Statutes.

What was meant by enacting that this "schedule C shall be known as schedule B," which is wholly obliterated and done away with does not seem very clear. In the new schedule A which is substituted for the two former schedules A and B, in substitution for twelve drugs prohibited in the former schedule

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A, are enumerated thirty-three poisonous drugs which are the only prohibited ones, and one of these, namely, "carbolic acid crude" is the only one which had been in schedule B. As to "Paris green" which was also in schedule B, special provision to be noted hereafter was made. Not one of the other items which had been enumerated in schedule B is referred to, and so by expunging the schedule B, the incongruity already referred to as an infirmity in the former Act in enacting that a clause which does not prohibit the sale of an article shall not prevent the sale of that article, would be removed.

The statute then enacted that "Art. 4039 of the Revised Statutes is replaced by the following: Nothing herein shall prevent the sale by persons not registered in pursuance of this law of 'Paris Green or London Purple,' so long as said articles are sold in well secured packages distinctly labelled with the name of the article, the name and address of the seller, and marked 'poison.'"

It is difficult to conceive that the legislature while thus authorising the sale of a deadly poison by unlicensed persons, contemplated by the clause to bring about the prohibition of the sale of proprietary medicines by unlicensed persons. It seems much more probable that in abrogating schedule B in the manner in which it was abrogated, the difference between a patent medicine not in terms prohibited, and specific drugs as all the other articles in schedule B were (and which also were not prohibited articles) was not noticed, or that it was thought unnecessary to make any distinction between them except in the provision made as to the poison "Paris green." But whether the abrogation of schedule B, under these circumstances had the effect of *creating* the prohibition of the sale by unlicensed persons of patent medicines which

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the Act declared had not been prohibited by it, we need not now inquire, for in 1899 the legislature passed the Act 62 Vict. ch. 35 upon which the learned Chief Justice Sir L. N. Casault proceeded at the trial, whereby a clause was added to Art. 4039 which was designated 4039 *b*, whereby it was enacted as follows:

> Nothing in this Act applies to or in any manner affects the preparation or sale of a patented or proprietary medicine,

thus restoring in the letter the provision in the original Act in conformity with its spirit, and intent, and indicating sufficiently, I think, that the change, if any was effected by the manner in which schedule B was abrogated, as regards patent or proprietary medicines, was caused through inadvertence and not intentionally, and that after the passing of 62 Vict. ch. 35, no court can pronounce the sale of a proprietary medicine, although the sale may have taken place before the passing of the Act, to be an offence against the provisions of the Act punishable by fine and imprisonment. It has been argued that as the Act was passed subsequently to the institution of the proceeding to have the sale pronounced to be an offence against the provisions of the Act the statute cannot affect the present proceeding which it is contended was an offence between the passing of 48 Vict. ch 46, and of 62 Vict. ch. 35, though it never had been an offence against the provision of any law before or since. This contention rests wholly upon a further contention, namely, that when this proceeding was instituted, the Pharmaceutical Association, the present appellants, had a *right* to the sum of twenty-five dollars now demanded of which right the subsequent Act has not deprived them, but this contention is wholly based on a fallacy, for no one can have any right in a sum to be inflicted as a fine in case only of an offence against the provisions of the Act being established, until the

offence is established, and fine imposed upon conviction; and as to the appellants in particular having had any right at the time of their instituting the present proceeding, more than any other informers, that contention appears to be devoid of any foundation; the Act does not say that to enforce and recover the penalty the appellants may proceed and recover it in a civil action as a debt due to them. The 36th sec. of 48 Vict. ch. 36, which is consolidated in Art. 4051 of the Revised Statutes, enacts that

all fees, penalties and fines payable under this Act *shall* belong to the Pharmaceutical Association of the Province of Quebec for the purposes of this Act,

but for a fine or penalty to become *payable* under the Act a conviction for an offence against the provisions of the Act must first be obtained; and this clause gives no civil action to the appellants to recover the amount of fine as a debt. The only section regulating prosecutions for the purpose of convicting a person of an offence charged to have been committed against the provisions of the Act is sec. 25 of 48 Vict. ch. 36, which is consolidated as Art. 4040 of the Revised Statutes, which enacts that

prosecutions instituted for the recovery of any fine imposed under this Act may be instituted by the association or by any other person before the judge of the sessions, the police magistrate or recorder in the cities of Montreal and Quebec, or before a district magistrate or justice of the peace of the place where the offence was committed in the other parts of the province, *or may be* instituted before any competent court of the place where the offence was committed by simple civil action in the ordinary manner.

This last clause, as it appears to me, plainly means that the fine may be imposed and recovered by civil action in the ordinary manner in which *fines and penalties for the contravention of* [illegible] *law* may be enforced and recovered in a court having civil jurisdiction, that is to say in the manner prescribed in Art. 16 C. C.

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namely, by an ordinary process of law in the name of Her Majesty alone or jointly with another prosecutor before any court having civil jurisdiction to the amount sought to be recovered; and as the amount sought to be recovered here is the amount payable for a first offence, if any such should be proved, namely, twenty-five dollars, the only court of civil jurisdiction competent to convict the appellant, if the offence should be proved, is the Circuit Court whose jurisdiction in matters under $100 is absolute, to the exclusion of the Superior Court. Upon all these grounds, therefore, the appeal, in my opinion, must be dismissed with costs.

SEDGEWICK J.—This is a proceeding instituted by the Pharmaceutical Association of the Province of Quebec against the defendant who styles himself a merchant-photographer and wholesale drug merchant, but who carries on the business of a druggist and chemist in the City of Quebec, and the charge alleged against him is a violation in several particulars of the Quebec Pharmacy Act.

It would appear that the council of the association, in the interests of the profession and of the public, as well as in pursuance of their statutory duties, resolved to prosecute offenders against the Act, and employed one Crankshaw to procure the necessary evidence. In the month of August, 1898, and on five different days of that month, he visited the respondent's drug store and purchased, in two instances from himself and in the other instances from his employees, the following articles: a bottle of Gray's Syrup, a bottle of Wampole's Cod Liver Oil; an ounce of tincture of Gentian Compound; a bottle of Fowler's Extract of Wild Strawberry; a bottle of Cherry Pectoral: an ounce of bromide of potash; an ounce of tincture of Rhubarb;

an ounce of Bismuth Lozenges, and a bottle of hypobromic compound (Wampole's). These articles were for the most part submitted, for examination and analysis, to Dr. Fafard, an eminent analyst and professor of chemistry in the University of Laval, who found and testified that four of them, namely, Gray's Syrup, Wampole's Cod Liver Oil, Ayer's Cherry Pectoral, and Wampole's Hypo-Bromic Compound, contained poisons, namely morphine and strychnine. The evidence of both Crankshaw and Dr. Fafard was amply corroborated and all the courts below agreed upon the facts just stated.

The right of the plaintiff association to recover depends solely upon the provisions of the Quebec Pharmacy Act, and for the purposes of this opinion, I set out the following articles:

Art. 4035. No person shall keep open a shop for the retailing, dispensing or compounding of drugs or of the poisons enumerated in schedule A, annexed to this section, or sell or attempt to sell any drug or poison mentioned in the said schedule, or any medicinal preparation containing any of the said poisons, or engage in the dispensing of prescriptions, or use or assume the title of chemist and druggist, or chemist or druggist, or apothecary, or pharmacist, or pharmaceutist, or dispensing or pharmaceutical chemist, or any other title bearing a similar interpretation, within this province, unless he be a physician inscribed as a member of the College of Physicians and Surgeons of this province or be registered in accordance with the provisions of this section as a licentiate of pharmacy.

Art. 4040. Prosecutions instituted for the recovery of any fine imposed under this section may be instituted by the association or by any other person, before the judge of the sessions, the police magistrate or recorder, in the cities of Montreal and Quebec, or before a district magistrate or justice of the peace of the place where the offence was committed, in the other parts of the province, or may be instituted before any competent court of the place where the offence was committed by simple civil action in the ordinary manner.

Art. 4052. Nothing in this section shall interfere with the privileges conferred upon physicians and surgeons by the various Acts relating to the practice of medicine and surgery in this province, or with the business of wholesale dealers in drugs in the ordinary course

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of wholesale dealing, or with chemical manufacturers, or with duly licensed veterinary surgeons in their practice or business as such.

It is admitted that the defendant is not a physician inscribed as a member of the College of Physicians and Surgeons nor is he a licentiate of pharmacy, and the first question is as to whether he has violated any of the provisions of art. 4035.

That article prohibits (among other things) the retailing or selling by unauthorised persons of several classes of articles, namely, (1) drugs; (2) poisons enumerated in the schedule; and (3), any medicinal preparations containing any of such poisons. According to the interpretation clause, the word *drugs* means articles used medicinally, whether compound or simple, and the word *poisons* means drugs or chemicals which are dangerous to human life. So that the statute is violated if drugs are retailed or sold, whether such drugs be poisons, or partially composed of poisons, or are absolutely free from poisons.

It was proved beyond controversy at the trial that the respondent sold the articles in question, and that they are drugs not only within the meaning of the Act, but according to the ordinary and popular meaning of that word, and the fundamental error, I respectfully venture to state, in the judgment appealed from, is the view that in order to constitute an offence under the Act, the articles sold must either be an enumerated poison, or an article containing an enumerated poison.

While no doubt the main object of the legislature in enacting the statute was to protect the public from the possible incompetency of vendors of drugs or chemicals dangerous to human life, it also was its object to take charge of the whole retail drug business and compel all persons engaged in it to pass a qualifying examination and obtain a license therefor. The contention, very feebly put forward, that the respond-

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ent was not a retail druggist, but a wholesale dealer as well in drugs as in photographic supplies, is in my view out of the question. The purchases proved were made on five different days. The articles purchased were probably, in every case but one, the minimum amount which one could purchase at a drug store. The articles submitted for analysis could all be carried in a small bag, and to say that these transactions were wholesale and not retail transactions is, in my view, nothing but farcical.

I am also of opinion that the proceedings were rightly brought in the Superior Court by virtue of art. 4040 above set out. Whether the proceedings were criminal, or penal, or purely civil in their nature, makes no difference. The prosecution by whatever name it may be called, was authorised to be instituted before any competent court by civil action in the ordinary manner. The Superior Court comes within that description. The proceedings were properly taken in the name of the association and any moneys recovered became the property of the association for the purposes mentioned in art. 4051.

The prosecutors set out in their declaration, in pursuance of the practice of the Superior Court, the circumstances upon which they relied in order to justify a condemnation. They allege several offences, but they describe all these offences committed after the first as *second* offences. In this they were wrong, as (it was admitted) a person can only be convicted of a second offence after a conviction for a first offence, so that none of the offences alleged in the declaration were second offences. They were each however, *first* offences, and inasmuch as in a civil proceeding several causes of action may be joined, there is no reason why in one proceeding in a civil court several penalties may not be sued for and recovered for more than one offence.

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There is not, however, any necessity to consider this point more fully, as counsel for the association consented at the argument that if the appeal should be allowed a judgment for one offence might be entered as the object of the association was not, in the present case, punitive, but rather to obtain an authoritative declaration as to their rights, and as to the disabilities of persons carrying on the ordinary retail drug business in the province.

One point remains. After these proceedings were instituted and after the learned trial judge had taken the case *en délibéré*, the Quebec Legislature amended the Pharmacy Act by adding to art. 4039*a*, another article which reads in part as follows:

> Nothing in this Act contained shall extend to or interfere with, or affect the making or dealing in any patent or proprietary medicines.

Now it is admitted that four and perhaps five of the articles purchased from the respondent by Crankshaw were patent or proprietary medicines, but it is equally clear that other articles purchased were not; they were drugs however, and therefore not within the article, and a judgment for the association may be sustained in respect to those articles not within the purview of the amendment just referred to.

Nevertheless, we think that this Act has no retroactive effect. Whether the amending statute would have been so considered under the old common law may be doubted, but any such consequence has been removed in the Province of Quebec by art. 7 of the Act respecting the Revised Statutes of Quebec, and by art. 11 of the Preliminary Title. In view, however, of the fact that we propose to give judgment for the plaintiff's for $25 only this point need not be further discussed.

In my view the appeal should be allowed with costs, and judgment entered in the Superior Court for

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$25 with costs upon the lower scale, together with the costs of the appeal.

KING and GIROUARD JJ. concurred in the judgment allowing the appeal for the reasons stated by Sedgewick J.

Appeal allowed with costs.

Solicitors for the appellant: *Drouin, Pelletier & Fiset.*

Solicitors for the respondent: *Robitaille & Roy.*

THE BELL TELEPHONE CO. (THIRD PARTY) ..... } APPELLANT;

AND

THE CITY OF CHATHAM (DEFENDANT) ..... } RESPONDENT.

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*Oct. 26.
*Nov. 13.

THE CITY OF CHATHAM (DEFENDANT)..APPELLANT;

AND

MARY LOUISA ATKINSON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Proximate cause—Telephone pole—Third party—Costs.

A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent, uncontrollable speed was the proximate cause of the accident.

In an action against the city corporation for damages in such a case the latter was ordered to pay the costs of the Telephone Company brought in as third party it being shewn that the company placed the pole where it was lawfully, and by authority of the corporation.

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

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THE BELL TELEPHONE COMPANY v. THE CITY OF CHATHAM.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiffs against the City of Chatham, defendant, and reversing said judgment in favour of the third party, the Bell Telephone Co.

This action was brought by the plaintiffs against the Corporation of the City of Chatham, in Ontario, to recover damages sustained through a collision with a telephone pole while the horses of the plaintiff, Nathan H. Stevens, were running away on King Street in Chatham, the plaintiff, Mary L. Atkinson being thrown out of the sleigh drawn by the said horses, the sleigh damaged and the young lady having her leg broken.

King street is a long street, and at the westerly end of it there is a sharp curve of 117 degrees, and about 60 feet from the centre of this angle there is a telephone pole erected by the appellants, the Bell Telephone Company, (under its statutory powers,) in 1893, which stands on the edge of the gutter along the travelled part of the street. The plaintiffs allege that the street was so much out of repair that it caused the sleigh to partly go over on its side when the horses and sleigh arrived at the turn, the sleigh, which was a high covered carriage top set on sleigh runners, in swinging round at the curve, upset, and the top struck against the telephone pole, thereby causing the injury complained of, and that but for the pole the injury might have been avoided.

The action was brought against the City of Chatham alone. The city caused the Bell Telephone Company to be joined as third party, to indemnify the city if the latter was liable to the plaintiffs.

Mr. Justice Ferguson, before whom the action was tried, found a verdict for the plaintiffs against the defendants, the City of Chatham, and dismissed the city's claim for indemnity against the Bell Telephone

Company, although he expressed the view that the telephone company might have been successfully sued for the damage claimed.

From this judgment the City of Chatham appealed to the Court of Appeal for Ontario, where the judgment as to the liability of the defendant (the city) to the plaintiffs was maintained, but the Bell Telephone Company, the third party, was ordered to indemnify the city. The city now appeals against the plaintiffs from that part of the judgment of the court which holds it liable, and opposes the Bell Telephone Company's appeal against its liability to indemnify the defendant, the city.

The finding of the learned judge at the trial was, that by reason of the telephone pole being so near the centre of the street the latter was out of repair, and was the cause of the accident and the defendant (the city) was liable therefor.

The defendant (the city), beside denying that the street was out of repair, by reason of the position of the pole, or otherwise, contends that the pole was erected and maintained in the place where it was by the Bell Telephone Co. (third party), under its statutory powers, without any authority of the defendant, and plead also contributory negligence on the part of the plaintiffs, as an answer to the action.

Matthew Wilson Q.C. for the appellant, Bell Telephone Co., third party. The pole was placed where it was by order of the city engineer and was lawfully there under the statute. *Roberts* v. *Wisconsin Telephone Co.* (1); *Commonwealth* v. *City of Boston* (2); *Soule* v. *Grand Trunk Railway Co.* (3); *Ricketts* v. *Village of Markdale* (4).

(1) 77 Wis. 589.
(2) 97 Mass. 555.
(3) 21 U. C. C. P. 308.
(4) 31 O. R. 180, 610.

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Aylesworth Q.C. and *Douglas Q.C.* for the respondent, City of Chatham. As to liability of third party to indemnify city see *Boun* v. *Bell Telephone Co.* (1).

Wilson Q.C. in reply to City of Chatham.

Aylesworth Q.C. and *Douglas Q.C.* for the City of Chatham, appellant, referred to *Town of Portland* v. *Griffiths* (2); *City of Halifax* v. *Lordly* (3); *Foley* v. *Township of East Flamboro* (4).

Atkinson Q.C. for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—In this action a verdict was rendered in favour of the plaintiffs against the City of Chatham for damages for which the third party was ordered to indemnify the City of Chatham.

The judgment of the learned trial judge having been confirmed in appeal, the third party, by leave of the Court of Appeal, at Toronto, in pursuance of a statute, affecting the case, appeals against the judgment as rendered against it, whether Chatham be or be not liable to the plaintiffs, and the Corporation of the City of Chatham by like leave appeals against the judgments rendered in favour of the plaintiffs against it.

As between the third party and the Corporation of Chatham, we entertain no doubt that the telegraph pole to which the learned judge attributes the accident which was the cause of the action, was planted in a street in Chatham, presumably by the servants of the third party, but by the authority of the corporation. And as between the Corporation of Chatham and the plaintiffs, we likewise entertain no doubt that the said pole so planted by the corporation was lawfully

(1) 30 O. R. 696.
(2) 11 Can. S. C. R. 333.
(3) 20 Can. S. C. R. 505.
(4) 29 O. R. 139; 26 Ont. App. R. 43.

planted where it was, outside of the portion of the highway appropriated by by-law for the use of horses and carriages, and so was not a nuisance of which persons lawfully using the highway could complain. But we hold it to be clearly established by the evidence that the pole was not the *causa causans* or any part of the cause of the accident, which was the running away of the horses with the carriage in which the injured plaintiffs were, in a violent manner, at excessive speed and wholly beyond the control of the person driving them.

The complaint at the trial was not that the pole caused the injury complained of, but the bad state of repair of the road, which it was contended caused the carriage to upset. The learned trial judge held, and we think rightly, against this contention, but as to the pole, instead of having caused the accident, the evidence seems to establish that it caused rather the separation of the horses from the carriage, (if it had any connection with the accident at all), and thereby prevented greater injury than might otherwise have happened.

But the *causa causans* was the violent, uncontrollable speed at which the horses were running away. Without saying that in no case can a person injured in a carriage drawn by running-away horses maintain an action for damages, we hold that in the present case the sole conclusion justified by the evidence is that the uncontrollable manner in which the horses were running away was the cause of the accident.

We are of opinion, therefore, that the appeal of the corporation must be allowed with costs, and that the action be dismissed with costs, but that the corporation be ordered to pay the Telephone Company their costs of this appeal and also the costs incurred in the

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action by reason of their having been made third party hereto.

Appeal of defendant allowed with special direction as to costs.

Solicitor for the third party, appellant: *S. G. Wood.*

Solicitor for the defendant, appellant: *Wm. Douglas.*

Solicitors for the respondents: *Atkinson & Atkinson.*

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*Nov. 5, 6.

*Nov. 13.

FRANCIS H. CLERGUE (DEFENDANT)...APPELLANT;

AND

SAMUEL F. HUMPHREY AND WILLIAM S. ADAMS, EXECUTORS OF DAVID BUGBEE, DECEASED (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action on foreign judgment—Original consideration—Ontario Judicature Act—Promoter of company—Loan to—Personal liability.

Under the Ontario Judicature Act, as before it, the declaration in an action on a foreign judgment may include counts claiming to recover on the original consideration.

A promoter of a joint stock company borrowed money for the purposes of the company giving his own note as security. The lender was informed at the time of the manner in which the loan was to be, and was, applied.

Held, that as the company did not exist at the time of the loan it could not be the principal debtor nor the borrower a mere guarantor. The latter was, therefore, primarily liable for repayment of the loan.

Judgment of the Court of Appeal (*Bugbee* v. *Clergue*, 27 Ont. App. R. 96) affirmed.

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

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CLERGUE v. HUMPHREY.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing in part the judgment at the trial in favour of the plaintiff.

Francis H. Clergue, now of the Town of Sault Ste Marie, in the Province of Ontario, and manager of large industrial and manufacturing establishments there, was in the year 1891 resident in Bangor, in the State of Maine. He was a member of the law firm of Laughton & Clergue, who were also actively engaged in promoting financial schemes. Amongst other companies, there were the Bangor Street Railway Company, the Water Works Company, the Bangor Electric Light and Power Company, and the Penobscot Water Works Company, the latter being in the adjoining Town of Veasey. Of all of these companies Laughton was president and Clergue a director.

An amalgamation or consolidation scheme had been brought about by the formation of a new company, the Public Works Company, to which the property of these several companies, amounting to about two million dollars, had been transferred. Of this company Laughton was also president and Clergue a director, one Wardell being treasurer.

The Public Works Company were in June, 1891, engaged in constructing large works at the hydraulic plant midway between the town of Bangor and the town of Oldtown; and on June 1st, 1891, a pay day was approaching when the funds of that company in hand were not sufficient to meet the whole pay-roll. Clergue went to Bugbee, the original plaintiff, and applied for a loan of $1,500 to the Public Works Company expressly for the pay-roll—to meet the pay-roll on the coming Saturday at the works then going on. Bugbee gave his cheque for $1,500 on the Eastern Trust and Banking Company payable to Laughton &

(1) 27 Ont. App. R. 96 *sub nom. Bugbee* v. *Clergue.*

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Clergue; handed this cheque to Clergue, who took it down to Wardell, the treasurer of the Public Works Company, indorsed it over and delivered it to Wardell with instructions to credit Bugbee with the $1,500 in the books of the Public Works Company, which was done. This money was used by the Public Works Company to meet the pay-roll.

A few days afterwards, Bugbee came to the office of Laughton & Clergue and asked for a guarantee from Laughton & Clergue for the repayment of the loan, and it was then arranged that the note of Laughton & Clergue should be given for this purpose; it was also arranged that $5,000 stock in the Bangor Street Railway Company belonging either to the Public Works Company or one of the consolidating companies, should be given as collateral security to Bugbee. The stock was accordingly delivered to Bugbee and the note given. The note became due and Bugbee refused to renew it; and Clergue heard no more about it till two or three years after, in 1894.

Clergue came to Sault Ste. Marie, Ontario, in the fall of 1894, and has resided there ever since.

Waiting till Clergue had been out of the country for a year, Bugbee on the 15th August, 1895, issued a writ out of the Supreme Judicial Court of the State of Maine, against both Laughton and Clergue. Laughton admits service of this and of notice of trial, apparently assisting Bugbee. He subsequently "defaulted," not appearing or answering, and judgment was noted against him in January, 1896.

This writ was not served upon Clergue and no notice of it was ever given or came to him.

In 1897 Bugbee issued a writ against Clergue in the High Court of Justice for Ontario indorsed with a claim on the judgment recovered in Maine. The statement of claim in said action contained a count

claiming also on the original debt, namely, the promissory note given by Laughton & Clergue when the loan was effected.

At the trial the plaintiff, Bugbee, recovered on both the note and the judgment. The Court of Appeal affirmed this judgment as to recovery on the note but reversed it as to the judgment.

Riddell Q.C. for the appellant. By the writ the action is on the judgment only and the statement of claim cannot give plaintiff another and separate action. *Ker* v. *Williams* (1); *United Telephone Co.* v. *Tasker* (2); *Lancaster* v. *Moss* (3). Moreover, the note is merged in the judgment.

If the note can be sued upon, it can only be as of the date of issue of the statement of claim and it is barred by pre-emption. *Dumble* v. *Larush* (4); *Chard* v. *Rae* (5).

Wyld and *Osler* for the respondent, referred to *Large* v. *Large* (6); *Smythe* v. *Martin* (7); *Bullock* v. *Caird* (8).

The judgment of the Court was delivered by:

GWYNNE. J.—This appeal, we think, must be dismissed with costs.

Before the Judicature Act, a declaration in an action on a foreign judgment might contain counts upon the original consideration upon which the judgment was obtained, and the plaintiff failing to prove the judgment, might recover on the original consideration. We do not think the Judicature Act which requires the cause of action to be briefly stated on the writ of summons, and the fact, that on the writ of summons, in this case, was indorsed a statement that the plaintiff's claim

(1) 30 Sol. Jour. 238.
(2) 59 L. T. 852.
(3) 15 Times L. R. 476.
(4) 25 Gr. 552.
(5) 18 O. R. 371.
(6) [1877] W. N. 198.
(7) 18 Ont. P. R. 227.
(8) L. R. 10 Q. B. 276.

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was on a judgment recovered in the Supreme Court of the State of Maine, for a sum stated, have the effect of preventing the plaintiff inserting in his statement of claim a count as formerly upon the original consideration.

To the statement of claim, which declared upon the judgment and also a note which was the original consideration, the defendant pleaded to both claims. As to the note he pleaded the statute of limitations and as to that plea must fail, unless he should succeed in establishing, as he contends, that the date of the commencement of the action, as regards the claim upon the note, must be the day of filing the statement of claim and not the day of issue of the writ of summons.

We do not think that this contention can prevail, the sole effect of which could be to bar a claim which appears to be quite just. But, apart from consideration of the effect of such contention prevailing, we do not think it well founded.

Then, as to the merits of the claim on the note, we are not troubled with considering the point so much urged at the trial and before us as to what the law is in the State of Maine as to the liability of guarantors of the debt of another, or as to what is the difference between the liability of guarantors and of sureties, for we have no difficulty in holding, upon the evidence, that the makers of the note sued upon, namely the defendant and his law partner, were the sole principals in the transaction.

The contention of the defendant was that the advance was made to a company whose guarantor only the defendant was, and that by the law of Maine a guarantor cannot be sued until his principal is put in default, but he himself admitted that it was he who applied for the loan for which the note was given—that his partner was president and he himself a

director of several companies, the consolidation of all which into one he was then engaged in promoting. It was, as the lender (of whose will the present plaintiffs are executors) in his lifetime testified, to assist the defendant in promoting the consolidatien in which he was engaged that the advance was made to him, and it was to secure payment of this loan that the note sued upon was made. Now, whether the consolidation so in promotion did take place and if so when, matters not, for when the loan was made at the defendant's request, the consolidated company was not in existence, and so could not have become the principal debtor, but whether it was to the consolidated company or to one of the several companies the consolidation of which the defendant was engaged in promoting that the defendant now contends the advance was made the evidence fails to show that the testator (whose executors the plaintiffs are) who advanced the money into the hands of the defendant and received the note as his sole security ever dealt with any company or with any other persons than the makers of the note, as principals in the transaction. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. C. Hamilton.*

Solicitors for the respondents: *Beatty, Blackstock, Nesbit, Chadwick & Riddell.*

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*Nov. 5.

*Nov. 13.

H. P. ECKARDT & CO., (PLAINTIFFS)....APPELLANTS;

AND

THE LANCASHIRE INSURANCE CO., (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fire insurance—Statutory conditions—Variations—Co-insurance.

The co-insurance clause printed as a variation from the statutory conditions in a policy of insurance against fire, requiring the insured in consideration of a reduced premium to keep the property covered by other policies to at least 75 per cent of its value, will not be pronounced unjust and unreasonable within the meaning of sec. 115 of the Ontario Insurance Act (R. S. O. [1887] ch. 167.)

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the defendant company.

The question for decision of the appeal is stated in the above head-note and in the judgment of the court.

Lash Q.C. for the appellants. The court must decide, from all the circumstances whether or not the condition is just and reasonable. See *Smith* v. *City of London Ins. Co.* (3); *May* v. *Standard Ins. Co.* (4).

The condition is eminently unreasonable. *McKay* v. *Norwich Union Ins. Co.* (5); *Graham* v. *Ontario Mutual Ins. Co.* (6).

Creelman Q.C. and *MacInnes* for the respondent.

The judgment of the court was delivered by:

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

(1) 27 Ont. App. R. 373.
(2) 29 O. R. 695.
(3) 14 Ont. App. R. 328; 15 Can. S. C. R. 69.
(4) 5 Ont. App. R. 605.
(5) 27 O. R. 251.
(6) 14 O. R. 358.

GWYNNE J.—The respondent, being a fire insurance company, doing business in the Province of Ontario, has two forms of printed policies in use, both framed in the form prescribed by the Ontario Insurance Act, (ch 167, R. S. O. 1887) the one being for insurance with the clause known as the "co-insurance" clause and the other not having such clause. The premium charged in the case of insurance effected on a policy having the clause is twenty per cent less than that charged on insurance in the other form. Parties insuring may select in which form a policy shall be entered into with them. Now in section 114 of the above Act, it is enacted that:

> The conditions set forth in this section shall as against the insurers be deemed to be part of every contract whether sealed, written or oral of fire insurance hereafter entered into or renewed or otherwise in force in Ontario with respect to any property therein or in transit therefrom or thereto and shall be printed on every such policy with the heading *statutory conditions;* and no stipulation to the contrary or providing for any variation, addition or omission shall be binding on the assured unless evidenced in the manner prescribed by sections 115 and 116.

Upon the second of January, 1896, the respondent entered into a policy with the plaintiffs which contained the *co-insurance* clause under the heading of "variations in *conditions*" as prescribed by the Act and in every particular in the precise manner prescribed by the sections 115 and 116.

Upon this clause being so introduced into the policy it became part of the contract of insurance contained in the policy to the same extent precisely as the statutory conditions indorsed on the policy would have been if no alteration had been made therein.

It is quite unimportant whether the alteration so introduced into the contract was of the character of a variation in any particular statutory condition or an addition to the statutory conditions, and the clause,

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having been introduced into the contract of insurance in the precise manner prescribed by the Act, became part of the contract, unless it should be pronounced to be unjust and unreasonable by the court or judge before whom a question should be tried relating thereto.

The clause then being so introduced into the policy, if it should be pronounced to be unjust and unreasonable, the effect would be that either the policy contained no contract or, as the appellants contend, one subject to the statutory conditions only, and so the plaintiffs, the now appellants, could recover a sum largely in excess of the amount upon which they had paid a premium upon a policy which they had held for sixteen months without objection.

The clause objected to has been in use in fire insurance companies in several countries on the continent of Europe, in England and in the United States for upwards of fifty years and is daily coming more into use and we can see no substantial reason or suggestion why it should be pronounced to be unjust or unreasonable.

There is no foundation for the contention that every variation from a statutory condition or addition thereto should be, *primâ facie*, held to be unjust and unreasonable.

In fine, with the reasoning of the learned Chief Justice Meredith, who tried the case, we entirely concur.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Blake, Lash & Cassells.*

Solicitors for the respondent: *McCarthy, Osler, Hoskin & Creelman.*

THE GENERAL ENGINEERING COMPANY OF ONTARIO, (PLAINTIFF) ..... APPELLANT;

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*Oct. 2, 3, 4.
*Dec. 7.

AND

THE DOMINION COTTON MILLS COMPANY AND THE AMERICAN STOKER COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent of invention—Option as to priority—Expiration of foreign patent—Construction of statute—R. S. C. c. 61, s. 8—55 & 56 V. c. 24, s. 1.

Under the provisions of the eighth section of "The Patent Act" as amended by 55 & 56 Vict. ch. 24, sec. 1 (D.), it is only in the case of the applicant exercising the option of obtaining a foreign patent before the issue of a Canadian patent for his invention that the Canadian patent shall expire by reason of the expiration of a foreign patent in existence at the time the Canadian patent is granted.

Where several applications are made in different countries upon the same day, the applicant cannot be said to have exercised an election to obtain any one patent before obtaining another.

APPEAL from a judgment of the Exchequer Court of Canada (1) upon a second trial, dismissing the plaintiff's action with costs.

The action is for infringement of letters patent of invention and at the first trial judgment was rendered, on the 14th June, 1899, in favour of the plaintiff (2). An order for a new trial was made and leave granted to amend the statement of defence by adding an allegation that prior to action the patent had expired by reason of the expiration of two foreign patents for the

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

(1) 6 Ex. C. R. 357. (2) 6 Ex. C. R. 306.

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same invention Upon the second trial the judgment now appealed from was rendered dismissing the action.

The questions at issue upon the present appeal are set forth in the judgment of His Lordship Mr. Justice King, now reported.

Riddell Q.C. and *J. L. Ross* for the appellant.

Macmaster Q.C. and *F. S. Maclennan Q.C.* for the respondents.

TASCHEREAU J.—I dissent from the judgment allowing this appeal.

GWYNNE J.—I concur in allowing this appeal for the reasons stated in the judgment of Mr. Justice King.

SEDGEWICK J.—I concur in the judgment allowing this appeal for the reasons stated in the judgment prepared by Mr. Justice King.

KING J.—This is an appeal by the plaintiff from the judgment of the Exchequer Court (1) in an action for infringement of letters patent, no. 40,700 granted for a boiler furnace.

Judgment for the plaintiff was given on June 14th, 1899, upholding the invention and establishing the alleged infringement. Subsequently an order for a new trial was made, and on May 7th, 1900, judgment was given dismissing plaintiff's action upon the ground that the patent had expired at the date of the alleged infringement.

The Canadian patent (no. 40,700) was applied for on March 1st, 1892, and was granted October 15th, 1892.

On the same day on which the Canadian patent was applied for, viz., March 1st, 1892, applications were

(1) 6 Ex. C. R. 357.

made for an Italian and also for a British patent. The Italian patent, or as it is termed in Italy, certificate of industrial privilege, was granted March 19th, 1892, and was for the period of six years with option to renew upon payment of fees. The British patent was granted on July 12th, 1892, and was for the term of fourteen years.

It was held that the Canadian patent had expired at and before the time of the alleged infringement, by reason of the fact that the foreign patents, or one of them, existing at the time of the granting of the Canadian patent had expired, in the case of the Italian patent by lapse of time, and in the case of the English patent for non-payment of fees. The provision of the Canadian Act is that

if a foreign patent exists, the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires.

The Canadian Act in force at the time of the application for the patent was the Revised Statutes of Canada, ch. 61, sec. 8 of which is as follows:

8. No inventor shall be entitled to a patent for his invention if a patent therefor in any other country has been in existence in such country for more than twelve months prior to the application for such patent in Canada; and if during such twelve months, any person has commenced to manufacture in Canada the invention for which such patent is afterwards obtained, such person shall continue to have the right to manufacture and sell such article notwithstanding such patent; and under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires.

After the application for the Canadian patent, but before it was granted, viz. on 9th July, 1892, section eight of chapter 61 of the Revised Statutes of Canada was repealed (1) and the following substituted therefor:

(1) 55 & 56 Vict. ch. 24, s. 1.

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8. Any inventor who elects to obtain a patent for his invention in a foreign country before obtaining a patent for the same invention in Canada, may obtain a patent in Canada if the same be applied for within one year from the date of the issue of the first foreign patent for such invention; and if within three months after the date of the issue of a foreign patent, the inventor gives notice to the commissioner of his intention to apply for a patent in Canada for such invention, then no other person having commenced to manufacture the same device in Canada during such period of one year shall be entitled to continue the manufacture of the same after the inventor has obtained a patent therefor in Canada without the consent and allowance of the inventor; and, under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires.

It has already been held in *Dreschel* v. *The Auer Incandescent Light Manufacturing Co.* (1) that the words "if a foreign patent exists," and the words "any foreign patent" in the last clause of these two sections, (which as to this is alike in both) relate only to such foreign patents as exist at the time of the grant of the Canadian patent.

In that case, the foreign patent, whose expiry was alleged to work the expiration of the Canadian patent, was granted after the granting of the Canadian patent, and hence it was sufficient for that case to make the distinction there made between foreign patents obtained before the Canadian grant and those obtained subsequent to it.

It is contended for the appellant that the class of foreign patents dealt with by the earlier part of the section is the class of foreign patents obtained prior to the application for the Canadian patent, and that therefore it is not unreasonable, according to the principle of construction adopted in *The Auer Light Co.* v. *Dreschel* (1) to treat the concluding clause as having reference to that class of foreign patents.

(1) 28 S. C. R. 608; 6 Ex. C. R. 55.

It may however be urged in reply that the section is dealing with foreign patents existing at the time of the Canadian grant and that the reference to the time of application is only for the fixing of a period in a way to admit of the doing of a necessary act in obtaining the Canadian grant; but whatever ambiguity might exist on the words of the clause in the Revised Statutes, it seems that it is removed, (without effecting substantial alteration upon this point,) by the words of the Act of 1892 passed before the issue of the grant in question.

The Act of 1892 lays stress upon the election of the inventor to obtain the foreign grant before the Canadian one. The enactment presents the case of an inventor who may seek, either a Canadian patent alone, or a foreign patent in one country or in several countries, as well; and it assumes that he elects to obtain a foreign patent before obtaining a Canadian patent, and it further assumes that he may have elected to obtain several foreign patents before obtaining a Canadian patent. Now the enactment is that this does not prevent him seeking the Canadian patent as well, if he applies for it within a year from date of the earliest of the foreign patents that he may have obtained. As has been said, stress is laid upon the election of the inventor to obtain a foreign patent, or foreign patents, in priority to the Canadian, and upon his succeeding in his attempt. Now where (as here) several applications are made on the same day, the inventor cannot know which (if any) will be first obtained; and so he cannot be said to have exercised an election to obtain any one before obtaining another. It is wholly a matter of administration in the several offices whether any patent shall issue at all, or when it shall issue in any given case Hence, if the concluding part of the section is to be construed by reference to

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its earlier part, the proper distinction is not one drawn between foreign patents granted before the granting of the Canadian patent and those granted afterwards during the currency of the latter, but is between foreign patents *elected to be obtained* (and actually obtained) before obtaining the Canadian patent, and foreign patents not so elected to be obtained and, consequently, between foreign patents elected to be obtained (and obtained) prior to the application for the Canadian patent and foreign patents afterwards obtained

As a matter of course the foreign patent must continue to exist down to the time of the grant of the Canadian patent, for it is manifestly only with regard to such that there could be any question.

If the enactment were clear beyond question, the consequences would be immaterial, but being open to construction in more than one sense, it seems proper to add that upon any other construction than that adopted, the inventor's rights would appear to be varied according to the greater or less degree of promptness amongst the officials of the respective patent offices.

The ground, therefore, upon which the learned judge vacated his original judgment fails and such judgment is to be maintained.

GIROUARD J.—I dissent from the judgment in this case.

Appeal allowed with costs.

Solicitors for the appellant: *Rowan & Ross.*

Solicitors for the respondents: *Macmaster, Maclennan & Hickson.*

THE UNION COLLIERY COMPANY..APPELLANT; 1900

AND *Oct. 22.
*Dec. 7.

HER MAJESTY THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Criminal law—Manslaughter—Indictment against body corporate—Crim. Code, s. 213—Fine.

Under sec. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control.

The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment.

As sec. 213 provides no punishment for the offence the common law punishment of a fine may be imposed on a corporation indicted under it.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the conviction of the appellant company on a case reserved.

The company was indicted for unlawfully causing the death of certain persons by neglecting to properly maintain a bridge over which certain trains were run when a train broke through. At the trial a verdict of guilty was entered and a case was reserved for the opinion of the Court of Appeal on the question whether or not the indictment would lie against a corporation. The reserved case is set out in the judgment of Mr. Justice Sedgewick speaking for the majority of the court.

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

(1) 7 B. C. Rep. 247.

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Aylesworth Q.C. for the appellant.

Christopher Robinson Q.C. for the respondent.

TASCHEREAU J. took no part in the judgment.

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

SEDGEWICK J.—This is an appeal from a judgment of the Supreme Court of British Columbia, upon a reserved case stated by Mr. Justice Walkem for the consideration of the court, the defendants having been convicted and sentenced to pay a fine of $5,000. Upon the appeal the court was equally divided. The following is the reserved case:

The defendants were tried and convicted at the fall assizes, at Victoria, before the Honourable Mr. Justice Walkem and a jury, under the following indictment:

CANADA: PROVINCE OF BRITISH COLUMBIA, COUNTY OF NANAIMO, CITY OF NANAIMO. } The jurors for our Lady the Queen present that the "Union Colliery Company of British Columbia, Limited Liability," is a company duly incorporated under the "Companies Act, 1878," for the purpose, amongst other things, of acquiring coal lands in the Province of British Columbia, of extracting the coal therefrom, and of erecting and using tramways and roadways necessary for transporting said coal from the mines to the place of shipment.

The jurors aforesaid do further present that the said company, pursuant to the said powers, have for a long time past been mining coal near Union, in the County of Nanaimo, in the Province of British Columbia, and have been transporting said coal from said mines to Union Wharf, in said county, the place of shipment thereof, along a tramway or railway, in cars drawn by locomotives.

The jurors aforesaid do further present that the said tramway or railway is about ten miles in length, and that for some time past the company has been carrying passengers as well as hauling coal on said tramway or railway, between said points.

The jurors aforesaid do further present that the said tramway or railway, on the day and year hereinafter mentioned, was carried across the valley of the Trent River by trestle-work and a Howe truss bridge erected several years prior to said date, which truss bridge was about one hundred and thirty-three feet in length, and about

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ninety-five feet above the bed of the said river, and that the said trestle-work and truss bridge were maintained by the said company.

The jurors aforesaid do further present that in the absence of reasonable precaution and care the said Howe truss bridge might endanger human life, and that the said company were under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger.

The jurors aforesaid do further present that the said company unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining the said Howe truss bridge, and that on the seventeenth day of August, in the year of our Lord one thousand eight hundred and ninety-eight, a locomotive engine and several cars, then being run along said tramway or railway and across said Howe truss bridge by said company, broke down said Howe truss bridge, owing to the rotten state of the timbers thereof, and were precipitated into the valley of the Trent River, thereby causing the death of Alfred Walker, Richard Nightingale, Walter Work, Alexander Mellodo, K. Nanko (Japanese), and Osana (Japanese), who were then on said cars and locomotive, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, Her Crown and dignity.

The question reserved for the opinion of the court is:—Will the indictment lie against a corporation? If this question be answered in the negative, the conviction is to be quashed; otherwise, the conviction is to stand.

A verdict of guilty having been found against the defendants upon the indictment above set out, we must assume that all the facts therein stated are correct. And they are substantially as follows: The company in pursuance of its corporate powers had for a long time past been operating a railway for the purpose of transporting coal from their mines to a place of shipment by means of locomotives, and whether in pursuance of their *corporate* powers or not, they, as a matter of fact, were engaged in the carrying of passengers, holding themselves out as common carriers by railway. The road crossed the Trent River by means of a bridge 130 feet in length and 90 feet above the river bed. The company neglecting to use reasonable care in maintaining the bridge so that it

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became unsafe, ran a train carrying passengers across it, which train broke through owing to the rotten state of its timbers, causing the death of six persons then being on the train. And the sole question for our consideration is whether these facts constitute a criminal offence, whether by statute or at common law.

It was at one time thought that a private corporation could not commit torts or be held liable for the wrongful acts of its officers or agents, but this view has long since been exploded. A similar notion obtained in early times as to the criminal liability of a corporation, but it has long since been settled that they are liable to indictment for non-feasance, or for negligence in the performance of a legal duty. It was not until 1846 that their liability for misfeasance or active negligence was determined to be subject to like proceeding. In the case of *The Queen* v. *The Great North of England Railway Co.* (1), in 1846, Lord Denman C.J. in delivering the judgment of the court, said, at p. 325:

> The question is, whether an indictment will lie at common law against a corporation for a misfeasance, it being admitted, in conformity with undisputed decisions, that an indictment may be maintained against a corporation for non-feasance. * * * * But the argument is, that for the wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming in the first place, that there is a plain and obvious distinction between the two species of offence.
>
> No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to more negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If A. is authorised to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it?

(1) 9 Q. B. 315.

But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission.

This case has been followed on many occasions, and cited with approval in the House of Lords. In the case of *Whitfield* v. *South Eastern Railway Co.* (1), Lord Campbell held that a railway company might be sued for a malicious libel, and in the course of his judgment says:

The ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails. But, considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation. The authorities are connected and commented upon in *Regina* v. *Great North of England Railway Company* (2), in which it was held that a corporation aggregate may be indicted for cutting through and obstructing a public highway.

And in the *Pharmaceutical Society* v. *London & Provincial Supply Association* (3), Lord Blackburn says, at p. 869:

I quite agree that a corporation cannot in one sense commit a crime —a corporation cannot be imprisoned, if imprisonment be the sentence for the crime; a corporation cannot be hanged or put to death if that be the punishment for the crime; and so, in those senses a corporation cannot commit a crime. But a corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said, upon the supposition that a body corporate, or a corporation that incorporated itself for the purpose of pub-

(1) E. B. & E. 115. (2) 9 Q. B. 315.
(3) 5 App. Cas. 857.

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lishing a newspaper could not be tried and fined, or an action for damages be brought against it for libel; or that a corporation which commits a nuisance could not be convicted of the nuisance or the like. I must really say that I do not feel the slightest doubt upon that part of the case.

From these authorities it is manifest that a corporation can render itself amenable to the criminal law for acts resulting in damage to numbers of people, or which are invasions of the rights or privileges of the public at large, or detrimental to the general well being or interests of the state. It appears to me perfectly clear that the offence set out in the declaration comes within this description. A public franchise was granted to the defendants to maintain and operate a railway between two certain points. They were possibly under no obligation to accept the charter, but having once accepted and acted upon it, they were under an obligation to exercise proper care and diligence in the performance of their corporate powers. Holding themselves out, as we are bound to assume they did, as public carriers, they were bound to carry their passengers safely. Even as carriers not of passengers, but of freight, carrying on their business by means of trains and locomotive engines, they were, in my view, equally bound to see to the safety and protection of their employees. Whether the persons alleged in the indictment to have been killed were employees or passengers does not appear, but whether passengers or employees, the company defendants were under an equal obligation to both, and the offence committed was an offence not so much against individual right or against people in their private capacities, but against the public at large, and therefore, in the public interest, indictable.

The learned Chief Justice has stated that the question to be determined is whether or not the company is liable to punishment under any section of the Code. Or,

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(I add) at common law. It has never been contended that the Criminal Code of Canada contains the whole of the criminal common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force. As stated by a text writer

> we can always separate the offence from the punishment. So that for example a statute which provides a new punishment for an old offence, repeals by implication only so much of the prior law as concerns the punishment, leaving it permissible to indict an offender either under the old law, whether statutory or common, and inflict upon him, upon conviction, the punishment ordained by the new, or under the new statute at the election of the prosecuting power. The offence and punishment, therefore, may be defined by different laws; and so, as we have seen, if a statute simply creates an offence, the common law punishment may by implication be imposed. Bishop on Statutory Crimes, 2 ed. p. 166.

But the ground of offence set out in the declaration has, it is clear, been dealt with by the Code, and the indictment is evidently framed, the prosecuting officer having them before him, under the provisions of section 213, which is as follows:

> Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to avoid such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

This article I take to be a mere statutory statement of the common law, neither abridging nor enlarging it in any respect. It is true this section has no penal

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provision attached to it; it does not state what the consequences shall be if the offence therein specified has been committed; but it clearly covers the offence specified here. The defendants have in their charge and under their control, and they maintain, a railway the running and operation of which without precaution or care must necessarily involve danger to human life. They were therefore under a legal duty to take precautions against such danger. They disregarded this duty. The anticipated event occurred and they are criminally responsible for it. It is not, I think, necessary to search through other provisions of the Code to find a penalty. The common law, in the case of a corporation, prescribed it—a fine. And the indictment is properly framed and the verdict found, and the fine imposed, both under it and the common law together.

It was, however, contended, that "every one" at the beginning of the section, does not include a corporation. I think it does. Section 3 (*t*) states:

> The expressions "person," "owner," and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts, in relation to such acts and things as they are capable of doing and owning respectively.

"Everyone" is an expression of the same kind as "person," and therefore includes bodies corporate unless the context requires otherwise. There is no doubt that the expression "every one" is, whether in a legal or popular sense, a wider term than the word "person," and in the case of *Pharmaceutical Society* v. *London and Provincial Supply Association* (1), already referred to, the Lord Chancellor (Lord Selborne), says:

> There can be no question that the word "person" may, and I should be disposed myself to say *primâ facie* does, in a public

(1) 5 App. Cas. 857.

statute, include a person in law; that is, a corporation, as well as a natural person. * * * *

That if a statute provides that no person shall do a particular act except on a particular condition, it is *primâ facie*, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject matter, to exclude that construction) to understand the legislature as intending such persons, as, by the use of proper means, may be able to fulfil the condition; and not those who, though called "persons" in law, have no capacity to do so at any time, by any means, or under any circumstances, whatsoever.

Applying this rule to the present case, inasmuch as criminal offences committed by corporations are for the most part offences confined to the class in question in the present case, namely, cases arising from dereliction in the performance of public duty, at all events, offences as possible and likely to be committed by artificial as by natural persons, there can be no reason, that I can see, why a corporation should not be included in the phrase "every one." The article is a statement of general principle of criminal law, applicable to the whole world, and binding as much upon corporations as upon individuals.

Several sections of the Code were cited to us at the argument, as including within their purview the offence described in the indictment. If I am correct in the view I have taken of section 213 above cited, the offence described in the indictment comes within arts. 191 and 192, where the offence of a common nuisance is described and its punishment provided for, the first section being a mere statement of the common law in regard to criminal nuisance. Whether it does not also come within sections 251 and 252 may be open to argument, although I am strongly inclined to the view that where the Code specifies an offence and provides for the punishment by imprisonment only, it does not necessarily follow that a corporation

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may not be indicted and fined for the offence so described. It is not, however, necessary to determine that point here.

It is further argued that as the indictment disclosed a case of manslaughter, and as (as is stated) an indictment will not lie against a corporation for manslaughter, the conviction was not maintainable. It is possible that the facts alleged in the indictment would be sufficient to sustain an indictment for manslaughter against an individual, but the offence alleged in the indictment here is not the manslaughter; it is criminal negligence in the discharge of duty. The killing is not alleged as the offence, but merely the consequence of the offence. In an indictment for manslaughter it is at least necessary to charge manslaughter as the crime—to allege that the defendants "unlawfully did kill and slay, &c." or "did commit manslaughter," allegations wholly absent in the present case. It is not, therefore, necessary here to express any opinion as to whether or not under the present state of the law and its constantly broadening and widening jurisprudence on the subject of the civil and criminal liability of bodies corporate, they are capable of committing the offence.

KING J. (dissenting).—I am of opinion that the question stated in the reserved case should be answered in the negative, with the result that the appeal should be allowed and the conviction quashed.

Appeal dismissed.

Solicitors for the appellant: *Davie, Pooley & Luxton.*

Solicitor for the respondent: *H. A. Maclean.*

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THE SUN LIFE ASSURANCE COMPANY OF CANADA, (PLAINTIFF)..... APPELLANT.

*Oct. 23.
*Dec. 7.

AND

ELLEN ELLIOTT (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Voluntary conveyance of land—13 Eliz. c. 5 (Imp.)—Solvent vendor—Action by mortgagee.

A voluntary conveyance of land is void under 13 Eliz. ch. 5 (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made if it results in denuding him of all his property and so rendering him insolvent thereafter.

A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realizing his security.

Judgment of the Supreme Court of British Columbia (7 B. C. Rep. 189) reversed, Gwynne J. dissenting.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the defendant.

The facts of the case are fully stated in the judgments published herewith.

Aylesworth Q.C. and *Wilson Q.C.* for the appellant.

Dockrill for the respondent.

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

SEDGEWICK J.—Henry Elliott, in his lifetime, carried on business at New Westminster, B. C., acquiring sufficient money to enable him to retire from business about

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

(1) 7 B. C. Rep. 189.

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five years before his death, which occurred on the 7th November, 1896. On the 6th January, 1892, he, together with one Benjamin Douglas, borrowed $45,000 from the plaintiff company with interest at 7 p. c. payable half yearly, the principal to be paid by instalments of $2,000 each on the 1st of January in the years 1893, 1894, 1895, 1896, and the balance on the 1st January, 1897. On the 29th September, 1892, he, Elliott, borrowed the further sum of $12,000 from the plaintiffs, a mortgage being taken therefor on a portion of a certain island called Annacis Island on the Fraser River, and containing about 905 acres. Interest at 8 p. c. was payable half yearly, and the principal was to be repaid in instalments of $500 each on the 1st days of July in the years 1893, 1894, 1895 and 1896, and the balance, $10,000, on the 29th September, 1897. At the time of the execution of these mortgages Elliott was a man of good standing and repute financially, and was the owner not only of the property mortgaged but of several other valuable lands, and at the end of the year 1892 had at his credit in cash in the Banks of Montreal and British Columbia at New Westminster, the sum of $11,788.53. The evidence leads to the conclusion that in the year 1892 there was an undue inflation in the value of real estate in British Columbia, and it was conclusively established that from 1892 to 1896 there was an enormous and steadily increasing depreciation. In the years 1892 and 1893 the deceased, Elliott, duly paid the interest and taxes upon the mortgaged property, the taxes amounting to several thousands of dollars having since been paid by the plaintiffs as mortgagees. In the year 1894 Elliott withdrew from his accounts in the banks large sums of money, placing the same to the credit of his wife in the same banks, the result being that while at the time of his death he had but a very small sum to his credit in the

bank, his wife had $7,330.60. This was not, however, the full extent of his generosity. Between the 10th February and the 10th December, 1894, he conveyed the whole of his real estate (except perhaps his equity of redemption in the mortgaged lands), amounting in value to $27,500 to his wife and daughter, without valuable consideration, thereby practically denuding himself of all his real property, so that at the time of his death in November, 1896, all that came into the hands of his administrator was the sum of $71.82, and the liabilities, including the two mortgages to the plaintiffs, being between $50,000 and $60,000. This suit is brought to have the voluntary conveyances made by Elliott to his wife and daughter declared void under the statute 13 Elizabeth c. 5. The plaintiffs recovered judgment against the administrator on the 17th August, 1897, for $13,467.20 and costs $21.73, and an administration order was duly made by which it was declared that the estate was insolvent.

Upon the trial of the case before the learned Chief Justice of British Columbia, the action was dismissed as against the defendant, Ellen Elliott, widow of the deceased, but the plaintiffs recovered judgment against the daughter, which judgment affects but a very small portion of the land covered by the impeached conveyances. From this judgment an appeal was taken to the Supreme Court of British Columbia, two of the learned judges dismissing the appeal upon a technical ground to which I will refer hereafter, and the dissenting judge being of the opinion that the appeal should be allowed. I entirely agree with him upon the merits of the case.

It may willingly be admitted that the deceased at the time he executed the mortgages in question was in a perfectly solvent condition. There is no doubt of that, nor is there any doubt but that he was in a per-

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fectly solvent condition before he made the conveyances and gifts of money to his wife and daughter in 1894. But it is equally clear, and the learned trial judge admits, that the effect of these gifts and transfers, assuming that they were regular and legal, was to create the deceased an insolvent thereafter. While there were two enormous mortgage debts outstanding against him and after he had ceased to pay the instalments and interest thereon, and when he must have been conscious that the lands held by the plaintiffs as security for their loan were rapidly decreasing in value, and in all probability no longer affording sufficient security to enable the Company to realize its loan from them alone, he voluntarily and deliberately presents to his wife and daughter the whole of his remaining property, denuding himself of everything and depriving his creditors, the mortgagees, of any practical remedy they might have against him upon his personal covenant, and leaving them to their remedy against the mortgaged lands alone. I cannot conceive a more glaring infraction of the Statute of Elizabeth than this case affords, opposed as the conduct of the deceased was to the elementary principles of justice and common sense. The learned trial judge seems to have given judgment in favour of the widow because, as he thought, at the time of the transactions impeached, the deceased was solvent and therefore in a position to make a voluntary conveyance. He admits that after the conveyances and gifts he was insolvent; that at the time of his death he was insolvent; and he shut off during the trial further evidence as to the depreciation of the real estate in question since the execution of the original mortgages, but appears to have lost sight of the principle that where at any time a person is solvent and then makes a voluntary conveyance the effect of which is to make him insolvent, the settle-

ment is void, and that too, no matter what the intent of the settlor was.

Lord Hatherley, in the leading case of *Freeman* v. *Pope*, (1) lays down the principle as follows at p. 541:

> In *Spirett* v. *Willows* (2) the settlor, being solvent at the time, but having contracted a considerable debt which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.

And that case has been followed in this court on several occasions. So much for the main question. If there ever was a case where a man's generosity was at the expense of his justice it is the present case, and equity demands that so much of the subject matter of his generosity as will be sufficient to discharge his debts should be restored to his estate.

But it is said that inasmuch as the plaintiffs are mortgage creditors, they are not creditors within the statute of Elizabeth, and cannot bring this action. I do not think that the mere fact of a creditor having something in pawn, or pledge, or hypothec or mortgage, destroys his character as creditor, or deprives him of the right which the statute gives a creditor. If, however, he is a *secured* creditor, if he has sufficient of the assets of the debtor in his hands to fully cover

(1) 5 Ch. App. 538. (2) 3 De G. J. & S. 293.

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the indebtedness, then undoubtedly the statute was not intended for him, but for the general and unsecured creditors. The cases, at all events those by which we are bound, assume when dealing with the question of secured creditors that the security is ample for its purpose. But the authorities show, as May points out, (2 ed. p. 164),

> that if the property mortgaged is not sufficient to satisfy the debt (as is the case here), the mortgagee of course will be a creditor for the balance.

An Ontario case, *Crombie* v. *Young* (1), was cited as authority for the proposition above referred to, but that case is altogether different from this.

In that case it was shewn that at the time of the impeached transaction, a donation from a husband to his wife, the settlor was perfectly solvent after the conveyance, still possessing other lands and a large interest in the mortgaged property, far in excess of the mortgage. And it was held, whether rightly or wrongly, that under these circumstances, any intent to hinder or delay could not be imputed to him. As already shown the facts here are the reverse of those in *Crombie* v. *Young* (1). At the time of the impeached conveyances (and all evidence of intent except at that particular time is irrelevant), the mortgaged lands were probably wholly insufficient to pay the mortgage debt, and the voluntary conveyances themselves forever precluded the settlor from having any means of making up the shortage.

No authority was cited to us to show that before a creditor, having admittedly insufficient security, can bring suit under the statute of Elizabeth he must first realise his security. That question may properly be raised in an administration suit, but the mere fact of such non-realisation is not, in my view, a defence.

(1) 26 O. R. 194.

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Finally, the judgment of the learned trial judge dismissing the action against the defendant, Ellen Elliott, and setting aside the conveyance in favour of the defendant, Mary Logan, was entered on the 8th of May, 1899, and an appeal was taken from that judgment in due form on the 29th of May. Subsequently, the learned trial judge prepared a written statement of his reasons for judgments, these reasons, although prepared after judgment, forming part of the case, and as they are brief, I insert them here.

I am now told by the registrar that my reasons for judgment are desired on the part of the plaintiff for the purpose of an appeal.

There is some misunderstanding as to the position. Mr. Wilson, of counsel for the plaintiff, asked me during his argument upon authorities which he cited, to direct an issue as to the insolvency of the deceased at the time of the impeached transaction, *if* I should be of opinion that such insolvency was not sufficiently established.

I had a strong opinion during the trial that the evidence as to insolvency was not directed to the time in question sufficiently as between the plaintiff and Ellen Elliott, and I so intimated and upon further consideration I remained of this opinion.

But I informed counsel that I would direct an issue as requested in case the plaintiff was not satisfied to have judgment against Mary Logan with costs, and in favour of Ellen Elliott without costs.

These two defendants occupy different positions, and I think the destruction by Mrs. Elliott of the books of the deceased warranted the bringing of the action, although it did not appear that she was actuated by any improper motive in doing so.

Mr. Wilson, after taking time, stated in open court, during the sitting of the twenty-first of April last, that as I understood him, he elected to take judgment in the terms mentioned which were taken down by the registrar, and initialed by me, and judgment formally given accordingly.

I do not, for myself, see how the facts stated by the learned Chief Justice in any way can affect the rights of the plaintiff to appeal from the judgment previously rendered. If we are to accept the directions of their Lordships of the Judicial Committee of the Privy Council, who are inclined to treat judgments

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written, as the present was, after delivery, as ineffectual for any purpose whatever, this document should not have formed part of the case upon appeal, either to the court *en banc*, or to this court. *Brown* v. *Gugy* (1); *Richer* v. *Voyer* (2).

Mr. Wilson, of counsel for the plaintiff, was satisfied that no additional evidence upon the question of insolvency could be obtained, even if a reference were had, and to insist upon a reference would therefore be useless, and the matter remained there, the judge giving judgment in favour of Ellen Elliott, because, in his view the plaintiff had failed to establish a case against her and, against Mary Logan because they had succeeded in establishing a case against her. It was not a consent judgment in any case of the term, or a compromise. Mr. Wilson, counsel for the plaintiff, both in his factum and on the hearing of the appeal before us, repudiates the idea that there was any intention on his part of compromising. I have always understood a compromise to be a settlement where each party gives away to some extent at least. I can see nothing given away in the present case, either by the plaintiff to the defendant Ellen Elliott, or by her to the plaintiff.

The appeal should therefore be allowed with costs, together with all costs in the courts below, and judgment entered against the defendant Ellen Elliott setting aside, as against creditors, the conveyance in her favour set out in the amended statement of claim herein, with costs.

GWYNNE J. (dissenting).—This action was commenced by writ of summons issued out of the Supreme Court of British Columbia upon the 23rd day of

(1) 2 Moo. P. C. (N. S.) 341. (2) L. R. 5 P. C. 461.

August, 1897, against Ellen Elliott and Mary Logan as the defendants thereto.

In their statement of claim the plaintiffs allege that on the 29th day of December, 1892, one Henry Elliott (since deceased, the husband of the defendant Ellen Elliott, and father of the defendant, Mary Logan), executed to the plaintiffs an indenture of mortgage of certain lands therein mentioned for securing repayment to the plaintiffs of the sum of twelve thousand dollars then lent by the plaintiffs to the said Henry Elliott, together with interest thereon at the rate of eight per cent per annum. That upon the 19th of February, 1894, the said Henry Elliott conveyed to the defendant Ellen Elliott, his wife, certain lands and tenements in the province of British Columbia in the statement of claim mentioned, and that upon the 29th day of October, 1894, he conveyed to his daughter, the defendant, Mary Logan, certain lands in the statement of claim particlarly mentioned, also situate in the Province of British Columbia. That the said Henry Elliott departed this life insolvent on or about the 7th day of November, 1896, and that one Charles George Major had been appointed administrator of his personal estate and effects. That on the 17th day of August, 1897, the plaintiffs recovered judgment by default against the said administrator for the sum of $13,467.20, and $21\frac{73}{100}$ costs.

The statement of claim then contains the paragraph following:

The plaintiff company say that the said Henry Elliott being to the knowledge of the defendants at that time in insolvent circumstances, or unable to pay his debts in full, *and at the same time indebted to the plaintiff company in divers large sums of money, conveyed the said hereditaments to the defendants voluntarily and without consideration, and with intent to delay, hinder and defraud the plaintiff company* and other

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the creditors of the said Henry Elliott in the payment of their just debts.

And the statement of claim prayed that the said conveyances be declared to be void as *against the plaintiffs* and all other creditors of the said Henry Elliott.

Now this statement of claim is in the precise form of the ordinary claim of a creditor who has proceeded or is proceeding to judgment, to set aside a voluntary conveyance as executed with the intent to delay or defeat the particular creditor and all other creditors from obtaining the fruits of a judgment recovered or to be recovered. In such cases the court goes no further than to avoid the deed in the event of a proper case being established leaving the several creditors to proceed by execution upon their judgments when recovered. It does not do anything further to assist the plaintiff unless the case made by the bill is one seeking for special relief applicable to the circumstances of the particular case. The defendants denied all the averments in the plaintiff's statement of claim, thus casting on the plaintiffs the burthen of every averment necessary to be established to justify a judgment avoiding the impeached conveyances. They also respectively expressly denied the crucial averment that Henry Elliott was insolvent when the deeds to the defendants were respectively executed.

At the trial it appeared that the plaintiffs not only held the mortgage mentioned in the statement of claim (in respect of which the judgment by default mentioned in the statement of claim was recovered) but also that on the 6th January, 1892, the said Henry Elliott and one Benjamin Douglas had executed to the plaintiffs a mortgage on certain lands therein mentioned situate in the City of New Westminster in British Columbia, in security for repayment to the plaintiffs of $45,000 and interest thereon at the rate of 7 per cent.

per annum, at the days and times and in the manner in the said indentures of mortgage mentioned. We have not on the record before us copies of these mortgages but only a short statement of their respective dates, of the lands therein respectively mentioned and the amounts thereby respectively secured: but they, no doubt, contained the powers of sale and lease on default usually inserted in all mortgages in British Columbia. It appeared also that upon the land mentioned in the mortgage of the 5th January, 1892, there were erected valuable buildings which in the year 1893 were leased at the sum of ($600 00) six hundred dollars per month and that the plaintiffs have been for some time in possession of these buildings receiving as mortgagees in possession the rents issuing thereout. What rents they are receiving now they did not shew, but they did admit on cross-examination that in the interval between the 1st December, 1896, and the 1st July, 1898, they received as such rents the sum of $7,503.60. It was also extracted from a witness of the plaintiffs that the lands in that mortgage were in 1894 of the value of $65,000.00 and that the buildings thereon were insured to the amount of $40,000.00

Then as to the 905 acres in the mortgage in the statement of claim mentioned one witness called by the plaintiffs valued these lands at ($10) ten dollars per acre, while another also called by the plaintiffs testified that in 1884 and at the present time these lands were well worth from ($15.00 to $20.00) fifteen to twenty dollars per acre, thus shewing at the lowest of these two last sums or $15.00 per acre the whole 905 acres to be worth $13,575.00 and at the mean between the two sums, or $17.50 per acre to be worth $16,837.50.

In a case like the present impeaching conveyances upon the ground of fraud the plaintiffs have no right to claim that more reliance should be placed on the

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testimony produced by them which placed the value of the lands at $10.00 per acre than upon the testimony of the witness also put forward by them to speak to value and who valued the same lands as well worth from $15.00 to $20.00 per acre. We have thus the value of the mortgaged lands to be: That the lands in the mortgage of the 6th of January, 1892, were, and so far as appears in the evidence still are worth the sum of $65,000.00 and are insured for $40.000, while the lands in the mortgage, in the statement of claim mentioned, were in 1894 and still are worth from $13,575.00 to $16,837 50 against which it was also extracted from the plaintiffs' witness that upon the 10th of February and and the 29th of October, 1894, the dates of the execution of the respective conveyances which are impeached the total amount due upon *both* mortgages together was $52,570.00, and upon the 1st of November, 1895, after the decease of Henry Elliott the sum of $52,500.00, of which sum if we attribute $12,500.00 to the mortgage in the statement of claim mentioned would leave only $40,000.00 due on 1st November, 1895, upon the other of which no mention is made in the pleadings, the whole of which sum was also covered by insurance.

This was the whole of the material evidence given in the case; all else was irrelevant, save that the only debts shewn in the evidence to have existed at the time of the decease of Henry Elliott independently of the plaintiffs' mortgage securities was the sum of $22.05 for a gas account and some taxes which being secured by liens on the lands assessed cannot be taken into consideration upon a question arising under the statute 13 Eliz. c. 5.

Upon this evidence the only judgment which upon the whole current of the authorities was warranted even if the plaintiffs were persons competent to maintain the action as set out in the statement of claim

was a judgment dismissing the action with costs. *Lord Townshend* v. *Windham* (1); *Stephens* v. *Olive* (2); *Doe d. Garnons* v. *Knight* (3.)

In *Lush* v. *Wilkinson* (4), which was the case of a bill filed by a subsequent judgment creditor to set aside a post marriage voluntary settlement made by a husband in favour of his wife as void within 13 Eliz. c. 5, no antecedent debt was proved, but the plaintiff having asked for an inquiry as to antecedent debts Lord Alvanley dismissed the bill giving leave to file another.

Sir William Grant in *Kidney* v *Coussmaker* (5) referring to this case, said that as that bill had charged insolvency at the time of the execution of the voluntary settlement, and no proof was given of any debt in existence at that time,

the only reason for surprise was that Lord Alvanley did not absolutely dismiss the bill instead of giving leave to file another.

The only exception to the rule that a creditor subsequent to a voluntary deed can only set it aside upon proof of some antecedent debts or debt is if the evidence be such as to warrant the conclusion that the voluntary deed was executed with the design and intent of incurring future debts, and of defeating them by the voluntary deed. But we have here no such case. Moreover, as upon the appeal from the judgment of the learned trial judge the court offered the plaintiffs an inquiry as to antecedent debts which they declined to accept, we may reasonably conclude that they could supply no evidence upon the point, and the fact may be regarded as established that no such debt did exist in so far at least as this action between the plaintiffs and defendants was concerned,

(1) 2 Ves. Sr. 1,
(2) 2 Bro. C. (Belt) 90.
(3) 5 B. & C. 695.
(4) 5 Ves. 384.
(5) 12 Ves. 136.

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and that therefore the deeds which in the statement of claim are impeached have not been effectually impeached.

But the plaintiffs being creditors of Henry Elliott, deceased, holding mortgages upon real estate in security for their debt are not creditors within 13 Eliz. c. 5, that is to say, in the language of May at p. 141 of his book giving the rationale of the authorities upon the point:

> The enactment is clearly intended to prevent persons from conveying away the whole or any part of their property in derogation of the rights of those who as general creditors have a claim on the general assets of their debtor. Mortgagees therefore who have a specific portion of land set aside, and so far as their interest is concerned, freed from liability to the general creditors, and to which they can primarily at least, resort for the satisfaction of their claim are not to be regarded as "creditors," or at least *a mortgage debt is not properly speaking a debt for the purposes of the statute.*

And so even in the case of the general creditors filing a bill for the administration of the estate of a deceased person, and therein seeking to set aside a voluntary conveyance as a fraud upon creditors within the statute 13 Eliz. c. 5, upon the question whether at the time of the execution of the impeached conveyance the settlor had creditors, with intent to defraud when the impeached conveyance can be said to have been executed, debts secured by mortgage are not to be taken into consideration

The learned counsel for the plaintiffs felt himself compelled to admit, as indeed he could not do otherwise, that the plaintiffs could not on their own behalf maintain the present action, but he contended that the present action was maintainable upon the ground of its being, as he contended, an action on behalf of all creditors of the deceased as of the plaintiffs themselves referring to a passage in Mr. May's book, (p. 466,) which is in these words:

The bill ought to be filed by a creditor or creditors on behalf of himself or themselves and all other the unsatisfied creditors of the settlor deceased, citing *French* v. *French* (1).

What Mr. May is there referring to, as plainly appears by the case cited, is the case of a bill filed by one simple contract creditor upon behalf of himself and all other the creditors of a deceased person for an administration of the assets of the deceased, and praying for the avoidance of a voluntary conveyance standing in the way of such creditors. That such an action must be instituted by one or more creditors on behalf of all is a very different thing from saying that a mortgagee, whose interests are quite distinct from the interests of the general unsecured creditors, can by assuming to act on behalf of himself and all other creditors of a deceased person invoke the court to set aside a conveyance which is impeachable only as standing in the way of the general creditors in which number as we have seen the mortgagee is not to be counted.

No case has been cited in support of such a proposition, nor is there any sense in saying that what a mortgagee could not effect in a suit instituted on behalf of himself alone he can effect by professing to act on behalf of himself and others whose interests are wholly distinct from his. Moreover as already observed this action is not *in form* an action on behalf of all the creditors of the deceased. No relief is sought other than the mere avoidance of the deeds impeached, upon which relief being granted the court goes no further but leaves all the creditors to avail themselves of their rights as best they may—no other relief is asked for in the present action and the plaintiffs declare themselves to be ready to seize the property to satisfy their judgment.

(1) 6 DeG. M. & G. 95.

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The case of *French* v. *French* is reported in 1 Jur. N. S. 840; 2 Jur. N S. 169 and 6 DeG. M. & G. 95. In the first of these reports the bill is shewn to have been filed by a simple contract creditor on behalf of himself and all other the creditors of a deceased person for an administration of the assets of the deceased and to set aside a voluntary settlement as fraudulent within the statute 13 Eliz. c. 5 against such creditors, and the bill prayed that an account might be taken of the personal estate and effects of the deceased, and that it might be declared that an annuity granted by the impeached instrument was as against the creditors of the deceased fraudulent, and that the wife in whose favour the annuity was granted might be declared trustee thereof for the benefit of such creditors, and that a receiver might be appointed. In 2 Jur. N. S. 170 the form of the decree pronounced in the case is given as follows:

> There will be a declaration that the settlement of 1852 (the impeached conveyance) was void as against creditors and the accounts will be taken on that footing, without prejudice to any question that may be raised by Mrs. French in case the assets should turn out to be more than sufficient to pay all the debts.

That this suit must have been instituted by a creditor upon behalf of himself and all other creditors entitled to share in the general assets of the deceased there can be no doubt; but the present is not a case like that and here it is to be observed how careful the court was to provide for protection of the interests of the volunteer beneficiary. To such a suit a mortgagee would have been an unnecessary party, for when a mortgagor dies leaving lands mortgaged and other lands and personal estate not mortgaged the only assets of the deceased to be administered for the benefit of creditors are the equity of redemption in the mortgaged lands and the residue of the deceased's estate, real and personal. To a

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bill by the general creditors of the deceased the mortgagee cannot be called upon to take any part; the equity of redemption in the mortgaged premises may be sold in such administration suit but not so as in any way to prejudice or interfere with the exercise by the mortgagee of all his rights under the mortgage. He may sell the whole estate absolutely under the powers of sale ordinarily inserted in all mortgages executed in every province of the Dominion. He may by petition be admitted into the administration suit and consent to a sale therein of the mortgaged premises, he receiving the whole of the proceeds of such sale until his mortgage debt, interest and costs are fully paid. In such a case he must submit to rendering an account of all monies received by him in respect of the mortgage and the decree is for the taking of such account and for sale of the mortgaged premises with the mortgagee's consent, and if the proceeds of the sale should prove insufficient to pay the mortgage debt, interest and costs, that then he should be admitted to prove for the balance not realized as a specialty creditor.

The cases are numerous but uniform on this subject. A few will suffice: *Mason* v. *Bogg* (1); *Greenwood* v. *Taylor* (2); *Carr* v. *Henderson* (3); *Ward* v. *McKinley* (4); *Crowle* v. *Russell* (5).

A mortgagee may also himself file a bill for an administration of the estate of the deceased. In such case he must render an account of all his receipts and dealings in respect of the mortgaged premises and shall retain his right to have the proceeds of the sale of the mortgaged premises applied wholly in payment of his mortgage debt, interest and costs, and in case of the proceeds of sale proving insufficient for that

(1) 2 My. & Cr. 443.
(2) 1 Russ. & My. 185.
(3) 11 Beav. 415.
(4) 10 Jur. N. S. 1063.
(5) 4 C. P. Div. 186.

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purpose, he shall be allowed to prove for the unsatisfied balance as in the case of his applying by petition to be let into an administration suit instituted by the general creditors and consenting to a sale of the mortgaged premises in that suit. *Brocklehurst* v. *Jessop* (1); *Tipping* v. *Power* (2); *King* v. *Smith* (3); *Aldridge* v. *Westbrook* (4); *Skey* v. *Bennett* (5); *Spensley* v. *Harrison* (6); *Pinchard* v. *Fellows* (7).

The decree in *Pinchard* v. *Fellows* (7) shews the form of decree in such cases. The decree directed an account to be taken of what was due to the plaintiff for principal, interest and costs of suit, including the costs of the account and consequent on the sale thereafter directed — account of the rents and profits of the mortgaged premises received by the plaintiff or which without wilful default might have been received, deducting what should appear to be due on such account of rents and profits from what appeared to be due to the plaintiff for principal, interest and costs. Lands comprised in plaintiffs' mortgages to be sold with the approbation of the judge and the money to arise by such sale to be paid into court; and that thereout on an application in chambers what should be certified to be due to the plaintiff be paid to him; but in case the money to arise by the sale should be insufficient to discharge the said amount to be so certified to be due to the plaintiff then the whole thereof to be paid to him. In case such monies should be insufficient to pay the amount due to the plaintiff he was declared entitled to come in with the other creditors of the deceased and to receive satisfaction for such deficiency out of the deceased's assets in a due course of administration.

(1) 7 Sim. 438.
(2) 1 Hare 405.
(3) 2 Hare 239.
(4) 5 Beav. 188.
(5) 2 Y. & C. Ch. 405.
(6) L. R. 15 Eq. 16.
(7) L. R. 17 Eq. 422.

Now, in the present case, to a bill filed by the plaintiffs for administration of the deceased Henry Elliott's estate, his co-mortgagor, Benjamin Douglas, if living, and his representatives if dead, must needs be a party or parties. No such bill having been instituted it is quite obvious, as indeed the frame of the statement of claim also shews, that the plaintiffs are standing upon what they consider to be their rights distinct from, and not, by any means, in concert with the general creditors, if there be any, of Henry Elliott, deceased.

The evidence adduced by the plaintiffs seems to shew that in truth the plaintiffs are the sole creditors of the deceased, for they proved that the whole amount of deceased debts, so far as known, amounted to something over $50,000, how much was not stated, and the plaintiffs gave evidence that the amount due to them by the deceased at the time of his death was $52,500. The only debts spoken of were the $22.05 for the gas account and the taxes already referred to, but the point in issue in the case is not whether the deceased was indebted at the time of his death, but at the times when he executed the impeached conveyances, and no debt whatever was proved to have then been in existence but the debt to the plaintiffs secured by mortgage, and as the evidence shewed amply secured.

In so far as the present action is concerned there is no other conclusion justified by the evidence and by the fact that the plaintiffs refused the opportunity for further inquiries as to the indebtedness of Henry Elliott at the time of the execution of the impeached conveyances than that the said Henry Elliott was free from all debt, save that secured to the plaintiffs at the times of execution of the said conveyances and had a perfect right to execute them without any interference on the part of the plaintiffs. The only judgment therefore, which was justified by the evidence was one

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dismissing the plaintiff's action with costs, and the appeal, therefore, in my opinion, must be dismisssed with costs.

The defendant, Mary Logan, not having appealed from the judgment rendered against her we can not deal with it, but I apprehend that means can readily be found to prevent the plaintiffs attempting, if they should attempt, to enforce an execution against the lands mentioned in Mary Logan's deed to obtain satisfaction of the judgment in the statement of claim mentioned to have been recovered against the administrator of the estate of Henry Ellliott, or of any part thereof.

Appeal allowed with costs.

Solicitors for the appellant: *Wilson & Senkler.*

Solicitors for the respondent: *Morrison & Cockrill.*

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*Nov. 12.

*Dec. 7.

JAMES P. KENT (PLAINTIFF).....APPELLANT;

AND

LORENZO ELLIS (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Pleading—Conversion—Defect in plaintiff's title—Statute of frauds.

In an action claiming damages for the conversion of goods the plaintiff must prove an unquestionable title in himself and if it appears that such title is based on a contract the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded.

It is only where the action is between the parties to the contract which one of them seeks to enforce against the other that the defendant must plead the Statute of Frauds if he wishes to avail himself of it.

Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 549) affirmed.

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

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

The material facts are stated in the judgments published herewith. The main question raised on the appeal was whether or not the defendant could without having pleaded it claim the benefit of the Statute of Frauds as avoiding the contract under which plaintiff claimed title to the goods for conversion of which the action was brought to which contract the defendant was not a party.

The trial judge gave judgment for defendant which was affirmed by the court *en banc*. The plaintiff appealed to this court.

Newcombe Q.C. and *Sedgewick* for the appellant. The statute must be pleaded. *Clarke* v. *Callow* (2); *Olley* v. *Fisher* (3); *Morgan* v. *Worthington* (4); *James* v. *Smith* (5). Nor will the defence of the statute be allowed at the trial unless the plaintiff to a material extent changes front. *Brunning* v. *Odhams Brothers* (6). Even if pleaded, the respondent being a stranger could not avail himself of the statute. *Waters* v. *Towers* (7); *Maddison* v. *Alderson* (8), at p. 488, per Blackburn L.J.

In reference to the sufficiency of the contract at common law, delivery is not necessary to pass the title. As soon as a bargain and sale of specific personal property are concluded the contract becomes absolute without actual payment or delivery. *Tarling* v. *Baxter* (9); *Hinde* v *Whitehouse* (10); *Clarke* v. *Spence* (11); *Bentall* v. *Burn* (12).

(1) 32 N. S. Rep. 549.
(2) 46 L. J. Q. B. 53.
(3) 34 Ch. D. 367.
(4) 38 L. T. 443.
(5) [1891] 1 Ch. 384.
(6) 75 L. T. 602.
(7) 8 Ex. 401.
(8) 8 App. Cas. 467.
(9) 6 B. & C. 360.
(10) 7 East 558.
(11) 4 Ad. & E. 448.
(12) 3 B. & C. 423.

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R. G. Code for the respondent. This court will not interfere with a decision such as is now appealed from as it is upon a mere question of procedure; *Dawson* v. *Union Bank* (1); *Gladwin* v. *Cummings* (2); *Ferrier* v. *Trépannier* (3); *Scammell* v. *James* (4); *Williams* v. *Leonard & Sons* (5).

The failure to plead the Statute of Frauds was not invoked at the trial and it is too late now to claim any benefit from it. *Hart* v. *McDougall* (6); *Horlor* v. *Carpenter* (7); *Bauld* v. *Challoner* (8). The trial judge had power to amend for the purpose of determining the real question or issue raised by or depending on the proceedings; Order XXVIII, rule 12; and he would undoubtedly have ordered such amendment if objection had been raised at the trial to the pleadings. *Dempster* v. *Fairbanks* (9); *Power* v. *Pringle* (10); *James* v. *Smith* (11). The plaintiff has no title to the goods, which were above the value of $40.00 and were not delivered to him, nor did he make payment, nor was there any memorandum in writing as required by the Statute of Frauds. *Waters* v. *Towers* (12); is distinguishable, and in *Smeed* v. *Ford* (13) Crompton J. said: "*Waters* v. *Towers* (12) seems to be treated as overruled in *Hadley* v. *Baxendale*" (14).

This is not an action on contract and we are not properly speaking setting up the Statute of Frauds. Our contention is that every link in the plaintiff's title should be a good valid link, and that if the link in question is dependent on a contract which cannot be

(1) Cass. Dig. (2 ed.) 429.
(2) Cass. Dig. (2 ed.) 427.
(3) 24 S. C. R. 86.
(4) 16 S. C. R. 593.
(5) 26 S. C. R. 406.
(6) 25 N. S. Rep. 38.
(7) 3 C. B. N. S. 172.
(8) 28 N. S. Rep. 205.
(9) 29 N. S. Rep. 456.
(10) 31 N. S. Rep. 78.
(11) [1891] 1 Ch. 384.
(12) 8 Ex. 401.
(13) 5 Jur. N. S. 291.
(14) 9 Ex. 341.

enforced, it is not a valid link. *Britain* v. *Rossitter* (1); *Sykes* v. *Dixon* (2); *Benbow* v. *Low* (3).

TASCHEREAU J.—Who owns the old sleigh and carriage in question, worth, at most, eighty dollars, which the appellant, who claims them, bought for fifty dollars, is the important question to be determined by the Supreme Court of Canada upon this appeal.

We hold with the two courts below that the appellant purchased the articles from one who had no right to sell them and the appeal is dismissed with costs.

The Maritime Provinces enjoy the costly privilege of bringing appeals to this court upon such paltry amounts. In a case from Prince Edward Island of *Gorman v. Dixon* (4), where one hundred and sixty dollars was the amount in controversy, the Chief Justice, speaking for the court, said:—

> It is to be hoped that some statutory amendment of the law may in the future prevent appeals to this court in cases of such very minor importance as the present in which the amount in controversy is so greatly disproportioned to the expense of the appeal.

These remarks have their full application in this case.

That such appeals should be possible is a blot upon the administration of justice. I hope the bar from the Maritime Provinces will assist in obtaining the necessary legislation to put an end to that state of things.

GWYNNE J.—The plaintiff in his statement of claim alleges that he has suffered damage by the defendant wrongfully depriving the plaintiff of his goods and chattels, to wit: one double-seated sleigh and one light riding carriage, which the defendant wrongfully took and carried away and converted to his own use. The

(1) 11 Q. B. D. 123.
(2) 9 Ad. & El. 693.
(3) 16 Ch. D. 93.
(4) 26 Can. S. C. R. 87.

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defendant in his statement of defence, pleads; first, that the said goods were not, nor was any of them, the plaintiff's; secondly, that the defendant did not at any time deprive the plaintiff of the said goods; and, thirdly, that at the time the defendant took the said goods, they were the property of one Arthur A. Archibald and not of the plaintiff and that in taking the goods the defendant acted by the authority and as the servant or agent of the said Archibald.

The plaintiff replied by joining issue to this defence and he also pleaded a special replication to the defendant's third plea.

This replication, Mr. Justice Ritchie was of opinion, was wholly unnecessary and irregular. It may not have been necessary for there is little or no difference between the modern and the former mode of pleading in actions for the conversion of goods. The first two paragraphs or pleas in the defendant's statement of defence are precisely similar in substance to the old pleas of "not guilty" and that the property was not the property of the plaintiff; and, under those pleas, all matters in difference of title could be given in evidence. It may, therefore, be that the special replication in the present case was unnecessary, but inasmuch as the plaintiff's title, if any he had, was acquired from a person, not the absolute owner of the goods but having only a qualified title to them under the true owner, and so that his title, if any, was derived under and in virtue of ch. 92, R. S. N. S. (5 ser.), I cannot say that it was improper for the plaintiff to plead a title under that statute as a purchaser for valuable consideration without notice.

The special replication is pleaded to the defendant's third plea and, in short substance, is that Arthur A. Archibald's sole title to the goods in question was by virtue of an unfiled and secret bill of sale thereof and

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that the same was and is under chapter 92, R. S. N. S., void against the plaintiff for that Lindsay as administrator of Nelson, without any notice or knowledge of the claim or title of Archibald, sold the goods for good and valuable consideration to the plaintiff, who likewise had no notice or knowledge of such claim.

I concur, however, with the learned judge that the rejoinder filed by the defendant to this replication served no useful purpose, for all the matters therein alleged otherwise than by way of repetition of his denial of the plaintiff's title to the goods, were matters of evidence in support of the defendant's plea of title in Archibald.

Now, at the trial, it appeared that within four days after Nelson's decease, one Lindsay and the plaintiff, who lived about sixteen miles from where Nelson had lived and died, came out together to the deceased's place claiming to be creditors of the deceased and wanting to see about his property, and they found one Chisholm Nelson, a cousin and brother-in-law of the deceased, in possession of his effects.

The plaintiff on that occasion went into the barns where the carriage and sleigh in question were and saw them there. Lindsay entered into conversation with Chisholm and asked him if he would administer to the deceased's estate, saying that if he, Chisholm, would not, he would. Chisholm replied that he would let him know in a few days, which he did, and within two or three days executed some papers renouncing administration.

Chisholm said that he told Lindsay that he thought the defendant had a claim against the carriage and sleigh. Lindsay replied that it was hard to tell whether he had or not; that he, Chisholm, told him that he thought there was an agreement; that Lindsay said, "some people would do most anything."

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Chisholm also said that as soon as deceased was buried he had locked up the deceased's goods in the barn and kept it locked until the defendant got possession of the carriage and sleigh, which he did, as also appears in the evidence, from Chisholm himself, on production of the paper showing Archibald's title to the goods. And he said further that Lindsay had told him not to let the defendant have the property unless he had a written agreement.

Lindsay, who besides the plaintiff himself was the plaintiff's sole witness, said that he had made no inventory of the deceased's effects before receiving the letters of administration and that the carriage and sleigh in question were not included in an inventory made after receiving the letters of administration, which he received by mail on the 17th of March, 1899.

He admitted also that he had heard that the deceased had got the carriage and sleigh from the defendant whom he knew to be a person employed in selling carriages and sleighs; that he did not know how the deceased had bought these; he said further that he himself had never seen the carriage before he sold it and the sleigh as he said he did to the plaintiff on the 17th of March. He had seen the sleigh on the day when he went out with the plaintiff before receiving the letters of administration.

Now the facts of what he calls a sale to the plaintiff are these. He says that the plaintiff never got possession of the goods; that the defendant had taken them away *before he could do so;* that plaintiff did not pay anything for them nor did he give any note for the price; that he took the plaintiff's word that he would pay fifty dollars at the expiration of nine months: that he sold on the seventeenth of March, *because he thought that he had got a good chance to do so;* that he had not seen the goods after receiving the

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letters of administration before this sale to the plaintiff; that he told the plaintiff that the goods were locked up in a building owned by the deceased; the key, he said, was at the house of the deceased's brother-in-law, (Chisholm Nelson); that a few days after this sale he and the plaintiff went out together to this brother-in-law's house, which was seven miles from where the goods were, for the purpose of getting the key, but did not get it, and that, in consequence thereof the plaintiff did not get the goods.

But at this time the goods were restored by Chisholm Nelson to the defendant's possession, for Lindsay said that not having got the key they did go on to where the goods were but that he and the plaintiff returning home met the defendant on the road driving the carriage; that neither he nor the plaintiff then made any claim to the carriage; that although he, Lindsay, had some conversation with the defendant who told them that he had received the sleigh also and was about to sell it, yet that he cannot say that the plaintiff said anything at all.

The plaintiff having been called in his own behalf, said, that Lindsay, after he was appointed administrator, sold him the carriage and sleigh in his, Lindsay's, own store at Middle Musquodoboit on the seventeenth of March, 1899, for fifty dollars, payable in nine months; that the carriage and sleigh were then at Moore River; that Lindsay asked him if he would go out to Moore River and get them; that he, plaintiff, asked if they were all right there, to which Lindsay replied that the barn was locked and that nobody could get them; that plaintiff said he would go out and get them the first of the week. Then he added. "*I heard that the defendant was going to take the carriage and sleigh and I started out with Lindsay to get*

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ahead of him but we were too late; on the road we met the defendant."

Then, as to what took place on that occasion, he said:

> Lindsay and the defendant were talking about the property. The defendant said that he had taken them away, I understood, before that. I said nothing to the defendant about the property; he, Lindsay, did not speak to the defendant of the carriage being his or mine.

The plaintiff denied that he had any notice of Archibald or any one having a claim on the carriage or sleigh.

The defendant shewed Archibald's title to the goods and produced the leases or bills of sale in virtue of which Nelson had held them in his lifetime, which reserved the property in Archibald until payment in full, and he proved that upon the sleigh no payments had been made and that nearly half of the rental of the carriage remained unpaid. He also proved the authority of Archibald for him to do all that he had done in the premises, and he testified that he, as agent for Archibald, took from Nelson his signature to the papers, and that he re-took possession. He found them, he said, in deceased's barn when he went for them; that he found Chisholm Nelson in charge of the building; that he had the key and that he showed the papers, (of title), to Chisholm Nelson, who at defendant's request came and opened the door and allowed the defendant to take the carriage and sleigh away.

He said that the second day after he had taken them away he met the plaintiff and Lindsay on the road; that Lindsay asked him by what authority he had taken the goods, to which the defendant replied, that if he, Lindsay, would come to town, Mr. Archibald would shew his authority; that Lindsay said: "I will find out what authority he had for taking them,

if you are without it;" that plaintiff was sitting in the same waggon with Lindsay during this conversation but said nothing at all, and the witness finally told them that, if they would pay what was against the goods, they could have them.

At the close of the plaintiff's case, before the defendant entered upon his defence, defendant's counsel moved for judgment for the following reasons:

1. That the sale was void under the statute of frauds;
2. No delivery;
3. No payment; no writing;
4. No delivery before or after Lindsay appointed administrator.

The contention of the plaintiff's counsel as to the objection of the statute of frauds, was that no person but a party to the contract could raise that objection.

The learned trial judge after the close of the defendant's evidence and arguments of counsel rendered judgment for the defendant, holding that it was competent in the present action for the objection to be taken by the defendant, and he held that the plaintiff never having had any possession, and not having title in writing, under the statute of frauds, could not recover in this action.

From this judgment the plaintiff appealed to the Supreme Court of Nova Scotia and there changed the frame of his contentions, which then, was not that a stranger to a contract could not raise any objection to the plaintiff's title as being defective for non-compliance with the statute of frauds, but that he was bound to plead the statute, and that the defendant, not having done so, could not object to any defect appearing in the plaintiff's title by reason of non-compliance with the statute.

This alteration in the plaintiff's contention never should have been entertained, for, if the plaintiff's objection had assumed that shape at the trial, the

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learned judge should have, and undoubtedly would have, under the circumstances appearing at the trial, intervened by allowing the plea to have been then pleaded, whether necessary or not, and so have avoided the scandal of an appeal in a case like the present, involving a claim by the plaintiff to the amount of fifty dollars, in a case where he had not paid a cent nor bound himself by any note or other instrument to pay a cent for the property in question in the event which has happened of his never having had the property delivered to him.

The ends of justice will, I think, be attained, if we dismiss the present appeal upon this ground alone, although, as the case has been argued both in the Supreme Court of Nova Scotia and before us, I must say, that in my opinion, there is really no material difference between the present and the former mode of pleading, or in the evidence necessary to support such pleading, or in the practice on the trial of a case of conversion.

When defendant denies the actual taking of the goods from the plaintiff, and also the plaintiff's property in the goods, the case is wholly at issue, and nothing remains but evidence of title which the plaintiff in order to recover must prove to be in himself by an unquestionable title, and if an instrument in writing is necessary, under the circumstances appearing in evidence to make his title perfect as against the defendant, he must prove such instrument or fail, and, if he should make default in showing a perfect title, it is quite competent for the defendant still, as it always was, to point to such defect in the plaintiff's title, and to insist upon it.

Until the defect became apparent, he could not have been required by a plea to point out a defect of which he cannot be assumed to have been aware. The defend-

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ant had only to support his own title, and anticipation of defects in the plaintiff's evidence produced by him of his title, constituted no part of the defendant's case or of the duty cast upon him.

All the cases which have been cited before us show that where the defendant was bound to plead the statute of frauds was in cases between the parties to the contract, where one of the parties was seeking *to enforce the contract against the other*, and the language of Lord Blackburn in *Maddison* v. *Alderson* (1), shows that it is in relation to a case instituted by one of the parties to a contract against the other to enforce the contract, he is speaking, when he says that a defendant must plead the statute. And Chief Baron Kelly, in *Clarke* v. *Callow* (2), and Lord Cairns in *Hawkins* v. *Lord Penrhyn* (3), explain why a party to a contract who is sued by the other party to enforce it must plead the statute of frauds, if he intends to rely upon it, because otherwise it could not be known whether or not he *intended to shelter himself* under the statute, or to *waive his right* to shelter himself under it.

This cannot apply to the case of a defendant in an action for the conversion of goods where title to the goods is the point in issue, in which action the defendant has nothing to do but to insist upon the plaintiff showing a title good *in omnibus* as against the defendant.

In a case like the present where the plaintiff had no title whatever to the goods in question unless he should prove, as he had undertaken to do upon the record, a good title under the provision of chapter 92 R. S. N. S. (5 ser.) he could not defeat Archibald's title unless he should establish beyond all reasonable doubt, a *bonâ fide* purchase for valuable consideration

(1) 8 App. Cas. 488.
(2) 46 L. J. Q. B. 53.
(3) 4 App. Cas. 58.

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without notice, and I must say, that the evidence in the present case is in my opinion pregnant with doubts as to the *bona fides* of the transaction and as to what was the real bargain between the parties.

The non-insertion by Lindsay in any inventory of the deceased's effects; the time selected for the alleged sale to the plaintiff, immediately after the receipt by Lindsay of the letters of administration; the price fixed which was just about two-thirds of the amount due to Archibald and less than half the value set by the plaintiff upon the goods in this action; the deferring of the payment of that small sum for nine months, without even the security of a promissory note; the non-explanation of any reason for the hasty sale; the knowledge that Lindsay had not possession of the goods, not even possession of the key of the building in which Chisholm Nelson had them locked up ever since Nelson's death; the admission by the plaintiff that it was because he had heard of the defendant's intention to take possession of the goods that he and Lindsay hurried away to get the key with the intention of endeavouring to get ahead of the defendant; and the non-assertion by the plaintiff of any claim whatever to the goods when he and Lindsay met the defendant driving the carriage and when he said he had got the sleigh also and was about to sell it; all these things appear to me to point to the conclusion that the bargain between the plaintiff and Lindsay was an imperfect one and was not intended to be complete unless they should succeed in getting possession of the goods so as to enable delivery to be made of them to the plaintiff.

This question of getting possession and of delivery to the plaintiff had surely something to say to the postponement for nine months; that sum surely never could become payable in the event

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which has happened of the plaintiff never getting possession of the goods.

Of the *mala fides* of Lindsay there can be no doubt. And I must say that the evidence affects my mind with the very gravest suspicions that the plaintiff was combining with Lindsay in an attempt to defeat the claim of Archibald or of some person known or believed to be the owner of the goods. Upon the plaintiff was cast the burthen of clearing up these doubts and suspicions and in my opinion he has failed to do so.

Then there is another point. When Chisholm Nelson restored the goods to the defendant upon production of the papers under which alone the deceased had held them he acted either in the character of an executor de son tort or as agent of Lindsay, the administrator and by his authority, for Chisholm said that Lindsay told him not to give up the goods to the defendant unless he should produce a written agreement. That direction implied authority for Chisholm to give them up upon production of the written agreement. This Chisholm did, and thereby the uninterrupted possession of the goods got back to the owner in the terms of the agreement under which the deceased had held them. This restoration of the actual possession of the goods to the person having the property in them must supersede the agreement between Lindsay and the plaintiff as it appears in the evidence.

For the above reasons I am of opinion that the appeal should be dismissed with costs. I will however add a few words in relation to actions of this description. When a plaintiff can only claim a title to goods under the provisions of chapter 92, R. S. N. S., or such like statute, by showing a *bonâ fide* purchase for valuable consideration without notice, I think that as equitable principles are now to govern in all actions

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of whatever form and as the plea of purchase for valuable consideration without notice owes its origin to courts of equity the least that should be required of a plaintiff should be conformity with the principles prevailing in equity, by his shewing that before he had notice of any adverse claim he had actually paid his purchase or such portion of it as would afford some guarantee of the *bona fides* of the transaction and that as in courts of equity upon such a plea he should have protection only as to the extent of the amount of his purchase money actually paid. See Story's Pleading in Equity, secs. 604-805, and Metford on Equity by Jeremy.

SEDGEWICK, KING and GIROUARD JJ. concurred.

Appeal dismissed with costs.

Solicitor for the appellant: *James A. Sedgewick.*

Solicitor for the respondent: *Hugh Mackenzie.*

THE ONTARIO MINING COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

EDWARD SEYBOLD AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1901
*Jan. 18

ON APPEAL FROM THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Appeal per saltum—Divisional Court judgment—62 *V.* (2), *c.* 11, *s.* 27 *(Ont.)—Constitutional question — Indian lands — Legislative jurisdiction—Costs.*

Under the provisions of section 26, sub-sec. 3 of the Supreme and Exchequer Courts Act, leave to appeal direct from the final judgment of a divisional court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario, and the fact that an important question of constitutional law is involved and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave.

MOTION on behalf of the plaintiff for leave to appeal direct from the judgment of the Queen's Bench Division of the High Court of Justice for Ontario affirming the decision of the Chancellor dismissing the plaintiff's action with costs.

This action was commenced in the High Court of Justice for Ontario, and was tried before the Chancellor who delivered judgment dismissing the plaintiff's action with costs. Plaintiff thereupon appealed to the Queen's Bench Divisional Court where the appeal was dismissed with costs.

On the 11th of January, 1901, a motion was made before the Registrar on behalf of the plaintiffs for leave to appeal direct from the judgment of the Divisional

*PRESENT :—His Lordship Mr. Justice Girouard, (in Chambers.)

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THE ONTARIO MINING COMPANY v. SEYBOLD.

Court to the Supreme Court of Canada upon the ground that the appeal involved questions of constitutional law between the Dominion of Canada and the province in regard to indian reserves which had been selected and laid aside under treaties entered into between the government of Canada and the indian tribes subsequent to the British North America Act (1867) and that any decision by the Court of Appeal (in the event of special leave being granted under 62 Vict. (2), ch. 11, sec. 27) would be unsatisfactory to either one or the other of the parties.

The motion was referred by the Registrar to a Judge in Chambers, and came on to be heard before His Lordship Mr. Justice Girouard on the 18th January, 1901.

Travers Lewis for the motion.

Chrysler Q.C. and *Burbidge* contra.

After hearing the parties, the following judgment was pronounced by:

GIROUARD J. (oral).—It is clear from the material filed that a very important constitutional question is involved in the present appeal, namely, a question of jurisdiction between the Federal and Provincial Governments over certain Indian lands in the north-west part of Ontario. It is objected by the respondents that leave should not be granted inasmuch as the matters in dispute are determined by certain judgments of the Privy Council, particularly *St. Catharines Milling Co.* v. *The Queen* (1). At this stage, it is impossible to tell, without knowing the particular facts of the case, how far the decisions of the Privy Council are applicable, but if the contention of the respondents be correct, they will suffer no prejudice by leave being

(1) 13 S. C. R. 577; 14 App. Cas. 46.

granted, as this court is bound to follow the decisions of the Privy Council. It is deposed to, and not denied on the present application, that neither party would be satisfied with the judgment of the Court of Appeal in this matter.

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THE ONTARIO MINING COMPANY v. SEYBOLD.

Gwynney.

In the report of *Farquharson* v. *Imperial Oil Co.* (1), which I saw for the first time when this application was made, I am said to have concurred in the dismissal of the appeal from the order made in Chambers. I presume that this means that I would not interfere with the discretion exercised by the learned judge who granted leave to appeal. I am supposed to have expressed no views upon the question of jurisdiction of the court to hear the appeal. But as I concurred in the judgment disposing of the merits of the case, I must be taken to have concurred with the view of the Chief Justice and Mr. Justice Gwynne that there was jurisdiction in the Supreme Court to grant an appeal *per saltum* to this court from the Divisional Court of Ontario, notwithstanding the limitations placed by the Legislature of Ontario upon appeals from the Divisional Court, where the party desiring a further appeal had failed both in the Divisional Court and in the court below.

Leave to appeal *per saltum* is therefore granted. The costs to be costs in the cause to the successful party.

Motion allowed with costs.

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(1) 30 S. C. R. 188.

1900

BIGELOW *v.* THE QUEEN.

*May 1.
*June 12.

Nova Scotia Liquor License Act, 1896—*Conviction by magistrate—Jurisdiction—Application for certiorari—Affidavit—Constitutional law—Powers of provincial legislature—Matter of procedure.*

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) vacating the order of Ritchie J. for certiorari on a conviction against the appellant, on the ground that the affidavit required by sec. 117 of the Liquor License Act, 1896, had not been produced on the application for the writ of certiorari.

After hearing counsel for the parties, the court reserved judgment, and on a subsequent day, dismissed the appeal for the reasons given in the judgment appealed from, Mr. Justice Gwynne dissenting, and holding that the question of the constitutionality of the Liquor License Act should have been decided before entering upon the technical point respecting the affidavit.

Appeal dismissed with costs.

Borden Q.C. for the appellant.

Longley Q.C., Attorney General for Nova Scotia, for the Crown.

McLellan for the informant.

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

(1) 31 N. S. Rep. 436.

BASTIEN *v.* FILIATRAULT *et ux.*

1900

*Oct. 4.
*Oct. 8.

Husband and wife—Judicial separation as to property—Debts incurred by husband before dissolution of community—Obligation by wife—Art. 1301 C. C.—Nullity—Public policy.

APPEAL from a judgment of the Court of Review, at Montreal (1), affirming the judgment of the Superior Court, District of Montreal (2), dismissing the plaintiff's action as to the female defendant, and relieving her from liability under a deed to which she had become a party to guarantee claims against her husband.

After hearing counsel for the parties the court reserved judgment, and on a subsequent day, dismissed the appeal on the merits with costs for the reasons given in the courts below, and without determining a question as to the jurisdiction of the court to entertain the appeal raised by the respondent upon a motion to quash the hearing.

Appeal dismissed with costs.

Charbonneau Q.C. for the appellant.

Rodolphe Lemieux Q.C. for the respondent.

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

(1) 6 Rev. de Jur. 13.

(2) Q. R. 15 S. C. 445.

1900
*April 21,23.
1901
*Feb. 19.

THE LAKE SIMCOE ICE AND COLD STORAGE COMPANY (DEFENDANT)..... ..... } APPELLANT;

AND

D. W. McDONALD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Watercourses—Navigable waters——Cutting ice—Trespass on water lots.

An ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice-houses, and for that purpose may cut a channel through private water lots through which to float the ice.

Judgment of the Court of Appeal (26 Ont. App. R. 411) reversed, and that of MacMahon J. at the trial (29 O. R. 247) restored, Strong C.J. and Taschereau J. dissenting.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial (2) in favour of the defendant.

The defendant company in harvesting ice on Lake Simcoe, outside of water lots in a bay, at Jackson's Point, of which the plaintiff claimed title under a patent from the Ontario Government, cut a channel through said water lots in order to float the ice harvested to the shore for storage in their ice-houses. The plaintiff brought an action for damages caused by this interference with his property. The trial judge gave judgment for the defendant, which was reversed by the Court of Appeal. The latter judgment decided that defendant had no right to trespass on plaintiff's water lots for the purpose of getting their ice to shore, and also, on an issue raised by defendant, that the bay

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

(1) 26 Ont. App. R. 411. (2) 29 O. R. 247.

at Jackson's Point was not a public harbour, and the patent to the plaintiff was, therefore, valid.

McPherson and *Campbell* for the appellant.

McDonald Q C for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs for the reasons given in the judgment of Mr. Justice Moss in the Court of Appeal.

TASCHEREAU J. was also of opinion that the appeal should be dismissed.

GWYNNE J.—I express no opinion whether the place in question consisting of twelve acres of land covered with the waters of Lake Simcoe was or was not a public harbour. But assuming the Letters Patent granted by the government of the province to be good, and concurring in the judgment of my brother King, I am of opinion that the acts of the defendants which are complained of by the plaintiff as constituting his cause of action were within the true intent and meaning of the special reservation in the Letters Patent "of the free use, passage and enjoyment of the waters of the lake." It seems to be impossible to hold that under those Letters Patent the plaintiff has as he claims to have, and as the judgment appealed from, if it should be left to stand, would give him, the right to exclude save at his will and pleasure all commercial intercourse between other places across and along the lake and the Grand Trunk Railway terminus at the place in question during at least three months of the year when the waters of the lake are covered with ice and when commercial intercourse with the railway is carried on with greatest ease and convenience upon the ice in the lake while the waters of the lake so frozen over and

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Gwynne J.

rendered most conveniently travelled over in winter, are by force of the reservation in the Letters Patent kept open for the free use, passage and enjoyment of every person.

The appeal must therefore, in my opinion, be allowed with costs and the action dismissed with costs.

SEDGEWICK J.—I am of opinion that the appeal should be allowed for the reasons stated in the judgment of Mr. Justice King.

KING J.—The question raised is one of considerable importance as affecting a growing business.

The facts shortly stated, are as follows:

The respondent claims to be owner, under a patent from the Government of Ontario, of certain water lots situate in a bay at Jackson's Point, in Lake Simcoe. The appellants, in harvesting their ice on the navigable portion of the lake outside the bay, cut channels to float it to the shore where their ice-houses were. Respondents claimed to own the ice cut out for these channels and to have a right to cut it for their own profit.

The appellants, as a defence to the action for damages brought against them, alleged: First, that the bay in question was a public harbour and the property therein being in the Dominion Government the patent under which plaintiffs claimed was *ultra vires*. Secondly, if this was not so, that they had a right to use any reasonable means of getting their ice to shore. If the last contention should prevail consideration of the other point becomes unnecessary.

The judgment appealed from reversed the decision of the trial judge in favour of the appellants, holding that they had no right to cut the ice on the water lots, the bed of which belonged to the respondents under the patent, and that the bay was not a public harbour.

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Water turned into ice is, for the time being, changed in its nature by losing its fluidity, but the water underneath the frozen surface remains unaffected in its legal as in its physical character. By analogy, the solid ice becomes the property of the person owning the soil below it, and any one cutting or removing it without leave or a superior right is a trespasser.

Here, the act of cutting is sought to be justified upon the ground that it was done in the exercise of the public right of navigation.

Now as to this right, where it exists it is not extinguished by the operations of nature in converting the fluid into a solid, but the exercise of the right is rendered precarious. Reference, if necessary, might be made to the not uncommon cases in some latitudes where navigation is regularly carried on by the breaking or crushing of the ice, or by cutting a passage through it, or to the case of polar navigation. There is also, it is conceived, the clear right to use the frozen surface as incidental to the carrying on of an act of navigation. Thus a vessel prevented from access to the shore by the formation of ice might well be unladen at the outer margin of the ice, and cargo or passengers be transferred over the surface of the ice, or the ice might be broken or cut to admit of the vessel's passage. In such case it would probably be a question as to which mode was the more beneficial for the ship.

The right of the vessel owners so to seek access to the shore would apply equally to the owner of other floatable goods, as for instance, a raft or lot of logs or lumber in course of transportation.

The question then is: How is it with regard to the floating of ice severed from the mass for transportation shoreward?

Supposing no claim on behalf of the Crown, ice cut in water, the bed of which is in the Crown, would

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become the property of him who had gathered it, and reduced it into possession as an article of personal property. After being cut it would be floating property, and might be transported to the shore by flotation if the means existed, and being transported by flotation for a commercial purpose, it is difficult to see why it is not in course of navigation as much as floating logs would be. There seems no valid reason why there should be a discrimination between different classes of personal property where the mode of transportation is the same.

It would not, indeed, be for the public interest to create a distinction whereby a useful (and as population increases an increasingly useful) commodity should be forced to become wholly lost through lack of facility for getting it to a place where it could be stored and preserved, which is open to other kinds of personal property dependent upon like means of transportation.

The material fact is that the ice when cut is floating property as much as logs floating in the same water.

At the same time the right of passing floating ice through a body of field ice is to be exercised, as all other rights, with due regard to the rights of others. The frost that created the ice seeking transportation also created the obstruction, and in so doing brought into existence other rights of property which equally with the first are entitled to consideration.

The pathway is therefore to be as direct as practicable and of no greater width than is reasonably necessary. It is manifest that, if properly done, the cutting of the inshore ice for a passage would ordinarily be advantageous to the owner of it in case he desired to make beneficial use of it as a commodity, as

enabling him at a less expense to gather his own crop of ice.

Upon the facts, it does not appear that more damage was occasioned by the plaintiff's operation than was reasonably incidental to it.

The case, as said at the beginning, is important as affecting an industry of considerable importance, and because of its presenting a new class of circumstances. It is satisfactory that it is capable of solution by the application of principles which, although framed in contemplation of different classes of facts, are wide enough to cover the new circumstances here presented. It is also satisfactory that the result advances the interests of trade, one of the main purposes of law.

It becomes unnecessary, in the view taken, to pass upon the question raised as to whether the locality in question was part of a public harbour or not.

If the above view is to be maintained the appeal is to be allowed.

Appeal allowed with costs.

Solicitors for the appellant: *McPherson, Clark, Campbell & Jarvis.*

Solicitors for the respondent: *Kerr, Macdonald, Davidson & Patterson.*

1900
*April 23.
1901
*Feb. 19.

SAMUEL C. BIGGS (PLAINTIFF).....APPELLANT;

AND

THE FREEHOLD LOAN AND SAVINGS COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mortgage—Rate of interest—Payment by instalments.

A mortgage given to secure payment of $20,000 with interest at nine per cent payable half yearly, contained these provisos: "Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable.** Provided that on default of payment of any of the instalments hereby secured, or insurance or any part thereof at the times provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid."

Held, reversing the judgment of the Court of Appeal (26 Ont. App. R. 232) that the principal sum of $20,000 becoming due for non-payment under the first of the above provisos was not an instalment in arrear under the second on which the mortgagee was entitled to interest at the rate of nine per cent per anuum.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the plaintiff.

The action in this case was brought for an account from the defendant company of the rents and profits received from mortgaged lands of which the company had taken possession as mortgagee and finally sold for an amount sufficient to pay all the mortgage monies. The mortgagor claimed that there would be a balance coming to him unless the mortgagee was entitled to

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

(1) 26 Ont. App. R. 232.

charge nine per cent interest on the principal after default in payment under the provisos set out in the above head-note The right to this rate of interest was what the court had to decide on this appeal.

Bicknell for the appellant referred to *People's Loan Co.* v. *Grant* (1).

Armour Q.C. and *Bethune* for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed, the judgment of the Court of Appeal discharged, and a judgment entered declaring that the appellant is only liable for interest at six per cent per annum from and after the date fixed by the mortgage deed for the payment of the principal money for the reasons given in the judgment of Mr. Justice Gwynne in which all concur. The appellant to have his costs in this court and both courts below.

TASCHEREAU J. concurred in the judgment of Mr. Justice Gwynne.

GWYNNE J.—The only question upon this appeal is as to the construction of certain mortgages.

Upon the 29th day of December, 1882, the plaintiff executed and gave to the defendants a mortgage upon certain lands therein mentioned situate in the Province of Manitoba for securing the repayment to the defendants upon the 2nd day of January, 1885, of the sum of $20,000, then advanced to the plaintiff, together with interest thereon payable half yearly. There were two other mortgages upon the same lands subsequently executed by the plaintiff for securing two other principal sums with interest. The principal sums secured by these two mortgages are made payable on the 14th

(1) 18 Can. S. C. R. 262.

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Gwynne J.

June, 1891. In all other respects the terms of these mortgages are precisely the same as those of the mortgage dated 29th December, 1882. At some time not stated on the record the defendants entered into possession of the mortgaged lands and took and received the rents issuing thereout as mortgagees in possession for some default and continued in such possession and receipt of rents until the 20th of June, 1889, when they sold the whole of the mortgaged premises for an amount admitted by themselves to have been sufficient to pay and discharge all monies claimed by them to have been due upon the security of all three mortgages. The plaintiff however insists that the amount so realised was sufficient to leave a balance payable to him, and this suit was instituted to procure the taking of an account of all the monies received by the defendants on account of the mortgaged debts and to ascertain and determine whether any, and if any, what amount of the purchase money realised upon the sale remained after satisfaction of the monies secured by and chargeable upon the mortgaged premises. The sole question before us is as to the amount of interest chargeable on the taking of such account and upon the said principal sum of $20,000 after the 2nd day of January, 1885, when the said sum was by the mortgage made payable, that is to say, whether or not there is any stipulation by the mortgagor contained in the mortgage of the 29th December, 1882, for the payment of interest at the rate of nine per cent upon the said principal sum after the said 2nd day of January, 1885, or whether from that date interest can only be allowed at the statutory rate of six per cent, as damages for breach of the covenant to pay contained in the mortgage. The whole difficulty arises by reason of a printed form containing clauses in use by building and loan societies and required by sec. 3 of

ch. 127 C. S. C. when principal money and interest are blended and made payable by instalments, having been used and adapted to this mortgage whereby the principal sum advanced is made payable in one sum at a prescribed date.

By the mortgage under consideration it is witnessed that in consideration of the sum of $20,000 therein acknowledged to have been advanced to the plaintiff, he did give and mortgage the lands therein mentioned to the defendant company, their successors and assigns forever. Then follows, in the printed form, a clause which is required by the statute to be inserted in every mortgage wherein the principal and the interest secured by the mortgage are blended together and made payable by instalments. It is as follows:

> The amount of principal money secured by this mortgage is twenty thousand dollars and the rate of interest chargeable thereon is nine per centum per annum payable half yearly not in advance. Provided this mortgage to be void on payment at the office of the company in the City of Toronto of twenty thousand dollars in gold coin if demanded.

Then follows a clause which is inserted in the mortgage in writing for the purpose of adapting the printed form used to a loan like the present where the principal sum is made payable in one sum at a prescribed date and the interest thereon in the meantime. The clause so written is as follows:

> The said principal sum of twenty thousand dollars to become due and be paid at the expiration of two years from the date thereof, that is to say on the second January, A.D. 1885, together with interest thereon *in the meantime at the rate aforesaid half yearly* on the second days of July and January in each and every year, the first of such payments of interest to be made on the second day of July next, A.D. 1883, together with taxes and performance of statute labour.

The mortgage then contains two provisos in the printed form upon the construction of which the question before us turns. They are as follows:

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Provided that on default of payment for two months, of any portion of the money hereby secured, the whole *of the instalments* hereby secured shall become payable.

Provided that on default of payment of any of *the instalments* hereby secured *or* insurance or any part thereof at the *times* provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid.

The language of these provisos has very intelligible application to the case of the loan where the principal sum advanced and interest thereon at a rate agreed upon are blended together and the sum of the amounts so blended is made payable by *instalments* until the whole blended sum is repaid, and the effect of the first of these provisos in such mortgage plainly is, that upon any one of *those instalments* becoming in arrear and continuing so for two months after the day prescribed in the mortgage for payment thereof, then the whole of the subsequent instalments shall become immediately payable in advance, whereupon the mortgagee may exercise all the powers contained in the mortgage for the recovery of the whole amount remaining on the security of the mortgage in anticipation of the day specified in the mortgage for payment of the last instalment.

The natural construction of such a clause when applied to a mortgage wherein the principal sum advanced is made payable in one sum at a prescribed date and *the interest thereon half yearly in the meantime*, is, as it appears to me, very plainly to be, that upon default being made and continuing for two months in payment of any of the sums, which, by the immediately preceding clause (to which this proviso must be construed as having special reference) are made payable as half yearly interest, then the principal sum shall become payable in advance of the day appointed in the mortgage for the payment thereof. Thus effect

is given to an imperfect clause as applied to a loan not payable by instalments but in one sum at a prescribed date *ut res magis valeat quam pereat.* The object of the second of the above provisos in a mortgage where the principal sum and interest thereon are blended together and made payable by instalments is to make interest, and that compound interest, become payable at the rate named upon all instalments coming due every half year, and also upon all sums, if any should be advanced by the mortgagees, by way of premiums of insurance. And the effect of that clause in a mortgage like the present, where the principal is made payable in one sum at a prescribed date and interest thereon in the meantime half yearly, is simply, as it appears to me, to make interest, and that compound interest, become payable upon all sums of the half yearly interest not paid at the days prescribed in the mortgage; this is the construction which can naturally and reasonably be put upon the words "any of the *instalments hereby secured*" as used in a mortgage like the present one. The provision as to interest upon insurance moneys has relation to a covenant in the mortgage whereby the mortgagor covenanted to insure and keep insured the mortgaged premises in the sum of six thousand dollars, and that in default thereof the mortgagee might insure the premises and charge the premiums to the mortgagor.

As to these insurance monies a very different provision is made in the next clause whereby it is agreed between the parties *that interest at the rate of one per centum per month* upon all moneys paid by the mortgagees for *insurance* and for taxes, and for incumbrances, if any, on the said lands, and for costs incurred by the mortgagees in recovering and keeping possession of the mortgaged premises shall be a charge on the lands.

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The only remaining clause is that which empowers the mortgagees, in case of any default aforesaid, by sale of the mortgaged premises to realise payment of the principal money and interest and all other moneys charged on the mortgaged premises. This clause in short substance provides that if default should be committed in payment of any of the sums becoming due half-yearly for interest or in payment of insurance moneys, or in payment of the principal sum, and that such default should continue for three months then the mortgagees

> may sell any of the said lands, &c., &c., and that upon such sale should any surplus remain in the hands of the company after payment of all their claims *for principal, interest* and all other sums secured by the mortgage the mortgagor shall be entitled to such surplus.

Now in none of these clauses is interest upon the principal sum of $20,000 stipulated for at the rate of nine per centum per annum, or indeed at any rate of interest after the 2nd day of January, 1885 ; interest *in the meantime*, that is to say up to that day, is stipulated for payable half yearly, and as the mortgagees were given power to sell the mortgaged premises in case of any default, to reimburse themselves before the expiration of another half year, it may have been deemed quite unnecessary to make any stipulation for interest on principal after the day prescribed for the payment thereof; but whether the not expressly providing for the payment of interest upon the principal sum after that day is attributable to inadvertence or design is of no importance, for none being stipulated for no more than six per cent (the amount by law allowable in the absence of stipulation) can be allowed. Take the case of the mortgaged lands proving insufficient to pay the whole of the mortgage security, and that after sale a large part of the principal should remain unsatisfied, it surely cannot be

held that nine per centum per annum would still be recoverable under the covenant or any stipulation contained in the mortgage.

The sole contention of the respondents has been that the principal sum of $20,000 is comprehended in the words "*any of the instalments*" &c., &c., in the two provisos above mentioned. To this contention the Court of Appeal at Toronto have assented. One of the learned judges was of opinion that this construction might be *inferred* from certain words in column No. 2 of schedule B of the Act respecting short forms of indentures set opposite No. 13 of the Act of the Province of Manitoba, but as already shewn an express clause is inserted in the mortgage specifying all the powers given for sale of the mortgaged premises upon any default; and moreover a rate of interest in excess of the rate of interest allowed by law in the absence of stipulation cannot be inferred.

In fine the contention of the respondents cannot be maintained. The appeal therefore must be allowed with costs, and an order made for the allowance only of six per centum on the principal sum of $20,000 after the second day of January, 1885, as the only sum allowable by law in the absence of a *stipulation* for a greater amount.

SEDGEWICK and KING JJ. also concurred in the judgement of Mr. Justice Gwynne.

Appeal allowed with costs.

Solicitors for the appellant: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Reid & Wood.*

1900
*April 20.

HUGH P. KEEFER AND THE QUEBEC BANK (PLAINTIFFS)..... APPELLANTS;

AND

1901
*Feb. 19

THE PHŒNIX INSURANCE COMPANY OF HARTFORD (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance against fire—Insurable interest—Unpaid vendor.

An unpaid vendor, who by agreement with his vendee has insured the property sold, may recover its full value in case of loss though his interest may be limited if when he effected the insurance he intended to protect the interest of the vendee as well as his own.

The fact that the vendor is not the sole owner need not be stated in the policy, nor disclosed to the insurer.

Judgment of the Court of Appeal (26 Ont. App. R. 277) reversed, and that of the trial judge (29 O. R. 394) restored.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial (2) in favour of the plaintiffs.

The plaintiff Keefer sold a piece of land to one Cloy for $2,000 payable by instalments, agreeing to keep it insured for the amount of the purchase money, which he did. A fire having occurred causing a loss of $1,740, when Keefer had been paid $800 by Cloy, the insurance company refused to pay more than the amount of Keefer's interest, and the latter brought an action to recover the full amount of the loss, the Quebec Bank, as assignee of Cloy's interest in the policy, joining him as plaintiff.

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

(1) 26 Ont. App. R. 277. (2) 29 O. R. 394.

At the trial before Mr. Justice Ferguson, the plaintiffs recovered the full sum claimed, but this judgment was reversed by the Court of Appeal. The plaintiffs then appealed to this court.

Collier for the appellants, relied on *Castellain* v. *Preston* (1), referring also to *Irving* v. *Richardson* (2), and *Howes* v. *Dominion Fire & Marine Ins. Co.* (3).

Aylesworth Q.C. for the respondent, cited *Guerin* v. *Manchester Fire Ins. Co.* (4); *Simeral* v. *Dubuque Mutual Ins. Co.* (5).

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Sedgewick.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed.

GWYNNE J.—I entirely concur in the judgment of the Court of Appeal for Ontario in this case. The policy of insurance sued upon is printed and is in the statutory form prescribed by ch. 167 R. S O. 1887, and is one only of indemnity, expressed, I think, in very plain terms, whereby the defendant agreed

to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage (not exceeding in amount $2,000, nor the interests of the insured in the property herein described).

At the trial the interest of the assured at the time of the policy being made, although then represented by him to be his own property, was in fact that of a vendor with a lien thereon for unpaid purchase money, amounting then to the sum of $1,200. Now that this policy so entered into operated solely as an insurance against loss of the insured's direct beneficial interest as such unpaid vendor cannot, I think, admit of a doubt.

(1) 11 Q. B. D. 380.
(2) 2 B. & Ad. 193.
(3) 8 Ont. App. R. 644.
(4) 29 Can. S. C. R. 139.
(5) 18 Iowa 319.

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KEEFER v. THE PHŒNIX INSURANCE CO. OF HARTFORD

Gwynne J.

The suggestion that the words "heirs or assigns" and "interests" (in the plural) as used in the above contract, which is in a printed form, show that the assured intended to insure the interest of his vendee as well as his own, has been fully answered by the judgment of the Court of Appeal for Ontario, and nothing can in my opinion be usefully added thereto. As to the assured having had the intention suggested (assuming him to have entertained it). all that need be said is that such intention is not expressed in the contract and it cannot be argued that a secret intention of the assured can be appealed to for the purpose of changing the terms of the contract, contrary to the intention of both parties to the contract as expressed therein. But this point also is fully dealt with by the judgment appealed against. The appeal, therefore, must in my opinion be dismissed with costs.

SEDGEWICK J.—The appellant Keefer, on the 25th July, 1893, being the owner of certain lands and premises in the town of Thorold, upon which the buildings covered by the policy in question were erected, entered into an agreement with one George C. Cloy to sell the property to him for $2,000, payable as follows: $300 in cash; $500 in four months, and the balance, $1,200 in twelve months. At the same time Keefer verbally agreed with Cloy to keep the buildings insured to the extent of $2,000 until the purchase money should be fully paid. There was, at the date of the agreement, a policy in force covering the property for that amount, and this policy was allowed to remain until the 23rd February, 1894, when the policy sued on was substituted for it, and issued to the appellant Keefer. Cloy at this time had paid Keefer $800 on account of the purchase money, and subsequently paid him $500. The policy was

renewed from time to time, and on the 11th December, 1896, the frame building mentioned in the policy was destroyed by fire, and another building damaged to the extent of $40, making a loss of $1,740, the amount claimed in this action. At this date the purchase money payable to Keefer had been reduced by payments made by Cloy to $700. The interest which Cloy had, or claimed to have, under the policy was assigned to the Quebec Bank, and this action was brought by Keefer and the Quebec Bank to recover the total amount of loss, the bank claiming the interest of Cloy under its assignment, as well as that of Keefer.

The case was tried before Mr. Justice Ferguson, and judgment given in favour of the appellant. This judgment was reversed by the Court of Appeal, Mr. Justice Maclennan dissenting.

At the time of the fire, the appellant was the owner in fee of the whole property, but having only a beneficial interest to the extent of $1,200, and Cloy having a beneficial interest to the extent of $800, and the question in dispute here is whether an unpaid vendor can recover not only his beneficial interest, but the beneficial interest of his vendee as well as under the circumstances of the present case.

I am clearly of opinion that he can. The learned Chief Justice of this court in *Caldwell* v. *Stadacona Fire & Life Ins. Co.* (1) thus clearly lays down what I understand to be the law:

> Whatever doubts may be raised by text writers, it is clear, from the language of judges used in delivering judgments in cases of authority, that provided the assured had an interest at the time of the execution of the policy, and at the date of the loss, he is entitled to recover upon a fire policy the full value of the property destroyed, provided the whole interest in the property was insured, although his interest may have been a limited one merely.

He cites, among other cases, *Simpson* v. *Scottish Union Ins. Co.* (2), where Vice Chancellor Wood says:

(1) 11 S. C. R. 242.
(2) 1 H. & M. 618.

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Sedgewick J.

I agree that a tenant from year to year, having insured, would have a right to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of his tenancy from year to year.

And *Waters* v. *Monarch Assur. Co.* (1), where Lord Campbell says:

The last point that arises is: To what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good "all such damage and loss as may happen by fire to the property hereinbefore mentioned." That is a valid contract, and as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them.

My brother Gwynne, at page 260, in the same case, expressed similar views.

Castellain v. *Preston* (2), (a case very largely relied on by the majority of the court below) strongly supports the view just stated. Lord Bowen says:

It is well known in marine and in fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. * * * Then to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a

(1) 5 E. & B. 870. (2) 11 Q. B. D. 380.

mortgagee. If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership, he is entitled to insure *primâ facie* for all. If he intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover.

Sedgewick J.

A case which I cite, not as authority, but as clearly stating what I conceive to be the law, is that of *Insurance Co.* v. *Updegraff* (1).

Although the vendor (the court says), is not bound to insure, or even to continue an insurance already made, he may, like any other trustee having the legal title, insure if he thinks proper, to the full value of the property. It is true that in the case of a mortgagee of a ship he can only recover to the extent of his mortgage debt, unless it appears that in effecting the insurance he intended to cover, not his own interest only, but that of the mortgagor also. If he intended to cover the whole interest, both legal and equitable, he may recover the whole amount of the insurance, under a trust, as to the surplus, to hold it for the mortgagor. The same rule applies to the case of an insurance by a vendor. There is this difference, however, that as the whole estate is at law in the vendor, and the vendee has only a title to go into equity, the insurance company cannot assert the rights of the latter, or go into equity in respect to them, except upon principles of equity and good conscience. An insurance upon a house, effected by the vendor, is *primâ facie* an insurance upon the whole legal and equitable estate, and not upon the balance of the purchase money. Where the form of the policy shows it to be upon the house, and not upon the debt secured by it, the burthen of showing that the insurance was upon the latter, and not upon the former, rests upon the underwriters. There is no hardship in this. The premium paid, as compared with that usually charged where the insurance is upon houses, and not upon debts secured by them, is generally decisive of the question, and the rates of insurance are peculiarly within the knowledge of the insurance company. If the insurance was upon the whole estate the premium would be according to the usual rates for houses of that description and location ; if it was only upon the debt due to the vendor, there would be a large reduction on account of the responsibility of the vendee, and the value of the lot of ground included in the sale, because both of these would, in that case, stand as indemnities to the underwriters. They would be entitled to a cession of the vendor's claims, from which an ample indemnity might be recovered.

(1) 21 Penn. 520.

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There cannot, I think, be any question, but that in the present case the appellant intended to insure the whole property, and not merely his beneficial interest therein. The agreement between him and Cloy is clear evidence of this as well as the terms of the policy itself. Nor in my view is there any doubt but that the company thought that it was insuring the whole property. The premium is for an insurance not upon a partial but upon an absolute interest. The terms of the policy show that the building itself was insured The company agreed to make good all such direct loss or damage not exceeding in amount the interests of the assured in the property described, and that word "interests," I think clearly includes interests of all kinds, if insurable; legal interests equitable interests, and all other interests arising from any relationship between the assured and any one claiming under the assurance

Some of the learned judges below seem to have thought the fact that Cloy's interest was not disclosed at the time of the insurance vitated the policy. The authorities are conclusively the other way. Bowen L. J. in *Castellain* v *Preston* (1) says two conditions only are necessary in order to entitle the assured to recover, "first, the form of his policy must be such as to enable him to recover the total value; and secondly, he must intend to insure the whole value at the time."

It is nowhere a condition of his recovering the whole amount that he must disclose all the parties interested. The law, I think, is well laid down in Wood on Fire Insurance, sec. 151:

> Unless the policy requires that the interest of the insured shall be disclosed, a failure to disclose the nature of his interest or of the existence of a lien or encumbrance thereon, is not a fraudulent con-

(1) 11 Q. B. D. 380.

cealment, and the policy is operative if the assured in fact has an insurable interest therein.

Lord Tenterden in *Crowley* v. *Cohen* (1), says:

Although the subject matter of the insurance must be properly described, the nature of the interest may in general be left at large.

And see Arnold on Marine Ins., 6th ed. p. 51.

Sedgewick J.

In arriving at the conclusion which I have done, I have been much influenced by the statement of the law in *Castellain* v. *Preston* (2). There is nothing inconsistent with our present judgment in that case. There, it was practically admitted that the vendor insured only in his own interest, and the case proceeding upon that assumption merely held that the vendor having received the full amount of the purchase money the insurance company became subrogated to his rights against the vendee, and could recover from him, the vendor, any excess which he received beyond a proper indemnity. On the whole I think this appeal must be allowed, and the judgment of the trial judge restored.

KING J.—I agree with Osler J. that the case mainly turns upon the question:

What is the proper construction of the policy of insurance? Is it limited by its terms to the plaintiff's interest which, though not disclosed to the company, was that of an unpaid vendor, or is it an insurance not only for himself but for others interested, as for example, the vendee, to the extent of the value insured?

And again:

The question is whether the policy is apt for the purpose?

The learned judge came to the conclusion that the words are not apt for such latter purpose, and that therefore the plaintiff's interest as unpaid vendor to the extent of the $700 remaining due at the time of the loss was alone at risk at that time.

(1) 3 B. & Ad. 478. (2) 11 Q. B. D. 380.

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The policy declares in the first place that the company in consideration of the stipulations herein named and of $40 premium does insure H. F. Keefer for the term of one year from the 23rd day of February, 1894, at noon, to the 23rd day of February, 1895, at noon, against all direct loss or damage by fire except as hereinafter provided to an amount not exceeding $2,000, to the following described property, while located and contained as described herein and not elsewhere, to wit: $1,700 on the frame building (describing it) and $300 on his frame storehouse (describing it).

It subsequently goes on as follows:

And the said Phœnix Insurance Company hereby agrees to indemnify and make good unto the assured, his heirs and assigns, all such direct loss or damage (not exceeding in amount the sum or sums insured as above specified, nor the interests of the assured in the property herein described), the amount of loss or damage to be estimated according to the actual cash value of the property with proper deduction for depreciation however caused.

I must admit to having been for some time of the opinion that by the terms of the indemnity clause the insurer's liability was limited to an amount (within the sum assured) not exceeding the assured's own interest at risk and liable to be prejudiced by a loss. Such seemed to me the fair meaning and scope of the indemnity clause; and it appeared to be quite unnecessary to guard therein against non-insurable claims or interests, as these would be excluded by the implied terms of an insurance contract. On fuller consideration, however, I think that the policy has a different meaning. By its opening clause, already recited, the plaintiff is insured generally in respect of the property mentioned to the amount specified, that is to say, he is insured generally in respect of his insurable interests in the property, whatsoever they may be. Then in the indemnifying clause, the company undertakes in terms to indemnify and make good unto the assured all such direct loss or damage; but that this may not appear to be a covenant to pay $2,000 in any event in case of loss, the words are added: "not exceeding in amount

the sum or sums insured as above specified;" and further, that it may not appear to be a covenant to pay the amount irrespective of the existence or continuance of the insurable interest of the assured, the further words are added: "nor the interests (*i. e.* the insurable interests) of the assured in the property herein described," and then the clause goes on to provide for the mode in which the amount of loss or damage shall be estimated. Strictly, the saving clauses, both as to the sums specified as insured and as to the insured's interests in the property, were not necessary; nor were they more necessary in the one case than in the other, and in both cases appear to have been inserted by way of greater caution. The object of the clause of indemnity, so called, was not to limit or define the subject of insurance in any way. That had been sufficiently designated or described in the opening clause of the policy. As to the use of apt words to cover beneficial interests intended to be insured, it seems to me that these need not be specially descriptive of such other interests in the subject of the insurance. All that is meant is that the words shall be large enough to cover all that was in fact intended. If they are so, the insurer's concurrence in what the assured intended to be embraced in them is implied, and so the difficulty involved in his supposed non-concurrence is removed.

The next question is whether it is competent for an unpaid vendor retaining the legal title and having the right so to retain it, to insure and recover for the whole value of the property which he has bargained to sell, there being no question of his intention so to insure and no question of the use of apt words therefor in the policy.

It is not easy to see how such a case can be put lower than that of a mortgagee as instanced by Bowen L.J. at p. 398 of *Castellain* v. *Preston* (1) where he says:

(1) 11 Q. B. D. 380.

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If he has the legal ownership he is entitled to insure for the whole value. * * If he intends to cover only his mortgage, and is only insuring his own interest, he can only, in the event of a loss, hold the amount to which he has been damnified. If he has intended to cover other persons besides himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself, and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest.

I cannot concur with Mr. Justice Maclennan in regarding what was said by Bowen L.J. as "an authoritative statement of the law by the Court of Appeal in England." The other members of that court had preceded him in the delivery of separate opinions in which the several matters arising in the case were fully considered, and we are not to suppose that they adopted all the views and statements of law expressed by Bowen L.J. in his somewhat wide incursion into the field of insurance law. To me it appears that, in respect of what is said by him as bearing on this appeal, his views mark a departure to some extent from prior authority; still we have in them the considered opinion of a very high authority which so far as I am able to discover appears also to have been adopted and established as part of the law and practice of insurance, and which, limited by him, appears to be consistent with good sense.

The remaining and alternative part of the case relates to the effect of the alleged agreement with the vendee for the keeping alive of insurance on the premises. If that agreement were a valid one, I think that there could be no doubt that under this policy the plaintiff could recover in respect of the whole value of the property to the extent of the insurance, for in such case the plaintiff, in addition to the amount of his interest as unpaid vendor, would in case of loss be

prejudiced to the further amount to which he had bound himself to keep up the insurance.

The result is that I concur in allowing the appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Collier & Yale.*

Solicitors for the respondent: *Smith, Rae & Greer.*

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THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT).... APPELLANT;

AND

GEORGE GUTHRIE AND CATHARINE GUTHRIE, EXECUTOR AND EXECUTRIX OF THE ESTATE OF DAVID GUTHRIE, DECEASED, AND JOHN D. GUTHRIE, (PLAINTIFFS)..... RESPONDENTS.

1900

*May 30, 31.

1901

*Feb. 19.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Easement—Right of way—User—Prescription.

A railway line passed over the northern half of lots 32, 33 and 34 respectively, of the eighth concession of North Dumfries, having a trestle bridge over a ravine on 34, near the boundary of 33. G., the owner of lot 33 (except the part owned by the railway company) for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34 over which he could pass to a village on the west side, his predecessor in title, who owned all these lots, having used the same route for the purpose. The company having filled up the ravine, G. applied for an injunction to have it re-opened.

Held, reversing the judgment of the Court of Appeal (27 Ont. App. R. 64) that such user could never ripen into a title by prescription of the right of way nor entitle G. to a farm crossing on lot 34.

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

1900

THE CANADIAN PACIFIC RAILWAY COMPANY v. GUTHRIE.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiffs.

The question raised on the appeal is sufficiently indicated by the above note of the judgment thereon. The facts are fully set out in the opinion of Mr. Justice Gwynne speaking for the court.

Armour Q. C. and *Nesbitt Q. C.* (*Macmurchy* with them) for the appellant. If title to the right of way could be acquired by user in this case the user did not continue for twenty years by persons in the same right. See *Ackroyd* v. *Smith* (2); *Bailey* v. *Stephens* (3); *Thorpe* v. *Brumfitt* (4).

The court will always presume that a person using another's land is a licensee, not a trespasser. *Mickle-thwaite* v. *Vincent* (5).

Title by prescription from user will not arise where a lost grant cannot be presumed, which is the case here. The railway company can only hold the lands for railway purposes, and a grant for any other purpose would be void. *Mulliner* v. *Midland Railway Co.* (6); *Creyke* v. *Hatfield Chase* (7)

As to the claim for a farm crossing, see *Grand Trunk Railway Co.* v. *Huard* (8). *In re Metropolitan Railway Co. and Cosh* (9).

Shepley Q.C. for the respondents.

The judgment of the court was delivered by:

GWYNNE J.—The plaintiffs claim, as owners of the north half of lot No. 33, in the 8th concession of the Township of North Dumfries, in the County of Water-

(1) 27 Ont. App. R. 64.
(2) 10 C. B. 164.
(3) 12 C. B. N. S. 91.
(4) 8 Ch. App. 650.
(5) 8 Times L. R. 685.
(6) 11 Ch. D. 611.
(7) 12 Times L. R. 383.
(8) Q. R. 1 Q. B. 501.
(9) 13 Ch. D. 607.

loo, in the Province of Ontario, a prescriptive right of way under the Credit Valley Railway (now vested in and operated by the C. P. Railway Company) where it crosses the north half of lot No. 34, in the said 8th concession so as thereby to obtain access to a piece of land called Dickson's Lane, situate wholly on the south half of said lot No. 34, and by that lane to the Town of Ayr. The Court of Appeal for Ontario, from whose judgment this appeal has been taken, affirmed a judgment of the Chancellor of Ontario by whom the prescriptive right so claimed was adjudged in favour of the plaintiffs; and have also held that independently of such prescriptive right the plaintiffs in right of their ownership of the north half of the said lot No. 33 are entitled to the way claimed by them under the railway where it crosses the north half of the said lot No. 34 as an ordinary farm crossing in virtue of the Act relating to railways, C. S. C. ch. 66.

We expressed at the hearing our unanimous opinion that the appeal must be allowed, and it only remains now for us to express the grounds upon which that opinion rested.

One Charles McGeorge some time in the year 1854 acquired a fee simple estate in the north halves of lots Nos. 32, 33 and 34 in the said Township of North Dumfries by title derived from one James Colquhoun, and by a deed dated the 25th day of February, 1854, and executed by the said James Colquhoun, the said Charles McGeorge became seized in fee simple of a part of the south half of the said lot No. 34, containing 3 acres, 2 roods and 38 perches, described as follows:

Commencing at the centre of the said 8th concession of Dumfries in the line between lots Nos. 33 and 34; thence along the south boundary of the north half of the said lot No. 34 south 76° 30′ west

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25 chains more or less to the western limit of the said lot No. 34, then along said limit south 15° 40′ east 17 chains more or less to the said road leading from the store heretofore occupied by James Forbes to the distillery belonging to John Hall; thence north 76° 30′ east 91 links; thence north 15° 40′ west 16 chains 9 links more or less to within 91 links of the centre of the concession; thence north 76° 30′ east 24 chains and 9 links more or less to the line between lots 33 and 34; thence north 15° 40′ west 91 links to the place of beginning.

It may be admitted that thereafter until his death in the year 1862 the said Charles McGeorge and his tenants had communication at their pleasure along the north half of the said lot No. 34 to the said above described piece of land on the south of the same lot which was known as Dickson's Lane, as affording a shorter access to the Town of Ayr, than round by the highway at the northern extremity of the said lots upon which the said lots fronted.

The said Charles McGeorge by his last will and testament devised the whole of his estate to the executors named in his will, three in number, in trust for the support and education of his children with directions that his executors upon his youngest child coming of age, or before that time, if judged necessary, should sell and dispose of the whole of his estate and divide it equally among the children or the survivors of them.

On the 1st of July in the year 1874 the Credit Valley Railway Company, a company incorporated by an Act of the Legislature of the Province of Ontario, passed in 1871, entered into an agreement with two of the said executors of the will of the said Charles McGeorge for acquiring the land required for the construction of their railway across the north halves of the said lots Nos. 32, 33 and 34 whereby the said executors in consideration of $1 and a further sum of $50 per acre to be paid on execution of a conveyance as therein mentioned, did for themselves, their heirs,

executors, administrators and assigns, covenant and agree to sell, grant and convey from time to time to the Credit Valley Railway Company, their successors and assigns so much of lots Nos. 32, 33 and 34, in the 8th concession of North Dumfries being part of the estate of Dr. McGeorge, as might be selected from time to time for the purposes of their railway, 4 rods in width, and also such other widths as might be required for the roadbed and slopes, berms, spoil-banks and materials for embankments or ballasting across and upon said lands and premises, and to make a good title to the same in fee simple, with all dowers barred, and free from incumbrances to the said railway company, and they did thereby grant to the said railway company the right to enter upon the said lands and premises, and to lay out and construct the said railway as might be required. It was thereby further agreed that the price above mentioned should be paid within two months from the date of the agreement, or should bear interest thereafter, and further, that the said price should be in full compensation for land and all damages of whatsoever nature or kind caused by the taking of lands as above mentioned.

Thereupon the company proceeded with the construction of their railway across the said lots in conformity with the provisions of the Acts of the legislature in that behalf, and there being upon the said north half of lot No. 34 a gully of about 19 feet in depth, the company erected, as they did in all similar places on the line of railway throughout, a trestle bridge instead of an embankment, deferring as is usual in such cases the making of embankments until later on and by degrees from year to year. The railway was not opened for traffic until the spring of 1880, and in the year 1881 the fee simple estate in the said

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lands was duly conveyed to the said railway company in accordance with the terms of the said agreement of the 1st of July, 1874.

Now that agreement although executed by two only of the trustee executors of the will of Charles McGeorge, became by force of the terms of the Railway Act, ch. 66 of the Consolidated Statutes of Canada which were incorporated with the Credit Valley Railway Act, absolutely binding as to the terms of compensation for price of land and for damages upon all three, the trustee executors of the said will, &c., &c., and absolutely conclusive as to all matters expressed therein although the legal estate in the said lands may have only become vested in the said company in 1881.

The railway across the said lots was completed save as to the laying of the rails early in the year 1875, or in the latter end of the year 1874, and upon such completion the effect was that whatever right, title or interest which the trustee executors of the will of Charles McGeorge had had in connection with the user of any part of the north half of lot No. 34 for access to the said piece of land on the south half thereof known as Dickson's Lane, became absolutely and for ever determined and extinguished. And in so far as the land taken for the railway was concerned, no right or title whatever remained in the said trustee executors to create any new right of way across the said railway lands or any part thereof. Their right even to acquire against the will of the company either a level or an under crossing if not wholly divested by the unlimited terms of the said agreement was limited to their statutory right to such farm crossings as might reasonably be required for access between the lands on either side of the railway which were severed by the railway, and such farm

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crossings were provided by the company upon each of the said lots upon the level.

By an indenture dated the 20th January, 1876, and made between Alexander McGeorge, C. J. Muir and John Robson, the executors of Charles McGeorge of the first part, and Elizabeth, Mary, Annie and Charles McGeorge, children of the said Charles McGeorge, deceased, of the second part, the parties of the first part did grant to the said parties of the second part, their heirs and assigns for ever the north halves of said lots Nos. 32, 33 and 34 in the 8th concession of North Dumfries excepting and reserving therefrom all of such lots theretofore sold and conveyed or agreed to be sold and conveyed by the parties of the first part. This reservation excepted from the said grant so much of the said lots as had been taken under the statutes in that behalf for the purposes of the railway. This deed contains a singular clause, the intent and purpose of which it is difficult to see, but it seems to have been inserted by the person who drafted the deed as proper to be inserted as part of the estate of the deceased vested in the trustee executors to which for whatever benefit such estate might confer upon them the children of the deceased were entitled; but in transferring such estate the draftsman seems to have been under the impression that there was vested in the trustee executors only a right of way over the land called the Dickson Lane and not an estate in fee. The executors could of course only convey to the children the estate in the said piece of land which was vested in them which was an estate in fee subject it may be to the right of many persons to a right of way thereon and thereover, but the transfer to the children as tenants in common in fee of the land known as the Dickson Lane as the north halves of the lots 32, 33 and 34 had been trasferred would have

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transferred all that was vested in the trustee executors and all that they could by any form of expression have conferred. This clause is as follows :

The said parties of the first part grant to the said party of the second part and to the tenants and occupiers of the said lands hereby granted a right at all times to use in common with the owners, tenants and occupiers of the land of the said late Charles McGeorge the land described in the deed from William Dickson to James Colquhoun dated 20th November, 1855.

The estate by that deed conveyed was an estate in fee simple. Now as to what may be the value of this clause, and with the question whether or not, it has any value we are not at present concerned, for it is obvious that it is wholly irrelevant in the present case inasmuch as it does not confer and indeed does not assume to confer any right whatever to cross the railway upon the said north half of lot No. 34 or anywhere else ; on the contrary it in express terms excepts and reserves the lands taken for the railway from the operation of the deed, as land over which the grantees in the deed had no control whatever.

Now by a deed dated the 17th November, 1877, and made between the grantees in the said last mentioned deed namely, Elizabeth, Mary, Annie and Charles McGeorge of the first part and David Guthrie of the second part, the said parties of the first part granted to the second party of the second part the north halves of said lots 32 and 33, in the 8th concession of North Dumfries,

reserving however all lands sold or agreed to be sold by the executors of the late Dr. McGeorge, of the Village of Ayr, also reserving out of the above lands the lands sold or agreed to be sold to the Credit Valley Railway Company.

This deed contained a clause as to use of the Dickson Lane similar in terms to the language used in the deed of January 20th, 1876. By a deed dated the same 17th of November, 1877, between the same parties of the

first part as in the above mentioned deed and one David Smith of the second part, the said parties of the first part granted to the said David Smith his heirs and assigns the north half of the said lot No. 34, excepting and reserving thereout

the lands sold or agreed to be sold to the Credit Valley Railroad Company.

This deed also contained a clause as to the user of the Dickson Lane in the precise terms used in the deed of the same date conveying the north halves of lots 32 and 33 to Guthrie.

Now it is to be observed that the former of these deeds does not profess to transfer to Guthrie any estate or interest whatever in the said north half of lot No. 34. If it had expressly affected to do so it would have been simply void *quoad* any such right in so far as it might have purported to affect the railway land for the grantors in the deed had no interest or estate whatever in such lands; neither does the latter of the said deeds subject the estate in the land by that deed conveyed to Smith to any right of way whatever in favour of Guthrie or of any other person. This latter circumstance is referred to in the judgment of the Court of Appeal but was deemed unimportant because of the fact that Smith had not objected to Guthrie crossing his land on lot 34, but if Guthrie could only reach the railway upon lot 34 by the permission or sufferance of the owner of the land upon that lot adjoining to the railway how can it be said that Guthrie could in virtue of his ownership of lot 33 as is claimed in the declaration, cross the land of the railway company upon the said lot No. 34 by any other authority than the sufferance or permission of the railway company? And so no prescriptive right as claimed could have ever come into existence. It would operate as a complete miscarriage of justice if

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the mere non-interference by a railway company with the owner of land severed by a railway across it, in passing from his land on one side of the railway to that on the other side so severed, under a trestle bridge constructed on the line of the railway (which user of the railway company's land could not in any the slightest degree prejudice the company in the use of the railway) could mature into an indefeasible right in the land owner of such a character as to divest the company of the right to improve their railway, and make it better suited for the transport of traffic increased in quantity and weight, by substituting an embankment for the trestle unless they should purchase the permission of the land owner who had been so suffered to enjoy a convenience, without any cost to him, in the company's property.

The cases of *The Canada Southern Railway Co.* v. *Clowes* (1); and *The Canada Southern Railway Co.* v. *Erwin* (2); in this court, are cases in which it was held in circumstances somewhat resembling the present that no such right existed. In the present case there is this difference from those cases, that they were instituted at the suit of the owners of the lands whereon the trestle bridge in the railway which severed their lands respectively had been constructed; but in the present case Guthrie had no claim whatever, as owner of lot 33, nor any pretence to a claim for a farm crossing upon lot No. 34; there is therefore no foundation whatever for the claim of the plaintiffs as made in their declaration nor for a farm crossing as held by the Court of Appeal.

The substitution of an embankment for a trestle bridge on a railway is a work which is not to be regarded as a work merely in the interest of the railway company, but also as a work to be executed in dis-

(1) 13 Can. S. C. R. 139. (2) 13 Can. S. C. R. 162.

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charge of a duty imposed upon the company by statute, in the interest of, and for the safety of the public, and no user for any length of time under circumstances similar to those appearing in the present case could ever mature into a prescriptive right as claimed by the plaintiffs and allowed by the judgment now in appeal.

The form of the judgment will be to allow appeal with costs. Dissolve injunction and dismiss action with all costs.

Appeal allowed with costs.

Solicitors for the appellant: *Wells & Macmurchy.*

Solicitors for the respondents: *Guthrie, Watt & Guthrie.*

LOUIS ADOLPHE LORD (PETITIONER)...APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

1900

*Mar. 8.

1901

*Feb. 19

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC (APPEAL SIDE).

Appeal—Expiration of time limit—Forfeiture of right—Condition precedent—Ouster of jurisdiction—Objection taken by court—Waiver—Arts. 1020, 1209, 1220 *C. P. Q.*

The provisions of articles 1020 and 1209 of the Code of Civil Procedure of the Province of Quebec, limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may therefore be waived by the respondent. *Cimon* v. *The Queen* (23 Can. S. C. R. 62) referred to (1).

Art. 1220 *C. P. Q.* applies to appeals in cases of Petition of Right.

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

(1) Compare *Park Iron Gate Co.* v. *Coates* (L. R. 5 C. P. 634). REPORTER.

1900

LORD v. THE QUEEN.

APPEAL from a judgment of the Court of Queen's Bench, Province of Quebec (appeal side), whereby the court, *ex mero motû*, dismissed the petitioner's appeal from the judgment of the Superior Court, District of Quebec, by which his Petition of Right had been dismissed with costs.

In a suit of *Marchand* v. *The Attorney-General of Quebec*, alleged to be identical with that of the present appellant, the Petition of Right had been dismissed by the Superior Court, prior to the dismissal of appellant's petition, and, at that time, an appeal in the case of *Marchand* v. *The Attorney-General of Quebec* was pending in the Court of Queen's Bench at Quebec. It was accordingly agreed between the Government of Quebec and the petitioner that they should await the decision on the appeal in *Marchand* v. *The Attorney-General of Quebec*, and that, in the meantime, proceedings should be stayed in the present cause. Subsequently judgment was rendered upon the appeal in *Marchand* v. *The Attorney-General of Quebec*, reversing the Superior Court judgment, but not until after the expiration of the delay limited for the prosecution of appeals by articles 1020 and 1209 of the Code of Civil Procedure.

An order of the Lieutenant-Governor-in-Council was passed, reciting the facts above mentioned and that, in consequence, the petitioner had abstained from the prosecution of an appeal in his suit and that, owing to legal questions involved, the most expedient manner to obtain a proper decision was to permit the petitioner to take an appeal from the judgment of the Superior Court and to waive the delay expired for instituting said appeal and that, in thus renouncing said delay, it was expressly understood that Her Majesty, represented by the Government of the Province of Quebec, did not in any manner admit that the said Petition of Right was well founded, or petitioner entitled to

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recover any sum from Her Majesty, or that his action was identical with that of Marchand against the Government, or that the evidence in the two cases was identical, or that the judgment of the Superior Court was in any way erroneous.

The Court of Queen's Bench, *ex mero motû*, held this order-in-council to be *ultra vires*, and that as the delay for proceeding with the appeal had expired prior to the inscription in appeal the court was without jurisdiction to entertain it and could not acquire any such jurisdiction in consequence of consent of the parties.

Robitaille Q.C. for the appellant.

Fitzpatrick Q.C. and *Cannon Q C.* for the respondent.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Queen's Bench dismissing an appeal from a judgment of the Superior Court for want of jurisdiction.

On the 3rd of June, 1890, judgment was rendered by the Superior Court in a Petition of Right against the Crown in which the appellant was petitioner.

There had previously, and on the 20th March, 1886, been rendered a judgment of the Superior Court in a case also instituted by Petition of Right of *Marchand* v. *The Attorney General*, dismissing the petition in that case. In this cause of *Marchand* v. *The Attorney General* an appeal was taken to the Court of Queen's Bench which was allowed in part. Whilst the appeal in *Marchand* v. *The Attorney General* was pending it was agreed between the present appellant and the Crown that an appeal which the appellant proposed to take from the judgment of the Superior Court should be suspended pending the appeal in *Marchand* v. *The Attorney General*.

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The appellant some time afterwards applied to the Lieutenant Governor in Council for redress for the grievances of which he had complained in his Petition of Right. Thereupon an order in council was passed whereby, after reciting the proceedings in the case of *Marchand* v. *The Attorney General*, as well as those in the appellant's own Petition of Right, the Crown waived the appellant's delay in instituting an appeal in the present cause and consented that the appellant should be permitted to appeal from the judgment of the Superior Court against him, and that so far as Her Majesty was concerned the appellant should be permitted to institute an appeal from the judgment against him with the same effect as if he had done so within the delay allowed by law.

Thereupon the appellant did forthwith institute an appeal to the Court of Queen's Bench. On this appeal coming on to be heard the Crown, abiding by the order in council, did not insist on the forfeiture of the right of appeal by reason of the delays and took no objection to the jurisdiction of the court. The court however *ex mero motu* raised the point of jurisdiction and holding that it was not competent to entertain an appeal after the expiration of the delays prescribed by law, dismissed the appeal for want of jurisdiction.

The judgment of the court is in these words:

Considérant que l'appel n'a pas été pris dans les délais fixés par la loi;

Considérant partant que cette cour est sans juridiction. En conséquence elle se déclare incompétente et renvoie l'appel avec dépens.

This judgment was accompanied by notes prepared by the learned Chief Justice of the Queen's Bench in which it was explained that this court did not consider it was competent for the Crown to renounce to the delays as it had done by the order in council, since the articles of the Code of Procedure were enact-

ments of public order, and pointing out that this decision was founded on the jurisprudence now prevailing in the French Court of Cassation.

The articles of the Code of Procedure bearing on the question in this appeal are the following:

Article 1020. The inscription in appeal from the judgment of the court of original jurisdiction or from that of the Court of Review, cannot be filed except within thirty days from the rendering of the judgment appealed against.

Article 1209. Proceedings in appeal must be brought within six months from the date of the judgment, saving the cases provided for by articles 924, 1006, 1010 and 1020. This delay is binding even upon minors, women under martial authority, persons interdicted or of unsound mind, and upon persons absent from the province when those have been duly brought into the suit.

Article 1220. Unless the court otherwise orders, the respondent may, within eight days next after the period allowed to appear, set up by motion any exception resulting from: * * *

3°. Non-existence or forfeiture of the right of appeal.

The articles of the French Code of Procedure providing for delays in appealing are as follows:

Article 443 C. P. francais. Le délai pour interjeter appel sera de deux mois.

Article 444. Ces délais emporteront déchéance; ils courront contre toutes parties, sauf le recours contre qui de droit; mais ils courront contre le mineur non émancipé que de jour où le jugement aura été signifié tant au tuteur, qu'au subrogé tuteur, encore que ce dernier n'ait pas été en cause.

There can, I think, be no doubt but that article 1220 applies to appeals in Petitions of Right as well as to appeals in actions between ordinary suitors.

Had there been no authority on the question presented I should have thought it clear that there was no want of jurisdiction in the Court of Queen's Bench to entertain this appeal. The delay imposed is like all other delays in procedure, imposed principally for the benefit of the party, though in a sense it may be said that public policy, which requires the prompt despatch of causes, has also influenced the legislature.

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However this may be it has always been considered competent to the parties conventionally to enlarge the delays for appearing, pleading, the hearing of causes and such like proceedings though these are prescribed for the same purpose as the limit of the time for appealing. Indeed public policy which favours the compromise of litigation requires that this should be so. But beyond this, in matters of much greater importance than procedure and in which the rights of the parties are involved, they are permitted to enlarge the delays fixed by the law. Thus prescription, even acquired, can be renounced. Again the defence of *res judicata* may be waived by agreement of the parties. And in many other cases it is competent to the parties to renounce their strict rights. I am at a loss, therefore, to see why any difference should be made as regards the time for appealing.

The Court of Queen's Bench appear from the notes of the learned Chief Justice to have been influenced by a decision of the Court of Cassation pronounced in 1849 which is said now to be followed in France. Up to the date of this decision the Court of Cassation itself and the highest authorities amongst the authors, especially Merlin, who discusses the question fully, were the other way.

Should we then be bound by this single decision of the French Court of Cassation?

Notwithstanding the very high authority of the court and the great learning of its judges, the decision is not even binding on the court itself but may be repudiated as an authority at any time. I need not say it has no direct authority as regards Canadian courts. Moreover the wording of Article 444 of the French Code of Procedure is expressed in stronger terms than is the article of the Quebec Code.

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Further it appears to me that Article 1220 of the Quebec Code, requiring exceptions to the right to appeal, founded on forfeiture to be taken within eight days after the time to appear, has an important bearing on the question involved.

Therefore on the authorities preceding the *arrêt* of 1849, referred to in the judgment of Chief Justice Lacoste, I would, if there was nothing more in the case, have come to the conclusion that it was competent to the Crown to waive the delay.

There is however an authority in this court which is binding on us. I refer to the case of *Cimon* v. *The Queen* (1) cited in the appellant's factum. In that case the objection was taken that the appeal to the Court of Queen's Bench, which had there admitted the appeal, was taken too late. The Queen's Bench had there largely increased the amount awarded to the respondent by the Superior Court, and this court by a majority allowed the appeal and restored the first judgment. Mr. Justice Fournier, one of the minority here, in his judgment fully discusses the point and decides it adversely to the objection to the competence of the Queen's Bench, and this opinion was acquiesced in by the majority.

I should have said that the Crown appeared by counsel on the hearing of this appeal and declined to take any part in the argument.

The appeal must be allowed and the case remitted to the Court of Queen's Bench to be there heard on the merits.

Appeal allowed with costs.

Solicitors for appellant: *Robitaille & Roy.*

Solicitor for respondent: *L. J. Cannon.*

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(1) 23 Can. S. C. R. 62.

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*Mar. 5.
*Mar. 8.

L'ASSOCIATION ST. JEAN-BAPTISTE DE MONTRÉAL (DEFENDANT) ..... APPELLANT;

AND

HENRI ALEXANDRE A. BRAULT (PLAINTIFF) ..... RESPONDENT.

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

Appeal—Jurisdiction — Constitutional law — Legislative powers—Appeals from the Court of Review—54 & 55 V. c. 25, s. 3, (D.)—B. N. A. Act, 1867, s. 101 — Illegal consideration of contract—Lottery—Corelative agreements.

The power of the Parliament of Canada under sec. 101 of the British North America Act, 1867, respecting a general court of appeal for Canada is not restricted to the establishment of a court for the administration of laws of Canada and, consequently, there was constitutional authority to enact the provisions of the third section of the Dominion Statute, 54 & 56 Vict. ch. 25, authorising appeals from the Superior Court, sitting in review, in the Province of Quebec.

On the merits, this appeal was allowed with costs, Girouard J. dissenting, the decision in *L'Association St. Jean-Baptiste de Montreal* v. *Brault* (30 Can. S. C. R. 598) being followed.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The questions at issue in this case arose out of the transactions that gave rise to the former appeal by the present appellant against the respondent (1), the action having been brought by the respondent to recover

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

(1) 30 Can. S. C. R. 598.

$3,114.39 for a second instalment of interest on the $30,000 mentioned in the statement of that case, under the deed of 19th March, 1892. Plaintiff recovered judgment in the trial court and this judgment was affirmed by the Court of Review, on 5th May, 1900, Doherty J. dissenting. The defendant appealed to the Supreme Court of Canada on the same grounds as were asserted in the former appeal. On the appeal coming on for hearing, it was admitted by counsel that the questions at issue, upon the merits, were precisely similar to those raised on the former appeal, except that the successful ground of defence there urged for the first time on appeal to the Supreme Court had been taken in the courts below, and there was therefore no argument made on the merits on behalf of either party.

The respondent, however, moved to quash the appeal on the ground that the provisions of the Dominion Statute, 54 & 55 Vict. ch. 25, sec. 3, which authorised the appeal from the judgment of the Court of Review were unconstitutional and *ultra vires* of the Parliament of Canada.

Belcourt K.C., for the motion, cited *Danjou* v. *Marquis* (1); *Macdonald* v. *Abbott* (2); *Grand Trunk Railway Co.* v. *The Credit Valley Railway Co.* (3) on the proposition that, as the provincial legislature had declared the judgment of the Court of Review where it has affirmed the judgment of the trial court final and conclusive between the parties, there could be no power in the Parliament of Canada to permit an appeal.

Béique K.C., contra, referred to *Clarkson* v. *Ryan* (4).

The judgment of the court was delivered by:

(1) 3 Can. S. C. R. 251.
(2) 3 Can. S. C. R. 278.
(3) Doutre, Constitution of Canada, p. 337.
(4) 17 Can. S. C. R. 251.

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L'ASSOCIATION ST. JEAN-BAPTISTE DE MONTREAL v. BRAULT.

TASCHEREAU J.—This is an appeal from the Court of Review. The respondent moves to quash it on the ground that the enactment of the Dominion Parliament passed in 1891, giving the right to appeal from that court is unconstitutional and *ultra vires*. This motion cannot prevail.

We have entertained a number of such appeals during the ten years that the enactment has been in force without any objection having been taken to our jurisdiction and it is too late now to ask us to decree that in all those cases our judgments are complete nullities.

Section 101 of the British North America Act, 1867, enacts that notwithstanding the exclusive jurisdiction given to the provincial legislatures over civil rights, the Parliament of Canada has the power to provide for the constitution, maintenance and organisation of a general court of appeal for Canada, without restricting the power, as it does for additional courts of first instance, to the administration of laws of Canada.

The respondent would contend that all the appeals heard in this from all over the Dominion, since its creation in 1875, in cases not governed by the federal laws, were determined without jurisdiction. For, if parliament had not the power to authorise an appeal in such cases from the Court of Review, in Quebec, it had not the power to authorise it from the courts of final jurisdiction in the other provinces. Then we have often held that the provincial legislatures have not power to restrict in any way the jurisdiction of this court or to add to it. The Quebec Legislature had not the power to authorise an appeal to this court from the Court of Review, or from any of its courts. That being so, it follows that the Dominion parliament must have that power.

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The motion is dismissed with costs, and the appeal is allowed with costs.

GIROUARD J. dissented from the judgment of the majority of the court upon the merits for reasons already stated by him in his judgment in the former case of *L'Association St. Jean-Baptiste de Montréal* v. *Brault* (1).

Motion to quash dismissed with costs; appeal allowed with costs.

Solicitors for the appellant: *Béique, Lafontaine, Turgeon & Robertson.*

Solicitors for the respondent: *Lamothe & Trudel.*

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*March 6.
*Mar 8.

WILLIAM BELL (PLAINTIFF)..... .....APPELLANT;

AND

GEORGE VIPOND, ET AL (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Appeal—Débats de compte—Issues on reddition—Amount in controversy—Jurisdiction.

In an action *en reddition de compte*, where items in the account filed exceeding in the aggregate two thousand dollars have been contested, the Supreme Court of Canada has jurisdiction to entertain an appeal.

MOTION on behalf of the plaintiff that his security for appeal to the Supreme Court of Canada be allowed.

The motion came up on reference from a Judge in chambers to whom application had been made by way of appeal from the decision of the registrar refusing to allow the security. The circumstances of the

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

(1) 30 Can. S. C. R. 598.

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case are stated in the judgment of the court delivered by His Lordship Mr. Justice Taschereau

Brooke for the motion.

Markey contra.

The judgment of the court was delivered by:

TASCHEREAU J.—This is a motion by the plaintiff to allow his security for appeal to this court. His action concluded for *reddition de compte*, or in default thereof, for one thousand dollars. The defendants, admitting their obligation to render the account, filed one amounting to over eight thousand dollars, claiming two hundred and forty-two dollars as the balance thereof in their favour. The plaintiff, by a contestation of that account, claimed to be entitled to an amount which, though not specified, yet, by his allegations, clearly amounted to a sum exceeding two thousand dollars, withdrawing expressly the alternative conclusion of his declaration for one thousand dollars. The defendants joined issue on that contestation, not objecting to the withdrawal by the plaintiff of his alternative conclusion for the one thousand dollars. On that issue, the Superior Court rendered a judgment in favour of the plaintiff for two thousand one hundred and ninety-one dollars. The Court of Appeal reversed that judgment, and dismissed his action and his contestation of the defendants' account.

The defendants' objections to the plaintiff's right of appeal are unfounded. The amount demanded by the plaintiff and in controversy in the courts below and upon this appeal was and is clearly over two thousand dollars.

The motion is allowed with costs.

Motion allowed with costs.

Solicitors for the appellant: *Stephens & Hutchins.*

Solicitors for the respondents: *Smith, Markey & Montgomery.*

FREDERICK W. GREEN (DEFENDANT)...APPELLANT; 1901

AND *Feb. 25, 26.

OLIVER S. MILLER (PLAINTIFF).....RESPONDENT. *Mar. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Privileged communication—Malice—Charge to jury—Evidence.

On the trial of an action claiming damages for a libel alleged to be contained in a privileged communication the judge charged the jury as to privilege and added "if the defendant made the communication *bonâ fide*, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him."

Held, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him.

One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact.

Held, that as to prove malice the writer's knowledge of the falsity of the fact was the material point the sense in which he may have used the words was the governing consideration.

The judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff.

Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 129) affirmed, Gwynne and Sedgewick JJ. dissenting.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside a verdict for the defendant and ordering a new trial.

The letter containing the alleged libel of the plaintiff by the defendant, and other facts bearing on the questions raised on the appeal are set out in the judgment of the court.

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

(1) 32 N. S. Rep. 129.

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W. B. A. Ritchie K.C. for the appellant. The letter written was upon a privileged occasion; *Toogood* v. *Spyring* (1); *Somerville* v. *Hawkins* (2); *Harrison* v. *Bush* (3); *Jenoure* v. *Delmege* (4); *Nevill* v. *Fine Art and General Insurance Company* (5). The jury could not have found that the statement of Green that he "relieved" Miller of the agency was false. There is no evidence of malice; on this point see *Spill* v. *Maule* (6); *Dewe* v. *Waterbury* (7). Even assuming untrue statements were made in the letter, there was no evidence of their falsity in the sense they were understood by the defendant, and instruction as suggested would have been inappropriate and misleading. *English* v. *Lamb* (8); *Attorney-General* v. *Good* (9). The jury were correctly instructed as to malice with the particularity necessary and also as to the meaning of the word "report" as used. Any remarks that might have been out of place were corrected when the jury was recalled, and further instructions given and the construction that might have been put on that reference as imputing misconduct. It was competent for the judge to correct his charge by this re-direction. These were mere comments on questions of fact and there was no suggestion in the letter of any fraudulent conversion or omission to account. See *Giblin* v. *McMullen* (10); *Metropolitan Railway Co* v. *Jackson* (11).

The evidence shews that the alleged libel was true in fact as to all material statements. A new trial should not be granted when the verdict is right and there is not sufficient error or omission in the charge

(1) 1 C. M. & R. 181.
(2) 10 C. B. 583.
(3) 5 E. & B. 344.
(4) [1891] A. C. 73.
(5) [1895] 2 Q. B. 156; [1897] A. C. 68.
(6) L. R. 4 Ex. 232.
(7) 6 Can. S. C. R. 143.
(8) 32 O. R. 73.
(9) McC. & Y. 286.
(10) L. R. 2 P. C. 317.
(11) 3 App. Cas. 193.

to justify it. *Deerly* v. *Duchess of Mazarine* (1); *Cox* v. *Kitchin* (2); *Ford* v. *Lacy* (3); *Great Western Railway Co.* v. *Braid* (4); *Edmonson* v. *Mitchell* (5); *Wickes* v. *Clutterbuck* (6); *Lordly* v. *McRae* (7); *Herrington* v. *McBay* (8); *Jenkins* v. *Morris* (9); *Wells* v. *Lindop* (10); *Bray* v. *Ford* (11).

Wrong observations in a charge as to facts are not material; *Taylor* v. *Ashton* (12); *Darby* v. *Ouseley* (13); *Hawkins* v. *Snow* (14); nor misdirection on points unnecessary to be considered. *Peters* v. *Silver* (15). There is no onus on the party holding the verdict to negative any substantial wrong or miscarriage; *Shapcott* v. *Chappell* (16). The full court had full power to dispose of the case; *Allcock* v. *Hall* (17); *Peers* v. *Elliott* (18); *Rowan* v. *Toronto Railway Company* (19); *Roach* v. *Ware* (20).

Roscoe K.C. for the respondent. The grounds for setting aside the verdict are mis-direction, non-direction, and that it is against weight of evidence. The libel is conspicuous in three places in the letter; that plaintiff had been discharged for inattention to business; that reports of collections were not made, and that he allowed the interests of the company to suffer. Starkie on Libel and Slander, p. 167; *O'Brien* v. *Clement* (21); Odger on Slander and Libel (3 ed.) p. 2; *Capital and Counties Bank* v. *Henty* (22). Direction should

(1) 2 Salk. 646.
(2) 1 B. & P. 338.
(3) 7 H. & N. 151.
(4) 1 Moo. P. C. (N.S.) 101.
(5) 2 T. R. 4.
(6) 2 Bing. 483.
(7) 3 N. S. Dec. 521.
(8) 29 N. B. Rep. 670.
(9) 14 Ch. D. 674.
(10) 15 Ont. App. R. 695.
(11) [1896] A. C. 44.
(12) 11 M. & W. 401.
(13) 1 H. & N. 1.
(14) 29 N. S. Rep. 444.
(15) 1 N. S. Dec. 75.
(16) 12 Q. B. D. 58.
(17) [1891] 1 Q. B. 444.
(18) 21 Can. S. C. R. 19.
(19) 29 Can. S. C. R. 717.
(20) 19 N. S. Rep. 330.
(21) 15 M. & W. 435.
(22) 5 C. P. D. 514; 7 App. Cas. 764.

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have been given that Green made statements he knew to be false, that malice could be inferred from this, and that proof of falsehood in part was evidence for the jury to renew the presumption of malice which the privilege of the occasion might otherwise rebut. *Nevill* v. *Fine Art etc. Ins. Co.* (1); *Robinson* v. *Dun* (2); *Blagg* v. *Sturt* (3); *Royal Aquarium Society* v. *Parkinson* (4); Odger on Libel (3 ed.) 318; Newell on Slander and Libel (2 ed.) at pp. 325, 771; *Smith* v. *Crocker* (5).

What the jury might have regarded in the light of a quarrel might be taken as evidence of malice; the judge declined to state this as the law. He practically told the jury that there was nothing to shew that malice could exist. There was misdirection as to what was necessary in order to find for plaintiff and as to the privilege of the occasion. The improper motive shewed malice; *Stuart* v. *Bell* (6); *Hawkins* v. *Snow* (7). When the jury once found that the letter implied misconduct it should not have been left open to their mere pleasure or caprice to find it libellous; *Weston* v. *Barnicoat* (8).

The direction as to the word "report" being considered in the light of defendant's construction of its meaning was improper. The question is how the person to whom the letter was addressed understood it. Odgers on Libel and Slander (3 ed.) 100. All the misdirections were of the most substantial character; *Anthony* v. *Halstead* (9); *Ashmore* v. *Borthwick* (10); *Nyburg* v. *Ullman* (11); *Dunbar* v. *Cardiff Phil. Music-Hall Co.* (12).

(1) [1897] A. C. 68.
(2) 24 Ont. App. R. 287.
(3) 10 Q. B. 899.
(4) [1892] 1 Q. B. 431.
(5) 5 Times L. R. 441.
(6) [1891] 2 Q. B. 341.
(7) 27 N. S. Rep. 408.
(8) 56 N. E. Repr. 619.
(9) 37 L. T. 433.
(10) 2 Times L. R. 113, 209.
(11) 8 Times L. R. 440.
(12) 9 Times L. R. 461.

There was a publication of the libel to the defendant's stenographer; *Pullman* v. *Hill & Co.* (1), and no privilege attached to this publication, nor is justification proved. The case of *Boxius* v. *Goblet Frères* (2) in no sense interferes with the doctrine of *Pullman* v. *Hill & Co.* (1). The *Boxius Case* (2) was one as to solicitors who might be required to write defamatory matter in the course of their business. It is not the business of the insurance companies more than of merchants to write anything defamatory.

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

KING J.—This is an action of libel by a former agent at Bridgetown, N.S., of the Confederation Life Assurance Society, against the appellant, who was the general manager of the company at Halifax.

The plaintiff ceased to be agent of the company at Bridgetown on the twenty-seventh day of April, 1897, and the defendant on the seventh of July, 1897, wrote the following letter, which contains the libel sued in respect of, to one Mrs. Freeman, who had a policy in the company and was supposed to be desirous of continuing it:

DEAR MRS. FREEMAN,—I think you know that at the time of my recent visit to Bridgetown, I relieved Mr. O. S. Miller of our local agency. As you and your husband have evidently taken a kindly interest in Mr. Miller, I might say to you without entering into details as to the causes which compelled me to take this action, an explanation of which would hardly be appropriate here, that we have tried for a considerable time past to get Mr. Miller to attend properly to our business, and that it was only because it was clearly necessary that the change was made. In order to give Mr. Miller an opportunity to get the benefit of commissions on as much outstanding business as I could, I left the attention of certain matters in Mr. Miller's hands, on the understanding that he would attend to them and remit to me as our representative. I now find that he has collected money which, up to the present time, we have been unable to get him to report, and I am told that he is doing and saying all that he can against myself and the company. The receipt for your premium fell

(1) [1891] 1 Q. B. 524. (2) [1894] 1 Q. B. 842.

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due May 30th, days of grace, June 30th. If you have made settlement of the premium with Mr. Miller your policy will of course be maintained in force, but I have thought that it would be part of the plan Mr. Miller at one time declared to me he would follow, in order to cease as much of our business as possible, that he would allow your policy to lapse through inattention. As I have thought that you would not like to have it so, I am prompted to write you this letter, and shall be glad if you will advise us whether or not you have made settlement with Mr. Miller. If not, what is your wish in regard to continuing the policy? Yours truly,

F. W. GREEN,
Manager.

This letter is clearly capable of a libellous construction, but it is claimed that it was a privileged communication, and it cannot be denied that the occasion was privileged. The only question arises as to the existence of malice which would deprive the communication of its otherwise privileged character, and as to the learned judge's direction or mis-direction in respect thereof.

The existence of malice rebutting the qualified privilege is an issue the affirmative of which is on the plaintiff in the action.

The case was tried before Chief Justice Macdonald, and the jury found in favour of the defendant. The Supreme Court of Nova Scotia directed a new trial on the ground of the insufficiency of the direction as to malice, (per Weatherbe, Ritchie and Graham JJ., Townshend J. dissenting), and this appeal is against the judgment for a new trial.

It is not to be expected that a judge in trying an action of libel shall attempt to define or specify all instances and tests of malice. To attempt to do so would be likely to confuse the jury. It is sufficient that he should explain the law to the extent required in dealing with the facts arising in the case.

One of the circumstances relied on by the plaintiff to prove malice was the alleged falsity, to the defendant's

own knowledge, of certain of the statements contained in the letter. It is clear that if a party speaking or writing on a privileged occasion states what is untrue to his knowledge, this is evidence of malice sufficient to destroy the privilege of the communication. *Clark* v. *Molyneux* (1); *Fountain* v. *Boodle* (2).

Now the letter in its opening sentences speaks of the plaintiff as having been relieved of his agency by the defendant and of the defendant having been compelled to take this action, by reason of having tried for a considerable time, without success, to get the plaintiff to attend properly to the business. The fact, however, appears to be, that the defendant was willing that the plaintiff should continue the agency, but that the latter was not willing to continue it on the terms as to compensation offered him. And the facts, (such as they were,) were within the knowledge of the defendant.

The plaintiff's counsel ask the learned judge to direct the jury, that if the defendant stated what he knew to be false it would be evidence of malice. The learned judge declined to do so because he considered that he had already covered the ground in his charge.

The only references to the point that I can find are at page 93 of the "Case" lines 5 to 10, where, in dealing with the matter of privileged communications, the learned Chief Justice says:

I tell you as a matter law, that the relation was sufficient to constitute privilege in relation to the communication made in that letter by the defendant to Mrs. Freeman, provided the communication (was) made *bonâ fide*, believing it to be true, although in fact it was untrue and defamatory. If the defendant made the communication *bonâ fide*, believing it to be true, and the privilege existed that I have endeavoured to explain then there would be no action against him.

All this is very true and upon analysis the point in question may be involved, but with all respect to the

(1) 3 Q. B. D. 237. (2) 2 Q. B. 5.

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very learned Chief Justice, who may very naturally have supposed that by this he had covered the ground, it seems to fall short of an instruction to the jury as to the effect of falsity within the knowledge of the defendant as constituting a test of malice, and I think that the plaintiff was entitled, (if he so requested), to have the more explicit statement of the law on a point directly affecting the proof of an issue, the burden of which was upon him.

Considerable argument took place respecting the statements in the letter as to the plaintiff's failure to report as to moneys left for his collection On the one hand it is said that the charge was that of a failure to inform his principal of the receipt of the money. On the other, that it merely meant a failure to make the form of report required of an insurance agent by the company. If the inquiry were as to the bare meaning of the words, as for instance whether the words were susceptible of a defamatory construction, I should think that the ordinary and natural sense would govern, as being the sense in which the words would be understood by the person receiving the letter; but, if the question upon the statement related to the question of malice or not, then, inasmuch as the knowledge of the defendant of the falsity of the facts alleged is the material fact, the sense in which the defendant may have used the word becomes the governing consideration; and, notwithstanding that the receiver might suppose that a grave charge was made, the person using the language cannot be said to have knowingly stated a falsehood, if he honestly meant to use the word in any innocent sense.

As to the learned Chief Justice not charging more explicitly in reference to malice, evidenced by a pre-existing unfriendliness, if indeed there were evidence of such on defendant's part, or of any quarrel shared

in by him, the charge would probably be inadequate; but looking at the facts, what is adduced was at most a scintilla of proof, consisting of hard things said by the plaintiff to and concerning the defendant, and not by the defendant to and concerning the plaintiff.

It is too strained and refined to argue that because plaintiff's conduct towards the defendant was improper and quarrelsome, therefore the defendant must have shared the feeling.

On the whole I think the only material ground of complaint adduced against the charge is that first alluded to.

It is not possible, I think, to say that the jury could not have been influenced by the non-direction and that no different verdict could reasonably or properly have been rendered had the charge been free from all objection.

I think that the case is still one for a jury suitably assisted and it would be improper to add a word which might affect the finding of another jury.

The appeal should, therefore, in my opinion, be dismissed, and chiefly for the reasons relied upon by Mr. Justice Ritchie, concurred in as it was by Mr. Justice Graham.

Appeal dismissed with costs.

Solicitor for the appellant: *H. C. Borden.*

Solicitor for the respondent: *F. L. Milner.*

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*Mar. 8.
*Mar. 18.

GEORGE PLUNKETT MAGANN, (DEFENDANT) ..... APPELLANT;

AND

AMÉDÉE JOSEPH AUGER, ET AL, (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Contract by correspondence—Acceptance—Mailing—Indication of place of payment—Delivery of goods sold—Pleading—Declinatory exception—Incompatible pleas—Waiver—Cause of action—Jurisdiction—Domicile—Procedure—Opposition to judgment—Arts. 85, 94, 129, 1164, 1173, 1175, 1176 *C.P.Q.—Arts.* 85, 86 *C.C.—Post Office Act.*

An offer was made by letter dated and mailed at Quebec, the defendant's acceptance being by letter dated and mailed at Toronto. In a suit upon the contract in the Superior Court at Quebec, the defendant, who was served substitutionally, opposed a judgment entered against him by default by petition in revocation of judgment, first by preliminary objection taking exception to the jurisdiction of the court over the cause of action and then, constituting himself incidental plaintiff, making a cross-demand for damages to be set off against plaintiffs' claim.

Held, that in the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but it is complete on the mailing of such letter in the general post-office. *Underwood* v. *Maguire* (Q. R. 6 Q. B. 237) overruled.

Article 85 of the Civil Code, as amended by 52 Vict. ch. 48, (Que.) providing that the indication of a place of payment in any note or writing should be equivalent to election of domicile at the place so indicated, requires that such place should be actually designated in the contract.

In forming an opposition or petition in revocation of judgment the defendant, in order to comply with art. 1164 C. P. Q. is obliged

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

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to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right.

A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the court.

In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers.

The judgment appealed from, affirming the decision of the Superior Court, District of Quebec (Q. R. 16 S. C. 22), was reversed.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec (1), dismissing the defendant's declinatory exception and, on the merits, maintaining the plaintiffs' action with costs.

The circumstances of the case and questions at issue upon this appeal are sufficiently stated in the head-note and in the judgment of the court delivered by His Lordship Mr. Justice Taschereau.

Fitzpatrick, *K.C.*, (Solicitor-General) and *Brodeur*, *K.C.*, for the appellant. The trial court had no jurisdiction, as the contract was made in Toronto and the whole cause of action did not arise in Quebec; art. 94 C.P.Q. The terms of arts. 1164 and 1176 C.P.Q. compelled defendant to set up full defence on the merits and his cross-demand by way of set-off or compensation, at the same time and in the pleading by which he opposed the default judgment entered against him. Therefore by defending on the merits defendant did not abandon the preliminary objection nor accept the jurisdiction of the incompetent tribunal. See *Goulet* v. *McCraw* (2). The plaintiff did not plead waiver of the *exception déclinatoire* and, in any case, the withdrawal by defendant of his pleas to the merits

(1) Q. R. 16 S. C. 22. (2) 19 R. L. 214.

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replaces him in the same position as if his cross-demand had never been made; art. 277 C.P.Q.

Under English law, contracts by correspondence are completed where the letter of acceptance is delivered, and our Post Office Act enacts that a mailed letter becomes the property of the person to whom it is addressed as soon as it is put in the post office (R.S.C. ch. 55 sec. 43). The mail carrier is then acting as agent of the person to whom the letter is addressed. *Underwood* v. *Maguire* (1) is evidently a misinterpretation of the law. The letter of acceptance having been mailed in Ontario, it was there that the parties became agreed, there their minds first met, and the law of that province must govern. Art. 8 C.C.

We claim that by the law in force in the Province of Quebec, the contract is made where the letter of acceptance is mailed. *Cloutier* v. *Lapierre* (2); *McFee* v. *Gendron* (3); *Warren* v. *Kay* (4); *Wurtele* v. *Lenghan* (5). Massé, Droit Commercial, vol. 3, p. 31, No. 1451. The authors who have written under the laws of France contending that the contract is made at the place where the letter is received, have not considered the dispositions of our Post Office Act. Delivery or indication of a place of payment in Quebec makes no difference. *Tourigny* v. *Wheler* (6); *Lapierre* v. *Gauvreau* (7). See also *Connolly* v. *Brannen* (8); *Rousseau* v. *Hughes* (9); *Henthorn* v. *Fraser* (10); *Turcotte* v. *Dansereau* (11); *Dawson* v. *McDonald* (12); *Dawson* v. *Ogden* (13); *Trevor* v. *Wood* (14); *Cowan* v. *O'Connor* (15); *Borthwick* v. *Walton* (16) Arts. 123, 196, 217, 218 C.P.Q.

(1) Q. R. 6 Q. B. 237.
(2) 4 Q. L. R. 321.
(3) M. L. R. 5 S. C. 337.
(4) 6 L. C. R. 492.
(5) 1 Q. L. R. 61.
(6) 9 Q. L. R. 198.
(7) 17 L. C. Jur. 241.
(8) 1 Q. L. R. 204.
(9) 8 L. C. R. 187.
(10) [1892] 2 Ch. 27.
(11) 27 Can. S. C. R. 583.
(12) Cass. Dig. 2 ed. 586.
(13) Cass. Dig. 2 ed. 797.
(14) Allen Tel. Cas. 330.
(15) 20 Q. B. D. 640.
(16) 15 C. B. 501.

Hogg K.C. and *Linière Taschereau K.C.* for the respondents. The mutual assent necessary to bind both parties came into operation only at Quebec. The contract was also executory in Quebec and delivery to be made there. *Clouthier* v. *Lapierre* (1); *Waren* v. *Kay* (2). Domicile was elected there; arts. 85, 1533 C. C.; payment was to be made there; Leake, Contracts, (ed. 1892) p. 23; Addison, Contracts, p. 17, referring to *Household, Fire, etc., Accident Ins. Co.*, v. *Grant* (3); Story, Conflict of Laws, p. 576, art. 280; Lafleur, pp. 148, 149; Dicey, pp. 567, 570; *Vaughan* v. *Weldon* (4.) 1 Massé, Dr. Comm., *n.* 579, p. 515; Pardessus, Dr. Comm. (5 ed) *nn.* 249, 250, 251; 6 Toullier, *nn.* 28, 29; 15 Laurent, *n.* 479; 1 Troplong, "Vente," *nn.* 24, 25, 26; Pothier, ed. Bugnet, "Vente," *n.* 32; 2 Baudry-Lacantinerie, Dr. Civ. *n.* 797 *bis*; 1 Larombière, art. 1101, *nn.* 19, 21; Merlin, (5 ed.) Rep. vo. "Vente," § 1, art. 3, *n.* 11 *bis.* p. 473; 1 Ponjol, Obl. art. 1109, *n.* 3; 7 Huc. art. 1108, *n.* 14; Dalloz, Rep vo. "Vente," *nn.* 86, 87, 88; Ferzier-Herman (ed. 1898) art. 1101 *n.* 58; 3 Massé et Vergé sur Zachariæ, *nn.* 6, 1453; Bédarride, Achats et Ventes, *nn.* 100 *et seq;* Edgar Hepp, *de la Corr. privée, nn.* 106, *et seq;* Würth, *Lettres missives;* Flandin, *Vente par Correspondance*, in *La Revue du Notariat*, Aug. & Sept. 1869; 1 Delamarre et Lepoitevin, *n.* 96; 3 Delamare et Lepoitevin, *nn*, 7, 102; Pollock, on Contracts, p. 11; Addison, on Contracts, pp. 14, 17; *Gillain* v. *Fourrier* (5); *Vandenbranden* v. *Mitchell* (6); *Gagey* v. *Cornu* (7); *Uzel* v. *Michard* (8); *De Marans* v. *Veuve Deschamps* (9); *Brousse* v. *Fardeau* (10).

(1) 4 Q. L. R. 321.
(2) 6 L. C. R. 492.
(3) 4 Ex. D. 216.
(4) L. R. 10 C. P. 47.
(5) S. V. 66, 2, 218; 67, 1, 400.
(6) S. V. 68, 2, 182.
(7) S. V. 68, 2, 183.
(8) Dal. 78, 2, 113.
(9) S. V. 86, 2, 30.
(10) Dal. 70, 2, 6.

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The person making the offer may retract it until the letter of the person accepting it has reached him. *Jahn* v. *Charry* (1); *Maïer-Yung* v. *Grapinet-Marmand* (2); Dal. Sup. vo. "Vent." *n.* 32; *Clark* v. *Ritchey* (3); *Underwood* v. *Maguire* (4); *McFee* v. *Gendron* (5).

Defendant constituted himself incidental plaintiff and asked judgment against the plaintiffs for $3,000, thereby accepting the jurisdiction, which he could do, the court being competent *ratione materiæ* to try the case. His subsequent withdrawal cannot be given retroactive effect to deprive plaintiff of the benefit of such acceptance; 2 Carré, *Procédure*, p. 174, art. 169, note 2, § 1, p. 175, art. 169, note 2, § 2; Metz. 12 mai, 1818, 4. Jour. des Avoués, p. 633; Grenoble, 29 août, 1836, 52; Jour. des Avoués, p. 231; Cass. 13 flo. an IX, 1 Jour. des. Avoués, p 88; 1 Dalloz, *Rep.* vo. "Acquiescement," *nn.* 37, 39; vo. "Competence," *nn.* 9, 25; 4 Carré, *Procédure*, p. 18, Q. 1584, et Suppl. *n.* 475: Dalloz, *Rep.* vo. "Exceptions et fins de non-recevoir," *nn*, 46, 115, 118, 188. A cross-demand is not a plea, but a new claim arising out of either the same or other causes to allow compensation to be declared. It is the most explicit acceptance of the jurisdiction of the court. He was not compelled to adopt that procedure to claim his right; he could have sued in any other court he thought competent. Having chosen the procedure, he acquiesced in having his claim decided by the Quebec court. As to the subsequent withdrawal, art. 277 C. P. Q. refers only to procedure, not to the right itself of jurisdiction granted by the defendant, an assent on which plaintiff can rely, and which he cannot retract.

(1) Dal. 71, 2, 96.
(2) Dal. 94, 1, 432.
(3) 9 L. C. Jur. 234.
(4) Q. R. 6 Q. B. 237.
(5) 18 R. L. 230.

Moreover, the declinatory exception must be pleaded within a fixed delay. By instituting a cross-demand, defendant's right of pleading to the jurisdiction ceased; and when he withdrew his cross-demand the delay had expired. The declinatory exception ought to have been pleaded *in limine litis*; and the right to plead it was extinguished by filing a cross-demand. Art. 99 C. P. Q.

On the merits, we refer to the judgment of Andrews J. in the Superior Court, unanimously adopted by the Court of Queen's Bench.

The judgment of the court was delivered by:

TASCHEREAU J.—The judgment of the Superior Court, confirmed by the Court of Appeal for the same reasons, as appears by the printed case, dismissed the appellant's exception to the jurisdiction on the sole ground that by constituting himself incidental plaintiff he had submitted to the jurisdiction of the court, and waived his said exception. We think that judgment untenable. The appellant's incidental demand, though not so in express terms as it was for instance in *Peale* v. *Phipps*, (1) was of its nature merely alternative, in the event of his exception to the jurisdiction not prevailing. If any part of the appellant's petition was illegal it was the incidental demand, not the declinatory plea. It is that demand that should have been objected to by the respondents, as incompatible with the exception to the jurisdiction. The respondents replied to the petition and declinatory plea and proceeded to trial and judgment upon the declinatory plea as a separate issue, and it was the court *ex proprio motû* which suggested the question of waiver. Now, it is a well settled rule that waiver must be pleaded or invoked by the party who relies upon it. In this case

(1) 14 How. 368.

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if there has been a waiver at all, it was on the part of the respondents who asked the Court a judgment on the merits of the appellant's declinatory exception without invoking waiver of it by the appellant. Then, were it necessary to determine the point, it would seem that appellant is right in his contention that under articles 1164, 1173, 1175, 1176 C. C. P., (new), his incidental or cross-demand was rightly filed with his petition. Arts. 217, 218, 219, C. C. P. *Turcotte* v. *Dansereau* (1). *Brunet* v. *Colfer* (2); 5 Boncenne-Bourbeau, 100 *et seq.* Though not a plea, in the ordinary sense of the word, the cross-demand was in the nature of a set-off, or compensation against the respondent's claim. Had he not filed it with his petition, he could not later have been allowed to file it, as of right.

Having come to the conclusion that the appellant had not waived his declinatory exception, we have to pass upon its merits, and determine whether or not the whole cause of respondents' action has arisen in the District of Quebec. If not, it is conceded, the Court had no jurisdiction. This brings up the controverted question raised in *Underwood* v. *Maguire* (3), and noticed in Sirey, Code Civil annoté, under art. 1101, no. 32, under art. 1583, no. 40; Code de procéd. under art. 420, no. 78, and in Pandectes Françaises vo. "Obligations," no. 7054. In negotiations carried on by correspondence is the contract entered into only when the letter containing the acceptance has reached the party who has made the offer? Or, as put in Sirey, *loc. cit.*

Est-il nècessaire pour la perfection du contract que l'acceptation soit parvenue à la connaissance de celui qui à fait l'offre?

The jurisprudence and commentators' opinions in France on the question are fully cited and collected in Sirey and the Pandectes, *loc. cit.*

(1) 27 Can. S. C. R. 583. (2) 11 Q. L. R. 208
(3) Q. R. 6 Q. B. 237.

If counted merely, the respondents' contention that the question should be answered in the affirmative would seem to have a majority in its favour. But if the reasoning is weighed, the question should, we think, be answered in the negative, and we adopt the view taken by Pothier, Vente, no. 32; 24 Demol. 1er, des Contr. No. 72; by Marcadé, vol. 4, under art. 1108, no. 395; by Lyon-Caen, Dr. Commercial, vol. 3, nos. 25 *et seq;* by the annotator to the *arrêt* of the 21st Jan, 1891, in Pand. Franc. 92, 2, 163, by the annotator o the same *arrêt* in Dalloz, 92, 2, 249; by Guillouard, Vente, vol. 1er, no 15; by Vigié, Dr. Civ. Fr. vol. 2, no. 1112; and by Hudelot, Obligations,no. 37. It would appear useless to repeat here the argumentation upon which these commentators have reached their conclusions upon the question. A simple reference to them is sufficient. They completely refute the reasoning upon which the contrary doctrine is based.

If it were required for the *aggregatio mentium* necessary to create mutuality of obligations in a contract made by correspondence that the party who has made the offer has received the acceptance of his offer, it would follow that the party accepting should himself not be bound till he is informed that his acceptance has reached the party offering. It is obviously of the greatest importance to the commercial community that such a doctrine should not prevail.

By the conclusion we have reached upon the question, we declare the law to be in the Province of Quebec upon the same footing as it stands in England, and in the rest of this Dominion, a fact rightly alluded to by Mr. Justice Bossé in *Underwood* v. *Maguire* (1), as of great importance specially in commercial matters.

It had previously in France been said by a learned writer that this view of the question

(1) Q. R. 6 Q. B. 237.

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est celle qui présenterait le plus de chances de succés devant la jurisdiction commerciale. Boncenne-Bourbeau, vol. 6, p. 163.

It has been argued for the respondents that as under arts 1152 and 1533 of the Civil Code the payment by the appellants under this contract had by law to be made to them in the District of Quebec where delivery of the ties sold to them had to take place, they had the right to bring the action there under the provisions of art 85. In France, no doubt, the action is rightly brought where the payment has to be made. But that is so only in virtue of art. 420 of their Code of procedure, which is treated by the commentators and the jurisprudence as an exception in the *tribunaux de commerce* to the ordinary rules in the matter. Dalloz, 63, 1 ,176. Pand. fr. 99, 1, 22. At common law, the indication of a place of payment does not confer jurisdiction upon the tribunals of that place I refer to Demol. vol. 1er no. 374; Sirey Cod. Civ. Ann. under art. 111, no. 52; 12 Duranton, no. 99; 27 Demolombe, vol. 4, des contrats, no. 274; 6 Boncenne-Bourbeau, 210 *et seq*; *Wurtele* v. *Lengham* (1); *Tourigny* v. *Wheeler* (2); *Cloutier* v. *Lapierre* (3), *Clark* v. *Ritchey* (4). By the act 52 V. ch 48, amending article 85 of the Civil Code, the indication of a special place of payment in any note or writing, wherever it is dated, now confers jurisdiction over any action relating to such note or writing upon the tribunals of the place so indicated. But here, in the written agreement sued upon there is no such indication of a place of payment and the declaration does not allege any. *Bent* v. *Lauve* (5); *Vidal* v. *Thompson* (6); *Morris* v. *Eves* (7). The place of payment designated by the law alone is not the indication required by art. 85 of the Code as it now reads. It is a stipulated

(1) 1 Q. L. R. 61.
(2) 9 Q. L. R. 198.
(3) 4 Q. L. R. 321.
(4) 9 L. C. Jur. 234.
(5) 3 La. An. 88.
(6) 11 Mart. La. 23.
(7) 11 Mart. La. 730.

domicile, one expressly contracted for by the parties not the place indicated by the law that this article provides for.

When articles 94 of the Code of procedure read with art. 86 of the Civil Code says that a defendant may be summoned in the case of an election of domicile for the execution of an act, before the Court of the domicile so elected, it means clearly a conventional domicile, not a legal domicile, not the place that the law alone designates as the place of payment.

It would seem, moreover, that article 85 C. P. Q. requires that the election of domicile and the indication of a place of payment equivalent thereto under its provisions, be made at such a designated place in a locality that the notifications, demands and suits relating thereto may be made and served thereat; art. 129 C. P. Q. For instance, if a note says "payable at Quebec," that is not an election of domicile under this article.

We hold therefore that the contract between the parties in this case having been made in Toronto where the appellant accepted the respondent's offer and mailed his letter of acceptance, the whole cause of action did not arise at Quebec, and the indication of a place of payment as required to give jurisdiction over the matter to the Superior Court at Quebec not having been alleged nor proved, the action not having been personally served upon the appellant must be dismissed.

Appeal allowed with costs, declinatory plea maintained and action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Dandurand, Broleur & Boyer.*

Solicitors for the respondents: *Taschereau, Pacaud & Smith.*

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*Feb. 21, 22.

*Mar. 22.

JOHN MILLARD (DEFENDANT).....APPELLANT;

AND

JOHN L. DARROW (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract for sale—Action for price—Counterclaim—Specific performance—Costs.

In an action for the price of land under an agreement for sale, or in the alternative for possession, defendant filed a counterclaim for specific performance and paid into court the amount of the purchase money and interest demanding therewith a deed with covenants of warranty of title. Plaintiff proceeded with his action and recovered judgment at the trial for the amount claimed and costs, including costs on the counterclaim, the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the court *en banc*.

Held, that as the defendant had succeeded on his counterclaim he should not have been ordered to pay the costs before receiving his deed and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the court below *en banc*, and to the Supreme Court of Canada against plaintiff. Parties to pay their own costs in court of first instance.

Held, per Gwynne J.—Defendant should have all costs subsequent to the payment into court.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the verdict at the trial in favour of the plaintiff.

The only question to be decided on this appeal was whether or not the judgment in the court below against defendant for costs subsequent to the payment of money into court should stand. The facts are

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

(1) 33 N. S. Rep. 334.

sufficiently stated in the above head-note and are fully set out in the judgment of Mr. Justice Gwynne.

Russell K.C. and *Wade K.C.* for the appellant.

J. A. McLean K.C. for the respondent.

TASCHEREAU J.—I concur with Mr. Justice King in allowing the appeal.

GWYNNE J.—This case appears to me to be very simple when divested of all superfluity and prolixity of pleading. The plaintiff in his statement of claim alleges three alternative causes of action. In the first he alleges in paragraph numbered

2. That on or about the 10th day of September, 1896, it was agreed by and between the the plaintiff and the defendant by an agreement in writing signed by the defendant on that date that the plaintiff should sell to the defendant, and the defendant should purchase from the plaintiff a wharf property land and premises in the first paragraph of the statement of claim mentioned at the price of $450, and that defendant should pay to the plaintiff $100 per year for the first three years, and $150 the fourth year with five per cent interest until said price or purchase money should be paid, and that the said plaintiff should accept payment in full any time within the said dates.

3. That the defendant went into possession of the said wharf property under said agreement and in part performance thereof on or about said 10th September, 1896

4. That plaintiff was at all times material to this action ready and willing to complete said sale and purchase and carry out said agreement on being paid said purchase money.

5. That the said defendant has not paid to the plaintiff the said price or purchase money or any part

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thereof although the periods at which the first and second instalments of $100 each year were due and payable, have long since elapsed.

6. That the defendant since he went into possession of the said property has continued and remains in possession thereof though the periods at which the first two instalments of purchase money were payable has long since elapsed and that the defendant has wrongfully refused to carry out said agreement on his part, &c.

In paragraph 8 the plaintiff in the alternative makes a claim similar to the above save that the agreement is alleged to be partly in writing and partly oral.

In paragraphs 10 and 11 the plaintiff alleges alternatively a cause of action in trespass, namely, that the defendant on divers days and times between the 10th of September, 1896, and 10th September, 1897, wrongfully entered the plaintiff's said property and tore down and removed part of a building of the plaintiff thereon and dug away and removed gravel and soil of the plaintiff from the said property to the injury thereof, and the plaintiff claimed the relief following:

1. Possession of the said property and $211 mesne profits.

2. $211.90 for damages for breach of the agreement as set out in paragraph 2.

3. Or in the alternative $211.90 amount of unpaid instalments of purchase money and interest as damages for breach of the agreement as set out in paragraph 8, of the statement of claim.

4. Alternatively the plaintiff claims $200 damages under paragraphs 10 and 11 in the statement of claim, that is to say for the alleged trespass in those paragraphs pleaded.

Now here it may be observed that as to this trespass claim there is no pretence whatever for the insertion

of that claim, for it is admitted in the statement of claim that the defendant's entry upon the premises was in part performance of and under the provisions of the agreement for sale and purchase which the plaintiff claims to be still in full force and effect; and therefore the main claim asserted in the plaintiff's action is to recover the two first instalments thereby made payable and which the plaintiff alleges that although overdue the defendant wrongfully refuses to pay. We may then deal with the cause of action as set out in the 2nd, 3rd, 4th, 5th and 6th paragraphs of the statement as really containing the whole substantial cause of action alleged in the statement of claim. The whole of the contention between the parties which has given occasion for this action consists in this that the defendant insists that it was part of the agreement between him and the plaintiff that the latter should sign an agreement for the execution of a deed upon payment of the purchase money. Immediately upon entering under the agreement he proceeded to build a house on the premises; while doing so some question arose as to whether some person or persons had or not a right of way over the premises. The defendant upon mentioning this to plaintiff saying also that he was negotiating for sale of the premises and therefore was anxious about the agreement, and that it should covenant for a deed with absolute covenants for title when the purchase money should be paid; that the plaintiff peremptorily refused to give the agreement or a deed with covenants for title except against his own acts; that this refusal of the plaintiff was the sole cause of the defendant not having paid the two instalments sued for in the statement of claim.

Upon the statement of claim having been served on the defendant he seems to have been well advised not

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to rest his case upon his right to have the agreement which he had insisted upon but which the plaintiff refused but while defending the action upon that ground to become himself a plaintiff by filing a counterclaim against the plaintiff in the action for specific performance; accordingly the defendant tendered to the plaintiff the full amount of principal and interest, namely $510.54, and demanded the execution of a deed with covenants for title, and thereupon pleas to the action were filed on the defendant's behalf in which the defendant admitted all the allegations contained in paragraph 2 of the statement of claim except that the said agreement was in writing, and he denied that the said agreement was in writing, and he said that the agreement was a verbal one and that at the time of the making thereof and as part of the said agreement the plaintiff agreed to execute and deliver to the defendant a written agreement of sale containing the terms set forth in said paragraph, and he said that he was in possession of said premises under said verbal agreement up to the present time; and he denied that the plaintiff was at all or at any time ready to complete and carry out the said agreement by executing a proper conveyance on being paid the purchase money, and he denied that he, the defendant, had ever refused to carry out the said agreement. He pleaded similar pleas to the cause of action as stated in the 8th paragraph of the statement of claim. He then counterclaimed for specific performance of the agreement upon the terms as set out in the plaintiff's statement of claim, and he averred that he had tendered the plaintiff the sum of $510.54 being the full amount of the said purchase money and all interest, and had demanded a deed of conveyance of said property which the plaintiff refused to give, and he alleged that he brought that amount into court to be paid to plaintiff upon the

said contract upon delivery of such deed to the defendant; he made then a claim for damages for loss from inability to resell and otherwise, but no evidence at the trial was entered into upon this head.

Now upon the filing and service of that counterclaim it is apparent that nothing remained to be decided in the plaintiff's action but the question of costs up to that time; the fact of the defendant not having availed himself of the privilege of the last clause of the agreement as set out in the plaintiff's statement of claim until after action brought did not deprive the defendant of his right to demand specific performance of the contract by the execution of a proper deed upon tender of the full purchase money and interest, and the question of the liability for costs up to that time depended upon the question whether the plaintiff's or defendant's contention should prevail as to the right which the defendant had claimed to have a written agreement of sale signed by the plaintiff; instead however of submitting to the defendant's demand for specific performance as contained in the counterclaim the plaintiff in a long replication averred among other things that defendant had waived all right to any written or other agreement than that set forth in the statement of claim, and he *denied that he had ever agreed to execute and deliver to the plaintiff any agreement to give a good and sufficient deed of the said property with or without covenants or warranties as soon as the defendant had paid the price or at all*, and in a much longer pleading in answer to the counterclaim containing much unnecessary and irrelevant matter, the plaintiff

denies that the defendant ever tendered to him $510.54 or any sum, and he does not admit that such sum is the amount of said purchase money with full interest thereon, and he denies that the defendant demanded delivery of a deed of conveyance of said property or

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of any property which plaintiff refused to deliver or otherwise, or that plaintiff refused to deliver said or any deed.

At the trial the plaintiff was examined on his own behalf, and his evidence establishes the defendant's contention. He produced his title deeds to show his title to the property. He produced a paper signed with the defendant's initials which the defendant had written as a memorandum of the agreement which is in the terms set out in the plaintiff's statement of claim, and he explains how it came into his possession. He testified that he agreed to sell the property on the 10th of September, 1896, for $450, $100 each year and the last year $150, with 5 per cent interest, and he to have the right to pay the whole. He produced the paper written by the defendant and signed with his initials, which, he said, was written when the bargain was made. He said that under this the defendant went into possession. He said that he left the bargain not fully complete—that the defendant wrote the paper which he produced in his store, and told witness to carry the paper to Mr. Mack, solicitor, to get agreement written for sale of his property.

One, he said, would have a copy signed by the other, or however Mr. Mack would do it.

He adds:

I asked him, that is Mr. Mack, to make the agreement; before I got the agreement made defendant took possession of the property; I was willing and knew defendant took possession and built a new building and filled in wharf; I saw him at work and made no objection; I after that knew defendant sold the property to Firth; I met the defendant in the street, and he asked me if the agreement was ready; I said I would go and see. This was some months after the sale; I left orders for the agreement to be made as soon as possible.

He then admitted the tender of the $510.54 accompanied with a letter dated 18th May, 1899, addressed by the defendant to the plaintiff as follows:

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DEAR SIR,—I herewith tender you $510.54 and demand a delivery of the deed with the usual covenants of the wharf property, &c., sold by you to me on September 10th, 1896, free from all incumbrances—

and he adds:

the money was offered me and he wanted me to sign the papers; I said I would not take it,

that is the money tendered.

Now without referring to the evidence of the defendant, or to any other evidence, the plaintiff here admits the whole of the defendant's counterclaim for specific performance, and he establishes defendant's contention that it was agreed that the agreement verbally made should be reduced to writing and signed by the plaintiff. Upon this evidence the defendant was entitled to judgment upon his counterclaim, and judgment thereon was pronounced in his favour subject to this qualification that before he should receive from the plaintiff a good valid conveyance of the property with usual covenants and warranty he should pay to the plaintiff (in addition to the sum of $510.54 paid into the court which the prothonotary was ordered to pay out to the plaintiff) the costs of the action and of the counterclaim, thus making a new contract for the parties. The defendant's appeal from this judgment must prevail upon the filing of the counterclaim for specific performance. The plaintiff had no just ground for resisting that claim. Upon tender of the full amount of $510.54 he had no claim for any other sum than for such costs as he might have been entitled to as costs of his action. Had he submitted, as he ought to have done to the counterclaim, it would have been competent for the court to have adjudicated, and it, no doubt, would have adjudicated in respect of these costs. All the subsequent costs have, quite unnecessarily, been incurred by the plaintiff resisting the counterclaim by pleading upon the record the matters alleged therein, and which he is

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compelled to disprove himself when coming forward as a witness in his own behalf. Had the plaintiff submitted on the counterclaim to execute whatever deed the court should declare the defendant entitled to, and had he asked at the same time for his costs of action up to that time he would have, no doubt, I think, succeeded, and all the subsequent costs of this action and counterclaim wherein such a small amount pecuniarily is at stake would have been avoided. The plaintiff has already received under the judgment of the court the $510.54 paid into court to abide the judgment of the court on the counterclaim so that in the terms of the contract the defendant was entitled to his deed without his right thereto being qualified by payment of a further sum by way of costs or otherwise. He has succeeded substantially upon his counterclaim and was of right entitled to his costs thereof. The appeal should therefore be allowed with costs and the judgment of the court below varied by ordering the plaintiff to execute forthwith upon demand a good and sufficient conveyance in fee simple of the property in the pleadings mentioned to the defendant with the usual comments for good title, and by ordering the plaintiff to pay to the defendant when taxed all the costs of the counterclaim less the amount of the plaintiff's costs of the action up to the filing of the counterclaim, which costs are allowed to the plaintiff and to be set off against and deducted from the defendant's costs on the counterclaim. This is the utmost relief which, I think, can be granted to the plaintiff in this protracted litigation for the costs of which subsequent to the counterclaim, unnecessarily incurred, I think the plaintiff to be responsible.

SEDGWICK J.—I concur in the judgment of Mr. Justice King.

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KING J.—The appellant having succeeded in the courts of Nova Scotia upon his counterclaim for specific performance of the agreement sued on by the respondent, it was error to have made it a condition of his right to the specific performance claimed and allowed, that he should pay the costs of the unsuccessful party. And this is not merely a question of costs, but of substantive right.

The decree should be varied so as that the appellant should be entitled to his deed at once, the full amount of purchase money with interest being in the custody and under the control of the court.

As to the costs in court below of the appellant in respect of the counterclaim, they might be denied to the appellant, *i.e.* there might be no costs allowed one way or the other. This out of deference to the opinion of the courts below.

Accordingly I would be favourable to this variation of the decree—that the appellant be given the immediate right to receive a deed from respondent, but without costs in the court of first instance, and that respondent be entitled (as directed by the court below) to the costs of his original action.

That the appellant will have his costs of appeal in this court and his costs of appeal to the Supreme Court of Nova Scotia.

GIROUARD J.—I concur in the above judgment of Mr. Justice King.

Appeal allowed with costs.

Solicitors for the appellant: *Wade & Paton.*

Solicitor for the respondent: *James A. McLean.*

JOSEPH LAROSE (SUPPLIANT).....APPELLANT;

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AND

*March 6.

*Mar 22. HIS MAJESTY THE KING..... .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence—Militia class firing—Government rifle range—Officers and servants of the Crown—Injury to the person—50 & 51 V. c. 16, s. 16 c. (D.)—R. S. C. c. 41, ss. 10, 69.

A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act, 50 & 51 Vict. ch. 16, sec. 16 (*c*).

The words "any officer or servant of the Crown" in the section referred to, do not include officers and men of the Militia.

Girouard J. dissented.

APPEAL from the judment of the Exchequer Court of Canada (1) dismissing the suppliant's petition of right with costs. A statement of the case will be found in the judgment of the court delivered by His Lordship Mr. Justice Taschereau.

Charbonneau K.C. for the appellant The fact of the government having rented the property in question for the public service and the use of the Department of Militia and Defence constitutes it public property and a public work, without any necessity that it should be so declared by order of the Governor-General-in-Council, and the limits of the range and control of the department extend as far as projectiles fired upon the rifle ranges may reach, whether or not their flight may continue beyond the lands leased for range purposes. The clauses of the Militia Act taken with section 16 (*c*) of the Exchequer Court Act and the general interpretation Act clearly give the suppliant a

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

(1) 6 Ex. C. R. 425.

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right to recover against the Crown for the injury sustained.

Fitzpatrick K.C., Solicitor-General of Canada, and *Newcombe K.C.*, Deputy of the Minister of Justice, for the Crown. Independently of the statute the Crown is not liable; *City of Quebec* v. *The Queen* (1) at page 423 There is no charge of negligence save that the authorities in charge of the ranges "savaient que l'exercice du tir à cet endroit, surtout avec les balles et fusils employés dans les dernières années étaient dangereux pour les voisins" The rifle range is not a public work within the meaning of sec. 16 (*c*) of the Exchequer Court Act, and, even assuming it to be so, the injury did not take place upon it, but in a field more than a mile and a half distant. The expression "any officer or servant of the Crown" in the section mentioned, does not include officers or men of the militia, which might (see R. S. C. ch 41, sec. 10) include all male inhabitants of Canada capable of bearing arms. There is no allegation or proof that militia regulations in respect to rifle practice have not been carried out, but on the contrary the ranges are shewn to be as safe as they could reasonably be made. It has not been shewn by whom the shot was fired that did the injury, and it is clear that if fired by any person not "on duty," there can be no liability. The Militia Act, R. S. C., ch. 41, sec. 69, does not make any provision for compensation for injury to the person. We refer to *The Queen* v. *McLeod* (2); *The Queen* v. *Filion* (3); *Black* v. *The Queen* (4), Sourdat "Responsabilité," par. 87.

The judgment of the Court (Girouard J. dissenting) was delivered by:

TASCHEREAU J.—On the 25th of September, 1897, the suppliant while working in his field upwards of a

(1) 24 Can. S. C. R. 420.
(2) 8 Can. S. C. R. 1.
(3) 24 Can. S. C. R. 482.
(4) 29 Can. S. C. R. 693.

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mile behind the targets of the Côte St. Luc rifle range, near Montreal, at a time when rifle practice was going on there, was wounded by a bullet presumably coming from the range. The property occupied by this range had been leased by the Government from one Descarries, on the 7th of June, 1888, under authority of an order of His Excellency-in-Council, of 12th January, 1888.

The suppliant brought this action in the Exchequer Court by petition of right against the Crown, claiming $10,000 for personal damages, alleging that the bullet which wounded him had been fired by one of the militiamen of Her Majesty who was practicing shooting at the place, and that

les autorités dépendant du département de la milice qui ont le contrôle de ce champ de tir, savaient que l'exercice du tir à cet endroit, surtout avec les balles et les fusils employés dans les dernières années, étaient dangereux pour les voisins.

No other act of negligence or ground of action is charged in the petition of right.

The judge of the Exchequer Court dismissed the action upon the ground that the rifle range was not a public work within the meaning of that term as used in the Exchequer Court Act, 50 & 51 Vict. c. 16, sec. 19, clause c. The appellant has failed in his endeavour to prove that he is aggrieved by that decision. The reasoning of the learned judge of the Exchequer Court upon this point seems to me unassailable, and I concur fully with all that he has said upon it without repeating it.

The section in question reads as follows:

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment.

I would say, apart from the reason that this rifle range was not a public work in the sense of the Act, that there is no evidence here that the suppliant's wounding resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, or that he suffered any injury on any public work. Moreover, it is not proved who fired the shot that wounded the suppliant. It may have been fired by one of the amateurs, or volunteers not on duty, who were there practising on that day with the men having what is called in the case, government practice.

Then I do not see that the words "any officer or servant of the Crown" can be held to include the officers or men of the militia. It must not be lost sight of that the suppliant to succeed must come within the strict words of the statute. It is in evidence that the regulations of the Governor-in-Council, as to this range were all followed, and the

autorités dépendant du département de la milice qui ont contrôle de ce champ de tir,

have not been proved to have been guilty of any negligence.

The appeal is dismissed with costs

Appeal dismissed with costs.

Solicitors for the appellant: *Charbonneau & Pelletier*

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

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*Mar. 13.
*Mar. 22.

FREDERICK FAIRMAN AND OTHERS (PLAINTIFFS) ..... } ...APPELLANTS;

AND

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

ON APPEAL FROM THE COURT OF QUEEN'S BENCH PROVINCE OF QUEBEC, APPEAL SIDE.

Municipal corporation—Montreal City Charter—Local improvements—Expropriation for widening street—Action for indemnity—52 V. c. 79 (Que.)—54 V. c. 78 (Que.)—59 V. c. 49 (Que.)

Where the City of Montreal, under the provisions of 52 Vict. ch. 79, sec. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so effected and, notwithstanding the subsequent amendment of the statute in December of that year, by 59 Vict. ch. 49, sec. 17, the city was bound, within a reasonable time, to apply to the court for the appointment of commissioners to fix the amount of the indemnity to be paid, to levy assessments therefor and to pay over the same to the owner, and, having failed to do so, the owner had a right of action to recover indemnity for his land so taken. *Hogan* v. *The City of Montreal* (31 Can. S. C. R. 1) distinguished.

The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. *The Grand Trunk Railway Co.* v. *Coupal* (28 Can. S. C. R. 531) followed.

APPEAL from the judgment of the Court of Queen's Bench, Province of Quebec, Appeal Side, reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

A statement of the case will be found in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

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

Fitzpatrick K.C. (Solicitor-General of Canada), and *Archer*, for the appellants, cited *Jones* v. *Gooday* (1); *Thayer* v. *City of Boston* (2); *Waldron* v. *City of Haverhill* (3); *Seldon* v. *Village of Kalamazoo* (4); *Soulard* v. *City of Saint Louis* (5); *Meuller* v. *St. Louis and Iron Mountain Railroad Company* (6); *Banque d'Hochelaga* v. *Montreal, Portland and Boston Railway Company* (7). The plaintiffs are entitled to recover indemnity for the land taken by ordinary action in the courts, as the city failed and refused within a reasonable time to take proper steps to have the indemnity fixed as provided by statute. This case is distinguished from *The City of Montreal* v. *Hogan* (8), which was a case of trespass where the city never had a title; here they have complete title and lawfully took possession of the property.

Atwater K.C. and *J. L. Archambault K.C* for the respondent. The city is prohibited from proceeding with the expropriation on account of the circumstances contemplated by 59 Vict. ch. 49, sec. 17, and cannot go on until the financial position has improved. The proposition to take possession and widen the street, etc., was always subject to the observance of the formalities of expropriation which have not been, and for the present cannot be, completed, by fixing the price and assessing parties liable for the special tax. These events not having happened the agreement became and remains ineffective, and plaintiffs have only a choice between taking mandamus to compel the city to proceed and having their property restored to its former condition, recovering damages, if any, which they may have suffered in the meantime. Otherwise they are bound to wait till conditions permit of the

(1) 8 M. & W. 146.
(2) 19 Pick. (Mass.) 511.
(3) 143 Mass. 582.
(4) 24 Mich. 383.
(5) 36 Mo. 546.
(6) 31 Mo. 262.
(7) 12 R. L. 575.
(8) 31 Can. S. C. R. 1.

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continuation of expropriation proceedings, now prohibited by the statute. The principle upon which the indemnity was assessed in the trial court by striking an average is also wrong and, in this case, resulted in excessive damages, which could not be sanctioned by an appellate court. We refer to *Hollester* v. *The City of Montreal* (1); *The Grand Trunk Railway Company* v. *Coupal* (2); and *The City of Montreal* v. *Hogan* (3). The city must be ruled to-day by the provisions of 62 Vict. ch. 58, which also governs the plaintiffs in respect to their remedy.

The judgment of the court was delivered by

GIROUARD J.—This case affords another illustration of the glorious uncertainty of the law governing the City of Montreal. It would require the ingenuity of a Philadelphia lawyer, to use an old popular expression, to ascertain exactly where the powers of the city council end, and the rights of the citizens commence Charters after charters, containing hundreds of clauses and sub-clauses, have been passed and repealed, the last two being in 1889 and 1899, without any indication of what is old or new law, so that the greatest confusion exists in almost everything. No laws have produced more litigation, and the decisions alone of the Privy Council and of this court, in cases where the City of Montreal is a party, would form almost one volume. This confusion we pointed out in *Hollester* v. *The City of Montreal* (1); *Crawford* v. *The City of Montreal* (4); and *The City of Montreal* v. *Hogan* (3).

These cases, like the present one, turned upon the application of section 17 of 59 Vict. ch. 49:—

> The said council shall not be bound to make the improvements, the cost whereof in whole or in part has to be paid by the city, and which

(1) 29 Can. S. C. R 402.
(2) 28 Can. S. C. R. 531.
(3) 31 Can. S. C. R. 1.
(4) 30 S. C. R. 406.

exceeds the limits of the power to borrow, without prejudice to recourse for damages, losses and expenses incurred by reason of the non-execution of the said improvement.

This Act was sanctioned and became law on the twenty-first of December, 1895.

It appears that at this time and for a few years previously, the appellants were proprietors of a valuable property known as Erskine Church, at the corner of St. Catherine and Peel streets, upon which they intended to erect stores. In 1894, architect Dunlop prepared plans for them with a view of making such alterations to the church building as would be necessary for a departmental store. On the second of November, 1894, the majority of the proprietors in the district sent the following petition to the city council :—

We, the undersigned proprietors and taxpayers of St. Antoine Ward, respectfully suggest the immediate purchase of the strip of land about fifteen feet in width projecting into Peel street, between St. Catherine street and Dominion Square.

We understand that this property can be had at a reasonable price without any expropriation proceedings, and as the owners have applied for a permit to erect a building thereon, according to plans prepared by A. F. Dunlop, architect, it is essential that early action be taken.

This is a matter of great importance, as Peel street at that point is already too narrow for the traffic on it and must eventually be widened.

The petition having received the recommendation of both the Road and Finance Committees, the council at its session of the twentieth of May, 1895, adopted the said recommendation, which reads as follows :—

That they have considered the accompanying petition and recommend that the line of the proposed widening of Peel street on the east side be extended to St. Catherine street, as shewn on plan hereunto annexed, so as to make said street of a uniform width between Dorchester street and St. Catherine street, in the St. Antoine Ward.

They further recommend that the city attorney be instructed to take the necessary steps to procure said change in the homologated plan of said St. Antoine Ward.

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Consequently the city attorneys applied to the Superior Court for a modification of the homologated plan of the city, which was granted by Mr. Justice Doherty on the eighth day of June, 1895.

On the nineteenth of June, 1895, the appellants forwarded to the city surveyor, Percival W. St. George, and the Road Committee, the following offer:—

> Having the intention to take advantage of the dispositions of the charter of the City of Montreal, relative to the annual expropriations which will take place according to section 222 of the charter, as amended by 54 Victoria, chapter 78, (Quebec), and being desirous and willing to cede and abandon to the said city that part of that immovable property designated as numbered fourteen hundred and fifty-seven, (1457), of the cadastre of St. Antoine Ward, in said city, which said part of immovable belonging to us is situated and comprised within the old line of Peel street and the new line, as it appears by the homologated plan of the said ward, we respectfully ask now from you to indicate the lines of said homologated plan as regards said part of said immovable property to be so expropriated in order that we may get the benefit of said cession so made the said city, and in order that said portion of immovable property be inscribed in the list of annual expropriations to be made during this year.
>
> We, moreover, consent that the city should take at once possession of said land.

The offer was duly recommended by the Road and Finance Committees and, finally, on the twenty-third of August, 1895, the council adopted their reports, which read as follows:—

> That they have considered the accompanying offer of cession of a strip of land on Peel street according to section 222 of the charter as amended by the Act 54 Vict. chap. 78, and they recommend that said strip of land lying between the old line of Peel street and the homologated line of said Peel street be expropriated under the provisions of the law governing the annual expropriations and the said strip of land, as shewn on plan hereunto annexed, be included in the list of properties to be expropriated this year.

On the tenth of October, 1895, the appellants wrote to the city clerk:—

We are ready to allow the city to take possession of the piece of property necessary for the widening of Peel street as ceded by us some time ago from the old Erskine Church property and now awaiting the expropriation of the same. We ask also that a "firimite sidewalk" be made both on Peel street and St. Catherine street, and would be willing to pay half the cost of the same. We are making important improvements upon the property and expect to have the same ready for occupation on December 1st: we would, therefore, urge that this sidewalk be proceeded with at once.

An estimate of the cost of the firimite sidewalk was made by the city surveyor on the fourteenth of October, 1895, shewing that it would cost $1,334.95. The construction of this sidewalk was recommended by the competent committees, and on the eighteenth of November, 1895, the council adopted their reports, which are in the following terms:—

That they have considered the accompanying petition of F. Fairman and C. C. Holland, and they recommend that a firimite sidewalk be laid outside of their property, corner of Peel and St. Catherine streets at an estimated cost of one thousand three hundred and thirty-two dollars and ninety-five cents ($1,332.95) one half the cost thereof to be paid by the petitioners and the other half by the city.

As the season was too far advanced, this firimite sidewalk, about twelve feet wide, was not constructed till May, 1896, and at the same time the balance of the land, two and one-half feet, was paved in asphalt as part of the carriage road; but in the fall of 1895, the corporation at once cut down a row of trees and laid down a temporary sidewalk and took possession of the piece of land in question, fourteen and one-half feet by one hundred and seventy feet, making 2,487 square feet, says Mr. St. George, which was immediately open to the public and has ever since remained in the possession of the city as part of Peel street.

Nothing further was done towards fixing or paying the indemnity. The respondents thought that, armed with the new powers granted to them by the Legislature in December, 1895, they were not called upon to

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move. In September, 1896, they were sued for what the appellants alleged to be the value of the property forming, they alleged in their declaration, 2,486 feet in superficies, namely, eighteen dollars per square foot, or a total of $44,748. What was their answer? They admit that they are bound to pay an indemnity under the expropriation laws, but only when the limits of their borrowing powers will permit them to do so, as provided for by section seventeen of 59 Vict., ch. 49, quoted above. In the alternative, they offer back the land, and at the argument before us invoked our decision in *The City of Montreal* v. *Hogan* (1).

The two cases are not alike. In the latter case there was no cession by the proprietor, no possession by order of the city council, but merely the tortious acts of its officers. Hogan alleged in fact that the city had taken possession of his land illegally. Here, on the contrary, the city has a valid title. The proprietors say so, and the city does not deny it, and could not deny it. Section 313 of the charter of 1889, which was then in force, enacts that the city may acquire any property required for public utility either "by agreement or expropriation." The agreement was perfect, and the fact that the price to be paid was to be determined by the commissioners to be named by the court, is not inconsistent with the validity of the cession, for even under the common law the price of sale may be determined by third parties to be named. Pothier, Vente, *nn.* 24 and 25. Even section 222, as amended in 1890, by 54 Vict. ch. 78, sec. 7, recognizes the validity of such a cession. Expropriation, that is transmission of land, and payment of indemnity are two different things. The latter is a personal right which may be renounced by the proprietor, partly or wholly. He may be willing to rely upon the credit

(1) 31 S. C. R. 1.

and good faith of the expropriating party. This indulgence is often in the best interests of all parties, and it is not surprising to find it sanctioned by the jurisprudence of all modern countries. De Lalleau, *nn.* 753, 754; Am. & Eng. Encycl. of Law, vo. "Eminent Domain," pp. 1102, 1144.

The city's pretention that under section 17 of the Act of 1895, 59 Vict. ch. 49, they are not bound to proceed, is altogether unfounded. This enactment applies only to future improvements, and not to past ones, for instance the enlargement of Peel street in the fall of 1895. The respondents understood this so well that in May, 1896, they laid down the pavement, asphalt in part on the carriage road, and the firimite sidewalk, in pursuance of the order of the council in 1895. They should have done more; they should have demanded from the court the appointment of commissioners to fix the indemnity and collected the same.

The appellants are therefore entitled to their indemnity, without waiting any longer. If the respondents are called upon to pay otherwise than provided by the expropriation laws they have only themselves to blame. They even allege in their plea that they do not intend to proceed, and nothing else is left for the proprietors to do but to take their remedy at common law. They might perhaps have forced them to move by writ of mandamus, but the city cannot take advantage of that objection, as they were in default and now declare they will not act under the expropriating statutes.

Twelve witnesses have been examined by the plaintiffs upon the question of value of the land and as many for the defendant. There is great variance in their opinions, as always happens in such cases, ranging from five dollars to twenty-five dollars per foot. The trial judge (Lemieux J.), who maintained the action,

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considered all the witnesses equally competent and reliable and he therefore took the average of their figures, and acting upon that principle, which this court condemned in *The Grand Trunk Railway Co.* v. *Coupal* (1), allowed them about thirteen dollars per foot. or a total of $32,818.50. Chief Justice Lacoste, who dissented in appeal, considers that this amount is not too much. With due deference, I believe it is not only exaggerated but also arbitrary.

The appellants and one D. Graham bought and took possession of the Erskine Church property on the 23rd of September, 1892, although the deed was signed only on the 20th of April, 1893. There was at that time quite a "boom" in real estate on St. Catherine street in the neighbourhood, where several of the large retailers of the lower town had already moved up, or were about to move. The price paid by the appellants was six dollars per square foot, or a total of $128,730.

A summary of the registered transfers in that district, proved in the case, shews that about six dollars per foot was the market price from 1889 to 1897. In 1889 only one sale was recorded, corner of Mansfield street, bought by the Bank of Montreal for six dollars per foot. In 1890 and 1891 no transfer appears. In 1892, one for $2.33 and another for $9. In 1893, eight transfers, three below $6, two at $6, and one at $7.25, one at $9.86 and one at $11. In 1894, two transfers, one at $5 and the other at $9.92. In 1895, one at $5.70. In 1896 and 1897, to May, one at $5.

The appellants paid cash $28,730, and the balance of $100,000 they promised, by the deed of sale, to pay on the 23rd of September, 1897, with interest at the rate of five per cent from the 23rd of September, 1892.

On the 17th of November, 1892, to avoid a *partage* or licitation, Mr. Fairman purchased the one-third of Mr.

(1) 28 Can. S. C. R. 531.

Graham for $12,000 ; but if we take into consideration the one-third of the purchase money the latter paid in cash, namely $9,576.66, his share of the interest of the balance for nearly fourteen months, amounting to about $1,934, his share of the taxes, amounting altogether to $1,100, insurance and probably some law costs in relation to the transaction, it is clear that Mr. Graham merely recouped himself without realising any profit. Up to the time of the expropriation, the plaintiffs received no rent, and from the 1st of January, 1896, their tenants, H. and N. E. Hamilton, agreed to pay them $7,000 per annum and the taxes during the whole duration of the lease, viz., ten years. The landlords undertook to make certain alterations in the buildings, which they did during the fall of 1895, but there is not the slightest evidence of their cost or value.

The rate of interest payable to the *bailleurs de fonds* establishes that, at the time of the expropriation, in 1895, the appellants considered that five per cent was the value of money. Witnesses for the plaintiffs, Bishop and Dunlop, who alone express an opinion upon the subject, think that real estate should bring a net return of six per cent says one, and four and one-half says the other. Probably five per cent is the correct figure, just as the rate of interest on money agreed to by the appellants. At that rate it will take $6,436 of the rental to pay the interest on the original purchase price, leaving only $564 per annum for insurance and wear and tear, without speaking of the alterations made in 1895, to make a church building suitable for a departmental store.

The wear and tear, insurance and taxes, Mr. Bishop, the only witness who speaks on the subject, values at one and one-half per cent, or about $1,930 per annum. We know that the taxes amount to $1,100, thus leaving $830 to be charged annually against the property for insurance and wear and tear.

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Under these circumstances, I would give the appellants six dollars per square foot, the price they paid or $14,916 with interest thereon from the 1st of November, 1895, date of the expropriation and possession, for which amount, judgment should be entered against the respondent, the whole with costs before all the courts

Appeal allowed with costs.

Solicitors for the appellants: *Archer & Perron.*

Solicitors for the respondent; *Ethier & Archambault.*

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*Mar. 8, 11.

*Mar. 26.

HIS MAJESTY, THE KING, *Ex rel.* THE ATTORNEY-GENERAL OF QUEBEC (PLAINTIFF) ..... } APPELLANT;

AND

THOMAS MONTGOMERY ADAMS (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Scire facias—Crown Lands—Grant made in error—Adverse claim—Cancellation—32 V. c. 11, s. 26 (Que.)—R. S. Q. 1299.

The provisions of the Quebec Statute respecting the sale and management of public lands (32 Vict. ch. 11, R. S. Q. Art. 1299) do not authorize the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, (Bossé and Cimon JJ. dissenting), reversing the judgment of the Court of Review, at Quebec, which set aside the judgment of the Superior Court, District of Quebec (1), and declared the letters

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

(1) Q. R. 18 S. C. 520.

patent of grant of the lands in question to the defendant null and void.

The facts of the case and questions at issue on this appeal sufficiently appear from the statement in the judgment of the court delivered by His Lordship Mr. Justice Girouard

Fitzpatrick K.C. (Solicitor-General of Canada) and *L. A. Cannon* for the appellant. The information seeks the cancellation of the letters patent granted to the defendant on the ground that they were so granted in error, the former letters patent granted of the same lands to the representatives of the late Hugh and John Montgomery having been illegally cancelled by the Commissioner of Crown Lands for the purpose of giving effect to an adverse claim. See 32 Vict ch. 11, sec. 26; R. S. Q. art. 1299.

J. A. Lane for the respondent. The first letters patent issued were clearly wrong and consequently the commissioner had jurisdiction to cancel them. The information merely alleges that they were not legally revoked "by indorsement;" there is no allegation of the existence of any "adverse claim" nor any proof of such to demonstrate that the commissioner had so exceeded his jurisdiction. This was a new point first raised on the appeal to the Court of Review and should not have been entertained. That judgment was *ultra petita*.

The judgment of the court was delivered by:

GIROUARD J.—On the 13th of February, 1888, certain letters patent for lots twenty-eight and twenty-nine of the Township of Restigouche, were cancelled by the Commissioner of Crown Lands for the Province of Quebec, upon the ground that they had been issued by error to the legal representatives of John and Hugh Montgomery, instead of to the representa-

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tive of Thomas Montgomery, and subsequently, to wit on the 28th of April, 1888, new letters patent for the same lots were issued in favour of the said representative of the late Thomas Montgomery, who is the respondent. The commissioner alleged in his decree of revocation that he was empowered to do so by section twenty-six of the Quebec Statute, 32 Vict. ch. 11. He admits himself, and it is proved beyond doubt, that the representatives of the late John and Hugh Montgomery had an adverse claim. He therefore acted without jurisdiction, and his act is *ultra vires* and utterly void. He should have left the parties to their remedy in the ordinary courts of the province.

The section in question reads as follows:

> Whenever a patent has been issued to, or in the name of the wrong party, through mistake in the Crown Lands Department, or contains any clerical error, or misnomer, or wrong description of the land thereby intended to be granted, the Commissioner of Crown Lands, (there being no adverse claim) may direct the defective patent to be cancelled and a correct one to be issued in its stead which corrected patent shall relate back to the date of the one so cancelled and have the same effect as if issued at the date of such cancelled patent.

For this reason, which is more fully developed by Mr. Justice Andrews in the Court of Review, and Mr Justice Cimon in appeal, we are of opinion that the appeal must be allowed. The judgment of the Court of Review is restored and the said letters patent granted on the 28th of April, 1888, to the respondent for the said lots of land are anulled and declared void and of no effect. but without costs as both parties were in error, the Commissioner of Crown Lands in exercising a power he did not possess, and the respondent in contending before all the courts that he had such power.

Appeal allowed without costs.

Solicitors for the appellant: *Fitzpatrick & Taschereau.*
Solicitor for the respondent: *J. A. Lane.*

ADAMS & BURNS (PLAINTIFFS) .....APPELLANTS; 1901

AND *Mar. 26.

THE BANK OF MONTREAL AND THE KOOTENAY BREWING, MALTING AND DISTILLING COMPANY (DEFENDANTS) ..... } RESPONDENTS.

Practice—Appeal to Privy Council—Stay of execution.

A judge in chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the Court to the Judicial Committee of the Privy Council.

MOTION on behalf of the appellants for an order to stay execution in the cause pending an application for leave to appeal to the Judicial Committee of His Majesty's Privy Council, from the judgment pronounced by the Supreme Court of Canada, on 19th February, 1901, dismissing the appeal of the said appellants from the decision of the Supreme Court of British Columbia.

The application was by motion, in chambers, before His Lordship Mr. Justice Girouard, prior to the entry of the judgment of the court.

Glyn Osler for the motion.

Travers Lewis, contra.

After hearing the arguments of counsel, judgment was reserved until a later hour of the day when the following judgment was delivered.

GIROUARD J. (Oral.)—I find that, according to the uniform practice of this court, it is not possible to grant this application. Since the argument upon the motion, I have had an opportunity of consulting with my brother judges, as to the question of practice, and they all agree that this court has always refused to entertain applications of this nature.

Motion refused with costs.

*PRESENT :—His Lordship Mr. Justice Girouard (In Chambers.)

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*Mar. 6, 7.

*Mar. 28.

TELESPHORE CHALIFOUR, (PLAINTIFF)..... } ....APPELLANT;

AND

PHILEAS PARENT, (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT QUEBEC.

Title to land—Metes and bounds—Description—Sale en bloc—Possession beyond boundaries—Prescription — Construction of deed—Sale to married woman—Propre de communauté—Cadastral plan and description —Arts. 1503, 2168, 2174, 2185, 2210, 2227, 2242, 2251, 2254 *C.C.*

In June, 1868, by deed of gift, P granted to his son, F, an emplacement, described by metes and bounds and stated to have thirty feet frontage, "tel que le tout est actuellement * * * et que l'acquereur dit bien connaître" declaring, in the deed, that the donation had actually been made in 1860, although no deed had been executed, and that since then F had been in possession as owner and erected the buildings thereon. Under this donation the donee and his vendees claimed title to thirty-six feet frontage as having been actually occupied by him and them since F took possession as owner in 1860, and also that plaintiff had acquired a prescriptive title by ten years possession without title, at the time of the action in 1897 to recover possession of the six feet then in occupation of the defendant, whom plaintiff alleged to be a trespasser.

Held, that the deed in 1868 operated as an interruption of prescription and limited the title to the thirty feet of frontage as therein described.

The plaintiff's wife purchased from F in 1885 by deed describing the emplacement in a manner similar to the description in the donation, but also making reference to its number on the Cadastral Plan of the Parish which described it as of greater width.

Held, that the description in the deed of 1885 left the true limits of emplacement subject to determination according to the title held by the plaintiff's *auteur* which granted only thirty feet of frontage; that by the registered title, the plaintiff was charged with

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either actual or implied notice of this fact and that, consequently, he had not, in good faith, possessed more than the thirty feet of frontage under this deed and could not invoke an acquisitive prescription of title to the disputed six feet by ten years possession thereunder, and further, that no augmentation of the lands originally granted could take place in consequence of the cadastral description of the emplacement in question.

The words "Tel que le tout est actuellement et que l'acquéreur dit bien connaître" used in the deed of gift, cannot be interpreted in contradiction of the special description that precedes them and can only be construed as extending "dans les limites ci-dessus décrites."

A prescriptive title to lands beyond the boundaries limited by the description in the deed of conveyance can only be acquired by thirty years possession.

Quære—Is a deed of sale of lands in Quebec to a married woman without the authorization of her husband, sufficient to support a petitory action? Would such a deed be null for defect of form and insufficient, under article 2254 C.C., to serve as the ground for a prescription by ten years possession?

APPEAL from the judgment of the Superior Court, sitting in review. at Quebec, affirming the judgment of the Superior Court, District of Quebec, which dismissed the plaintiff's demand for damages, with costs, and ordering boundaries to be established on a line giving a uniform width of thirty feet to the emplacement in question, the costs of such bornage in the action and in execution of the decree to be divided equally between plaintiff and defendant.

The facts of the case and questions at issue on this appeal are stated in the head-note and in the judgment by His Lordship Mr. Justice Taschereau.

Belleau K.C. and *C. E. Dorion* for the appellant. The donation received its proper construction by the conduct of the parties in adopting the full width of the emplacement, thirty-six feet, "tel que le tout est actuellement," etc., and their interpretation justified by eight years of previous possession, which continued thereafter down to the date of the *troubles*, must rule

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between their vendees as it did among themselves. It was followed by the *cadastre* in 1873, and the deed of 1885 adopted the cadastral description, possession being continued of the full width there given to the emplacement under the new designation as lot No. 660. Arts. 1501, 1503 C.C.; 1 Despeisses, t. 1, p. 47. There is in the deed a reference to the real limit on the west side of the lot mentioning the fence and ditch there, which the buyer is burdened with keeping in repair; this fence and ditch existed since 1860. The donee received and plaintiff acquired the lot with its superficial contents up to the fence.

The plaintiff being *en communauté de biens*, the purchase, although by his wife, made the community of which he is the head, proprietor of the lot, as a joint acquest of the community: arts. 1271, 1273 C.C.

In any case we have acquired a title by thirty years possession (arts. 2210, 2242 C.C.) for the strip beyond the limit described in the deed, and the plaintiff has himself acquired indefeasible title by over ten years possession under the deed of 1885: (art. 2251 C.C.) We refer also to *Munro* v. *Lalonde* (1); *Tétrault* v. *Paquette* (2); *Cummings* v. *Laporte* (3); and *Herrick* v. *Sixby* (4), which latter case, although reversed in part in the Privy Council (L. R. 1 P. C. 436), is still in force on the point as to sales *en bloc.*

L. A. Taschereau for the respondent. This action is really *petitoire*, while it concludes for *bornage*, and the onus of proof of title is upon the plaintiff. Any possession his *auteurs* may have had anterior to 1868 was interrupted by the acceptance of the donation then made; arts. 2185, 2227 C.C.; and the action in 1897 is within thirty years. The ten years prescription invoked must be limited to the thirty feet described in

(1) 13 L. C. Jur. 128.
(2) 21 R. L. 62.
(3) Q. R., 6 S.C. 31.
(4) 8 L. C. Jur. 324.

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the deeds. The possession at any time of any land beyond the limits of these descriptions was equivocal and in bad faith. The deeds were registered and the plaintiff must be charged with knowledge of their contents and limitations.

The *cadastre* is not a title and the error therein confers no right of ownership (art. 2174 C.C.)

Again, the title is in the name of the plaintiff's wife and clearly the land is *propre de communauté* and the title insufficient to support a petitory action by the husband. The husband did not authorize or assist his wife in connection with her purchase and he was not present at the execution of the deed. It is therefore a nullity on the ground of informality and cannot avail in support of the claim by ten years possession (art. 2254 C.C.)

TASCHEREAU J.—Convaincre ses juges qu'un titre qui lui donne trente pieds de front lui concède le droit d'en avoir trente-six est la tâche ardue que l'appelant s'est imposée dans cette cause.

Il a failli devant la Cour Supérieure et la Cour de Révision. Nous ne voyons pas qu'il pût en être autrement.

Le 22 juin, 1868, par acte notarié, Alexandre Parent (*et uxor*), donna à son fils, François Celestin :—

Un lot de terre ou emplacement situé en la dite paroisse de Beauport, au lieu appelé la Côte des Pères, de la contenance de trente pieds de front, (sans le chemin de dix pieds,) sur huit perches de profondeur, borné en front, au nord, au chemin de la Reine, en arrière, au sud, et du coté sud-ouest, à *d'autre terrain appartenant aux dits donateurs*, et du coté nord-est à la route servant de passage à François Charles Parent, Phillippe Maheux et Louis Parent, ensemble avec la maison en bois dessus erigée, circonstances et dépendances, et tel que le tout est actuellement, se poursuit, comporte et s'étend de toutes parts, sans en rien excepter ni réserver.

Appartenant aux dits donateurs, le dit immeuble, comme faisant partie de plus ample terrain donné au dit Alexandre Parent par feu

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sieur François Parent et Dame Marie Maheux, ses père et mère, ainsi qu'il appert par l'acte de donation passé devant Mtre. Chs. Maxime DeFoy, et son confrère, notaires, à Québec, le douzieme jour d'août, mil huit cent vingt-cinq.

Les donateurs déclarent que l'immeuble ci-dessus décrit et donné avait été par eux donné au dit donataire dès l'année mil huit cent soixante, et que ce dernier a lui-même bâti la maison qui se trouve sur cet emplacement, mais qu'il ne lui avait jamais donné de titre authentique, et que la présente donation est consentie pour remédier à cela.

C'est pourquoi les dits donateurs veulent et entendent que le dit François Celestin Parent jouisse, fasse et dispose comme bon lui semblera en pleine et entière propriété, à compter de ce jour et à toujours, du dit emplacement *ci-dessus décrit et donné*, en conséquence ils lui cèdent, transportent et abandonnent dès maintenant et à toujours, tous leurs droits de propriété généralement quelconques en et sur icelui ; et veulent que le dit donataire en soit saisi et mis en bonne possession par qui et ainsi qu'il appartiendra, au moyen des présentes.

Il semble évident à la simple lecture de cet acte que tout ce qu'Alexandre Parent entend donner à son fils, lui donne et reconnaît lui avoir donné verbalement en 1860, c'est bien trente pieds, et non trente-six, à détacher de son terrain, se réservant implicitement, mais bien clairement, tout le reste, y compris les six pieds en litige.

Et si auparavant son fils en avait pris trente-six pieds il admet, sans équivoque, par cet acte qu'il n'a de droit qu'à trente pieds, et que l'excédant de six pieds appartient à son donateur, qui refuse de lui en donner plus que trente, et à qui il lui faut dès lors remettre la possession de ces six pieds laquelle il avait usurpée.

Eussent-ils le lendemain fait borner leurs propriétés et tirer la ligne de division entre eux, ce n'est que trente pieds au sud comme au nord, que la délimitation aurait donnés à l'emplacement en question.

Cet acte du 22 juin, 1868, sous les circonstances, a indubitablement operé une interruption dans la pos-

session de ces six pieds que François Célestin a pu avoir jusqu'alors.

Ce n'est donc que de cette date que la prescription acquisitive de trente ans invoquée par l'action de l'appelant en revendication de ces six pieds, sous forme d'action en bornage, aurait commencé à courir, pour expirer le 22 juin 1898. Or c'est en 1897, d'après les allégations de la déclaration même, ou au plus tard le 4 mai, 1898, date du bornage par Lefrançois, que l'intimé en a pris possession. L'appelant ne peut donc réussir sur ce point.

L'article 2210 decrète, il est vrai, que la prescription de trente ans peut avoir lieu acquisitivement en fait d'immeubles corporels pour ce qui est au delà de la contenance du titre. Mais je l'ai dit, l'appelant n'a pas eu sans interruption pendant trente ans la possession de ces six pieds.

Mais nous dit l'appelant, si je ne puis baser mon droit sur la prescription de trente ans, vu qu j'ai acheté cet emplacement en 1885 de François Célestin Parent, et que j'ai depuis joui sans interruption jusqu'en 1897 de trente-six pieds de front en vertu de ce titre, j'en ai acquis la propriété par la prescription de dix ans.

La Cour Supérieure a répondu comme suit à cette partie de sa demande :

Considering that as the said sale by the said F. C. Parent to plaintiff's wife also restricts the limits of the lot sold to her to the same extent, the plaintiff's claim to a greater width by reason of a title by prescription of ten years with title is also untenable.

Nous arrivons à la même conclusion. Voici comment est décrite la propriété vendue à l'appelant dans cet acte de 1885 ;

Un emplacement situé en la dite paroisse de Beauport, Côte des Pères, contenant trente pieds de front (sans le chemin de dix pieds qui se trouve au sud-ouest de la maison ci-après mentionnée,) sur huit perches de profondeur, borné en front au nord au chemin de la

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Reine, *au sud et au sud-ouest à Sylvain Parent*, (maintenant à l'intimé,) et au nord-ouest au chemin de sortie de Madame Dumontier representant Phillippe Maheu et autres avec ensemble la maison en bois dessus construite, circonstances et dépendances, le dit emplacement étant le lot numéro six cent soixante, (660), des plan et livre de renvoi officiels du cadastre pour la dite paroisse de Beauport, tel que le tout est actuellement et que l'acquéreur déclare bien connaitre.

Au sud et au sud-ouest à Sylvain Parent n'est évidemment pas une limite précise ; la description laisse à déterminer à quel endroit le terrain de Sylvain Parent, (maintenant l'intimé,) termine et où celui de l'acheteur, l'appelant, commence.

L'énonciation de la contenance dans cet acte était donc, comme elle l'était dans la donation à l'auteur de l'appelant, essentielle et indispensable pour déterminer ce qui était vendu, parce que l'emplacement, il appert par l'acte, ne pouvait être spécifié et distingué d'une manière certaine du terrain de l'intimé ou de ses auteurs que par la contenance.

L'appelant, sur cette partie de la cause, prend pour admis qu'il a un titre pour ces six pieds. J'ai un titre, dit-il, j'ai joui pendant dix ans, donc j'ai acquis par prescription. Mais, c'est là prendre pour admis ce qui est de fait le point controversé. Et s'il a un titre à ces six pieds, *cadit questio ;* il en était propriétaire le lendemain de son achat tout aussi bien qu'après dix, trente ou cinquante ans. Et d'un autre coté, s'il n'a pas de titre, la possession de dix ans ne lui en a pas acquis la propriété par prescription.

Or ce n'est que trente pieds que son titre lui donne. Ce n'est que trente pieds qu'il a achetés de bonne foi, car il savait, ou est censé avoir su, par le bureau d'enregistrement, que son vendeur n'avait que cela par la donation de son père, et pas un pouce de plus. Il n'a pas possédé les autres six pieds en vertu de son titre. Le cadastre, il est vrai, donne trente-six pieds à cet emplacement, mais c'est là une erreur dont l'ap-

pelant ne peut se prévaloir de bonne foi. L'article 2174 du Code décrète expressement que nulle erreur dans la description ou l'étendue d'un terrain inscrit au cadastre ne peut être interpretée comme donnant à une partie plus de droit que ne lui en donne son titre. Et le cadastre n'est pas son titre. Il n'y est fait référence dans son acte d'achat que parce que la loi devenue alors en force obligeait le notaire de le faire. Art. 2168 C. C. C'est dans les bornes fixées par son acte d'achat exclusivement que ses droits reposent, or il n'y a, dans cet acte, que la contenance qui indique ces bornes, qui puisse guider la délimitation de son terrain. Il est impossible d'y voir la vente d'une chose certaine et determinée, sans égard à la contenance, prévue par l'article 1503 du Code Civil. Cet article régit entre vendeur et acheteur Mais c'est avec son voisin qu'il doit borner, non pas avec son vendeur. Cette différence, cependant, n'a pas d'importance dans l'espèce. L'appelant lui-même admet qu'il y a erreur dans le cadastre, car il réclame un emplacement plus large au sud qu'au nord, tandis que le cadastre lui donnerait une égale largeur à chaque extrémité.

Les mots "tel que le tout est actuellement et que l'acquéreur dit bien connaître," style de notaire, ne peuvent s'interpréter dans les deux actes en question, qu'avec l'addition des mots "dans les limites ci-dessus décrites." Il est impossible de leur donner une signification que les mettrait en contradiction avec la description spéciale que les precède.

On peut prescrire au delà de son titre, dit l'appelant. C'est vrai. L'acquéreur d'un terrain determiné peut prescrire la propriété d'un terrain plus étendu que celui qui lui est attribué par son titre. Mais non pas par la prescription de dix ans. Ce n'est que par trente ans qu'il peut prescrire la partie non comprise dans son titre, la partie au delà de son titre. Millet "Bornage"

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pages 383 *et seq.*; Leroux de Bretagne, vol. 1, page 419; 32 Laurent, nos. 331, 400; 3 Beaudry-Lacantinerie, Dr. Civ. (4 ed.) p. 975, no. 1631; Beaudry-Lacantinerie et Tissier, de la Prescription, no. 325; Sirey, '95, 1, 496; Fournel, du Voisinage, vol. 1, page 243; *Herrick* v. *Sixby* (1); *Dunn* v. *Lareau* (2), (Cons. Priv); art. 2210, C.C. Et celui qui réclame de son voisin dans une action en bornage une étendue de terrain supérieure à celle que lui donne son titre ne peut réussir qu'à condition de prouver qu'il l'a possédée pendant trente ans, 2 Aubry et Rau (4 ed.), pages 223, 226 par. 199, et pages 382, 383, par 218, *n.* 23; car, dit la cour de cassation, il n'a pas de juste titre à un terrain situé en dehors de celui qu'il a acquis, quoiqu'il soit contigu. Sirey, '83,1, 453; Dall. '81, 1, 353.

L'appelant ne peut justifier par un titre qui lui attribue une propriété de trente pieds de largeur à son extremité sud comme à son extremité nord, une possession de trente pieds au nord et trente-six au sud, comme il voudrait le faire. Ces six pieds de surplus à l'extremité sud qu'il revendique il ne peut pas les avoir possédés de bonne foi en vertu de son titre.

Puis, en voulant prescrire aucune partie de ce terrain au delà de trente pieds, il me semple qu'il veut prescrire contre son titre. Car il a acheté en 1885, avec cet emplacement, un droit de passage par un chemin

qui se trouve du coté sud-ouest et *le long de la dite maison* sur une largeur de dix pieds, avec obligation de faire et entretenir * * * la barrière qui se trouve au bout sud du dit chemin.

Il a une servitude par conséquent sur ces dix pieds. Ils ne sont donc pas à lui. On ne peut avoir de servitude sur ce qui nous appartient. Or, en réclamant la propriété par prescription de tout ou partie des dix pieds reservés pour ce chemin, ne veut-il pas prescrire contre son titre?

(1) L. R. 1 P. C. 436. (2) 32 L. C. Jur. 227.

D'abondant, je refère au passage suivant de son témoignage :

Q. Si le chemin ne vous appartient pas, votre hangar ne se trouve pas chez vous ?—R. Si, ce n'est pas à moi, le chemin, le hangar n'est pas à moi.

Q. Par conséquent, le bout au sud-ouest de votre hangar va plus loin que les trente pieds, n'est-ce pas ?—R. Il passe les trente pieds, oui, monsieur.

Q. De combien de pieds, votre hangar dépasse-t-il les trente pieds ? —R. Je n'ai jamais mesuré ça, je compte bien que c'est à l'entour de quatre ou cinq pieds, cinq ou six pieds.

D'autres questions out été soulevées par l'intimé. L'acte de vente à la femme seule de l'appelant, hors sa présence, et non-autorisée, confère-t-il à l'appelant un droit d'action pétitoire par lui-même et sans allégations spéciales ? Millet, du Bornage, page 237. Cet acte, est-il nul par défaut de forme, et comme tel ne pouvant servir de base à la prescription de dix ans ? Art. 2254 C. C.

Mais comme nous en sommes venus à la conclusion d'adopter les motifs du jugement *a quo*, il nous serait inutile d'examiner ces autres points sur lesquels les cours de la province ne se sont pas prononcées. L'appel est renvoyé avec dépens.

GWYNNE J. dissented from the judgment of the majority of the court.

Appeal dismissed with costs.

Solicitor for the appellant : *C. E. Dorion.*

Solicitors for the respondent : *Fitzpatrick, Parent, Taschereau & Roy.*

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*Mar. 11, 12, 13.

*Mar. 28.

EDMUND BARNARD (DEFENDANT)....APPELLANT;

AND

HORMISDAS RIENDEAU (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Vendor and purchaser—Artifice—Misrepresentation—Consideration of contract—Error—Laches—Possession and administration—Ratification—Waiver—Estoppel—Art. 992, 993, 1053, 1054 *C. C.*

B having a hotel scheme under promotion, agreed to purchase an old building from R in order to prevent it falling into the hands of persons who might use it for a brewery and thereby cause a nuisance and ruin his enterprise. R by falsely representing that he had a serious offer for the purchase or lease of the property for the purpose of a brewery, induced B to close on his agreement and take a deed of the property, the payment of the price being deferred. On discovery of the falsity of these representations B notified R that he repudiated the contract and invited him to bring an action to test its validity if he was unwilling to give a release and take back the property. The vendor delayed some time in taking action for the recovery of the price and, in the meantime, B remained in possession and collected the rents.

Held, that, under the provisions of the Civil Code, as the vendor had made false representations which deceived the purchaser as to the principal consideration for which he contracted, he could not recover; that the purchaser had a right to have the contract rescinded on the ground of error; that, under the circumstances, the delay in bringing the action could not be imputed as laches of the defendant, nor waiver of his right to have the contract set aside, and that defendant's administration of the property in the meantime could not be construed as ratification of the contract.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, reversing the judgment of the Court of Review, at Montreal, and restoring the judg-

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

ment of the Superior Court, District of Montreal, by which the plaintiff's action had been maintained with costs.

The defendant was interested in a hotel enterprise at Chambly, in connection with which he was attempting to organize a joint stock company, the proposed site for the building being close to old barracks belonging to plaintiff which had at one time been used as a brewery, but had fallen into ruin without any real saleable value. For the purpose of preventing the re-establishment of a brewery, which might prove a nuisance in the immediate vicinity of the proposed summer hotel and ruin his important enterprise, the defendant secured from the plaintiff a right of pre-emption or option to purchase the barracks property in case any offer should be made to buy or rent it by persons likely to use it again as a brewery. Some time afterward three strangers visited Chambly and looked over the property, making remarks about its suitability for brewing lager beer if the water in the river could be used for that purpose, but they made no definite offer either to rent or purchase. The plaintiff immediately instructed his solicitor to insist upon the defendant exercising his option at once, otherwise that he would deal with the strangers who were offering to buy or lease for a long term and utilize the barracks as a brewery. The defendant was pressed to close upon this representation and purchased the property at a price considerably above its actual market value, receiving a conveyance and becoming a party to the deed covenanting to pay the price at a subsequent date therein stated. On discovering that he had been led into error, in thus purchasing, through misrepresentations, the defendant refused to carry out his bargain, invited the plaintiff to take back the property or to sue upon the covenant, if he wished

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to test its validity, and in the meantime collected the rents and looked after the administration of the property of which he had received possession. After some considerable delay the action was taken, to which it was pleaded that the defendant had been induced to purchase through fraudulent misrepresentations, and that his obligation was vitiated by error as to the moving consideration and by the artifices used to mislead him into making the bargain when there was not any chance of the strangers either buying or renting the property for the purpose of using it as a brewery.

The Superior Court, (Davidson J.) maintained the plaintiff's action, but this judgment was reversed unanimously by the Court of Review (Sir Melbourne Tait A. C J. and Mathieu and Gill JJ.) The present appeal is from the judgment of the Court of Queen's Bench reversing the Court of Review and restoring the trial court judgment, Würtele and Ouimet JJ. dissenting.

Atwater K.C. and *Beauchamp K.C.* for the appellant. Error was the determining cause of the contract, induced by misrepresentations made by the plaintiff as to a serious offer having been made. No want of diligence can be imputed to the defendant, for he notified the plaintiff of his repudiation of the contract as soon as he was made aware of the falsity of the representations and as the plaintiff would not take back the property and give a release he put him *en demeure* to enforce specific performance by suit to test the validity of the obligation. It was through no fault of the defendant that plaintiff hesitated and delayed the action. The administration of the property in the meantime was no waiver or ratification, but a duty legally imposed on the defendant who was

obliged to hold possession and collect the rents until the questions in difference were determined.

The contract was entered into as the result of manœuvres without which the other party would not have contracted and it should be annulled at the demand of the party who has been deceived, even though there is no fraud. We refer to arts. 992, 993, 1053, 1054, C. C.; 10 Duranton, *nn.* 171, 181, 188; 6 Toullier, *nn.* 37, 38, 41, 87, 88, 92; 24 Demolombe, *nn.* 12, 165–172, 187; Larombière, art. 1116 *nn.* 7, 10; Solon "Nullité," *nn.* 227, 228, 229; 4 Boileux, art. 1116, p. 362; Pothier, Obl. 2; Pand. fr. "Obligations" t. 11, *nn.* 7149, 7293, 7311, 7312, 7313, 7314; 7 Huc *n.* 36; Beaudry-Lacantinerie "Obligations" *n.* 71 (1); 26 Laurent, *n.* 281; vol. 15, *nn.* 500, 528: *Belhumeur* v. *Massé* (1); *Lighthall* v. *Chrétien* (2); *Halde* v. *Richer* (3); Pollock on Torts, 277, 278; 267-8; Cooley on Torts, 474-6, 497, 499. *Murray* v. *Jenkins*, (4); *Cole* v. *Pope* (5); *Malzard* v. *Hart* (6); *Demers* v. *Montreal Steam Laundry Co.* (7); *Lefeuntéum* v. *Beaudoin* (8); *Peek* v. *Gurney* (9); *Derry* v. *Peek* (10); *Lindsay Petroleum Co.* v. *Hurd* (11); Jour du P., Rep. "Erreur," *nn.* 13, 19, 20. The solicitor acted on the plaintiff's instructions in misleading defendant and the fraud thus practiced by the agent may be set up against the principal, in the sense that the nullity of the contract by reason of fraud could be demanded as against the principal. 1 Bédarride, "Dol. et Fraude," *nn.* 78–81.

Fitzpatrick K.C. (Solicitor General of Canada) and *Lafleur K.C.* for the respondent. It is clear that there was no fraud contemplated by plaintiff, nor was there

(1) 34 L. C. Jur. 294.
(2) 11 R. L. 402.
(3) 19 R. L 260.
(4) 28 Can. S. C. R. 565.
(5) 29 Can. S. C. R. 291.
(6) 27 Can. S. C. R. 510.
(7) 27 S. C. R. 537.
(8) 28 Can. S. C. R. 89.
(9) L. R. 6 H. L. 377.
(10) 14 App. Cas. 337.
(11) L. R. 5 P. C. 221.

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even a false statement made. The plaintiff was convinced that the strangers who had visited the property seriously intended to buy or lease, and fearing the loss of a market for the property, called upon the defendant either to exercise or abandon his option. The consideration inducing defendant to purchase was good and sufficient and he ratified his bargain by many subsequent acts, held possession, interested himself to secure exemption from taxes, collected rents and so forth, from the date of his purchase, 20th April, 1896, till suit, 9th September, 1897. This is a waiver and operates to estop defendant from having the contract annulled. This long delay was allowed to elapse although defendant was aware of all the facts material to his defence in June, 1897. The facts have been found in the plaintiff's favour by the trial judge who saw and heard the witnesses, and cannot be reconsidered on appeal.

We refer to *Paradis* v. *Municipality of Limoilou* (1); *The Village of Granby* v. *Ménard* (2); *Campbell* v. *Fleming* (3); *Morrison* v. *Universal Marine Ins. Co.* (4); *Clough* v *London and Northwestern Railway Co.* (5).

The judgment of the court was delivered by:

TASCHEREAU J.—Il serait inutile de relater ici au long les faits nombreux que ce dossier présente. Monsieur le juge, Sir Melbourne Tait, en a fait une analyse détaillée et si complète qu'il me suffit d'y référer. Nous en sommes venus, avec la Cour de Revision, à la conclusion que l'appelant n'a acheté la propriété en question que parce que l'intimé lui avait dit ou fait dire que Cummings avait offert de l'acheter ou de la louer pour en faire une brasserie. Or il ressort clairement de la preuve que Cummings n'a jamais fait une telle offre.

(1) 30 Can. S. C. R. 405
(2) 31 Can. S. C. R. 14.
(3) 1 Ad. & El. 40.
(4) L. R. 8 Ex. 40, 197.
(5) L. R. 7 Ex. 26.

L'intimé ne pourrait pas soutenir que si l'appelant n'eut pas acheté, la propriété serait passée entre les mains de Cummings, ni alors, ni en aucun temps depuis. Cummings et ses associés jurent positivement qu'ils n'ont jamais fait d'offres à l'intimé lors de leur visite à Chambly, et n'ont jamais eu l'intention d'en faire depuis.

L'intimé a mis l'appelant en demeure quand il n'y avait pas le moindre danger que la propriété passe en d'autres mains, bien plus, avant même qu'il ait vu Cummings. Qu'il ait été coupable de fraude dans le sens vulgaire de ce mot, il a droit au bénéfice du doute. Mais qu'il fût de bonne foi ou non, ne peut affecter la question. Il est peut-être possible qu'il n'ait pas eu le dessein de tromper l'appelant, mais il l'a trompé tout de même, et forcé à acheter de suite dans la crainte que s'il n'achetait pas, Cummings acheterait. Il l'a mis dans l'erreur et c'est cette erreur qui a été, pour l'appelant, la *causa contractui*, la considération principale qui l'a déterminé à acheter pour me servir des termes mêmes du Code, art. 992. Son consentement a été surpris.

Sans doute l'erreur sur le motif d'un contrat n'est pas généralement une cause de nullité. Mais ce n'est pas sur son motif que l'appelant a été induit en erreur dans l'espèce, mais bien sur le seul fait que l'a déterminé à acheter, le fait d'une offre sérieuse de Cummings.

Et d'ailleurs, quand l'erreur dans le motif, dans la cause impulsive d'un contrat, résulte de l'artifice, dol, ou des fausses représentations d'une des parties contractantes, la partie trompée a le droit de demander la resolution du contrat. La lettre écrite par l'intimé à Monsieur Sicotte le seize mars n'est pas justifiée par la preuve. Son imagination était sans doute surexcitée. Il s'est fait illusion et a pris pour accompli ce qu'il pensait devoir arriver et pouvoir prévoir.

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Taschereau J.

Tant qu'à Monsieur Sicotte, personne n'a songé, devant nous du moins, à mettre sa bonne foi en doute. Et l'appelant n'avait pas raison d'être injuste à son égard, comme il l'a été dans les questions qu'il lui a posées comme témoin.

Tant qu'à l'engagement que l'intimé avait pris envers l'appelant de lui donner l'option d'acheter, ou ce qui est appelé au dossier le droit de préemption, ou la préférence (*the refusal,*) la preuve en est si claire, que tant en Cour Supérieure et en Cour de Revision, qu'en Cour d'Appel, il ne semble pas y avoir eu le moindre doute à ce sujet. L'intimé d'ailleurs dans sa déposition a dû l'admettre Mais ce fait n'est peut-être pas essentiel. Si sans cet engagement l'intimé eut obtenu de l'appelant son consentement à ce contrat par la fausse représentation que Cummings avait offert d'acheter de suite les prémisses pour en faire une brasserie, le consentement de l'appelant aurait tout de même été obtenu sous de faux prétextes.

Tant qu'à la prétendue ratification par l'appelant nous adoptons l'opinion de Monsieur le juge Tait sur ce point comme sur tous les autres. L'Appelant a répudié son achat aussi promptement qu'il lui a été possible de le faire. Au lieu de prendre une action lui-même, il a sommé l'intimé de prendre l'initiative; et si celui-ci a retardé de ce faire, l'appelant ne peut en souffrir. Il a administré la propriété, c'est vrai, mais, sous les circonstances, c'était son devoir de le faire en attendant que la justice prononce sur le différend entre lui et l'intimé.

Nous sommes unanimement d'avis d'allouer l'appel avec depens et de rétablir le jugement de la Cour de Revision avec frais dans toutes les cours contre l'intimé.

Appeal allowed with costs.

Solicitors for the appellant: *Beauchamp & Bruchési.*

Solicitors for the respondent: *Lafleur & Macdougall.*

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THE TORONTO RAILWAY COMPANY (DEFENDANT)..... } APPELLANT;

*Mar. 28.
*April 1.

AND

ROBERT SNELL (PLAINTIFF).. .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Electric railway—Motorman—Workmen's Compensation Act—Injury to conductor.

The motorman of an electric car may be a "person who has charge or control" within the meaning of sec. 3 of the Workmen's Compensation Act (R. S. O. [1897] ch. 160) and if he negligently allows an open car to come in contact with a passing vehicle whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured the electric company is liable in damage for such injury.

Judgment of the Court of Appeal (27 Ont. App. R. 151) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiff.

The facts presented on the appeal were as follows:

On the 29th of June, 1899, the respondent, Snell, was in the employ of The Toronto Railway Company, as a conductor on their line of street railway in the City of Toronto. For thirteen years he had been employed in a similar capacity not only by the defendants, but by the company who owned the franchise before it came into the hands of the defendants by purchase from the City of Toronto. On the evening of the 29th of June, Snell was performing his duties as conductor on one of the open cars of the defendants operated by electricity on Queen Street East, a leading thoroughfare in the City of Toronto. In these open cars the

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

(1) 27 Ont. App. R. 161.

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seats are placed across the car and there is no aisle or passage for the conductor to pass from the rear to the front of the car for the purpose of collecting fares or performing his other duties. The only way the conductor can go from one end of the car to the other to collect the fares is by a side step or running board extending along the outside of the car. About 8.15 on the evening in question, Snell was standing on the running board and had just collected a fare from a passenger. On the track in front of the car and going in the same direction was a wagon with a load of furniture. This wagon was in the act of pulling off the track and had pulled off a sufficient distance to clear the car but not to clear Snell standing on the running board. The motorman, without slackening speed, ran the car at the rate of eight miles an hour past the wagon. The wagon or the load came in contact with Snell, throwing him violently to the ground. It is for the injuries sustained by him by being thus knocked off the car that he brought action against the defendants.

The respondents' cause of action arises under R.S.O. ch. 160, section 3, subsection 5, The Workmen's Compensation for Injuries Act: "Where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer, who has charge or control of any points signal, locomotive, engine, machine, or train upon a railway, tramway or street railway, the workman, or in case the injury results in death the legal personal representatives of the workman, and any persons entitled in case of death shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer nor engaged in his work."

The question for decision was:

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Was the motorman an employee in charge of a machine or engine on the appellant's street railway under this section?

The case was tried with a jury who found that the motorman was guilty of negligence. Judgment was entered for the plaintiff and the damages assessed at $1,200. This judgment was affirmed by the Court of Appeal, from whose judgment the defendant appealed to the Supreme Court.

Bicknell for the appellant.

Robinette and Godfrey for the respondent.

THE CHIEF JUSTICE and SEDGWICK, KING and GIROUARD JJ., were of opinion that the appeal should be dismissed with costs, for the reasons given in the Court of Appeal.

GWYNNE J.—There is no dispute as to the facts in this case. The only question in the appeal is whether or not the motorman on an electric street railway is the person having control of the movement of the train of which he is the motorman within the meaning of the Workmen's Compensation Act. The learned trial judge held that he was; the defendants, on the contrary, insists that he is not, and that the conductor, the injured man in the present case, is. Apart from this contention, no objection whatever has been taken to the learned trial judge's charge to the jury, and none indeed could be, for in every particular it was a most fair charge. In so far as the present case is concerned, that is to say as to an injury alleged to have been caused by the manner in which the train is propelled by the motorman, he is necessarily the person having control of the car within the meaning of the statute referred

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to. There being no other point raised in this case, the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *James Bicknell.*

Solicitors for the respondent: *Robinette & Godfrey.*

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*Nov. 13.

*Dec. 7.

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**Mar. 28.

THE CONSUMERS CORDAGE COMPANY (DEFENDANT AND INCIDENTAL PLAINTIFF) ..... APPELLANT;

AND

NICHOLAS K. CONNOLLY AND MICHAEL CONNOLLY (PLAINTIFFS AND INCIDENTAL DEFENDANTS) ..... RESPONDENTS.

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

Contract—Unlawful consideration—Répétition de l'indu—Account—Public policy—Monopoly — Trade combination — Conspiracy—Malum prohibitum—Malum in se—Interest on advances—Foreign laws—Arts. 989, 1000, 1067, 1077, 2188 *C. C.—Matters judicially noticed.*

In an action to recover advances with interest under an agreement in respect to the manufacture of binder twine at the Central Prison at Toronto, the defence was the general issue, breach of contract and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract.

Held, per Sedgewick, King and Girouard JJ. that the evidence disclosed a conspiracy and that, although under the provisions of the Civil Code the moneys so advanced could be recovered back, yet no interest before action could be allowed thereon, as

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

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the law merely requires that the parties should be replaced in the position they respectively occupied before the illegal transactions took place. *Rolland* v. *La Caisse d'Economie, Notre-Dame de Québec*, (24 S. C. R. 405) discussed and *l'Association St. Jean-Baptiste de Montréal* v. *Brault*, (30 S. C. R. 598) referred to.

Held also, that laws of public order must be judicially noticed by the court *ex proprio motû*, and that, in the absence of any proof to the contrary the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractu*.

Per Taschereau, J. (dissenting.)—1. A new point should never be entertained on appeal, if evidence could have been brought to affect it, had objection been taken at the trial. 2. In the present case, the concurrent findings of both courts below, amply supported by evidence ought not to be disturbed, and as the company itself prevented the performance of the condition of the agreement in question requiring the assent of the Government to the transfer of the binder twine manufacturing contract, its non-performance cannot be admitted as a defence to the action upon the executed contract.

Gwynne J. also dissented on the ground that the judgment appealed from proceeded upon wholly inadmissable evidence and that, therefore, the action should have been dismissed and further, that the evidence which was received and acted on, though inadmissible for the purposes for which it was intended, shewed that the action was based upon a contract between the plaintiffs and defendant for the commission of an indictable offence; that neither party could recover either by action or by counter-claim upon such a contract and, therefore, that the incidental demand, as well as the action, should be dismissed.

APPEAL from a judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiffs' action to the extent of $22,-324.48 with interest thereon at eight per cent per annum from 1st October, 1896, until paid, and the interest at the same rate on $4,380.26 from 1st October, 1896, to the 18th of April, 1898, and costs, and further dismissing the defendant's incidental demand with costs.

The circumstances under which litigation arose in this case and the questions at issue upon the appeal

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are stated in the above headnote and in the judgments reported. The appeal was heard upon the merits on 13th November, 1900.

Fitzpatrick Q.C. (Solicitor General of Canada) and *Chase-Casgrain Q.C.* for the appellant.

E. A. D. Morgan for the respondents.

When the arguments of counsel were concluded, judgment was reserved and on the 7th of December, 1900, an order was made, (Taschereau J. dissenting) in terms, settled by the majority of the court, stated as follows by His Lordship Mr Justice Girouard:

"Before we decide this case we order a re-hearing upon the following questions:

1. Does the evidence establish a conspiracy or illegal combination between the parties affecting public interests?

2. If so, can the court take notice of it, although not pleaded or set up in the factums, or argued at the hearing?

3. And finally, if both questions be answered in the affirmative, are the parties or either of them entitled to an account of the moneys paid and received in the course or by reason of the illegal dealings and operations of the parties and recover the same, or should the court refuse to entertain the action?"

His Lordship Mr. Justice Taschereau dissented from the order and said: "I do not take part in this order. I am of opinion that the appeal should be dismissed with costs." His Lordship's reasons for this judgment appear below.

His Lordship Mr. Justice Sedgewick concurred in the order, and His Lordship Mr. Justice King said: "I am of opinion that the questions framed by Mr. Justice Girouard for a re-argument of the appeal are appropriate; they seem to me to be material" and he concurred in the order.

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On 7th March, 1901, it was ordered that the re-argument should take place after the hearing of the Ontario Appeals at the Winter Sessions and, on 8th March, 1901, an order was made dispensing with the re-argument, discharging all orders and directions therefor, and the case stood for judgment as it was at the close of the hearing in November, 1900.

On the 28th of March, 1901, Their Lordships Justices Gwynne, Sedgewick, King and Girouard being present, (His Lordship Mr. Justice Taschereau, refusing to take any part, and not present,) judgment on the merits was pronounced by the majority of the court, Gwynne J. dissenting, by which the appeal on the principal demand was dismissed in part with costs, the judgment appealed from being reduced and the appellant condemned to pay to the respondents $18,044.86 with interest thereon from the 23rd of December, 1896, and costs in all the courts, and the judgment appealed from on the incidental demand was affirmed with costs.

TASCHEREAU J.*—On this appeal, which presents very little else but questions of fact, we would all be of opinion to confirm the judgment in the case that has been tried, argued and determined in the court of first instance, that has been argued and determined in the Court of Review, and that has been argued here on both sides. But it is now suggested for the first time that the case should be determined upon a ground never taken at bar, never argued here or in the two courts below, and never tried in the court of first instance. Now, that is an untenable proposition.

I should have thought that if a new point, as the one suggested, had, in our opinion, necessarily to be determined, the rational conclusion would have been,

* Reasons for dissenting judgment of 7th December, 1900.

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Taschereau J.

if not to remit the case to the court below, at least to order that the parties should be heard here upon it.

How fraught with danger of doing injustice is the course proposed, it is unnecessary to insist upon.

If such a point had been taken at the trial, evidence to meet it might have been given. The whole matter might have been explained. And it is a rule, never to be departed from, that a new point in appeal should not be allowed to be taken, if evidence could have been brought to affect it, had it been taken at the trial.

To me it seems almost incredible that it could be proposed, upon mere conjectures and suspicions, to find these parties guilty of conduct amounting to a crime punishable by seven years penitentiary, not only without ever having heard them upon that charge, but even when they have never been charged or accused of it.

As to the merits of the case that was argued and determined in the two courts below, the only case that has been submitted for our consideration, the appeal entirely fails. The concurrent findings of the two courts is, upon overwhelming evidence, that as regards the tender and contract and in the taking possession of and working of the binder twine business in the Central Prison, leased to P. L. Connor by the contract of 25th September, 1895, and which was subsequently transferred to Robert Heddle, the said Connor and Heddle were but the *prête-noms* and salaried representatives of the defendants and acted on their behalf and in their interest, under their control and for their exclusive profit; that for the purpose of the tender, contract and working of said business, which had been carried on by the defendants since the said 25th of September, 1895, the plaintiffs advanced and procured for the defendants, at the agreed rate of interest, the sums mentioned in the declaration and that the plaintiffs fulfilled

all their obligations towards the defendants under the agreement of the 29th of February, 1896; that at their request they caused a transfer of the contract of the 25th of September, 1895, to be made to Robert Heddle, the *prête-nom* and employee of the defendants, and also furnished the capital required for operating the said business, and that this transfer would have received the consent of the Lieutenant-Governor-in-Council, if Heddle, under the advice of the defendants, had not withdrawn his demand to that effect.

The appellant's contention based upon the condition requiring the consent of the Lieutenant-Governor-in-Council to the transfer of the contract in question, amounts to nothing else than a fraudulent attempt on its part to get rid of its responsibilities. Under the circumstances of the case, the appellant cannot now be admitted to avail itself of that defence upon an executed contract.

Sir Melbourne Tait, in the Court of Review, has fully demonstrated this. I do not see anything that can be added to his comments upon the case.

GWYNNE J. (dissenting).—This appeal presents a most singular case of what the plaintiffs in the action, the now respondents, claim to be the simple case of money lent and advanced by the plaintiffs to the defendants and paid to and for their use at their request. To establish this contention a volume of 500 pages of printed matter containing the pleadings, evidence and reasons for the judgment now in appeal, and 49 pages of printed matter in an argument presented to us by the respondents in their factum have been deemed to be necessary, an unusual circumstance in the case of a simple action to recover money lent and advanced to, and to the use of, the defendants at their request.

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The declaration, in which the plaintiffs' cause of action is asserted, alleges that on the 29th day of February, 1896, the defendants were indebted to the plaintiffs in divers sums of money, to wit, in the sum of $5,000 advanced for their benefit by the plaintiffs and deposited with the Government of the Province of Ontario to accompany a tender for the obtaining of a contract for the manufacture of binder twine at the Central Prison at the City of Toronto, and at their request, and in the further sum of $7,350 for a like sum constituted a first charge on the earnings of said manufacturing institution at the said Central Prison at Toronto and taken over by plaintiffs in settlement of a certain claim due them, and accepted by the said defendants as a debt and charged on said business to be repaid by them, and the further sum of $22,048.52 advanced by the plaintiffs at the request of said defendants *and invested in the said business*, and interest on the said different amounts, and lastly "for an overcharge on a certain lot of twine amounting to $303.30." The declaration then alleges that on the 29th day of February, 1896, the said plaintiffs and the defendants acting by and through their general manager, one Elisha M. Fulton, entered into a certain written agreement whereby it was agreed and covenanted that the plaintiffs should transfer to the defendants the right from the Government of the Province of Ontario to manufacture binder twine in the Central Prison, *which contract* P. L. Connor had already transferred to them, and further, that the plaintiffs would furnish the defendants with the necessary capital to carry on the business of manufacturing twine at said Central Prison during the then ensuing season of 1896, and that they should obtain necessary discounts with the assistance of the defendants from the Dominion Bank of Toronto, and that at least $40,000 of the

sum furnished should be repaid between the 1st and 15th days of June then next, and as to the balance all the moneys *invested by the plaintiffs in the said business* were to be repaid by the 1st day of October then next, save and except the aforesaid mentioned sum of $7,350, the repayment of which sum was to extend over the first two years of the Government contract.

The declaration then proceeded to claim in the itemized account the said several sums of $5,000 as advanced on the 21st August, 1895, with interest thereon from that date; $7,350 as advanced on the 25th day of September, 1895, with interest thereon from that date; $22,048.52 as advanced on November 7th, 1895, with interest thereon from that date, and certain other items amounting in the whole (after deduction of certain sums entered therein as credits) to $34,054.74, which sum with interest thereon at 8 per cent since October 1st, 1896, is what the plaintiffs claimed in the action.

Now here it is to be observed that the declaration contains no averment of the performance by the plaintiffs of any of the acts by the agreement of the 29th of February, 1896, covenanted to be performed by them, nor of any advances having been made by the plaintiffs to the defendants under the clause in that agreement by which they undertook to furnish the necessary capital to carry on the business of manufacturing twine in the Central Prison during the season of 1896. The sole claim made by the declaration is in respect of the principal sums of $5,000, $7,350 and $22,048.52 alleged to have been advanced to the defendants at the respective dates aforesaid of the 21st of August, 25th of September and 7th November, 1895, together with interest thereon and a few other items not appar-

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ently connected with the agreement of 29th of February, 1896.

To this declaration the defendants pleaded;

1st plea: A general denial.

2ndly. A special plea that the plaintiffs never performed the essential condition precedent necessary to the contract of 29th February, 1896, going into effect and becoming binding upon the company defendant, and never gave and secured to the defendants the object and consideration of their said contract, to wit, the right from the Government of Ontario to manufacture binder twine at the Central Prison for the period mentioned in the contract of the 25th of September, 1895, but wholly failed to secure such right to the defendants. And

3rdly. A plea in thirty-four paragraphs which is in substance and effect an amplified repetition of the matters pleaded in and covered by the two previous pleas coupled with a long argument insisting with great prolixity upon the particular points in which the plaintiffs failed in the performance of their covenant in the said agreement, as had been pleaded in the said second plea. All of which matters, assuming the defendants' construction of the agreement of 29th of February to be correct, were matters the performance of which it was necessary for the plaintiffs to have averred in their declaration, and to establish in evidence in order to succeed in an action against the defendants for breach of their covenants contained in the instrument.

Now as to the second plea the averments therein contained although proper and essential in an action or an incidental demand instituted by the defendants against the plaintiffs for breach of their covenants in the instrument were quite inappropriate and unnecessary as a plea by way of defence to an action framed

as the cause of action set out in the declaration in the present case is, wherein the contention of the plaintiffs simply is that the true construction of the instrument of February, 1896, is that the defendants thereby covenanted to pay to the plaintiffs moneys then due for money previously lent and advanced by the plaintiffs to and for the use of the defendants at their request, a point determinable by the construction of the instrument.

The whole of the matters in the third plea (it must, I think, be admitted,) were also wholly irrelevant and unnecessary and improper to be set out upon the record as a plea to the cause of action as set out in the declaration. A few of the paragraphs will serve as a specimen of the whole.

The fourth paragraph avers simply a fact appearing on the face of the contract of the 25th September, 1895, mentioned in the declaration, namely, the names and description of the several parties thereto.

The fifth paragraph simply stated what was the provision contained in the seventeenth paragraph of the said contract of the 25th of September, namely, that

the contractor shall not assign this agreement or sublet the same without the consent of the Lieutenant Governor in Council.

The plea in its sixth paragraph averred that the contractor referred to in paragraph seventeen of the contract was the said P. L. Connor, and the Lieutenant Governor in Council referred to was the Lieutenant Governor of the Province of Ontario and the Executive Council of that province.

In the seventh paragraph the plea averred that the said Lieutenant Governor in Council had never assented to any assignment of the said contract by the said P. L. Connor to the plaintiffs.

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In the eighth paragraph it was averred (in short substance) that it was a condition precedent to any obligation undertaken by defendants by the agreement of February, 1896, without which they would not have entered into that agreement that the said plaintiff should lawfully assign the said contract of the 25th September, 1895, to the defendants in accordance with said seventeenth paragraph thereof, viz., with the assent and approval of the Lieutenant Governor in Council.

In the ninth paragraph it was averred that by the said agreement of February, 1896, the plaintiffs undertook and agreed that the said contract of the 25th September, 1895, should be legally transferred to the defendants with the consent of the Lieutenant Governor in Council.

In the tenth paragraph it was averred that the plaintiffs had frequently acknowledged and submitted, as was the fact, that they were bound to transfer the said contract and to procure the assent of the Lieutenant Governor in Council thereto, and that without such transfer the defendants never consented to, authorised or incurred any liability to the defendants.

By paragraph twenty-seven it was averred that without a due and legal transfer of the said contract of the 25th of September, 1895, duly assented to by the Lieutenant Governor in Council the said defendants would not have had any *locus standi* in and with respect to the said prison plant and would have been without any right or title to conduct the said operations, and as a matter of fact the said prison authorities never in any manner or form recognised the said defendants in any manner in connection with the said prison plant but always dealt in respect thereto, with the said P. L. Connor and his representatives.

All these matters (and all the other paragraphs of this third plea are of similar nature) constitute simply an argument in support of the defendants' construction of the contract of February, 1896, and seem to have been inserted solely for the purpose of meeting the plaintiffs' construction of that agreement as appearing in their declaration to the effect that it was entered into merely in respect of, and to prescribe the times of payment of sums of money antecedently lent and advanced by the plaintiffs to the defendants at their request. These several matters so with great prolixity set out upon the record did not in reality constitute any issuable pleading by way of defences to the cause of action set out in the declaration which, as already observed, was for the recovery of sums alleged to have been lent and advanced by the plaintiffs to the defendants at their request prior to the 29th of February, 1896, and by that instrument covenanted to be paid at the times therein mentioned with interest as therein mentioned.

The plaintiffs by way of answer to the above pleas pleaded to the said second plea as follows:

That each and all and every of the allegations of said plea is and are false except in so far as the same may be specially hereinafter admitted. That as appears by the allegations of the plaintiffs' declaration the defendants were indebted to the plaintiffs for the causes set out in the said declaration prior to the agreement of the 29th of February, 1896, which the said defendants' plea calls the "*pretended contract which is invoked by the plaintiffs, and which is really the sole ground of their pretended demand against defendants,*" and that the said agreement *only fixed the date* of the repayment of said sums advanced long previously by the plaintiffs to the defendants at their request and for their benefit in connection with the Central Prison binder twine contract."

And further among other things not necessary to be set down at large

that the said P. L. Connor, mentioned in the said agreement, had been long previous to the said 25th day of September, 1895, employee and *prête-nom* of the said defendants, and both he and the plaintiffs would

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only have been too willing to transfer not only the right to manufacture, which they did, but also would have been willing that the contract should have been in name as it was in fact transferred to defendants, but the latter never wished same to be done, but preferred carrying on as they ever did since the date of the said contract between the Inspector of Prisons and said P. L. Connor the business for the sole benefit of the said company defendant by whom it *was assumed confidentially and under the asked and granted pledge of secrecy*, and that for the benefit and advantage of the defendant company.

To the defendants' third plea the plaintiffs pleaded an answer which, as it is pleaded in reply to a pleading itself irrelevant and defective for the reasons already stated, partakes necessarily of the same defects as those which characterized the plea to which it is pleaded in reply; it is unnecessary therefore to notice it further than to say that it repeats what had been alleged in the answer to the defendants' second plea, and contains what has been throughout the trial, and still is, the main contention upon which the plaintiffs rest their cause of action and their right to maintain the judgment therein now under consideration.

The allegation is

> That the said P. L. Connor obtained the said contract for the benefit of his employers the said defendants; that the whole business was assumed confidentially by them, and that from and after the going into force of the said contract of the 25th of September, 1895, the whole business was carried on for the exclusive benefit of the said defendants and under their sole control, the only right pertaining to the said plaintiffs in respect of said contract, and the business connected therewith being their option of advancing the money necessary for the carrying on said business *at six per cent interest per annum and two per cent bonus.*

The defendants filed an incidental demand for damages alleged to have been sustained by them by reason of the non-fulfilment of the covenant of the plaintiffs contained in the said agreement of the 29th of February, 1896, to which the plaintiffs as incidental defendants pleaded by way of defence the same matters

which they had pleaded by way of answer to the pleas of the defendants in the principal action.

Now the sole contention of the plaintiffs upon this singularly framed record was that the defendants being upon the 29th of February, 1896, indebted to the plaintiffs in the several sums stated in the declaration mentioned for advances of like sums made at the respective dates in the declaration mentioned by the plaintiffs to the defendants at their request, executed the instrument of February, 1896, for the sole purpose of prescribing the times and mode of repayment of such loans, and that such was the sole intent and effect of that instrument, while on the contrary the contention of the defendants was that the sole obligation incurred by the defendants to the plaintiffs was incurred under, and by virtue of, the terms of that instrument of February, 1896, which as they contend was a contract of purchase by the defendants, and of sale and transfer by the plaintiffs to the defendants, or as they should direct, of the contract between the Ontario Government and P. L. Connor of the 25th September, 1895, for the residue of the term by that contract created and which the plaintiffs declared to have been transferred to them and to be in their power to transfer to the defendants; and the defendants filed their incidental demand for damages alleged to have been sustained by them for non-fulfilment by the plaintiffs of their covenant in that behalf contained in the said instrument and to be performed by them. The main contention between the parties thus appears to have been as to, and to be determinable by, the construction of the instrument of February, 1896. The case proceeded to *enquête*. The contract of the 25th September, 1895, having been produced by and on behalf of the plaintiffs it appeared that Patrick Louis Connor therein described as of the City of Brantford, in the

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County of Brant, thereinafter called the contractor, did for himself, his heirs, executors, administrators and assigns covenant with the Inspector of Prisons among other things,

to at all times at his own cost provide all expert labour and instruction necessary in manufacturing and to supervise and instruct the prisoners in the work required of them in operating the plant, &c.

The contract then contained provisions for limiting the price at which the twine manufactured at the prison should be sold to the farmers. Then by sections 13, 14 and 17 it was agreed as follows:

13. The contractor shall take over at cost all the manufactured twine and binder twine material on hand at the time of entering upon the contract, the twine at a price to be arrived at the same as provided in making up the selling price of twine by the contractor, and the unmanufactured material at invoice prices, with cost of delivery at the prison added.

14. This contract shall, subject to the herein contained provisions as to default and resumption by the Government, be in force from the 1st day of October, 1895, until the 1st day of October, 1900, renewable for a further period of five years provided the Lieutenant Governor in council considers it in the public interest that such further period should be granted.

17. The contractor shall not assign this agreement or sublet the same without the consent of the Lieutenant Governor in Council.

The plaintiffs also produced the agreement of the 29th of February, 1896, which is as follows:

It is hereby mutually agreed by and between the Consumers Cordage Company, limited, a body corporate and politic, with its head office and chief place of business in the City of Montreal, P.Q., party of the first part, and the firm of N. K. and M. Connolly, contractors of the City of Quebec, party of the second part, witnesseth that whereas Mr. P. L. Connor, of Brantford, Ontario, has acquired the right from the Government of the Province of Ontario, to manufacture binder twine in the Central Prison in the City of Toronto, in the said province, for a period of five years from October 1st, one thousand eight hundred and ninety-five, to October 1st, nineteen hundred, the party of the second part hereby agrees to transfer and make over to the party of the first part *the said right from the Government* of the Province of Ontario *to manufacture binder twine in the Central Prison* in the City of

Toronto in the said province *for the full period of said contract with P. L. Connor.*

The party of the second part further agrees to furnish all the capital that may be required for said manufacturing operations at said Central Prison for and during the full term of the twine season of 1896 at which time the party of the first part hereby agrees to reimburse the party of the second part *all money they have invested in the said business*, and not later than October 1st, 1896, with interest thereon at eight per centum per annum, *but* it is understood and agreed that at least $40,000 (forty thousand dollars) of this shall be paid between June 1st and 15th, 1896, and if required the party of the second part shall assist the party of the first part to obtain any part *of this amount* through the Dominion Bank at Toronto, as well as a sum of $7,350 constituted by P. L. Connor as a first charge on the earnings of the said manufacturing institution *and taken over by the party of the second part* in settlement of accounts with John Connor of St. John, N.B. The payment of this amount shall extend over the first two years of the Government contract.

This agreement is signed E. M. Fulton as manager of the Consumers Cordage Company, limited, on behalf of that corporation, and by N. K. and M. Connolly, the plaintiffs in the present action. Now as the main question between the parties as to the plaintiffs' right to succeed in this action is as to the admissibility of evidence tendered by the plaintiffs and objected to by the defendants' counsel and received by the learned judge at *enquête* subject to such objection and to future consideration as to its admissibility and as to whether it should be acted upon, and as that question depends upon the construction of the contract of February, 1896, it will be convenient before entering upon this latter question to advert to certain other evidence given at *enquête* not objected to, or open to objection, and which seems to have also a bearing upon the question whether the evidence objected to by the defendants and received subject to further consideration should be accepted and acted upon as admissible.

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It appears then that in the summer of 1895 the plaintiffs, Nicholas K. Connolly and Michael Connolly and one John Connor, trading in partnership together under the name, style and firm of "The Continental Twine and Cordage Company," were carrying on the business of manufacturers of rope and binder twine at certain premises in the City of Brantford, leased from defendants, under a lease dated the twenty-eighth day of January, 1895, and also at the Penitentiary at Kingston under some contract executed by the Dominion Government which was not produced, but of which the said partnership firm had control. The business carried on by the said firm at Brantford was under the management of Patrick L. Connor as superintendent for and on behalf of the said partnership firm in which employment he himself said that he continued until the first of November, 1895, at which time the lease of the Brantford premises where the said partnership business had been carried on, was taken off the hands of the lessees by their lessors the defendants.

In the month of July or early in the month of August, 1895, the Ontario Government advertised for tenders for leasing the Central Prison plant for manufacturing rope and binder twine and required each tender to be accompanied with the deposit of $5,000 as security for the *bona fides* of the tenderer and to remain as security for the fulfilment by the lessee of the terms of the lease in the event of the tenderer becoming the lessee. On or about the 21st of August, 1895, Patrick L. Connor, being at that time in the employment of the Connollys, and John Connor (who was his brother) as their superintendent of the home manufacturing business carried on by them at Brantford, put in a tender to the Ontario Government in reply to their advertisement for tenders for a lease of the Central Prison twine manufacturing plant.

About the 20th of August John Connor drew upon his partners, the present plaintiffs, for $5,000, payable at sight to his own order. This draft was addressed to the plaintiffs, to care of R. Moat & Co., bankers, Montreal, who were the brokers of the plaintiffs and (as deposed by the plaintiffs' bookkeeper) was cashed by Messrs. Moat & Co. and forwarded to John Connor and was deposited with Patrick L. Connor's tender in accordance with the requirements of the Ontario Government's advertisement for tenders. This is the first item in the plaintiffs' declaration and in the itemized account therein charged under date of 21st August, 1895.

Afterwards, on September 13th, 1895, P. L. Connor put in another or substituted tender and in relation thereto, on the 18th September, addressed and sent to the inspector of prisons a letter in which, referring to his new tender of the 13th instant, and to certain matters connected therewith, and to the contract tendered for, he makes use of the following language :—

> It is also understood that the cheque for $5,000 which accompanied my first tender in this matter is to be held by you as security to the Government for carrying out my second tender as explained by this letter.

Then as to $7,350, the second item in the plaintiffs' declaration, and which the plaintiffs therein allege to have been an item of debt owed by the defendants to the plaintiffs upon, and prior to, the 29th day of February, 1896, and which is charged in the itemized account set out in the declaration as having accrued due upon the 25th day of September, 1895, and therefore from that date interest is charged thereon, Martin Connolly, the then book-keeper of the plaintiffs, deposed that all he knew as to that item was that he had seen a note for t at amount made by Patrick L. Connor to the plaintiffs, but when he saw it, he did

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not say, but he said that he knew nothing whatever as to the consideration for which it was given, although he adds that he was confidential clerk of the plaintiffs as a rule. In short there is not a particle of evidence offered in the case for the purpose of establishing that, and the plaintiffs do not contend that, as is averred in the plaintiffs' declaration, this sum constituted a debt due by defendants to the plaintiffs prior to the 29th of February, 1896. The evidence does not profess to disclose any liability whatever of the defendants to the plaintiffs in respect of this item other than such as appears in the agreement of the 29th of February, 1896, the nature and character of which we shall consider in the construction of that instrument.

Now as to the sum of $22,048.52, the third item in the plaintiff's declaration, that sum constituted money payable to the Ontario Government by Patrick L. Connor under the 13th paragraph of his contract of the 25th September for the manufactured twine and binder twine material then on hand, and it was paid by him in the month of November of that year to the Ontario Government out of the proceeds of a cheque of Messrs. R. Moat & Co., Montreal, the brokers of the plaintiffs, dated the 7th November, 1895, for $25,000 (twenty-five thousand dollars), and made payable to the order of the plaintiffs and indorsed by them to the said John Connor, the brother of Patrick L. Connor, and plaintiffs' partner. Now as to this item Martin Connolly, the bookkeeper of the plaintiffs, and called as a witness by the plaintiffs, said that he knew that the plaintiffs' brokers in Montreal had charged this sum in the firm's account to Mr. Michael Connolly, and that on a subsequent occasion, but when he did not say, Mr. Michael Connolly told him to charge the amount, $25,000, *to the Central Prison account*, which, he said that he accordingly did; and he added that subse-

quently, it having appeared that some four hundred and odd dollars had gone into the Brantford business, the charge to the Central Prison account was reduced to $22,048.52, and this, he said, took place when the plaintiffs came to have a settlement with Mr. Fulton, but when this took place he did not say, but naturally, in view of the contract of the 29th of February, 1896, it must needs have been after the execution of that instrument and for the purpose of arriving at the amount of the moneys in that instrument referred to as the *investments* theretofore made by the plaintiffs in the binder twine manufacturing industry at the Central Prison with the view of determining the extent of the defendants' liability under that instrument.

Now the materiality of this evidence in the present case is that, in the books of the plaintiffs, there seems to have been an account opened as the Central Prison account to which this sum of $25,000 was, by the direction of one of the plaintiffs, charged.

The evidence given by the plaintiffs' bookkeeper as to this item is important as evidencing the fact that the plaintiffs, when one of themselves directed this amount to be charged against an account opened in their books and known as the Central Prison account, must have been interested in the business carried on at the Central Prison in respect of which the account was opened. That seems at least to be the natural conclusion to arrive at from the bookkeeper's evidence.

There is still one other piece of documentary evidence to be referred to, prior to the execution of the agreement of the 29th of February, 1896. It is a letter of the 24th of February, written by the plaintiff, Michael Connolly, giving to Mr. Heddle an introduction to a Mr. Archbold, a person then employed as an accountant in the business of manufacturing twine at the Central

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Prison under the lease to P. L. Connor. My purpose of referring to it is simply to evidence the fact that Mr. Michael Connolly was exercising some control over that business quite inconsistent with the present contention of the plaintiffs' that they never had any concern with, interest in, or control over, the business carried on at the prison, the whole of which, as they allege, was the sole business of the defendants, which in fact and truth had always, from the making of the contract of the 25th September, been under the sole management and control of the defendants.

The terms of the letter are just those which would naturally be used by a person interested in and having management and control of the business. The letter is as follows:—

MONTREAL, February 24th, 1896.

MR. ARCHBOLD,
Central Prison, Toronto.

DEAR SIR,—This letter will introduce to you the bearer, Mr. Heddle, *to whom you will submit your accounts and any statement in connection with the industry* you are able to furnish him; *kindly introduce him to Mr. Daly who, as well as yourself, will kindly take any instructions Mr. Heddle wishes to give.*

Yours very truly,
M. CONNOLLY.

Within four days after the date of this letter, the agreement of the 29th February, 1896, already set out was executed, and the plain construction of that instrument is that the plaintiffs thereby covenanted to transfer and make over to the defendants (or to cause to be transferred to them or to such person as they should direct, for that would be a discharge of the plaintiffs' covenant) the right granted by the Ontario Government by the contract of the 25th September, to P. L. Connor, to manufacture binder twine at the Central Prison for the full period of the five years granted by the said contract to said P. L. Connor; that in the

said business of manufacturing twine under said contract they, the plaintiffs, *had invested* divers moneys. the amount of which is not stated; that further they were possessed of a claim for $7,350 which P. L. Connor had legally and effectually constituted a first charge upon the earnings of the said manufacturing institution in satisfaction of that sum due by John Connor (P. L. Connor's brother) upon a settlement of accounts between him and the plaintiffs his copartners; and by the instrument the plaintiffs further covenanted *to furnish all the capital* that might be required for said manufacturing operations at said Central Prison for and during the full term of the twine season of 1896, and the defendants in consideration thereof and as the purchase money to be paid by them for such transfer covenanted to pay to the plaintiffs all the moneys then already invested by them and thereafter to be invested by them in the said twine manufacturing operations by way of capital to be furnished by them under their covenant in that behalf with interest at 8 per cent not later than the 1st October, 1896, and of the sum total of such investments which was expected to exceed $40,000, the defendants covenanted to pay $40,000 between the first and fifteenth of June, 1896, and they further covenanted to pay to the plaintiffs within the first two years of the term granted by the said contract between the Ontario Government and P. L. Connor, so as aforesaid covenanted to be transferred by the plaintiffs to the defendants, the said sum of $7,350, so as aforesaid alleged to have been constituted by P. L. Connor a first charge in favour of the plaintiffs upon the earnings of the manufacturing operations carried on under said contract.

Now as to this contract, and first as to this sum of $7,350, it appears to be recoverable only by way of satisfaction of a like sum alleged by the contract to have

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been constituted by P. L. Connor a first charge in favour of the plaintiffs upon the operations carried on under his contract with the Ontario Government to be so constituted a valid charge upon the industry at the Central Prison by Connor, it must have been so charged as to affect the legal term created by the instrument of the 25th September, 1895, vested in him and his assigns; and for the plaintiffs ever to recover that sum against the defendants upon this covenant of theirs in the instrument of February, 1896, it would be necessary, I apprehend, for the plaintiffs to aver in their declaration and to prove in evidence that the charge was legally constituted by P. L. Connor, and that the legal estate and interest subjected to the charge by Connor had been effectually transferred to the defendants or to some person appointed by them so as to vest in the defendants or such person the legal estate or interest which had been vested in Connor, and by him subjected to the charge. It cannot admit of a doubt that this sum of $7,350 is by the instrument of February, 1896, made part of the purchase money or consideration covenanted to be paid by the defendants for the legal and effectual transfer to the defendants, or as they should direct, of the Ontario Government's contract or lease with Connor, and there is nothing whatever in the instrument to justify a suggestion that the consideration for the other sums made payable by the defendants by the instrument is different from the consideration for the covenant to pay the $7,350, namely, the transfer of the legal and beneficial interest in the contract of the 25th September, 1895, which the plaintiffs covenanted by the instrument to transfer. In the declaration in the present action there is in reality no case whatever made for the recovery of that sum under the terms of the instrument of February, 1896, and so neither for the recovery of any of these

other sums mentioned in the instrument to become payable by the defendants.

Then as to these sums of $5,000, and $22,048.52, claimed by the plaintiffs in their declaration, these sums clearly appear to be, and must be regarded as being, moneys then already *invested* by the plaintiffs in the said twine manufacturing business at the Central Prison. As to the $5,000 it was *invested*, as we have seen, on the 21st of August, 1895, at which date Mr. John Connor admits that he was not engaged in the service of the defendants, but was then the partner of the plaintiffs in manufacturing twine at Brantford, of which business, as already stated, P. L. Connor admitted himself to have been superintendent on behalf of the partnership firm consisting of his brother and the plaintiffs until the 1st of November, 1896, when the lease was taken off their hands by the defendants.

As to the $22,048.52 I have already adverted to the manner in which that sum came to be entered by the plaintiffs in the books kept by them as a charge against the Central Prison Account. As to the covenant to furnish *all the capital necessary to carry on the manufacturing operations* at the Central Prison during the season of 1896, it is to be observed that such capital was to be furnished at the sole charge and expense of the plaintiffs; the defendants were under no obligation whatever to assist the plaintiffs in providing that capital or any other sum whatever. This, the plaintiffs' covenant to furnish all the necessary capital to carry on the business during the year 1896, seems to constitute a joint adventure or partnership between the plaintiffs and the defendants in the said manufacturing operations until the close of the season of 1896 upon an agreement that the moneys which the plaintiffs had already *invested* in the said

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manufacturing operations prior to the 29th of February, 1896, together with what should thereafter be *invested* by them under their covenant to furnish the necessary capital for the season's operations, together with interest at the rate of 8 per cent should be paid by the defendants to the plaintiffs at latest by the 1st of October, 1896, when the plaintiffs' connection with the business should cease; the intention and expectation of both parties being, as I think would seem, that these sums should be paid out of the proceeds of the sale of the season's manufactured twine which by that time were expected to be realised; and this would seem to account also for the plaintiffs covenanting to assist the defendants, if required, in raising at the bank in June the moneys then payable in advance of the realisation of the stock manufactured during the season. Now that the plaintiffs had in fact at the time of the execution of the agreement of the 29th February, 1896, the beneficial interest of P. L. Connor in the agreement of the 28th September, 1895, and although not the legal estate vested in them in the sense of being accepted as lessees in the place of Connor under the seventeenth paragraph of the Government's contract yet that they had absolute control over P. L. Connor in compelling him to transfer such contract so that it should be effectually transferred and made over to the defendants or as they should direct for the full period of five years mentioned in the contract of September, 1895, as covenanted by the plaintiffs, appears from the following letter addressed by the plaintiff, Michael Connolly, to Martin Connolly the plaintiff's bookkeeper at Quebec:

COLORADO SPRINGS, Colo., April 18th, 1896.

MY DEAR MARTIN,—On my return I intend to stop off a day in Toronto and in order to save time and avoid making another trip there, *if I had the papers that P. L. Connor signed making the transfer of*

the Central Prison contract I might get it transferred while I am there, I wish therefore you would send the transfer he has signed to my address, Queen's Hotel, Toronto, and when I am there I will see if the transfer cannot be made to Heddle ; but perhaps N. K. (meaning the other plaintiff) had best see Fulton and find out from him if there is no other person to whom he would as soon have the transfer made.

I expect to reach Leadville this evening about six and of course will then know what there is in sight.

Yours truly,
M. CONNOLLY.

The bookkeeper to whom this letter was addressed complied with the request therein contained.

Then there is a letter dated the 18th May, 1896, from the plaintiffs to Mr. Heddle which seems to show very plainly that Mr. Heddle was then under the actual control and in the employment of the plaintiffs in the discharge of duties in connection with the Central Prison. It is as follows:

QUEBEC, May 18th, 1896.

R. HEDDLE, Esq , Brantford.

DEAR SIR,—Referring to your favour of the 12th instant we would say that we have been assured by Mr. John Connor that the different owners of the respective notes that have been protested would take immediate steps to make a settlement and we would wish you to get them from the bank when paid and forward to us here.

Our Mr. Michael Connolly writes asking us to get you to ascertain whether Mr. P. L. Connor's house at Brantford is free from incumbrance, and he also states that Mr. P. L. C. was to pay for horse and rig purchased by him from the Continental Company. If this has not been done it would be well for you to take possession of the horse for the company or sell it if you cannot find use for it.

Mr. Connolly also states that he promised the Dominion Bank that he would give them all our collections in connection with the Central Prison and wishes you to act accordingly.

Yours faithfully,
(Signed,) N. K. & M. CONNOLLY.
Per M. P. CONNOLLY.

Then by a letter dated 30th May, 1896, from the plaintiff, Michael Connolly, to Mr. Heddle, it appears

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that the plaintiffs were as anxious, as they allege the defendants were, to preserve secrecy as to the business of manufacturing twine at the Central Prison, and that such secrecy consisted in not letting it be known that either the plaintiffs or the defendants had any connection with the business carried on at the prison. The letter is as follows:

DEAR MR. HEDDLE,—I wrote you to-day sending you a copy of a letter to be addressed to Mr. Gibson asking that you be substituted for Connor as the contractor for the Central Prison output or manufacture. I hope you will get the thing through as soon as possible.

I also sent you a letter from parties to Kelly making inquiries about prices of binder twine. *When answering them you had best use plain paper so as to not identify the Continental with any of the prisons.*

The copy of the letter to be sent to Mr. Gibson was also produced and it was headed with the words following:

Do not use any letter heading but plain paper.

"The Continental" here mentioned is a body corporate into which, by letters patent dated the 28th of December, 1895, Messrs. John Connor and the plaintiffs who had previously carried on business in partnership under the name, style and firm of the "Continental Twine and Cordage Company," and two others were incorporated into a company under the same name with the affix, "Limited."

If as is now contended by the plaintiffs, P. L. Connor acquired the Government contract of the 25th September in his own name, but in truth to and for the sole use and benefit of the defendants, holding it as their servant, agent or *prête nom*, and if from that date, (as is also now contended by the plaintiffs) always continually enjoyed the full benefit of that contract to their own use, and have always had the sole management and control of the business carried on under the contract, and if as is also now alleged

by the plaintiffs they had no interest whatever in said business and never interfered in its management or control it is difficult to understand how Mr. Heddle (if at the date of the 30th May, 1896, he was acting solely as the agent of and under the sole management and control of the defendants), should have had in his possession the paper headed with the name of the Continental Twine and Cordage Company, or why Mr. Michael Connolly should have been the person to caution him to be guarded as to what paper he should use upon the occasions referred to in the letter of 30th May.

It must be admitted *that the act* of Mr. Michael Connolly upon that occasion is inconsistent with the present contention of the plaintiffs.

Now the admissibility of the evidence which was objected to by the defendants' counsel, and which was received subject to such objections and to future consideration as to its admissibility, and as to its being acted upon by the court, must be tested not merely by reference to the instrument of the 29th February, 1896, and to its true construction, but also by the other acts, documents and evidence to which I have referred.

The Superior Court adopted and acted upon as admissible the whole of the evidence so objected to, and the judgment founded upon that evidence has been maintained by the Court of Review. The judgment in its first *considérant* adjudges

that it results from the proof and documents in the case that the tender, the contract, the taking possession and the operation of the rope factory established in the Central Prison of Ontario, at Toronto, and leased to one Patrick Louis Connor, by contract dated September 25th, 1895, and subsequently transferred to one Robert Heddle, the said Connor and Heddle were only the *prête noms* and salaried representatives of the defendant, that they acted on its behalf and for its interest, under its exclusive control and direction and for its profit and advantage solely, and that for the purpose of the tender, contract

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and operation of the said rope factory which was always operated by the defendants since September 25th, 1895, the plaintiff advanced and furnished to the defendant on demand of its authorised officers the sums of money at the rates of interest mentioned in the principal demand.

Then in a second *considérant* it is declared that the defendants have fulfilled all the obligations incumbent upon them by the agreement of February 29th, 1896. No possible force can be given to this *considérant.* It was doubtless introduced in reference to the second plea above set out, which, as I have already shewn, offered no issuable matter by way of defence to the plaintiffs cause of action as set out in their declaration. The first *considérant* wholly disposed of that cause of action, and in view of that adjudication the second *considérant* is insensible as in truth amounting no more than this—that whereas by the first *considérant* it is established that the plaintiffs had never had any interest in or control over the property which, by the agreement of the 29th of February, 1896, they covenanted to transfer to the defendants, but that such property was always the property of the defendants and in their actual possession and enjoyment, and under their sole management and absolute control, and that therefore the plaintiffs could not have been and were not under any obligation to transfer to the defendants the property which they had always had in their actual possession and enjoyment and being under no such obligation by the instrument of the 29th of February, 1896, they fulfilled that obligation. In another *considérant* the court held that the $7,350 is not yet exigible and for that reason and for that only was deducted from the amount claimed, and after another *considérant*, that the pretention contained in the defendants' plea and incidental demand against the incidental defendants are unfounded, the judgment condemned the defendants to pay to the plaintiffs the sum

of $22,324.48, with interest at 8 per cent from 1st October, 1896, until payment, with costs, and dismissed the incidental demand with costs.

The effect of acting upon as admissible the evidence which was objected to by the defendants has been, in my opinion, and I say it with the greatest deference, and the effect of the first *considérant* found thereon as above set out, has been to subvert and render wholly nugatory a rule prevailing in the jurisprudence of every country, and which, in the jurisprudence of the Province of Quebec, where the action in the present case was instituted, is expressed in art. 1234, C.C.,

that testimony cannot in any case be received to contradict or vary the terms of a valid written instrument.

It has also had the effect of pronouncing at the instance of one of the parties, the instrument of the 29th February, 1896, deliberately signed by both parties, to be absolutely delusive, nugatory and false, and for that reason to be wholly void, or else to be capable of the construction now contended for by the plaintiffs, which construction is wholly inadmissible as being in direct contradiction of the plain terms of the instrument and wholly inconsistent moreover with all the facts in evidence exclusive of the evidence objected to. The admission of the evidence objected to has also had the effect of introducing into the case a flood of false swearing, an evil, the prevention of which constitutes a large portion of the foundation upon which the rule of law, as expressed in art. 1234, C.C., is based. As I am of opinion that the evidence upon which the judgment is founded was inadmissible, and that, therefor, the judgment founded thereon cannot be maintained, I do not propose to analyze the evidence for the purpose of discovering upon which side the false swearing has been, nor whether upon one side only;

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but no one can read the large mass of matters which have been introduced for the purpose of establishing a claim which, in contradiction of the plain terms of agreement of 29th February, 1896, is now alleged to have been at the time of the execution of that instrument, the common case of a debt then due for moneys previously lent by the plaintiffs to the defendants at their request, without seeing that there has been much false swearing in the case somewhere.

Now the judgment being based, as I think it is, upon inadmissible evidence, cannot be maintained. But although the evidence is inadmissible for the purpose for which it was tendered by the plaintiffs, having been acted upon by the court, it is now before us on this appeal, and we cannot shut our eyes to what we think it does establish beyond all serious doubt or controversy, namely, that the contract of the 25th of September, 1895, and everything which has taken place thereunder which has been the subject of discussion in the action including the agreement of the 29th February, 1896, constitute merely steps in the carrying out or attempt to carry out a combination, arrangement, agreement and conspiracy entered into between Mr John Connor and the plaintiffs, and Mr. Fulton, the manager of the defendant company, to unduly enhance the price of binder twine in the interest of and for the benefit of the plaintiffs and the defendant company and others engaged in the manufacture of that article, and to the manifest loss and prejudice of the farmers of the Province of Ontario for whose benefit the manufacture of binder twine at the Central Prison was instituted by the Government of the province under the authority of an Act of the Provincial Legislature in that behalf. I much doubt that a contract of that nature or any contract to give effect to a combination or arrangement of such a nature could be made by

Mr. Fulton so as to be binding upon the corporate body whose manager he is, but assuming the corporate body to be bound by Mr. Fulton's act, so as to make such his act the act of the corporate body, I cannot entertain a doubt that courts of justice when a contract under discussion appears to a court of justice to have been entered into for the purpose of giving effect to a combination, arrangement or conspiracy of the nature mentioned, should not permit themselves to be made instruments in giving effect to such a contract. That a combination and arrangement of the nature I have spoken of is the true and only natural solution of the dealings of all the parties concerned in the combination, namely, Mr. John O'Connor, the plaintiffs, and Mr. Fulton is, I think, the proper conclusion resulting from the evidence which has been acted upon by the Superior Court in the present case. Mr. Heddle, a witness called by both the plaintiffs and the defendants, accredited by both of them, and in the confidence of both, seemed to have no doubt upon the point, and he seems to have been in a position to know. The principal part of the delicate business seems to have been confided to Mr. John Connor as a person from his ability and experience in matters of the very delicate nature of those in question made him most competent to assume and discharge the duties of the office. Some of his letters, to which I refer, without setting out their contents at large, throw light upon his method of procedure, namely, those filed as exhibits D 79, D 80, D 84, D 87, D 88, D 89, D 91, D 92.

In declining to give any effect to this contract, either for plaintiffs or defendants, I would do so in the interest of public order and morality, and to maintain the integrity of courts of justice. As we are bound to give the judgment which in our opinion should have been given by the Court of Review our judg-

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ment, I think, should be to dismiss the principal action and the incidental demand and to leave each party to bear and pay their own costs of the action, the incidental demand and this appeal.

SEDGEWICK and KING JJ. concurred in the judgment delivered by GIROUARD J.

GIROUARD J.—The majority of this court agrees that the binder twine business of the Toronto Central Prison was the business of the appellants, carried on by agents for their sole advantage and benefit, and that if we had to decide this case upon the issues presented in the courts below and also in this court, our duty would be to dismiss the appeal for the reasons given by Mr. Justice Tellier, and more elaborately developed by Acting Chief Justice Tait. But in the course of our deliberations, suspicion came to our mind that perhaps the respondents were endeavouring to enforce an illegal contract, and, in consequence, we felt in duty bound to order a re-hearing upon some new points which embarassed us, and to which we desired to have the assistance of counsel. As these points affect public interests, which private parties might not perhaps feel inclined to clear up, we instructed the registrar of this court to communicate our order, together with the factums and case, to the Attorneys-General for Quebec and Ontario, and also to the Minister of Justice of Canada, who are by statutes the constitutional guardians of the administration of justice, although no machinery is provided for such an emergency. We thought that this want of legislative enactment did not preclude courts of justice from giving such order as the ends of justice might commend in a particular case. Art. 3 C. P. Q. In taking this course we followed quite a respectable precedent in *Scott* v.

Brown (1), where, in 1892, the English Court of Appeal took the same objection and maintained it after hearing both parties. It is unfortunate that for reasons which appear upon the proceedings of this court the re-hearing could not take place. Nothing more is left for us to do, but to dispose of the case as it stood before the re-hearing was ordered.

I must confess that my suspicions arose at the outset, when reading the factums. At page 5, of the appellants' factum, they say:

To form a correct idea of what was the true position between the respondents and the appellants previous to the 29th of February, 1896, it is necessary to recall the condition of the binder twine trade at that time. The appellants for several years had controlled the business in Canada. They had factories in Halifax, Montreal, Brantford, Port Hope, etc. They could produce sufficient twine for the Canadian consumption, and were protected against imported twine by a duty of 25 per cent. In 1896, the protective duty was reduced to 12½ per cent. Previous to this date, the Government of Ontario introduced into the Central Prison at Toronto, a plant to manufacture twine, and the Dominion Government did the same thing in the Kingston Penitentiary, with the object of competing by prison labour against the appellants. The Ontario Government, after working the plant themselves, advertised for tenders. It will be seen at a glance how important it was for the appellants that the contractor who secured the plant, should work in harmony with them to prevent the slaughter of prices which had previously taken place under the management of the Ontario Government. Two contractors were bidding for the plant, Mr. Hallam and Mr. John Connor, under the name of his brother, P. L. Connor. John Connor, in the name of his brother, was the successful competitor.

The two courts below unanimously found that Hallam and Connor were bidding confidentially for and on behalf of the appellants As Sir Melbourne Tait, A.C.J., truly observes:

As to the transfer of the Government contract to the defendants, I think the evidence clearly shows that they wanted to keep it secret that the Central Prison business was carried on in their interest and never wanted the contract transferred to their own names.

(1) 61 L. J. Q. B. 738.

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And at page 43 of the respondents' factum, more light is thrown upon the true character of the transactions:

> The question naturally arises, if the appellants owned this contract, why should the respondents agree to obtain a transfer of it through P. L. Connor to them? It must be remembered, however, that absolute secrecy was necessary for the purpose of the successful working of the scheme by which the appelants wanted to control the output of all the twine mills in Canada, and of this prison mill where the Government was endeavouring by the means of prison labour to defeat the monopoly in binding twine by selling it to the farmers at a fraction over cost, and had P. L Connor refused to carry out the provisions of the letter of 29th of October, the appellants could never have compelled him to do so, as the Government of Ontario would have cancelled the right to manufacture as provided in clause 12 of the contract, (exhibit P., 6, case p. 55,) had it become known that the appellants, the very institution which the Government was seeking to fight, were the contractors

The respondents do not seem to realize that by giving to the appellants the aid of their money and credit, and every other possible assistance, they placed themselves in almost the same objectionable position. They, perhaps, thought that they were only helping a movement tending to remove slaughtering prices in an article of commerce, which, jointly with John Connor, they were producing in the Brantford mill leased by them from the appellants in January, 1895, and operated for export only. But they knew, at least should have known, that legal combinations are formed openly and in good faith between all the producers interested for the honest purpose of giving them all fair and equal protection against ruinous competition, without causing any injury to the public or any class of the community. They should have known that combinations secretly organized by the fraudulent interposition of third persons paid and salaried for the purpose, to unduly enhance the price of a commercial commodity, are contrary to public

policy and even criminal. Secrecy and false representations constitute one of the elements of conspiracy. Gain to be made and injury to be done to the public or an individual are another.

I do not propose to review the 250 pages of oral evidence, and the 200 pages of printed documents thrown in *pêle-mêle* at different stages of the trial. Conspiracies are always intricate and difficult to prove, and I regret that I cannot be as brief as I would like to be. Dealing with facts in the first instance and of our own motion, our findings must be clear.

It appears that in August and September, 1895, John Connor, of St. John, N.B., a large shareholder of the company appellants, E. M. Fulton, its president and general manager, Michael Connolly, and others, met in Toronto and Montreal for the purpose of acquiring, for and on behalf of the said company, the business of the Toronto Central Prison, then advertised to let. As it is important to know exactly what took place at the very inception of the proceedings, I will quote the story as told by all the parties interested.

Patrick L. Connor's story is short. He was not a leading actor on the scene, but merely played a secondary and passive roll assigned by the Consumers' manipulators; he does not appear to have possessed pecuniary means of any consequence; he was a practical twine manufacturer in charge of the Brantford mill, and his name was necessary to better deceive the Ontario Government. His brother, John, conducted the negotiations.

> The Consumers' Cordage Company, (he says) put through the deal, and my brother, as well as I, considered we were both representing the Consumers' Cordage Company.

On the 18th September, 1895, he writes to Mr. Noxon, the inspector, that he is ready to satisfy him-

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self and the Government as to his financial ability to carry out the terms of his tender.

It is also understood (he adds) that the cheque for $5,000 which accompanied my first tender in this matter is to be held by you as security to the Government for carrying out my second tender.

John Connor:

Q. Will you please state now that the correspondence is filed, as shortly as possible, what have been your transactions with the Consumers Cordage Company, your brother, and the officials of the Ontario Government, with regard to the Central Prison twine contract?

A. In the latter part of August, 1895, I had various conversations with E. M. Fulton, sr., in the office of the Consumers Cordage Company, in reference to the Central Prison binder twine plant, which was at the time advertised through the public press, by which tenders for the operation of this plant were invited from the public. I think it would be probably the 28th or 29th of August, Mr. Fulton, on behalf of the Consumers Cordage Company, closed an agreement with me by which I was to enter the employment of the Consumers Cordage Company. The agreement, which was then closed verbally, was reduced to writing, and signed under the date of 29th of August, that is the agreement was kept in abeyance from the latter part of August, and only executed in the office of Mr. Fulton's solicitor in the latter part of October, but I was to enter the employ of the Consumers Cordage Company under the terms of the company on the 1st day of September. * * *

So, on September 1st, I entered the employ, pursuant with the agreement—the understanding with Mr. Fulton, on behalf of the company. I was immediately detailed to go to Toronto, for the purpose of preparing a tender which was to be presented to the Ontario Government, and I was directed by Mr. Fulton to secure if possible, that tender. Before starting for Toronto, it was arranged that that tender would go in, in the name of my brother, P. L. Connor, who was a resident of Brantford, Ontario, and it was thought, both by Mr. Fulton and myself, that it was better that the bidder on this contract should be from the province of Ontario, more especially as my brother was acquainted with some of those governing the province, and he resided in the city of Brantford, and was a binder twine manufacturer. * * *

Q. In the conversations you had, and in the negotiations with Mr. Fulton, or the Consumers Cordage Company, and the Messrs. Connolly, how was Mr. P. L. Connor treated in relation to that contract?

A. He was treated, Your Honour, as an employee of the Consumers' Cordage Company; just simply his name was used as the

lessee, believing it was expedient in the interests of the Consumers' Cordage Company that his name should be so used?

Michael Connolly:

Q. Mr. Connolly, would you tell us what you know about the obtaining of the contract for the Central Prison in the month of September, one thousand eight hundred and ninety-five, and how you came to be mixed up with it?

A. Well, the first intimation I had, or the first knowledge I had of the matter, was from John Connor, who called to see me in Kingston and laid the matter before me, telling me the Consumers' Cordage Company desired to control the output from the different mills in the Dominion, as fast as they could acquire them, and when the time came he would tender on their behalf, but in somebody else's name, and thereby secure the contract for them, and if we chose, we would contribute. * * *

Q. After meeting Mr. Connor did you meet anybody connected with the Consumers' Cordage Company?

A. Yes.

Q. Whom, and tell us what took place?

A. I met Mr. Fulton, senior, the president and general manager of the Consumers' Cordage Company, who confirmed all that Mr. Connor had represented to me.

N. K. Connolly:

At the time that the lease of the Toronto binder twine factory, or the prison factory, was leased, the Consumers' Cordage Company was very anxious to control the output of the country, and they wanted to get that lease, and I believe they employed Mr. Connor, as well as another gentleman in Toronto, to get it for them. * *

The promise (to refund advances) was made soon after the contract —on or about the contract being signed. It may have been done previous to the contract being signed, for Mr. Fulton was talking to both my brother and myself regarding getting the contract—what a good thing it would be for the Consumers' Cordage Company to have control of the whole outfit, that it would then keep the market at any price they thought fit, or at least, at a paying price.

The testimony of Mr. Fulton, an old man of 70 years, is somewhat contradictory, but the documentary evidence produced, which, in cases like this, is always of great value in determining *les faits et gestes des parties*, clearly shews that his memory was very deficient; he admits himself that it is weak. In substance his evi-

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dence does not, however, differ from that of the other witnesses. He states that the Toronto Central Prison and the penitentiary at Kingston had practically ruined the twine business of Canada, and on hearing of the advertisements for the lease of the Toronto mill, he preceeded to that city about the middle of August, 1895, to see what could be done in the interests of his company. He made several trips to Toronto, always in great secrecy, being even afraid to register his name at any hotel. On the 4th September, 1895, he writes a note to John Connor while in Toronto:

I am here by invitation, *incog.*, so do not mention it to any one.

He first saw one Hallam, and immediately came to terms with him. He learned from him that John Connor was also looking after the Central Prison contract. After some delay and a good deal of negotiations, held both in Montreal and in Toronto, he succeeded in securing the services of both Hallam and Connor, and the assistance of the respondents. Fifty-seven cents per 100 lbs. of twine or rope to be produced was the figure first settled by them as the bid or rent of plant and convict labour. But on the 31st of August, Fulton telegraphed John Connor to raise it to 72, and finally, when the Government decided to call for new tenders, John Connor and Hallam agreed with him to put in a concurrent bid of 75c, prepared by himself and similar in every respect. It turned out however that this was done by Hallam alone, and not by Connor. The latter had learned that "eighty will close and nothing else;" in fact, Fulton had telegraphed him on the 10th of September, that Hallam wired him so. He, therefore, came to the conclusion that it would be prudent to advance his tender by $7\frac{1}{2}$, and make it $82\frac{1}{2}$. Fulton looked upon this change as a "trickery," and he complained bitterly in a letter written to Patrick L. Connor, on the 21st September, but the same day, John Connor telegraphed Fulton:

Executed contract with my brother. Hallam out of it. Agreed to take over stock October 1st. Rest easy and do nothing more.

The contract was actually signed on the 25th September, 1895, by Patrick L. Connor and Noxon, the inspector of prisons and public charities for Ontario.

In order to prevent the possibility of a combination with monopolists, several clauses were inserted in the contract, which will be noticed later on; but one should be mentioned here. Clause 17 provides that

the contractor shall not assign this agreement or sub-let the same without the consent of the Lieutenant-Governor in council.

What a revelation! if, before signing or afterwards, the inspector had been told that the "contractor" was the great Consumers' Cordage Company. Noxon swears that neither Fulton or any employee of the company ever told him that Fulton was at the back of the Central Prison contract.

A cheque for $5,000 accompanied both the tender and the contract, as requested in the advertisements. It had been provided for by the respondents accepting and cashing on the 21st August, 1895, in Montreal, the draft of John Connor on them for the same amount, dated Brantford, 20th August, 1895. P. L. Connor swears that this cash reached him in the shape of a "certified cheque or draft" which he deposited with his tender.

During all these negotiations, no complete understanding was put in writing beyond telegrams and letters, which might be mislaid or destroyed. On the 18th October, 1895, Fulton writes to John Connor:

I think it advisable that you and Connolly should come to Montreal just as soon as possible and have all understandings and agreements placed in proper ship shape.

This was done in Montreal on the 29th October, 1895, where four documents were carefully prepared and signed simultaneously in Mr. Fulton's lawyer's office:

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First. A letter from John Connor to Fulton in the following terms:

As my brother, P. L. Connor, has secured the control of the Ontario prison plant for five (5) years on certain terms, with which you are familiar, I beg hereby to state, on his behalf, that this contract was secured by him and myself in the interests and for the benefit of your company, and is to be assumed by you confidentially, the business to be conducted in P. L. Connor's name; our colleagues, Messrs. M. and N. K. Connolly, to have the option of contributing the working capital required at 6 per cent interest and a bonus of 2 per cent.

The output is to be marketed from year to year.

Secondly. A proposal of agreement respecting the Brantford mill and also the Toronto Central Prison, signed by John Connor, and agreed to in a P. S. by the respondents, who are styled his "associates," where he formally offers to appellants his services in the twine and cordage business for a term of years, from the 1st of September, 1895, at a salary of $2,500 per annum, not more than six months to be called for annually. In fact, he had been engaged on the 29th of August, and on the 22nd October, 1895, he received $208.33, "being for one month's salary." Mr. John Connor's last conditions were:

8. This agreement and the connection between me and your company to be kept absolutely confidential and secret by myself and my associates.

9. P. L. Connor to be retained as superintendent of the Brantford mill, or otherwise in the employ of the company at fifteen hundred dollars ($1,500) per annum.

Thirdly. An acceptance by Fulton of the above proposals and terms, in which he says:

On behalf of the company, I now agree to all the terms and conditions of your letter, and shall consider the agreement a binding one from September 1st, 1895, until September 1st, 1896, and thereafter until terminated according to your letter. * * *

With respect to the necessity for preserving the secrecy regarding your connection, I think the suggestion an admirable one, but we will have many opportunities of discussing this and other business matters

I see no necessity for further contracts between us. Your letter and this reply are enough, and, therefore, again accepting the offer made by you with the approval of your esteemed colleagues.

The fourth document had reference to the price of twine to be manufactured at the prison and will be noticed hereafter.

The combination having been thus fully organized, the respondents were called upon by Fulton, John Connor, and sometimes by Patrick, his brother—who from time to time came down from Brantford to look after the Central Prison affairs,—to advance the necessary funds to carry on the business, and among others a sum of $22,048.52 to make to the Government of Ontario the payment of the raw material and manufactured goods in the prison at the time of the contract. This sum was advanced in Montreal on the 7th November, 1895, by a cheque of R. Mowat & Co., brokers, of Montreal, for $22,500 on the Molsons Bank in that city, payable at par in their Toronto branch, to the order of the respondents, indorsed by them to the order of John Connor, and indorsed by the latter, and finally deposited by P. L. Connor with the Dominion Bank, in Toronto, where it was checked out by him in favour of the Ontario Government. Mr. N. K. Connolly, who indorsed the cheque for his firm, at the request of Fulton, thinks with hesitation that he sent it to John Connor. It was certainly issued, certified by the Molson's Bank, and indorsed by the respondents in Montreal. John Connor, who, on the 1st November, had been requested by letter from Fulton to go down to Montreal to arrange about finance, is positive. At page 268 of the case, he says, and he repeats the statement at page 269.:

That was a draft handed me in Montreal by N. K. Connolly, which amount I took to Toronto to pay for the material.

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This sum of $22,500, and also the $5,000 deposited with the contract, are the only amounts in question in the present appeal.

Soon after a line of credit with a bank became necessary, and on the 12th December, 1895, the respondents guaranteed the account of the Toronto prison agency by P. L. Connor with the Dominion Bank in Toronto, who advanced them, in the latter city, large sums of money, amounting altogether to $47,000, which are not, however, involved in this case.

It will not be necessary either to refer at length to the assignment in 1896 of the contract by Patrick L. Connor to Robert Heddle, which was not carried into effect. It appears conclusively that this assignment was made with the full knowledge, and I may say at the special solicitation of the respondents, who, as recent investors (February, 1896), in the capital stock of the Consumers, exercised considerable influence over the board of directors. Being dissatisfied with the past management they desired the change.

On the 30th of May, 1896, Michael Connolly sends Heddle a draft letter, to be addressed to the Hon. Mr. Gibson, member of the Ontario Government, "on plain paper, having no letter heading," enclosing a copy of the assignment, and requesting him to have the same ratified, and Heddle accepted in place of Connor. Of course the fact that Heddle was, like Connor, a servant and *prête nom* of the appellants, is carefully concealed. By this time, Noxon, the inspector,

> knew all about the combine in prices, and so, writes Heddle to Fulton, fears an attack from the Patron element in time.

But he had no reason to suspect that he was dealing with the Consumers Cordage, and in the interest of their gigantic monopoly. But, adds Mr. Connolly to Heddle,

> I hope you will get the thing through as soon as possible.

This Mr. Heddle had been the confidential bookkeeper of the appellants for years, and in February, 1896, had been sent to the Central Prison to look after their interests, which he reported to be in bad shape. Contracts were "mixed up" with the Brantford business. The accounts were "not in such a state as they should." On the 28th of February, 1896, he writes to Fulton:

> I mentioned to you last night that my impression as to the working of Central had not been satisfactory. I regret to confirm this.

From that time Heddle took the full management of the whole business on behalf of the appellants, and was recognized as the representative of P. L. Connor by the prison authorities, expecting that the assignment would soon be completed.

In the meantime (20th June, 1896) the respondents had guaranteed a new line of credit in his favour with the Dominion Bank to the extent of $60,000.

The assignment had been signed by P. L. Connor, on the 7th March, 1896, the name of the assignee being, however, left in the blank, but filled afterwards with the name of Robert Heddle at the request of the appellants and respondents. Months elapsed before the matter was really approached by the Ontario Government. It appears from the evidence of Mr. Noxon that no objection would have been made to the assignment, provided an additional bond of $10,000 was given which the respondents readily granted, and, in fact, executed on the 15th October, 1896. But serious difficulties between the appellants and respondents were brewing about the repayment of advances. Heddle, acting at the request of the appellants, dropped his application for a confirmation of the transfer to himself, and the business continued to be carried on by Heddle in the name of P. L. Connor, as previously.

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Finally, two other documents fully exhibit the true position of the parties:

1st A deed of agreement set forth in the declaration of the respondents, signed by them and the appellants on the 29th February, 1896, which reads as follows:—

That, whereas Mr. P. L. Connor, of Brantford, Ontario, has acquired the right from the Government of the province of Ontario to manufacture binder twine in the Central Prison in the city of Toronto in the said province, for a period of five years, from October 1, one thousand eight hundred and ninety-five, to October 1, nineteen hundred, the party of the second part hereby agrees to transfer and make over to the party of the first part the said "right" from the Government of the province of Ontario to manufacture binder twine in the Central Prison in the city of Toronto in the said province, for the full period of said contract with P. L. Connor.

The party of the second part further agrees to furnish all the capital that may be required for said manufacturing operation at said Central Prison for and during the full term of the twine season of 1896, at which time the party of the first part hereby agrees to reimburse said party of the second part all moneys they have invested in said business, and not later than October 1, 1896, with interest thereon at eight per cent per annum, but it is understood and agreed that at least $40,000 (forty thousand) of this amount shall be paid between June 1st and 15th, 1896, and, if required, the party of the second part shall assist the party of the first part to obtain any part of this amount through the Dominion Bank of Toronto, as well as a sum of seven thousand three hundred and fifty dollars ($7,350.00) constituted by P. L. Connor as a first charge on the earnings of said manufacturing institution, and taken over by the party of the second part in settlement of the accounts with John Connor, of St. John, N.B. The payment of this amount shall extend over the first two years of the Government contract.

We have already seen that soon after the respondents obtained from P. L. Connor a transfer in favour of Heddle, for and on behalf of the appellants, that they did everything in their power to have the same ratified by the Government, and that finally without their interference, its acceptance would have been obtained.

The above agreement, if it has any validity, establishes beyond doubt that the judgment appealed from,

allowing the whole of their demand, with the exception of $7,350, which was not due before September, 1897, is well founded.

The second deed, although not signed by the respondents, contains admissions by the appellants which are, perhaps, unnecessary in face of all the documents and the evidence in the case. But, as it is approved by the board of directors, it is not without importance. First, on the 15th September, 1896, the following resolution was adopted by the board:

That Mr. Elisha M. Fulton, sr., be, and is hereby authorized to sign and enter into an agreement indemnifying Messrs. Nicholas K. Connolly and Michael Connolly, in respect of the bond and suretyship undertaken by them in respect to the Toronto Central Prison contract, on the 25th day of September, 1895, and assigned by Patrick L. Connor to Robert Heddle, acting for this company, which the directors consider it advisable to carry out.

This is, I believe, the only paper passed by the board of directors, but it is sufficient to establish the authority of Fulton to act as he did. The business of the Central Prison in the name of Patrick L. Connor, conducted first by John Connor and last by Robert Heddle, was the business of the appellants.

It must be added, however, that it does not appear that the directors were aware of the methods used by their president and manager. These were probably considered as mere details left to his own judgment.

The deed of indemnity is dated the 3rd of October, 1896, and reads as follows:—

Whereas, the said Nicholas K. Connolly and Michael Connolly have become sureties and bondsmen to and in favour of the Inspector of Prisons and Public Charities for the province of Ontario, for the fulfilment by one Patrick Louis Connor and his assignee, Robert Heddle, of a certain contract made between the said Inspector of Public Prisons and Charities and the said Patrick L. Connor, on the twenty-fifth day of September, 1895, at the request of the Consumers Cordage Company, and;

Whereas, the said Robert Heddle is an *employee* of the said Consumers Cordage Company, Limited, and carries on the said enterprise

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in the interests of the said company, and the said Consumers Cordage Company, Limited, and the said Elisha M. Fulton, senior, personally, desire to indemnify the said Nicholas K. Connolly and Michael Connolly, in respect of the undertaking given by him to the Inspector of Prisons and Charities.

Now, therefore, it is agreed and covenanted by and between the said parties hereto as follows, to wit :—

1. In consideration of the said Messrs. Nicholas K. Connolly and Michael Connolly having become bondsmen and sureties, as hereinabove set forth, the said Consumers Cordage Company, Limited, and the said Elisha M. Fulton, senior, personally, hereby guarantee and agree to indemnify and hold harmless the said Nicholas K. Connolly and Michael Connolly, in respect of all undertakings given by them as such bondsmen and sureties, and agree to pay to the said Nicholas K. Connolly and Michael Connolly, on demand, the amount of any damages which they may be put to in respect of their said undertakings.

Finally, as the respondents were pressing for money, an itemized account was made up, on or about the 1st of October, 1896, at the request of both parties, by Heddle and one Martin R. Connolly, confidential bookkeeper of the respondents (but not related to them), in the head office of the Consumers Cordage in Montreal, and accepted as "settled" there by the parties.

That settlement of accounts is produced and the respondents claim what still remains due and payable under the same. The two courts below have found it proved and they also found that the appellants promised to pay the same. As remarked by Sir Melbourne Tait, A.C.J., the appellants practically admit this fact in their pleadings. They allege,

that the said statement was prepared by plaintiffs simply as being the amount which would have been payable by the defendants to the plaintiffs, had plaintiffs procured the consent of the Lieutenant-Governor in council to the transfer of the said contract to them, (the said defendants), and the said defendants never undertook or promised, or bound, or obliged themselves to pay the said sum of money or any part thereof, until the said transfer and consent were legally and formally given, and granted by the Lieutenant-Governor in council, and at the time the said statement was prepared, the said plaintiffs

specially and particularly promised and undertook that they would procure the said consent of the said transfer as required by paragraph 17, of the said contract, of the 25th September, 1895.

By the deed of the 29th February, 1896, the respondents,

agreed to transfer over to the party of the first part, the said 'right' (to manufacture binder twine in the Central Prison), from the Government of the province of Ontario.

It is impossible that the parties contemplated a transfer to the appellants in their own name. Such a deed would have killed the enterprise. What was intended in the agreement of the 29th of February, 1896, was a transfer to Heddle from Patrick L. Connor, whose management, through John Connor, had been recently found unsatisfactory by Heddle. This transfer from Patrick L. Connor to Heddle was soon afterwards executed and would have been finally accepted by the Ontario Government, if no hostile action had been taken by the appellants.

There is ample evidence in support of the findings of the courts below, partly quoted by Sir Melbourne Tait.

Writing to Heddle, on the 12th November, 1896, Fulton, speaking of the itemized account, further says :—

That is only showing a balance due them of nearly $40,000, because that amount was made up with the $5,000 security deposit, $7,500 Connor's election contribution, a large amount of interest and several other things that I allowed to go in at that time on a basis of their giving us the prison now and carry until next summer all last season's twine.

On the 7th November, 1896, Fulton, hearing further that the bank was also pressing for the payment of a demand note for $47,000, wrote to Heddle :—

I am sorry to feel so distrustful of the Connollys, for in most respects they have behaved generously towards the company, but they are evidently now trying to force us to take over the prison and all its twine or transfer the lease to some new party, and are using the

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bank to force us to an issue. This places us in a very embarrassing fix. The company is now carrying so much twine it will be impossible to take on this additional prison load, and to throw it up means our losing the control of the prison altogether, which will be most unfortunate.

On several occasions Fulton expressed his regrets at his inability to raise the necessary funds to put the Connollys out of the concern. He offered bonds of an American coal company, in liquidation, but as they were not marketable they were not accepted, and no other alternative was left to both the bank and the respondents, but to take legal proceedings. The present action was instituted on the 23rd of December, 1896, and the business of the appellants, in the name of P. L. Connor, in the Central Prison, soon after collapsed.

Now let us see how this contract was worked out in so far as the Ontario Government and the farmers of Canada were concerned. The results were:—

1. The uniformity of prices and a monopoly in the twine mills of Canada, which were all either owned or operated by the appellants. At the very beginning, Fulton boasted to the Connollys that the getting of the twine mills would permit the appellants "to keep the market at any price they thought fit, or, at least, at a paying price."

On the 29th October, 1895, on the very occasion of signing of the contracts between the parties, in the solicitor's office, in the presence of the respondents, called the "associates," John Connor writes to the appellants:—

Gentlemen,—As my brother, P. L. Connor, has secured the control of the Ontario prison plant, for making binder twine, for a period of five years, on the terms of the Government public prospectus, I beg hereby to state in his behalf, that this contract was secured by him and myself in the interests and for the benefit of the Consumers' Cordage Co. The business is to be conducted in P. L. Connor's name, but

under the direction and control of the Consumers' Cordage Co. It is understood that I am to be allowed 8 per cent interest on the capital employed. The output is to be marketed from year to year. Having also the disposition of the product of the binder twine plant of the Kingston Penitentiary, it is hereby agreed that said output of binder twine shall be marketed conjointly with the Consumers' Cordage Company, and the undersigned, in conformity with such conditions as will guarantee absolute uniformity of prices.

On the 1st May, 1896, Fulton sends to Heddle, a "list of prices now established for the season," that is the first season following the date of the contract, observing at the same time:

I suppose you have all twine particulars from Jenkins or Bonnell. Note your telegram about Bonnell, representing all the manufacturers. I have thought a good deal about this and of the importance of avoiding even the appearance of a combination, but it will not pay to put out a man for each company and Bonnell can so easily attend to all. The price list is not issued by any one or combination of manufacturers, but goes out as from Bonnell, commercial broker, salesman, or whatever you please to call him, not the special representative of any one manufacturer. You can now quote prices in reply to all inquiries, not sending price list, but writing each party and quoting prices you know especially adapted to their trade or wants.

He wished so much to avoid even the appearance of combination that, on the 5th of June, 1896, he did not hesitate to request Heddle to ask Noxon for permission

to do business in the name of the Central Prison, or Central Reformatory, Robert Heddle, agent or contractor

but whether the permission was granted or not, does not appear.

2. Fictitious cost of twine.—The contract provides for a certain mode of ascertaining the price to be paid by farmers, by adding to the cost price of the fibre, cost for manufacturing, allowing for waste, etc., and one and one-half cents per pound, and finally, adds clause 5, par. d:

The aggregate shall be the maximum selling price of the twine to farmers for their own use.

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On the 1st May, 1896, Fulton writes to Heddle:

We will be called upon by Noxon to submit items of our cost of prison twine, under the contract. We are required to sell any farmers applying to the prison at cost, and 1¼c per pound profit. Noxon may ask for these items and you must be prepared to furnish them and support your figures with evidence. Here is my idea of cost per 100.

Follows a list of figures shewing cost price to be $8.25 per 100 lbs, for manilla rope and $6.06 for sisal. And he concludes:

So if you can make good our estimate of cost, our prices must be satisfactory to the Government.

On the 4th of May, Heddle answers:

I shall go carefully into your costs of twine at the Central.

So far as we can judge from a letter of Noxon to P. L. Connor of the 29th December, 1896, this estimate of cost was accepted under reservation.

3. Fraudulent decrease of production.—The contract provides for a production of four tons or over of binder twine per day of ten hours, subject to a heavy fine. Early in the season of 1896, he urges the necessity of closing down the Central, so that the stock in hand in other mills, where no contract limitations existed, might reach the market. As early as the 28th February, 1896, and for two months previously, Heddle reports to Fulton that the Central Prison had not worked "an average of two hours per day." Writing to Heddle on the 26th of June, 1896, Fulton says: "Cannot we get up an excuse to shut Central Prison down until next holidays. Intimate casually that machinery is in bad shape, making bad twine." On the 14th of July he writes that Halifax has been closed for the season; Port Hope, now running on Standard, will also close down this week.

We are not making, he adds, any twine at this mill. As soon as you finish sisal orders you will have to shut down too. We have so much mixed twine that we can change tags and bags to suit any

orders that may come in. When you shut down you should arrange to get your packers on very short notice to change bags and tags when required.

Subsequently, during September and till the 11th of December, 1896, Fulton incessantly writes to close down for a year if possible, or at least for any length of time. See letters of the 12th October, 21st October, 1896, 11th November and 8th and 11th December, 1896. In a letter of the 24th of September, 1896, Heddle writes to Fulton:

As wired you yesterday, Mr. Noxon has decided to place the prisoners in the binder twine mill on Monday and continue from day to day, charging the contractor on four tons per day. I interviewed the warden in regard to this, but he flatly refused to remain any longer idle. Mr. Noxon would not argue the matter one moment: the latter gentleman is perfectly aware that Connolly wants to go out of it.

And on the 7th of November, 1896, he instructed Heddle:

Go as slow and light on prison work as possible, so that your present stock of hemp will hold out until we get the matter settled.

It is evident that the combined efforts of Fulton and of his agents were directed to injure the Government of Ontario in particular and the community in general.

It must be remarked that the respondents, although fully aware of the end which the appellants had in view when acquiring the business of the Central Prison, do not appear to have taken any part in, or to have had any knowledge of, the methods employed by Fulton and Heddle to reduce the production or increase the cost price. The same remark applies to the board of directors, who, like the respondents, were acquainted with the nature and object of the organization. Conjectures and suppositions might be made as to these matters and other details, but they are insufficient to sustain a verdict.

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Such are the facts proved in the case. Unfortunately for the parties in this cause they establish clearly that a conspiracy, affecting injuriously public interests by unreasonably raising the price of an article of commerce, had been organized and maintained by them and their agents for more than one year for the benefit of the company appellants.

But can we take notice of these facts, which have not been set up in the pleadings, nor in the factums, or even at the hearing before us? Can we, of our own motion, pronounce the adventure illegal and even criminal, and as a necessary consequence, all the transactions connected with it? In France before the promulgation of the code, the opinion seemed to prevail that courts of justice can do so, and since the code, there are quite a few jurists who hold the same view. D'Argentré, Ancienne Coutume de Bretagne, art 266, ch. 2, n. 11: Dunod, Prescriptions. 1st Part, ch. 8, p. 47; Bouhier, Coutume, ch. 19, n. 12; 7 Toullier, n. 553; Dalloz, Rep. vo Nullité, n. 49; Arrêt of the 26th March, 1834, reported in Troplong, Société, vol. 1, p. 111; Premier Des Actions, n. 201. According to some other authorities, illegality of contracts cannot be pronounced except at the request of one of the parties interested, or of the state, if the nullities are absolute and in the public interests. See 1 Biret, Des Nullités, 49; 1 Laurent, nn. 69 to 72; 1 Demolombe, n. 381.

The rule is clearly laid down in the English and American jurisprudence—although, perhaps, not more than one or two precedents can be quoted where it was actually enforced—that a judge is in duty bound, *ex-officio*, to notice illegality of that character. I have been able to collect from the law reports two cases in point, *Scott* v. *Brown*, (2) decided in 1892 by the English Court of Appeal, and *Fabacher* v. *Bryant*, (1) which was

(1) 61 L.J.Q.B. 738.

(2) 46 La. An. 820.

decided in 1894 by the Supreme Court of Louisiana. These decisions, and the language of all the judges in the other cases, proceed upon the ground that if, from the statements of one of the parties, either in the courts below or in appeal, or otherwise, the cause of action appears to arise *ex turpi causâ*, or out of the transgression of a positive law, "there," continues Lord Mansfield,

> the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

Holman v. *Johnson* (1); *Price* v. *Mercier* (2); *City of Montreal* v. *McGee* (3); *L'Association St. Jean-Baptiste de Montréal* v. *Brault* (4). But see *Clark* v. *Hagar* (5).

At first I entertained some doubts upon this point of procedure. I was afraid that articles 110 and 113 of the new Code of Civil Procedure of Quebec might interfere with the old ruling. This code came into force some months before the case was argued in the first court, but after the issues were joined. Article 110, which is new, says:—

> Every fact which, if not alleged, is of a nature to take the opposite party by surprise, or to raise an issue not arising from the pleadings, must be expressly pleaded.
>
> Article 113: The court cannot adjudicate beyond the conclusions, that is, as set up in the issues.

These rules were no doubt enacted in the interest of the parties themselves, and were never intended to apply to a case like this, where law and order are alone at stake, and where both parties are interested to be silent rather than to expose themselves to a criminal charge

There is, however, a declaration of principle in article 2188 of the civil code which seems to settle

(1) 1 Cowp. 341.
(2) 18 S.C.R. 303.
(3) 30 S. C. R. 582.
(4) 30 S.C.R. 598.
(5) 22 S.C.R. 510.

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this point. It is conceded that laws of prescription under the code are laws of public order, but, in consequence of that article, they cannot be applied by the judge *ex proprio motû*, meaning that, in every other case, laws of public order must be noticed by him. Art. 2188:—

> The court cannot, of its own motion, supply the defence resulting from prescription, except in cases where the right of action is denied.

And does not article 1000 likewise lay down the principle that absolute nullities can be noticed officially, without any action or pleading?—

> Error, fraud and violence or fear are not causes of absolute nullity in contracts. They only give a right of action, or exception, to annul or rescind them.

Now let us see what effect in law this unforeseen feature of the case will have upon the action of the respondents.

Ex turpi causâ, non oritur actio.—This and other kindred maxims of the Roman law have been adopted by all civilized nations, whether governed by that system of laws or by the common law of England. The law reports of every country are full of decisions where courts of justice have refused to enforce contracts opposed to good morals or public policy or prohibited by positive laws. It would be a waste of time to cite the cases where this fundamental principle, upon which rests the whole social edifice, has been applied; they are well known to the bar and are collected in the text books and the law digests, and more particularly in the American and English Encyclopædia of Law, (2 ed.) vo., Illegal Contracts, and in Dalloz, *Repertoire*, vo. Obligations, nn. 553 to 651, and *Supplement*, nn. 157 to 193. The difficulty exists only when courts of justice come to deal with actions arising incidentally out of illegal transactions. In these cases, the jurisprudence of Great Britain and France are far

apart; and it must be added that in some of them there is great diversity of opinion in the courts governed by the English Common law.

This case, as I understand it, is not to be decided according to the principles of the English jurisprudence, nor by those of the Roman law, but by the rules laid down in the Civil Code of the province of Quebec, similar in this respect to the French code. All the contracts were executed and signed in the city of Montreal. The advances, which are involved in this cause, were also made in Montreal to the appellants or their agents, although the money was actually used by them in Toronto. In fact the headquarters of the adventure were in Montreal, where all reports were made and all instructions came from. But even if the transactions had taken place in Toronto, sitting as we do in a Quebec case without any proof that the laws of Ontario differ from those of Quebec, I must assume that they are alike. *Glengoil S. S. Co.*, v. *Pilkington* (1). Finally, article 6 of the Civil Code, says that the law of Lower Canada is applied,

whenever the question involved relates * * * to public policy.

There is no room for doubting that in Old France, and for many years after the promulgation of the *Code Napoléon*, judges and jurists followed the rules of the Roman law. As in England, it was held that courts of justice would not assist a wrongdoer in recovering any money, whether due or paid, in respect of a contract prohibited by law or contrary to good morals or public policy, for few French jurists make the distinction between *malum in se* and *malum prohibitum*. The Civil Code is explicit:—

The consideration is unlawful when it is prohibited by law, or is contrary to good morals or public order. C.C., art. 990; C.N., art. 1133.

(1) 28. S. C. R. 146.

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Under the old law, recovery *condictio indebiti* would not be allowed in any such case. As Pothier, Obl. No. 43, observes, the wrongdoer having sinned against the laws and public morals is unworthy of the assistance of the public courts,

est indigne du secours des lois pour la répétition de la somme due.

Domat and Merlin are of the same opinion, and all the early commentators of the French Code, such as Toullier, Duranton, Troplong, Delvincourt and others, who simply adopt the Roman law and ignore the articles of the Civil Code. Larombière and Aubry et Rau and a few others make a distinction between contracts which are immoral or criminal and those which are only illegal, *ultra vires* or against public policy, a distinction which has been followed by the Quebec Court of Appeal, in *Rolland* v. *La Caisse d'Economie de Notre Dame de Québec* (1), without, however, expressing any opinion as to the question of *répétition* in cases of immoral contracts, *n'étant pas appélés à la décider* observes Mr. Justice Bossé, speaking for the court, but when this court came to deal with the same case, the principle was merely laid down that money lent by a bank contrary to law, can be recovered back (2). This and other distinctions were introduced by the Scholastics, Grotius even holding that after the consummation of the crime, the wrongdoers could assert their rights in a court of justice. See Barbeyrac sur Puffendorff (ed. 1713), vol. 1, pp. 402 to 410. They were partially recognized by the tribunals of Europe, including the English courts, at least till after the time of Lord Mansfield, but since they have been very considerably modified, both in England and in France. See Benjamin on Sales and Smith's Leading Cases and Pandectes Françaises, Rep. vo. Obligations.

(1) Q R. 3. Q. B., 315.

(2) 24 S. C. R. 405.

For the purposes of this case, it is unnecessary to examine the nature and effect of these distinctions, which are altogether inapplicable to it. The broad rule must be established that, under the Code, moneys advanced or paid, not being the profits of the illegal, or even immoral or criminal adventure or contract, can always be recovered back by the advancing party, whether or not he be a principal to the same. Ernest Dubois, in a foot note to an *arrêt* of the Court of Cassation, of the 15th December, 1873, which is reproduced by Mr. Justice Routhier in the recent case of *McKibbin* v. *McCone* (1), is about the only recent writer of note who advocates the old rule. He takes some notice of the articles of the Civil Code, but considers them inapplicable. His reasoning, however, is refuted by nearly all the subsequent commentators. Dubois asserts that

parmi les auteurs qui ont écrit depuis la promulgation du Code Civil, l'exclusion de la répétition est encore la doctrine qui compte le plus de partisans.

This was undoubtedly true at the time Dubois wrote in 1873. But among those he mentions, how many did refer to the articles of the code? They all invoke, purely and simply, the rules of the Roman law, precise and express if you like, but inconsistent with the spirit and text of the code. And, if we look at the number of writers who, since Dubois' time, have expressed an opinion on the subject, it cannot be denied that to-day the large majority of the commentators are opposed to the Roman doctrine. Dubois further states that *la grande majorité des arrêts* is in favour of it; but to do so he is obliged to set aside quite a number of *arrêts* rendered in cases of sale or cession of public offices, which he endeavours to distinguish from the ordinary cases of illegal contracts.

(1) Q. R. 16 S. C. 126.

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The commentators adverse to his views cannot see any ground for distinguishing, and in support of the general rule that *la répétition de l'indu* lies to recover back moneys paid under an illegal or even an immoral contract, Marcadé, for instance, concludes:

La doctrine contraire dont quelques arrêts ont fait l'application à la répétition de la partie du prix d'offices ministériels convenu en dehors du traité ostensible, est enfin repoussée aujourd'hui par la jurisprudence. See Huc, Vol. 8, n. 392.

There may possibly be cases where the sense of justice would be so shocked as to close its eyes and ears and turn the rascals out of court the moment the true character of the suit is revealed, for instance, a demand to recover back moneys paid to commit murder or other atrocious crimes, although I do not wish to express any opinion upon a supposition of that kind. No case of this description can be found in the reports, and there is very little probability that, in the future more than in the past, criminals of this class will ever soil the precincts of courts of justice, for they are well aware that they would have to face a cross-demand by the State for confiscation. We need not trouble, for the present at least, about these imaginary cases, and we may treat them as the legendary English one of *Everett* v. *Williams*, where, in 1725, the highwayman, in a disguised declaration, was suing his companion to account for his share in the plunder. It is not reported anywhere, except in the European Magazine for 1787, vol. 2, p. 360, undoubtedly as a good sensational story for its readers. Lord Kenyon, after examining the office, found no record of it, and we may well pronounce it a fiction, as much as the more amusing case of *Bardell* v. *Pickwick*, reported in Dickens. See Evans' Pothier, vol. 2, p. 3.

The Code Napoléon, art 1131, 1235, 1376, 1965 and 1967 is reproduced almost word for word in articles

989, 1047, 1140 and 1927 of the Civil Code of the province of Quebec. Art. 989 says:

A contract without a consideration, or with an unlawful consideration, has no effect.

It is argued that to refuse *la répétition de l'indu* would be to give to such a contract a most important effect, which, also upon grounds of public policy, ought not to be tolerated. Even partners, whatever may be their rights to demand an account of the unlawful profits, are entitled to restitution of moneys put by them into the legal firm. In all cases of illegal, immoral or criminal contracts, the parties should be replaced where they stood before the illegal act was committed.

Articles 1140 of the Civil Code introduced a new maxim into the French law:

Every payment presupposes a debt; what has been paid where there is no debt may be recovered.

The Roman law, which was followed by Pothier, Domat and the old commentators, admitted the action *condictio indebiti* only when error was shown. The principle of our code that no one is allowed to enrich himself at the expense of another did not exist in the Roman law.

Then article 1140 makes an exception to the general rule:

There can be no recovery of what has been paid in voluntary discharge of a natural obligation.

Finally, article 1927, already referred to, contains another exception in respect to gaming contracts and bets, which are generally prohibited by the same article:

If the money or thing has been paid by the losing party, he cannot recover it back, unless fraud be proved.

These exceptions, it is contended, establish the general rule that in all other cases of illegal contracts

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recovery of moneys paid can be obtained. After some hesitation and not without some dissenting voices, it has finally been accepted by the courts and commentators.

Marcadé was one of the first, about 1845, to denounce the old doctrine as being contrary to the text of the code and to public policy, and no doubt the authority of his great name had considerable influence upon the change which about that time took place in the French jurisprudence. He says, vol. 4, n. 458:

> Nous ne saurions adopter ce système qui nous parait aussi contraire à l'intérêt social qu'au texte de la loi. Notre Code, à la différence du droit romain, ne permet pas qu'on s'enrichisse jamais aux dépens d'autrui; il ne veut pas qu'on puisse jamais garder le bien qui appartient à d'autres. Aussi l'art. 1376 déclare-t-il de la manière la plus absolue que quiconque reçoit ce qui ne lui est pas dû est obligé à le restituer sans distinguer pourquoi ni comment a été livrée la chose qui n'était pas due; tandis que le droit romain ne permettait la répétition à celui qui avait payé indûment qu'autant qu'il l'avait fait par erreur; *Si quis indebitum ignorans solvit, condicere potest; sed se sciens se non debere solvit, cessat repetitio* (1). Il ne faut donc pas argumenter ici du droit romain: et du moment qu'un bien n'a été livré qu'en exécution d'une obligation nulle, et dès lors sans être dû, le juge ne peut pas se dispenser, en face de l'art. 1376, d'en ordonner la restitution. La doctrine contraire, dont quelques arrêts ont fait l'application à la répétition de la partie du prix d'offices ministériels convenu en dehors du traité ostensible, est enfin repoussée aujourd'hui par la jurisprudence.

In a foot note to the 7th edition of his work published in 1873, nearly twenty years after his death, no less than twelve decisions of the *Cour de Cassation* are quoted in support of his views.

Demolombe soon followed and did not hesitate to hold the same opinion. He says:

> Notre avis est que la répétition devrait être toujours admise, lorsque le payement a été en vertu d'une obligation qui avait une cause illicite * * * D'une part, l'article 1131 dispose dans les termes les plus absolus, que l'obligation *sur une cause illicite ne peut avoir aucun*

(1) D. I. 12 t. VI. 1.

effet; or, cette obligation aurait un effet, et même un effet très important, si elle faisait obstacle à la répétition ; donc, il résulte du texte même qu'elle n'y saurait faire obstacle. D'autre part, les plus hautes considérations d'intérêt public nous paraissent exiger que ces obligations soient considérées de la façon la plus considérable, comme destituées de toute valeur juridique, et qu'elles ne puissent engendrer aucun droit (1).

Laurent, Vol. 16, n. 164:

Aux termes de l'article 1131, l'obligation sur une cause illicite ne peut avoir aucun effet, or, n'est-ce pas lui donner un effet très-important que d'empêcher la répétition? L'ordre public et la moralité ne seraient-ils pas blessés si celui qui a retiré un bénéfice d'une convention que la loi réprouve pouvait le conserver? Voilà la vraie turpitude, pour nous servir du langage traditionnel, il n'y a qu'une manière de prévenir ce scandale, c'est de donner l'action en répétition dans tous les cas.

Colmet de Santerre, ed. 1883, Vol. 5, n. 49 *bis:*

L'exécution même de l'obligation n'en couvrirait pas la nullité, et la partie pourrait répéter ce qu'elle aurait payé, car elle aurait payé ce qu'elle ne devait pas. Cette decision, admise généralement en ce qui concerne les obligations sans cause, est cependant l'objet de vives controverses quand il s'agit des obligations sur cause illicite. On trouve, en effet, dans des textes de droit romain, une distinction que Pothier a reproduite et qu'un grand nombre de jurisconsultes modernes ont adoptée. On accorde la répétition à la partie dont le rôle, dans la convention, n'a rien d'immoral, et on la refuse du moment que celui qui a fait un paiement avait joué un rôle immoral dans la convention primitive. Si Pierre a promis 1,000 francs à Paul pour que celui-ci s'abstienne de commettre un délit, on accorde à Pierre la répétition après qu'il a payé ; mais s'il s'agissait d'exciter Paul à commettre un délit on refuse la répétition.

Sur la première hypothèse la solution de Pothier est incontestable, soit qu'on accorde la répétition, d'après les principes sur les obligations sans cause, soit qu'on la concède en vertu de la règle sur les conditions illicites. Mais, dans la deuxième espèce, nous ne voyons pas comment, dans le droit français actuel, la répétition peut être déniée à celui qui a payé. Il ne devait pas (2), il a payé, donc il a le droit de répéter (3). Les articles qui consacrent le droit de répéter l'indu ne distinguent pas en vertu de quelle règle la chose payée était indue. Il faudrait une exception à l'article 1235 et à l'article 1376, pour que

(1) 1 Contrats, n. 382.

(2) Art. 1133.

(3) Art. 1235.

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l'opinion de Pothier pût être admise dans notre droit. Cette exception n'est pas dans notre Code, et nous pouvons ajouter elle ne devait pas s'y trouver. En effet, la société est intéressée à ce que celui qui stipule le salaire d'un acte illicite soit bien convaincu qu'il ne possédera jamais ce salaire en toute sécurité, que non-seulement il ne pourra en obtenir le paiement, mais que le paiement, même effectué, n'aura pas un caractère stable et définitif.

Pont, *Explications du Code Civil*, ed. 1884, vol. 7, n. 53, under the title, *Sociétés:*

Assurément, la prétention du détenteur serait audacieuse, puisqu'elle ne tendrait à rien moins qu'à retenir pour lui toutes les mises et à s'enrichir ainsi aux dépens de ses coassociés en invoquant le fait délitueux, ou en tout cas illicite, dont, aussi bien que ceux-ci, il serait lui-même l'auteur ou le complice ; mais il s'en faut de beaucoup que sa défense pût être considérée comme *péremptoire.* On lui répondrait justement que, ayant reçu les mises non comme propriétaire, mais comme simple dépositaire en vue d'un emploi spécial et convenu entre tous, il est détenteur sans cause et ne peut échapper à l'action en répétition dès que l'emploi est prohibé par la loi, ou dès qu'il est contraire aux bonnes mœurs ou à l'ordre public. Et il n'est pas de tribunal qui pût se considérer comme empêché de faire droit à l'action en répétition, parce que, bien loin d'invoquer l'existence de la société, celui qui forme cette action se fonde précisément sur l'invalidité de la convention. C'est pour faire prévaloir la nullité qu'il intente sa demande ; et c'est en l'accueillant seulement qu'on donne satisfaction à la loi puisque la repousser ce serait maintenir les effets du contrat, l'un des associés retenant alors le montant des apports, qu'il n'a pu toucher, cependant, qu'en vertu de ce contrat.

Guillouard, *Sociétés*, ed. 1892, n. 58 :

Toute autre est la nature de l'action par laquelle l'associé réclame la restitution de l'apport qu'il a versé ; il invoque pour agir, non pas le fonctionnement de la société, non pas l'existence d'une communauté de fait, que l'on ne peut pas substituer après coup, nous le reconnaissons, à une société illégale ; mais il invoque précisément ce qui a été jugé, la nullité de la société, et, se fondant sur le principe qu'un contrat nul ne peut produire aucun effet il demande à son ancien associé de lui restituer des valeurs qu'il détient sans cause. C'est donc le defendeur qui est amené pour s'approprier d'une manière immorale des apports auxquels il n'a aucun droit, à rappeler la cause pour laquelle la société avait été contractée. Les tribunaux devront, croyons-nous, lui répondre qu'ils n'ont plus à s'occuper de la cause de la société, car la société n'est plus en question, mais des consé-

quences de la nullité qu'ils ont prononcée, et ils ordonneront la restitution des valeurs pour la rétention desquelles il ne peut invoquer aucune cause légitime.

Dalloz, *Supplément*, 1893, evidently does not consider the question as yet open to any discussion. At n. 2308, vo. *Obligations*, he merely observes:

Il y a lieu à l'action en répétition lorsque le payement a été effectué en vertu d'une cause illicite.

The compilers of the Pandectes Francaises vo. *Obligations*, n. 7855, also published in 1893, after setting forth the two systems in controversy and authorities *pro* and *con*, conclude:

La meilleure manière de prévenir la formation de certaines conventions honteuses ou illicites, c'est de donner l'action en répétition dans tous les cas. Cette raison d'intérêt général a une valeur bien supérieure à celles que l'on peut donner en sens contraire, soit que l'on s'arme du fait de la possession, c'est-à-dire que l'on subordonne la décision à un pur hasard, soit qu'un repousse le demandeur en répétition à raison de son indignité, comme si l'on pouvait raisonnablement le déclarer indigne d'exercer la répétition après le payement, alors qu'on ne le considère pas comme indigne d'invoquer la nullité de l'obligation par voie d'exception s'il ne l'a pas encore payée.

It is useless to add that the *Répertoire* of Dalloz and the Pandectes Françaises are considered as the best legal periodical publications of France at the present time, published as they are by a committee of professors, lawyers and judges renowned for their learning and accuracy.

Huc and Baudry-Lacantinerie, the recognised leading authorities at the Bar and Bench and in the University of France, to-day, both hold the same views. Huc, vol. 8, n. 392, ed. 1895, says:

On admet par exception que la répétition est possible, indépendamment de toute erreur, quand le paiement a été effectué en vertu d'une convention illicite, alors même que le débiteur aurait participé sciemment à l'acte illicite, par exemple quand il s'agit de la cession d'une part d'office ministériel.

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Baudry-Lacantinerie, after referring to a few contrary *arrêts* rendered chiefly by inferior courts, concludes likewise that the jurisprudence allowing recovery is the correct one:

L'article 1131 qui dispose que l'obligation sur cause illicite ne peut avoir aucun effet, serait violé s'il n'y avait pas lieu à répétition ; car l'obligation sur cause illicite, devenant ainsi inattaquable, serait plus résistante que les obligations dont la cause est licite (1).

Huc and Lacantinerie quote several recent *arrêts* of the Court of Cassation in support of their contention; Cass. 11th Feb. 1884, S. 84, 1, 265; 25th Jan. 1887, S. 87, 1, 224; 11th Dec. 1888, and 8th Dec. 1889, S. 89, 1, 213. They also refer to the articles of Meynial, S. 90, 2, 87; 91, 2, 89; and G. Appert, 96, 1, 290. See also Cass. 3rd Feb. 1879, S. 79, 1, 411; Cass. 14th May, 1888, D. P. 88, 1, 487; Caen, 16th Jan. 1888, Id. 2, 319; Seine, 26th July, 1894, P. F. 95, 2, 282; Besançon, 6th March, 1895, P. F. 96, 2, 221; Poitiers, 28th Dec. 1896, P. F. 98, 1, 529.

Mr. Charmont, reviewing the whole French jurisprudence in a foot note to the *arrêt* of Poitiers on the 28th December, 1896, concludes:

Nous souhaitons vivement que le système consacré par notre arrêt, conforme à l'interprétation de la chambre civile, (a branch of the Court of Cassation), finisse enfin par l'emporter. Dans tous ces cas de convention sur cause illicite, il nous paraît impossible de refuser l'action en répétition de l'indu sans violer le texte du code et les principes de notre droit. L'art. 1131 déclare que l'obligation sur cause illicite ne peut avoir aucun effet. Comment ne pas reconnaître qu'elle en aurait un si elle pouvait valider un payement, et si la convention pouvait devenir inattaquable par le seul fait de son exécution? Ce qui nous semble encore plus évident, c'est que la maxime, qui s'expliquait en droit romain, n'a plus aucune raison d'être dans notre législation ; son application n'est qu'une sorte d'anachronisme ; c'est tout au moins le résultat d'une confusion. Pour s'expliquer les restrictions apportées à l'exercice de la *condictio ob turpem causam*, il faut ne pas oublier que cette *condictio* est, en réalité, le correctif d'une législation qui ne se préoccupe pas de la cause. A Rome le contrat

(1) 1 Traité Thé. et Pra. 1897, vol. 1, p. 316.

normalement est formel ; l'obligation résulte de l'accomplissement de certaines formalités légales. Quand on a prononcé la formule de la stipulation, le débiteur est obligé ; on ne se demande pas quel but il a poursuivi en s'obligeant. Cependant, pour tempérer la rigueur de ce principe, on vient, dans certains cas, au secours de débiteur ; s'il est obligé sans cause, sur fausse cause ou sur *l'exceptio non numeratæ pecuniæ*, la *condictio sine causâ*, la *condictio ob turpem causam*. Mais cette protection ne peut jamais lui être accordée que s'il paraît digne d'intérêt ; il ne peut être considéré comme tel lorsqu' il a lui-même poursuivi un but illicite, et c'est pourquoi, dans cette hypothèse la *condictio* lui est refusée (1). Il en est tout autrement dans notre droit. La cause est actuellement un élément nécessaire à la formation du contrat ; si ce contrat n'a pas de cause, ou si la cause est illicite, il est nul et ne peut avoir aucun effet. Les parties n'étant pas obligées, tout payement fait par l'une d'elles est indu. Et puisque le droit d'agir en répétition n'est qu'une simple conséquence de cette nullité, on n'a pas à se demander si le contractant qui prétend l'exercer, n'encourt aucun reproche ; on ne peut jamais le lui refuser (2).

I might add considerably to this list of authorities. See for instance, Bédarride, Fraude, vol. 3, nn. 1304 to 1307 ; Rivière, *Jur. Comparée*, nn. 366 to 369 ; Pillette, *Rev. Pra.* 1863, t. 15 p. 467 ; Boistel, *Dr. Com.* n. 356 ; Pont, *Société*, n. 51 ; Lyon-Caen et Renault, 2 *Dr. Com.* ed. 1892, n. 236 ; Duvergier, *Société*, n. 30, sur Toullier, vol. 6, n. 126 ; 7 *Rev. Etran. et Fr.* vol. 7. p. 568 ; Boileux, art. 1123, vol. 4, p. 386 ; Vavasseur, *Société*, ed. 1897, vol. 1, n. 40 ; 3 Arntz, n. 39.

Hardly one of the two writers can be found within the last quarter of a century in favour of the old rule. I know that we are not bound by the French text books, nor even the French decisions, but both have always been considered as forming the jurisprudence of France, which could not be, and never was, overlooked by this court, nor by the Privy Council on all occasions—and they are so numerous that it is unnecessary to recall them—whenever dealing with articles of the Quebec Code similar to the French Code.

(1) D. 8, au Dig. liv. xii, t. 5. (2) P. F. 98, 2, 2.

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I feel that I cannot disregard the opinions of these great jurists, who are generally considered in Quebec cases as the best exponents of our code; nor can I ignore the numerous decisions of the Court of Cassation and other French tribunals. Even if I were entertaining a different view, I would hesitate to regard it as the true interpretation of the articles of the code. But the reasons they advance commend themselves to my mind; they are conclusive, and I have no hesitation in coming to the conclusion that the respondents are entitled to recover back the amount of their advances, but without interest, so as to place the parties exactly where they stood when the illegal transactions took place. In the lottery case of *L'Association St. Jean Baptiste de Montréal* vs. *Brault*, (1), this court decided last term that the contract was illegal, and even criminal, and without adjudicating as to the reimbursement of the principal sum advanced, which was not involved in the case, refused the interest, which alone was demanded. Few recent French decisions have allowed legal interest from the date of payment, the debtor being considered in bad faith. C. N., art, 1878. There is a similar article in our code, art. 1049, but it applies only to payments made "through error of the law, or of fact," and not to a case like the present one; Art. 1047. In France it applies to all payments not due, whether made by error or knowingly, *sciemment*. C. N. Art, 1376. We have only Art. 989, which declares that a contract with an unlawful consideration has no effect, and consequently cannot carry interest from the day of maturity, although of a commercial nature, as provided for by article 1069. Therefore, no interest can be allowed before the institution of the action. C. C. Arts. 1067, 1077.

(1) 30 S. C. R. 598

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As to the incidental demand for damages claimed by the appellant for the alleged breach of the contract of 29th February, 1896, the judgment dismissing the same must be confirmed, not only for the reasons given in the courts below, but also because it purports to enforce an illegal contract.

For these reasons, I would deduct from the itemized account all the items for interest, amounting altogether to $4,339.62, thus reducing the judgment against the respondents to $18,044.86, with interest thereon from the 23rd of December, 1896, date of the institution of the action, and all costs

The judgment on the incidental demand is confirmed with costs

*Appeal allowed in part with costs.**

Solicitors for the appellant: *McGibbon, Casgrain, Ryan & Mitchell.*

Solicitor for the respondents: *E. A. D. Morgan.*

*An application for leave to appeal to the Judicial Committee of the Privy Council was refused.

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*May 7.

OTTAWA ELECTRIC COMPANY (DEFENDANT) ..... APPELLANT;

AND

JOHN CHARLES BRENNAN AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM A DIVISIONAL COURT OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Appeal per saltum—Jurisdiction—R. S. C. c. 135 s. 26 (3).

Leave to appeal direct to the Supreme Court from a judgment of a Divisional Court of the High Court of Justice under sec. 26, sub-sec. 3 of the Supreme and Exchequer Courts Act, cannot be granted unless it is clear that there is a right of appeal from such judgment to the Court of Appeal for Ontario.

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

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THE OTTAWA ELECTRIC COMPANY v. BRENNAN.

MOTION for leave to appeal direct from the judgment of Mr. Justice MacMahon increasing the amount awarded to plaintiffs by arbitrators appointed to determine the value of lands expropriated by the defendant company.

The motion was first made to the registrar of the court sitting as a judge in chambers, who refused the application, and an appeal from his decision to Mr. Justice Taschereau in chambers was referred by him to the full court.

The appellant company is a corporation to which the Railway Act of Canada applies. In 1900 notice was given to the plaintiffs of the company's intention to expropriate their land in the township of Nepean offering to pay $2,124.60 therefor which offer was refused. Arbitrators were then appointed under the provisions of the Railway Act to determine the value of the land and they awarded the plaintiffs $2,865, which being deemed insufficient an appeal was taken to the High Court of Justice from the award and heard before Mr. Justice MacMahon, who increased the amount to $5,861. The company applies for leave to appeal direct from the judgment of MacMahon J. to the Supreme Court.

In the case of *Birely* v. *Toronto, Hamilton & Buffalo Railway Co.* (1), on appeal from the decision of Armour C.J. (2) affirming an award by arbitrators under the Railway Act, the Court of Appeal held that a party dissatisfied with such an award might appeal either to a Divisional Court or to the Court of Appeal, but if he elected to go to the former there was no further appeal to any provincial court.

Glyn Osler in support of the motion.

In *Farquharson* v. *Imperial Oil Co.* (3) leave to appeal *per saltum* was granted, although there was no appeal

(1) 25 Ont. App. R. 88. (2) 28 O. R. 468.
(3) 30 Can. S. C. R. 188.

as of right to the Court of Appeal, and leave to appeal to that court had been refused.

The Court of Appeal by its decision in *Birely* v. *Toronto, &c., Railway Co.* (1) has held that we have no right to go to that court. It is submitted that that decision was wrong, and if our motion cannot be granted because of it we ask that it be overruled.

Henderson, contra, was not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (oral).—We are all of opinion that this application must be refused. It is not a case in which leave to appeal *per saltum* can be granted. It has not been shown that there was any right of appeal to the Court of Appeal which is necessary to give us jurisdiction; on the contrary it appears that there is no such right of appeal.

The motion is refused with costs.

Motion refused with costs.

Solicitors for the appellant: *Wyld & Osler.*

Solicitors for the respondents: *McCracken, Henderson & Macdougall.*

(1) 25 Ont. App. R. 88.

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*May 7.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF THE WEST RIDING OF THE COUNTY OF DURHAM.

CHARLES JONAS THORNTON (RESPONDENT)..... } APPELLANT;

AND

CHARLES BURNHAM (PETITIONER)...RESPONDENT.

ON APPEAL FROM THE DECISION OF MR. JUSTICE STREET.

Election petition—No return of member—Illegal deposit—Parties to petition.

A petition under The Dominion Controverted Elections Act (R. S. C. ch. 9) alleged that T., a respondent, who had obtained a majority of the votes at the election was not properly nominated, and claimed the seat for his opponent, and that if it should be held that T. was duly elected his election should be set aside for corrupt acts by himself and agents.

Held, that the petition as framed came within the provisions of sec. 5 of the Act and that T. was properly made a respondent.

APPEAL from a decision of Mr. Justice Street overruling preliminary objections to the election petition.

At the election of members of the House of Commons on November 7, 1901, for West Durham, the candidates were the appellant Thornton and Robert Beith. Thornton received the greater number of votes, but exception having been taken to the deposit of $200 at his nomination by marked cheque neither party was returned as elected, but a special return was made of the circumstances. Then an election petition was filed against Thornton and the returning officer which, after stating the necessary facts as to the petition and of Beith's nomination, alleged as follows:

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

"4. And your petitioner further states that at the time fixed by the said proclamation, or prior thereto, Charles Jonas Thornton, of the township of Clarke, in the county of Durham, farmer (hereinafter called the respondent), or some one on his behalf, did produce to the returning officer for the said election a nomination paper, stating therein the name, residence and addition of the said respondent as a person proposed, but neither at the time the said nomination paper was produced to and filed with the returning officer, nor at any time prior or subsequent thereto, was the sum of $200 in legal tender or in the bills of any chartered bank doing business in Canada, deposited in the hands of the said returning officer by or on behalf of the said respondent Thornton."

"5. And your petitioner further states that on the day fixed by the said returning officer for summing up the votes cast at the said election, objection was taken to the return of the respondent by reason of the invalidity of his nomination, as more particularly set forth in paragraph 4 hereof, and the said returning officer, in view of such objection, made a special return of all the circumstances to the Clerk of the Crown in Chancery at Ottawa, and returned no member as elected at the said election."

* * * * * * *

"7. And your petitioner submits that the nomination paper of the said respondent was invalid and should not have been acted upon by the returning officer, and by reason of the invalidity of the nomination paper of the respondent your petitioner submits that his election was null and void and that he should not be returned as member for the said Electoral District, but that the said Robert Beith, being the only candidate validly nominated at the said election, should have been returned as elected thereat."

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"8. And your petitioner further states that if it should be determined by this honourable court that the said respondent was duly nominated and entitled to have been returned as elected at the said election, such election of the said respondent was undue, and should be declared to be null and void, by reason of the fact that the said respondent by himself, by his agents and by other persons on his behalf before, during, at and after the said election, was guilty of bribery, treating, personation and undue influence, as defined by the Dominion Elections Act, the Dominion Controverted Elections Act, and other Acts of the Parliament of Canada, whereby the said respondent was and is incapacitated from serving in parliament for the said Electoral District."

The petition alleged other corrupt acts and prayed—

"(1) That it may be determined that the nomination of the said respondent was invalid and should not have been acted upon, and that the said Robert Beith should be returned as elected thereat, or that a new election should be ordered for the said Electoral District."

"(2) Or, in the alternative, that if this honourable court shall be of opinion that the said respondent was duly nominated at the said election, then that it may be declared that the said election was undue and should be declared to be null and void, for that the respondent, by himself, and by his agents, was guilty of the said several corrupt and illegal acts and practices hereinbefore charged as having been committed by him, or by his agents, before, during, at and after the said election."

Preliminary objections to the petition were filed on behalf of the respondent Thornton, among them being the following:

"The said petition in its form and contents and the relief sought is unauthorized in law, and is in violation of the provisions of sections 5, 6, 7, 8 and 9 of the Dominion Controverted Elections Act, inasmuch as it attempts to group together in one petition, with but one deposit of security more than one cause of complaint, to wit—no less than three causes of complaint. (1) Of no return; (2) Undue election of your said respondent; (3) Unlawful acts of a candidate, to wit, your said respondent, not returned, the effect of which is that your said respondent is alleged to have become disqualified to sit in the House of Commons."

Argument on the preliminary objections took place before Mr. Justice Street when they were overruled and an appeal was taken from his judgment to the Supreme Court of Canada.

W. D. McPherson for the appellant. Thornton should not have been made a respondent to this petition. It alleges that he was not a candidate and complains of "no return" of a member. The only person responsible for that is the returning officer. See *Harmon* v. *Park* (1).

All candidates are not necessary parties. *Monkswell* v. *Thompson* (2); *Lovering* v. *Dawson* (3); *Lyne* v. *Warren* (4).

Assuming the facts alleged in the petition to be proved the prayer could not be complied with. *North Victoria Election Case* (5) following *Stevens* v. *Tillett* (6).

Aylesworth K.C. for the respondent was not called upon.

(1) 6 Q. B. D. 323.
(2) [1898] 1 Q. B. 479.
(3) L. R. 10 C. P. 711.
(4) 14 Q. B. D. 73, 548.
(5) Hodg. El. Cas. 585.
(6) L. R. 6 C. P. 147.

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THE CHIEF JUSTICE.—(Oral): The law applicable to this case is contained in section 5 of The Dominion Controverted Elections Act (1), which section, so far as it is material to the appeal, reads as follows:

The Chief Justice.

5. A petition complaining of an undue return, or undue election of a member, or of no return, or of a double return, or of any unlawful act by any candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons at any election may be presented to the court by any one or more of the following persons:

(*a*) A person who had a right to vote at the election to which the petition relates; or

(*b*) A candidate at such election.

The fifth paragraph of the election petition, which alleges that—

on the day fixed by the said returning officer for summing up the votes cast at the said election, objection was taken to the return of the respondent by reason of invalidity of his nomination, as more particularly set forth in paragraph four hereof, and the said returning officer in view of such objection made a special return of all the circumstances to the clerk of the Crown in Chancery at Ottawa, and returned no member as elected at the said election,

brings the case within the section of the Controverted Elections Act, just read, the petitioner being a person who had a right to vote at the election, and the allegation being that there was "no return" of a member elected.

The appellant claims that as it was alleged in the petition that he was not duly nominated, and therefore not a candidate, he could not be made a respondent. But he was a candidate *de facto* if not *de jure*, and Mr. Beith could not claim the seat without giving him an opportunity to assert his rights before the election court.

I am far from saying that all the points presented for our consideration are precluded by this decision. On the contrary, many of the arguments so ably urged

(1) R. S. C. ch. 9.

before us by counsel for the appellant may be renewed when the petition comes on to be heard on its merits and should then have great weight. Our present decision is on a matter such as might have been raised on demurrer in an action.

TASCHEREAU, SEDGEWICK and GIROUARD JJ. concurred.

GWYNNE J.—I only desire to say this. I think that a petition framed as the one in this case could be properly presented to the election court, but I was doubtful whether or not it should have been presented against the returning officer alone, but that is a question which might more properly come up on the trial of the merits of the petition and not on preliminary objections. I do not dissent from the decision of the court.

Appeal dismissed with costs.

Solicitor for the appellant: *W. D. McPherson.*

Solicitors for the respondent: *Simpson & Blair.*

1901

*May 7.

SIMEON JONES (PLAINTIFF).....APPELLANT;

AND

THE CITY OF SAINT JOHN (DEFENDANT.....) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Assessment and taxes—Appeal from assessment—Judgment confirming—Payment under protest—Res judicata.

J., having been asssessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council and then applied to the Supreme Court of New Brunswick for a writ of certiorari to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. In 1897 he was again assessed under the same circumstances, and took the same course with the exception of appealing to the Supreme Court of Canada from the judgment refusing a certiorari, and that court held the assessment void and ordered the writ to issue for quashing. J. then brought an action for repayment of the amount paid for the assessment in 1896.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a certiorari to quash the assessment in 1896 was *res judicata* against J., and he could not recover the amount so paid.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict at the trial in favour of the plaintiff and ordering judgment to be entered for the defendant.

The material facts are set out in the above head-note.

Currey K.C. for the appellant. The assessment for 1896, the amount of which was paid by plaintiff and which he now seeks to recover, was precisely the same

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

as that for 1897 which was declared illegal by this court. *Jones* v. *City of St. John* (1). He has, therefore, a right to be repaid the money to which the city was never entitled. *City of London* v. *Watt* (2); *Preston* v. *City of Boston* (3).

The appeals committee was without jurisdiction as the assessment was illegal and consequently the judgment refusing certiorari is not *res judicata* against the plaintiff. *Mayor, &c., of London* v. *Cox* (4).

C. J. Coster for the respondent. The appellant cannot set up want of jurisdiction in the inferior court unless such defect appears on the face of its proceedings. *Colonial Bank of Australasia* v. *Willan* (5) following *Reg.* v. *Bolton* (6). See also *Brittain* v. *Kinnaird* (7).

The appellant having paid the tax voluntarily after the judgment refusing a certiorari such judgment is *res judicata*. *Flitters* v. *Allfrey* (8).

The judgment of the court was delivered by;

THE CHIEF JUSTICE (oral).—I have read very carefully the opinion delivered by Mr. Justice Barker in the Supreme Court of New Brunswick, and I entirely agree with it. The taxes of 1896, which form the subject of the present action, fall within the same category as those of 1897 in respect to which we gave our former judgment (1). But putting this entirely out of the question, here we find that Mr. Jones, after having been assessed, applied to the statutory tribunal, the appeals committee of the common council, which had authority to deal with the subject matter, and rendered the decision in consequence of which he paid

(1) 30 Can. S. C. R. 122.
(2) 22 Can. S. C. R. 300.
(3) 12 Pick. (Mass.) 7.
(4) L. R. 2 H. L. 239.
(5) L. R. 5 P. C. 417.
(6) 1 Q. B. 66.
(7) 1 Brod. & B. 432.
(8) L. R. 10 C. P. 29.

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the taxes now sought to be recovered. This alone would have constituted *res judicata* against him, but we have more. The plaintiff appealed to the Supreme Court of New Brunswick, before making the payment, which he made only after that court had affirmed the decision of the appeals committee. As was suggested by my brother Taschereau, if the Supreme Court had decided the other way, it would have been *res judicata* in favour of Jones.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *L. A. Currey.*

Solicitor for the respondent: *C. J. Coster.*

MARIA INCE, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF THOMAS HENRY INCE, DECEASED, (PLAINTIFF) ..... } APPELLANT;

1901

*Mar. 18,19.

*May 13,

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Maintenance of streets—Accumulation of snow and ice—Gross negligence—R. S. O. [1897] *c.* 223 *s.* 606 (2).

About 10.30 a.m. on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shown that there had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employees of the city had scattered sand on the crossing but the high wind prevailing at the time had probably blown it away.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 410) that the facts in evidence were not sufficient to show that the injury to the deceased was caused by "gross negligence" of the Corporation within the meaning of R. S. O. [1897] ch. 223, sec. 606 (2).

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the plaintiff.

The facts of the case are sufficiently stated in the above head-note.

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

(Mr. Justice King was present at the argument but died before judgment was delivered.)

(1) 27 Ont. App. R. 410.

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Aylesworth K.C. for the appellant referred to *Town of Cornwall* v. *Derochie* (1); *Driscoll* v. *Mayor of St. John* (2).

Fullerton K.C. and *Chisholm* for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—In the judgment of the Court of Appeal at Toronto in this case and in the reasons upon which that judgment is founded I entirely concur. For the suggestion that the original grade upon which the street crossing where the accident occurred was constructed was so faulty and defective as to constitute any ingredient in establishing that "gross negligence" of the Corporation necessary to maintain an action against them, there was not in the evidence the slightest foundation whatever; and the only other suggestion of negligence of the Corporation was in substance to the effect merely, that they had not succeeded in preventing the severe inclemency of the weather upon the morning in question, in which inclemency a high wind travelling at the rate of from 24 to 28 miles an hour constituted a most material element, from being attended with its natural consequences. There was evidence that between the hours of 7 and 8 and of 9 and 10 on that morning the Corporation had made use of the ordinary method to countervail the inclemency of the weather by spreading sand upon the crossing in question, but that such method proved ineffectual in the present case was reasonably attributable to the high wind not suffering the sand to remain upon the slippery places where it was spread. To hold the defendants responsible in the present case would not only have the effect, as stated by the learned judges of the Court of Appeal, of depriving

(1) 24 Can. S. C. R. 301. (2) 29 N. B. Rep. 150.

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the defendants altogether of the recent Ontario statute which exempts municipal corporations from liability in the cases of accidents occasioned by falling on icy places unless in case of *gross negligence* by the Corporation, but would introduce a new element of liability by making the Corporation responsible as for gross negligence in not providing means which shall prove effectual to prevent injury happening to any one from ice upon the streets in the city being occasioned by the inclemency of the weather however severe it be. The appeal must, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Barwick, Aylesworth & Wright.*

Solicitor for the respondent: *Thomas Caswell.*

1901

[*Mar. 22.
*May 13.

MACDOUGALL, SONS AND COMPANY AND OTHERS (PLAINTIFFS)..... } APPELLANTS;

AND

THE WATER COMMISSIONERS OF THE CITY OF WINDSOR (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Water commissioners—Statutory body—Powers—Contract—37 V. c. 79 (Ont.)

By 37 Vict. ch. 79 (Ont.) the Waterworks system of Windsor is placed under the management of a Board of Commissioners who are to collect the revenue, paying over to the city any surplus therefrom, and to initiate works for improving the system the city supplying the funds to pay for the same. The total expenditure is not to exceed $300,000 and not more than $20,000 can be expended in any one year without a vote of the ratepayers.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 566) that the Board is merely the statutory agent of the city in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, not authorized by by-law of the council, and incurring an expenditure which would exceed the statutory limit was not a binding contract.

Held also, that if an action could have been brought on such contract the city corporation would have been a necessary party.

Quaere.—Would not the city corporation have been the only party liable to be sued?

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the plaintiff.

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

(Mr. Justice King was present at the argument but died before judgment was delivered.)

(1) 27 Ont. App. R. 566.

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The action in this case was brought for the price of work done by the plaintiffs as contractors for the installation of a filtration plant in connection with the waterworks system of the City of Windsor under a contract with the Board of Water Commissioners, and the only question to be decided on the appeal was whether or not the Board could make a valid contract for the work without the sanction of a by-law of the City Council. The statute incorporating the Board is 37 Vict. ch 79, and the several sections material to the decision on the appeal are set out in the judgment of the court.

The Court of Appeal held that the contract was not binding reversing the judgment of the Chancellor in favour of the plaintiffs.

Riddell K.C. for the appellants. The commissioners could be sued notwithstanding no by-law was passed by the city council for raising the money. *In re Pickering's Claim* (1).

The fact that defendants could not satisfy a judgment against them is no reason why they could not be sued. *City of Ottawa* v. *Keefer* (2).

Aylesworth K.C. for the respondents. The commissioners could not enter into this contract without the previous sanction of the city council to the expenditure. *Mersey Docks Trustees* v. *Gibbs* (3); and see *Sanitary Commissioners of Gibraltar* v. *Orfila* (4); *Graham* v. *Commissioners of Niagara Falls Park* (5); *Bailey* v. *City of New York* (6).

The judgment of the court was delivered by:

GWYNNE J.—This action although for the recovery merely of the sum of $892 is one of very considerable importance not only because this sum is claimed as a

(1) 6 Ch. App. 525.
(2) 23 Ont. App. R. 386.
(3) L. R. 1 H. L. 93.
(4) 15 App. Cas. 400.
(5) 28 O. R. 1.
(6) 3 Hill (N. Y.) 531.

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progress estimate of work which involves the outlay of $20,000 if an instrument purporting to be a contract dated the 7th November, 1896, between the plaintiffs and the defendants is valid and binding, but also because it raises a much more important question namely, whether the corporate body called the Water Commissioners of the City of Windsor are agents only of the municipal corporation of the city and subordinate thereto in the performance and discharge of the duties and powers imposed upon and vested in them by the Act incorporating them or, on the contrary, are paramount to the municipal corporation of the city, and can compel the latter body to adopt a scheme or process of filtering suggested by a majority of the corporate body called The Water Commissioners, &c., which consists of only three persons, and to provide the money necessary to pay the expense of putting the scheme into operation although a by-law passed by the city council for the purpose of taking the opinion of the ratepayers upon the scheme was, in accordance with the provisions of the law in that behalf, submitted to the ratepayers in 1895 and was rejected by them. It is admitted that the municipal corporation of the city are the only persons by the statute incorporating the Water Commissioners made liable to pay for the works mentioned in the document of the 7th of November, 1896, if that constitutes a valid contract; the question really in issue therefore is whether the municipal corporation of the city was under an obligation to pay the $20,000 mentioned in that document and which the corporate body called the Water Commissioners have therein undertaken to covenant to pay or cause to be paid to the plaintiffs. The details of the circumstances which led up to the execution of the document sued upon as a binding contract and the provisions of the statute in virtue of which alone

the Water Commissioners had any authority, and under which alone they purported to act, have been so fully dealt with by the learned judges of the Court of Appeal at Toronto that I do not propose to deal with those matters so fully dealt with by them further than to say that I entirely concur in their construction of the statute by which the defendants have been made a corporate body called the Water Commissioners of the City of Windsor, and that such corporation in the discharge of the duties imposed upon them, and in the exercise of the powers vested in them by the statute incorporating them, act as agents of, and not as paramount to, the municipal corporation of the city.

These Acts in the Province of Ontario which vest the management of waterworks in small corporate bodies seem to have been drafted by different persons employed by the several municipal corporations petitioning the legislature for the passing of the several Acts and so we find the form and frame of the Acts somewhat different, but these essential elements maintained in all of them namely, that all the works when constructed and all profits derived therefrom in excess of the money spent annually in maintenance are the property of the municipal corporations respectively, and that by-laws must be passed by the councils of the municipalities in the manner required by law to authorise the expenditure of any of the funds of the municipal corporations for the construction of the works contemplated to be constructed before any contract valid and binding upon the municipal corporation can be entered into by the commissioners. Thus in 1872 was passed the Act 35 Vict. ch. 79 incorporating the Water Commissioners of the City of Toronto. That Act was passed at the instance of, and upon the petition of the municipal council of the cor-

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poration of the city. In the preamble it is recited among other things that

> the Council of the Corporation of the City of Toronto have by petition declared that it is deemed necessary and advisable that the said Corporation of Toronto should have the power to purchase, construct, have and manage as to them shall seem meet certain waterworks on behalf of the City of Toronto, and it is expedient to grant the prayer of the said petition.

The Act then proceeds in its first section to enact

> 1. That the Corporation of the City of Toronto by and through the agency of commissioners and their successors *to be* elected and appointed as hereinafter provided may, and shall have power to, design, construct, build, purchase, improve, hold and generally maintain, manage and construct waterworks and all buildings, or other machinery and appliances therewith connected or necessary thereto in the City of Toronto and parts adjacent as hereinafter provided.

Section 2 then enacts that the commissioners and their successors should be a body corporate consisting of five members of whom the mayor for the time being shall *ex officio* be one—but the mode of selection of the other four is postponed to the 37th and 38th sections of the Act. Sec. 3 and the subsequent sections prescribe the duties and powers of the commissioners as such corporate body, and for the purpose of constructing the said waterworks and for meeting the payment of any other matter or thing contemplated or allowed by the Act, the Corporation of the City of Toronto are empowered to raise the money necessary by the issue of debentures not exceeding in the whole the sum of five hundred thousand dollars as is provided in section 29. Then by sec. 37 it is enacted that

> this Act shall not have any force or effect until the Council of the Corporation of the City of Toronto shall pass a by-law authorising the construction of the said waterworks and on the said by-laws being finally passed it shall be lawful for the mayor of the said city and he is hereby authorised and required within fifteen days after the passage of the said by-law to issue his warrant under the corporate seal, &c.

Here follow provisions for procuring the election of the four other commissioners, who together with the mayor, constitute the corporate body. Now by this Act it is plain that the commissioners so made a corporate body are as such corporation subordinated to, and authorised to act merely as agents of, the municipal coporation assisting them in the construction, maintenance and management of the works authorised to be constructed by the by-law required to be passed before ever the corporate body for construction, maintenance and management comes into existence, and it is to works so authorised by by-law of the city corporation that the duties and powers vested by the Act in the subordinate body are limited. Upon the same day was passed the Act 35 Vict. ch. 80, whereby the mayor for the time being and one person elected for each ward by the citizens, as provided in the Act, were made a corporate body under the name of the Water Commissioners of the City of Ottawa. The preamble of that Act recited that the corporation of the City of Ottawa had passed a by-law for the construction of waterworks, and for raising by debentures the sum of $400,000, and that the ratepayers of the city had assented thereto; that such sum was not sufficient for the purpose, and that the corporation had petitioned to be authorised to repeal the former by-law and to pass another for raising the sum of $500,000 for the same purpose. This Act was plainly framed upon the model of the City of Toronto Act, 35 Vict. ch. 79, with which, including sec. 37, it is identical in every respect save that it omits the 1st section of the Toronto Act, which in my opinion was reasonably deemed unnecessary in view of the provisions of sec. 37, which are identical with those of sec. 37 of the Toronto Act. Then in 1874 was passed 37 Vict. ch. 78 entituled "An Act for the construction of waterworks for the

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Town of Peterborough." This Act contains all of the sections of the Toronto Act, 35 Vict. ch. 79, which prescribe the duties and powers of the commissioners when incorporated, but it contains some more sections not important to be considered in the present case; its 38th section is *in pari materiâ* with sec. 37 of the Toronto Act, but is more precise in its provisions. It enacts sec. 38—

> This Act shall not have any force or effect until the council of the corporation of the town of Peterborough shall pass a by-law authorizing the construction of the said waterworks,

but no by-law shall be so passed until first, estimates of the intended expenditure shall be published for one month and notice of a poll to be taken on the proposed by-law, and a copy of the by-law shall be also published for one month: nor secondly until such poll shall be taken and a majority of the electors voting at the poll are in favour of the by-law; nor thirdly, unless the by-law is thereafter passed at some meeting of the council of the corporation held not less than ten days nor more than one calendar month after the taking of such vote; and sec. 39 enacted that if the proposed by-law should be rejected at such poll no other by-law for the same purpose should be submitted to the electors for the current year. Upon the same day was passed the Act 37 Vict. c. 79, under which the defendants in the present action were incorporated. The preamble of that Act recites that the municipal corporation of the town (now the city) of Windsor had established waterworks at an expense of $100,000, and that the municipal council of the corporation had by petition asked for *an Act to provide for the better working, management and extension of the said waterworks* and to legalize and confirm by-law No. 20 passed by the town council and approved by the ratepayers in aid of waterworks, and that it is

expedient to grant the prayer of the said petitioners. The Act then enacted:

1. The waterworks already constructed or that may hereafter be constructed in the town of Windsor, or in any adjacent municipality, in extension thereof under the provisions of this Act shall be placed under the management of commissioners and their successors to be appointed as hereinafter provided, who shall have power to *design*, *construct*, *build*, purchase, improve, alter, hold and generally maintain, manage and conduct waterworks and all buildings, matters, machinery and appliances therewith connected or necessary thereto in the town of Windsor or parts adjacent as *hereinafter provided*.

2. The commissioners and their successors shall be a body corporate under the name of the "Water Commissioners of Town of Windsor," and shall be composed of *three* members of whom the Mayor of the town of Windsor for the time being shall be *ex officio* one and the said commissioners shall have all the powers necessary to enable them to *manage* the *system of waterworks now established, to extend the same*, to construct new or additional ones and to carry out all and every the other powers conferred upon them by this Act.

Then from sec. 3 are inserted sections identical with these in the three Acts already mentioned containing provisions as to the duties imposed upon, and the powers vested in the commissioners as a corporate body and those which declare the whole property in the works mentioned in the Act and in the rent and profits accruing therefrom annually less the amount of necessary disbursements of the commissioners for management to be vested wholly in the municipal corporation for the general purposes of the municipality. The section which vests in the municipal corporation the power of raising all the funds necessary to be expended in construction and repairs is the 33rd which enacts that

for the purpose of acquiring the necessary lands, rights and privileges *for the extension and repairs of the* said waterworks, or for the purpose of meeting the payment of any other matter or thing contemplated or allowed by this Act, the corporation of the town of Windsor shall have power

to raise by debentures a sum not exceeding $300,000

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including debentures for waterworks then already issued,

but every by-law for raising on the credit of the said municipality any money, additional to that already raised for waterworks purposes, shall, before the final passing thereof, receive the assent of the electors of the town of Windsor in the manner provided for in the 231st section of the Municipal Institutions Act, except that the municipal council of Windsor may raise by by-law or by by-laws without submitting the same for the assent of the electors of the town any sum or sums not exceeding in any one year $30,000 for waterworks purposes.

This sum is by the Act of 1894, 57 Vict. ch. 87, reduced to $20,000. Then the sec. 45 of 37 Vict. ch. 79 declares, as it appears to me, in clear terms, that in the exercise of the powers vested by the Act in the water commissioners incorporation, that body acts only as agents of, and as subordinate to, or concurrently with the municipal corporation in the matter of waterworks, for the whole cost of the construction and maintainance of which, as the property of the municipal corporation, they alone are liable, and therefore, as it seems to me, they should be made defendants, if not sole defendants, in every action brought to recover any sum of money made payable in respect of every valid contract for such purposes entered into by their agents the water commissioners incorporation.

In 1894 was passed the Act 57 Vict. ch. 87 in amendment of the Act 37 Vict. 79. By that Act it was enacted that

for the purpose of extending the water mains, constructing a new intake pipe, and *repairing the waterworks of the City of Windsor,* the corporation of the said city shall have power to issue debentures for the said city *in addition to the debentures authorised to be issued by the town of Windsor under the provisions of sec.* 33 *of* 37 *Vict. ch.* 79,

and it was enacted that every by-law for issuing debentures for raising money under the provisions of that Act should be submitted to the ratepayers under the provisions of the *Consolidated Municipal Act,*

provided always that the said corporation may issue by by-law or by by-laws without submitting the same to the ratepayers any sum of money not exceeding in any one year $20,000

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for the purposes mentioned in this Act. It has been argued that the rejection by the ratepayers of the by-law submitted in 1895 for raising a sum of money (I do not see the amount stated) for the purpose of putting into operation the filtering process spoken of must not be regarded as a rejection by the ratepayers of the principle of the filtering process as inefficient, but should be attributed to the fact that the application of the money of the municipality to instituting the filtering process was not authorised by that Act, the purposes thereof as therein mentioned being limited to *extending the water mains, constructing a new intake pipe, and repairing the waterworks of the city.* It may be admitted that the purposes named in the Act do not include the filtering process, but that is rather a question of law depending on the construction of the Act which naturally should have been considered before submitting the by-law to the ratepayers. The question as submitted to them, I think, was whether, assuming the by-law to be quite legal, the ratepayers approved of the outlay of the public money as proposed to the particular purpose named in the by-law. Assuming then an outlay of the public money for the purpose of putting the filtering process into operation not to be within the purposes specified in the Act of 1894 I do not well see how it can be said to be within the purposes of the Act of 1874. The municipality had expended the sum of $281,700 of the $300,000 authorised to be raised for the purposes of that Act, namely for extending and improving the waterworks previously established under by-laws or a by-law passed for the purpose by the council of the municipality as provided by the Act. Of the $300,000

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so authorised to be raised only the sum of $18,300 remained unapplied. Granting it then to have been competent for the city municipality to have raised that sum for some waterworks purposes, it would seem, I think, that such purpose should be for some work *additional to* the works mentioned in the Act of 1874, which had been completed under the provisions of the by-laws or by-law passed for that purpose, and the council of the municipality alone could determine what the particular purpose should be to which such $18,300 or any part thereof should be applied Now at the time of the passing of the Act of 1894 that sum not having been applied to any waterworks purpose would seem, I think, to have come under the Act of 1894 *by which* $200,000 *in addition to that sum* were appropriated to the purposes named in the Act. This expression in the 1st section, "in addition to the debentures mentioned," &c., &c., seems to me to appropriate the $18,300 remaining unapplied under the Act of 1874 equally with the $200,000, to the purposes mentioned in the Act of 1894.

This point not having been mentioned in the argument before us I do not rest my judgment upon it although it seems to me, I confess, to add some strength to the judgment of the learned judges of the Court of Appeal in which independently, however, of it I entirely concur. As no valid contract for any work in excess of $20,000 could be entered into by the Water Commissioners Corporation until after the passing of a by-law by the council of the municipality assented to by the ratepapers authorising the construction of the work named in the by-law, so equally no valid contract can be entered into by them under the statute for the construction of any work to cost less than $20,000 unless in virtue of a by-law previously passed by the council of the municipality authorising the construction of

such work. The water commissioners corporation are not by the Act made paramount to the city corporation, nor have they any power to compel the municipal council to pass a by-law, the principle of which they may utterly disapprove of as wasteful, extravagant, ineffectual for the purpose contemplated or of an experimental character, or the principle of which had been disapproved of and rejected by the ratepayers, or for the purpose of experimenting upon suggestions of the commissioners. The statute does not place the council of the municipality in subjection to the water commissioners of the city in any such manner. I am of opinion also that the city corporation were a necessary party if not the sole necessary party to be made defendants in the present action, for if the instrument sued upon constituted a valid contract under the provisions of the Act of 1874 the question really at issue was. Were the city corporation bound by the act of their agents, the water commissioners corporation? To an action raising such an issue the city corporation was the necessary party. The judgment condemning the water commissioners corporation to the payment of the sum demanded, $892 with costs, has no force under the statute if it is not imperative upon the city corporation to fulfil and satisfy the judgment, and that question could not be adjudicated upon adversely to the city corporation in their absence, and there is no warrant for dividing such a claim against the city into two actions instead of determining the whole question in one action by making the city corporation the actual as they are the real defendants. For all the above reasons I am of opinion that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Murphy, Sale & O'Connor.*

Solicitors for the respondents: *Clarke, Cowan, Bartlet & Bartlet.*

1901

*Mar. 25.

*May 21.

A T. KING (DEFENDANT).....APPELLANT;

AND

CHARLES BAILEY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute of limitations—Criminal conversation—Damages.

The statute of limitations is not a bar to an action for criminal conversation where the adulterous intercourse between defendant and plaintiff's wife has continued to a period within six years from the time the action is brought.

Quaere.—Does the statute only begin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within the six years preceding the action?

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiff.

The respondent was married in England on the 8th August, 1861, and lived there with his wife until the 24th March, 1886.

On or about the last mentioned date, the appellant, who was employed by the respondent, and the respondent's wife eloped and took steamer from Liverpool to Halifax, thence to Montreal, and subsequently took up their residence in Toronto, and from that time up to the issue of the writ of summons herein, lived together as husband and wife.

The respondent came out from England to the City of Toronto shortly before the issue of the writ herein, and commenced the proceedings herein.

On these facts the courts below held that the Statute of Limitations did not bar the respondent's action and

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

(Mr. Justice King was present at the argument but died before judgment was delivered.)

(1) 27 Ont. App. R. 703.

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that he was entitled to damages for injury caused by the conduct of the parties during the six years immediately preceding the issue of the writ.

Lobb for the appellant. The cause of action arises on commission of the first act of adultery, and the statute begins to run then. *Evans* v. *Evans* (1); *Patterson* v. *McGregor* (2).

Hyde K.C. for the respondent.

The judgment of the court was delivered by:

GWYNNE J.—The cause of action first set out in the statement of claim in this case is the old action on the case for criminal conversation expressed in the language of the modern formula of pleading, and, as so stated, is in substance simply that in the year 1885 (it should have been 1886), upon the request of the defendant, the plaintiff's wife left the home of the plaintiff with the defendant, and that they went together to the City of Toronto, in the province of Ontario, where ever since their arrival they have lived, and still, at the time of the commencement of this action, do live together in adulterous intercourse, whereby the plaintiff has been deprived of the comfort and enjoyment of the society of his wife, and her affections have been alienated from the plaintiff, and he has been deprived of the assistance which he formerly derived from her and to which he was entitled.

To this is added a paragraph asserting a cause of action for wrongfully enticing the plaintiff's wife from the plaintiff and procuring her to absent herself from him for some time from the year 1885 (should be 1886), to the time of the commencement of this action.

As this cause of action was only inserted to meet the case of the plaintiff being unable to prove the

(1) [1899] P. D. 195. (2) 28 U. C. Q. B. 280.

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adulterous intercourse charged in the previous paragraph, and as that intercoure has been established by most abundant evidence, the cause of action stated for wrongfully procuring the plaintiff's wife to absent herself from her husband has become merged in the charge for adulterous intercourse, and is, apart from that cause of action, quite immaterial, and it was so properly treated at the trial It is only necessary, therefore, for us to deal with the cause of action for adulterous intercourse as set out in the statement of claim.

No plea in denial of that cause of action has been put upon the record, unless the plea of the Statute of Limitations, namely,

> that the cause of action which the plaintiff's statement of claim purports to set forth did not accrue within six years next before the writ of summons herein was issued

may be construed as being a plea of "not guilty" within six years.

The averment in the statement of claim that in the year 1886, the defendant took the plaintiff's wife from the plaintiff's house in Doncaster, England, where they resided, and removed to the City of Toronto, and has ever since lived with her there in adulterous intercourse, and is still living with her in such intercourse, is precisely equivalent to an averment that the defendant is now at the time of the bringing of this action living with the plaintiff's wife in adulterous intercourse in the City of Toronto, and has lived with her in such adulterous intercouse ever since some time in the year 1886, when he induced her to elope with him from the plaintiff's house in Doncaster, England, and *quàcunque viâ* it is viewed, a plea that a cause of action so alleged did not accrue within six years next before the commencement of the action can admit of no other construction than that no part of the adulterous intercourse, which is the cause of action stated, to which

the plea is pleaded, took place within six years before the commencement of the action.

In an action on the case for criminal conversation according to the old form of pleading, the wrong might have been stated to have been committed "*diversis vicibus et diebus*," and in such a case it was competent for a plaintiff to recover upon proof of adulterous intercourse having taken place within six years before the commencement of the action.

How then when, as here, it has been abundantly proved by witnesses who have known the defendant ever since his arrival in Toronto, in September, 1886, and it is sworn absolutely by the defendant himself, that he and the plaintiff's wife have been and still are living together in adulterous intercourse, can it be argued that the plaintiff is deprived by a plea of the Statute of Limitations of his right to recover in this action because of its being alleged in the statement of claim that the adulterous intercouse commenced in England in 1886, and has ever since continued ?

When, to an action of the nature of the present, the Statute of Limitations is pleaded and an isolated case appears, or several distinct isolated cases appear, to have taken place more than six years before the commencement of the action and a case or cases is or are shown to have occurred within six years, evidence of those cases which occurred at periods beyond the six years must be excluded from the consideration of the jury, and the damages recoverable are limited to the cases proved to have occurred within six years before action. This was the case of the *Duke of Norfolk* v. *Germaine* (1). Whether or not that rule is applicable to a case like the present where the adultery charged is one continuous cohabitation alleged to have been commenced in England in 1886, and to have been

(1) 12 How. St. Tr. 927.

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continued to the present time, it is not necessary to decide in the present case, for the learned Chief Justice Meredith, at the trial, in very clear terms directed the jury to exclude from their consideration everything which, by the evidence, appeared to have occurred within the six years next ensuing the elopement in 1886, and to confine themselves to the subsequent conduct of the parties. For the contention that the Statute of Limitations is a complete bar to the plaintiff's remedy, notwithstanding the proof of the relationship which existed between the parties during the six years next preceding the commencement of the action, there is no foundation in law

Then it was argued that strict evidence of the actual marriage of the plaintiff was necessary, and that such evidence was not given. Evidence of an actual marriage, *i.e.* a marriage *de jure*, was undoubtedly necessary although there was no plea on the record denying the marriage and expressly putting it in issue. Rule 403 made under the authority of the Ontario Judicature Act is as follows:

> Save as aforesaid the silence of a pleading as to any allegations contained in the previous pleadings of the opposite party is not to be construed into an applied admission of the truth of such allegation.

The editors of the last edition of the Judicature Act, Messrs. Holmsted & Langton, say in a note to this rule:

> When a material fact is alleged in pleading, and the pleading of the opposite party is silent in respect thereto the fact must be considered in issue

citing *Waterloo Mutual* v. *Robinson* (1); and *Seabrook* v. *Young* (2).

This rule is in terms the exact reverse of the English Order 19, rule 13 which provides that:

> Every allegation of fact in any pleading if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposite party shall be taken to be admitted.

(1) 4 O. R. 295. (2) 7 C. L. T. 152.

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It was therefore incumbent on the plaintiff to give strict proof of the marriage.

This it appears to us he has done sufficiently by the supplementary proof which the learned Chief Justice permitted to be given after the trial of the issues which were left to the jury. That the Chief Justice had the power to adjourn the trial for the reception of such evidence and for further consideration and to permit proof by affidavit there can be no doubt, in view of of the rules 564, 567 and 682.

The only point remaining is upon the question whether we should grant a new trial.

The claim for a new trial is rested upon what appears, I think, to be a misconception of the charge of the learned Chief Justice to the jury, which appears to have very fairly and fully drawn the attention of the jury to all the matters urged by the defendant's counsel in his client's behalf. The defendant's ground of complaint, if any there be, seems to be that the jury have not given that consideration to the points so submitted to them by the learned Chief Justice which the defendant thinks was due to them rather than to any just ground of complaint against the charge given to the jury.

The appeal must be dismissed with costs.

Appeal dismissed with costs

Solicitors for the appellant: *Lobb & Baird.*

Solicitor for the respondent: *Louis F. Heyd.*

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*Mar. 26, 27.
*May 21.

IMPERIAL BANK OF CANADA (DEFENDANT) ..... } APPELLANT;

AND

THE BANK OF HAMILTON (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Marked cheque—Fraudulent alteration—Payment by third party—Liability for loss—Negligence.

A man dealing with others is under no duty to take precautions to prevent loss to the latter by the criminal acts of third persons, and the omission to do so is not, in itself, negligence in law.

B. having an account for a small amount in the Bank of Hamilton had a cheque for five dollars marked good, and altering it so as to make it a cheque for $500, had it cashed by the Imperial Bank. The same day it went through the clearing house and was paid by the Bank of Hamilton to the Imperial Bank. The error was discovered next day by the former, and re-payment demanded from the Imperial Bank and refused. The Bank of Hamilton then brought an action to recover from the Imperial Bank $495, the sum overpaid on the cheque. The defendant contended that the note as presented to be marked good was so drawn as to make the subsequent alteration an easy matter, and the plaintiff's act in marking it in that form was negligence which prevented recovery.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 590), which affirmed that at the trial (31 O. R. 100), that there was nothing in the circumstances to take the case out of the rule that money paid by mistake can be recovered back, and the Bank of Hamilton was therefore entitled to judgment.

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

(King J. was present at the hearing but died before judgment was delivered.)

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IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the plaintiff.

The facts are sufficiently set out in the above headnote, and more fully in the judgments published herewith.

Lash K.C. and *Bicknell* for the appellant referred to *Chambers* v. *Miller* (3); *London and River Plate Bank* v. *Bank of Liverpool* (4); *Pollard* v. *Bank of England* (5); *Boyd* v. *Nasmith* (6).

Douglas K.C. and *Stewart* for the respondent cited *Kelly* v. *Solari* (7); *Brownlie* v. *Campbell* (8) approving of *Bell* v. *Gardiner* (9); *Clark* v. *Eckroyd* (10).

THE CHIEF JUSTICE.—This is an appeal by leave from an order of the Court of Appeal affirming a judgment pronounced by Mr. Justice MacMahon at the trial of the action without a jury. There is no dispute as to the facts, and the questions we have to decide are entirely matters of law. The learned Chief Justice of Ontario dissented from the judgment of the court which was in favour of the present respondent who was also the respondent below and the plaintiff in the action.

It was proved at the trial that one Carl Bauer had an account with the defendants at their agency in Toronto, and that on the 25th of January, 1897, he drew a cheque in the following form:

(1) 27 Ont. App. R. 590.
(2) 31 O. R. 100.
(3) 13 C. B. N. S 125.
(4) [1896] 1 Q. B. 7.
(5) L. R. 6 Q. B. 623.
(6) 17 O. R. 40.
(7) 9 M. & W. 54.
(8) 5 App. Cas. 925.
(9) 4 Man. & G. 11.
(10) 12 Ont. App. R. 425.

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IMPERIAL BANK OF CANADA v. THE BANK OF HAMILTON.

The Chief Justice.

No. 136. TORONTO, ONT., January, 25th, 1897.

TO THE BANK OF HAMILTON.

Pay to Cash.....or bearer $

Five..... /100 Dollars.

(Signed) CARL BAUER.

This cheque Bauer on the same day presented to the ledger-keeper of the respondents who wrote the folio number of the account in the ledger on the cheque and stamped it with the words "Bank of Hamilton, Toronto, entered January 25th, 1897," and handed it back to Bauer who did not present the cheque to be cashed but took it away with him.

On the following day, January 26th, 1897, Bauer entered the figures "500" in the space after the $ mark and wrote the word "hundred" in the blank space after the word "five" in the body of the cheque and deposited it to his credit in an account with the appellants at their agency in Toronto, and immediately drew out nearly the whole sum. Bauer never had any greater sum to his credit with the respondents than the sum of $10.22. On the morning of the 27th January the appellants sent the cheque for $500 in the usual course through the clearing house to the respondents who paid it and stamped it with the words "Bank of Hamilton, Toronto, paid January 27th, 1897."

On the following day (January 28th), the respondents discovered the fraud and demanded repayment from the appellants who declined to restore the money. In the mean time Bauer had drawn a cheque for the full amount of the balance to the credit of his account with the appellants. At the time of the payment of the cheque by the respondents Bauer had to the credit of his account with them but twenty-two cents, and this appeared from the respondents' ledger.

The cheque as altered by Bauer and paid by the respondents was as follows:

No. 136. TORONTO, ONT., January 25th, 1897.

TO THE BANK OF HAMILTON.

Pay to Cash.....or bearer $500.00.

Five hundred and..... xx/100 Dollars.

(Signed) CARL BAUER.

Some evidence was given as to the usages of the clearing house and the practice of the respondents and other banks in making payments through it. I do not refer to this evidence, for in the view I take it is immaterial.

It is clear that the payment by the respondents was made under a mistake of fact, in reliance on what appeared on the face of the cheque which after the forgery presented the appearance of a marked cheque for $500.

The rule of law that money paid by mistake can *primâ facie* be recovered from the person who receives it must therefore apply unless the case can upon the facts stated come within some exception to that rule.

It was contended in the court below on behalf of the appellants that the judgment of Mr. Justice MacMahon was wrong and that the rule mentioned was improperly applied, and that for two reasons. First, it was said that the case of *Young* v. *Grote* (1) applied, and that the respondents were debarred from recovering by reason of their negligence in certifying a cheque which from its form was susceptible of alteration on account of the blank spaces left in it. In other words they set up the defence of estoppel by negligence. The majority of the Court of Appeal repelled this defence, and the Chief Justice in his judgment did not deal with this question. Secondly, it was insisted that the cheque having been paid on the 27th of January, and the amount paid not having been reclaimed until the morning of the 28th, there

(1) 4 Bing. 253.

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was such negligence in making the demand for repayment that the respondents were for that reason precluded from recovering.

The majority of the court overruled this defence also which was upheld, however, by the Chief Justice in his dissenting judgment in which he relied upon the authority of *Cocks* v. *Masterman* (1) and other cases following that authority.

Young v. *Grote* (2) was a case between a banker and his customer. The facts were that the latter having occasion to leave home had left some cheques signed by himself in blank for the purpose of his business with his wife which she was to hand over to the plaintiff's clerk for such amounts and on such occasions as she should in her discretion think fit. The clerk applied to her for a cheque which she gave him to be filled up for an amount and to be used for a purpose to be approved of by her. The clerk showed her the cheque filled up for the proper amount, but she omitted to notice that space was left which enabled the clerk, as he did, to commit a fraud similar to that perpetrated by Bauer in the present instance. The Court of Common Pleas held that the loss must fall upon the customer and not on the banker who had cashed the forged cheque.

It is not easy to ascertain from the report the exact *ratio decidendi* of the several judgments but in his judgment in the case of *Schofield* v. *Lord Londesborough* (3), Lord Watson seems to consider it attributable to one or the other or both of two principles, namely: first that one who signs a negotiable instrument in blank impliedly as regards third persons authorises it to be filled up for any amount for which the stamp is sufficient. The second ground was he thought that as between banker and customer it is

(1) 9 B. & C. 902.
(2) 4 Bing. 253.
(3) [1896] A. C. 514.

by virtue of some rule of law or some implied agreement the duty of the latter to take reasonable care that cheques are so drawn as to present no opportunity for frauds on the former. Lord Watson does not say whether these grounds or either of them are sound, but he considers them to be reasons for distinguishing the older case from *Schofield* v. *Lord Londesborough*—the case before the House of Lords—in which the acceptor of a bill had enabled the drawer feloniously to convert an acceptance for £500 into one for £3,500 by means of blank spaces left in the bill when he accepted. It was held that this did not meet the defence of forgery set up by the acceptor against a *bonâ fide* holder for value of the altered acceptance. This decision proceeded on principles which have been applied in a variety of cases, and which are familiar to all for as the Lord Chancellor says in *Schofield* v. *Lord Londesborough* (1):

> A man for instance does not lose his right to his property if he has unnecessarily exposed his goods or allowed his pocket handkerchief to hang out of his pocket, but could recover against a *bonâ fide* purchaser of any article so lost notwithstanding the fact that his conduct had to some extent assisted the thief. It is true that stolen goods sold in market overt could be retained by a *bonâ fide* purchaser for value notwithstanding that they had been previously stolen; but the same result would follow equally whether the owner had been careful or careless in the custody of his goods.

In other words it would seem that there is no duty obliging a man who is dealing with others to take precautions to prevent loss to them by the criminal acts of third persons, and the omission to do so does not in the absence of some special and exceptional relationship amount to negligence in law. This is the law as I understand the judgment laid down by the House of Lords in *Schofield* v. *Lord Londesborough*.

(1) Page 522.

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Then if this is so and we are I think bound by the authority of that case, can there be any distinction between the case of a certified cheque like the present and an acceptance? I can see none and I entirely agree with Mr. Justice Osler and Mr. Justice Moss in the reasons given in their judgments. I would also refer to the case of the *National Bank of Commerce* v. *The National Mechanics Banking Association* (1) in which the Court of Appeals of the State of New York in an able and well reasoned judgment reaches the same conclusion in the case of a certified cheque raised in amount under circumstances precisely similar to those before us. I may also refer to that case as assigning the true reason for the decision in *Mather* v. *Lord Maidstone* (2), namely, that one who pays an acceptance to which his name has been forged is estopped from recovering back the money upon the ground that he is bound to know his own signature.

As I have said the learned Chief Justice did not in his judgment deal with the present case in the aspect in which it has just been looked at, but founded his opinion on another point. That point was this—it was said that the respondents having paid the cheque on the 27th were too late to recall the payment when on the morning of the 28th they discovered the fraud and consequent mistake in payment since the appellants might have been prejudiced and their position altered by the delay. For this not only *Cocks* v. *Masterman* (3) was relied on but other cases also, the principal of which was a decision of Mathew J. in *London & River Plate Bank* v. *Bank of Liverpool* (4). In all these cases however it will be found that they were mistaken payments by parties behind whom were others secondarily liable, recourse against whom

(1) 55 N. Y. 211.
(2) 18 C. B. 273.
(3) 9 B. & C. 902.
(4) [1896] 1 Q. B. 11.

might have been lost by delay and the holder thus prejudiced. In some of them also the principle of *Mather* v. *Lord Maidstone* (1) was applicable. I deny that there is any abstract rule of law which requires that the money paid shall be demanded on the day of the erroneous payment without regard to any question of prejudice to the holder. Each case must depend on the facts. If however there is any such rule of law it must be confined to the case of acceptances.

In the present case it is impossible that the delay could in the least degree have caused detriment to the appellants. This point also arose in the case before cited in the New York Court of Appeals (2), and was there held to be no defence, and I am convinced it has been properly decided against the appellants in the present case.

The appeal must be dismissed with costs.

GWYNNE J. (dissenting.)—The appeal must, in my opinion, be decided upon a wholly different principle from that upon which either *Young* v. *Grote* (3), or *Schofield* v. *The Earl of Londesborough* (4), was decided. Neither of these cases has really any application in the present case. The only negligence which it is all necessary to refer to, is the negligence of the respondents causing injury to themselves alone in paying a cheque drawn upon them by a customer of which the appellant was the *bonâ fide* holder for value and which, under the circumstances, as asserted by the respondents in their action and as proved by them, they were under no obligation to pay but which they did pay in due course upon presentment, notwithstanding that they possessed, and they alone possessed, the fullest possible means, of which they did not avail themselves, of

(1) 18 C. B. 273.
(2) See at p. 216.
(3) 4 Bing. 253.
(4) [1896] A. C. 514.

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knowing that by reason of the fraud of their customer, the drawer of the cheque, they were under no obligation to pay it, and the only question is whether or not they can recover from the appellants the amount so paid to them.

It now appears by the evidence in the action that on the twenty-fifth of January, 1897, one Bauer, (whom we must regard as having then been a customer of the respondents, (his bankers), drew a cheque upon them for the sum of five dollars payable to "cash, or bearer." On the same day he procured the respondents to mark it "good" with their stamp impressed thereon containing the words "Bank of Hamilton, Toronto, entered, January 25th, 1897." He then altered the sum "five" to "five hundred" in such a manner as not to create any, the slightest, suspicion that any alteration of or tampering with the cheque had taken place. It was to all appearances a perfectly valid cheque for five hundred dollars, marked by the respondents as good for that amount.

So altered he transferred the cheque on the twenty-sixth of January, for value to the appellants, who caused it to be presented for payment to the respondents through the Toronto Clearing House and, on the twenty-seventh of January, the respondents paid the cheque and stamped it on that day with their stamp as "paid."

Doubtless they assumed that, having stamped the cheque upon the 25th of January, as "entered," they had funds to meet it, and that, therefore, they paid it upon presentment.

In this it appears the respondents were mistaken, but the mistake was one in respect to which they had in their possession the fullest possible means to avoid making. It was a mistake having its origin solely in their own default or negligence, for, if they had

referred to their own books, before paying the cheque, they would have seen, as they did see on the twenty-eighth of January, that the drawer of the cheque had no such sum to his credit in their hands.

It was thus that then, for the first time, the respondents discovered that the alteration from "five" to "five hundred" dollars had been made.

Having thus made discovery of the fact of forgery, the respondents demanded re-payment of the amount paid on the twenty-seventh of January, in excess of the "five" dollars for which amount they had marked the cheque before it was altered, the excess being claimed to be recoverable as money paid by mistake of fact. The mistake of fact, under the influence of which the cheque was paid, was, I think, as already observed, no other than a mistake in concluding from seeing the respondents' stamp of the 25th January on the cheque, that there were funds of the drawer's to pay it. That mistake led to the discovery, (on the twenty-eighth of January, when first they referred to the books), of the fact of alteration of the sum of five dollars for which the cheque had been marked to "five hundred." But the mistake under the influence of which the cheque had already been paid, at a time when no forgery was suspected or could have been discovered, save by a reference to the respondents' books, remained unaltered and if that mistake did consist, as I think it did, in ignorance of the fact that the respondents had no funds of the drawer's in their hands sufficient to pay the cheque, or in a mistaken belief that they had, then *Chambers* v. *Miller* (1) is an unquestioned authority that money paid by reason of such a mistake of fact cannot be recovered back.

Then it is to be borne in mind that the forged alteration was made by the drawer of the cheque him-

(1) 13 C. B. N. S. 125.

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self and it affected only the liability the respondents had incurred by affixing their stamp to it on the twenty-fifth of January. In all other respects the cheque was perfectly good and was as binding upon the drawer, in the interests of and for the benefit of the respondents, for the full amount of the five hundred dollars after they paid the cheque and received it from the appellants as it had been in the hands of the appellants in the interest of and for the benefit of the appellants until payment, so that it cannot be said that the respondents paid the money, which is now sought to be recovered back from the appellants without having received any value or consideration for such payment, as could have been said if the forgery committed had been of the drawer's signature. The language of Erle C. J. in the above case of *Chambers* v. *Miller* (1) is precisely applicable in the present case, as imputing the respondents' loss occasioned by having paid the cheque to their own fault and negligence disqualifying them from recovering back the amount paid, rather than to what the law regards as a mistake of fact entitling the respondents to recover back the money paid.

He there says at page 182:

> With regard to cheques, the well known coure of business is this: When a cheque is presented at the counter of a bank, the banker has authority on the part of his customer to pay the amount therein specified on his account. The money in the banker's hands is his own money. *On the presentment of the cheque it is for the banker to consider whether the state of the account between him and his customer will justify him in passing the property in the money* to the holder of the cheque.

The presentment of the cheque to the bank of the respondents through the clearing house gave to the respondents full opportunity of determining by reference to their books whether or not they should pay the cheque. Of this opportunity they did not avail

(1) 13 C. B. N. S. 125.

themselves. If they had availed themselves of the opportunity so given they would have discovered, as they did discover on the day after they had paid the cheque immediately upon referring to the books, that the cheque which had been marked on the 25th of January was for $5, and not for $500.

Surely it is to their own fault and negligence and not to any mistake of fact that, under the circumstances, the respondents' payment of the cheque must be imputed; it was so held by Lord Mansfield in *Price* v. *Neal* (1).

In *Cocks* v. *Masterman* (2), a bill purporting to be accepted by A., payable at his banker's, was paid by the bankers on presentment, they believing the acceptance to be in the handwriting of A., a client of theirs. The next day discovering that the acceptance was a forgery, they notified the holders to whom they had paid the amount of the bill, and brought an action to recover it back. It was contended upon two grounds that the plaintiffs could not recover. First, that the bankers should have satisfied themselves of the genuineness of the acceptance before paying, and; secondly (and upon this the court unanimously proceeded expressly guarding itself from being understood as giving any opinion upon the first point), that the holder of the bill is entitled to know on the day when it becomes due, whether it is a honoured or a dishonoured bill, and that, if he receive the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back.

Now, as to the first point taken in that case, in respect of which the court guarded itself from being understood to express an opinion, there cannot, I think, be entertained a doubt that where, as in the present case, a cheque having a bank's stamp thereon

(1) 3 Burr. 1354. (2) 9 B. & C. 902.

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certifying to its genuineness, which must be taken to be the purpose of affixing the stamp so as to give it transferable value, and the amount of the cheque has been altered, after being so stamped and before being used by the drawer, in such a perfectly deceptive manner that the alteration was incapable of detection by any means whatever save by reference to the bank's own books, by the use of which means the alteration immediately becomes plainly patent to the bank, and the bank without the use of such means, being satisfied apparently upon seeing its own stamp, pays the amount to a *bonâ fide* holder for value, such a payment must be regarded as in the bank's own wrong and must be attributed to its own default and neglect and cannot be recovered back upon a suggestion that the payment was made under the influence of what the law regards as a mistake of fact. And the language of the court as above extracted from *Chambers* v. *Miller* (1), is, I think, in support of this view.

The second ground in *Cocks* v. *Masterman* (2), upon which the court unanimously proceeded, is however precisely in point in the present case.

In *Mather* v. *Lord Maidstone* (3), the principle upon which *Cocks* v. *Masterman* (2) was decided, was in 1856 affirmed in the following language by Jervis C.J.

> As a general rule the holder of a bill of exchange has a right to know whether or not it has been duly honoured by the acceptor at maturity, and when the bill is presented, if the acceptor pays it, the money cannot be recovered *back if the acceptor has the means of satisfying himself of his liability to pay it, though it should turn out that the acceptance was a forgery.*

And by Cresswell J.:

> A man accepts a bill of exchange purporting to be drawn by one Thompson, and pays it, and if it afterwards turned out to be a forgery, he cannot afterwards be permitted to say that he paid the money under a mistake,

(1) 13 C. B. N. S. 125. (2) 9 B. & C. 902.
(3) 18 C. B. 295.

and in *The London and River Platte Bank* v. *The Bank of Liverpool* (1), *Cocks* v. *Masterman*, as approved and affirmed in *Mather* v. *Lord Maidstone*, is again recognised as having established

a clear unimpeachable rule which ought not to be tampered with.

The Court of Appeal of Toronto seems to have been of opinion that the respondents had a superior equity to the appellants which entitled them to recover back the money from the appellants.

In what does that superior equity consist?

No blame, default or negligence of any description in the transaction is attributable or attributed to the appellants. The alteration was so well made as to give no ground of suspicion, and the appellants could not by any means have discovered the forgery. They were holders for full value of the cheque as altered. On the other hand, the respondents had, and they alone had ample means of discovering the forgery by simple reference to their own books. Surely the default, omission or neglect to avail themselves of so ready a method in their possession to have detected the forgery of their own acceptance and so to protect themselves cannot be said to give to them *an equity* superior to the right of the innocent holder for value to retain the money paid to them by the respondents in satisfaction of a cheque which, upon such payment, the appellants transferred to the respondents, who became as entitled to recover the amount from the drawer, equally as the appellants themselves would have been if the respondents had not paid the cheque.

There is no case in the books to support the respondents' claim to recover back the money paid by them to the appellants, but, on the contrary, the judgment in their favour in the present action is in direct contra-

(1) [1896] 1 Q. B. 7.

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diction of a principle well established by the cases above referred to, all tampering with which is to be deprecated.

I am of opinion, therefore, that the appeal should be allowed with costs, and the action dismissed with costs.

SEDGEWICK J. concurred in the judgment of Mr. Justice Girouard.

GIROUARD J.—I do not see that we can decide this case otherwise than the learned judges of the two courts below have done, although I fear that the conclusion arrived at will be injurious to our commercial intercourse, not only at home, but also abroad, and more particularly in the neighbouring States of the American Union, where a different principle generally prevails.

I quite agree with them that there was no negligence on the part of the Bank of Hamilton in not discovering and giving notice of the raising of the cheque until the morning after it went through the Clearing House. In fact, according to the custom among bankers, the verification with the books of the bank is not made, and cannot be made, before that time. At all events, the Imperial Bank was not prejudiced by the delay.

But can we say as much about its conduct in accepting or marking the cheque in the incomplete form in which it was presented?

From the beginning of the argument I felt that *Young* v. *Grote* (1), which had been the standard authority for more than half a century, had been well decided and expressed the law of England; even as late as 1891, we find it quoted as a binding authority

(1) 4 Bing. 253.

by the House of Lords in *The Bank of England* v. *Vagliano* (2).

I can see however that a distinction should be made between that case and the present one, the former arising out of the relation of mandant and mandatory, which does not exist in that of the acceptor or certifyer and holder of a cheque. But is not negligence to affect the latter case as the former one? Is not the acceptor or certifyer under some obligation or duty to the public when dealing with an instrument transferable by mere delivery?

I never supposed that there is a duty on his part to guard against crime; that evidently concerns the lawmaker; but I certainly thought that he should not facilitate its commission by others and that, at least, he should be prudent, and that having occasioned damage by not filling the blanks which were the immediate cause of the fraud upon the holder in due course, he, and not the latter, ought to suffer. Negligence by the bank on which a cheque is drawn, is especially recognised by secs. 78, 79 and 81 of the Bills of Exchange Act, as an important element of responsibility to the holder in the negotiation of crossed cheques. Why not apply the same principle to the action of the bank negligently certifying a cheque, especially if we consider that there is no obligation on its part to accept or certify, but merely to pay. The principle of negligence seems to rule over all the operations of business men, whether under the common law the law merchant, or any other law. A decision holding the bank so acting responsible to the holder would be more in accord with the notions of right and wrong I have learned from the writings of that great jurist, Pothier, which led to the ruling in *Young* v. *Grote*, and also in a case still more in point decided

(2) [1891] A. C. 107.

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unanimously by the Court of Appeal of the Province of Quebec; I refer to *Dorwin* v. *Thomson* (1). In my humble opinion, that ruling is the mere application of the elementary principle that every person is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill. I have always been under the impression that this principle was held good in every country, in England as well as everywhere else, in commercial as well as in civil matters. But after much conflict of opinion, the House of Lords in *Schofield* v. *The Earl of Londesborough* (2), has held that it did not apply to a case where a drawer of a bill of exchange availed himself of spaces, which he had purposely left, to raise the amount of an acceptance from five hundred pounds to three thousand five hundred pounds, and that the acceptor, who had not filled the spaces, was not liable to a holder in due course. Rightly or wrongly, the highest tribunal of the Empire has overruled *Young* v. *Grote*, in so far as the general principle of negligence can be applied, because, observe their Lordships, it was founded upon the civil law and the authority of Pothier, which, they add, form no part of the mercantile law of England.

Already this decision has undergone an unusual amount of adverse criticism which will be found summarised in Am. & Eng. Encycl. of Law (2 ed.) vo. "Bills and Notes," page 332; La revue Legale, 1890, p. 436, and in a valuable book on the principles of Estoppel, just published by Mr. Ewart, K.C. of the Winnipeg Bar.

We are bound by the decision of the House of Lords, till set aside by an Act of the Canadian Parliament. I cannot distinguish this case from *Schofield* v. *Londesborough*, because in the latter case the instrument was

(1) 13 L. C. Jur. 262. (2) [1896] A. C. 514.

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a bill of exchange and not a cheque. The Bills of Exchange Act, 1890, sec. 72, declares that a cheque is a bill of exchange drawn on a bank, payable on demand.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *McCarthy, Osler, Hoskin & Creelman.*

JOHN HOUSTON AND THOMAS N. WARD (DEFENDANTS) ..... APPELLANTS;

AND

THE MERCHANTS BANK OF HALIFAX (PLAINTIFF) ..... RESPONDENT.

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*Mar. 28,29.

*May 21,

Banks and banking—Advances—Security—Bank Act, sec. 74—Chattel Mortgage.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

H. held a chattel mortgage on a sawmill belonging to G., with the machinery and lumber therein, and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no priority over subsequent incumbrancers. Two months later G. gave H. a second mogtgage on said property to secure a note for $794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes. G. being unable to purchase the logs asked the Merchants Bank for an advance. The bank, knowing G. to be financially embarassed, refused the advances to him but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of $3,500 G. assigned the contractor's order to the book-

*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, and Girouard JJ. (Mr. Justice King was present at the argument but died before judgment was delivered.)

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keeper and agreed to cut the logs at a price fixed and deliver them to the bookkeeper at the mill site. The latter then assigned to the bank all monies to accrue in respect to the contract, which assignment was agreed to by the contractor, and a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. This purported to be done under sec. 74 of The Bank Act. Two or three days later G. made an assignment for benefit of his creditors, previous to which, however, the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage.

Held, affirming the judgment of the Supreme Court of British Columbia (7 B. C. Rep. 465), that no property in the logs assigned to the bank had passed to G., and H. having no higher right than his mortgagor, could not claim them under his mortgage.

Shortly before G.'s assignment for benefit of his creditors his bookkeeper transferred to the bank a chattel mortgage given him by G. to secure payment of $800. The judgment appealed from ordered the assignee in bankruptcy to pay the bank the balance due on said mortgage.

Held, reversing said judgment, that the assignee had been guilty of no acts of conversion and was not liable to repay this money. The mortgage was not given to secure advances and did not give the bank a first lien on the property. The bank was in the same position as if it had received the mortgage directly from G. when he was notoriously insolvent.

APPEAL from a decision of the Supreme Court of British Columbia (1) reversing the judgment at the trial in favour of the defendant.

The following statement of facts is taken from the judgment of Drake J. on appeal:

"The facts of this case are somewhat involved. Gray "was a sawmill owner at Nelson, B.C., and being "involved in financial difficulties, on the 25th of April, "1898, he made a bill of sale by way of mortgage to "Houston of his sawmill and machinery and all lumber "therein, and all lumber dressed or undressed which "might at any time be brought on the mill premises.

(1) 7 B. C. Rep. 465.

" This bill of sale was apparently not duly registered,
" as the affidavit made in support of it was not sworn
" until the 26th of September, 1898, and is therefore
" not binding on subsequent incumbrancers. The
" defendant undertook at the trial to furnish certified
" copies of his bills of sale, but hitherto has not done
" so. We must therefore take the bills of sale as they
" appear in the appeal book to be correct.

" On the 28th of June, 1898, Gray gave to Houston
" a further bill of sale by way of mortgage to secure a
" note of $794.22 payable on demand with ten per cent
" interest. This bill of sale was apparently regular.
" On the 11th of August, 1898, Lawford assigned to the
" plaintiffs a chattel mortgage given to him by Gray
" on the mill and machinery to secure $800. Gray
" also made an assignment to Ward for the benefit of
" his creditors of all his property, and Ward, according
" to his evidence taken 27th January, 1899, contested
" the plaintiff's right to the machinery as being subject
" to the security in favour of Gray's creditors. Some
" time about the 1st of August, W. H. Armstrong, a
" contractor, applie to Gray to be supplied with a
" large quantity of lumber for bridge building. Gray
" had no means of buying the necessary logs, and
" applied to the plaintiffs for an advance. The plain-
" tiffs, aware of Gray's position, refused, but the
" manager, Mr. Kydd, said if some person whom
" they could trust would undertake the contract they
" would advance the necessary funds to him to buy
" the logs, and Mr. L. C. Lawford, Gray's bookkeeper,
" with the approval of the plaintiffs, agreed to buy
" the logs, and the plaintiffs agreed to advance him
" the necessary funds for the purpose in order to
" carry out the arrangement. On the 4th of August
" Gray assigned the order of Armstrong to Lawford,
" and agreed to cut the lumber at $1.50 per M. and

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" deliver the same to Lawford at the mill site. This " agreement purports to be made in consideration of " an advance of $3,500 to Gray.

" On 6th August Lawford assigned to the plaintiffs " all moneys to accrue due to them from Armstrong " in respect of the contract which Armstrong accepted. " On the 8th of August L. C. Lawford assigned to the " bank booms 48, 49 and 50, aggregating 545,000 feet, " which were then in process of cutting, having " previously assigned boom 47. This assignment pur- " ported to be made under section 74 of the Bank " Act, 1890. On the 30th of August boom 49 was " assigned to the bank. On the 6th of September " boom 50 was also assigned, and on the 20th of " September a further deed confirming the former " assignments, and including boom 47, was made " by Lawford to the bank. These various documents " seem to have been executed by way of precaution " to make the bank secure in case any mistake had " occurred in the original transfers under the Bank " Act. All moneys necessary to pay the expenses " connected with the booms were advanced by th " plaintiffs to Lawford, and disbursed by him, and " Gray gave Lawford promissory notes for the sums " he had thus advanced, and these notes were indorsed " to the bank.

" These booms arrived at the mill, and when there " Gray appears to have mixed the logs with other logs " in his boom, and the greater part were converted " into lumber, and immediately Houston, as alleged " mortgagee, claimed them under his chattel mort- " gage."

Taylor K.C. for the appellant Houston.

Garrow K.C. for the appellant Ward.

Sir Charles Hibbard Tupper K.C. for the respondent.

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The Chief Justice.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—This case, for the facts of which I refer to the judgments in the courts below, involves two separate appeals, one by Houston who claims a lien on the logs in question having priority over that of the respondent, and the other by Ward, the assignee, for the benefit of creditors of Gray who insists that he is not liable to the bank for the money which the judgment has directed him to pay.

As regards Houston's appeal there can, in my mind, be no doubt but that the proof established conclusively that the money advanced by Mr. Kydd, the agent of the bank, was so advanced to Lawford as the agent of Gray to enable the latter to purchase the logs required to carry out the Armstrong contract, and that the logs seized by Houston on the 16th of September included the logs purchased for that purpose. The legal consequence is that under the 74th and other sections of the Banking Act the bank had a first lien upon the logs so purchased with their money which they in good faith lent for the purpose to which it was thus applied and that Houston is bound to account for the logs he so possessed himself of.

As to Ward, it does not appear to us that he was guilty of any conversion or other wrongful act as regards the logs. The appeal by him should therefore be allowed and the action dismissed against him except in so far as it is considered to be in the nature of a mortgage action for the purpose of enforcing a security.

The first clause of the judgment which directs Ward to pay to the respondents $530 being the amount secured by a chattel mortgage of the 15th of August, 1898, Gray to Lawford, assigned to the bank on the 16th of September, i manifestly wrong. The bank is

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not entitled to any security on those chattels giving them priority under the Bankers Act. It was not given to secure money advanced to buy the goods. It is conceded that Houston has priority over these tools and plant, Lawford having paid merely the vendors lien of A. C. Shaw & Co. did so presumably with the money of Gray and was entitled to no security from Gray, and the bank as assignee of Lawford can stand in no better position as against the creditors of Gray represented by Ward his assignee.

It is therefore just as if Gray, when he was notoriously insolvent to the knowledge of the bank and on the same day on which he executed an assignment for the benefit of his creditors, had made a direct mortgage to the bank; manifestly such a mortgage cannot be enforced.

Houston's appeal is dismissed with costs. Ward is entitled to the costs of his appeal here and also to all costs in the court below except (as regards the costs below) in so far as he is to be regarded as the representative of the mortgagor in an action to realize a mortgage security, and as to these latter costs, they are to be reserved until the final decree.

Appeal of Houston dismissed with costs. Appeal of Ward allowed with costs.

Solicitors for the appellant Houston: *Hanington & Taylor.*

Solicitors for the appellant Ward: *Elliott & Leanie.*

Solicitors for the respondent: *Macdonald & Johnson.*

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT).... } APPELLANT;

AND

JESSIE E. SMITH (PLAINTIFF).....RESPONDENT.

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*May 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Railway company—Injury to passengers in sleeping berth.

S. an elderly lady, was travelling on a train of the Canadian Pacific Railway Company from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding with her back to the engine she tried to turn around in the berth, and the car going around a curve at the time she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages it was not shown that the speed of the train was excessive or that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the verdict at the trial in favour of the defendant company.

The material facts are sufficiently stated in the above head-note. The trial judge withdrew the case from the jury and ordered judgment to be entered for the defendant. The court *en banc* set aside this judgment and granted the plaintiff a new trial

Nesbitt K.C. and *Harris K.C.* for the appellant.

Drysdale K.C. for the respondent.

The judgment of the court was delivered by:

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

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THE CHIEF JUSTICE (oral).—It is clear beyond a doubt, though I say it with all respect, that there was no proof of negligence which would have warranted the Chief Justice, who presided, in submitting the case to the jury. It would have been exceedingly wrong if he had done so, and his power of dealing with a case in the way he did when there is no such proof depends on rules which are now quite elementary.

I find in the old reports that in cases of coach accidents in England it was customary to leave the case to the jury as a whole, but that stage of the law has long since passed away. The principle laid down by the House of Lords, in some quite recent cases, as that upon which the courts ought to act, is that it is the duty of the judge to inquire for himself as to whether or not there is any evidence of negligence for the jury. If there is none, he should dismiss the action; if there is any evidence he is to call upon the defendant to disprove it, and if he fails to do so the plaintiff must have judgment.

In the present case the question of negligence must depend either upon negligent construction of the permanent way or negligent running of the train. There has been no proof made of either. In order to prove that the railway was badly constructed the plaintiff would have required a great mass of expert evidence, in order to admit which it would have been necessary to lay the foundation by an inquiry, of vast scope and involving very heavy expense, as to the construction of the whole of the line from Montreal to Toronto, including the necessity of curves and so forth. At the time of the accident it appears to have been probable that the train might have been going round a curve. It is in the very nature of things that all railways must have some curves, and we must presume that the curve in this case was necessary and proper for

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the construction of the road and also that it had been properly constructed.

Then again, as my brother Taschereau remarked during the argument a high rate of speed is not necessarily evidence of negligence, and, moreover, there is no proof that there was an irregular or excessive rate of speed. Beyond this allegation or inference there has been no attempt made to show that there was any negligence. This elderly maiden lady, journeying upon a most laudable mission, appears to have had no previous experience of travelling by railway and using berths in sleeping cars, and she met with the accident. Her berth appears to have been constructed in the usual manner, with all customary appliances for the comfort and safety of passengers, and an electric button to ring a bell for the porter in case of any assistance being required, of which, however, she did not avail herself. She appears to have been in an extraordinary posture at the time the accident occurred, trying to change her position in the berth, when the train probably went round a curve at a rate of speed not shown to have been improper. The accident must be attributed to her own act and inexperience.

To some extent it would appear that the accident was on account of a change made in the location of the plaintiff's berth from a lower to an upper one, through the train of the Intercolonial Railway failing to make the proper connection at Montreal, but this is not to be attributed to the Canadian Pacific Railway Company.

We must allow the appeal and dismiss the action with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Harris, Henry & Cahan.*

Solicitors for the respondent: *Drysdale & McInnis.*

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*May 21, 22.

HUBERT CHARLES CADIEUX *et al.* (DEFENDANTS)..... } APPELLANTS;

AND

LOUIS J. O. BEAUCHEMIN *et al.* (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Copyright—Infringement—Evidence—Textual copy.

In an action for infringement of copyright in a dictionary the unrebutted evidence shewed that the publication complained of treated of almost all its subjects in the exact words used in the dictionary first published and repeated a great number of errors that occurred in the plaintiff's work.

Held, affirming the judgment appealed from, that the evidence made out a *primâ facie* case of piracy against the defendants which justified the conclusion that they had infringed the copyright.

APPEAL from the judgment of the Court of Queen's Bench, appeal side (1), reversing the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

The facts established by the evidence sufficiently appear from the head-note and judgments reported The judgment appealed from reversed the trial court judgment (H. T. Taschereau J.) which dismissed the action with costs, ordered the defendants immediately to cease the publication and sale of the work complained of, to render an account of the total edition printed and published and of sales made, and directed that the

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

(1) Q. R. 10 Q. B. 255.

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record should be returned to the court of first instance for taking accounts and adjudication as to damages and the other conclusions of plaintiffs' *demande*, the defendants being also ordered to pay the costs of the appeal.

Fitzpatrick K.C. (Solicitor General for Canada) and *Aimé Geoffrion* for the appellants.

Mignault K.C. for the respondents was not called upon.

THE CHIEF JUSTICE (Oral).—We do not consider it necessary to call upon counsel for the respondents in this case.

I have read all the evidence and listened carefully to the very able arguments by counsel for the appellants, but I must say that I entirely agree with every word said by the Chief Justice, Sir Alexandre Lacoste in the court below, and have not been in any way convinced that the judgment of the Court of Queen's Bench was wrong. I think also with my brother Gwynne, as he shortly remarked, that the repetition of the great number of errors in the work of the appellants could not possibly have been accidental or have happened otherwise than by making a textual copy of the respondents' supplement. It appears as if the book published by the appellants had not been made with the pen, but with scissors and paste pot. I have read the notes of Mr. Justice Taschereau and Mr. Justice White in this case. I think the former goes too far in his judgment in the Superior Court in finding excuses for the defendants. Mr. Martin, who prepared the manuscript of the work complained of ought to have been called. No doubt the manuscript was destroyed or lost in the process of printing and the printers cannot be expected to have any recollection

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The Chief Justice.

as to how it was made, whether written by hand or simply with printed sheets pasted in. Mr. Martin was possibly the only person who could have given the information on this point which the defendants ought to have been prepared to give. It was clearly upon the defendants to shew what he did and how it was done in order to rebut the *primâ facie* case against them made out by the plaintiffs' evidence of piracy. I would add that the case was most ably argurd by Mr. Geoffrion on behalf of the appellants.

The appeal should be dismissed with costs.

TASCHEREAU, GWYNNE and SEDGEWICK JJ. concurred in the judgment dismissing the appeal with costs.

GIROUARD J. (Oral.)—I concur in the judgment dismissing the appeal for the reasons just stated by His Lordship the Chief Justice but I wish to add that I consider it was not possible that the supplement complained of could have been compiled as admitted, in eight or nine months, unless by borrowing largely from the publication of the respondents.

Appeal dismissed with costs.

Solicitors for the appellants: *Geoffrion, Geoffrion, Roy & Cusson.*

Solicitor for the respondent: *P. B. Mignault.*

THE WESTERN ASSURANCE COMPANY (DEFENDANT)..... } APPELLANT.

AND

THOMAS A. TEMPLE (PLAINTIFF).....RESPONDENT.

1901

*May 17.
*June 5.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Insurance against fire—Condition in policy—Interest of insured—Mortgagor as owner—Further insurance—Estoppel—Pleading.

By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property * * or if the interest of the assured in the property whether as owner, trustee * * mortgagee, lessee or otherwise is not truly stated."

Held, that a mortgagor was sole and unconditional owner within the terms o f said condition.

By another condition the policy would be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance but before being notified of the acceptance of his application the premises were destroyed by fire.

Held, that there was no breach of said condition. *Commercial Union Assurance Co.* v. *Temple*, (29 Can. S. C. R. 206) followed.

In one count of his declaration plaintiff admitted a breach of said condition but alleged that it was waived. On the trial counsel agreed that the facts proved in the case against the Commercial Union should be taken as proved in the present case. These facts showed, as held by the decision in the previous case, that there was no breach.

Held, that the agreement at the trial prevented the appellant company from claiming that respondent was estopped from denying that there had been a violation of the condition.

APPEAL from a decision of the Supreme Court of New Brunswick sustaining the verdict at the trial in favour of the plaintiff.

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

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The questions to be decided on the appeal are sufficiently stated in the above head note.

Leighton McCarthy for the appellant. The condition as to other insurance is not the same as that in the Commercial Union case. In this policy other insurance even if invalid will avoid the policy.

Plaintiff having admitted in his declaration and at the trial that he had effected other insurance without consent is estopped from denying a breach of the condition. Ewart on Estoppel p. 187.

There was a mortgage on the property when the policy issued and plaintiff thereby ceased to be owner and his interest not being disclosed the policy was void. See *Citizens Insurance Co. of Canada* v. *Salterio* (1); *Torrop* v. *Imperial Fire Insurance Co.* (2); *Westchester Fire Insurance Co* v. *Weaver* (3).

(Respondent's counsel were only required to argue the last point.)

Pugsley K.C., Atty. Gen. of New Brunswick, for the respondent. A mortgagor is always regarded as the owner of the mortgaged property. In *North British and Mercantile Ins. Co.* v. *McLellan* (4) the Chief Justice said "a mortgagor is deemed the owner of the property mortgaged both in a popular and a technical sense."

The insurers who must state the nature of the interest insured are named in the policy and the mortgagor is not one.

Every decision of the courts in the United States and Canada dealing with this condition has held the mortgagor to be the owner. See *Dolliver* v. *St. Joseph Fire & Marine Ins. Co.* (5); *Friezen* v. *Allemania Fire Insurance Co.* (6); *Insurance Co.* v. *Haven* (7).

(1) 23 Can. S. C. R. 155.
(2) 26 Can. S. C. R. 585.
(3) 70 Md. 536.
(4) 21 Can. S. C. R. 288.
(5) 128 Mass. 315.
(6) 30 Fed. Rep. 352.
(7) 95 U. S. R. 242.

Masters K.C. follows for respondent. The wording of the condition shows that the term owner was intended to include a mortgagor, and in some policies the mortgagor is referred to as owner. *Hopkins* v. *Provincial Insurance Co.* (1).

In *Sinclair* v. *Canadian Mutual Fire Insurance Co.* (2) a mortgagor was held to be "absolute owner" of the mortgaged property.

A mortgagee has a conditional interest, but not a mortgagor.

The judgment of the court was delivered by:

THE CHIEF JUSTICE —We are all of opinion that the respondent was the sole and unconditional owner of the property within the meaning of the conditions of the policy, and that the interest of the assured was not untruly stated by him. *The North British and Mercantile Ins. Co.* v. *McLellan* (3), and *Dolliver* v *St. Joseph Fire & Marine Insurance Co.* (4), are authorities in point.

The other objections relied on in the appellants' factum, viz., that the assurance in the Quebec Assurance Co invalidated the policy, was, we think, rightly considered by the Supreme Court of New Brunswick to have been decided adversely to the contention of the appellant in the former case of *Temple* v. *The Commercial Union Assurance Co.* (5) by which we are bound.

The question of estoppel not referred to in the factum, but raised for the first time at the argument here, is not open to the appellant under the agreement come to at the trial that the facts proved in *Temple* v. *The Commercial Union Assurance Co.* (5) should be taken as proved in this case, and that upon this evidence with any additional facts which either party might prove, the case should be decided. This agreement entirely

(1) 18 U. C. C. P. 74.
(2) 40 U. C. Q. B. 206.
(3) 21 Can. S. C. R. 288.
(4) 128 Mass. 315.
(5) 29 Can. S. C. R. 206.

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precludes the highly technical objection of an estoppel on the pleadings.

Concurring as we do in the reasons given in the judgment of the court appealed from, it is unnecessary to write more fully.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Belyea.*

Solicitor for the respondent: *Wm. Pugsley.*

1900

*May 17.
*June 12.

THE STANDARD LIFE ASSURANCE COMPANY *v.* TRUDEAU, *et al.*

Life insurance—Agency—Art. 610 C. C.—Unworthy beneficiary—Murder of assured—Exclusion from succession.

APPEAL from the judgment of the Court of Queen's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was dismissed with costs.

The action in which the judgment appealed from was rendered was united for the purposes of trial with an action in which Marie Trudeau, one of the respondents, was plaintiff against the appellant to recover her share of the amount secured by the policies of life insurance in question (2), and in which an appeal sought to the Supreme Court of Canada, was quashed (3), on the ground that the amount in controversy was insufficient to give jurisdiction to entertain the appeal.

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

(1) Q R. 9 Q. B. 499. (2) Q. R. 16 S. C. 539.
(3) 30 Can. S. C. R. 308.

1900

THE STANDARD LIFE ASSURANCE COMPANY. v. TRUDEAU.

The present action was against the mother and collateral representatives of the deceased for the cancellation of two policies of insurance on the life of deceased payable to his wife should she survive him, otherwise to his legal representatives. Assured was murdered by his wife and her lover, who were both convicted and executed for the murder. Deceased left a will by which he bequeathed all his property to his wife; he left no children. By a judgment of the Superior Court, District of Terrebonne, the wife was deprived of all of her rights as a beneficiary under the policies and will, thus leaving the defendants sole beneficiaries, and they claimed the amount assured under the policies The company charged the defendants with endeavouring to take advantage of fraud and felony committed by the murderess of deceased.

The judgment appealed from held that as there was no evidence that, at the date of the policies, assured was aware of the evil intentions of his wife, nor that she was acting as his agent in effecting the assurances, the fact that she might then have had the intention to murder and did subsequently murder her husband would not have the effect of discharging the insurer from liability upon the policies towards the legal representatives of the assured.

After hearing counsel for the parties, the court reserved judgment, and on a subsequent day dismissed the appeal for the reasons stated by Mr. Justice Würtele in the court below.

Appeal dismissed with costs.

Macmaster Q.C. and *Falconer* for the appellant.

Fitzpatrick Q.C. and *Demers* for the respondents.

1900

*Oct. 24.

*Dec. 7.

THE FEDERATION BRAND SALMON CANNING COMPANY *v.* SHORT.

Patent of invention—Combination of known devices—Novelty—New result—Infringement.

APPEAL from the judgment of the Supreme Court of British Columbia (1), reversing the judgment at the trial by which the plaintiff's action was dismissed with costs.

The action was for damages and an injunction for alleged violation of the plaintiff's patent of invention for soldering oval cans by causing them to revolve with regularity and to be evenly dipped in a bed of solder. The defence was that defendant was making use of another patent with the consent and license of the patentee and that the machine so used possessed advantages superior to the plaintiff's patent. The judgment appealed from reversed the decision of Drake J. at the trial in favour of the defendant, granted the injunction and condemned the defendant for nominal damages.

After hearing counsel for the parties the court reserved judgment and on a subsequent day dismissed the appeal with costs.

Appeal dismissed with costs.

C. Wilson Q.C. for the appellant.

Ridout for the respondent.

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

(1) 7 B. C. Rep. 197.

MESSENGER *v.* THE TOWN OF BRIDGETOWN.

1901

Municipal corporation—Negligence—Obstruction on highway.

*Feb. 26, 27.
*Mar. 18.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *en banc* (1), affirming the judgment of McDonald C.J. (2), dismissing the plaintiff's action with costs.

The action was for damages for injuries caused through alleged negligence of the corporation in permitting a mound of earth about eight inches in height to remain at the filling over a trench dug to lay a pipe across a public street. In passing over the obstruction during the night plaintiff's horse stumbled and fell throwing the plaintiff from the vehicle whereby the injuries were sustained. The court below held that there had been no negligence on the part of the defendant, that the obstruction was not serious or unusual, and that the accident occurred through want of proper care by the plaintiff in approaching, in the darkness, the dangerous place which he had previously seen in the same condition by daylight.

After hearing counsel for the parties the court reserved judgment, and on a subsequent day dismissed the appeal with costs.

Appeal dismissed with costs.

Roscoe K.C. for the appellant.

J. J. Ritchie K.C. for the respondent.

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

(1) 33 N. S. Rep. 291. (2) 33 N. S. Rep. 292.

1901

THE TOWN OF TRURO *v.* ARCHIBALD.

*Feb. 22, 25.
*May 13.

Municipal drains—Continuing trespass—Limitation of actions ex delictu—58 V. c. 4, s. 295 (N. S.)—Verdict.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *en banc* (1), reversing the judgment entered for the defendant on findings of the jury at the trial and maintaining the plaintiff's action with costs.

The plaintiff's action was for trespass by the municipal corporation constructing and maintaining a drain through his land. The jury found that the drain had been constructed in 1886 "by virtue of the Streets Commissioner's power of office." The plaintiff, although aware of the existence of the drain at the time, made no objection till 1896, when the land caved in. The court below held that the jury had found that the defendant had constructed the drain by its agent, and that the trespass, being a continuing one, was not barred by the limitation provided in the "Towns' Incorporation Act of 1895" for actions *ex delictu* against towns.

After hearing counsel for the parties, the court reserved judgment, and on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

Borden K.C. and *Lovett* for the appellant.

Mellish for the respondent.

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

(Mr. Justice King was present at the argument but died before judgment was delivered.)

(1) 33 N. S. Rep. 401.

WILSON *et al. v.* THE WINDSOR FOUNDRY CO.

1901

*Feb. 27,28.
*May 13.

Contract—Sale of goods—Evidence to vary written instrument—Admission of evidence.

APPEAL from a judgment of the Supreme Court of Nova Scotia *en banc* (1), affirming the judgment of Townshend J. at the trial (2), which dismissed the plaintiffs' action with costs.

The plaintiffs (appellants), carried on business at Montreal under the style of "A. R. Williams & Co.," and brought the action against the respondent for the price of an engine, ordered by respondents in writing, and other machinery supplied in connection with repairs to the foundry, amounting in all, according to the amended statement of claim to $495.91 The order was given through the plaintiffs' agent W. The principal defence to the action was that the company supposed and was led to believe that they were dealing with a company carrying on business in Toronto as "The A. R. Williams Machinery Company (Limited)," with which it had previous dealings, and which, at the time, had in its possession machinery belonging to the defendant of the value of $780 which it was agreed with W. should be accepted in payment for the machinery ordered. The trial judge found that the business carried on in Montreal was distinct from that carried on in Toronto, but that at the time the order was given defendant believed it was contracting with the Toronto company, and that there were surrounding circum-

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

(Mr. Justice King was present at the argument but died before judgment was delivered)

(1) 33 N. S. Rep. 21.

(2) 33 N. S. Rep. 22.

1901

WILSON v. THE WINDSOR FOUNDRY COMPANY.

stances to lead to the belief that the business carried on in Montreal and Toronto were one and the same. He held that the plaintiffs were bound by the bargain made with W., and, on the ground that it was not inconsistent with the written agreement to prove that payment was to be made otherwise than in cash, he received evidence of the agreement relied on by the defendant.

After hearing counsel for the parties the court reserved judgment, and on a subsequent day dismissed the appeal for the reasons given in the court below by the Chief Justice of Nova Scotia and by Townshend J. in the trial court. Gwynne J. dissented from the judgment rendered by the majority of the court and was of opinion that the appeal should be allowed with costs and the plaintiffs' action maintained.

Appeal dismissed with costs.

Russell K.C. for the appellants.

Roscoe K.C. for the respondent

In re PATRICK WHITE,

1901

ON APPLICATION IN CHAMBERS FOR A WRIT OF HABEAS CORPUS.

*May 17.

Practice—Habeas corpus—Binding effect of judgment in provincial court.

An application for a writ of *habeas corpus* was referred by the judge to the Supreme Court of the province and, after hearing, the application was refused. On application subsequently made to a judge of the Supreme Court of Canada, in chambers;

Held, that under the circumstances it would be improper to interfere with the decision of the provincial court.

APPLICATION to Sedgewick J., in chambers, for a writ of *habeas corpus* to inquire into the cause of commitment of the petitioner on a conviction by the Stipendiary Magistrate of the City of Halifax, N.S.

The circumstances under which the application was made are stated in the judgment reported.

Haydon for the application.

Newcombe K.C. contra.

After hearing the parties the following judgment was pronounced by:

SEDGEWICK J.—The applicant is confined in a Nova Scotia gaol by virtue of a conviction of the Stipendiary Magistrate of the City of Halifax for stealing certain goods "in or from" a warehouse belonging to the Intercolonial Railway. He first applied to the Chief Justice of his province for a writ of *habeas corpus* which was refused. Then he applied to Graham J. who referred the matter to the Supreme Court. After argument and due consideration his application was again refused, two judges dissenting. No appeal was

*PRESENT:—His Lordship Mr. Justice Sedgewick, (in Chambers.)

1901

In re WHITE.

Sedgewick J.

taken from such judgment and he now renews his application to me, a judge of the Supreme Court of Canada, under section 32 of the Supreme and Exchequer Courts Act.

That section may give me all the power which the common and statute law gives to judges of superior courts in matters of *habeas corpus*, but it does not constitute me a court of appeal with jurisdiction to void or reverse judgments of the Supreme Court of Nova Scotia. If I have in the premises equal and co-ordinate power with a judge of that court, my power most certainly does not extend further. The suggestion is almost impertinent, but were either of the two judges of the provincial court who until now have had no part in the matter, to grant the writ and, in spite of the judgment of the Supreme Court, and in vindication and assertion as well of his autonomy as of his possibly superior and conceivably infallible knowledge of law, to release the prisoner, his action, violating elementary principles as to legal authority and precedent, would be open to not undeserved censure. In the case supposed he would unhesitatingly and without question accept as law the judgment of his court. And what he should and would do, I must also do.

Even if I thought the imprisonment illegal, (which I do not), I would not, and under the circumstances above stated, I cannot interfere.

The application is refused.

Application refused.

THE DOMINION COUNCIL OF ROYAL TEMPLARS OF TEMPERANCE (DEFENDANT) ..... APPELLANT;

1901
*Oct. 1.

AND

JOSEPH HARGROVE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Special leave—60 & 61 V. c. 34, s. 1 (e).

Special leave to appeal from a judgment of the Court of Appeal for Ontario under 60 & 61 Vict. ch. 34, sec. 1 (e) will not be granted where the questions involved are not of public importance and the judgment of the Court of Appeal appears to be well founded.

MOTION for special leave to appeal from a judgment of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court in favour of the plaintiff.

The plaintiff was a member of the Order of Royal Templars of Temperance and held a benefit certificate which entitled him on becoming seventy years old, or being totally disabled, to receive a sum based on the membership of the Order provided he had fulfilled the conditions of his membership. In an action to recover the amounts due under this certificate the defence was that plaintiff had incorrectly stated his age in applying for admission to the order, and that he had not observed certain conditions which, however, were not set out nor referred to in the certificate. The plaintiff succeeded in all the courts below and the amount recovered being less than $1,000 defendant

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

(1) 2 Ont. L. R. 79, 126.

1901

THE ROYAL TEMPLARS OF TEMPERANCE v. HARGROVE.

applied to the Supreme Court for special leave to appeal from the final judgment.

Hogg K.C. for the motion.

Sinclair contra.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (Oral).—We must refuse this application. The case cannot be distinguished from *Fisher* v. *Fisher* (1) which we must follow. Even if we were not bound by that decision the appeal should still be refused. It raises no question of public importance and the judgment appealed from appears to be sound, two principles always considered by the Judicial Committee of the Privy Council as grounds for refusing an application for leave to appeal.

Motion refused with costs.

Solicitors for the appellant: *Gallagher & Bull.*

Solicitors for the respondent: *Washington & Beasler.*

(1) 28 Can. S. C. R. 494.

HELEN M. C. KAULBACH .....APPELLANT;

AND

FRANCIS H. W. ARCHBOLD AND JAMES R. LITHGOOD, EXECUTORS ..... RESPONDENTS.

1901

*May 7, 8, 13, 14.

*Oct. 29.

In re WILL OF EDWARD P. ARCHBOLD.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Capacity of testator—Undue influence.

A codicil to a will executed shortly before the testator's death, increasing the provision made by a former codicil for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece.

Held, reversing the judgment of the Supreme Court of Nova Scotia, Taschereau and Sedgewick JJ. dissenting, that as the testator was shown to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece even if it had been proved that she urged him to make better provision for her than he had previously done such would not have amounted to undue influence.

Held, also, following *Perera* v. *Perera* ([1901] A. C. 354) that even if there was ground for saying that the testator was not at the time of execution capable of making a will if he were when he gave the instructions the codicil would still have been valid.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the ruling of the Probate Court Judge who refused to admit to probate a second codicil to the will of Edward P. Archbold.

The testator, E. P. Archbold, died on June 29th, 1898, aged 83 years. By his will he left $600 a year to the appellant which was increased to $800 by a codicil not attacked in these proceedings. A second

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

1901

KAULBACH v. ARCHBOLD.

In re ARCHBOLD.

codicil, increasing the annuity to $1,000 and bearing date June 16th, 1898, was refused probate, the probate Judge holding that the appellant had not satisfied the conscience of the court that the testator was capable of making a will at that date and that it expressed his last will.

The executors impeached the last codicil on the grounds that the testator was too infirm and feeble in mind to administer his affairs; that the codicil was made at the instigation and under the influence of the appellant; and that it was prepared and executed during the absence of the residuary legatee, testator's only son, and secretly, which were suspicious circumstances not explained away by the latter. The Supreme Court of Nova Scotia, the Chief Justice dissenting, affirmed the ruling of the Probate Judge in refusing probate of this codicil.

Newcombe K.C. for the appellant. Suspicions entertained by the court must be "pregnant suspicions" in order to justify rejection; *Raworth* v. *Marriott* (1); *Goodacre* v. *Smith* (2). The testator's instructions were sufficient; it is not necessary to show that the codicil was read over by him before he signed it; *Raworth* v. *Marriott* (1); *Goodacre* v. *Smith* (2); *Parker* v. *Felgate* (3). As to the law respecting undue influence we refer to *Adams* v. *McBeath* (4); *Hall* v. *Hall* (5); *Beamish* v. *Beamish* (6); *Wingrove* v. *Wingrove* (7); *Boyse* v. *Rossborough* (8); *Parfitt* v. *Lawless* (9). The judge in first instance admitted improper evidence on the part of the executors, and improperly excluded evidence favourable to appellant, *Crowninshield* v.

(1) 1 Myl. & K. 643.
(2) L. R. 1 P. & D. 359.
(3) 8 P. D. 171.
(4) 27 Can. S. C. R. 13.
(5) L. R. 1 P. & D. 481.
(6) [1894] 1 Ir. 7.
(7) 11 P. D. 81.
(8) 6 H. L. Cas. 2.
(9) L. R. 2 P. & D. 462.

Crowninshield (1). We also rely upon *Aitkin* v. *McMeckan* (2); *Re Stulz* (3).

Drysdale K.C. for the respondents. The question involved in this appeal is one of fact, passed upon by the trial court and the Court of Appeal, and ought not to be reversed. *City of Montreal* v. *Cadieux* (4); *Senesac* v. *Central Vermont Railway Co.* (5) The concurrent findings on questions of fact in the courts below should not be interfered with upon appeal.

The second codicil was prepared by appellant, who takes a large benefit under its terms, under circumstances which raise the suspicion of the court; it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the court that the will was the voluntary act of the testator, and that he knew and approved the contents of the instrument. *Tyrrell* v. *Painton* (6); *Fulton* v. *Andrew* (7); *Barry* v. *Butlin* (8); *Ashwell* v. *Lomi* (9); *Baker* v. *Batt* (10); *Parker* v. *Duncan* (11); *Brown* v. *Fisher* (12); *Parfitt* v. *Lawless* (13).

The learned counsel then dealt with the alleged suspicious circumstances attending the preparation and execution of the will and contended that they indicated both improper influence by the appellant and incapacity of the testator.

The appellant, by the codicil, practically raises her own annuity from the $800 a year provided in the former codicil to $3,250 a year at no remote date, as by the death of any one of the three annuitants (both the others being advanced in years), the provisions for

(1) 2 Gray (Mass.) 524.
(2) [1895] A. C. 310.
(3) 17 Jur. 749.
(4) 29 Can. S. C. R. 616.
(5) 26 Can. S. C. R. 641.
(6) [1894] P. D. 151.
(7) L. R. 7 H. L. 448.
(8) 2 Moo. P. C. 480.
(9) L. R. 2 P. & D. 477.
(10) 2 Moo. P. C. 317.
(11) 62 Law Times 642.
(12) 63 Law Times 465.
(13) L. R. 2 P. & D. 462.

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the annuitant who dies accrue to the survivors and the whole amount provided for the three annuities goes to the last survivor during life. The trial judge discredited the appellant and disbelieved her story; and was fully justified in doing so, not only by her demeanour but in the matter of her testimony; and her statements are improbable, inconsistent, contradicted and uncorroborated. As a large benificiary, who procured the codicil in her favour, she was bound to see that the testator received proper and independent advice, and the testimony in support of the codicil should not be that of herself alone, but independent and impartial.

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

GWYNNE J.—In *Adams* v. *McBeath* (1) I was unable to concur in the judgment of this court affirming a will executed under the circumstances appearing in that case, for the reason that in my opinion the case came within the principle laid down by the House of Lords in *Fulton* v. *Andrew* (2); by the Privy Council in *Baker* v. *Batt* (3); and *Barry* v. *Butlin* (4); by Sir John Nicholl in *Paske* v. *Ollat* (5); *Billinghurst* v. *Vickers* (6); *Ingram* v. *Wyatt* (7); and by Sir John Hannen in *Parker* v. *Duncan* (8); and *Brown* v. *Fisher* (9); and because I was of opinion that the person who had caused the will in question in that case to be prepared and executed giving all the property of the deceased to himself, had not removed the burthen imposed upon him by the principle laid down in those cases.

In the present case I can see nothing in the evidence which brings it within the principle laid down in the above cases; nothing whatever justifying the impeach-

(1) 27 Can. S. C. R. 13.
(2) L. R. 7 H. L. 448.
(3) 2 Moo. P. C. 317.
(4) 2 Moo. P. C. 480.
(5) 2 Phillim. 323.
(6) 1 Phillim. 187.
(7) 1 Hagg. Ecc. 384.
(8) 62 L. T. N. S. 642.
(9) 63 L. T. N. S. 465.

ment of any conduct of the appellant in connection with the testator's making the codicil in question, as constituting undue influence.

It is quite possible, although no evidence of the fact was offered, that as a niece of the testator's deceased wife who had lived with her uncle the testator for many years, and in the latter years of his life as his housekeeper, the appellant may have persuaded the testator that he should make some better provision for her than was contained in his will as then already made, but such persuasion if established could not be characterised as undue influence. There is in my opinion no evidence of the codicil which is impeached having been procured to be executed by any undue influence whatever exercised by her. The evidence abundantly establishes the competency of the testator and that a day or two before he caused the codicil to be prepared he communicated to an intimate friend his intention to alter his will, whereupon that friend advised him to consult a solicitor, which it appears that he did, and the codicil was prepared by a professional gentleman of the highest reputation, upon instructions given both in writing under the testator's hand and also orally; and the codicil so prepared the testator copied in his own handwriting and executed. The recent case of *Perera* v. *Perera* (1), in approving *Parker* v. *Felgate* (2), is an instructive case which would have supported this will even if there had been any foundation for a suggestion that the testator had not sufficient mental capacity to make a will. The appeal should, in my opinion, be allowed with costs and probate be ordered to be granted of the will and codicils.

TASCHEREAU and SEDGEWICK JJ. were of opinion that the appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Borden, Ritchie & Chisholm.*
Solicitors for the respondents: *Drysdale & McInnis.*

(1) [1901] A. C. 354. (2) 8 P. D. 171.

1901

*May 29,30.

*Oct. 29.

THE DOMINION CARTRIDGE COMPANY (DEFENDANT)..... } APPELLANT;

AND

ARCHIBALD McARTHUR, ès QUALITÉ, (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workman—Employer's liability—Presumptions—Findings of jury sustained by courts below.

As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability in a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff, not assented to by the trial judge, have been sustained by two courts below.

Taschereau J. dissented, taking a different view of the evidence and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *The George Matthews Co.* v. *Bouchard* (28 S. C. R. 580), and *The Metropolitan Railway Co.* v. *Wright* (11 App. Cas. 152) those findings ought not to be reversed on appeal.

The Asbestos and Asbestic Co. v. *Durand* (30 S. C. R. 285) discussed and approved.

APPEAL from the judgment of the Court of Queen's Bench, affirming the judgment of the Court of Review, at Montreal, upon the case reserved by the trial judge,

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

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THE DOMINION CARTRIDGE COMPANY v. MCARTHUR.

refusing with costs the motion of the defendant for judgment *non obstante veredicto*, and granting, with costs, the motion of the plaintiff *ès qualité* for judgment upon the verdict rendered by the jury at the trial, and ordering, in conformity with the verdict, that judgment should be entered for the plaintiff for $5,000, with costs, as damages for injuries sustained by the plaintiff's minor son, Hector McArthur, through an accident occasioned on account of the negligence of the defendant.

The material facts are sufficiently stated in the judgments reported.

Under the provisions of art. 491 C. P. Q, the trial judge abstained from rendering judgment for the plaintiff, in whose favour the verdict of the jury had been given, but reserved the case for the consideration of the Court of Review for the special causes stated in the following certificate, viz.:

"This case came on to be heard before me and a special jury, on the first of February, 1900. The trial continued with the exception of the intervening Saturday and Sunday until the 5th of February when the jury returned a verdict for the plaintiff."

"To question seven, the jury answered that the explosion occurred through the fault and neglect of the company by their neglect to provide proper machinery, and by their neglect to take proper precautions to prevent an explosion; and to question nine, that the damages suffered amounted to $5,000."

"I therein took until this day, Friday, the 9th of February, to further consider whether I should render judgment upon the verdict or reserve the case for the consideration of the Court of Review."

"I now determine and adjudge not to render judgment upon the verdict, but to reserve the case for the consideration of the Court of Review, when and as

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THE DOMINION CARTRIDGE COMPANY v. MCARTHUR.

thereto moved according to law, and for the following special causes:"

"1. Simpson, the general manager, who designed the automatic shot shell loading machine in question, is designer, draughtsman and machinist. Rousseau, the machine foreman of the company, is a practical machinist; he approved the designs and built the machine by himself, or under his immediate supervision."

"2. After construction, the machine was tested for some days before employees were allowed to handle it; a short time afterwards a 'knock out' was added, and a detail in the loading mechanism strengthened by the replacement of brass by iron material."

"3. At the date of the accident the machine had been in use for from 12 to 14 months, saving an interruption of a few weeks during which work was suspended."

"4. The machine automatically loaded from six to seven thousand shells a day; no primer exploded, no accident of any kind occurred, and no complaint nor suggestion was made that risk or danger existed in consequence of any defect in the machine."

"5. When Hector McArthur entered the company's employ in June, 1897, he was assigned to the duty of keeping the machine supplied with wads and powder; saving a few weeks, he continued in the performance of this work until the occurrence of the explosion, a year afterwards; he never reported or suggested to the foreman or other superior officer that his employment was attended with danger in consequence of any defect in the machine."

"6. The company's officers believed that the machine was working safely and satisfactorily."

"7. After the explosion, no exploded shell was found."

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"8. The shot shell room was under the constant supervision of a competent foreman; the evidence is further without contradiction that every possible precaution was taken to insure the safety of the employees in the room."

"C. P. DAVIDSON,"

"*J. S. C.*"

Macmaster K.C. and *Fleet* for the appellant. The evidence showed no negligence on the part of the company which could be the proximate cause of the explosion from which the injuries resulted. The certificate of the trial judge makes it quite obvious that he did not approve of the findings of the jury. The origin of the accident is totally unexplained, and it has been shown that the machine in question was constructed by competent machinists; that it had worked well for the fourteen months it had been in use, loading thousands of cartridges daily without accident or complaint or suggestion of any defect or danger in its operation. The trial judge's certificate vouches for the excellent condition of all the machinery in the factory and the great care taken to ensure the safety of the employees. We rely upon the decisions in *Webster* v. *Friedeberg* (1); *The Metropolitan Railway Co.* v. *Wright* (2); *Phillips* v. *Martin* (3); *Wakelin* v. *The London and South Western Railway Co.* (4); *The Municipality of Brisbane* v. *Martin* (5); *The New Brunswick Railway Co.* v. *Robinson* (6); *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (7); *Deroches* v. *Gauthier* (8); *Mercier* v. *Morin* (9); *Montreal Rolling Mills Co.* v. *Corcoran* (10); *Tooke* v. *Bergeron* (11); *Canada Paint Co.* v. *Trainor* (12).

(1) 17 Q. B. D. 736.
(2) 11 App. Cas. 152.
(3) 15 App. Cas. 193.
(4) 12 App. Cas. 41.
(5) [1894] A. C. 249.
(6) 11 S. C. R. 688.
(7) 29 S. C. R. 478.
(8) 3 Dor. Q. B. 25.
(9) Q. R. 1 Q. B. 86.
(10) 26 S. C. R. 595.
(11) 27 S. C. R. 567.
(12) 28 S. C. R. 352.

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On the whole it is respectfully submitted that the judgments appealed from were erroneous, and the appellant should be relieved. The plaintiff's action should be dismissed, or in any event a new trial should be granted, and in the latter event, the appellant's motion, asking for particulars as to the allegations of the respondent's declaration in the Superior Court, should be granted.

Hutchins and *Harvey* for the respondent. We have the findings of the jury in our favour, and both the Court of Review and the Court of Appeal have concurred in those findings as justified by the evidence. This court should not reverse concurrent findings of all the courts below especially when the facts have been found by a jury. There was no attempt to non-suit, and the trial judge considered that there was evidence upon which the jury was required to render a verdict. The main ground on which appellant moved for a new trial was that a witness failed to appear and give evidence at the trial; it never was contended that the plaintiff's evidence was not full and complete. The jury believed plaintiff's witnesses and found negligence against the company, and that the machine was defective, improper and obsolete. Both courts below thought likewise. The doubts that appear to have arisen in the judge's mind, after the trial was over, can be of no consequence. He was not called upon to find the facts or draw inferences, that being the special function of the jury. We refer to *The Asbestos and Asbestic Co.* v. *Durand* (1); Arts. 1205, 1238, 1242 C. C.; *The George Matthews Co.* v. *Bouchard* (2), and the authorities there considered; *Grand Trunk Railway Co.* v. *Rainville* (3); *Citizens Light & Power Co.* v. *Lepitre* (4).

(1) 30 S. C. R. 285.
(2) 28 S. C. R. 580.
(3) 29 S. C. R. 201.
(4) 29 S. C. R. 1.

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Many of the cases cited by the appellant are good authorities for refusal to reverse concurrent findings of courts appealed from. It is clear, in this case, from the evidence, that there was no contributory negligence on the part of the employee who was injured, but on the contrary it is shown that the company accumulated large quantities of explosive materials in dangerous proximity to its employees and failed to take reasonable and proper precautions to prevent accidents. The company was bound to take extra precautions under the circumstances of their trade but failed to do so, and the injuries complained of resulted. The whole jurisprudence is against reversing in such a case.

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

GIROUARD J.—I consider that the principles of law involved in this appeal have been finally settled by this court in a long and unbroken series of decisions, more particularly in *Montreal Rolling Mills Co.* v. *Corcoran* (1); *Tooke* v. *Bergeron* (2); *Cowans* v. *Marshall* (3); *Burland* v. *Lee* (4); *Canada Paint Co* v. *Trainor* (5); *The Dominion Cartridge Co.* v. *Cairns* (6); *The George Matthews Co.* v. *Bouchard* (7).

In the latter case the court reviewed the decisions which had been rendered in France since *Montreal Rolling Mills Co.* v. *Corcoran* (1), had been decided, and we did not fail to notice that in all of them—some ten or twelve determined chiefly by the Court of Cassation—the rule has been re-affirmed invariably and most emphatically that no employer is responsible for

(1) 26 S. C. R. 595.
(2) 27 S. C. R. 567.
(3) 28 S. C. R. 161.
(4) 28 S. C. R. 348.
(5) 28 S. C. R. 352.
(6) 28 S. C. R. 361.
(7) 28 S. C. R. 580.

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injuries suffered by an employee in the course of his employment, unless the latter proves, by positive testimony, or by presumptions weighty, precise and consistent, that there is fault on the part of the former, and that this fault is the immediate, necessary and direct cause of the injury he sustains. We added that this jurisprudence was (1898), accepted as settled in France, and that no hope for a change favourable to the cause of the workingman could be entertained, except by and through legislative authority. They did apply to the legislature and secured the passing of a statute known as "*la loi du* 9 *avril*, 1898," which in cases of injuries from accidents in the course of their employment, grants them partial compensation from the employer, in the form of a pension or insurance, *de plein droit*, without proving any fault. See Pandectes Francaises, 1899, part 3, p. 49, and also the very interesting foot notes by Mr. Fernand Chesney.

This special relief has already occasioned many contests before the tribunals of France, but has been undoubtedly the cause of a considerable decrease in the number of suits for indemnity under the common law.

But whenever the employee injured is demanding full compensation under that law, that is, the Civil Code, the *arrêts* continue to be unanimous in exacting proof of a fault which certainly caused the injury. Cass. 30th March, 1897; P. F. '98, 1,111; Cass. 12th June, 1899; Cass. 1900, 1,20; Orléans, 18th February, 1898; Orléans, '99, 2,22; Cass. 11th December, 1899; Cass. 1901, 1,15; Cass. 13th December, 1899; Cass. '93.

The *arrêts* of 30th March, 1897, and of 13th December, 1899, are especially interesting in the present case. It will be sufficient to quote the former.

Attendu que, le 10 mars, 1894, le sieur Grande, employé à bord d'un paquebot de la Compagnie Transatlantique a été victime de l'explo-

sion de la chaudière et que le landemain il succombait aux suites de ses blessures ; que sa veuve a assigné la Compagnie Transatlantique en dommages intérêts ; que pour repousser cette demande l'arrêt attaqué conclut que l'accident a donné lieu à deux enquêtes et vérifications technique faites immédiatement, l'une par la commission de surveillance, l'autre par M. Vance, expert commis par le juge d'instruction ; qu'il résulte de ces deux mesures d'instruction que les foyers et chaudières du Maréchal Bugeaud étaient construites conformément aux règles de l'art, en bon état d'entretien et qu'il leur est impossible de déterminer la cause d'un accident qui doit rentrer dans la catégorie des accidents fortuits déjouant toute prévision et ne pouvant engager aucune responsibilité.

I am not aware that the soundness of this doctrine has been questioned by any member of this court. The only dissent I can find is in the appreciation of the evidence in one or two cases.

It is suggested that a recent decision of this court in *The Asbestos and Asbestic Co.* v. *Durand* (1), is not entirely in harmony with this jurisprudence. The head-notes and summary of facts by the reporter, which form no part of the opinion of the court, do not accurately represent that opinion as it is there stated that "the cause of the explosion" which produced the accident was unknown*. That opinion clearly shows that we simply held that sufficient evidence had been adduced to establish negligence on the part of the employer, which was the cause of the accident, so as to justify us not to interfere with the unanimous findings of facts by two courts. The proof adduced was not direct ; it was by presumptions which are recognised by the Quebec Civil Code as legal evidence.

Art. 1205 : Proof may be made by writings, by testimony, by presumptions, etc.

(1) 30 Can. S. C. R. 285.

*[NOTE BY REPORTERS.—The head-notes and statement of the case referred to were prepared under directions of the late Mr. Justice King and the printed proofs specially revised by him. See remarks by Taschereau J. at page 406 *infra*.]

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Art. 1238 : Presumptions are either established by the law, or arise from facts which are left to the discretion of the courts.

Art. 1242 : Presumptions not established by law are left to the discretion and judgment of the court.

Our lamented brother King, who delivered that opinion, did not find that the cause of the explosion was unknown; he merely held that the court might reasonably presume that it was caused by the excessive accumulation of a highly dangerous material in close proximity to the workmen. He said:

> Clearly, therefore, upon the evidence adduced by the defendants themselves, there was, at the time of the explosion, an unnecessary and unreasonable quantity of this highly dangerous explosive in dangerous proximity to the workmen engaged in carrying on their work; and no attempt is made to excuse or explain the circumstance.
>
> The negligence involved in this was one of the efficient causes of Rivard's death, which, as admitted and found, was caused by the explosion that in fact took place, and was not the conjectural consequence of a smaller explosion.
>
> The peril to life from high explosives is so great, and as shown by the evidence, the cause of their explosion frequently so obscure, that damage may fairly be anticipated as likely to ensue from the act of one who accumulates an unusual and unreasonable quantity in dangerous proximity to others. In placing it where an opportunity for damage may be created, either by the nature of the substance or by fortuitous circumstances or neglect of others or other causes, he takes the chance of the happening of such other event and cannot disconnect himself from the fairly to be anticipated consequence of his own negligence.
>
> * * * * * * * * *
>
> In the declaration (after averring that the explosion which caused the death was that of at least three boxes of dualine, in the building contiguous to that occupied by the deceased), it is averred that "it was an act of gross neglect on the part of the defendant to leave such a large quantity of explosive matter, such as dualine, in the said building, and the death of the said Theodore Rivard resulted from, and was due to the carelessness, gross neglect, and fault of the defendant."
>
> In what has been adduced there is proof of this allegation, and hence the appeal should be dismissed.

The present case is similar to the preceding one in one respect, namely, that the accident was caused by

an explosion. But, as to the cause of this explosion, it is very different. Here we are left entirely in the dark. No negligence or fault whatever is established, and no presumption is possible. The courts below do not even attempt to indicate any. All the witnesses declare they cannot account for the accident. Alone the plaintiff attributed it to a jam of the cartridges in the automatic machine. But that was a mere supposition. He is not even certain that his back was not turned to the machine at the time of the explosion. It is proved that the machine was perfect and worked regularly and properly. The trial judge so found and certified under the provisions of the new Code of Civil Procedure and there is ample evidence in support of his finding.

The Court of Appeal did not review the evidence. The Court of Review did, Mr. Justice Langelier delivering a long and elaborate opinion. But he accepts a supposed negligence as proved. He says:

Mais qu'est-ce qui a amené l'explosion dans la machine? Aucun témoin, n'a pu le dire, mais H. M. et Stewart *pensent* qu'elle a été causé par le fait que, comme cela était arrivé souvent, d'après eux, une cartouche aura éte saisie dans le sens de sa longeur par les pinces, et un doigt de celles-ci frappant sur la capsule en a emené l'explosion.

It is of no importance to know what the witnesses think, but what they have seen and can testify as facts. In *The Asbestos and Asbestic Co.* v. *Durand* (1), there was indisputable evidence of fault, and not a mere suggestion or surmise as in this case. The plaintiff should have been non-suited.

The appeal is therefore allowed with costs and respondent's action dismissed with costs.

TASCHEREAU J. (dissenting).—I would dismiss this appeal. In the case of *The George Matthews Company*

(1) 30 S. C. R. 285.

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v. *Bouchard* (1) this court refused to disturb the concurrent findings of fact of two courts of the province, though it was very doubtful if the injuries complained of by the plaintiff had actually been caused by the negligence of the defendant.

Now the appellant here is asking us to give less consideration to findings of fact by a jury, concurred in by two courts, than findings of fact by a judge were in that case deemed to be entitled to.

The respondent has proved and the jury have found that the accident in question was not caused by his own fault or negligence. And it clearly was not caused by the act of God. Neither was it a fortuitous event; art. 17, subsec. 24 C. C., or an inevitable accident; *The "Schwan"* (2); *Eugster* v. *West* (3).

Then there is ample evidence, (a complete analysis of it has been made by Mr. Justice Langelier, in the Court of Review; I refer more particularly to the depositions of Aikins, Stuart and the two McArthurs), that the machine used by the appellant was defective, one employed nowhere else in factories of this kind, and discarded altogether by the appellant itself since this accident, presumably because the workmen would thereafter have nothing whatever to do with it. And the jury have given credit to that evidence, though the appellant endeavoured to prove the contrary by its employees. It is further proved that the explosion took place in the machine itself.

Now, the jury, seeing an explosion in a defective machine, and having before them evidence that it was utterly impossible to otherwise account for it, have drawn the inference of fact that the machine exploded because it was defective. There is nothing in the case to justify me in saying that the two courts

(1) 28 Can. S. C. R. 580. (2) [1892] P. D. 419.
(3) 35 La. Ann. 119.

of the province (eight judges), were clearly wrong in holding that this conclusion was not an unreasonable one. *Metropolitan Railway Co.* v. *Wright* (1); Art. 501 C. C. P. It falls within the exclusive province of a jury to pass upon presumptive evidence of this nature. The suppositions and conjectures the appellant would rely upon cannot militate against the common sense view of the facts that guided this verdict. The company placed a defective instrument in the respondent's hands; the jury found consequently, that it had not taken the extra care required when there is an extra risk, clearly a question of fact; the instrument exploded and injured the respondent. It seems to me that from the facts proved, as it was in evidence, that the explosion could not reasonably be traced to any other cause, the jury could fairly infer that the appellant's negligence in not providing a safer machine was the cause of the respondent's injuries.

It is possible that, upon the evidence, a judge might be satisfied that appellant had taken all the care reasonably required under the circumstances. But that was a fact for the jury, who, we have to assume, received and acted upon the directions expected from the presiding judge in such a case. As *per* Brett J. in *Bridges* v. *The North London Railway Co.* (2) at page 232. And they having found that the appellant has not acted with the prudence and care that the law required on its part, to disturb their verdict would be to usurp their functions.

To use the words of Mr. Justice Brett, in *Bridges* v. *The North London Railway Co.* (2).

> If such decisions may be overruled on the mere ground that the courts or judges do not agree with them, the juries are bound to matters of fact by the view of the judges as to facts. That cannot be.

(1) 11 App. Cas. 152.
(2) L. R. 7 H. L. 213.

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Or as said in other words by the Privy Council in the case of *The Connecticut Mutual Life Ins. Co.* v. *Moore* (1).

If the only question for their lordships were whether or not they take the same view of the evidence as the jury, they might be disposed to say that the evidence on the part of the defendants somewhat preponderates. But this is not enough to justify them in granting a new trial; to hold it to be enough would be, in fact, to substitute a court for a jury.

It is much better and more in conformity with our system of trial by jury, that juries should sometimes render verdicts against the weight of evidence as estimated by trained judicial minds, than that their verdicts should be too readily set aside by the judgment of judicial minds, who, in matters of fact, are subject to the same infirmity as jurors and are not less liable to differ among themselves. Vide *The Connecticut Mutual Life Ins. Co.* v. *Moore* (2); *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (3); *Smith* v. *South Eastern Railway Co.* (4); *Washington & Georgetown Railroad Co.* v. *Harmon's Administrator* (5).

Certainly, as the appellant argued, the plaintiff has to prove his case upon an action of this nature. But it is a fallacy to contend, as they virtually do, that a stricter proof should be required from him than which would be required to convict a man of murder or manslaughter by negligence. Arts. 213, 220 Crim. Code.

As said by Baron Pollock in *Bridges* v. *The North London Railway Co.* (6).

The plaintiff, no doubt, is bound to make out her case, and cannot, by bare suggestion, challenge its rebuttal, and if what I have stated was mere speculation, it ought not to have gone to the jury, but if it was an inference which could be fairly drawn from facts proved in the same manner as things unseen or unproved—which in the eyes of the law are the same—are constantly inferred and found

(1) 6 App. Cas. 644.
(2) 6 Can. S. C. R. 634.
(3) 3 App. Cas. 1155.
(4) [1896] 1 Q. B. 178.
(5) 147 U. S. R. 571.
(6) L. R. 7 H. L. 213.

as facts by a jury, then the evidence should have been submitted to the jury, together with any which the defendants chose to adduce, and which might have exculpated or further inculpated them according as their witnesses knew more of the occurrence and confirmed or displaced the evidence for the plaintiff.

Or as Lord Penzance puts it in *Parfitt* v. *Lawless* (1).

It is not intended to be said that he upon whom the burden of proving an issue lies is bound to prove every fact, or conclusion of fact, upon which the issue depends. From every fact that is proved, legitimate or reasonable inference may, of course, be drawn and all that is fairly deducible from the evidence is as much proved for the purpose of a *primâ facie* case as if it had been proved directly. I conceive, therefore, that in discussing whether there is, in any case, evidence to go to the jury, what the court has to consider is this, whether, assuming the evidence to be true, and *adding to the direct proof* all such inferences of fact as, in the exercise of reasonable intelligence, the jury would be warranted in drawing from it, there is evidence to support the issue.

It is upon that principle that in the case of *The Canada Atlantic Railway Co.* v. *Moxley* (2), in the Ontario Court of Appeal, and in this court (3), the verdict of the jury based upon an inference of facts was upheld, though there was much room for doubt.

And the following other cases, *inter alia*, show that the tendency of modern rulings in this court has been, as in the English courts, Pollock on Torts, (5 ed.) pp. 413, 414, if not to enlarge, at least not to curtail the functions of the jury. *St. John Gas Light Co.* v. *Hatfield* (4); *Grand Trunk Railway Co.* v. *Weegar* (5); *Toronto Railway Co.* v. *Grinstead* (6); *The Toronto Railway Co.* v. *The City of Toronto* (7); *Drennan* v. *City of Kingston* (8), confirmed in this court (9); *The Canadian Coloured Cotton Mills Co.* v. *Talbot* (10); *The Manufacturers Accident Ins. Co.* v. *Pudsey* (11); *The Grand*

(1) L. R. 2. P. & D. 462.
(2) 14 Ont. App. R. 309.
(3) 15 Can. S. C. R. 145.
(4) 23 Can. S. C. R. 164.
(5) 23 Can. S. C. R. 422.
(6) 24 Can. S. C. R. 570.
(7) 24 Can. S. C. R. 589.
(8) 23 Ont. App. R. 406.
(9) 27 Can. S C. R. 46.
(10) 27 Can. S. C. R. 198.
(11) 27 Can. S. C. R. 374.

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Trunk Railway Co. v. *Rainville* (1); *The Halifax Electric Tramway Co.* v. *Inglis* (2).

In the recent case of *The Asbestos and Asbestic Co.* v. *Durand* (3) a non-jury case, the cause of the *explosion* was unknown; (the syllabus of the case, as it appears in the report is, I have ascertained, in the handwriting of the learned judge himself who delivered the judgment, and *ipsissimis verbis*, given by the reporter as handed down by him); but the defendant was held liable because by allowing an unnecessary quantity of dynamite to accumulate in dangerous proximity, it could not

> disconnect itself from the fairly to be anticipated consequences of its own negligence,

it being clear that the injured party was not himself the cause of his injuries.

Now, if an inference of fact of this nature can lawfully be drawn by the court in a non-jury case, a jury, it seems to me, can likewise reasonably do so, where, as here, it is likewise found that the plaintiff was not guilty of negligence.

The appellants seem to place great reliance upon the certificate of the learned judge who presided at the trial. But, as I read it, that certificate does not help their case. First, as to the facts, the jury's conclusions, not the judges, it is trite to say, must prevail. *Ad questionem facti non respondent judices.* Secondly, article 469 of the Code of Civil Procedure specially decrees, in accordance with the English practice, that, whenever the judge is of the opinion that the plaintiff has given no evidence upon which the jury could find a verdict, he may dismiss the action. Now, by the fact that the learned judge did not dismiss the action, but

(1) 29 Can. S. C. R. 201. (2) 30 Can. S. C. R. 256.
(3) 30 Can. S. C. R. 285.

left the case to the jury, he necessarily must be assumed to have been of the opinion that there was a case made out by the respondent for them. The appellants themselves do not appear to have contended before the learned judge, at the close of the respondent's case, that there was room for his interference. And, if there was a case for the jury, upon the authority of *Lambkin* v. *The South Eastern Railway Co.* (1), this appeal must be dismissed. There, as here, though the verdict of the jury had been upheld by two provincial courts, yet the defendants impugned it before the Privy Council as being against the evidence. But, said their lordships:

> With respect to the verdict being against evidence, it appears to their lordships * * * that the question of negligence, being one of fact for the jury, and the finding of the jury having been upheld or at all events not set aside by two courts, it is not open under the ordinary practice to the defendants.

The cases cited by the appellant of *The Montreal Rolling Mills Co.* v. *Corcoran* (2); *The Canada Paint Paint Co.* v. *Trainor* (3); *The Dominion Cartridge Co.* v. *Cairns* (4); had not been tried by a jury. In the cases of *Tooke* v. *Bergeron* (5); and *Burland* v. *Lee* (6); (also non-jury cases,) the actions were dismissed upon the ground that the injuries complained of had been caused by the negligence of the plaintiffs themselves. In *Cowans* v. *Marshall* (7) a new trial was ordered upon the ground that the answers of the jury were unsatisfactory. The case of *Wakelin* v. *The London and South Western Railway Co.* (8), and that class of cases have no application. There, as in *The Canadian Coloured Cotton Mills Co.* v. *Kervin* (9) in this court, it

(1) 5 App. Cas. 352.
(2) 26 Can. S. C. R. 595.
(3) 28 Can. S. C. R. 352.
(4) 28 Can. S. C. R. 361.
(5) 27 Can. S. C. R. 567.
(6) 28 Can. S. C. R. 348.
(7) 28 Can. S. C. R. 161.
(8) 12 App. Cas. 41.
(9) 29 Can. S. C. R. 478.

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was consistent with the evidence that the accident was due to the injured party's own carelessness. Here, there is no room for such a contention; the jury has found conclusively that the plaintiff has not been guilty of negligence. Moreover, contributory negligence, had any been found, does not, in the Province of Quebec, defeat the action. *Price* v. *Roy* (1).

Appeal allowed with costs.

Solicitors for the appellant: *Fleet, Falconer & Cook.*

Solicitors for the respondent: *A. E. Harvey & H. A. Hutchins.*

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*June 3

*Oct. 29.

WILLIAM R. SINCLAIR AND JAMES FLANAGAN (PLAINTIFFS).. } APPELLANTS;

AND

WILLIAM A. PRESTON AND W. J. MUSSON (DEFENDANTS) ..... } RESPONDENTS.

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

Interest—Debt certain and time certain—3 & 4 Wm. c. 42 s. 28 (Imp.)

To entitle a creditor to interest under 3 & 4 Wm. 4 ch. 42 sec. 28 (Imp.) the written instrument under which it is claimed must show by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future.

APPEAL from a decision of the Court of King's Bench for Manitoba (2) reducing the damages given at the trial by deducting the interest allowed.

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

(1) 29 Can. S. C. R. 494. (2) 13 Man. L. R. 228.

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SINCLAIR v. PRESTON.

One Charlebois had a contract to build the Great North-West Central Railway, and the defendant Preston contracted with him to do the fencing, taking Musson, the other defendant, into partnership for the work. Plaintiffs then agreed with defendants to do the fencing, the agreement containing the following provision.

"Estimates for the said work shall be made monthly by the company's engineer, or at such other times as the said engineer shall deem reasonable and proper, and such estimates, less ten per cent rebate, shall be paid forthwith upon same being paid to said Preston and Musson by said company, and the said ten per cent rebate shall be paid forthwith upon same being paid to said Preston and Musson by said company."

Charlebois not having been paid by the company, Preston took proceedings and obtained judgment, which it was agreed should be entered against the company direct. This judgment was assigned to other parties by which plaintiffs claimed that their right to judgment under the above clause immediately attached. They received the principal of their claim and brought suit for the interest, which the trial judge allowed but the full court deducted from the amount given by the verdict.

Aylesworth K.C. for the appellants. The court below followed *Merchant Shipping Co.* v. *Armitage* (1) in holding that plaintiffs were not entitled to interest. That decision does not bind this court, and is not in accord with others before and since. *Duncombe* v. *Brighton Club & Norfolk Hotel Co.* (2) decided in the following year, is directly opposed to the ruling in *Merchant Shipping Co.* v. *Armitage*, as is *Macintosh* v. *Great Western Railway Co.* (3), decided ten years

(1) L. R. 9 Q. B. 99.
(2) L. R. 10 Q. B. 371.
(3) 4 Giff 683.

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earlier, and in *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (1), Lindley L. J. characterizes the decision in *Merchant Shipping Co.* v. *Armitage* as " a restricted, or perhaps it may be called rather a narrow contruction of this Act of Parliament." See also the opinion of Lord Cairns in *Rodger* v. *Comptoire D'Escompte de Paris* (2), and *McCullough* v. *Clemow* (3), in which the whole question as to interest is discussed by Mr. Justice Osler.

Christopher Robinson K.C. and *Elliott* for the respondents. *Merchant Shipping Co.* v. *Armitage* (4) has never been overruled, and was followed by the Court of Appeal in *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (5) overruling the judgment of the Chancery Division cited by the learned counsel for the appellants. And see *Webster* v. *British Empire Mutual Assurance Co.* (6).

THE CHIEF JUSTICE.—I am of opinion that the appeal should be dismissed.

TASCHEREAU J.—I do not see that upon any of the grounds taken by the appellants, they can succeed upon their appeal. I entirely agree with the reasons given in the full Court of Manitoba. I would dismiss the appeal with costs.

GWYNNE J.—By the contract of the 12th of October, 1889, declared upon in this case no sum of money was made payable or could ever become payable to the plaintiffs except for work then yet to be performed, accepted and certified by the engineer of the railway company as executed in conformity with the provi-

(1) [1892] 1 Ch. 120.
(2) L. R. 3 P. C. 465.
(3) 26 O. R. 467.
(4) L. R. 9 Q. B. 99.
(5) [1893] A. C. 429.
(6) 15 Ch. D. 169.

sions of the contract; what amounts, if any, and when any such amounts should be so certified depended on the judgment of the engineer and subject to this further condition that nothing should become payable by the defendants until they should receive payment for work which they had contracted to perform for one Charlebois who claimed to have a contract with the Great North West Central Railway Company for constructing their railway, part of which work was the work which the plaintiffs by sub-contract with the defendants contract to perform.

The judgment in the declaration alleged to have been pronounced by the High Court of Justice for Ontario upon the 28th of September, 1891, in the suit of Charlebois against the railway company (to which suit the Union Bank who were then assignees of the whole right, title and interest of the plaintiffs in, and under, the said contract and on whose behalf and in whose interest the present action is prosecuted were parties, defendants, to the said suit equally as the plaintiff Preston) can not, in my opinion, by reason of anything therein contained be construed to constitute, as the appellants contend, payment to the defendants in the present action within the meaning of the contract of the 12th of October, 1889, of the sums therein mentioned, the payment of which to the defendants was by the contract made a condition precedent to the plaintiffs having any cause of action against the defendants.

It appears upon the record before us that in the month of January, 1890 the Union Bank as assignees of all the rights and interest of the appellants in and under the contract of the twelfth of October, 1889, received as money payable to the appellants under their contract with the respondents, the sum of $2,611 out of monies payable to, and paid on account of, the

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respondents' claim against Charlebois under their contract with him. It in like manner appears also that shortly after the rendering of the judgment of the High Court of Justice in Ontario on the 28th of September, 1891, the respondent Preston with the knowledge and consent of the Union Bank as assignees of the appellants assigned all the right, title and interest of the respondents to receive payment under the said judgment for the work performed by them under their contract with Charlebois to one Nugent (then the attorney of the respondents, now the attorney of the plaintiffs in the present action which is plainly brought in their names in the interest of and for the Union Bank) upon trust to pay thereout when received the balance of the amount due to the appellants under their contract.

It is not disputed that since the month of January, 1890, no sum was actually paid to either of the respondents personally or to any one on their behalf until the month of February, 1898, when the sum of $8,400 as due to the respondents under their contract with Charlebois was paid to Nugent as such trustee for the Union Bank, the assignees of the claim of the appellants against the respondents. Out of this sum it appears that Nugent paid the bank the sum of $5,835.50 retaining the balance in his own hands. Upon affidavits of these facts it also in like manner appears that application was made by the respondents for an order to have Nugent joined as a defendant with them which motion was refused, for what reason does not appear, and judgment was thereupon rendered in the action against the defendants therein, the now respondents, for the sum of $1,078.50, with interest thereon at the rate of six per centum per annum from the commencement of the action until the recovery of judgment.

From that judgment the respondents have not appealed and the sole question therefore before us on this appeal is upon a question whether or not the appellants or the Union Bank in their right are entitled to recover interest which they claim from the 28th September, 1891, under statute 3 & 4 Wm. 4, ch. 42, s. 28, upon the sum of $6,914, which as now appears would have been the amount then payable to the plaintiffs if the defendants had then received the amount due to them under their contract with Charlebois.

Now in *The Merchant Shipping Co.* v. *Armitage* (1) it was held in the month of November, 1873, unanimously by seven judges in the Exchequer Chamber, that where by a charter party a lump sum of £5,000 was agreed to be paid for freight after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House, and part of the cargo was lost by fire the full sum of the £5,000 was payable under the contract. So far as the sum was concerned there was a sum certain payable under the contract, but it was held unanimously that it was not made payable *at a time certain* by the contract. In the month of March, 1874, the case of *Hill* v. *The South Staffordshire Railway Co.* (2) was decided by Vice Chancellor Hall. The question there arose upon a contract between the railway company and a contractor which provided that payments should be made monthly as the work proceeded on the certificates of the company's engineer; some payments on account were made and a demand was made by the contractor upon the company for payment of a balance claimed by the contractor. This amount was in excess of the amount recovered in an action brought by the contractor in consequence of the

(1) L. R. 9 Q. B. 99. (2) L. R. 18 Eq. 154.

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company not having complied with the contractor's demand and it was held by the learned Vice Chancellor that interest could not be recovered under 3 & 4 Wm. 4, ch. 28, there being *no sum certain* payable under the contract *at a time certain*. This case was determined wholly independently of *The Merchant Shipping Co.* v. *Armitage* (1) which was not cited by counsel on the argument nor by the learned Vice Chancellor. The case of the defendants was argued by Lindley Q.C., subsequently Lord Justice Lindley, whose argument the Vice Chancellor seems to have adopted, and it appears to me so much to the point that I quote a few passages of it. At p. 163 he says:

> The statute only applies to debts or sums certain. Is the sum now found due from the defendants a debt *or sum certain*—that will depend on the meaning of the expression *certain*. There was no certainty what would become payable to the contractor even in respect of the £92,000—*for that was subject to variation*, and unquestionably the other sums which were payable under the contract were not sums certain. It is said that anything is certain which can be rendered so by the contract or anything else—that is clearly too wide a construction.

Then he cited *Annandale* v. *Pattison* (2) decided it is true under a different statute namely the Stamp Act 55 Geo. 3 ch. 184, but strongly in support of his argument. Then again he says:

> Can it be said that because the chief clerk has found that a sum—now of course *a certain sum*—is payable by the defendants that it is a debt or sum certain within the meaning of the statute? When was it certain? Was it so before it was ascertained? How can it be said that a sum which is ultimately found due in respect of all sorts of work constitutes a debt or sum certain within such meaning? It can only be upon the theory that everything is certain when it is made so—a proposition not disputed—but it is plain that interest is to be payable in respect of a certain instrument; therefore *it must be a definite stated sum mentioned in the agreement itself. It cannot be found in the contract itself what particular sum can possibly be payable under it. To do that the functions of the engineer must be performed*, for it was deputed to him to find out in respect of what work the calculation was to be made.

(1) L. R. 9 Q. B. 99. (2) 9 B. & C. 919.

This argument resting so forcibly upon the uncertainty of the sum—a point not in uncertainty in *The Merchant Shipping Co.* v. *Armitage* (1) may possibly account for that case not having been referred to in *Hill* v. *The South Staffordshire Railway Co.* (2) in which case the argument on behalf of the plaintiff was largely rested upon *Mildmay* v. *Methuen* (3), and *Macintosh* v. *The Great Western Railway Co.* (4). These cases were also cited by the plaintiffs in the present case, but the learned Vice Chancellor shows why they are wholly unsatisfactory authorities and unreliable upon the question before him as to which in giving judgment he says:

> Independently of any authority upon the point I should have said that this was not a case in which within the meaning of the statute there had been a demand made in writing of *a sum certain* payable at a *certain time.*

In the month of June, 1875, the case of *Duncombe* v. *The Brighton Club and Norfolk Hotel Company* (5) came before the Court of Queen's Bench composed of Blackburn, Mellor and Lush JJ. The terms of the contract were contained in a letter dated the 28th of September, 1865, from the plaintiffs to the defendants, which was as follows:

> I have thought over your application respecting the Norfolk Hotel, the best terms I could offer would be one-third in cash and bills at six and twelve months for the balance.

This letter related to negotiations which had taken place between the writer of it and the company in relation to furnishing the hotel.

The terms of the letter were accepted by the company and the furnishing was completed in the month of March, 1866, at the cost as appeared by the bill rendered by the plaintiff of £3169 1s 11d.: the defendants

(1) L. R. 9 Q. B. 99.
(2) L. R. 18 Eq. 154.
3 Drew. 91.
(4) 4 Giff. 683.
(5) L. R. 10 Q. B. 371.

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paid on account of the third of this amount the sum of £800 0s 0d, leaving £256 0s 0d unpaid. Subsequently an action was brought to recover this sum, and it was in respect of interest claimed upon it from the completion of the furnishing of the hotel in March, 1866, that the question arose.

Now it is to be observed that neither *The Merchant Shipping Co.* v. *Armitage* (1), nor *Hill* v. *The South Staffordshire* (2), was cited, and from the judgments pronounced by the learned judges it is quite plain that they were not aware of either of these decisions. Blackburn J. was of opinion that the case did not come within the statute, and he held that interest was therefore not recoverable. He said:

> I think that the construction of the statute is that the written instrument should specify the time; and if that be so, the written instrument in this case does not do so,

and he expresses his surprise that there is so little authority on the subject; and again he says:

> I have already expressed my opinion that they (the words of the statute) do mean that the debt *or the sum certain must be* payable at a certain time by virtue of the written instrument, and that it is not enough that it afterwards becomes payable on a certain day. The section does not mean by *a certain time*, a time which is to depend upon a future named event, which will when the event happens become certain.

Mellor J. while differing from the opinion of Blackburn J. said that he did so with doubt and hesitatation. He stated his opinion to be

> that the object of the statute was not that the actual day should be ascertained on the face of the instrument, but that *the basis of the calculation* which was to make it certain *should be found in the instrument in writing.*

Then he explained how as he was of opinion *that such basis* appeared on the letter of the 28th of September, 1865.

(1) L. R. 9 Q. B. 99. (2) L. R. 18 Eq. 154.

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The goods were to be paid for one-third in cash, one-third by a bill at six months, and the residue by a bill at twelve months. I think when the goods were sent in the time for the payment of one-third in cash had arrived, and all the *rest of the calculation* must depend upon that.

And what he meant he explains further by saying:

It is not necessary that the day for payment should be named *e. g,* "*the debt shall be payable on the 1st of October,*" but it is sufficient if the time can be ascertained *by* the terms which are in writing *and which enable the jury to form a safe basis of calculation* as to the time certain at which it is to be payable,

and he closes his judgment by saying:

I am, shortly, of opinion that if the basis of the calculation is to be found in the written instrument it is enough.

He was thus of opinion that if *anything* had to be done further than a mere calculation made upon a basis sufficiently defined in a written instrument then the case would not be within the statute, and interest would not be recoverable. We may, I think, reasonably conclude that a majority of two to one would not have arrived at the judgment if the case in the Exchequer Chamber had been cited. However the judgments of Blackburn J. and Mellor J. both make reasonably clear that in a case like *Hill* v. *The South Staffordshire Railway Co.* (1) where the functions of an engineer must intervene before anything becomes due under the contract, which was the case here, they would have entirely concurred with the argument of Lindley, Q.C. and the judgment of the Vice Chancellor in that case.

In the *London & Chatham Railway Co.* v. *The South Eastern Railway Co.* (2) the cases of *The Merchant Shipping Co.* v. *Armitage* (3), and of *Duncombe* v. *The Brighton Club & Norfolk Hotel Co.* (4) came under the consideration of the Court of Appeal

(1) L. R. 18 Eq. 154.
(2) [1892] 1 Ch. 120.
(3) L. R. 9 Q. B. 99.
(4) L. R. 10 Q. B. 372.

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consisting of the Lords Justices Lindley, Bowes and Kay, and it was unanimously held that the latter case was inconsistent with the former by which, it being a judgment of the Exchequer Chamber, the Court of Appeal was bound. It is true that Lord Justice Lindley there expressed the opinion that the construction put upon the statute by the Exchequer Chamber was a narrow construction but he nevertheless entertained no doubt that it must prevail. We cannot, however, from that observation infer that the Lord Justice had any doubt of the soundness of his argument or of the judgment of the learned Vice Chancellor adopting it in *Hill* v. *The South Staffordshire Railway Co.* (1) between which and the present case rather than between the present case and the Armitage case a parallel exists. The judgment of the Lords Justices having been appealed from to the House of Lords (2), was affirmed there. Lord Chancellor Herschell did not express any opinion as between the Armitage case and the Duncombe case because in his opinion neither case supported the claim of the appellants in the case before the House. He stated, however, his opinion upon the construction of the statute to be that the *certain sum* payable must be a sum certain which is due absolutely and in all events from the one party to the other although it may not constitute strictly speaking a debt, and he held that in the case before the House *there was not a sum certain payable at a certain time by virtue of a written instrument.* The application of the rule so expressed is quite sufficient for the purposes of the present case. Lord Watson was of opinion that the statute was evidently framed in recognition of the law as stated by Lord Tenterden in *Page* v. *Newman* (3) to the effect that interest is not due on money secured by a written instrument unless it appears *on*

(1) L. R. 18 Eq. 154. (2) [1893] A. C. 429.
(3) 9 B. & C. 378.

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the face of the instrument that interest was intended to be paid or unless it be implied from the usage of trade as in the case of mercantile instruments. Lord Morris unhesitatingly expressed his entire concurrence in the judgment of the Exchequer Chamber. Lord Shand while concurring with the Lord Chancellor in other respects alone expressed his inability to concur in the opinion of Lord Morris. In this state of the authorities the rule as laid down in the Exchequer Chamber is still binding in all parallel cases, but as already observed the case of *Hill* v. *The South Staffordshire Railway Co.* (1) is most similar in its circumstances to the present case, and there does not appear to have ever been raised any objection to the construction of the statute upon which that case proceeded.

Upon the authorities as they stand I cannot hesitate to say that in the contract before us there is *no sum certain* payable *at a time certain* within the meaning of the statute. I entertain no doubt that the judgment of the 29th September, 1891, in the declaration mentioned did not constitute payment to the defendants of the monies, the payment of which to them was, by the contract, made a condition precedent to the plaintiffs having any cause of action against the defendants. What was sought to be done by that judgment was, by a rather irregular mode, but still to endeavour to obtain better security for payment at some future time not only of the claims of the defendants here but also of the Union Bank and others for claims against Charlebois by transferring his liability to the railway company and so substituting them, the parties really benefited by the work done, in the place of Charlebois, but of present or immediate or proximate payment no expectation was at the time entertained by any one. To treat that transaction as a payment of the defendants

(1) L. R. 18 Eq. 154.

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claim against Charlebois or the company is in my judgment wholly inadmissible. The appeal must be dismissed with costs.

SEDGEWICK and GIROUARD JJ. concurred in the dismissal of the appeal.

Appeal dismissed with costs.

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

Solicitor for the respondents: *Geo. A. Elliott.*

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*June 4.

*Oct. 29.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANT)..... APPELLANT;

AND

SIMON JAMES (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Fencing—Culvert—Negligence—Cattle on highway—51 V. C. 29 s. 194—53 V. C. 28 s. 2.

A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a water course and where cattle went through the culvert into a field and from thence to the highway and straying on to the railway track were killed, the company was not liable to their owner. Taschereau J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Street J. at the trial (2) in favour of the plaintiff.

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

(1) 1 Ont. L. R. 127. (2) 31 O. R. 672.

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The question to be decided on this appeal is stated in the above headnote. The facts are set out in the judgment of Mr. Justice Gwynne.

Nesbitt K.C. and *H. S. Osler* for the appellant.

Teetzel K.C. and *Thompson K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Sedgewick.

TASCHEREAU J.—I would dismiss this appeal. The respondent's horses, it is clear, got upon the railway line because it was not fenced, as required by the statute. The reasoning of the Court of Appeal seems to me unassailable.

GWYNNE J.—The railway of the defendant crosses a farm of one Burns, in the Township of Saltfleet, in the County of Wentworth, in the Province of Ontario, through which, in a low place about fifteen feet below the upper surface of the farm a natural stream runs, which during the spring and autumn freshets flows in a great volume and with considerable force insomuch that during their continuance no animal can pass along the bed of the stream from one side of the railway to the other, but in the summer season the water is low and then animals can pass along the bed of the stream from one field to another. The defendants in constructing their railway across the farm made their railway over the stream by a stone arch on a level with the general surface of the upper lands, the top of the arch being from 12 to 15 feet above the bed of the stream. They also constructed and have maintained fences on either side of their railway terminating at the walls of the arch across the stream so that no animal in a field on either side of the railway can get on to the railway at any place direct from

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such field. The whole of the space under the arch, constitutes the bed of the stream, and in point of fact no use whatever is made of such space by the defendants.

The plaintiff is the owner of horses which he had placed at pasture with Burns the owner of the farm. The evidence is that two of the plaintiff's horses passed from the field belonging to Burns on the south side of the railway along the bed of the stream into the field on the other side. How long they remained there does not appear, but it does appear that they escaped from that field through a fence bordering on a highway, by reason of the insufficiency of such fence and of the negligence of Burns or his servants in not keeping that fence in an efficient condition, and that they thence proceeded along the highway to a point where it is crossed on the level by the defendants' railway, from which point, crossing the cattle guards maintained by the defendants there, they got on to the railway track, and at some distance from the highway crossing were killed by a passing train. In an action by the plaintiff to recover the value of the horses so killed it clearly appears that the horses got on to the railway track from the highway by reason of the inefficiency of the cattle guards maintained by the defendants there, but the defendants rest for their defence upon this that the horses of the plaintiff which were killed were, as the defendants contend, contrary to the provision of sec. 271 of the Railway Act, 51 Vict, c. 29, at large upon the highway which is crossed on the level by the defendants' railway, and that being so at large they reached the place where the highway is crossed by the railway, and that although they get on to the railway outside of the line of the highway by reason of the insufficiency of the cattle guards main-

tained by the defendants there and were killed by a train of the defendants nevertheless the plaintiff is disentitled to recover for the value of the horses.

The plaintiff on the contrary contended, and his contention has been maintained by the courts in the Province of Ontario, that by the section 194 of 51 Vict., c. 29, as amended by 53 Vict., c. 28, it was the duty of the defendants to have fenced across the stream on either side of the railway, and to have so prevented all possibility of animals crossing along the bed of the stream under the railway, and that having neglected so to do, they cannot appeal to the fact of the horses having got on to the railway by reason of the insufficiency of the fence separating Burns's farm from the highway, nor insist that the horses were wrongfully on the highway.

The contention of the defendants on the contrary was that their fences as constructed were in perfect conformity with the provisions of the statute as they were sufficient to prevent any cattle from getting directly from either of the fields of Burns on to the railway, and that this was the object and intent of the sec. 194 which imposed on the defendants the obligation of fencing on either side of the railway, and they contended further that even assuming their obligation to fence on either side of the railway to have required them to fence across the stream in question, they were nevertheless entitled to insist as they did that their omission to do so was not, under the circumstances appearing in evidence, a matter of which the plaintiff could avail himself in support of the present action; for that it was clearly established that the negligence of Burns in not maintaining a sufficient fence alongside of the highway was the cause of the horses getting on to the highway and so that they were on the high-

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way at large wrongfully within the meaning of the sec. 271.

The contention of the plaintiff was maintained upon the authority of *Sneesby* v. *The Lancashire and Yorkshire Railway Company* (1). In that case the negligence of the defendants' servants had caused a drove of cattle which were being driven along a road crossed by the defendants' railway to become so infuriated that they rushed furiously away from the control of the drover and in the course taken by them in their terror they got into a garden or orchard close to the railway, and in their fury broke down a fence separating the garden from the railway upon which some were found killed at the distance of about a quarter of a mile from the road where they had been terrified by the negligent conduct of the defendants, and it was held that as the defendants had been guilty of negligence which caused the drover to lose control over the cattle and caused the cattle to become infuriated it was no answer that if the fence of the garden had not been defective the accident would not have happened, and that consequently the damages were not too remote.

Between that case and the present there is no parallel; there the injury suffered by the cattle was the direct consequence of the act of negligence committed by the defendants which consisted in this that there was a steep incline from the level of the railway to the level of the road, and while the cattle were proceeding along the road across the railway track several trucks were by the negligence of the defendants' servants, allowed to run down between the cattle and the persons in charge of them and so separated the cattle from the persons in charge of them. There the defendants were held to be liable because the injury complained of followed directly in continuous sequence

(1) 1 Q. B. D. 42.

from the wrongful act of the defendants' servants. In the present case the omission to fence across the stream assuming it to constitute default in the discharge of the duty imposed upon the defendants did no injury to the plaintiff. His horses remained in the possession of and under the care of Burns, when in the field to which they removed by passing under the railway on the bed of the stream equally as they had been before. Between the omission to fence across the stream and the defect in Burns's fence alongside of the highway there is no connection whatever; none of cause and effect as there was in *Sneesby* v. *The Lancanshire and Yorkshire Railway Company* (1). The present case, therefore, can not be rested upon the judgment in that case, nor are the defendants estopped, by reason of anything appearing in evidence, from insisting that the cause of the horses getting on to the highway was the defect of Burns's fence, or from claiming the benefit of the said sec. 271.

That section which has been in force in virtue of (and without alteration since the passing of) the Act 20 Vict. c. 12, sec. 16 enacts that:

Sec. 271. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level unless such cattle are in charge of some person or persons to prevent their loitering or stopping on such highway at such intersection.

By an unbroken series of decisions of the courts of Ontario and of that portion of the late Province of Canada constituting Upper Canada, from 1858 to the present time, it has been held that the mere fact of an animal being on a highway within the prescribed distance from a railway crossing without being in charge of some person, as required by the statute apart from all consideration of how it got there, constitutes being

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at large within the meaning of the statute, and that the statute takes away the right of action not only where an animal so at large is killed or injured at the very point of intersection of the railway with the highway, but also in case of its being killed or injured on the railway outside of the limits of the highway to which place it had gotten by reason of the insufficiency of the cattle guards of the defendants at the crossing. This ruling has been invariably maintained and although the statute in which the section originally appeared has since then been amended by the legislature no alteration has been made in this section.

The general rule so laid down is, however, I apprehend, like all general rules, subject to some exception, as for example, in case an animal should inadvertently escape from an enclosure in which it was kept and a person in charge should immediately go in search of it, or that an animal being led by a person on foot on a highway should escape from him and run away from the control of the person leading it and that such person should immediately follow in pursuit of it, but that in these cases the person in search of the one or in pursuit of the other should only succeed so far as to get up in time to see the animal cross from the highway on to the railway outside of the limits of the highway by reason of the insufficiency of the cattle guards of the railway, and that the animal should be killed or injured before the person following it could interpose and drive it away it would seem hard if in such a case the railway company should be held to be irresponsible for a loss so occasioned by the insufficiency of the cattle guards which they are required by statute to maintain.

However, the present case is not one of that nature but is of the class which is governed by an uninter-

rupted series of decisions extending over a period of 43 years which I do not think should now be departed from especially in a case in which the plaintiff rests upon quite a different ground, and has not called in question the correctness of these decisions.

As to the other point I am of opinion that the erection of fences on either side of the railway terminating at the walls of the arch constructed over the stream, as was done in the present case, constituted complete fulfilment of the obligation imposed by the statute on the appellants.

The appeal must therefore be allowed.

SEDGEWICK J.—The defendant company's line of railway between Hamilton and Niagara Falls crosses the farm of two brothers named Burns in the Township of Saltfleet, Wentworth County, Ontario.

Through the farm and substantially at right angles to the railway track runs a wide natural watercourse with high banks on either side which watercourse the railway crosses by means of two culverts or bridges each twenty feet in width and fifteen feet in height. For the most part during the year the stream is so filled with water as to prevent animals from fording it or passing under the culverts, but sometimes in the autumn it is dry enough for this purpose. That was the case in September, 1899, when the accident happened which is the foundation of the present actio

On the south side of the track there is a pasture and upon the north side a field used for pasture after the spring crops are taken off. The plaintiff by agreement with the owners of the land was pasturing a number of horses on the lower field. At the time in question the stream under the culverts between the two fields having become so small or shallow, the horses in the lower field were enabled to pass up

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stream to the upper field. That field had all summer been surrounded by fencing erected on three sides by the proprietors, the fourth side being the fencing and bridging of the railway, but through the negligence or mistake of some one unknown, a panel on the northern fence separating the field from a highway had been left open and the plaintiff's horses escaping through the opening to this highway which crosses the railway track at right angles and on the level a short distance therefrom, wandered upon the road-bed of the railway. Two were struck by a train passing westward and were killed. There was some question raised at the trial as to whether the cattle guards on each side of the highway crossing were in proper condition, but I will deal with this later on.

There is no complaint as to the condition of the fences on each side of the railway track; they were in perfect repair. The company had not, however, maintained a fence across the watercourse running under the culverts although about ten years before it had by request made some sort of a barricade under one of the culverts where the water was dry. The fences, however, on each side of the track were firmly attached to the perpendicular walls of the culverts and there was no possibility, as things stood at the time of the accident, for cattle in any way to obtain access to the road-bed or railway tracks, except by means of the highway some distance from the stream. The respondent contends that the company were bound not only to maintain fences in such a way as to prevent cattle from straying upon its tracks but were equally bound to erect such fences or other structures and adopt such other measures as would prevent them from going under the track through the culverts from one side of the railway property to the other.

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The trial judge, Street J., decided in favour of this contention and that view was upheld by the Court of Appeal.

It is elementary to say that a railway company is under no common law liability to build such fences as are claimed here. The burden imposed upon it in that regard is wholly legislative and to place liability upon it the case must be brought within the four corners of a statute. The statute upon which the defendant's liability is here claimed is the Railway Act of 1888, (51 Vict. c. 29, sec. 194,) as amended by the Act of 1890, (53 Vict. c. 28, sec. 2). I cite some of the sections relied upon.

Section 194.—When a municipal corporation for any township has been organised and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof with proper fastenings at farm crossings of the railway and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway.

Sub-section 3, (as amended by the Act of 1890). If the company omits to erect and complete as aforesaid any fence or cattle guard, or if, after it is completed, the company neglects to maintain the same as aforesaid, and if, in consequence of such omission or neglect, any animal gets upon the railway from an adjoining place where, under the circumstances, it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines, and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there.

Section 271 of the Railway Act, which also affects the case is as follows:

Sec. 271. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway within half a mile of the intersection of such highway with any railway at rail level, unless such cattle are in

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charge of some person or persons to prevent their loitering or stopping on such highway at such intersection.

* * * * * * * * * * *

3. If the cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

The plaintiff, as I have said, contends that under this legislation the railway company is bound to erect and maintain a fence on each side of the culvert across the watercourse and upon the dividing line between the railway property and that of the adjacent owners.

The company, on the other hand, asserts that it is not bound to maintain fences across watercourses at all or to build them on the boundary line, but that so long as it erects and maintains fencing sufficient in character to fulfil the statutory condition and which prevents cattle from straying upon the railway tracks, it has wholly fulfilled its statutory obligation.

According to my view the company's contention is the correct one.

The court below, in order to support the plaintiff's view, had recourse to the interpretation clause in the Railway Act, section 2, (*q.*), which provides that the expression "railway" means any railway which the company has authority to construct and operate, and includes all stations, depots, wharves, property and works connected therewith, and also any railway bridge or other structure which any company is authorized to construct under a special Act, and they hold that the word "railway" in section 194, (fifth line,) is therefore equivalent to railway property, and that it thus becomes obligatory on the railway company to erect its fences on the dividing line between its land and that of the adjacent proprietor. In other words, that the section, in fact, calls for a division, line, or boundary fences. Is this the proper construc-

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tion? There is sufficient, I think, in the section itself to shew that it is not. Its object seems to me clear and express, namely, the securing of protection for adjoining proprietors. If parliament had intended to insist upon the erection of and maintainance of *boundary* fences, it would have said so.

On the contrary, the phrase of the section leads to the inference that a boundary fence was not intended but only a fence on each side of the track of the height and strength of a line fence.

Again, in the proviso at the end of sub-section one of section 194, there is an indication that the object is to protect, not the railway, but the owners of improved and occupied lands on each side of it. So long as such protection is afforded by a fence of the prescribed character there is no liability.

Again, by the same subsection, provision is made for cattle guards at highway crossings and the only kind of cattle guard required is one suitable and sufficient to prevent cattle from going on the railway, another clear indication that the object of the section was the prevention of injury to the property of the adjacent owner.

Subsection three strongly indicates the same motive. The only penalty for breach of the requirements in regard to fences and cattle guards is that in the event of the company's neglect, the company shall be liable to the owner, not for all damage which may happen to him or to his property, but only for the damage which he may suffer on account of animals killed or injured by the company's trains or engines.

If it was the duty of the company to erect its fences on the exact limit of its "right of way," there would, I think be a clear indication of such intention and there would have been some penalty imposed for failure to perform such duty. All this, it seems to me,

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goes to shew that the intention of the legislature was not in any way to provide for the safety of the company's property or the company's servants, or for the delimitation of the respective lands of the company and the adjacent proprietor. but solely for the latter's protection in so far as the animals claimed by him or under him might be damaged through lack of the statutory requirements.

It seems to me that it is not necessary to look at the interpretation clause to ascertain the meaning of the word "railway" here. When it uses that word the presumption is that it uses it in its primary, ordinary sense. Everyone knows what the word "railway" ordinarily means; ("a way on which a train passes by means of rails," a learned English judge described it in 1883; *Doughty* v. *Firbank* (1)); and it must receive that meaning unless there is some all-powerful necessity compelling a departure from it and justifying the addition of one or more or all the entities also specified. Besides, if the rules of interpretation compel us here to add the word "property" converting the substantive "railway" into an adjective, qualifying the word "property" are we not equally bound to add all its neighbouring words, and to conclude that the obligation of fencing extends to stations, depots, wharves, bridges, and all other structures the building of which is within the company's powers.

To enlarge; if the plaintiff's contention is the correct one, all the company's property wheresoever situate, whether there is a railway track on it or not, and irrespective of the purposes for which it may be used, must be fenced. This burden will cover the depots and station houses, freight sheds and all other erections upon its lands no matter how inconvenient or detrimental to the public such fencing may be. It

(1) 10 Q. B D. 358.

will cover its magnificent Victoria Bridge and all bridges across streams and lakes whether navigable or not navigable as well. What has generally been supposed to be the paramount right of a ship-owner, the right of navigation through navigable waters, must give way, as well as those rights over floatable streams which, in Ontario at least, have been secured to the public by other statutes. Tunnels too must come within the operation of the rule as well as those enormous structures of masonry high above the adjacent houses which one sees in large cities both in the old world and the new, upon the crown of which the railway tracks are laid and the railway operations carried on.

I say the railway Act cannot be construed so as to give colour to a demand involving such a useless and insensate expenditure. The true view as to the use to be made of the interpretation clauses is, I think, well stated in Hardcastle, (2 ed.) at page 236, as follows:

> An interpretation clause * * * is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of the term must be under *all* circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be comprehended. If therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if the word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may always be a matter of argument whether or not the interpretation clause is to apply to the word used in the particular clause of the Act which is under consideration.

Vide also cases there cited.

Other sections of the Railway Act aid us, I think, in coming to the conclusion that the legislature never contemplated the imposition of the burden referred to.

Section 90 specifies certain general powers which the company may exercise, and among them, it has the

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right;—(*g*), to construct across or over any river, stream or watercourse, permanent embankments, aqueducts, bridges, arches, etc.;—(*h*), to divert or alter, as well temporarily as permanently, the course of any stream, river or watercourse, in order to carry the same under the railway.

Section 91 provides that, if in the course of the construction of a railway, a river, stream or watercourse has been diverted or altered, it shall be restored as nearly as possible to its former state so as not materially to impair its usefulness.

Sections 178 and 179, the one providing that no company shall cause any obstruction in or impede the free navigation of any river or stream across which its railway is carried, and the other in substance, that where the railway is carried across any navigable river, the company shall leave open certain spaces between the bridge piers and shall erect such swing or other bridges over the river's channel as the Governor General in Council may direct, both indicate that in such cases the idea of fencing was wholly foreign to the mind of the legislature.

These provisions of the Railway Act and the considerations to which I have referred lead, I think, to the inevitable conclusion that fencing is necessary only upon each side of the company's road-bed where such fencing will protect the land owners from danger or injury by the engines or trains of a railway to any of the land owner's cattle which, otherwise, might stray thereon, and that where the fence is properly attached to the piers of a bridge crossing a watercourse so as effectually to prevent access of the cattle to the roadway above, the bridge piers and the bridge itself must be deemed to be sufficient fencing, and that in case of navigable streams at least, no fencing at all was ever contemplated or was necessary.

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If this view of the case be the correct one, then the plaintiff's right to recover wholly fails. No negligence or breach of statutory duty can be imputed to the railway company, and the plaintiff's remedy, if any, must be against his lessors, or the persons through whose negligence the accident happened.

It may be advisable, however, that I refer to another point to which reference was made at the argument. The plaintiff rested his whole case according to the statement of claim upon the company's neglect to erect and maintain proper fences across the watercourse on both sides of the culverts. No claim was made by reason of the alleged defective cow-catchers on each side of the highway where it crosses the railway track. Leave was, however, given at the trial to add a paragraph setting up the insufficiency of these guards. During the course of the trial, counsel for the defendant contended that the company's liability depended upon the correctness of the plaintiff's claim as to the fencing across the watercourse, admitting that, if that contention was right the company was liable. and it was thereupon, as I read the case, admitted in substance that the horses got through the south field to the north field through a culvert, and that there was no one in charge when they got upon the highway, aud it was thereupon agreed that no evidence should be given as to the sufficiency or insufficiency of the cattle guards. Evidence was, however, given subsequently upon that point.

The learned trial judge did not, I suppose, in view of the admission that was made, pass upon that question, but as there might be some question as to this, it is, I think, well here to state, which I think counsel for the plaintiff admitted at the trial, that in my view the question as to the cattle guards cannot be raised. This, I

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think, necessarily follows from section 271 above cited. The horses in question were admitted to be at large upon the highway within half a mile of its intersection with the line of railway. They were in charge of no one so as to prevent their loitering or stopping on the highway at the point of intersection. It was at that point they were killed and the owner has not therefore any right of action by reason of such killing. This point was expressly decided in the case of *Nixon* v. *The Grand Trunk Railway Co.* (1), and as I understand the judgment of the court below the soundness of the judgment of the late Mr. Justice Rose in that case was not called in question.

The result is that the appeal is allowed and judgment shall be entered for the defendant with costs incurred in the courts below. Pursuant, however, to the undertaking contained in the order of the court below allowing this appeal, the respondent is entitled to the costs of this appeal, each party to have the right of set-off and the party in whose favour the balance of costs is found to have execution therefor.

GIROUARD J.—Concurred.

Appeal allowed with costs to respondent as directed.

Solicitor for the appellant: *John Bell.*

Solicitors for the respondent: *Teetzel, Harrison & Lewis.*

(1) 23 O. R. 124.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF TWO MOUNTAINS.

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JOSEPH A. C. ETHIER (RESPONDENT)...APPELLANT; *Oct. 1.

AND *Oct. 29,

JOSEPH LEGAULT (PETITIONER).....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE H. T. TASCHEREAU.

Controverted election—Status of petitioner—Evidence—Certified copy of voters' list—Imprint of Queen's Printer—Form of petition—Jurat—61 V. c. 14 s. 10, (D).

On the hearing of preliminary objections to a controverted election petition the production of a list appearing on its face to be an imprint emanating from the Queen's Printer, certified by the Clerk of the Crown in Chancery to be a copy of the voters' list used at the election, and upon which the name of the petitioner appeared as a person having a right to vote at such election, is sufficient proof of the status of the petitioner.

A copy of a list of electors bearing upon its face a statement that it is issued by the Queen's Printer makes proof of its contents without further verification.

The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne."

Per Gwynne J.—An objection to the regularity of the subscription to the jurat does not constitute proper matter to be inquired into by way of preliminary objection to the petition.

APPEAL from the judgment of Mr. Justice H. T. Taschereau, at Ste. Scholastique, in the District of Terrebonne, Province of Quebec, dismissing preliminary objections to the petition against the return of the appellant as member for the Electoral District of Two Mountains, in the House of Commons of Canada.

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

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The questions arising on this appeal are stated in the judgments reported.

Belcourt K.C. and *Perron* for the appellant. The affidavit was received, as appears by the jurat, before a firm of prothonotaries who do not constitute a moral person capable of administering or receiving oaths in judicial proceedings. Art. 23 C. P. Q. The affidavit is not in conformity with 54 & 55 Vict. ch. 20, sec. 3, because the petitioner uses in his affidavit the words "contestation d'élection" instead of the words "pétition d'élection," and has sworn merely that the contestation of election is true, to the best of his knowledge, and does not conform to the statute which gives the form of affidavit and exacts that the petitioner should swear that the allegations of the election petition are true.

No copy of the petition certified by the prothonotary as required by law was served on the appellant; the copy served as well as that of the procedure accompanying it was certified by "Grignon & Fortier, prothonotary, etc.", who have no right, as a firm, to certify judicial proceedings. Further, there has been no sufficient proof made of the quality of the petitioner as an elector, as required by R. S. C. ch 9, sec. 5. *Richelieu Election Case* (1); *Macdonald Election Case* (2).

The petition was served in the office of the prothonotory of the Superior Court, and in the presence of one of the prothonotaries who was then acting during the vacation in the place and stead of the judge. This service was contrary to Art. 147 C. P. Q.

Beaudin K.C. for the respondent cited *The Lunenburg Election Case* (3); *Macdonald Election Case* (2); *Mercier* v. *Bouffard* (4); 61 Vict. ch. 14, sec. 10, sub-sec. 6;

(1) 21 Can. S. C. R. 168.
(2) 27 Can. S. C. R. 201.
(3) 27 Can. S. C. R. 226.
(4) Q. R. 12 S. C. 385.

Richelieu Election Case (1); *Hickson* v. *Abbott* (2); *White* v. *Mackenzie* (3); *Caverhill* v. *Ryan* (4); *Queen's (P. E. I.) Election Case* (5); *The Queen* v. *Forget* (6); *Bureau* v *Normand* (7); 6 Fuzier Herman, vo. Audience No. 164; *Bussière* v. *Faucher* (8); *Wilson* v. *Ibbotson* (9); *Hus* v. *Charland* (10). The Code of Civil Procedure has no application in the present case, and service must be regulated by the Act respecting controverted elections as amended by 54 & 55 Vict. ch. 20, sec. 8, which provides "that the petition can be served on the respondent at any place within Canada." If article 147 C. P. Q. could apply, respondent has not, under Art. 174, alleged and proved prejudice.

THE CHIEF JUSTICE.—This is an appeal by the sitting member against a judgment dismissing his preliminary objections to a petition against the return.

Four objections to the judgment of the court below are raised by the appeal. Two were dismissed on the hearing and one was abandoned. There only remains to be considered he objection numbered three which is that "the petitioner has not proved his quality."

The petitioner filed the petition in the character of a voter, or, in the words of the statute "as a person who had a right to vote at the election." The appellant by his preliminary objections denied the petitioner's status as a person having a right to vote. It was therefore incumbent on the petitioner to prove his right.

The petitioner established by his evidence that his name appeared on the voters' list used at the election,

(1) 21 Can. S. C. R. 168.
(2) 25 L. C. Jur. 289.
(3) 19 L. C. Jur. 117.
(4) 18 L. C. Jur. 323.
(5) 7 Can. S. C. R. 247.
(6) 1 Legal News, 542.
(7) 5 R. L. 40.
(8) 14 L. C. R. 87.
(9) 13 L. C. Jur. 186.
(10) 29 L. C. Jur. 33.

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by the production of a certified copy of that list returned to the Clerk of the Crown in Chancery; see Dominion Evidence Act, 56 Vict. ch. 31, secs. 13 & 14; and which copy moreover appears to be an imprint emanating from the Queen's Printer, which of course under the law as it now stands required no verification beyond the statement appearing on its face that it was issued by the Queen's Printer. 61 Vict. ch. 14, sec. 10, subsec. 5. This was amply sufficient and the objection is therefore nothing less than frivolous.

The appeal is dismissed with costs.

TASCHEREAU J.—All the objections taken by the appellant have been abandoned or dismissed instanter at the hearing except the one concerning the proof of the election list, which, in my opinion, is as frivolous as the other ones.

I would dismiss the appeal with costs. It is one clearly taken only for delay.

GWYNNE J.—This is an appeal from a judgment dismissing preliminary objections filed to an election petition.

The petition was filed in the office of the prothonotary of the Superior Court of the District of Terrebonne having at the foot of it an affidavit the jurat to which was as follows:

Assermenté devant nous à St-Scholastique dans le district de Terrebonne ce quinzième jour de décembre mil neuf cent.

GRIGNON & FORTIER,

Protonotaire de la cour superieure dans et pour le district de Terrebonne.

At the same time a copy of the petition was left with the prothonotary to be forwarded to the returning

officer pursuant to the statute, which copy was on the same day mailed to the address of the returning officer.

It may here be observed that it is not disputed that in point of fact the petitioner was sworn to the truth of the matters alleged in the affidavit by one or other of the two gentlemen named respectively Grignon and Fortier, or that they jointly are prothonotary or prothonotaries of the Superior Court of the District of Terrebonne.

The preliminary objections are contained in twenty-two paragraphs, in the 18th of which the defendant alleges

> that the petitioner did not appear upon the list of the electors of the Electoral District of Two Mountains at the time of the election in this cause.

This objection is again repeated thus in paragraph 21.

> The petitioner in this cause has not and had not a right to vote at the election which is in question in the present cause. That he is not inscribed as an elector upon the electoral list which was used at the said election.

In the 19th and 20th paragraphs the respondent in the petition complained that the petitioner had lost, if he ever had, the right to vote at said election by reason of the committal by him of divers acts of bribery and corrupt practices said to have been committed by him both before and during the election.

It is not perhaps now necessary to inquire whether the charges alleged in these paragraphs which appear to aim at converting a petition against a sitting member to avoid his election upon charges made of bribery and corruption into an indictment against the petitioner upon charges of bribery and corrupt practices alleged to have been committed by him, constitute proper matter to be inquired into by way of preliminary objection to an election petition, because the defendant

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although given the most ample opportunity for proof failed to establish any of the charges alleged and the learned judge who adjudicated upon the preliminary objections has so adjudged and determined, and no suggestion of any ground of appeal against such judgment has been made before us or in the appellant's factum on appeal.

The whole gist and substance of the objections alleged in the other paragraphs of the preliminary objections are thus comprised and summed up in paragraphs 22 and 23.

22. The intimation of the said election petition and of the notice of its presentation—of the certificate of deposit of security—of the appearance and election of domicil of the petitioner's advocate—of the appointment of the petitioner's attorney made to the defendant is irregular, illegal and null, inasmuch as the said intimation was made to him in the office of the clerk of the Superior Court for the Province of Quebec, in the District of Terrebonne, during office hours, in presence of the prothonotary of the said court then acting as such prothonotary in vacation, in the absence of the judge of the said court for the said district.

23. In consequence no intimation of the petition and of the notice of presentation of the said election petition—of the security *and the other proceedings in this cause* has been made to the defendant.

The defendant produces in support of his preliminary objections the following exhibits;—

1. A copy of the election petition and of the affidavit at the foot thereof;

2. A copy of the certificate of deposit of security;

3. A copy of the appointment of petitioner's attorney;

4. The appearance and election of domicil of the petitioner's advocate;

and the preliminary exceptions thus conclude:

For all the reasons above mentioned the defendant concludes to dismiss the petition with costs.

It thus appears upon the defendant's own shewing that in point of fact he was served with the above several documents, and it was further shown in

evidence that the election petition with the affidavit at the foot thereof was presented and filed in the prothonotary's office on the 15th December, 1900, and a copy delivered to the prothonotary to forward and which was forwarded by him by post on the same day to the returning officer, and the defendant's sole contention was that by reason of alleged irregularity in the manner in which the signature of the prothonotaries appeared on the affidavit and the other papers and proceedings filed and certified by Grignon & Fortier, prothonotaries of the Superior Court, &c., were all null and void and nullified the petition which was filed. The learned judge before whom the matter of the preliminary objections was heard adjudged and determined that the petitioner had established his status of a petitioner who had a right to vote at the election and to file the election petition filed in the cause, and as to the several objections of alleged irregularities relied upon by the defendant as constituting nullities he adjudged and determined that they were not well founded in law and so he dismissed the preliminary objections. From this judgment the present appeal is taken, and in the argument before us in so far as relates to the alleged irregularities relied upon as constituting nullities the contention of the appellant was limited to the fact of the affidavit having the jurat subscribed with the names "Grignon & Fortier, protonotaire," &c., &c., and the fact of other papers served on defendant being similarly signed. The fact that the petitioner had made oath to the matter alleged in the petition before one of the two gentlemen who jointly fill the office of prothonotary of the Superior Court of the District of Terrebonne not being disputed the objection taken that the one who administered the affidavit had subscribed the jurat, with the name of "Grignon & Fortier, protonotaire," &c., &c., can

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amount at most to an irregularity and one which it would be competent for the court to cause to be amended; the objection, in truth, if a good one in the opinion of the court, was attributable to the officer of the court for which the petitioner should not be made to suffer. Such an objection should be made by an ordinary motion in court like any ordinary motion upon the ground of irregularity committed in the progress of a cause and not as a preliminary objection which calls in question the validity and very existence of the petition. Upon such a motion being made I cannot think that any court or judge could hesitate in directing the jurat to be amended (if the signing the joint name of the prothonotaries was unauthorised by the practice of the Superior Court) by that one who had administered the oath subscribing his own name to the jurat *nunc pro tunc*, so as to avoid stifling an inquiry into the grave charges in the election petition.

As to the petitioner's status the appellant's contention simply is that the evidence given by the petitioner of his status was not legal evidence at all, his contention being, that the only legal evidence of status is a certified copy by the clerk of the Crown in Chancery of the list or copy of list actually used at the election. This contention he makes upon the assumed authority of the *Richelieu Election Case* (1), but no such point was decided by the court in that case; all that was decided was, that a certified copy by the clerk of the Crown in Chancery of the list returned to him by *the revising officer* as the list finally revised by him constitutes no evidence at all of a petitioner's status, and that such status can be proved only by the petitioner's name appearing as a voter on the list actually used at the election. Then in the *Winnipeg Election Case* (2), this court held that a certified copy by the clerk of the Crown in

(1) 21 Can. S. C. R. 168. (2) 27 Can. S. C. R. 201.

Chancery of the list or copy of list returned to him by the returning officer at an election as the actual list used at the election is sufficient *primâ facie* evidence of the list used at the election, and so a sufficient compliance with the judgment in the *Richelieu Election Case* (1). The appellant relies upon these two cases, and the respondent does not at all question their authority in the present case, but neither the Richelieu case nor any other case has ever held that original public documents of which for convenience of proof a copy certified by a public officer in charge of the original may be made by statute *primâ facie* evidence, when themselves produced constitute no evidence. The originals themselves do of course when produced constitute the best evidence.

The respondent in point of fact, *ex abundanti cautelâ*, produced a plethora of evidence of his status as a petitioner. He called the Secretary Treasurer who under the Provincial law made the voters' list which under the Dominion Franchise Act now in force. 61 Vict. ch 14, constitutes the voters' list in force at Dominion elections at the polling division in question. He produced the original list prepared by him and retained in his possession under Art. 185, R. S. Q. He also proved that he transmitted a duplicate original of that list to the Registrar of the County of Terrebonne as required by Art. 303, R. S. Q. The registrar was called and he produced that list and proved that he had transmitted a copy of it to the Clerk of the Crown in Chancery as required by the Dominion Statute, 61 Vict. ch. 14.

The Clerk of the Crown in Chancery was called and produced the copy of list as transmitted to him and he proved that he had transmitted it to the Queen's Printer to be printed by him as required by sec. 10, s.s. 5 of 61 Vict. ch. 14, and had received back the copy so sent to the printer together with a number of

(1) 21 Can. S. C. R. 168.

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printed copies. He also proved that immediately upon the issue of the writ of election for the election in question he transmitted to the returning officer for the District of Terrebonne two of the said printed lists of voters so received from the Queen's Printer for every polling division in his district, including the polling division in question. It was not disputed that these lists so transmitted to the returning officer were authenticated by the imprint of the Queen's Printer as provided in sec. 10, s.s. 6 of 61 Vict. ch. 14. He also produced the very list which had been returned to him by the returning officer as the one actually used at the election in question. Of the two printed lists which had been so transmitted to him by the Clerk of the Crown for the polling division in question he produced the one which he had retained in his own possession and by marks in his own handwriting on the list produced by the Clerk of the Crown as the one returned to him as the one used at the election he identified that list to be the very one he had sent to the deputy returning officer to be used, and finally the poll clerk by marks in his handwriting on that list also identified it as the very one which had been used at the election. It was not disputed that all of these lists in so far as related to the polling division in question corresponded with each other and contained the petitioner's name thereon as a voter, and his identity with the person of his name on the list was established by evidence. Thus the status of the petitioner was established in the most perfect manner possible. The appeal therefore must be dismissed with costs.

SEDGEWICK, GIROUARD and DAVIES JJ. concurred in the judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. L. Perron.*

Solicitor for the respondent: *S. Beaudin.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF BEAUHARNOIS.

GEORGE. M. LOY (RESPONDENT).....APPELLANT; 1901

AND *Oct. 1.

JOSEPH EMERY POIRIER (PETITIONER) ..... } RESPONDENT. *Oct. 29.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE BELANGER.

Controverted election—Preliminary objections—Status of petitioner—61 V. c. 14; 63 & 64 V. c. 12 (D.)—59 V. c. 9, s. 272 (Que.)—Dominion franchise—Construction of statute.

The principal contention on preliminary objections to a controverted election petition was that the petitioner had been guilty of corrupt practices before and during the election, and that, by the effect of the statutes 61 Vict. ch. 14 and 63 & 64 Vict. ch. 12, the Dominion Franchise Act was repealed, and the provisions of the "Quebec Elections Act" regulating the franchise in the Province of Quebec substituted therefor so as, thereby, to deprive the petitioner of a right to vote under 59 Vict. ch. 9, sec. 272, and being so deprived of a vote that he had no status as petitioner. In the Election Court, evidence was taken on issues joined and the judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada;

Held, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise.

Per Gwynne J.—The amendment to the Dominion Franchise Act by 61 Vict. ch. 14 (D.) and 63 & 64 Vict. ch. 12 (D.) has not introduced into that Act the provisions of section 272 of "The Quebec Elections Act" so as to deprive a person properly on the list of voters for a Dominion election of his right to vote at such election.

APPEAL from the judgment of His Lordship Mr. Justice Bélanger dismissing the preliminary objec-

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

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tions to the petition against the return of the appellant as member for the Electoral District of Beauharnois in the House of Commons of Canada.

The questions at issue upon this appeal are stated in the judgments reported.

Belcourt K.C. for the appellant cited the statutes, and *Rouville Election Case* (1); Cunningham on Elections (3 ed.) p. 281.

Bisaillon K.C. and *Laurendeau* for the respondent.

THE CHIEF JUSTICE.—The preliminary objection in this case was to the status of the petitioner. It was said that he was a person not entitled to vote because he had been guilty of corrupt acts.

There was a long argument to shew that either under the new Franchise Act (which makes the law of Quebec the test of the right to vote at a Dominion election in that province) or under the Dominion Elections Act, a person guilty of corrupt practices cannot vote and consequently cannot maintain a petition against the return. All this argument as to the law, however, appears to me to be immaterial in the absence of evidence shewing that the petitioner, (the respondent in this appeal), was guilty of a corrupt act.

For this reason of the want of proof of the pretended ground of disqualification the preliminary objection was rightly dismissed by the court *a quo* and this appeal must be similarly dealt with.

TASCHEREAU, J.—The petitioner-respondent alleges in his petition that he is an elector, who had a right to vote, and has voted at the election to which the

(1) Q. R. 13 S. C. 94.

petition relates, the Dominion election held on the 7th of November, 1900.

The appellant filed a preliminary objection on the ground that the respondent, during the said election, had been guilty of corrupt practices and had therefore no right to vote, and consequently no right to present this petition, as the statute gives the right to present an election petition exclusively to a person who has the right to vote.

We have, first, to see if, in fact, the appellant has proved that the respondent has committed the corrupt practices of which he accuses him. The question of law whether corrupt practices by a petitioner disentitle him *ipso facto*, of the right to petition does not come up for our determination if this petitioner is not proved to have committed any. The Superior Court found, as a fact, that he had not. I am of opinion, that the appellant has failed to establish that this finding is wrong. The charge in his bill of particulars upon which he seems to rely more specially is that the respondent, two or three days before the election, promised some money to one *Joseph* Vallée to induce him to vote for the candidate Bergeron, and did in fact later on, give him two dollars. Not *Joseph* but one *François* Vallée was brought as witness for the appellant to prove that charge. Now, suffice it to say that the judge who heard this witness entirely rejects his testimony as unworthy of belief. Moreover, the bill of particulars does not mention *François* Vallée's name, and this evidence should not have been received. The charge as to one Bougie is also not mentioned in the bill of particulars And Roch Sauvé, a witness brought by the appellant, entirely fails to prove that respondent committed a corrupt practice by treating any of the electors. The witnesses Emile Boyer and Dominique Lecompte prove nothing whatever against the respond-

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ent. These are the only cases relied upon before us by the appellant. The Superior Court could not but find the respondent not guilty of the charges brought against him.

Taschereau J.

I would dismiss the appeal with costs.

GWYNNE J.—This appeal arises upon an election petition to which the defendant filed divers preliminary objections which have been dismissed and from the judgment dismissing them this appeal is taken.

The petitioner in his petition alleged that his name was inscribed, as a voter, upon the electoral list used at the last election held in the electoral district of Beauharnois in the Province of Quebec of a member of the House of Commons, to represent the constituency of that electoral district; that he was an elector qualified and having the right to vote, and as such did vote at the said election; and the petitioner prayed that the return of the respondent as the member elected at the said election should be set aside and declared to be null and void by reason of the respondent having been, as was alleged in the petition, guilty of divers numerous acts of bribery and corrupt practices mentioned in the petition. The point raised by the appeal is a wholly novel one, insisting in fact, that by force of the recent change in the law affected by the Dominion Franchise Act, 61 Vict. ch. 14, and the Dominion Election Act, 63, & 64, Vict. ch. 12, the power of defendants in an election petition to raise by way of preliminary objections thereto, questions of a wholly new character is extended in an unlimited degree. The point having been almost the sole point discussed in the appeal before us and having been pressed upon us by the learned counsel for the appellant with the greatest earnestness and persistency, and as the point is one of very considerable importance as effecting in

the future election petitions, and the right now claimed for defendants to meet them by filing preliminary objections being of a novel character, I think we should dispose of the appeal upon the point so pressed upon us, even at the risk of being deemed to treat the case at greater length then may be thought absolutely necessary for the disposal of the appeal.

The respondent met the petition by filing a long list of preliminary objections.

In the fifth he alleges:

That before, during and after the said election, the petitioner directly and indirectly by his agents and other persons acting for him and in his name, has made gifts, loans, offers, promises and agreements with electors and with other persons with intent to induce *electors to support and to undertake to support his election and with intent to obtain the votes of electors at the said election.* and especially to Joseph Vallée an elector and labourer of Salaberry de Valleyfield.

Now not to dwell upon a fact which appears upon perusal of the objections, namely, that some of them are framed as if the petitioner was himself the opposing candidate at the election, notably that which I have above quoted, and also some of the others, it is to be observed that the objections relate to acts which are by 63 & 64 Vict. ch. 12 declared to constitute indictable offences which upon conviction are punishable some with fine and imprisonment, some by fine alone, or by a liability to pay a sum of money by way of forfeiture to any one who shall sue therefor, as a penalty imposed by the act, and it is to be observed that the objections are stated in the most general terms possible (much in the form which, I think it is much to be regretted, has been sanctioned by practice in election petitions), charging the petitioner with having "committed all and every one of the acts of corruption defined and prohibited by the law", and thus enumerating all of the offences of every description which are mentioned in secs 108 to 113

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both inclusively, and which are all made indictable offences punishable severally upon conviction in the manner prescribed in the Act. The only attempt at assigning a particular specific act as having been committed by the petitioner is that alleged in the objection above quoted, which is framed as if the petitioner himself had been an opposing candidate, and the offence charged involves the indictable offences of bribery punishable upon conviction by fine and imprisonment.

Besides being made indictable offences and punishable on conviction all the acts alleged are made inquirable into *upon the trial* of an election petition, calling in question the validity of the election, and upon being proved to the satisfaction of the court or judge to have been committed by a candidate or any agent of his, the election may be declared void and in some cases a candidate may be disqualified, but no such judgment or finding of the court or judge trying the election petition subjects any person other than a candidate who may have been the person who actually committed the offence so proved to any penalty whatever imposed by the statute on such person.

Section 129 of the Act attaches to convictions for corrupt practices, of whatever description they may be, of which a party is found guilty a very severe penalty in addition to the fine or imprisonment or both prescribed by the Act for the particular offence charged. By that section it is enacted that:

> Every person other than a candidate found guilty of any corrupt practice (in any proceeding in which after notice of the charge he has had an opportunity of being heard) shall during the eight years next, after the time *at which he is found guilty* be incapable of being elected to, and of sitting in the House of Commons and of voting at any election of a member of the House of Commons or of holding any office in the nomination of the Crown or of the Governor General of Canada.

Then section 140 enacts that:

Whenever it appears to the court or judge trying an election petition that any person has violated any of the provisions of this Act for which violation such person is subjected to a fine or *penalty* (other than fine or imprisonment imposed for any offence amounting to an indictable offence) such court or judge may order that such person shall be summoned to appear before such court or judge at the place, day and hour fixed in such summons for hearing such charge.

And by section 141 it is enacted that:

Notwithstanding anything in the Criminal Code 1892, no indictment for corrupt practices shall be tried before any court of Quarter Sessions or General Sessions of the Peace.

There is nothing in the Act which expresses any intention of Parliament to subject the offences charged in the objections filed by way of preliminary objections to inquiry thereinto as preliminary objections under the statute to an election petition. On the contrary the precise provisions of the Act by which alone a party other than a candidate shall be found guilty of such offences and subjected to the penalties of every description imposed by the statute, in my opinion, exclude all ideas of the accusation of such offences as committed by a petitioner affording a good ground of preliminary objection.

It is contented however that, (notwithstanding the precise provisions of the Act to which I have adverted) the Dominion Parliament has by implication introduced into the Dominion Franchise Act, 61 Vict. ch. 14, a clause of an act of the legislature of the Province of Quebec which has the effect of subjecting the petitioner to an election petition to having accusations by way of preliminary objections, made against him of having committed the several offences alleged to the present case, and to having them inquired into and adjudicated upon as and by way of preliminary objections to any further proceedings on the petition.

The argument is that as by 61 Vict. ch. 14, it is enacted that for the purpose of a Dominion election

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held within the limits of the province the qualifications necessary to entitle any person to vote thereat shall be those established by the laws of that province as necessary to entitle such person to vote in the same part of the province at a provincial election, and that as by a provincial statute of Quebec, 59 Vict. ch. 9, sec. 272, it is enacted:

> Tout électeur qui à une election a commis une acte constituent une manœuvre électorale quelconque défendue par la présente loi, ou a été partie à la commission d'un tel acte est *ipso facto* privé du droit de voter à cette élection.

Then the argument is that as by 37 Vict. ch. 10 sec. 7 (D.), the only persons competent to present an an election petition are

1st. A person who had a right to vote at the election to which the petition relates; and 2nd. A candidate at such election. And, by reason of the 272nd sec. of the Provincial Act 59 Vict. ch. 9, being as it is contended incorporated into the Dominion Franchise Act, it is contended that upon proof upon trial of the preliminary objections that the petitioner committed some or one of the acts of bribery and corrupt practices charged in the preliminary objections, he loses his status as a petitioner, notwithstanding that it is not disputed that he was qualified to be and was entered upon the electoral list in force at the election as a voter thereat and that upon his applying at the election for his ballot paper he was given one and that he voted thereon without his right to vote being disputed, and without his being asked to take the oath which by the Dominion law he was bound to take under penalty of forfeiting his vote if he did not.

What should be the construction of the section of the Quebec statute above mentioned, if it was, as is contended, incorporated into the Dominion Franchise Act, and whether it could be given the construction as

contended by the appellant in view of the provisions of the Dominion Acts to which I have referred, I do not propose to inquire, for in my opinion the contention that it is so incorporated is not well founded. Under the Dominion Franchise Act now in force, 61 Vict. ch. 14, the qualifications necessary to entitle any person to vote at a Dominion election, save as otherwise is provided by that Act and also by the Dominion Elections Act, 63 & 64 Vict. ch. 12, are those established by the law of the province in which the election is held as necessary to entitle such person to vote in the same part of the province at a provincial election.

By article 177 R. S. Q. the secretary-treasurer of every municipality is required to make a list in duplicate of all persons who, according to the valuation roll then in force in the municipality for local purposes, appear to be electors by reason of real estate possessed or occupied by them within the municipality, in any manner specified in article 173.

Provision is then made for the revision and correction of such list. Article 208 then enacts *that every such list when put in force as prescribed in the Act shall, during the whole period in which it remains in force be deemed the only true list of electors within the electoral district.* The law then provides for one of those duplicate original lists being retained on record by the municipality and for the other to be registered in the registry office of the registration division in which the municipality is situate. Then by 61 Vict. ch. 14, sec. 5 s.s. *c*, it is enacted that the *voters lists used at a Dominion election* shall be those prepared for and in force under the laws of the province for the purpose of provincial elections, and in sec. 10 of the same Act it is enacted that within ten days after the final revision of every list of voters for the purpose of provincial elections it shall be the duty of the custodian thereof to transmit to the Clerk

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of the Crown in Chancery a copy of such list certified under the hand of such custodian. Then in s.s. 2 of the same section it is enacted that for the purposes of Dominion elections *such certified copy shall be deemed to be the original and legal list of voters* for the polling division for which the list of which it is a copy was prepared, so long as that list remains in force, subject however to such changes and additions as are subsequent to revision made in such lists under the provisions of the provincial law. Then by s.s. 3, it is made the duty of the clerk of the Crown in Chancery to cause such certified copy to be printed by the Queen's Printer. Then by sub sec. 6, it is enacted that all voters lists so printed by the Queen's Printer shall be authenticated by his imprint in the same manner as other Parliamentary documents, and every copy of a voters list bearing such imprint *shall be deemed to be for all purposes an anthentic copy of the original list of record in the office of the clerk of the Crown in Chancery*. Now from these sections it is abundantly apparent that subject to certain provisions specified in the Act and in 63 & 64 Vict. ch. 14, the sole test of the qualification of a person to vote at a Dominion election, and to be a petitioner in an election petition to avoid any such election is his being entered as a qualified voter upon the list of voters which by the above sections is declared to be, and to be deemed to be "the original and legal list" and "the only true list" of voters within the electoral district.

Section 6 of 61 Vict. ch. 14 then enumerates several descriptions or classes of persons who though they may be disqualified by the provincial law from being entered on the provincial list of voters though otherwise qualified shall not be disqualified from voting at Dominion elections, and sec. 2 provides how such persons, although not on the list shall be admitted to

vote at a Dominion election. Then 60 & 64 Vict. ch. 12, sections 7, 8, 9, 65, 68, 126 and 129 designate divers persons and classes of persons who having the qualification entitling them to be and being entered on the provincial voters lists shall be disqualified from exercising their franchise at a Dominion election. The Dominion Parliament has itself designated every person and every class of persons who although not entered upon the provincial lists as qualified electors at provincial elections shall nevertheless be qualified to vote at a Dominion election, and in like manner every person and every class of persons who although qualified to be, and as such being, entered upon the provincial lists shall nevertheless be disqualified from exercising their franchise at a Dominion election. The Dominion Parliament has plainly reserved to itself the right of determining what persons, if any, who are entered upon a provincial list as duly qualified electors at a provincial election, shall nevertheless be disqualified from exercising their franchise at a Dominion election, and no provincial Act can qualify that right in any the slightest degree. Sec. 272 of the Quebec Act, 59 Vict. ch. 9, has therefore it is clear, no operation whatever in the present case.

The parties proceeded as appears to trial of the facts alleged in the preliminary objections before having the question as to the sufficiency in point of law of the objections determined, and no evidence was offered in support of any of the objections, save only of that contained in that paragraph which I have above quoted, namely, a charge of bribing Joseph Vallée therein mentioned. The learned trial judge discredited the evidence offered in support of that charge and he declared that it was not proved, and he dismissed the preliminary objections as well for their insufficiency in point of law as for the absence

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of proof in point of fact of the only charge in the objections upon which any evidence was offered. In my opinion the sole material question raised by, and argued in the appeal is as to the right of the defendant in the election petition to make the charges involved in the matters asserted by way of preliminary objections to an election petition, and I am of opinion that no such right exists. The appeal should, I think, for that reason, be dismissed for evidence offered in support of objections or in objections not constituting good grounds to set up as preliminary objections is irrelevant and so inadmissible and should not be received. The main question here seems to be, as I have said, upon the sufficiency of the objections pleaded by any of the preliminary objections.

SEDGEWICK, GIROUARD and DAVIES JJ. concurred in the judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *L. J. Papineau.*

Solicitor for the respondent: *J. G. Laurendeau.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF BURRARD.

JOHN MAYFIELD DUVAL (PETITIONER) ..... } APPELLANT;

AND

GEORGE RITCHIE MAXWELL (RESPONDENT)..... } RESPONDENT.

1901
*Oct. 2.
*Oct. 29.

ON APPEAL FROM THE DECISION OF MR. JUSTICE MARTIN.

Election petition—Deposit of copy—Preliminary objections.

Where a copy of an election petition was not left with the prothonotary when the petition was filed and, when deposited later, the forty days within which the petition had to be filed had expired.

Held, Gwynne J. dissenting, that the petition was properly dismissed on preliminary objections (8 B. C. Rep. 65). *Lisgar Election Case* (20 Can. S. C. R. 1) followed.

Per Gwynne J.—The Supreme Court is competent to overrule a judgment of the court differently constituted if it clearly appears to be erroneous.

APPEAL from a decision of Mr. Justice Martin (1) maintaining preliminary objections to a petition against the return of respondent as member elect for the electoral district of Burrard.

The only question to be decided on this appeal was whether or not the petition was out of court by the fact that a copy was not deposited with the prothonotary when the petition was filed or within the forty days allowed by the Election Act for filing it.

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

(1) 8 B. C. Rep. 65.

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J. Travers Lewis for the appellant. The *Lisgar Election Case* (1) which Mr. Justice Martin followed may be distinguished from this. There no copy of the petition was ever filed and the subsequent steps required by the statute were therefore not taken. In this case all those steps were taken and no prejudice has been suffered by the respondent. The learned counsel cited also *Folkard* v. *Metropolitan Railway Co.* (2); *Robertson* v. *Robertson* (3); *Smith* v. *Baker* (4).

McDougall for the respondent referred to *Edwards* v. *Roberts* (5); *North Ontario Election Case* (6); *Noseworthy* v. *Buckland* (7).

THE CHIEF JUSTICE.—The preliminary objection upon which the court below dismissed the petition was simply this, that whilst the petition was filed within forty days after the holding of the poll, a copy of the petition required by the English rules of court (made applicable by the Controverted Elections Act, 49 Vict. cap. 9, sec. 34) was not filed with the petition nor until the time limited for filing a petition had expired. The election was on the 6th of December, 1900. The petition was filed on the 15th of January, 1901, but a copy was not filed until the 17th or 18th day of January, 1901, the latter dates being subsequent to the expiration of the time for filing the petition.

With great respect for the opinions of those from whom I differed in the Lisgar case, I must say that I still adhere to all that I said in my judgment in that case. My views, however, did not prevail, and it was determined by the majority of the court that a non-

(1) 20 Can. S. C. R. 1.
(2) L. R. 8 C. P. 471.
(3) 8 P. D. 96.
(4) 2 H. & M. 499.
(5) [1891] 1 Q. B. 303.
(6) 3 Can. S. C. R. 374.
(7) L. R. 9 C. P. 233.

compliance with the rule requiring the filing of a copy contemporaneously with the filing of the petition was a fatal omission.

It was suggested on the argument that this case could be distinguished from the Lisgar case for the reason that here a copy of the petition was filed two or three days subsequently to the petition, whilst in the Lisgar case no copy was ever filed, and it was said that the provision authorising the court or a judge to enlarge the time showed that the omission was not fatal.

The same argument as that put forward here, namely, that the rule in question was not imperative, was urged in the Lisgar case and as I thought then was well founded.

I cannot, however, see that the subsequent filing of the copy distinguishes this case in principle from the Lisgar case, by which I am bound and which I must therefore reluctantly follow. Mr. Justice Martin's decision was correct and this appeal must be dismissed with costs.

TASCHEREAU J.—I would dismiss this appeal. When the law says that the petition must be presented not later than forty days after the holding of the poll and that with that petition a copy thereof shall be left for the returning officer, it seems to me to be just as imperative to leave the copy within forty days, as it is to present the petition itself within that delay. Here, no copy was left during the forty days. The argument that whatever the length of time after the forty days the copy is filed the object of the law is accomplished and no prejudice is caused, is, in my opinion, not tenable. It might as well be contended that a petition may be filed after the forty days. The law says that both the petition and the copy shall be

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left with the clerk *not later* than forty days after the election.

Gwynne J.

GWYNNE J.—I feel difficulty in concurring in the proposition that it is not competent or proper for this court to reverse a judgment of the court differently constituted if it clearly appear to be erroneous.

This court is not invested with the prerogative of finality as is the House of Lords whose judgments are the law of the land until and unless varied by Parliament. Nor is this court invested with the prerogative of infallibility so as to prevent its seeing error in one of its own judgments. Not being incompetent to perceive error if there be error in a judgment of the court it must, I think, be competent for it to correct such error if it clearly appear and it be in the interest of the due administration of justice that the error should be corrected.

SEDGEWICK, GIROUARD and DAVIES JJ. concurred in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *Henry O. Alexander.*

Solicitor for the respondent: *D. G. MacDonell.*

AURELIE IDYLLE GAREAU ET VIR (PLAINTIFFS) ..... } APPELLANTS;

AND

THE MONTREAL STREET RAILWAY COMPANY (DEFENDANT)... } RESPONDENT.

1901
*Oct. 11.
*Oct. 29.

ON APPEAL FROM THE COURT OF REVIEW, AT MONTREAL.

Nuisance—Operation of electric railway—Power house machinery—Vibrations, smoke and noise—Injury to adjoining property—Evidence—Assessment of damages—Reversal on questions of fact.

Notwithstanding the privileges conferred by its Act of Incorporation, upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city the company is responsible in damages to the owners of property adjoining its power-house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and value thereby occasioned. *Drysdale* v. *Dugas* (26 S. C. R. 20) followed.

In an action by the owner of adjoining property for damages thus caused the evidence was contradictory and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality.

Held, Taschereau J. dissenting, that notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations.

In reversing the judgment appealed from, the Supreme Court, in the interest of both parties, assessed damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise, the record was ordered to be transmitted to the trial court to have the amount of damages determined.

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

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GAREAU v. THE MONTREAL STREET RAILWAY COMPANY.

APPEAL from the judgment of the Court of Review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

The action was brought by the owner of a number of dwelling houses built upon land adjoining property upon which the company had built a large power-house equipped with powerful engines and a number of electric dynamos which were utilized for the production of the necessary motive power to operate the Montreal electric tramways authorised by the provincial legislation incorporating the company.

The evidence, on the part of the plaintiff, (principally tenants who had occupied the dwellings) shewed, that the building of this power-house and the vibrations caused by working the machines placed therein, constituted a nuisance to plaintiff and to her tenants. Doors would be banged, windows would rattle, stoves required to have their legs fastened to the floor; glasses would be shaken off sideboards and tables; tinware would jump around; the pans on stoves would clatter; the oil and the flame of lamps would be perceptibly agitated; plaster was shaken down; and the usual small articles of house furniture would be either broken or shaken into tormenting makers of noise. There was also almost constant trembling and jarring underfoot attended with shocks trying to the nervous system. The dwellings became uninhabitable and were gradually deserted on account of the smoke from the power-house, the noise and the vibrations of the ground and of the houses.

On behalf of the respondent this evidence was to a great extent contradicted by persons living in the immediate neighbourhood and by scientific witnesses who testified to the effect that they had failed to detect any vibration by means of their senses, or as the

result of tests by means of extremely sensitive vibrometers, and that the noise caused by the works was not of an extraordinary nature, but rather the contrary.

The trial court considered that the plaintiff's evidence had been rebutted and, "considérant que l'établissement autorisé de la défenderesse (respondent), n'est donc que l'exercice d'un droit, exclusif de toute faute et conséquemment de toute responsabilité," dismissed the action with costs. The Court of Review affirmed this decision by the judgment from which the plaintiff asserts the present appeal.

De Bellefeuille K.C., for the appellant, cited arts. 356, 406, 1053 C. C.; 1 Avisse, Etablissements Industriels, no. 249; Massé, "Dr. Comm," p. 456, no. 385; Pand. Fr. 1896, 2, 17; 6 Laurent, *nn.* 143, 145; 12 Demolombe, *nn.* 653, 654; 2 Sourdat, "Responsabilité," (ed. 1887), no. 1472; Dal. 1841, 2246; S. V. 1844, 1811, 1895, 1222; *St. Charles* v. *Doutre* (1) *per* Ramsay J. at p. 257; *Ville de Sorel* v. *Vincent* (2); *Gravel* v. *Gervais* (3); *Chandler Electric Co* v. *Fuller* (4); *Drysdale* v. *Dugas* (5); *Carpentier* v. *Ville de Maisonneuve* (6); *Canadian Pacific Railway Co.* v. *Roy* (7). In this case there was no fault on the part of the plaintiff as in *McGibbon* v. *Bedard* (8) and the inconvenience suffered has been more than mere fanciful injury, as in *Crawford* v. *The Protestant Hospital for the Insane* (9). As to the appreciation of the scientific testimony, see *Crawford* v. *The City of Montreal* (10).

Lafleur K.C. and *Meredith K.C.* for the respondent. There has been no nuisance proved for which any damages can be recovered; all the plaintiff's evidence has been fully rebutted by positive testimony of

(1) 18 L. C. Jur. 253.
(2) 17 R. L. 220.
(3) M. L. R. 7 S. C. 326.
(4) 21 S. C. R. 337.
(5) 26 S. C. R. 20.
(6) Q. R. 11 S. C. 242.
(7) Q. R. 9 Q. B. 551.
(8) 30 L. C. Jur. 282.
(9) M. L. R. 7 Q. B. 57.
(10) 30 S. C. R. 406.

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witnesses and instrumental tests made by scientific witnesses. In any case the power-house was lawfully erected and operated and necessary for the purpose of carrying on the business as authorized and in accordance with the powers conferred by the charter of incorporation, 49 & 50 Vict. c. 86, and 57 Vict. c. 73, (Que.), and by by-law 210 of the City of Montreal, and franchises and privileges conferred by law. In view of statutory authority the respondents are entitled to the power-house and to carry on the works complained of. The appliances used and the mode of construction are both necessary and proper and, as it has not been proved that the power-house has been erected negligently, or that the works carried on in it have been attended with any neglect, there is no responsibility on the part of the company.

We rely upon the following authorities: — *Port Glasgow and Newark Sailcloth Co.* v. *The Caledonian Railway Co.* (1); *The King* v. *Pease* (2); *London Brighton & South Coast Railway Co.* v. *Truman* (3); *Dunn* v. *Birmingham Canal Co.* (4); *Rapier* v. *London Tramways Co.* (5): *Hammersmith Railway Co.* v. *Brand* (6); Abbott on Railways, p. 170; *National Telephone Co.* v. *Baker* (7).

The judgment of the majority of the court was delivered by

GIROUARD J.—Il s'agit dans cet appel plutôt d'une question de fait que de droit, bien que sur le droit le jugement, qui n'est accompagné d'aucunes notes, ne nous semble pas clair et même sur le fait, nous sommes clairement d'opinion qu'il est erroné.

(1) 20 Rettie H. L. 35.
(2) 4 B. & Ad. 30.
(3) 11 App. Cases, 45.
(4) L. R. 7 Q. B. 244; 8 Q. B. 42.
(5) [1893] 2 Ch. 588.
(6) L. R. 4 H. L. 171.
(7) [1893] 2 Ch. 186.

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Girouard J.

Le jugement de la cour Supérieure, (Tellier, J.) qui a été confirmé par la cour de révision à Montréal, (Gill, J. dissident), admet que le propriétaire de toute usine est responsable des dommages que sa construction ou son fonctionnement peut causer aux propriétés voisines, soit en les dégradant, soit en les ébranlant, soit en les affectant d'odeurs malsaines ou de fumées nuisibles, soit en produisant des vibrations, bruits ou autres inconveniens, dépassant les bornes du bon voisinage.

Ce principe, établi par une jurisprudence constante en France, vient d'être développé par M. le juge Blanchet, parlant au nom de la cour d'appel, dans une autre espèce qui, à en juger par les observations du savant juge, doit être analogue à celle-ci, si l'on considère qu'il s'agissait d'une action en dommages intentée contre l'intimée par un deuxième voisin au sujet de la même usine; je fais allusion à la cause de *Félix Gareau* v. *The Montreal Street Railway Co.* (1) décidée le 18 janvier 1901. Cette cour a fait l'application du même principe dans *Drysdale* v. *Dugas*, (2.)

L'intimée a soutenu en sus qu'étant autorisée par la législature a exploiter un chemin de fer électrique dans la cité de Montréal et ses environs, elle est par la même autorisée à manufacturer de l'électricité, sans aucune restriction de temps ou de lieu, et sans responsabilité pour dommages, s'il n'y a négligence de sa part. Il ne peut en être ainsi en face du Code Civil de la province de Québec, quelque soit le droit Anglais sur le sujet. Une corporation n'est pas un être privilégié; c'est, disent les articles 352 et 356 C.C., une personne morale ou fictive, régie par les lois affectant les individues, et par conséquent repondant de son fait comme eux, sauf les privilèges spéciaux conférés par sa charte.

C'est la doctrine que la cour d'appel de Québec vient de consacrer, et nous ne croyons pas que, dans la pré-

(1) Q. R. 10 Q. B. 417.

(5) 26 S. C. R., 20.

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sente espèce, les tribunaux inférieures aient décidé autrement, bien que les considérants ne soient parfaitement clairs à cet égard. Il est indubitable que l'intimée jouit de privilèges spéciaux sur les rues publiques, à l'égard des propriétés riveraines, mais ce point ne se prêsente pas devant cette cour, pas plus qu'il ne s'est présenté devant les tribunaux inférieurs. Ils paraissent s'être appuyés sur l'appréciation de la preuve, qui suivant eux ne révèle rien qui dépasse la mesure des obligations ordinaires du bon voisinage, auxquelles tout le monde est tenu. Nous sommes d'un avis contraire.

Grand nombre de témoins ont été entendus de part et d'autre ; l'appelante a fait entendre ses locataires et des personnes qui connaissaient les lieux avant et depuis la construction des usines.

L'intimée s'est fortement appuyée sur des témoignages scientifiques. Mais ils ne peuvent démentir les faits relatés par les témoins occulaires. Qu'il y ait eu vibrations et bruits et autres inconvénients excédant la mésure des obligations du voisinage, personne ne peut en douter, lorsque l'on apprend que l'établissement d'électricité de l'intimèe, appelé le "Power House", contient six machines à vapeur d'une force de huit mille chevaux, et dont l'une, le "Corliss engine" pèse cent tonneaux, et faisant 70 évolutions à la minute ; en sus dix-huit dynamos électriques. Toutes ces machines fonctionnent sur un sol mou jour et nuit, plus ou moins, suivant que requis pour produire la force motrice nécessaire à la circulation des chars électriques, non seulement en la cité de Montréal, mais aussi dans la banlieue. Ses deux cheminées, dont l'une de 255 pieds de hauteur, surmontent des fournaux qui consumment de 30,000 à 40,000 tonnes de charbon par an. Enfin, c'est, dit-on, le plus puissant et le plus considérable établissement de ce genre en Amérique.

L'avocat de l'intimée n'a pas pu s'empêcher d'admettre, à l'audience devant nous, que cet établissement gigantesque causait quelques vibrations à la proprété de l'appelante. De quel droit peut-elle produire ces vibrations, même légères, qui proviennent non de la voie publique, mais d'une propriété privée? Qu'on remarque bien que les logements de l'appelante ont été bâtis à une époque où la localité formait un quartier de résidences d'ouvriers, à quelques distance du district industriel.

Reste la question du montant des dommages.

La propriété de l'apelante valait $8,000; elle est couverte de seize logements d'ouvriers, vieux il est vrai, mais lui rapportant environ de $1,000 par an de loyer, qui ont été considérablement réduits par l'établissement de l'intimée. Elle insiste qu'il n'y a pas eu de dommages avant l'institution de l'action, intentée en 1894.

M. le juge Gill était d'avis d'accorder $300 de ce chef seulement, savoir $200 pour dépréciation de la propriété et $100 pour pertes de loyer. Les témoins Loignon et Aubry parlent de $2,000 et $2,200, mais ils comprennent évidemment des dommages soufferts après l'action.

Nous croyons qu'il est de l'intérêt des parties d'estimer ces dommages une fois pour toutes. Nous accordons donc à l'apelante, si elle veut les accepter, $2,000 avec intérêt à compter de ce jour pour toute indemnité, passée, présente et future, provenant de la même cause, et à défaut par elle de ce faire dans un mois de la présente date, nous ordonnons que le dossier soit transmis à la cour supérieure du district de Montréal afin d'y faire déterminer et fixer suivant la loi le montant des dommages-intérêts demandés.

Dans l'un ou l'autre cas, l'intimée est condamnée à payer tous les frais encourus tant devant cette cour que devant les tribunaux inférieurs.

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TASCHEREAU J. (dissenting).—This appeal, in my opinion, involves nothing but questions of fact, which the concurrent judgments of the two Provincial Courts have upon very contradictory evidence, found against the appellant. I fail to see anything in it to take it out of the well established jurisprudence upon appeals of this nature. In the Privy Council, such an appeal would be dismissed instanter, without calling on the respondent.

Having come to this conclusion, I have not to consider the question of law raised by the respondents here, and by the defendants in *Hopkin* v *Hamilton Electric Light & Cataract Power Co.* (1).

Appeal allowed with costs.

Solicitor for the appellant: *E. LeF. de Bellefeuille.*

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

(1) 2 Ont. L. R. 240.

MOISE SCHWOB *et al.* (PLAINTIFFS)....APPELLANTS; 1901

AND *Oct. 11.
*Oct. 29.

THE TOWN OF FARNHAM (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Péremption d'instance—Retrospective legislation—Arts. 1 *and* 279 *C. P. Q. —Art.* 454 *C. C. P.*

Where the period of peremption commenced after the promulgation of the new Code of Procedure of the Province of Quebec the exceptions declared by the fourth paragraph of its first article do not prevent the peremption of a suit pending at the time it came into force under the limitation provided by article 279. *Cooke* v. *Millar*, (3 R. L. 446; 4 R. L. 240) referred to.

APPEAL from the judgment of the Court of King's Bench affirming the judgment of the Superior Court, District of Bedford, declaring the peremption of the plaintiffs' action.

The circumstances under which the motion for *péremption d'instance* was made in this case sufficiently appear in the judgment reported.

Lafleur K.C. for the appellants.

Racicot K.C. and *Duffy K.C.* for the respondent.

TASCHEREAU J.—Le 9 juillet 1900, la défenderesse obtint du protonotaire un certificat constatant que le dernier acte de procédure dans la cause, d'après les registres de la Cour, était en date du 30 juin 1898, et fit motion pour péremption d'instance. Cette motion fut accordée par la Cour Supérieure, dont le jugement fut subséquemment confirmé par la Cour d'Appel.

*Present :—Sir Henry Strong C. J. and Taschereau, Sedgewick, Girouard and Davies JJ.

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La cause était pendante le 1er septembre 1897, lorsque le nouveau Code de Procédure, limitant à deux ans au lieu de trois, le délai pour péremption, est devenu en force. Est-ce le nouveau ou l'ancien Code qui s'y applique? C'est là la seule question que nous avons à décider sur cet appel. Je suis d'avis, avec les deux Cours de la province, que c'est le nouveau Code qui régit, quand, comme dans l'espèce, le délai des deux années a commencé à courir après le 1er septembre 1897.

Les instances pendantes tant qu'à la procédure sont soumises aux lois actuellement en force, eussent-elles été décrétées subséquemment à leur introduction. Mais, dit l'appelant, le 4me par. de la sect. 1ère du nouveau Code de Procédure fait exception à cette règle pour la péremption d'instance. Ce paragraphe modelé sur l'article 2613 du Code Civil se lit comme suit :

> Néanmoins pour ce qui concerne les procédures, matières et choses pendantes lors de la mise en vigueur de ce Code, ou les droits d'appel et les restrictions relatives à un droit matériel antérieurs à cette mise en vigueur, et auxquels on ne pourrait en appliquer les dispositions sans produire un effet rétroactif, les dispositions de la loi qui, sans ce Code, s'appliqueraient à ces procédures, matières, choses, droits et restrictions restent en vigueur et s'y appliquent.....

Le demandeur soutient que les mots " les droits d'appel et les restrictions..... antérieurs " excluent la péremption d'instance de l'opération du nouveau Code. Mais, c'est là laisser de côté les mots " et auxquels on " ne pourrait appliquer les dispositions sans produire " un effet rétroactif."

L'appelant fait une pétition de principe en arguant que le délai pour péremption doit être, dans l'espèce, celui de l'ancien Code, parce qu'en y substituant celui du nouveau Code, ce serait, dit-il, donner à la loi un effet rétroactif. C'est là la question à résoudre, y a-t-il rétroactivité ou non à limiter à deux ans, dans cette

cause, le délai pour la péremption? Je ne puis en voir, étant admis qu'il n'y a pas rétroactivité à appliquer toute loi de procédure nouvelle à une cause pendante. Il n'y a là aucune atteinte à un droit acquis. Un délai qui a commencé à courir sous un droit nouveau est, en matière de prescription, régi par ce droit, quoique la dette fût contractée sous l'ancien droit. Ce n'est pas là donner un effet rétroactif à la loi. Il me semble impossible de faire sous ce rapport une distinction entre la péremption d'instance et la prescription. Ce n'est que le 30 juin 1898, date de la dernière procédure, que le droit du défendeur à la péremption demandée dans l'espèce a originé. C'est la loi en force à cette date qui détermine ce droit.

La question, en France, ne souffre pas de difficulté Jugé, en cassation:

La demande en péremption est régie par le Code de Procédure, bien que l'instance ait été introduite avant le Code. S. V. 54, 1, 42; Dall. 53, 1, 271.

C'est là un point reconnu par tous les auteurs et consacré par de nombreux arrêts, dit l'arrêtiste. Voir aussi 3 Carré-Chauveau, Quest. 1428.

La péremption des instances intentées avant le Code de Procédure et ses effets sont réglés par les dispositions du Code, lorsque le temps exigé pour l'accomplissement de la péremption s'est entièrement écoulé depuis sa promulgation; il n'y a en cela aucun effet rétroactif. DeV. & Gil., Table Générale, vo. Péremption, Nos. 232, 235, 236, 240, 241.

Jugé, en principe, que la demande en péremption est une demande principale et nouvelle qui doit être instruite et jugée d'après les lois en vigueur à l'époque où elle a été formée et non d'aprés les lois antérieures en vigueur à l'époque où le procès du fond a été intenté.

Sur la prétention de l'appelant appuyée sur des affidavits qu'en fait il y avait eu dans la cause des procédures depuis deux ans, quoique le protonotaire ait certifié le contraire, prétention que la Cour a rejetée

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séance tenante à l'audition, je refère à la cause de *Cooke v. Millar* (1).

Appeal dismissed with costs.

Solicitors for the appellants: *Lafleur, Macdougall & Mackay.*

Solicitor for the respondant: *E. Racicot.*

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*Oct. 15.

*Oct. 29.

JULIE MONARQUE (PLAINTIFF).....APPELLANT;

AND

LA BANQUE JACQUES-CARTIER (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Title to lands—Legal Warranty — Description—Plan of sub-division—Change in street line—Accession — Arts. 1506, 1508, 1520 *C. C.—Arts.* 186, 187, 188 *C. P. Q.—Troubles de droit—Eviction—Issues on Appeal—Parties.*

A vendor of land, described according to an existing plan of sub-division, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently by municipal authorities of powers in respect to the alteration of the street line.

A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from judgments maintaining both the principal action and the action in warranty although he may have refused to do so in the court of first instance, but, should the appellate court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action.

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

(1) 3 R. L. 446; 4 R. L. 240.

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APPEAL from the judgment of the Court of Queen's Bench, appeal side (1), reversing the judgment of the Superior Court (2) in favour of the appellant, plaintiff in warranty, in an action against her by Paula S. Gauthier in which she had called the respondent into the suit as warrantor of her title to the lands claimed by the principal plaintiff, and dismissing the *demande* in warranty with costs.

By her petitory action against the appellant, the principal plaintiff sought to recover a parcel of land forming the south-west corner of Ontario and Dézery Streets, in the City of Montreal, having a frontage of twenty-five feet on Ontario Street by a depth of forty feet on Dézery Street, and of which the principal plaintiff alleged the appellant to be illegally in possession. The appellant had purchased, with legal warranty, from the bank in 1885, a parcel of land, at the intersection of the streets mentioned, with a frontage of twenty-feet by one hundred feet in depth, described as bounded in front, to the north-west, by Ontario Street, as then laid out upon the plan of sub-division of lands recently included within the extended limits of the City of Montreal, and in rear by other lands in the same subdivision, "the whole as then enclosed and fenced," and of which the appellant had then been in possession for some months. The emplacement thus sold and described, at the time of this sale fronted upon Ontario Street, a public thoroughfare, then shewn on the plan of sub-division, of the width of one hundred feet, but which was reduced in 1887, to the width of sixty feet by the municipal corporation, leaving forty feet between the property of the appellant and the established street line, so that her land no longer fronted upon Ontario Street but was bounded towards the north-west by the new emplacement created by the

(1) Q. R. 10 Q. B. 245. (2) Q. R. 19 S. C. 93.

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city thus abandoning forty feet of the land which had been reserved for Ontario Street, and the appellant took possession of it as an accession to her lands. The principal plaintiff, in 1897, purchased this strip of forty feet from the former owners, who were *auteurs* of the respondent, without warranty of any kind, and, upon this title, the petitory action against the present appellant was instituted.

The appellant defended the action and, alleging that she had, by the action, been disturbed in her title derived from the respondent and in the quiet enjoyment of her land so purchased, incidentally constituting herself plaintiff in an action of warranty, called the Bank into the suit to defend her against the petitory action. The Bank refused to take up the defence and denied any liability as warrantor for troubles subsequent to the sale resulting from the legitimate exercise of powers conferred upon the municipal corporation.

The Superior Court maintained the action in warranty, but this decision was reversed by the judgment now appealed from.

In the court below there was no appeal taken by the present appellant from the judgment of the Superior Court maintaining the principal action, and, upon the appeal to the Court of Queen's Bench by the Bank, the court, in reversing the judgment of the Superior Court upon the question of warranty and dismissing the action in warranty, abstained from pronouncing any opinion as to the judgment of the Superior Court maintaining the petitory action against the appellant. The appellant in the present appeal asked to have the principal action dismissed, but the plaintiff in that action was not made a party to this appeal.

Mignault K.C. and *Beaudin K.C.* for the appellant. We rely upon the following authorities; Arts. 1506,

1508, 1519, 1520 C. C.; Arts. 186, 188 C. P. Q.; Cass. 21st March, 1853, (1); Pothier "Vente," no. 86, 102, 103, 107, 108, 109; Guillouard, "Vente et Echange," nos. 299, 304, 404, 405, 406; *Rességuier* v. *Arbouys*, Cass. 6th Feb. 1889, (2); *Walker* v. *Pease*, (3); 4 Aubry & Rau par. 355; 24 Laurent, nos. 211, 231, 232, 233; *Archbald* v. *Delisle* (4).

Brosseau K.C. for the respondent, cited Fuzier-Herman, Code Civil Annoté, Art. 1626, *n.* 18; 10 Huc. no. 106; *Béarn* v. *Chevrier* (5).

The judgment of the court was delivered by:

TASCHEREAU J.—En 1885, la Banque, intimée, vendit à l'appelante un emplacement contenant vingt-cinq pieds de front sur cent pieds de profondeur, borné en front au nord-ouest par la rue Ontario, en arrière par la subdivison 54 du numéro 54, ainsi que le tout était alors enclos et clôturé, dont la dite appelante était déjà en possession depuis plusieurs mois.

Tant qu'à cet emplacement dans les bornes ainsi décrites, personne ne conteste le titre de l'appelante, et elle en a toujours joui paisiblement. Et tant qu'à la description d'icelui donnée par l'intimée dans la vente à l'appelante, elle était alors des plus correcte, et l'emplacement vendu avait de fait son front sur la rue Ontario, tel que le comporte l'acte de vente. L'appelante elle-même l'allègue spécialement dans son plaidoyer en réponse à l'action principale, et la preuve en est d'ailleurs parfaite. Mais l'appelante croit cependant avoir des griefs contre l'intimée et voici les faits sur lesquels elle les fonde.

La rue Ontario en question qui avait alors cent pieds de large a été depuis réduite par l'autorité munici-

(1) Dal. '54, 1,435.
(2) S. V. '92, 1, 360; Dal. '90, 1, 390.
(3) Q. R. 8 Q. B. 218.
(4) 25 Can. S C. R. 1.
(5) Dal. '94, 1, 43.

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pale à soixante pieds, laissant quarante pieds entre la propriété de l'appelante et la rue actuelle, en sorte que la propriété de l'appelante n'est plus maintenant bornée à la rue, mais bien à ce nouvel emplacement créé par l'abandon de ces quarante pieds comme rue publique. Une nommée Gauthier, par une action pétitoire, réclame contre la présente appelante la propriété de ces quarante pieds. La contestation entre elles, tant qu'à ces quarante pieds, n'est pas devant nous sur le présent appel. Nous n'avons qu'à juger du mérite d'une action en garantie que la présente appelante a prise contre l'intimée pour la faire condamner à prendre son fait et cause sur l'action pétitoire prise contre elle par la nommée Gauthier.

L'intimée conteste cette demande et nie qu'elle soit garante d'un fait postérieur à sa vente à l'appelante, résultant des actes de l'autorité municipale dans l'exercice de ses pouvoirs. Le jugement *a quo* a maintenu cette défense, et renvoyé l'action en garantie de l'appelante. Je ne puis voir d'erreur dans ce jugement.

Pourquoi l'intimée interviendrait-elle dans la contestation entre la femme Gauthier et l'appelante ? Je ne puis le voir. Elle n'a jamais vendu le terrain en litige entre elles ; elle n'est pas l'auteur de l'intimée tant qu'à ce terrain. Mais, dit l'appelante, par l'action de la femme Gauthier, je suis troublée dans la jouissance du terrain que m'a vendu l'intimée. C'est là une assertion que la lecture de cette action ne justifie pas ; la femme Gauthier ne réclame rien que ce soit du terrain que la Banque a vendu à l'appelante. Sans doute, la conséquence de sa réclamation, si elle réussit, est bien que la valeur de la propriété de l'appelante sera diminuée ; mais ce n'est pas la faute de l'intimée si l'appelante souffre des dommages, si sa propriété a diminué de valeur. Elle n'a pas garanti à l'appelante que l'autorité municipale ne changerait jamais

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les limites de la rue Ontario, ne l'abolirait pas toute entière peut-être.

Tout acheteur d'une propriété située sur une rue sait, ou doit savoir, que l'autorité municipale a le pouvoir d'élargir, rétrécir, ou clore entièrement cette rue.

L'appelante invoque une autre raison contre le jugement *a quo*. En cour supérieure, elle a lié contestation avec la nommée Gauthier sur l'action pétitoire de celle-ci, et jugement maintenant cette action a été donné en même temps que jugement contre la banque sur l'action en garantie. La banque, paraît-il, a appelé à la cour d'appel, des deux jugements, de celui sur l'action principale, comme de celui sur l'action en garantie. C'était ce qu'elle avait à faire sous les circonstances. Car, comme le décrête un arrêt de la cour de Toulouse du 16 novembre 1825, (1) un garant peut prendre le fait et cause pour le défendeur principal en appel, même quand il ne l'a pas fait en première instance. Mais il est évident dans l'espèce que l'appel de la banque sur l'action principale ne pouvait être pris en considération et déterminé par la cour d'appel qne dans le cas où elle en serait venue à la conclusion de débouter son appel sur la demande en garantie. Ce n'est que dans le cas où la cour d'appel aurait décidé, comme la cour supérieure l'avait fait, que la banque devait garantir la présente appelante, que la banque aurait eu intérêt et aurait pu être reçue à attaquer le jugement sur l'action principale. Mais du moment que la cour en est venue à la conclusion de renvoyer l'action en garantie, elle devenait, *ipso facto*, desaisie de l'appel sur l'action principale, et ne pouvait pas adjuger sur le mérite de cette action sur l'appel d'une partie qu'elle déclarait être non garante, et n'ayant conséquemment, aucun intérêt dans cette action. C'est pourquoi elle s'est abstenue de prononcer

(1) S. V. 26, 2, 245 & 249.

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sur l'appel du jugement sur l'action principale. Elle ne pouvait que ce faire. Cet appel était devenu caduc.

Et d'ailleurs, comment l'appelante pourrait-elle nous demander de prononcer sur l'action principale en l'absence de la demanderesse qui n'est pas partie au présent appel ?

Je suis d'avis de débouter l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Beaudin, Cardinal, Loranger & St. Germain.*

Solicitors for the respondent: *Brossea[illegible], Lajoie & Lacoste.*

T. MILBURN AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM ARTHUR WILSON (PLAINTIFF) AND THE HIGHWAY ADVERTISING COMPANY OF CANADA (DEFENDANT) ..... } RESPONDENTS.

1901
*Nov. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Principal and agent—Promoters of company—Agent to solicit subscriptions —False representations—Ratification—Benefit.

Promoters of a company employed an agent to solicit subscriptions for stock and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters.

Held, affirming the judgment of the Court of Appeal (2 Ont. L. R. 261) that the latter, having benefitted by the sum paid by W. were liable to repay it though they did not authorize and had no knowledge of the false representations of their agent.

Held, per Strong C.J., that neither express authority to make the representations nor subsequent ratification or participation in benefit were necessary to make the promoters liable; the rule of *respondeat superior* applies as in other cases of agency.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the plaintiff.

The action is an action for deceit in procuring the plaintiff to subscribe and pay for ten shares of stock in a company promoted by the individual defendants which was afterwards incorporated as the Highway Advertising Company of Canada (Limited).

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

(1) 2 Ont. L. R. 261, sub nom. *Wilson* v. *Hotchkiss.*

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The alleged fraud was committed by the defendants Hotchkiss and McKay who were authorized by the other defendants (appellants) to canvass for and obtain subscriptions for stock in the intended company and consisted substantially in the statements made to the plaintiff by these two defendants that they and their co-defendants had not only between them already subscribed for $50.000 in the stock of the company but that the whole sum subscribed for had actually been paid into a bank for the company. Relying upon these statements as evidence of the soundness and practical character of the scheme and on the faith of their being true, the plaintiff subscribed for ten shares and paid over the whole amount to the defendants.

It was found as a fact at the trial and not disputed by the appellants at the hearing that the plaintiff was induced to subscribe for stock on the false representations made by Hotchkiss and McKay. The appellants claimed, however, that they neither authorized the agents to make such representations nor ratified their action by acquiescence or otherwise and that they were not liable for what their agents did beyond the scope of their authority. Whether or not they were liable in such case was the sole question to be decided by the appeal.

Shepley K.C. for the appellants.

Aylesworth K.C. and *McEvoy* for the respondent Wilson.

R. V. Sinclair for the respondent company.

The judgment of the court was delivered by:

THE CHIEF JUSTICE: (Oral).—We do not think that we should withhold our judgment in this case. It is to be regretted that an appeal was taken to this court

considering the amount involved, the nature of the questions raised and the unanimity of opinions in the courts below, especially in the Court of Appeal.

I have no hesitation in saying that I am quite prepared to adopt the principle of law laid down by Mr. Justice Lindley (1), namely, that where false representations have been made by an agent in executing his mandate, though the principal has not directly authorized such representations, yet the rule of *respondeat superior* applies as in other cases, and it is not essential that the principal should have ratified or derived benefit from the act of his agent.

I am not sure that all my learned brothers will concur in this, but I am sure they will agree as to what Mr. Justice Moss finds to be the effect of the evidence, namely, that it is patent from the depositions that the principals, if they did not expressly authorise the statement made by their agents, did receive benefit from it in getting the money sought to be recovered by this action. I cannot do better than read an extract from the judgment of Mr. Justice Moss, who says:

> It was essential to the plaintiff's case that he should establish either that the appellants themselves were knowingly guilty of actual misrepresentations on the faith of which he acted, or that they authorised Hotchkiss and McKay, or one of them, to act for them in obtaining the plaintiff's subscription, or that they received the plaintiff's money or some of it, or that in some way they derived a profit or benefit from the fraud practised upon the plaintiff. I think upon the testimony the plaintiff has succeeded in establishing the three latter propositions.

For myself I go further than this and say that neither express authority to make the representations nor subsequent ratification or participation in benefits were necessary ingredients to make the appellants liable, though I agree with Mr. Justice Moss in his

(1) Lindley on Partnership, (6 ed.) p. 161.

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conclusion from the evidence that the latter element was in fact present here.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Kilmer, Irving & Porter.*

Solicitors for the respondent, Wilson: *McEvoy, Pope & Perrin.*

Solicitors for the respondent, The Highway Advertising Co.: *Hanna & Burnham.*

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*Oct. 31.

ALFRED ROBINSON (PLAINTIFF).....APPELLANT;

AND

GEORGE T. MANN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Indorser—Bills of Exchange Act, 1890 *s.* 56—*Chattel mortgage—Consideration.*

Under sec. 56 of The Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee may be liable as an indorsee to the latter.

The provisions of the Ontario Chattel Mortgage Act required the consideration of a mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated, not their legal effect.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the defendant.

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

(1) 2 Ont. L. R. 63.

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The questions raised on the appeal are sufficiently indicated in the above head note, and the facts as far a they are material are set out in the judgment of the court.

Ryckman and *Kirkpatrick* for the appellant. The respondent having indorsed the note before the payee incurred no liability on it. *Steele* v. *McKinlay* (1).

If so there was no consideration for the mortgage. The Chattel Mortgage Act must be construed strictly. *Barber* v. *Macpherson* (2).

Hellmuth and *Saunders* for the respondent, were not called upon.

The judgment of the court was delivered by:

THE CHIEF JUSTICE (Oral). — We all think this appeal must be dismissed. The questions to be decided are: First: Did the respondent incur any liability by indorsing a note not made payable to him but to the Molsons Bank and not indorsed by the payee? Secondly: Were the recitals in the chattel mortgage of the consideration for which it was made sufficient?

As to the first point it appears that the note in question was in form as follows:

LONDON, Sept. 25th, 1899.

$1,200.00.

Three months after date I promise to pay to the order of the Molsons Bank, at the Molsons Bank here twelve hundred dollars for value received.

"W. MANN & CO."

Indorsed on the back was the name "George T. Mann."

Then the position was this; George T. Mann, the present respondent, indorsed a note signed by W. Mann & Co., and payable to the Molsons Bank. It is contended that he was not an indorser and as such liable to the bank to whom the note so indorsed was

(1) 5 App. Cas. 754. (2) 13 Ont. App. R. 356.

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delivered and by them discounted, Walter Mann receiving the proceeds.

Next, what was the legal effect of this endorsement? Section 56 of the Bills of Exchange Act, 1890, provides that

> where a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liability of an indorser to a holder in due course and is subject to all the provisions of this Act respecting indorsers.

Then when the bank took the note was it not entitled to the benefit of the respondent's liability as indorser? Certainly it was, for by force of the statute the indorsement operated as what has long been known in the French Commercial Law as an "aval" a form of liability which is now by the statute adopted in English law.

The argument for the appellant as I understand it is that this indorsement at most amounted only to a guarantee and that there being no consideration expressed in writing the statute of Frauds would have been an answer if the bank had sued the respondent. Some colour is given to this argument by the case of *Sanger* v. *Elliott* as reported in 4 Times Law Reports, p. 524, but there the Bills of Exchange Act was not referred to and it appeared that the bill had not been negotiated. It is to be remarked that that case is not to be found in the regular series of reports. Here however the note was negotiated and the bank were holders in due course and, consequently, the 56th section of the Act applies and creates a liability as indorser independently altogether of the principle of guarantee. If the section referred to is to have any effect it must apply in a case like this.

Then as to the recital in the chattel mortgage. It declares the indorsement of the note to be the consideration and sets out the note itself which is surely a sufficient compliance with the requirement of the

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Act that the consideration should be recited. It is not necessary that the mortgage should state the legal effect of the facts set out as forming the consideration. It is sufficient to state the facts and leave the legal effect to be inferred.

I agree with the reasons given by their lordships in the Court of Appeal for deciding this case in favour of the respondent, but I do not agree with Mr. Justice Osler who, I think, puts the case too favourably for the appellant when he says that the bank would have found it difficult to enforce the liability on the note against the respondent. In my opinion the respondent was clearly liable under the 56th section of the Bills of Exchange Act already referred to.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Ryckman, Kirkpatriek & Kerr.*

Solicitors for the respondent: *Helmuth & Ivey*

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*Oct. 9, 10.

*Nov. 16.

THE CANADIAN FIRE INSURANCE COMPANY (DEFENDANT).. } APPELLANT;

AND

JAMES ROBINSON, *et al.* (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent.

The *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different.

The appointment of a local agent of a fire insurance company is one in the nature of *delectus personæ*, and he cannot delegate his authority or bind his principal through the medium of a sub-agent. *Summers* v. *The Commercial Union Assurance Company* (6 Can. S. C. R. 19), followed.

The local agent of a fire insurance company was authorised to effect interim insurances by issuing receipts countersigned by him on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt which he countersigned as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium.

Held, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority.

Held, further, that even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurance.

APPEAL from the judgment of the Court of King's Bench (appeal side), affirming the judgment of the

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

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

The plaintiffs' claimed $5,000 for insurance on a factory in the City of Hull, the property of two of the plaintiffs (D'Amour and Charlebois), which was destroyed in the great conflagration on 26th April, 1900. On 2nd May, 1900, D'Amour and Charlebois assigned their interest in the insurance to Robinson, the other plaintiff, to whom the insurance had been made payable as mortgagee. The application for insurance was made on 21st April, 1900, for twelve months, and, as plaintiffs alleged, an interim receipt was given by the company's agents on that date securing provisional insurance for thirty days from its date or until the issue of a policy or rejection of the risk. The plaintiffs further alleged that they gave a promissory note for the premium at the time of delivery of the interim receipt, payable in three months, which was accepted by the agents and afterwards duly paid.

The defendant denied that any authorised agent on its behalf had ever insured the property, or signed the interim receipt, and contended that no contract of insurance had been entered into. It also denied receiving any valid consideration or premium, or that any promissory note had been given to or accepted by or paid to any of its authorised agents, and alleged that the person named Healy who signed the interim receipt as its agent at Ottawa, had never been its agent nor held out by it as its agent, and had no authority to bind it in any manner. Defendant alleged that a number of blank receipts signed by the managing director in blank had been forwarded to one Smith, who was its agent at Ottawa, entrusted to him and were not to be issued by any other person nor without his signature as agent; that in Smith's absence and without his consent, Healy unlawfully obtained possession

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of the interim receipt produced by plaintiffs while it was still in the condition in which it left the head office; that the firm styled D'Amour and Charlebois, acting personally and through Healy, their agent, had prior to this unsuccessfully sought to effect an insurance upon the property in question; whereupon Healy, acting for them, and with their knowledge, on the receipt falsely stated a payment of $200 when both he and they knew no money had been paid, and signed the same as defendant's agent at Ottawa when both he and they knew he was not such agent; that upon the application for insurance reaching the head office at Toronto, where it was not known that Healy had signed the interim receipt, the manager there immediately telegraphed to Smith that the application was refused, and instructed him to take up the receipt, which he did; that the manager at Toronto had no means of knowing at the time that Healy had signed the receipt; that, had he known such fact, he would have repudiated the right of Healy to act as its agent or to countersign its blank receipts, and that he became aware of the fact of Healy's having signed the paper long after the fire; that when plaintiffs paid Healy the amount of the note given to him personally by them, both he and they knew that the company had repudiated the contract in question; and that, at the time of the fire, no premium had been paid and no consideration given to the company or to any one authorised to act for it.

The plaintiffs answered that the agents who effected the insurance were duly authorised for that purpose, and that the receipt was not only signed by Healy but also by Smith and by the general manager; that the company had frequently recognised the validity of similar receipts; that the application had been received and forwarded by Smith who confirmed the acts of

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Healy; that the company knew that it had been customary for its agents to accept promissory notes in lieu of cash for the first premium; and that the note in question was received by the company's agents and paid to them; that Smith knew that the receipt had been issued, and had approved of it; that, at the time it left his possession to be given to plaintiffs, it bore his signature, and that Healy's name was simply written over his, which did not vitiate it, if such signature was at all necessary.

The trial judge after hearing the witnesses in court decided in favour of the plaintiff, and on appeal, the Court of King's Bench affirmed this judgment, Hall and Bossé JJ. dissenting

Foran K.C. and *Lafleur K.C.* for the appellant. The agent, Smith, had no power to delegate his functions; Boudousquié "Assurance contre l'Incendie," no. 84; Grenoble, 24 Mars, 1838; Gouget & Merger, Dict. de Dr. Comm. *vo* "Assurance Terrestres" 81, 466; Ponget, Dict. des Assurances Terrestres, *vo.* "Agents," nos. 5, 6; 5 Pothier, "Mandat" (ed. Bug.) p. 211; Troplong, "Mandat" nos. 446, 448; 12 Huc (Art. 1998) no. 86; Arts. 1142, 1144, 1711 C. C.; *Summers* v. *Commercial Union Assurance Co.* (1); In the *Summers Case* (1) the jury had found as a fact that the broker was employed by the local agent, and had been authorised by him to sign interim receipts. In this case Healy never was in Smith's employ and had never been authorised to sign anything. In the *Summers Case* (1) the jury found that the general agents of the company had knowledge that the broker was acting as agent. Here the existence of Healy was not brought to the general agent's knowledge until after the action had been instituted. The company never held out Healy as its agent; it could not do so; it did not know him. D'Amour

(1) 6 Can. S. C. R. 19.

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knew from Healy's actions that Smith was the real agent, and that recourse was to be had to him when the question of accepting a note for the premium was mooted. D'Amour saw Smith's name on the receipt, consented to it being erased by Healy, and accepted the receipt without Smith's signature. D'Amour gave Healy a note for the premium payable not to the order of the company, nor Smith, but to the order of Healy. Healy never indorsed the note but kept it. Smith told him he would not accept the note and never saw it. See Art. 2500 C. C. The agent cannot accept anything but money in payment of a premium. Ostrander, (2 ed.) p. 295, sec. 94; *Canadian Fire Ins. Co.* v. *Keroack* (1); *Montreal Assurance Co.* v. *McGillivray* (2); *Walker* v. *Provincial Ins. Co.* (3); *Frazer* v. *Gore District Mutual Fire Ins. Co.* (4); *Western Ins. Co.* v. *Provincial Ins. Co.* (5); *Citizens Ins. Co.* v. *Bourguignon* (6).

Aylen K.C. for the respondent. The company ratified the acts of Smith and Healy by accepting the money for the note; Joyce on Insurance, nos. 73, 455, 456, 457, 458; Ostrander on Fire Insurance, pp. 35, 37, 152, 207, 272, 276, 277, 302; *The Manufacturers' Accident Insurance Co.* v. *Pudsey* (7); *Basch* v. *Humboldt Mutual Fire & Marine Ins. Co.* (8). See also Dalloz. *vo.* "Assurance Terrestres," nos. 26, 27, 152, 172, 177, 182; Dalloz. Supp. *vo*, "Assurance Terrestres," nos. 105, 128; *Rossiter* v. *Trafalgar Life Ins. Assoc.* (9); *Compagnie d'Assurance des Cultivateurs* v. *Grammon* (10), Art. 2481 C. C.

THE CHIEF JUSTICE.—There are, in my opinion, four distinct grounds for allowing this appeal.

(1) 2 Legal News 272.
(2) 13 Moo. P. C. 87.
(3) 8 Gr. 217.
(4) 2 O. R. 416.
(5) 5 Ont. App. R. 190.
(6) M. L. R. 2 Q. B. 22.
(7) 27 Can. S. C. R. 374.
(8) 5 Bennett's Fire Ins. Cases, p. 421.
(9) 27 Beav. 377.
(10) 3 Legal News 19; 24 L. C. Jur. 82.

First: Smith, if he did in fact delegate his authority as an agent for the appellants for the purpose of effecting policies of assurance to Healy, had no legal authority to do so.

At the opening of the appeal there was some discussion as to whether the authority of Smith to appoint a sub-agent depended upon the law of Ontario or Manitoba, (the legal domicile of the company), or on that of Quebec, and my brother Taschereau remarked that the law governing the contract must be presumed to be that of the *lex fori*, unless the *lex loci* was proved to be different. I agree in this and consider that the appeal must be determined by the law of the Province of Quebec.

Article 1711 of the Civil Code is as follows:

1711. The mandatary is answerable for the person whom he substitutes in the execution of the mandate, when he is not empowered to do so; and, if the mandator be injured by reason of the substitution, he may repudiate the acts of the substitute.

This article 1711 deals only with the question of responsibility and it does not define the cases in which the mandatary may appoint a sub-agent The corresponding article of the French Code is 1994. The provision appears to apply in cases where the mandatary is neither empowered nor prohibited by the contract of mandate to appoint a sub-agent.

There can be little doubt, although there is no express article to that effect, that the mandator may prohibit the delegation of his mandate by the mandatary to a third person, provided the prohibition is express. Then, surely there is nothing requiring that the prohibition to delegate should be express in its terms; it may well be left to inference when the mandate necessarily implies trust and confidence in the person on whom it is conferred.

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Then, in a case in this court, *Summers* v. *The Commercial Union Insurance Co.* (1), an appeal from Ontario, it was held that an agent of an insurance company, such as Smith was in this case, could not act through the medium of a sub-agent since the authority of the original agent involved trust and confidence and was in the nature of *delectus personæ*. It is therefore a case where the mandatary cannot legally discharge his duties by handing them over to another not selected by the mandator.

There is an *arrêt* of a Belgian Court of Appeal to this effect. Gand, 26th, May, 1851; Pasicrisie, 1851, 2, 318.

For this reason I conclude that Smith had no legal power to substitute Healy for himself in making the contract of insurance with d'Amour and Charlebois.

Secondly: Even if Smith had legal authority to substitute Healy, he, in point of fact, as appears from the depositions, never did so. Healy had apparently authority to get proposals for Smith, but Smith never empowered him to conclude contracts, to sign interim receipts or to receive premiums. It was incumbent on the plaintiff to establish this in proof by clear testimony, but he has failed to do so. It does not appear that Healy was authorized to conclude a contract and to sign an interim receipt with d'Amour and Charlebois or with anyone else. This appears to have been his own view for he erased Smith's countersignature from the interim receipt, thus indicating that he had not authority from the latter. The very way the interim receipt he used came into the hands of Healy, militates against the pretention that he had, in fact, actual authority from Smith for Healy appears to have abstracted the receipt from a parcel containing blanks sent by the company's agent at Toronto, addressed to Smith and without having authority to do so from the

(1) 6 Can. S. C. R. 19.

latter. On the whole, it is not proved that Healy had *de facto* the authority he professed to exercise. This is further confirmed by the fact that he gave the interim receipt without receiving payment of the premium, taking for it a promissory note at three months payable, not to Smith, but to himself, which note he did not hand over to Smith at once, although after some time, he offered to deliver it to the latter, who refused to accept it. There certainly never was, in fact, any authority conferred by Smith to enter into a contract of insurance to be binding on the appellant on the terms and to be carried out in the manner this assumed contract was.

Thirdly: Even if it were granted that Smith could, in law, substitute a sub-agent and had, in fact, done so, there is a clause in article 1711 C. C., (not to be found in the French Code), which is conclusive as to the right of the appellant to disavow Healey's acts. The words of this clause are:

> If the mandator be injured by reason of the substitution, he may repudiate the acts of the substitute.

If there could be a case in which a principal would be entitled to say he was injured by the acts of one who had assumed to act as the sub-agent of his mandatary, it is the present. Here we find this pretended sub-agent entering into a most improvident contract of insurance as regards the risk taken, not complying with the terms of the mandate as regards the interim receipt, and taking payment of the premium in a manner not warranted by anything the appellant had authorized, by a deferred promissory note payable, not to the appellant, or its agent, but to the sub-agent himself. It is impossible to say, if this could be in law and was in fact a substitution, that the appellant was not grievously injured by the way in which the substitute executed the mandate. This therefore gives the company the right to repudiate the pretended contract.

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Lastly: The powers of the sub-agent cannot exceed those of the principal agent. Smith, himself, had no power to enter into a contract in the terms of that which Healy pretended to make as his sub-agent with d'Amour and Charlebois. He could only effect an interim insurance binding on the company by an interim receipt countersigned by himself and on receiving himself the premium in cash. *London and Lancashire Life Assurance Co.* v. *Fleming* (1); *Acey* v. *Fernie* (2). These terms were not complied with and, therefore, on this last distinct ground, that on which Mr. Justice Hall's dissenting judgment proceeds, the respondent must fail.

The appeal is allowed and the action dismissed. The appellants must have their costs here and in both courts below.

TASCHEREAU J. concurred in the judgment allowing the appeal with costs and dismissing the plaintiff's action with costs.

GWYNNE J.—The appeal in this case must, in my opinion, be allowed with costs.

The case in the Privy Council of *The London and Lancashire Insurance Co.* v. *Fleming* (1) is, in effect, an overruling of the judgment of this court in the case of *The Manufacturers Accident Insurance Co.* v. *Pudsey* (3), reported in the twenty-seventh volume of the Supreme Court reports.

SEDGEWICK and DAVIES JJ. also concurred in the judgment allowing the appeal and dismissing the action with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Foran & Champagne.*

Solicitors for the respondent: *Aylen & Duclos.*

(1) [1897] A. C. 499. (2) 7 M. & W. 151.

(3) 27 Can. S. C. R. 374.

J. C. ASH (PLAINTIFF).....APPELLANT; 1901

AND *Nov. 12.

THE METHODIST CHURCH (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Church discipline.

Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court refused to interfere the matter complained of being within the jurisdiction of the Conference.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment a the trial in favour of the defendant.

The plaintiff had been "located" as it is termed by the Methodist Conference, which had the effect of preventing him pursuing his calling as a minister of the church and deprived him of the emoluments attached to such position. He brought an action claiming damages and a mandamus for reinstatement in the ministry, but failed at the trial and in the Court of Appeal to obtain judgment.

Riddell K.C. for the appellant. Plaintiff had a right to resort to the civil courts. *Essery* v. *Court Pride of the Dominion* (2).

Under its rules the Conference had no right to locate him after twenty-three years service. See *Mulroy* v. *Knights of Honor* (3

The learned counsel also refered to *Richardson-Gardner* v. *Fremantle* (4). Bacon on Friendly Societies, (2 ed.) 101 *et seq.*

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

(1) 27 Ont. App. R. 602.
(2) 2 O. R. 596.
(3) 28 Mo. App. 463.
(4) 24 L. T. 81; 19 W. R. 256.

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Maclaren K.C. for the respondent was not called upon.

The judgment of the court was delivered by:

The Chief Justice.

THE CHIEF JUSTICE (Oral).—I do not think we need call on counsel for respondent. Without putting it on the technical ground of our jurisdiction to entertain the appeal, we think it is a case in which we should not interfere. The evidence and documents shew that the conference has a right to superannuate a minister, using the word not as it may be used in some special sense in the rules of the conference, but in its general sense, and that justified that body in "locating" as it is termed, this minister as they did. As said by Mr. Justice Maclennan at the close of his judgment, we have no right to interfere in a matter clearly within the powers of the domestic forum and in which they have taken action.

I cannot state the position better than by using the words of Mr. Justice Maclennan where he says:

> The question whether a minister is unacceptable or inefficient is peculiarly one for the judgment of Conference, and by the discipline that body is made the sole judge on the subject. In the present case they had before them, and upon their records, the grounds upon which they proceeded. The domestic appellate court has declared that their proceedings were regular and I think the plaintiff has not made out any case for the interference of a court of law.

Probably some of my brothers would like to add that what was done by the Conference was entirely justified by the facts. I do not myself proceed on any such ground.

The appeal is dismissed with costs

Appeal dismissed with costs.

Solicitors for the appellant: *Beatty, Blackstock & Nesbitt.*

Solicitors for the respondent: *Maclaren, Macdonald, Merritt & Shepley.*

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY GENERAL FOR THE DOMINION OF CANADA (PLAINTIFF)... } APPELLANT;

AND

THE HONOURABLE JOHN DOUGLAS ARMOUR, THE TORONTO GENERAL TRUSTS COMPANY, AND HENRY COX (DEFENDANTS) ..... } RESPONDENTS.

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*Mar. 15, 16, 17, 20, 21.

*Oct. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Exchequer appeal—Assessment of damages—Interference with findings of Exchequer Court Judge.

The Exchequer Court Judge heard witnesses and upon his appreciation of contradictory testimony awarded damages to the respondents. The Crown appealed on the ground that the damages were excessive.

Held, Gwynne and Girouard JJ. dissenting, that as it did not appear from the evidence that there was error in the judgment appealed from, the Supreme Court would not interfere with the decision of the Exchequer Court Judge.

APPEAL from the judgment of the Exchequer Court of Canada adjudging that the lands mentioned in the information were vested in Her Majesty The Queen, for the purposes of the Trent Valley Canal, and awarding $14,158 to the respondent, the Honourable John Douglas Armour, as compensation for the said lands with interest and costs, and $100 to the respondent Henry Cox, for damages in respect of his lease of said lands with costs.

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

(REPORTERS' NOTE.—This case, not reported at the time judgment was delivered, is now published at the request of the court.)

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THE QUEEN v. ARMOUR.

The questions at issue upon this appeal sufficiently appear from the judgments reported.

The judgment appealed from was delivered on the 12th of September, 1898, the learned judge of the Exchequer Court stating his reasons for judgment as follows:

BURBIDGE J.—The information is filed to obtain a declaration that certain lands situated in the County of Peterborough, taken for the Trent Canal, are vested in Her Majesty, and that a sum of six thousand eight hundred and sixty dollars tendered to the defendent, the Honourable John Douglas Armour is sufficient compensation for the lands so taken, and for damages to adjoining lands held therewith.

The question of compensation is the only matter in dispute. The amount tendered is made up of a sum of three thousand eight hundred and sixty dollars for the land taken and a sum of three thousand dollars for damages. The valuators, on whose report the tender was made, put the value of the land taken at two hundred dollars per acre, and I have no difficulty, in view of the evidence as a whole, in accepting that as a fair value.

There is, however, a slight discrepancy between the statements of the quantity of land taken, as given in the tender, on the one hand, and in the pleadings and proof in this case, on the other. In the former it is stated at nineteen acres and three-tenths of an acre; in the latter at nineteen acres and fifty-four-hundredths of an acre. I accept the latter as being correct, and allow three thousand nine hundred and eight dollars for the value of the lands so taken.

With reference to the damages, the evidence discloses a wide difference of opinion. That the amount tendered for damages was not sufficient, can, I think,

admit of little doubt, but what that amount should be is a question not without its difficulties. I am of opinion, however, to allow in respect thereof, the sum of ten thousand two hundred and fifty dollars. That sum is less than the amount at which Mr. A. F. Wood and other witnesses, who in a general way agreed with him, estimated such damages, but it appears to me to be sufficiently liberal to cover and include all possible elements of damage presented by the case, excepting a sum of one hundred dollars, which, it was understood at the trial, the Crown was to pay to the tenant, Cox, for injury to his crops; the other damages sustained by the tenant being, it was agreed, settled for by the landlord, and included in the general damages awarded to him.

There will be a declaration that the lands mentioned in the information are vested in Her Majesty, and that the defendant, the Honourable John Douglas Armour, is, upon giving the Crown proper discharges or releases from the other defendants, entitled to be paid for compensation for the lands taken, and for damages, the sum of fourteen thousand one hundred and fifty-eight dollars with interest at six per centum per annum, from the eighth day of May, one thousand eight hundred and ninety-six, and that the defendant Henry Cox, is entitled to be paid the sum of one hundred dollars.

The defendants will also have their costs.

S. H. Blake, K.C. and *Edwards* for the appellant.

Osler, K.C. and *Aylesworth, K.C.* for the respondents.

The judgment of the court was delivered by:

SEDGEWICK J.—The information was filed in the Exchequer Court to obtain a declaration that certain lands situate in the County of Peterboro, taken for the

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Sedgewick J.

Trent Valley Canal, were vested in the Crown, and that the amount tendered therefor and for the injurious affection of adjoining lands, viz., six thousand eight hundred and sixty dollars, should be deemed sufficient compensation.

The case was tried before Mr. Justice Burbidge who awarded for the lands taken the sum of three thousand nine hundred and eight dollars, and for damages done to the adjoining lands the sum of ten thousand two hundred and fifty dollars. From that judgment the Crown has appealed to this court.

At the argument of the appeal I was strongly impressed with the view that these damages were excessive and I subsequently endeavoured to write a judgment giving effect to that view, but in this attempt I failed. After a repeated perusal of the evidence I found it impossible, if proper effect was to be given to it, to do otherwise than confirm the judgment. It seemed to me that it would be necessary to demonstrate in the clearest possible way by reference to the evidence in the case that there was error in the judgment. This was impossible. The learned trial judge who heard the evidence came to a conclusion upon it and the respondent is entitled to the benefit of that conclusion unless the Crown can present a clear case to show he was wrong.

In my view the appeal should be dismissed with costs. There should be amalgamated with the present judgment, if the Crown so desire, the undertaking of the Crown with respect to the subway referred to in the evidence.

GWYNNE J. (dissenting.)—I am compelled to dissent with great deference from the judgment in this case.

The question is as to the amount to be paid by the Dominion Government for nineteen and a half acres

expropriated for the Trent Valley Canal out of a farm of two hundred and twenty acres of which the respondent Armour is seized in fee subject to a mortgage and to a lease for a term of years not yet expired, to one Cox, tenant of the whole farm. A portion of the farm is within the limits of the Village of Ashburnham and it is claimed by the respondent Armour that such part has a special value as village property and that the construction of the canal will depreciate the value as village lots of so much of the land within the limits of the village plot as is not expropriated.

But during the past thirty years there has been no demand for such land as village lots; all has been occupied and cultivated as farm land and there is not in the evidence any ground for entertaining any reasonable expectation that there shall be any greater demand for such land as village lots in the next thirty years than in the past. Every estimate both of the value of such land as village lots, and of the alleged depreciation in their value of the part not expropriated occasioned by the construction of the canal is purely speculative, conjectural, fanciful and illusory in the extreme. In fine, without entering into a detailed analysis of the evidence it is sufficient for me to say I am of opinion that the only conclusion warranted by a full, fair and reasonable appreciation of the evidence is that the sum tendered by the Government, namely six thousand eight hundred and sixty dollars ($6,860), which is over twenty per cent of the utmost value of the whole farm of two hundred and twenty acres, and all the buildings thereon, none of which are on the part expropriated as existing without the canal, is liberal and ample compensation for the nineteen and a half acres expropriated and for all damage by depreciation, severance or otherwise of the land not

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expropriated, consequent upon and attributable to the construction of the canal, and for which the Court of Exchequer has allowed fourteen thousand one hundred and fifty-eight dollars ($14,158), besides interest thereon, or upwards of forty per cent of the utmost value of the whole two hundred and twenty acres.

I am of opinion, therefore, that the appeal should be allowed.

GIROUARD J. (dissenting).—In expropriation cases and generally in all matters where the valuation of land is involved, I have always been inclined to maintain the findings of experts acting officially, unless clearly wrong. As usual, the evidence in this instance is contradictory. Seven or eight practising attorneys at law, and a few others, have given testimony in favour of the respondent, but, in my humble opinion, it is not of sufficient weight to destroy the report of the experts, supported as it is by the witnesses of the appellant.

All the parties expropriated along the canal have declared themselves well satisfied with the valuation made, except the respondent; but, I see no reason why he should feel to have been unfairly treated.

I am, therefore, of opinion that the amount fixed by the valuators should be restored and the appeal allowed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondents: *Barwick, Ayelsworth & Wright.*

WILLIAM PRICE, *et al.* (DEFENDANTS) ..... } APPELLANTS;

AND

ALEXANDER FRASER, *et al.* (PLAINTIFFS) ..... } RESPONDENTS.

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*Oct. 16.

*Nov. 16.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Practice—Proceeding in name of deceased party—Amendment—Jurisdiction—Interference with discretion on appeal.

Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *ès qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted the amendment and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side), reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that, consequently, all the orders and judgments given were nullities.

Held, reversing the judgment appealed from, (Q. R. 10 K. B. 511), the Chief Justice and Taschereau J. dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not to have interfered.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the Court of Review and restoring the judgment of the

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

(1) Q. R. 10 K. B. 511.

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

The circumstances under which the questions on this appeal arose are stated in the judgments reported.

Stuart K.C. for the appellants.

Pouliot K.C. and *Orde* for the respondents.

THE CHIEF JUSTICE dissented from the judgment allowing the appeal.

TASCHEREAU J. (différant). — Je débouterais cet appel.

Les autorités invoquées par les appelants sur la procédure et les règles à suivre lorsqu'une des parties décède dans le cours de l'instance, n'ont pas d'application. Ce n'est pas dans le cours de l'instance qu'Evan John Price, le défendeur originaire, est décédé. L'appel est une instance nouvelle, une action judiciaire en réformation du jugement de première instance, comme le dit Poncet, et tout autant que l'ajournement devant les premiers juges, l'œuvre directe de la partie, comme le dit Boncenne, 5 vol. page 216. Voir Bioche, Procéd. v. Actions, No. 116. C'est un acte attributif de juridiction, et non un acte de simple procédure dans une instance pendante. C'est pour cela que les réprésentants d'un défunt n'ont pas à reprendre l'instance pour initier un appel ou inscrire en révision ; ils inscrivent en appel ou en révision comme s'ils prenaient une nouvelle action. C'est pour cela qu'un procureur autre que celui qui a occupé en première instance, peut, sans la formalité d'une substitution, instituer l'appel ou inscrire en révision. C'est pour cela que suivant la jurisprudence constante de cette cour un statut donnant ou restreignant le droit d'appel ne s'applique

pas aux causes pendantes : *Hyde* v. *Lindsay* (1) ; quoiqu'un statut amendant la procédure s'y applique. *Schwob* v. *The Town of Farnham* (2).

Je ne vois vraiment dans l'espèce qu'une question de fait. Le défunt Evan John Price a-t-il jamais inscrit en révision du jugement de la cour supérieure ? Impossible, il me semble, de répondre oui. Il n'existait plus lorsque la cour supérieure a rendu son jugement. Et il n'a pu faire par procureurs ce qu'il ne pouvait faire en personne. Il ne peut pas y avoir de mandat d'outre-tombe, de mandataire sans mandant. La loi ne connaît pas plus les procureurs des trépassés que de ceux qui ne sont pas nés. Le document prétendant inscrire en révision au nom d'Evan John Price, après sa mort, est nul, d'une nullité de *non esse*. Il n'y a pas eu dans le délai voulu d'inscription. La cour de révision n'avait donc pas juridiction ; elle n'a jamais été saisie de la cause. Elle a elle-même décidé qu'elle n'a pas juridiction si le dépôt requis par l'art. 1196 n'a pas été fait dans les huit jours qui suivent la date du jugement. *Ringuette* v. *Ringuette* (3) ; *Leferrière* v. *The Mutual Fire Ins. Co. of Berthier* (4). Il doit en être de même il me semble, si l'inscription n'a pas été faite dans le délai voulu. Et c'est, de fait, ce que cette même cour a décidé dans *Jamieson* v. *Rousseau* (5), où l'inscription fut rayée parce qu'elle n'avait été produite que le surlendemain du dépôt. Ici, il n'y en a pas eu du tout aux yeux de la loi.

Maintenant, la prétendue inscription faite au nom d'un défunt, pouvait-elle être validée par la cour de révision, en substituant au nom du défunt celui de ses exécuteurs testamentaires ? La cour d'appel a décidé que non (6), et je suis d'avis qu'elle a

(1) 29 Can. S. C. R. 99.
(2) 31 Can. S. C. R. 471.
(3) Q. R. 5 S. C. 33.
(4) 24 L. C. Jur. 206.
(5) 1 Que. P. R. 268.
(6) Q. R. 10 K. B. 511.

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eu raison. Il n'est pas possible de valider ce qui n'a jamais existé. Si l'inscription était nulle d'une nullité de *non esse*, et je ne puis voir rien de plus nul qu'un acte fait au nom d'un défunt, elle n'a pu conférer juridiction à la cour de révision. Or, si cette cour n'avait pas juridiction sur la cause, elle n'a pu donner la permission d'amender l'inscription. Elle n'a pu dire, *ut ex tunc*, qu'Evan John Price était représenté par ses exécuteurs lorsque l'inscription n'a pas été en fait produite par eux. Une action prise au nom d'une personne défunte ne pourrait être amendée en lui substituant ses héritiers comme demandeurs. Et, sous la forme d'un amendement, c'est la substitution d'une nouvelle inscription au nom des exécuteurs à celle intérieurement faite au nom du défunt que la cour de révision a permise. Ou plutôt, c'est de fait une inscription en revision plus de deux mois après le jugement de première instance qu'elle a autorisée, lorsqu'il n'y en avait pas eu dans le délai requis. Et cette permission d'amender a été accordée sur la demande de tiers non parties à l'instance. Quand la motion des exécuteurs pour permission d'amender l'inscription a été faite, le décès du défendeur avait été dénoncé au dossier. Or comment, sans reprendre l'instance, ont-ils pu subséquemment être admis à faire une motion dans la cause sans même produire le testament du défunt qui les appointe ? C'est ce que je ne puis comprendre. Dans la cause de *Haggarty* v. *Morris* (1) il y avait eu une reprise d'instance, et c'est parce que cette reprise d'instance avait été accordée, le rapport ne dit pas si elle avait été contestée ou non, que la cour a refusé de rejeter l'appel. Je ne vois là rien de contraire à la décision de la même cour six mois auparavant, dans la cause de *Kerby* v. *Ross* (2) qui est entièrement conforme au jugement dont est appel.

(1) 19 L. C. Jur. 103.

(2) 18 L. C. Jur. 148.

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Une autre décision qui me semble militer bien fortement contre le pouvoir d'amender l'inscription en question est celle dans la cause de *McPherson* v. *Barthe* (1) où il a été jugé:

Qu'une inscription pour révision, inscrivant pour révision *du jugement rendu en cette cause, par la cour supérieure,* lorsque le jugement a été rendu *par la cour de circuit* sera déchargée sur motion à cet effet, et le dossier renvoyé à la cour de première instance, et qu'une motion pour amender l'inscription sera rejetée.

Cette décision n'a pu être basée que sur le motif qu'une inscription défectueuse ne peut conférer juridiction, et que conséquemment la cour n'avait pas le pouvoir d'amender.

Les appelants paraissent croire que la solution de la question devrait être influencée par le fait qu'ils ont maintenant perdu leur droit d'appel à la Cour du Banc de la Reine. C'est là une erreur. D'abord, s'ils ont perdu leur droit d'appel, c'est parce qu'ils l'ont bien voulu. Ils avaient six mois pour ce faire, et il n'y en avait pas deux depuis le jugement, lorsque les intimés ont fait motion pour rejeter l'inscription. Et d'ailleurs, ce fait ne peut affecter notre décision, qui doit être la même qu'elle aurait dû être en cour de révision lorsque la motion des appelants pour amender a été faite. La cour d'appel a dit aux appelants que cet appel *ad misericordiam* ne pouvait prévaloir. Elle leur a dit que c'est exclusivement à la cour des commissaires que l'article 1253 du Code donne le pouvoir de juger suivant l'équité et en bonne conscience. Et je crois qu'elle a eu raison. Les appelants oublient que leurs adversaires ont aussi des droits. Si l'inscription en révision est nulle, ceux-ci ont un droit acquis au jugement de la cour supérieure. Et les en priver serait une injustice.

(1) 5 R. L. 259.

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

GIROUARD J.—No vested rights are at stake in this appeal. Rights arising out of a pending suit cannot be considered as vested till they are finally settled and adjusted by the highest tribunal having jurisdiction in the matter. This appeal involved only a question of procedure very injuriously affecting one of the parties, and on several occasions we declared that we would not hesitate to interfere in cases of this character. *Eastern Townships Bank* v. *Swan* (1); *Lambe* v. *Armstrong* (2). To do otherwise would be to hold that, without a clear statutory enactment, courts of justice may serve to destroy substantial rights they are summoned to define and enforce.

The action was instituted by the respondents against the late Senator Price to recover lands upon which abutted certain wharves, and also damages. The Superior Court maintained the action in part. The case was inscribed in revision, but unfortunately Mr. Price having died pending the *delibéré*, his counsel inscribed on the fourth day of December, 1899, not in the name of his executors, but in the name of the deceased defendant. The plaintiffs did not move at once, or at the next term of the court, to reject the inscription; they appeared and nearly two months after the service of the inscription, when the case was ready to be heard on the merits, on the 26th January, 1900, they served a motion to reject the inscription. The following day, the attorney for the executors of Mr. Price moved to amend by substituting their names, their counsel producing his affidavit that he had been fully instructed by them to inscribe, had received from them the deposit of money required by law, and that it was by inadvertence and error on his part that

(1) 29 Can. S. C. R. 193. (2) 27 S. C. R. 309.

the inscription was not properly made. The two motions were heard at the same time, and on the 3rd of February following, the motion to amend was granted unanimously without costs (Casault C.J., Caron and Andrews JJ.), and the motion to reject the inscription was granted as to costs only. A few months later, the same judges, after having heard the parties, gave judgment on the merits, reversed the judgment of the Superior Court and dismissed the action against Mr. Price with costs.

An appeal was taken by the plaintiffs to the Court of Appeal who held (Bossé J. dissenting) (1), that the Court of Review had no jurisdiction to amend the inscription in revision and to hear the case on the merits, and that all the judgments in review were null and void; and as a necessary consequence the judgment of the Superior Court against Mr. Price was allowed to stand as final. It must be added that when the motion to reject the inscription was made that judgment could have been appealed to the Court of Appeal, but that it was too late to do so when the Court of Appeal pronounced its decision.

No opinion of the judges upon the point of procedure has been transmitted to us, although very full notes upon the merits are given. Probably the learned judges thought that they were the best judges of the procedure of their own court.

The appellants were not, however, without judicial authority when they offered their motion to amend. They had no less than four decisions of the Court of Appeal in support of the course they adopted and that was undoubtedly the reason why the learned judges in review took only four days to deliberate upon the point.

In September, 1874, in *Haggarty* v. *Morris* (2), the Court of Appeal held that the defect of issuing a writ

(1) Q. R. 10 K. B. 511.

(2) 19 L. C. Jur. 103.

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of appeal in the name of a dead party is not absolute and can be covered up by the allowance of a *reprise d'instance*, and that it is not competent to the respondent to move afterwards to quash the same. Article 1154 of the Code of Procedure then in force declared that proceedings in appeal *may be brought* by the legal representatives of a deceased party to a suit.

In 1883, in *Clement* v. *Francis* (1), Dorion C.J. speaking for the full court, said :

> That the court in a previous case had already allowed the tutor to file the authorisation obtained but not produced (that is the authorisation of the family council to appeal), and he thought that the appellant (a curator) was also entitled to delay to obtain this authorisation.

A similar *arrêt* was again rendered by the same court in 1889, in *Laforce* v. *La Ville de Sorel* (2). Articles 306 and 343 of the Civil Code enact that a tutor or curator cannot appeal without such authorisation, and it is a well known principle that prohibitive laws import nullity. (Art. 14 C. C.)

Against this jurisprudence apparently settled by the highest authority in the province, there is one solitary precedent rendered previously, March 1874 ; I refer to *Kerby* v. *Ross* (3), where the majority of the Court of Appeal held that an appeal in the name of a dead person is absolutely null and cannot be corrected by allowing a *reprise d'instance*. Two of the learned judges (four in all), seem to have soon changed their views, for six months afterwards they concurred in *Haggarty* v. *Morris* (4), above referred to. Moreover, Mr. Justice J. T. Taschereau dissented, being of the opinion that Art. 1154 of the Code of Procedure was merely facultative. This opinion finally prevailed, and the jurisprudence seems to be well settled, for nearly thirty years, by numerous decisions quoted above, that a defective appeal, such as in the above cases, is not so

(1) 6 Legal News 325.
(2) M. L. R. 6 Q. B. 109.
(3) 18 L. C. Jur. 148.
(4) 19 L. C. Jur. 103.

absolutely null and void that it cannot be remedied by subsequent proceeding or conduct, and especially by an amendment. See also *Les Curé et Marguilliers de l'Œuvre et Fabrique de Ste. Anne de Varennes* v. *Choquet* (1); *Sawyer* v. *The County of Missisquoi* (2); *Varin* v. *Guérin* (3); *Barrette* v. *Lallier* (4).

The appellants had reason to rely upon that jurisprudence and the judges in review could not very well refuse to follow it. The present case is even more favourable than that of the tutor or curator which is governed by a prohibitive enactment. In this instance the law is merely permissive. Art 1193 of of the new code, reproducing Art. 1154 of the old one says:

> Proceedings in review may be brought by the legal representatives, etc.

I am not prepared to say that this article is imperative and *à peine de nullité*, especially as our code does not so enact, and for a very obvious reason; unquestionably an inscription in review may validly be taken in the name of a dead person, for instance, if his death is unknown to his attorney. Whether considered as a mere revision before the same court or an appeal (Arts. 40, 52 and 72), this case involves merely a point of practice which is left to the discretion of the court which deals with it. I am inclined to regard the jurisprudence of Quebec as not only just and reasonable but also sound in law. I certainly do not feel disposed to punish a party who has respected it by the forfeiture of his substantial rights.

Under the new Code of Procedure, which governs this case, the power of a court to amend has been greatly enlarged; it is almost unlimited. See articles 513 to 523. The commissioners, charged with its con-

(1) M. L. R. 1 Q. B. 333.
(2) Q. R. 1 S. C. 207; 217.
(3) Q. R. 3 S. C. 30.
(4) Q. R. 3 S. C. 489.

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fection, observe that all the provisions contained in the above articles are in conformity with the new principle they lay down in relation to exceptions to the form, namely, that formal defects do not entail nullity unless they are not remedied. They express the opinion that article 522 furnishes the only exception upon the power to amend, viz., the nature of the action cannot be changed. I find, however, another wise limitation in article 520, viz., the opposite party must not be led into error. With these two exceptions, the power to amend is much larger than in France; it is practically as liberal as in England, the State of New York and the Province of Ontario. The commissioners have even indicated the Codes and Judicature Acts in force in these states as the source of several articles of our new code. The cardinal rule seems to prevail in the courts of these countries that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form or by too rigid an adherence to technical rules of practice. No appellate court should undertake to reverse the action of the court below, unless it affirmatively appears that there was a plain abuse of discretion—that the appellant was put to serious disadvantage or materially prejudiced thereby, or that some statutory provision or established rule of practice was violated. Ency. of Plead. & Prac. (2 ed.) vo. Amendments, p. 464 I cannot see why these rules should not also guide the courts of Quebec under the new code. Can it be contended that the present case falls within any of the above exceptions?

To apply the limitations imposed by our own code, can it be said that the respondents have been led into error, or that the nature of their demand has been changed by the amendment? Nothing of the kind. Their rights, as set up in the issue between the parties, can be investigated as fully and effectively as if Mr.

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Price was still alive and a party in the cause. They are not prejudiced in the least, and the Court of Appeal had no right to interfere.

The appeal is therefore allowed with costs before this court and the Court of Appeal, and it is further ordered that the case be remitted to the Court of Appeal to be adjudicated upon the merits.

Appeal allowed with costs.

Solicitors for the appellants: *Caron, Pentland, Stuart & Brodie.*

Solicitors for the respondent: *Pouliot & Drapeau.*

1901

*Oct. 10.

*Nov. 16.

THE PROVINCE OF QUEBEC.....APPELLANT;

AND

THE PROVINCE OF ONTARIO AND THE DOMINION OF CANADA.....RESPONDENTS.

In re COMMON SCHOOL FUND AND LANDS.

ON APPEAL FROM THE DECISION OF THE DOMINION ARBITRATORS IN THE ARBITRATION RESPECTING PROVINCIAL ACCOUNTS.

Accounts of the Province of Canada—Common school fund and lands—Administration by Ontario—Remitting price of lands sold—Default in collections—Withholding lands from sale—Uncollected balances—Jurisdiction of Dominion arbitrators.

By the submission of 10th April, 1890, amongst other matters submitted to the Dominion Arbitrators were the following:

"(*h*) The ascertainment and determination of the principal of the Common School Fund, the rate of interest which would be allowed on such fund, and the method of computing such interest.

"(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold.

The Province of Quebec claimed that Ontario was liable (1) for the purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence had been used, have been collected from the purchasers by Ontario, but which, owing to the neglect and default of the provincial officers, have not been collected but have been lost; (3) for lands which might have been sold but have not been sold, and (4) for all uncollected balances of purchase money.

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

Held, Gwynne J. dissenting, that the Dominion Arbitrators have jurisdiction, under the submission, to hear and adjudicate upon the claims so made by the Province of Quebec.

APPEAL from the decision of the arbitrators appointed to adjust the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec respectively and between the said provinces, by which the majority of the arbitrators held that they had no jurisdiction, under the submission, to take cognizance of such claims as are set out in the head-note as having been made by the Province of Quebec, and for that reason, declining to entertain the question upon the merits.

The award of the 13th September, 1900, appealed against, is as follows:

"To all to whom these presents shall come:—

"The Honourable Sir John Alexander Boyd, of the City of Toronto, in the Province of Ontario, Chancellor of the said Province; the Honourable Sir Louis Napoleon Casault, of the City of Quebec, in the Province of Quebec, Chief Justice of the Superior Court of the said Province of Quebec; and the Honourable George Wheelock Burbidge, of the City of Ottawa, in the said Province of Ontario, Judge of the Exchequer Court of Canada."

Send Greeting:

"Whereas, it was in and by the Act of the Parliament of Canada, 54-55 Victoria, chapter 6, and in and by an Act of the Legislative Assembly of Ontario, 54 Victoria, chapter 2, and in and by an Act of the Legislature of Quebec, 54 Victoria, chapter 4, among other things, provided that for the final and conclusive determination of certain questions and accounts which had arisen, or which might arise, in the settlement of

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accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, both jointly and severally, and between the two provinces, concerning which no agreement had theretofore been arrived at, the Governor-General in council might unite with the Governments of the Provinces of Ontario and Quebec in the appointment of three arbitrators, being judges, to whom should be referred such questions as the Governor-General and Lieutenant-Governors of the Provinces should agree to submit;

"And whereas, we, the undersigned, John Alexander Boyd, Louis Napoleon Casault, and George Wheelock Burbidge, have been duly appointed under the said Acts, and have taken upon ourselves the burdens thereof;

"And whereas, it was provided in and by the said Acts that such arbitrators, or any two of them, should have power to make one or more awards and to do so from time to time;

"And whereas, by an agreement made on the tenth of April, 1893, on behalf of the Government of Canada of the first part, the Government of Ontario of the second part, and the Government of Quebec of the third part, it was, among other things, agreed by and between the said Governments, parties thereto, that the following questions, among others, mentioned in the order of the Governor-General in Council of the twelfth day of December, eighteen hundred and ninety, be, and they were thereby, referred to said arbitrators for their determination and award in accordance with the said statutes, namely:

"The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which should be allowed on such fund, and the method of computing such interest.

"In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold."

"And whereas it was also provided by the said agreement that all the accounts therein referred to should be brought down and extended to the thirty-first day of December, eighteen hundred and ninety-two inclusive;

"And whereas it is alleged and appears that at that date there remained to be collected by the Province of Ontario a large sum consisting of uncollected balances of the price of the Common School Lands theretofore sold;

"And whereas it is in substance claimed on behalf of the Province of Quebec that the amount of such uncollected balances should be ascertained, and that the Province of Ontario should be charged or debited, and the Common School Fund credited therewith, or with such proportion thereof as is right, fair and just;

"And whereas on behalf of the Province of Ontario it is objected that we, the said arbitrators, have no jurisdiction to entertain the claim so made on behalf of the Province of Quebec;

"And whereas we have heard the parties and what was alleged by them respectively;

"Now therefore we, the said John Alexander Boyd and George Wheelock Burbidge (the said Louis Napoleon Casault dissenting) proceeding upon our view of a disputed question of law do award, order and adjudge that we, the said arbitrators have no authority or jurisdiction to entertain the said claim.

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"This award is made without prejudice to the rights and interests of the Province of Quebec in such uncollected balances and to its right to have the same saved and excepted in any final award made in the matters submitted to us.

"In witness whereof, we, the said John Alexander Boyd, Louis Napoleon Casault, and George Wheelock Burbidge have hereunto set our hands and seals this thirteenth day of September, in the year of our Lord one thousand nine hundred.

"J. A. BOYD," [Seal.]
"L. N. CASAULT," [Seal.]
"GEO. W. BURBIDGE." [Seal.]

"Signed, sealed and published in the presence of

"L. A. AUDETTE."

The reasons of the Honourable Chancellor Sir John A. Boyd and of Mr. Justice Burbidge in support of said award, were as follows:

BOYD C.—The Common School Fund is not composed in part of lands set apart for Common School purposes under Con. Stat. Canada, Cap. 26, nor is it in part composed of the uncollected proceeds of the sale of the said lands.

"It is entirely a fund represented by such moneys when collected by the Province of Ontario; but it consists of moneys in hand and not of claims to recover money by any right of action or other method of recovery.

"This und in hand is what is dealt with by the award of the first arbitratrators pursuant to the British North America Act, and in my opinion this board has no jurisdiction under the present deed of submission as to anything that does not form such fund.

"The submission to the board as to the amount of the Common School Fund for which Ontario is liable

does not, as I read it, cover the case of outstanding moneys the proceeds of the price of such lands yet uncollected.

"I do not repeat what was said on a former occasion against any 'wilful default' clause being imported into the award of the first arbitrators contrary to the expressed terms of that award. But I see no reason to change what I then said on account of anything decided in the last appeal by the Supreme Court of Canada. I think Quebec should take nothing by its motion."

(Sgd.) "J. A. BOYD."

13th June, 1900.

BURBIDGE J.—"By the fourth paragraph of the deed of submission under which this arbitration is proceeding it is provided that all the accounts referred to therein shall be brought down and extended to the thirty-first day of December, eighteen hundred and ninety-two inclusive.

"On the sales of lands set apart for the purposes of the Common Schools of the late Province of Canada there remained at that time to be collected by the Province of Ontario sums amounting in the aggregate to something less than half a million of dollars. It is now claimed for the Province of Quebec that this amount should be ascertained by the arbitrators, debited to the Province of Ontario and credited to the Common School Fund as part of the principal thereof. To that claim the Province of Ontario answers that this is a matter in respect of which the arbitrators have no jurisdiction.

"By the deed of submission the arbitrators are in general terms given jurisdiction among other things, in all matters of account between the two provinces. That is, I think, the effect of clause (*f*) of the second paragraph of the submission read in connection with

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what therein precedes it. Then follows the provision, omitting clause (*g*) which is not material to the question now under discussion:—

"3. It is further agreed that the following matters shall be referred to the said arbitrators for their determination and awarded in accordance with the provisions of the said statutes, namely:—"

"(*h*) The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which should be allowed on such fund, and the method of computing such interest; (*i*) In the ascertainment of the amount of the principal of the said Common School Fund the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada; but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold."

"Now it would appear that as there is a special submission of the question of the ascertainment and determination of the amount of the principal of the Common School Fund, it must be taken and understood that it was not the intention of the parties to submit that question by the more general reference and words preceding, and to which allusion has been made. That is made very certain, it seems to me, by the words with which the third paragraph opens: 'It is further agreed that the following matters shall be referred.' Showing clearly that it was in the minds of the parties that the general words preceding did not include this matter of the ascertainment of the amount of the principal of the Common School Fund.

"What then is the authority given to the arbitrators in respect to the ascertainment of this fund? They are to take into consideration:

(1). The sum then held by the Dominion of Canada;

(2). The amount for which Ontario was at the time liable; and

(3). The value of the school lands that have not yet been sold.

"The value of the latter, it turns out, is not considerable, and one may be at some loss to see why it should have been thought necessary to refer this matter, and make no allusion to the large sum that represented at that date the uncollected balances in respect of lands that had been sold. But the reason or motive for the omission is not a matter with which the arbitrators should concern themselves. The important consideration is that they are not by the deed of submission given any power to value these uncollected balances. It is suggested, however, that the arbitrators may in effect do that by declaring and awarding that Ontario is liable for this amount, or for such a portion of it as may be thought to be fair and just. With that view I cannot agree. Up to the thirty-first day of December, 1892, beyond which date the arbitrators cannot go (at least without the agreement of parties) the Government of the Province of Ontario had, so far as the facts before us show, done nothing that would prevent them from collecting all of the portions of such moneys as would constitute the Province of Quebec's share therein, As to the share of the Province of Ontario, that being their own, the Government could, with the authority of the legislature, which they had, do what they thought best. Nor do I see any reason to believe that because of the delays that have taken place, these uncollected balances were at the time mentioned uncollectable. I do not think we have jurisdiction, by holding the Province of Ontario liable therefor, or for some proportion thereof, in substance and effect, to value these outstanding moneys, the parties themselves not having given us by their submission any such power.

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"And I am confirmed in that view by the fact that the deed of submission having been executed on the 10th of April, 1893, the Legislature of the Province of Quebec on the 8th of January, 1894 (57 Vict. c. 3), and the Legislature of the Province of Ontario on the 5th of May, 1894 (57 Vict. c. 11) passed statutes in which, among other things, it was provided that the Governments of the two provinces might agree upon a price to be paid by the Province of Ontario for the acquisition by it of the uncollected balances of the price of the Common School Lands."

(Signed) "GEO. W. BURBIDGE.

The reasons of the Honourable Chief Justice Sir Louis Napoleon Casault in support of his dissent from said award were as follows:—

CASAULT C.J.—"By her claim bearing date the 9th December, 1899, Quebec asks:

"6. That the said uncollected balances, to wit, both of principal and interest, mentioned in said statement No. 6 ought to be and be deemed, held and treated, in all respects as moneys received by Ontario from and on account of the Common School Lands and as part of the principal of the Common School Fund or moneys in the hands of Ontario on the 31st December, 1892, at the latest, and for which Ontario then was and still is liable with interest.

"7. That in default of the honourable arbitrators determining that the said 31st of December, 1892, is a proper date by which said balances are to be deemed as part of the principal of the Common School Fund in the hands of Ontario, and for which she is liable, that they do fix and determine the proper date or dates at or by which Ontario ought to be considered to have received said balances—Quebec alleging that Ontario ought to have collected in the said

balances long prior to 1892," and concludes that her claim be maintained, as set forth, or that the arbitrators make such other award in the premises as law or equitable principles may authorise."

"Ontario objects that the claim of Quebec is not within the terms of the submission under which the Board of Arbitrators acquired jurisdiction.

"The submission as agreed by the Dominion and the Provinces of Ontario and Quebec referred 'the following questions, as mentioned in the order of the Governor General in Council, of the twelfth day of December, 1890,' namely:

'1. All questions relating or incident to the accounts between the Dominion and the Provinces of Ontario and Quebec and to accounts between the two Provinces of Ontario and Quebec.

'The accounts are understood to include the following particulars:

(*a*), (*b*), (*c*), (*d*) and (*e*) are omitted because they refer only to accounts between the Dominion and the provinces.

'(*f*) All matters of account (1) between the Dominion and either of the two provinces, and (2) between the two provinces.

'3. It is further agreed that the following matters shall be referred to the said arbitrators for their determination and award, in accordance with the provisions of the said statutes, namely:

'(*g*) The rate of interest, if any, to be allowed in the accounts between the two provinces, and also whether such interest shall be compounded, and in what manner.

'(*h*) The ascertainment and determination of the amount of the principal of the Common School Fund, the rate of interest which should be allowed on such fund, and the method of computing such interest.

'(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the

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arbitrators are to take into consideration, not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold.'

"It is true that 'The Common School Fund' under the statute 12 V. ch. 100, which gave it existence, and ch. 26 of the Consolidated Statutes of Canada, was the moneys arising in principal and interest from the sale of the 1,000,000 acres of lands set apart for that object. But the reference itself shows that afterwards 'The Common School Fund' was meant to include moneys uncollected and even the unsold lands, since it directed that, in the ascertainment of the principal of the Common School Fund, the arbitrators were directed to take into consideration not only the sum then held by the Dominion, but also the amount for which Ontario was liable and the value of the lands not then sold. This direction makes it evident that the parties intended 'The Common School Fund' to mean and comprise not only the moneys received on the price of land sold, but also the uncollected balances and the lands unsold. And the statutes of Quebec, 57 V. ch. 3, and that of Ontario 57 V. ch. 11, both recognizing the fund to be composed of lands unsold, uncollected balances and amounts collected on price and interest of lands sold, leave, in my mind, no possible doubt upon that point.

"It appears, by the deposition of Mr. Hyde, that the uncollected balances on the school lands sold were, on the 31st December, 1892, $485,801.65, and the accounts and correspondence show that from the 31st of June, 1867, to the 20th of April, 1890, Ontario had collected $936,729.33, for which she had accounted to and been debited by the Dominion, on the 1st December, 1889, for a part, and on the 20th April, 1890, for the rest. From this latter date to the 20th of December follow-

ing, date of the Order in Council mentioned in the fifth paragraph of the submission, the amount collected, if any, could have been but a trifle compared to the almost half million outstanding. Is it possible to suppose that the parties to the submission, and especially the representatives of Quebec, had only in view that trifle, and that other, the value of the 3,383 acres of land unsold, which is all that is proved by Mr. Hyde to have remained unsold on the 31st December, 1892, of the 1,000,000 acres, and not the half million of uncollected balances?

"If the possible amount collected by Ontario, after the 20th April, 1890, had been what the parties meant, they would have been written '*the sum now held by* '*the Governments of the Dominion of Canada and of the* '*Province of Ontario*" in lieu of, *but also the amount for* '*which Ontario is liable.*'

"The word 'liable' is construed by the counsel for Ontario as meaning the moneys which that province had received and had in hand. I have just shewn that the parties to the submission did not attach that meaning to the use they made of that expression; but moreover under the law as it stood, it appears to me to have a larger one. Section 109 of 'The British North America Act' made, not only the lands situated in Ontario the property of that province, but also 'all sums then due and payable for such lands, subject to any trust existing in respect thereof and to any other interest than that of that province in the same.' The uncollected amounts then due for school lands were thereby made the property of Ontario subject to the trust in favour of the common schools of both Ontario and Quebec representing Upper and Lower Canada. Being made the owner of said uncollected amounts, Ontario became the debtor of the portion which was to be applied to the Common Schools of

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Ontario and Quebec, and liable towards the same. It is the view which the framers of the submission seem to have taken and the meaning which they have attached to the word 'liable' as comprising not only what Ontario had collected, but all sums then due and payable for the school lands which she was not entitled to retain for collection or otherwise.

"Quebec in claiming that we do award that said uncollected balances are moneys held and received by Ontario on account of the Common School Fund and moneys in her hands bearing interest from the 31st of December, 1892, or from such other date which we should decide, appears to me to be asking more than we are authorized to do, and we may so decide.

"But I cannot concur in the opinion expressed in the note which The Honourable Sir John Boyd has sent me, nor agree to the draft of award submitted and which appears to adopt the same idea.

"I have twice already expressed the opinion that in determining, under the reference, the amount of 'The Common School Fund' the arbitrators were bound to take in consideration those uncollected balances. I have not changed my opinion.

"Quebec, in the last paragraph of her claim, concludes that, if we do not allow what is her principal demand, we make such other award as in law and equity she may be entitled to, which means in relation to said uncollected balances.

"I think that this includes a request that, in the ascertainment of the amount of the principal of the said 'Common School Fund' we should take into consideration those uncollected balances. I am of opinion that so far we have jurisdiction, and I think that we should so award. I therefore think that in rejecting the part of the Quebec claim which demands that Ontario be debited of the said uncollected balances as

of moneys which she had received on the 31st December, 1892, we should appoint the two provinces to proceed to the ascertainment of the amount of the said uncollected balances which, after deduction of five per cent for management and twenty-five per cent from such of them as are subject to the improvement fund, we should decide to form part of the principal of the said 'Common School Fund.'

"The statutes 57 Vict. ch. 11, of Ontario and 57 Vict. ch. 3 of Quebec do not appear to me to afford argument against that determination. The object of those two statutes is to establish the value of said uncollected balances, which is not within our powers, and to discharge Ontario from any further responsibility to Quebec for said balances and the unsold school lands, by making over to Ontario the interests of Quebec in the same, and that, for a consideration which the arbitrators have no right to fix or even to consider at present.

(Signed), "L. N. CASAULT."

Duffy K.C. (Treasurer of the Province of Quebec), and *Lafleur K.C.* for the appellant.

Æ. Irving K.C. and *Shepley K.C.* for the Province of Ontario, respondent.

Hogg K.C. for the Dominion of Canada, respondent.

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

THE CHIEF JUSTICE.—In a judgment in a former appeal arising out of this arbitration relating to the Common School Fund, (reported in 28 Can. S.C.R. 609, at page 804), I have stated the nature of the questions submitted to the arbitrators relative to the fund in question.

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In proceedings before the arbitrators since that judgment was delivered, a question which a majority of them, (Mr. Justice Burbidge and Chancellor Boyd), have treated as a question of jurisdiction, has arisen and has been determined adversely to the Province of Quebec. The arbitrators having certified that they proceeded on a disputed question of law, the matter has been brought by appeal to this court.

By the agreement or submission of the tenth of April, 1890 (1), amongst other matters referred were the following:

(*h*) The ascertainment and determination of the principal of the Common School Fund, the rate of interest which would be allowed on such fund, and the method of computing such interest.

(*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable and also the value of the school lands which have not yet been sold.

The Province of Quebec having claimed that Ontario is liable; (1) for purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence had been used, have been collected from the purchasers by Ontario, but which, owing to the neglect and default of the provincial officers, have not been collected but have been lost; (3) for lands which might have been sold but have not been sold; and (4) for all uncollected balances of purchase money, the majority of the arbitrators held that they had no jurisdiction under the submission to take cognizance of such claims and, for that reason, declined to entertain the question on the merits.

As intimated on the argument, a majority of the court consider the decision to be erroneous. The clear and distinct words of the reference, which require the

(1) 28 Can. S. C. R. 804.

arbitrators "to take into consideration the amount for which Ontario is liable" seem to us to make it impossible that a claim that Ontario is liable for uncollected balances of purchase moneys as well as for the wilful default and neglect of its officers can possibly be outside the terms of the reference.

Whatever may be the result upon the merits, at least the Province of Quebec, when it asserts a claim for these moneys remitted and lost to the fund, or not realised, by the omissions of Ontario, is entitled to be heard and cannot be repelled *in limine* upon the pretention that there is a want of jurisdiction when in the very words of the submission it is referred to the arbitrators to ascertain the amount of Ontario's liability. In order to support the ruling of the arbitrators rejecting the claim without hearing the parties, it is not now competent for counsel for Ontario to travel into the merits of the case and show that, as a matter of law, upon the construction of the submission, of previous awards, and of legislative acts, the Province of Ontario cannot be made liable for these claims. Quebec has a right to urge this liability before the arbitrators in the first instance and this they have been prevented from doing by the denial of jurisdiction. We need not amplify these reasons for our decision as we agree in the arguments stated by Chief Justice Casault in his dissenting opinion so far as it bears on the question of jurisdiction.

The appeal is allowed and it is referred back to the arbitrators with a declaration that they have jurisdiction to hear and adjudicate upon the claims made by the Province of Quebec.

GWYNNE J. (dissenting).—This appeal is made in assertion of a right on the part of the appellant to apply to the arbitration between the Provinces of Quebec

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and Ontario under the terms of a submission entered into by the provinces, a principle which the Court of Chancery applies and applies only in cases of accounts ordered to be taken between *cestuis que trustent* and their trustees having imposed on them a duty to collect, receive and apply to the uses of their *cestuis que trustent* moneys belonging to them; and between mortgagors and their mortgagees in possession. The appellant claimed before the arbitrators a right to have an inquiry made as to whether or not the Government of the Province of Ontario had by wilful default and neglect failed or delayed in collecting any money which when received would belong to the Common School fund in which both provinces have a common interest, and if it should appear that they had, then the appellant claimed to have the right to charge against the Province of Ontario in the arbitration, the amount which should be so ascertained as if in fact this money had been received by the Government of the province. The arbitrators declined to enter upon any such inquiry for the reason that in their judgment such an inquiry did not come within the terms of the submission under which they acquired jurisdiction. From that decision this appeal is taken. In the arguments before us the appellant, by its learned counsel, pressed upon us that it does not charge the Government of Ontario with having been guilty of any such wilful default or neglect, nor does it allege that any loss has accrued to the school fund by reason of any moneys not having been collected and received by the Province of Ontario—that all that the appellant asked is an inquiry into the matter—and of course *consequential* directions, as it should appear, and that the appellant insisted that not to allow the appeal would be, in effect, an adjudication in the negative upon the merits of the question,

whether or not Ontario had been guilty of such unlawful default and neglect. I endeavoured to point out at the time what appeared to me to be, and what still appears to me to be, the fallacy of this contention. It needs no argument; all may be summed up in this short sentence—it is difficult to understand how the declining to enter upon an inquiry into any subject for the reason of want of jurisdiction can be construed into a determination of the subject matter upon its merits either in the affirmative or the negative. This, however, was the sole argument used before us.

Regarding then the question as it is, as one only of the construction of the submission to arbitration it is simply this: Did the Government of the Province of Ontario by the submission to arbitration, in which it has concurred with the Government of the Province of Quebec, submit to the judgment of the arbitrators the determination of the question whether or not it is liable to account as a defaulting trustee as being guilty by wilful default and neglect in not having collected money which when collected and received by the Government belongs to the school fund? The arbitrators have as I have said expressed their opinion that no such question is by the submission remitted to them to determine. In this opinion and in the reasons upon which it has been founded I concur, and I am therefore of opinion that the appeal should be dismissed with costs.

Appeal allowed.

Solicitor for the appellant: N. *W. Trenholme.*

Solicitor for Ontario, respondent: *Æ. Irving.*

Solicitor for Canada, respondent: *W. D. Hogg.*

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*Oct. 8, 9.
*Nov. 16.

FELIX HAMELIN, *et al.* (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS BANNERMAN, *et al.* (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, PROVINCE OF QUEBEC, APPEAL SIDE.

Deed of lands—Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Art. 5535 R. S. Q.—Arbitration—Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate court.

A deed conveying a portion of the vendor's lands bordering on a stream granted the privilege of constructing dams, etc., therein, with the proviso that, in case of damages being caused through the construction of any such works, the vendor or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators and that the purchasers should pay the amount awarded.

Held, that, under the deed, the purchasers were liable, not only for damages caused by the flooding of lands, but also for all other damages occasioned by the building of dams and other works in the stream by them; and, that the provisions of Art. 5535 R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused.

Held, also, that an objection as to arbitration and award being a condition precedent to an action for such damages which had been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Supreme Court.

On a cross-appeal the Supreme Court refused to interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence.

APPEAL from the judgment of the Court of Queen's Bench (appeal side), reversing the judgment of the Superior Court, District of Terrebonne, and maintain-

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

ing the plaintiffs' action for damages to the extent of $510, with costs.

The circumstances under which the action was brought and the questions at issue are sufficiently stated in the judgments now reported.

The defendants' appeal asked for the restoration of the judgment at the trial by which the action had been dismissed with costs. The plaintiffs by cross-appeal asked for increased damages.

J. A. N. Mackay K.C. and *Alfred Mackay* for the appellants. By the special terms of their title deed, as well as by the common and statute law, the appellants, having their mills in operation, are entitled to use the waters of the stream and improve the water-power by the construction of the dams complained of, paying, however, such damages as might, on reference to arbitration, be awarded for injury to the lands bordering on the stream. Art. 503 C. C.; Art. 5535 R. S. Q.; C. S. L. C. ch. 51; *Jones* v. *Fisher* (1).

The vendor of the appellants was not a mill-owner, but a farmer, and no mills, at the time, existed on the stream; the clause relating to damages was clearly intended to protect the farm lands in view of the extensive rights in the stream then conveyed to the manufacturers proposing to utilise the water-power. The estimate of the experts as to damages covered alleged injury by the damming back of the water. This right was granted by the deed which, by its registration, was sufficient notice to respondents, who purchased subsequently, that this right was a prior charge upon the waters of the stream.

The court was not bound by the report of the experts; Art. 409 C. P. Q.; *Bell* v. *City of Quebec* (2); Arts. 1013-1019 C. C.; *City of Montreal* v. *Drummond* (3).

(1) 17 Can. S. C. R. 515. (2) 5 App. Cas. 84.
(3) 1 App. Cas. 384.

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In any case the action is premature, because both under the agreement and by the law relating to the improvement of watercourses, a reference to arbitration and award had thereon are conditions precedent. *Guerin* v. *Manchester Insurance Co.* (1).

Atwater K.C. and *Beauchamp K.C.* for the respondents. Neither Art. 5535 nor the agreement as to arbitration can oust the tribunals of their jurisdiction. The cumulative remedy afforded thereby leaves the jurisdiction of the courts as it was before. Hardcastle on Statutes (3 ed.) pp. 130-136. By consenting to *expertise* the defendants waived arbitration, and they failed to ask it when served with the notarial protest in 1888.

The appellants have no special or exclusive rights either by virtue of the statute or under the agreement; they must in any case pay all damages caused by damming the stream whether it be by the flooding of the lands or by drowning the water-power above them. We rely upon *Emond* v. *Gauthier* (2); *Jean* v. *Gauthier* (3); *Frechette* v. *Compagnie Manufacturière de St. Hyacinthe* (4), remarks by Sir Arthur Hobhouse at pages 178-180; *Megantic Pulp Co.* v. *Village of Agnès* (5); *Merchants Marine Ins. Co.* v. *Ross* (6); *Anchor Marine Ins. Co.* v. *Allen* (7); *Breakey* v. *Carter* (8); *Bazinet* v. *Gadoury* (9); *Demers* v. *Germain* (10); 2 Demolombe "Contract" No. 4.

The registration of appellants' deed has no effect upon our rights in the waters of the stream. Art. 2085 C. C. *Trainor* v. *Phœnix Fire Ins. Co.* (11), at page 39; *Attrill* v. *Platt* (12).

(1) 29 Can. S. C. R. 139.
(2) 3 Q. L. R. 360.
(3) 5 Q. L. R. 138.
(4) 9 App. Cas. 170.
(5) Q. R. 7 Q. B. 339.
(6) 10 Q. L. R. 237.
(7) 13 Q. L. R. 4.
(8) 7 Q. L. R. 286; 15 R. L. 513; Cass. Dig. (2 ed.) 463.
(9) M. L. R. 7 Q. B. 233.
(10) 14 R. L. 369.
(11) 8 Times L. R. 37.
(12) 10 Can. S. C. R. 425.

On cross-appeal to increase the damages we refer to *The Queen* v. *Paradis* (1); *The Village of Granby* v. *Ménard* (2); *Morrison* v. *City of Montreal* (3); *Lemoine* v. *City of Montreal* (4).

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

TASCHEREAU J.—The plaintiffs, respondents, who are owners of a lot of land and a dam across the North River, at Lachute, allege that the appellants who own a property and a dam across the said river a few hundred feet further down, have, in 1888, by raising their said dam and increasing thereby the volume of water backed up by it, overflowed the respondents' own dam, diminished the force of their water power, flooded their land, and damaged trees and a quarry thereon, for which they claim $5,000 by this action.

Both parties derive their titles from one Peter Cruise, the appellants by a deed of 1876, the respondents by a deed of 1880, both duly registered.

The appellants pleaded to the action that by their deed of purchase of 1876, from Cruise, they had acquired, in addition to the land therein specified, the right to use the waters of the said river as they please wherever the said river flows past any of the land then bought by them, as well as wherever it flows past Cruise's land above it, comprising the land since sold by said Cruise to the respondents, and that consequently, they had the right to overflow the respondents' dam as they had done. The clause of their deed under which the appellants base their said claim to so dam the said river, whatever may be the effect of it on respondents' own dam further up the river, reads as follows: The vendor sells, assigns and transfers to Hamelin and Ayers, present appellants

(1) 16 Can. S. C. R. 716.
(2) 31 Can. S. C. R. 14.
(3) 3 App. Cas. 148.
(4) 23 Can. S. C. R. 390.

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Taschereau J.

A certain piece or parcel of land lying, being and situated in the seigniory of Argenteuil forming part and being comprised in the quantity of land purchased by the seller as hereinafter stated, containing one acre in width running along the shore of the North River on the south side thereof, by an acre in depth towards the property of the seller in such a manner as to form the quantity of two acres in superficies of the property of the said seller, bounded in front by the waters of the said North River, and in rear on both sides by the said seller, with all ways, water, watercourses, privileges, commodities, advantages, emoluments, appurtenances whatsoever in, over and upon that part of the said North River in and appertaining to the said premises as the said purchaser may choose to disturb, arrest, impede and cause to raise up by dams or other artificial means.

This deed, however, contains another clause, which the respondents invoke as giving them the right to be indemnified for the damages which the appellants have caused to them by the overflowing of their (the respondents') land and the diminution of their water power by the appellants raising their own dam in 1888. This other clause reads as follows:

It being well understood between the said parties that should the said seller or his heirs or assigns at any time hereinafter sustain any damage or loss, for and by reason of any work, construction or erection of dams or other fixtures or building by and on the part of the said purchasers or their heirs or assigns in and about the said premises that then and in that case such damages and losses shall be submitted to the award, order, arbitrament final end and determination of two persons indifferently chosen between them as arbitrators with power to the said arbitrators to name an umpire or third arbitrator, in case of a difference of opinion between them touching and concerning the matter so submitted to them, by either of the said parties hereunto, for final adjustment. The said parties hereunto agreeing to stand to, obey, abide, observe, perform, fulfil and keep the award, order, arbitrament, final end and determination of the said arbitrators or any two of them in and about all or any of the matters to be submitted to them, the whole under all costs, losses, damages and interests.

The appellants' contention is that this reserve of the right to claim damages is confined to damages to the land itself, and cannot be construed as extending to

damages caused by the use of the water power itself, which was sold to them together with the land. That contention was upheld by the Superior Court, but rejected by the Court of Appeal.

The appellants seem to me right in their contention that, by the deed of 1876, they have acquired the right to dam this river as they have done, and cause the waters to rise over the respondents' premises. I take that to be conceded by the respondents who by their protest in 1888, and by this action merely claim the damages resulting to them from the appellants' works under the clause of the deed to appellants by which they bound themselves to pay such damages, when arising.

But the appellants' further contention that they are not liable for all the damages caused to their seller (or to respondents, his representatives) but only for the damages caused to the land itself, by the erection of dams or other works on the property bought by them is, in my opinion, unfounded.

Their deed of purchase, as I read it, clearly says that if any damage whatsoever is later on sustained by Cruise or his representatives by reason of any dam or work erected by the appellants on the property purchased, the amount of the said damages shall be ascertained by arbitration. I cannot see how such a general, unambiguous clause can by interpretation be restricted as applying exclusively to damages to the land. They purchased two acres of land, with in addition the right to cause the waters to back up and so destroy all the benefit that their seller could derive from that part of the river that flowed past the property he retained above the one sold for the sum of $60, and $60 only, because the damages to the seller could not then be ascertained, depended on an eventuality and the lesser or greater elevation of the dam the

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purchaser might build, and might never accrue; therefore not including them, but reserving the amount thereof to be determined later on whenever they accrued, if ever they did. It is incumbent on the appellants who claim the exorbitant right of causing damage and not to pay for it to establish their contentions by an unequivocal title. And they have failed to do so. Indeed, they have proved the contrary. By their own title, they are liable for all damages, without any reserve or restriction.

The fact that by Art. 5535 of the Revised Statutes (Q.) the appellants might have had the right of raising their dam as they did on condition of paying all the damages resulting therefrom does not, that I can see, militate against the respondents' contention. Assuming that it might be so if the deed of 1876 were ambiguous as to the damages, its language is so clear that it cannot but be held to mean what it says. Moreover, though legal warranty, for instance, is implied by law without stipulation in a contract of sale it could not be contended that a stipulation amounting to nothing more in a deed of sale is to be read out of the deed. Likewise as to legal community, a clause in a contract of marriage stipulating it is not void because it is superfluous.

The appellants further contended that no damages recoverable in law had been proved by the respondents. The Court of Appeal allowed $500, being the depreciation of the value of their property resulting to them from the appellants' raising of their dam in 1888. That seems to have been a fair basis of the amount of damages in this case.

As to the arbitration being a condition precedent to respondents' action, that point must be considered as abandoned. There is no allusion whatever to it in the appellants' factum, and there was none in their

factum in the Court of Appeal, in whose formal judgment the point is consequently not alluded to. They cannot raise here an objection which they waived in the court appealed from.

As to the amount of damages, on the cross appeal of the respondents, I do not see that there is any room for our interference. The evidence on this point is very contradictory. According to some of the witnesses, the respondents would have suffered none at all.

I would dismiss appeal and cross-appeal with costs.

GWYNNE J. (dissenting).—The plaintiffs in their declaration allege that the defendants are in possession of certain lands abutting on the North River at Lachute, in the Province of Quebec, which they purchased from one Peter Cruise in 1876 and 1880. That it was specially stipulated by the said deeds of sale that the said defendants, their heirs and assigns should be responsible for all loss or damage which should at any time be sustained by the said Peter Cruise, his heirs or assigns, by reason of the erection of a dam or other obstructions by the said defendants upon the said pieces of land. That the defendants erected a dam of five feet in height upon the said pieces of land. That subsequenly in 1886 one Robert Bannerman being then seized of a piece of land abutting on the North River, about 1,500 or 1,700 feet higher up the river than the piece sold by Cruise to the defendants which said piece of land the said Robert Bannerman also acquired by purchase from the said Cruise, and that he conjointly with one J. C. Ireland, who was proprietor of land at the other side of the North River, opposite to the piece of land purchased by Bannerman from Cruise, built upon their land a dam across the river. The declaration then alleges the death of the said Robert

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Bannerman and the acquisition by the plaintiffs of the property of which he died seized, including the piece of land so purchased by him from Cruise, and the half of the said dam so constructed conjointly with Ireland across the river. The declaration then alleges that in the months of August and September, 1898, the defendants increased considerably the height of the dam which they had erected across the river and thereby forced back the waters of the river to the prejudice of the plaintiffs' one-half interest in the said dam of five hundred dollars, and also thereby inundated the plaintiffs' land and destroyed divers trees growing thereon, and inundated a large quantity of valuable stones the property of the plaintiffs, and damaged a rope walk, &c., &c. To this declaration the defendants pleaded by way of peremptory exception that by article 5535 of the Revised Statutes of the Province of Quebec the plaintiffs' remedy for the causes of action stated is by arbitration as provided in that section, and not by an action, and that moreover by deed of sale of the date of 4th of November, 1876, from Cruise to the defendants of part of the land whereon the defendants erected their dam he, Cruise, granted to the defendants the right and privileges of inundating the lands in question by reason of dams or otherwise, and that if any damage should be thereby caused to the said lands the same should be ascertained and determined by arbitration as therein provided. That the lands in respect of which the plaintiffs claim damages are some of which Cruise was proprietor at the time of the passing of the deed of the 4th November, 1876, and which he subsequently by a deed of the 18th June, 1880, sold to the plaintiffs' *auteur*.

The defendants plead further that by the deed of 4th November, 1876, they acquired all the water power and absolute right to all the water power of the river

as abutting on the land sold by Cruise to Bannerman as on that sold to the defendants. They then plead that Ireland's interest in the same was sold to the defendants by deed dated the 25th February, 1892. That this last mentioned dam whereof the plaintiffs are possessed in common with the defendants has never been used for any purpose. That it serves no useful purpose. That the plaintiffs have never expressed an intention of utilising it for any purpose whatever, and that up to the present day no use whatever has been made of it nor has there been any need of it for any purpose whatever.

To these pleas the plaintiffs answer in law to the peremptory exception, and as to the other pleas of the defendants they simply assert that the allegations of the defendants are in point of fact false.

The court having ordered the issues of fact to be tried before determining the issue in law the case was brought down for trial before experts to whom these issues had been remitted by the court. In the reference to the experts several questions were submitted to them to inquire into and report upon. To only some of them will it be necessary to refer, but before doing so it will be proper here briefly to refer to the agreement between F. C. Ireland and Robert Bannerman in virtue of which the dam was erected of which the plaintiffs as they themselves claim and the defendants are now proprietors in common. That agreement is contained in a notarial deed bearing date the 31st day of July, 1886, whereby it was agreed that a dam should be abutted on the property of Ireland upon one side of the river and of Bannerman on the other; and that it should be constructed across the river in the form prescribed in the deed to the height of four feet and a half from lower water mark, and when built should be maintained at the common and equal cost

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and charge of Ireland and Bannerman and of their respective heirs and assigns. Then follows the special provision following:

Should the said dam require to be raised beyond the height herein above mentioned to furnish more power, or lowered on account of causing any damage to the water power above as hereinafter stipulated such works shall be performed at equal costs and expenses by the said parties, but the said dam shall in no way interfere with the rights already accrued to other interested parties having water power above the said dam to be constructed by the said appearants. *Should either of the said parties require to make additional works* other than *the dam proper* such work shall be performed by one of the said appearants requiring the same, and should any such additional works *other than the dam proper* made by either of the said parties requiring the same for supply of water in any way, cause a leakage *or damage to the said dam proper and lessen or interfere with the water power of the other it shall be repaired immediately* by the one of the said appearants who shall have built the same on pain of all costs, damages and interest to the party suffering from the same. Each of the said appearants *shall be the proprietor of the one half of the water furnished by the dam so intended to be erected as aforesaid.*

The first two questions submitted by the court to the experts to report upon are as follows:

1st. Have the defendants, by raising the height of the dam, inundated that of the plaintiffs and have they thereby caused the plaintiffs damage as alleged in the declaration?

2nd. If such damage has been caused to the plaintiffs what is the total amount of it?

To which the experts in their report reply that the information given at the enquête respecting damage caused to the said dam proper of the plaintiffs arising from the raising of the defendants' dam does not present any quality of certainty and does not rest upon any accurate observation—that such damages can be established by the assistance of special tests; that under these circumstances the experts thought it to be their duty to rely more especially upon the results furnished by their own observations—and *so doing they arrived at the conclusion that the raising of the defendants' dam has not inundated the said dam proper of the plaintiffs, and so that there has been no damage upon that head.*

3rd. Is there at the foot of the said dam of the plaintiffs a fall in the water furnishing them with an additional height of about four feet and one-half or, if not, how much?

To which they answer that

from the foot of the dam to the surface of the still waters there is *une dénivellation superficielle* which furnishes an equivalent to 2 feet $\frac{2}{100}$.

4th. How much loss of horse-power has the raising of the defendants' dam caused to the dam of the plaintiff, and what value does such loss represent?

* * * * * * *

7th. What is the value of one horse power at the place where the plaintiffs' dam is built?

* * * * * * *

11th. Has the dam of the plaintiffs ever served any purpose of commerce or manufacture whatever and has it ever, up to the day upon which the present action was commenced, been of any use to the plaintiffs?

12th. Has the dam of the plaintiffs lost value on the market or otherwise by the act of the defendants?

I have grouped these questions together because they all relate to the plaintiffs' claim for damages alleged to have been caused to them at the dam.

In answer to the sixth question the experts, expressing their own opinion, for there was no evidence before them on the subject, say that, in their opinion, the height of the fall at the plaintiffs' dam is to be measured from the height at the water above the dam to the surface of the water at the foot of a current which flows from the foot of the dam and so measuring that they find the penning back of the waters in the current below the dam to have diminished the disposable fall at plaintiffs' dam by two feet and one half.

Now the dam of the plaintiffs is in a particular form prescribed by the terms of the deed in virtue of which it was erected namely in the shape of a $\overset{A\ B}{V}$ with its apex in the centre of the river; calling then the apex $\underset{C}{}$ and the terminus of the leg on the plaintiffs' side of the river and that of the leg on the defendants' side ^{A}, and the current commencing at the foot of the dam at say the point marked ^{C}, and as the plaintiffs

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could never have any use of the water-power created by the dam unless the water should be drawn off on to their own land behind the point B it does not appear clear how the doing away with the current below the dam can diminish the *fall* of the water drawn off behind the point B. The experts however in estimating the value of an alleged diminution of power from such causes, say that in view of the topography of the places a manufactory could be placed upon the plaintiffs' property in such a manner as to use, as I understand them the whole of the plaintiffs' share in the water power created by the dam which by the terms of the deed in virtue of which the dam was erected was, as we have seen one half of such water power; but the works in such manufactory for the operation of which the water from behind the dam should be conducted would naturally be above the surface of the waters in the river at the foot of the dam, and why the height of the surface waters behind the dam should be measured to a point two feet and one half *below* the surface of the waters in the river at the foot of the dam and should be introduced as an element in determining the force of the water conducted to such works for their operation no evidence was adduced or explanation offered; it may be moreover that the cost of erecting such manufactory and of conducting the water into it for the purpose of using such half of such water power would not justify a prudent person in incurring the expense; and it may be that herein can be found a sufficient reason to account for the fact that the water power never has been used by the plaintiffs or their predecessors in title for any commercial or useful purpose, or by the plaintiffs for any purpose whatever save only that to which it has been applied in the present action, namely to base thereon a claim of right to prevent the

defendants from using at their dam for manufacturing purposes the waters of the river up to the foot of the dam in which the plaintiffs have a half interest in common with the defendants.

In answer to the seventh question the experts say in substance that the evidence is so very contradictory that the only conclusion which can be drawn from it is that the value of a horse power is something between fifty (50) cents and thirteen dollars and fifty cents and they say that the conclusion they have drawn from this evidence aided by their own experience is, that a horse power is worth five dollars ($5) per annum, and they estimate therefore the loss of the 2½ feet in the fall mentioned in their answer to the sixth question at 53 horse power which at $5 per horse power makes $265 per annum.

In answer to the eleventh question they say that it does not appear in the evidence that the dam of the plaintiffs has ever served any purposes of commerce or manufacture whatsoever, and that up to the present time it has not been of any use whatever to the plaintiffs.

They answer the twelfth question by referring to their answers to the sixth and seventh questions, and say that the raising of the defendants' dam having diminished (according to their opinion) the plaintiffs' use of their share of the water power usable at the dam by 53 horse-power the market value of the plaintiffs' share in the dam has been diminished. This answer simply amounts to this that diminution of water power at a dam by 53 horse-power *necessarily* diminishes the market value of the dam by the value of 53 horse-power which in the present case the experts estimate at $5 per horse-power or $265 per annum, but this argument is based upon the assumption of a fact which is wanting in the present case namely that

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water-power for which since its creation in 1886 no use whatever has been found had a market value capable of being injuriously affected by the diminution of the power. Now from the report of the experts and the evidence taken before them it is established that the dam in which the plaintiffs have a share has never since its erection, nor the water power thereby created, been applied to any useful purpose whatever —that the plaintiffs have never made any use of the dam save, as already observed, the use made of it in the present action—that the dam has not been damaged by the raising of the defendants' dam, and that the plaintiffs have not sustained any actual damage whatever of the nature complained of in the plaintiffs' declaration, but that from the foot of the dam to the tranquil waters further down there was a current in the river having a fall of about $2\frac{1}{2}$ feet (two and one half feet;) that this current has been done away with by the back waters caused by defendants' dam, and that in the estimation of the experts such change in the condition of the waters in the current has diminished the plaintiffs' share in the water power created by the dam which, although not made any use of by the plaintiffs hitherto could, in the opinion of the experts, be made use of if a manufactory should be erected on the plaintiffs' property at a point and in a manner observed by the experts as capable of using the whole of the plaintiffs' share in such water power, but whether the cost of erecting such manufactory and of conducting the water into it for manufacturing purposes would justify any prudent man in incurring the necessary expenditure no evidence whatever has been produced upon which to form any opinion.

The only loss which the experts have suggested that the raising of the defendants' dam has caused to the plaintiffs is the possible diminution theoretically

conceived in the market value of a dam which since its erection to the present time has never served any useful purpose whatever and which for that reason may fairly be assumed to have had no market value. In estimating the marketable value of water power created by a dam there are many things to be taken into consideration besides an estimate of the cubic contents of the water used or capable of being used and of the height of the fall from the top of the dam where the water is drawn off for use to the place where the water is to be used. The cost of constructing a manufactory in which to use the water power and of conducting the water to the works in the manufactory must be taken into consideration, also the beneficial purpose to which the water power has been or can be applied, and the profitable character of such use based either upon experience by actual use of the water power or based upon some substantial material as to the profitable purpose to which the water power can be applied. None of those things have been taken into consideration by the experts in the present case, the estimate therefore which has been made by them is, in my opinion, not only theoretical, speculative and illusory and of no practical value but, in the present action, is irrelevant. The estimate is of a permanent diminution in value, by the act of the defendants, of the plaintiffs' share in the water power created by the dam, is purely theoretical, not based upon any practical experience in the use of the power, but it is as to the value of a permanent deprivatory of the plaintiffs of water power equivalent to 53 horse power but the plaintiffs do not by their action ask for any damages upon such a calculation—they do not offer to surrender to the defendants the right to continue to deprive the plaintiffs of the water power if any there be by which the share of the plaintiffs in the water-power at the

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dam has been diminished by the defendants' dam of which diminution there is no sufficient evidence, upon payment either of a sum calculated on the estimate of the experts nor upon payment of any sum nor would judgment for the plaintiffs in the present action have the effect of vesting in the defendants or of securing to them the permanent right forever of depriving the plaintiffs of the water-power, if any there be, of which the raising of the defendants' dam has deprived the plaintiffs. What the plaintiffs claim in their action, and what judgment in their favour therein would give them, would be compensation for whatever actual damages if any that they can shew they have already sustained, or nominal damages in case of infringement of a right without actual damages as yet sustained and judgment affirming their right to the continual enjoyment of the water-power if any there be of which they have been deprived, and to have the cause of such diminution of the water power removed and to restrain the continuance of the wrong, if any there be, which, as alleged in the declaration, has caused—is causing and will continue to cause damage to the plaintiffs. Beyond this the court has no jurisdiction in the present action and it would be preposterous that the defendants should be compelled by the judgment of the court to pay to the plaintiffs the full value of the permanent deprivation of them of a thing the permanent retention of which the judgment cannot secure to the defendants.

As to the remaining heads of inquiry, namely, relating to damages alleged in the declaration to have been sustained by the plaintiffs—by their land having been inundated a quantity of valuable stone flooded—a rope-walk damaged—and trees destroyed, it is sufficient to say that the experts report and that the evidence justifies such report that

no damage whatever has been sustained by plaintiffs' land by flood-waters backed from the defendants' dam —no damage done to any stones or stone quarry, and no damage done to plaintiffs' rope-walk, and as to the damage claimed for trees alleged to have been destroyed they say that the evidence was wholly contradictory, and they set out in their report that evidence which on the plaintiffs' side consisted of the evidence of one of the plaintiffs who claimed that trees to the value of from $100 to $150 had been killed by the backwater—and of Peter Cruise who thought this too high an estimate and would go no further than $35, while five witnesses on the part of the defendants testified that there were no trees at all killed or damaged by back-water, and certainly it seems difficult to understand how trees could have been killed on plaintiffs' land by flood waters from the dam consistently with the finding that no damage was done to the plaintiffs' land from such cause although one of the plaintiffs swore that one half of the value of his land was destroyed by such cause. It would certainly seem that the evidence on the part of the plaintiffs as to the destruction of trees was as unreliable as that in relation to the flooding of their land; however the whole weight of the evidence was that no trees were damaged by back water and yet the experts in their report say that they were of opinion that damage to trees to the amount of $10 was caused by back water.

Upon this report and the evidence referred to therein, the case came down before Mr. Justice H. T. Taschereau of the Superior Court who pronounced judgment therein allowing the answer in law to the peremptory exception and gave judgment in favour of the defendants upon the residue of the issues joined in the action. Among the reasons upon which that judgment is founded the following are stated in the judgment:

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Considering that the report of the experts establishes that the defendants have not by the raising of their dam inundated that of the plaintiffs and that there is nothing due for damage upon that head, and that there has not been any inundation of the land of the plaintiffs nor damage caused to their manufacture (that is the rope walk claim), and that the plaintiffs have no claim for indemnity in respect of the pretended loss of a stone quarry.

Considering that the sole damage as ascertained by the experts has been caused to certain trees which the report values at ten dollars, *but that this opinion of the experts is not supported by the evidence* and cannot be sustained by the court.

And, considering that the plaintiffs' dam is of little value and has never been utilized, and that it is impossible *upon the evidence* to say that it ever can be advantageously made use of, and that a water power can only be valued in connection with a manufactory or manufacture already in existence with motive powers, and that in the absence of such industry and of these motive powers the dam alone cannot have any appreciable mercantile value in prospect of the water which it may later on be employed to help more or less according to the industry and motive powers which may be connected with it, and so that the existence of a dam alone can give no more right to indemnity than the existence of the power of the water itself so long as it is not in active condition,

and he concludes his judgment by saying:

Considering that from all the circumstances of the action, disclosed by the *enquête*, the plaintiffs' action appears vexatious and to have no legitimate foundation.

Upon a consideration of the whole case I can see no just ground of objection to these reasons upon which the learned judge has based his judgment. In my opinion, as already stated, there was no evidence whatever adduced from which an intelligent opinion can be formed of the market value of the plaintiffs' interest in the dam possessed by them in common with the defendants, or of the value of any diminution of such value, if any such there be, or which would justify the conclusion that in point of fact any diminution of the water power created by the dam, or any damage past, present or prospective, has in reality, been caused to

the plaintiffs' share in the water power created by the dam, by the raising of the defendants' dam.

From the judgment of the Superior Court the respondents appealed to the Court of Queen's Bench in Appeal, at Montreal; that court reversed the judgment of the Superior Court and pronounced judgment for the plaintiffs for $510 damages made up of $500 which the court estimated as representing the permanent loss of one-fourth of what the court estimated as being the full market value of the plaintiffs' interest in the dam, and $10 as the experts' estimate of injury to trees.

As to the $500, although not as extravagant as the estimate of the experts, it is nevertheless open to the same objections, namely, that it is not founded upon any sufficient evidence of any permanent or temporary damage past, present, or prospective, having been in fact occasioned to the plaintiffs' interest in the dam in question—this estimate of total market value, and also of the one-fourth diminution of such value are also wholly arbitrary, unsupported by any sufficient evidence and moreover the judgment is also open to the same abjection as already alluded to in relation to the estimate of the experts, namely, that it awards the plaintiffs a sum of money estimated to be the full value of the permanent deprivation of the plaintiffs, of one-fourth of the whole market value of the plaintiffs' interest in the dam, while the judgment does not secure to the defendants the right to enjoy permanently the thing for which they are adjudged to pay unconditionally the estimated full value.

As to the ten dollars in respect of trees, that sum, as already shewn, was in the opinion of the learned judge of first instance and in fact not authorised by the evidence. The judgment of the Superior Court so adjudged, and I can see no reason for varying that judgment upon that point.

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There remains only the construction of the defendants' title from Peter Cruise of the 4th of November, 1876, which the defendants have in their plea, insisted to be and still insist upon its being an absolute grant by Peter Cruise to the defendants, their heirs and assigns to pen back at their dam all the water in the river flowing along the whole extent of the land then owned by Cruise alongside of the river, of which he, by the deed of 4th November, 1876, sold a small piece to the defendants for the abutment of a dam then proposed to be erected by the defendants across the river.

Now it may be admitted that in November, 1876, when Cruise sold that small piece of land to the defendants, as he owned no land on the opposite side of the river and had consequently no mill site which he could then effectually use, the only damage which he contemplated as being possible to be done to him by the proposed dam of the defendants was in respect of his land remaining to him being flooded by the backwater caused by the dam—the language of the deed, it is not disputed, secures to him that right but it is short of containing a *grant* as is contended by the defendants of all Cruise's interest in the water flowing past the whole of his land. On the contrary the words used literally pass only the small piece particularly described, including to the middle of the stream together with all the waters of the river passing along such small piece of land alongside of the river. A careful perusal of the sentence relied upon by the defendants shews that it is not very grammatically expressed but however read there is nothing in it I must say, which can, I think, warrant the contention of the defendants.

It was, I think, quite competent for Cruise notwithstanding his deed to the defendants, subsequently to

acquire, on the opposite side of the river, a site whereon to abut, on that side, a dam to be built across the river to utilise any water-power available above the piece sold to the defendants, and Cruise's assignee, Robert Bannerman, would have the same right.

Judgment therefore must be given against the defendants upon that plea; but this does not, except as to costs, affect the right of the defendants to judgment in the action which in my opinion, for the reasons already given, they ought to have. The appeal therefore of the defendants ought, in my opinion, to be allowed but without costs, because of the defendants failing upon their plea of a grant from Cruise of the whole of the water-power in the river as aforesaid.

The cross-appeal of the plaintiffs, the now respondents, should be dismissed but without costs also for the reason that I do not think the costs have been appreciably increased by such cross-appeal.

Each party should bear the costs of the appeal from the Superior Court to the Court of Queen's Bench, in appeal, for the reason that, as I think, the appellants there were only entitled to succeed in part, namely, on the defendants' plea of grant from Cruise.

The plaintiffs should have costs incidental to the peremptory exception having been pleaded and all costs in the Superior Court incidental upon the plea of the grant of all the water in the river from Cruise, and the defendants should have all the residue of the costs in the action.

Each party should have the right of setting off one set of costs against the other.

Appeal dismissed with costs.

Solicitor for the appellants: *J. A. N. Mackay.*

Solicitors for the respondents: *Beauchamp & Bruchesi.*

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*Oct. 16, 17.
*Nov. 16.

LEON PARENT (PLAINTIFF).....APPELLANT;

AND

THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Title to land—Trespass—Overhanging roof—Right of view—Evidence—Boundary line—Waiver—Servitude.

In 1844 the defendants constructed a toll-house close to or on the boundary of their land with windows overlooking an adjoining vacant lot, and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or any subsequent owner till after the purchase of the lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable and defendants paid the costs of the necessary alteration. In 1900 the plaintiff instituted the present action against defendants to have the remaining projection of the roof demolished and the windows closed up. There was no evidence that there had ever been a division line established between the properties and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty.

Held, affirming the judgment appealed from, Strong C.J. dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute and consequently that his action could not be maintained.

Held further, *per* Girouard J. following *Delorme* v. *Cusson* (28 S. C. R. 66) that, as the plaintiff and his *auteurs* had waived objection to the manner in which the toll-house had been constructed and permitted the roof and windows to remain there, the demolition could not be required at least so long as the building continued to exist in the condition in which it had been so constructed.

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

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PARENT
v.
THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Court of Review and restoring the judgment of the Superior Court, District of Quebec, which dismissed the plaintiff's action with costs.

The questions at issue on this appeal are sufficiently stated in the head-note and in the judgements reported. It may be added that the defendants did not invoke title to the strip of land in dispute by pleading acquisitive prescription. There was a question raised, however, as to whether or not the action was an *action pétitoire*.

Pelletier K.C. for the appellant, cited Arts. 533-539, C. C.; Ferrières, Coutume de Paris, vol. ii, p. 1521, tit. ix, *Servitudes*, Art. clxxxvi, no. 10; 2 Coquille, Coutume de Nivernois, Cap. 10, Art. 2 *Egout*. Our action is distinctly *négatoire* in form and cannot be deemed possessory; 1 Pothier, 112; 7 Laurent, no. 152; 8 Laurent, no. 285; Dall. Rep. Sup. *Action Possessoire*, nos. 135, 136, 145, 152; Bourcart, *Actions Possessoirs*, nos. 145, 146; Poncet, *Action*, no. 23; *Gauthier* v. *Masson* (1).

Stuart K.C. for the respondents. The plaintiff produced with his action, for the purpose of *qualifying* his position, a deed dated in 1895, in which his vendor declares his title to be under sheriff's deed which is not produced. It conveys thirty feet frontage on Grande Allée by sixty feet in depth. The defendants' title deed from the owner in 1843 describes the land sold as commencing 128 feet from the Quebec City limits. There never has been a regular *bornage* to establish the line between the defendants' land and the lot purchased by the plaintiff between it and the city limits, and from the evidence, it is impossible to say

(1) 27 Can. S. C. R. 575.

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PARENT v. THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES.

whether or not the roof overhangs plaintiff's land, nor that the windows are within the distance prescribed by the Civil Code, Arts. 536, 537, 538. We deny any trespass; we claim to have built within our proper boundaries, and that the limits of plaintiff's title and possession are equivocal, by mere tolerance and promiscuous and insufficient to give him a right of action. Arts. 1064 to 1066 C. P. Q. We rely upon the following authorities viz.: Dall. Rep. "Action Possessoire" nos. 171, 175; 2 Aubry & Rau, 138, 159.

The plaintiff being the last comer by over forty-five years cannot maintain his possessory action without establishing such undisputed possession as to leave no doubt whatever that his possession was acquiesced in and had ousted that of the defendants.

It may be that the respondents tolerated encroachments or possibly joint possession of part of their land, but joint possession does not give rise to a possessory action. *Price* v. *LeBlond* (1); *Lalonde* v. *Daoust* (2); *Lacroix* v. *Ross* (3); *Béliveau* v. *Church* (4). 1 Garsonnet, § 135; 7 Bourbeau, no. 354; Bourcart, no. 62; Fuzier-Herman, nos. 313, 314, 315; Ordonnance, 1667, t. 18, Art. 1; Pothier, Procédure Civile, ch. 3, Art. 1, § 5; Pothier, Possession, no. 102; Rousseau & Lainé, Dict. de Proc. *vo. Action Possessoire*, no. 110; Pardessus, Servitudes, nn. 212 et seq.; Dall. Rep. *vo.* Servitude, no. 792; Dall. Rep. Supp. *vo. Servitude*, no. 267; *Gauthier* v. *Masson* (5); *Emerald Phosphate Co.* v. *Anglo-Continental Guano Works* (6). We also refer to *Delorme* v. *Cusson* (7) as applying to this case.

THE CHIEF JUSTICE—I dissent from the judgment of the court for the reasons given by Mr. Justice

(1) 30 Can. S. C. R. 539.
(2) 8 L. C. Jur. 163.
(3) 11 Q. L. R. 78.
(4) Q. R. 2 Q. B. 545.
(5) 27 Can. S. C. R. 575.
(6) 21 Can. S. C. R. 422.
(7) 28 Can. S. C. R. 66.

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Andrews in delivering the judgment of the Court of Review.

TASCHEREAU J.—Mon collègue, le Juge Girouard, a bien voulu me communiquer ses notes. Je suis d'avis, avec lui, de rejeter cet appel. Mais tout en partageant son opinion sur la question de droit qu'il a si savamment élucidée dans la cause de *Delorme* v. *Cusson* (1), dont il fait application à la présente cause, je base la conclusion à laquelle j'en suis venu dans l'espèce sur le motif que l'appelant n'a pas prouvé le fait principal sur lequel repose son action, celui de son droit à la propriété des quelques pieds du terrain en litige. C'est à ce fait que se borne toute la contestation entre les parties. Ce n'est pas un droit de servitude que les intimés réclament, c'est la propriété même de ces quelques pieds.

Il incombait à l'appelant de faire une preuve claire et positive de son principal allégué, savoir, que c'est sur son terrain que le larmier des intimés déverse les eaux pluviales, que c'est à son terrain que s'étend le droit de vue exercé par eux. Or, il m'est impossible de voir cette preuve au dossier. Il n'y est pas, et il n'a jamais été légalement établi contradictoirement entre les parties, où commence et où finit la propriété de l'appelant, suivant leurs titres ou suivant la prescription acquisitive, s'il y a lieu. Et c'est là, la question préjudicielle. Il est autant possible que, par erreur commune, ce soit la maison de l'appelant et sa clôture qui empiètent sur le terrain des intimés qu'il est possible que ce soit le pan est de la bâtisse des intimés qui fasse la ligne de division entre eux et l'appelant.

J'attache peu d'importance à ce que l'appelant dit s'être passé entre lui et Burroughs en 1895, même

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en supposant que Burroughs ait pu lier les intimés par ce qui se serait passé dans la circonstance. Que l'appelant place sa bâtisse là où il l'a fait leur était tout-à-fait indifférent, mais si l'appelant leur eût alors dit qu'il réclamait le droit de leur faire reculer leur propre bâtisse, il n'aurait pas obtenu d'eux le consentement dont il voudrait se servir aujourd'hui comme une admission de son droit de propriété à toute la lisière de terrain en question.

GWYNNE J.—Without expressing any opinion upon the question whether or not the action is *possessoire* or *pétitoire*, I am of opinion that assuming it to be *une action pétitoire*, as contended by the learned counsel for the appellant, the appeal must be dismissed for default of the plaintiff to shew title.

GIROUARD J.—Toute la plaidoirie devant nous a roulé sur le point de savoir si l'action de l'appelant est au pétitoire ou au possessoire. La cour d'appel n'y a vu qu'une action possessoire intentée depuis l'année du trouble. L'appelant soutient au contraire que c'est une action pétitoire. Sans m'arrêter aux distinctions qui caractérisent ces deux actions, toujours difficiles dans la pratique, je suis disposé à accepter la prétention de l'appelant, sans décider qu'elle est bien fondée.

D'abord a-t-il prouvé son droit de propriété, ainsi qu'il l'allègue? Mon savant collègue, M. le Juge Taschereau, vient de démontrer qu'il n'a pas fait cette preuve et je concours entièrement dans son opinion.

Mais supposons un instant que l'appelant soit propriétaire, a-t-il donné un consentement au maintien des constructions dont il demande la suppression? C'est sur ce dernier point que je me propose d'offrir quelques observations.

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Les faits de la cause ne sont guère contestés. En 1843, les intimés ont construit sur leur terrain de la Grande Allée, à Québec, une maison du péage dont deux des fenêtres, dit l'appelant, donnent vue sur l'emplacement voisin et aussi avec chapeau ou toit dépassant de trois pieds sur le même immeuble, qui était alors vacant. Ces constructions ont été faites au su et vu du propriétaire voisin, sans opposition de sa part, si l'on en juge par le témoignage de son héritier. Elles sont restées dans le même état sans plainte de la part de qui que ce soit jusqu'à l'année 1895, époque où l'appelant acheta le terrain en question pour le prix de $275.00 et y bâtit une maison, dont la façade est en ligne avec la profondeur de celle des intimés et dont le pignon ouest est aussi en ligne avec le pignon est de cette dernière, et comme la projection du toit lui nuisait, il en a scié et enlevé le coin, avec l'autorisation du secrétaire des syndics qui lui en a payé le coût, affirme l'appelant dans le témoignage qu'il offrit à la cour. Il plaça en même temps sur l'alignement de la rue une clôture jusqu'à la maison des intimés et a continuellement depuis utilisé ce terrain comme parterre, sans aucune opposition de la part des syndics qui ont continué d'y avoir vue. L'appelant nous informe lui-même de cet arrangement et il ajoute qu'il connaissait la situation des lieux, s'en étant aperçu lorsqu'il acheta. Ce n'est que cinq ans plus tard, en 1900, qu'il porte plainte et intente son action en démolition.

L'espèce que nous avons donc à décider est celle d'un propriétaire qui a empiété sur le terrain de son voisin, non seulement au vu et su de ce dernier, mais même de son consentement au moins tacite, et de celui de tous les possesseurs subséquents. Les faits que l'appelant invoque n'établissent-ils pas un consentement même formel de sa part, sujet aux conditions

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qu'il posa et qu'il admet avoir été remplies par les intimés? Or, nous avons décidé dans la cause de *Delorme* v. *Cusson* (1), qu'un voisin ne peut exiger la démolition dans le cas où il aurait autorisé la construction soit expressément, soit tacitement, au moins tant qu'elle durera. Je me contenterai de référer aux autorités qui sont citées dans le rapport de cette cause.

Je suis d'avis de confirmer le jugement et de débouter l'appel avec dépens.

DAVIES J. concurred in the judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *P. J. Jolicœur.*

Solicitors for the respondents: *Caron, Pentland, Stuart & Brodie.*

(1) 28 S. C. R. 66.

ANSELME DROUIN (DEFENDANT IN WARRANTY) ..... } APPELLANT;

AND

ALPHONSE MORISSETTE (PLAINTIFF IN WARRANTY) ..... } RESPONDENT.

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*Oct. 17.
*Nov. 16.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Title to land—Warranty—Construction of deed—Sheriff's deed—Sale of rights in lands—Eviction by claimant under prior title.

By the deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff in the lands therein mentioned and of which he was actually in possession, and that the immovable belonged to him as having been acquired at the sheriff's sale.

Held, reversing the judgment appealed from, the Chief Justice and Taschereau J. dissenting, that the warranty covenanted by the vendor had reference merely to the rights he may have acquired in the lands under the sheriff's deed and did not oblige him to protect the purchaser against eviction by a person claiming under prior title to a portion of the lands. *Ducondu* v. *Dupuy* (9 App. Cas. 150) followed.

APPEAL from a decision of the Court of Queen's Bench (appeal side), reversing the judgment of the Superior Court, District of Quebec, and maintaining, with costs, the *demande en garantie* against the present appellant.

The respondent, principal plaintiff in the Superior Court, having purchased lot 513 of the Parish of St. Michel de Bellechasse, from Drouin, the appellant, on the 2nd of November, 1899, instituted a petitory action against one Mercier for the recovery of a part

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

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of the lot of which, it was alleged, Mercier had taken possession. Drouin had purchased the lot in question at sheriff's sale on the 7th of July, 1897. Mercier defended the action claiming a title to the parcel of land in dispute from an alleged previous owner, and that she had been in possession for over twenty years and that the land in dispute had been specially described as a separate subdivision on the cadastral plan of the parish as lot No. 513 A.

The principal plaintiff, constituting himself incidentally plaintiff in warranty, called his vendor, Drouin, into the action as his warrantor, to take up his *fait et cause* against Mercier, and to indemnify him against any condemnation in principal, interest or costs.

The appellant, defendant in warranty, pleaded amongst other defences to the *demande en garantie*, that he had sold to the respondent merely the rights in the lands described which he might have acquired under the sheriff's deed, the risk of which respondent knew and assumed.

The trial judge construed the deed of sale to the respondent to be of the rights of property merely that had passed under the sheriff's sale, and held that the appellant had given warranty only that he had obtained a title to certain rights of property acquired from the sheriff; that he had done nothing to impair or diminish the effect of that title and that he was not obliged to warrant against the adverse claim under prior title made by the principal defendant, Mercier. The *demande en garantie* was accordingly dismissed. The Court of Queen's Bench, by the judgment now appealed from, reversed the decision of the trial court, Bossé J. dissenting.

The questions at issue on the appeal sufficiently appear from the judgments reported.

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Pelletier K.C. for the appellant, cited *Ducondu* v. *Dupuy* (1), by which the decision of the Supreme Court of Canada in that case (2) was reversed; Dal. Rep. *vo*, Vente, no. 187; 2 Delvincourt, 154; *Archbald* v. *Delisle* (3), *per* Taschereau J. at page 20; *Allan* v. *Price* (4).

Belleau K.C. for the respondent, cited *Demers* v. *Duhaime* (5); Arts. 778-784 C. P. Q.; 1 Guillouard, Vente, nos. 388, 389; 3 Pothier (ed. Bugnet) no. 190; Dall. Rép. *vo.* Vente, no. 875; 1 Troplong, Vente, no. 469; 16 Duranton, no. 264; 4 Aubry & Rau § 355, p. 382, n. 47; 24 Laurent no. 260; Merlin, Rép. *vo.* Garantie § VII; Merlin, Quest. de Dr. § I.

The CHIEF JUSTICE (dissenting).—I dissent for the reasons given in the judgment of my brother Taschereau, in which I entirely concur.

GWYNNE J. concurred with GIROUARD J. in allowing the appeal with costs, and dismissing the action in warranty with costs.

TASCHEREAU, J. (différant).—J'opine sans hésitation pour le débouté de cet appel.

Le jugement *à quo* qui condamne l'appelant à prendre le fait et cause de l'intimé comme son garant formel me paraît inattaquable.

La prétention de l'appelant que ce n'est pas l'immeuble en question qu'il a vendu à l'intimé, mais seulement les droits qu'il avait acquis du shérif ne repose que sur une subtilité. Est-ce que tout vendeur d'une propriété vend autre chose que ses droits sur cette propriété? Or si vendre un immeuble c'est vendre ses

(1) 9 App. Cas. 150.
(2) 6 Can. S. C. R. 425.
(3) 25 Can. S. C. R. 1.
(4) 30 Can. S. C. R. 536.
(5) 16 Can. S. C R. 366.

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droits à la propriété de cet immeuble, il m'est difficile de comprendre sur quoi l'appelant peut se baser pour prétendre que vendre ses droits à la propriété d'un immeuble, ce n'est pas vendre l'immeuble lui-même. Il a vendu avec garantie des droits de propriété qu'il représente avoir acquis du shérif. Et il voudrait, car c'est évidemment à cela que se réduisent ses prétentions, substituer les mots "sans garantie" aux mots "avec garantie". Or il ne peut le faire. Il s'est bien et dûment porté garant de sa vente. Or, de quoi est-il garant? Prétendrait-il que c'est uniquement du fait qu'il a acheté du shérif? Cela ne peut-être, car même avec une clause expresse de non garantie, il serait garant de ce fait. Art. 1509, C.C. Il n'a acheté du shérif que les droits que Martineau avait sur cet immeuble, dit-il. Sans doute, c'est bien là tout ce que le shérif pouvait vendre. C'est bien là, tout ce que Martineau lui-même aurait jamais pu vendre. Je ne sache pas que personne puisse jamais vendre ce qui ne lui appartient pas, ou transférer plus de droits qu'il n'en a lui-même. Mais c'est la propriété que le shérif avait saisie et lui a vendue. Et c'est ce que le shérif lui a vendu qu'il a revendu à l'intimé; l'acte le dit expressément. Et cette revente, il l'a faite avec garantie. Il a vendu avec garantie ses droits à la propriété. Or vendre des droits avec garantie, c'est garantir qu'on a des droits. Il a vendu un procès peut-être, mais avec garantie. A quoi bon cette garantie, s'il n'était pas obligé de prendre le fait et cause de son acheteur dans ce procès? Il n'est pas possible, comme le prétendrait l'appelant, que les mots "avec garantie" et les mots "aux risques et périls de l'acheteur" signifient la même chose. Il n'est pas possible que celui qui se porte garant, ne garantisse rien.

Si Martineau eût lui-même vendu avec garantie à l'appelant tous ses droits de propriété dans l'immeuble

en question, est-ce que l'appelant, dans le cas où il aurait été inquiété dans ses droits à la propriété par cette même Dame Mercier, n'aurait pas eu un recours en garantie contre lui, Martineau ? N'aurait-il pas pu lui dire : " Vous m'avez garanti que vous aviez droit à la propriété de cet immeuble. Or voici que Madame Mercier prétend que vous n'en aviez aucun ; vous êtes tenu de me garantir contre ses prétentions."

Le fait allégué par l'appelant que, lors de la vente, l'intimé connaissait les prétentions de Madame Mercier et le danger de l'éviction dont il est menacé, fût-il d'aucune importance dans l'espèce, n'est pas prouvé, et conséquemment aucune allusion n'y est faite dans les considérants de la Cour Supérieure, non plus que dans ceux de la Cour d'Appel. La preuve par témoins de ce fait n'aurait pu d'ailleurs être légalement faite. C'était là essayer à prouver par témoins que l'intimé avait acheté " à ses risques et périls " à l'encontre d'un acte qui dit expressément qu'il a acheté avec la garantie de son vendeur sans exception, c'est-à-dire, contre tous troubles et autres empêchements quelconques.

La Cour d'Appel a dit à l'appelant que ses prétentions sur tous les points étaient insoutenables. Elle ne pouvait en venir à une autre conclusion.

GIROUARD J.—Il s'agit d'une action en garantie fondée sur une vente d'immeubles. La Cour Supérieure (Andrews J.) la renvoya, étant d'opinion que la garantie invoquée n'existe pas. La Cour d'Appel a renversé ce jugement, M. le juge Bossé différant. Nous sommes d'avis avec M. le juge Bossé et M. le juge Andrew qu'il n'y a pas de garantie contre le trouble que l'intimé dénonce.

Par l'acte de vente du 2 novembre 1899, l'appelant a vendu à l'intimé " avec garantie " non pas certains immeubles, mais seulement

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tous les droits de propriété et autres qu'il a acquis en vertu de l'acte de vente du shérif du district de Montmagny ci-après mentionné et daté et qu'il possède actuellement *dans*, savoir ;

suit la description de deux immeubles formant 179 arpents en superficie. Puis, le vendeur ajoute "que les immeubles lui appartiennent," non pas en vertu de bons et valables titres, selon la formule banale, mais

pour les avoir acquis du shérif pour le District de Montmagny, suivant vente datée de la ville de Montmagny le 7 juillet 1897, enrégistrée sous le no. 27,308.

L'appelant a donc vendu avec garantie contre l'éviction de la chose vendue, c'est-à-dire, de ses droits dans les immeubles achetés du shèrif, et rien de plus ; art. 1508 C. C. La dénonciation de ce titre informait de suite l'acheteur que le vendeur n'avait que les droits du saisi. L'article 780 du Code de Procédure déclare en effet que

l'adjudication est toujours sans garantie quand à la contenance de l'immeuble, mais elle transfère tous les droits qui y sont inhérents et que le saisi pouvait exercer.

L'intimé devait connaître cette disposition de la loi. D'ailleurs le titre du shérif l'informe en toutes lettres de tous ces effets du décrêt. Or l'action en garantie dénonce un trouble résultant d'un acte de vente qui remonte au 24 août 1873 et auquel l'appelant était tout à fait étranger.

L'intimé soutient que la déclaration du vendeur—que les immeubles lui *appartiennent*—comporte qu'il vendait la propriété entière et absolue des deux immeubles, et la garantissait. Cette interprétation n'est pas possible en face des termes de l'acte ; il n'a vendu que les droits qu'il a acquis du shérif et évidemment s'il manque une parcelle de terre, dans l'espèce un arpent sur dix à la profondeur, son acquéreur n'a pas plus de garantie contre lui que ce dernier n'en avait contre le shérif.

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Ducondu v. *Dupuy* (1), n'est pas sans analogie. Ici le Conseil Privé a décidé que le concessionnaire d'une limite à bois acquise sous l'autorité des Status Refondus du Canada, ch. 23, n'est pas tenu de garantir contre l'éviction d'un concessionnaire antérieur, malgré, la garantie stipulée "de tous troubles généralement quelconques," et qu'il n'y eut aucune réserve ni déclaration que le vendeur ne vendait que ses droits, parceque cette concession antérieure est protégée et par la loi et par le contrat de concession (*timber icense*).

D'ailleurs, le plaidoyer de l'appelant et la preuve faite nous donnent l'explication des terms de l'acte. L'acheteur connaissait parfaitement, lors du contrat, les causes d'éviction dont il se plaint. Il l'admet formellement dans son témoignage. Il ajoute que le vendeur a verbalement promis de le garantir de ce trouble, ce que l'appelant nie, et son témoignage est corroboré par le notaire qui représenta à l'intimé qu'il n'avait rien à craindre. L'opinion du notaire peut être bien ou mal fondée ; c'est ce que les tribunaux auront à décider sur l'action principale. Voici ce que dit l'intimé :—

Q. Quand il a été question.....lorsque vous avez eu des pourparlers avec monsieur Drouin pour acheter cette propriété-là, est-ce qu'il a été question entre vous et monsieur Drouin des drotts que les Mercier (savoir les auteurs du trouble) prétendaient avoir là ?

R. Oui.

Q. Qu'est-ce que vous vous êtes dit entre vous deux à ce sujet-là ?

R. J'ai demandé à monsieur Drouin : "vous me vendez un morceau de terre—avez-vous bien le droit de le vendre ?"

Il dit, "certainement, je l'ai acquis du shérif."

Q. Vous aviez des doutes que monsieur Drouin avait droit de vendre le terrain de Mercier ?

R. Comme de raison, dans le temps j'avais entendu parler que monsieur Drouin les avait empêché de bucher depuis trois ans. Je lui ai demandé si monsieur Drouin avait droit.....s'il avait bien droit de me vendre ce morceau de terrain-là, et il m'a dit : "certaine-

(1) 9 App. Cas. 150.

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ment, je l'ai acquis du shérif." J'ai dit : "je ne voudrais pas avoir aucun trouble pour cette affaire-là." Il dit : "vous n'en aurez pas non plus....." Il dit : "si vous venez à reçevoir quelque papier pour cette affaire-là vous viendrez me trouver et je défendrai ça.

Et plus loin :—

Q. Dans ces temps-là, vous connaissiez les prétensions des Mercier sur le terrain lorsque vous l'avez acheté ?

R. Je l'ai entendu dire que depuis trois ans monsieur Drouin les avait opposés de bucher, et qu'ils avaient perdu leurs droits parce que c'avait été vendu par le shérif deux fois, et je pensais que c'était une affaire finie.

Et l'appelant de son coté jure :

Il (intimé) m'a demandé si j'avais le droit de vendre. Je lui a dit : "j'ai acquis du shérif et je vendrai tel que j'ai acquis du shérif." Je n'ai pas fait de garantie. On a pris nos conventions devant le notaire de vendre et on a été chez le notaire, on a fait dresser le contrat tel qu'on l'avait écrit. Lorsqu'est venu le temps de la signature du contrat, monsieur Morissette a interrompu la lecture du contrat en me demandant si je me porterais garant s'il était troublé par les Mercier. Je lui ai dit : "si tu est troublé par les Mercier tu te défendras à tes dépens comme je me défendrais si j'avais été attaqué dans le temps." Je l'avais possédé pendant trois ans et je n'ai pas été troublé par les Mercier. C'est de même que ça été fait, c'est nos prétentions qu'on avait.

Voici la version du notaire Forgues :—

Lorsqu'il s'est agi de signer l'acte et que l'en ai fait la lecture, l'acquéreur, monsieur Morissette, a fait la remarque que les Mercier, la famille Mercier, avaient des prétentions sur une partie de la propriéte numéro cinq cent treize (513). Alors, à cette remarque, j'ai observé à monsieur Morissette qu'ils n'avaient aucun droit sur cette partie-là de la propriété, parce que leur titre n'était pas enrégistré et qu'ils n'avaient pas fait d'opposition à la vente, lors de la vente du shérif. Sur ce, il n'a pas insisté pour demander des garanties à monsieur Drouin, le vendeur, au cas où il serait troublé dans la possession du lot numéro cinq cent treize (513 .

Ce qui est certain c'est que la cause du trouble était connue et, qu'à dessein, il n'y a pas eu de convention ou stipulation particulière à cet égard. Partant, même si la garantie et la vente étaient aussi étendue que l'intimé le prétend, il pourrait tout au plus réclamer

une réduction du prix,—ce qui n'est pas l'objet de sa demande—mais il ne peut exercer l'action en garantie. C'est ce qui résulte de l'article 1512 de notre Code Civil. Les codificateurs observent que cet article ne se trouve pas dans le Code Napoléon et qu'ils ont voulu introduire une exception à la règle générale énoncée dans l'article 1511. Ils réfèrent à Pothier et à Delvincourt qui en effet se prononcent en faveur de cette exception. En France, en l'absence d'un texte précis, elle divise la jurisprudence et les commentateurs. Sous l'empire du Code de Québec, le doute n'est pas permis. *Allan* v. *Price* (1); Sirey, Code Civil annoté, art. 1626 à 1630; 24 Laurent, n. 259.

Pour ces deux raisons, nous sommes d'avis d'accorder l'appel et de rétablir le jugement de la Cour Supérieure. L'action en garantie de l'intimé est donc renvoyée avec dépens devant toutes les cours.

DAVIES J. concurred in the judgment, allowing the appeal with costs, and dismissing the action in warranty with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Drouin & Pelletier.*

Solicitors for the responden : *Belleau & Belleau.*

(1) 30 S. C. R. 536.

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*June 5.

*Nov. 16.

WARREN Y. SOPER (DEFENDANT).....APPELLANT;

AND

JAMES E. B. LITTLEJOHN AND JOSEPH CRAWFORD VAUGHAN (PLAINTIFFS)..... RESPONDENTS.

AND

THOMAS FANE AND CHARLES F. LAVENDER..... DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lease—Covenant—Forfeiture—Company—Shareholder—Personal liability—Waiver.

A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors six months rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company and while the lease was in force one of them, at a meeting of the directors moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment which was afterwards done the lessors executing the assignment as creditors assenting thereto.

Held, reversing the judgment of the Court of Appeal (1 Ont. L.R. 172) that the lessors and the company were distinct legal persons and the individual interests of the former were not affected by the above action. *Salomon* v. *Salomon & Co.* ([1897] A. C. 22) followed.

The assignee of the company held possession of the leased premises for three months and the lessees accepted rent from him for that time and from sub-lessees for the month following.

Held, also reversing the judgment appealed from, that as the lessors had claimed the six months accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; as the assignee had a statutory right to remain in possession for the three months and collect the rents; as the

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evidence showed that the receipt by the lessors off the three months rent was in pursuance of a compromise with the assignee in respect to the acceleration; and as the months rent from the sub-tenants was only for compensation by the latter for being permitted to use and occupy the premises and for their accomodation; the lessors could not be said to have waived their right to claim a forfeiture of the lease.

Mortgagees of the premises having notified the sub-tenants to pay rent to them the assignee paid them a sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged.

Held, that this also was no waiver of the lessors' right to claim a forfeiture.

Quære. Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company or would it, on surrender of the orriginal lease have bound the lessor and a purchaser from him of the fee?

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

The questions to be decided on the appeal sufficiently appear from the above head-note and are fully stated in the judgment of the Court.

Ritchie K.C. and *Ryckman* for the appellant. The findings of fact by the trial judge should not have been disturbed by the Court of Appeal. *Village of Granby* v. *Ménard* (2).

There was clearly a forfeiture of the term which the lessors elected to claim. Their subsequent acts cannot be held a waiver. *Griffith* v. *Brown* (3); *Baker* v. *Atkinson* (4); *Linton* v. *Imperial Hotel Co.* (5).

Thomson K C. and *Tilley* for the respondents. The original lessor was bound by the covenant in the sub-lease to supply power. Woodfall on Landlord and Tenant (16 ed.) sec. 324.

(1) 1 Ont. L.R. 172.
(2) 31 Can. S. C. R. 14.
(3) 21 U.C.C. P. 12.
(4) 11 O.R. 735.
(5) 16 Ont. App. R. 337.

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The forfeiture clause is divisible, *Graham* v. *Lang* (1) and the case is governed by the principle of the decision in *Linton* v. *Imperial Hotel Co.* (2).

The judgment of the court was delivered by:—

THE CHIEF JUSTICE.—Up to January, 1898, Fane and Lavender, two of the defendants in this action, had carried on business for the manufacture of bicycles in partnership. On the tenth of January, 1898, a joint stock company was formed under the provincial statutes of Ontario in which Fane and Lavender became shareholders. The name adopted as the designation of this company was that of "The Comet Cycle Company."

On the eleventh of January, 1898, Fane and Lavender made a lease of the premises on which they had previously carried on their partnership business, to the company. This lease was made by indenture and was for a term of five years to be computed from the first of October, 1897, at a yearly rental of three thousand dollars, and it contained the following clause:

> If the term hereby granted shall at any time be seized or taken in execution of an attachment by any creditor of the said lessee, or if the said lessee shall make any assigment for the benefit of creditors, or becoming bankrupt or insolvent, shall take the benefit of any Act which may be in force for bankrupt or insolvent debtors, six months rent shall immediately become due and payable and the said term shall immediately become forfeited and void.

On the twenty-fifth of February, 1899, the company made by indenture a sub-lease to the respondents, Littlejohn and Vaughan, (the plaintiffs in the action and respondents in this appeal,) of a portion of the premises contained in the first mentioned lease, for a term of two years from the fifteenth of March, 1899, with an option to the lessees of renewal for a further

(1) 10 O. R. 248 (2) 16 Ont. App. R. 337.

term of three years at a rental of thirty dollars per month. This sub-lease contained the usual covenant for quiet enjoyment and also a covenant in the following words:

> The said lessors agree to supply the said lessees with heating and sufficient live steam for heating water, wax tables and pots and steam drying tables, and the said lessors for this agree to supply the said lessees whenever required with power up to ten horse at and for the sum of twenty-five dollars per month, payable in advance, the said live steam and power to be furnished between the hours of seven o'clock in the morning and six o'clock in the evening.

On the twenty-ninth of April, 1899, the company made an assignment pursuant to the statute to James Langley as assignee for the benefit of creditors.

Fane and Lavender, as creditors, assented to and executed the deed of assignment in the character of creditors of the company.

The assignee took possession of that part of the premises comprised in the original lease to the company which were not included in the sub-lease to Littlejohn and Vaughan and remained in such possession until the twenty-sixth of April, 1899.

The assignee gave no notice to the lessors within one month of the assignment, or at any time, declaring his election to retain the premises as provided by R. S. O. (1897), ch. 170, sec. 34, sub-section 2. On the 30th of May, 1899, Fane and Lavender filed with the assignee a claim verified by the affidavit of Fane for rent, including six months rent in advance amounting to $1,500, from the date of the assignment under the provisions in that behalf contained in the lease and before set forth.

From the evidence contained in the depositions of witnesses examined at the trial it appears to me to be plain that immediately after the assignment Fane and Lavender in addition to the claim for rent gave verbal notice to the assignee that they would insist on the

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forfeiture under the terms of the lease. The finding of the trial judge is to this effect and I adopt his finding as being a proper conclusion from the evidence.

Certain mortgagees of the premises having given notice to Littlejohn and Vaughan to pay the rent reserved by the sub-lease to them, an arrangement was made by which, on the twenty-sixth of June, 1899, the assignee paid over to the mortgagees a sum of seven hundred and fifty dollars in satisfaction of their demand and thereupon the latter withdrew their claim to rent. This payment was charged against the claim of Fane and Lavender and was paid with their assent

On the twenty-seventh of July, 1899, the assignee gave up possession of the company's part of the premises to Fane and Lavender and made no further claim to rent from Littlejohn and Vaughan who had, whilst the assignee remained in possession, paid the rent under the sub-lease, including that for the power, to him. This payment was insisted upon by the assignee. It is not found that Fane and Lavender assented to these payments.

On the fifteenth of August, 1899, Fane and Lavender sold the premises to the appellant Soper, and a written agreement having been entered into, it was registered on the sixteenth of August. On the twenty-second of August, 1899, a deed was executed by Fane and Lavender conveying the premises to the appellant. Fane and Lavender supplied steam and power in accordance with the terms of the sub-lease and were paid by the respondents rent therefor up to the first of September, 1899.

On the thirty-first of August the appellant demanded possession of the respondents, which was refused.

On November, 1899, the respondents brought this action against the present appellant and Fane and

Lavender for breach of the covenant for quiet enjoyment, and for refusing to supply steam and power. The defendants insisted on the forfeiture of the respondent's lease, and the present appellant counter-claimed for the delivery of possession.

The action was tried before Mr. Justice Meredith who gave judgment dismissing the plaintiff's action with costs, and directing that upon the counter-claims, the appellant Soper should recover possession and mesne profits up to the first of January, 1900, and that Fane and Lavender should recover $72.50 for mesne profits and services up to the thirtieth of October, 1899.

This judgment was reversed by the Court of Appeal, the ground of reversal being that the forfeiture was waived and that there was, by operation of law, a surrender of the original term to Fane and Lavender which under the statute made them liable upon the covenants of the company contained in the sub-lease; that the appellant Soper, as assignee of the reversion was also bound by these covenants, which together with the sub-lease were valid and subsisting against him; and that the respondents were entitled to recover certain damages to be ascertained by a reference

I may say at once that I have great doubts as to whether the covenant to supply steam and power to the respondents was anything more than a personal covenant by the company. I doubt if it would, on the assumption of a surrender by operation of law, have bound Fane and Lavender under the statute and whether the burthen of it would have run with the reversion so as to bind the appellant Soper. I assume, however, for the purposes of the judgment, that Fane and Lavender as well as Soper would have been so bound.

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Then it is as well to point out here that there is nothing in the pretence that Fane and Lavender having been shareholders in the company, they must, as regards their individual interests as lessors, be affected by the acts of the company. Fane and Lavender and the company were undoubtedly distinct legal persons, and the acts and conduct of one cannot have any effect on the other. This appears from the case of *Salomon* v. *Salomon & Co.* (1). Any objection founded on the connection of Fane and Lavender with the company resolves into a criticism of the law which permits the establishment of companies with such consequences and is not a ground for any judicial action.

Then the first proposition of the appellants is that there was a forfeiture of the lease. As concluding this point, I cannot do better than quote from the judgment of Meredith J. who says:

> It is contended that there was no forfeiture, because the assignee did not go out of possession until three months after the making of the assignment, and because, after that the lessors accepted from him and from the sub-lessees the amount of the rent under the lease and the sub-lease, the former for the three months during which the assignee was in possession, and the latter for the month of August, that is, the month following the going out of possession by the assignee.
>
> That the term ended is not denied. There is no contention, no suggestion on either side, that it still subsists in either the company or the assignee. For the defendants, it is said, it ceased by forfeiture. For the plaintiffs, it is said to have ceased by surrender.
>
> * * * * * * *
>
> Now, there was the forfeiture clause contained in the lease, coupled with the provision for payment of the six months' unearned rent. There is the probability that the lessors would avail themselves of the provisions of this clause. Why would they not? It was altogether in their interests to do so. There was a claim made for the six months' rent unearned, showing a determination to have the benefit of this clause, to act under it; and there is the positive testimony of the lessor, Fane, in support of the election to forfeit, not denied by the

(1) [1897] A. C. 22.

assignee, but rather supported, I think, by his testimony, and without contradiction by any one. The acts relied upon by the plaintiff as indicating an intention not to forfeit are all, I think, entirely consistent with the assignee's right to possession under the statute, notwithstanding the landlord's election in favour of the forfeiture, and so consistent with the testimony in proof of that election.

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Then the learned judge further finds that on the conflicting testimony as to the acquiescence of Fane and Lavender in the assignee's claim to hold possession under the statute and to keep the sub-lease subsisting there was no acquiescence on the part of the lessors.

Upon the evidence and upon the findings of the trial judge, who was in a better position than an appellate court to determine, upon the credit of witnesses, and the weight of evidence, that there was a forfeiture which the lessors Fane and Lavender declared their election to insist upon immediately after the assignment was executed, we are bound to hold that the forfeiture took effect. I think too little weight has been attached to the statutory rights of the assignee and the line of conduct pursued by him in exercise of those rights. Had the assignee not had a paramount right under the statute to retain possession, including therein the receipt of rent from the sub-lessee and, notwithstanding the forfeiture clause, for the three months following the assignment, the case would have been very different Then, it might have been difficult to account for the omission to enforce delivery up of possession and the receipt of rent, upon any hypothesis consistent with an election to forfeit. The effect of the statute, however, was to compel the lessors to await the termination of the statutory three months during which the assignee thought fit to keep things in uncertainty.

I am of opinion, therefore, that there was a completed forfeiture communicated to the parties. How

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anything *ex post facto* could do away with the effect of this forfeiture I am at a loss to see; therefore, on this point of law, the appellant's case is conclusively established. But, even if the evidence and the finding of the learned judge had been different, I should have difficulty in attributing waiver to any of the acts relied on as proving it.

The payment to the mortgagee has no bearing; he had a right over-riding that of the parties and all the lessors did was to let the assignee pay him off, charging the amount paid against the rent coming to them.

The receipt of the three months rent from the assignee is obviously no waiver sufficient to do away with a forfeiture already consummated, and is explained moreover as having been based on a compromise with the assignee and was the only payment in full which the assignee was bound to make, whatever rights the lessors may have had to prove against the insolvent estate for the balance of six months rent.

The receipt of the August rent from the respondents was manifestly by way of compensation for use and occupation permitted, for the accommodation of the sub-tenants and which they did not treat in any other way. It is impossible to say that by this the lessors intended to renounce the absolute title they had acquired under their election to forfeit, even if in law it could have had that effect. The receipt of this August rent, moreover, could not have effected the appellant since his equitable title under the agreement preceded the receipt by the lessors.

On the whole the judgment of Mr. Justice Meredith appears to be right and should be restored. It may be a very hard case but that cannot affect the decision. It is much to be regretted that the fair and liberal offer of the appellant, Soper, was rejected.

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The judgment of the Court of Appeal must be reversed and that of the Divisional Court restored. The record must be remitted to the High Court with directions to carry on the account of mesne profits up to the time the appellant shall recover possession and to enforce payment of the same.

The appellant Soper and the defendants Fane and Lavender must have their costs in all the courts below as well as in this court.

Appeal allowed with costs.

Solicitors for the appellant: *Ryckman, Kirkpatrick & Kerr.*

Solicitors for the respondents: *Thomson, Henderson & Bell.*

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*Oct. 18.

*Nov. 16.

ROBERT NAPOLÉON LEBLANC (DEFENDANT) ..... } APPELANT;

AND

LOUIS ADOLPHE ROBITAILLE (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Crown lands—Timber licenses—Sales by local agent—Location ticket—Suspensive condition—Title to lands—Art. 1085 *C. C.—Arts.* 1269 *et seq. and* 1309 *et seq. R. S. Q.*

During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown Lands Agent made a sale of a part of the lands covered by the license and issued location tickets or licenses of occupation therefor under the provisions of Arts. 1269 *et seq.* of the Revised Statutes of Quebec, respecting the sale of Crown Lands. Subsequently the timber license was renewed, but, at the time the renewal license was issued, there had not been any express approval by the Commissioner of Crown Lands of the sales so made by the local agent as provided by Art. 1269 R. S. Q.

Held, affirming the judgment appealed from, Taschereau and Davies JJ. dissenting, that the approval required by Art. 1269 R. S. Q. was not a suspensive condition the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown for which the timber license had been validly issued.

APPEAL from the judgment of the Court of King's Bench (appeal side), reversing the judgment of the Superior Court, District of Gaspé, and maintaining the plaintiff's action with costs.

The plaintiff claimed to be proprietor in possession for several years previous to the trespass charged against

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the defendant, under a renewal of his license from the Department of Crown Lands of the Province of Quebec, dated 3rd May, 1899, covering the year then following, of the right to cut timber on certain timber berths or limits known as "Limits A and B" on the Bonaventure River, in the county of Bonaventure, Province of Quebec. By the action, which was commenced by *saisie-revendication*, the plaintiff claimed a quantity of logs alleged to have been unlawfully cut by the defendant, during the autumn and winter of 1899-1900, upon lots covered by the license, and a further sum for damages suffered through the defendant's trespass.

The defendant denied the trespass and alleged that the logs in question had been cut by him, upon lots nos. 23 and 24 of the Township of Hamilton, with the permission of the owners, Bourque and Arbour, who held these lots under location tickets issued to them on the 18th and 22nd of December, 1898, respectively, by the local agent of the Department of Crown Lands, prior to the renewal of the plaintiff's license, and which were, in consequence, withdrawn and excepted from the lands covered by the license under which the plaintiff claimed the right to the timber. The defendant contended that, as Bourque and Arbour were settlers upon the lots which they so held, in good faith, they had the right to assign their rights to the timber thereon and that the lots had been inadvertantly and by error included in the renewal of the plaintiff's license of the 3rd of May, 1890, and that the license, in so far as it assumed to affect the lots in question, was, under the statute then in force, null and without effect.

By his answer, the plaintiff contended, among other things, that the location tickets conferred no rights upon the holders, Bourque and Arbour, because they had been issued by the local agent subject to the

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approval of the Commissioner of Crown Lands, which approval had never been formally given, but had been withdrawn and impliedly refused when the lots were included in the renewal of his timber license on the 3rd of May, 1899

The plaintiff's license contained clauses providing that the licensee had the right to cut timber on the lands therein mentioned during the term of the renewal, but that—" tous les lots vendus ou mis sous la location par l'autorité du Commissaire des Terres de la Couronne, avant la date de la présente, sont retirés de cette licence, et aussi les lots ainsi vendus ou mis sous location, subséquemment à l'émission de telle licence, cesseront d'y être sujets après le 30 avril suivant, et dans chaque cas où la vente ou la location d'aucun des dits lots sera annulée, ces lots seront insérés de nouveau dans cette licence."

During the hearing the defendant admitted having cut 722 logs on the plaintiff's timber berth beyond the limits of the lots held under the location tickets, and the trial judge, DeBilly J., maintained the attachment for this quantity of timber only, dismissing the action as to the rest of the plaintiff's *demande* and releasing the remainder of the logs from seizure. By the judgment now appealed from, the Court of King's Bench modified and reformed the trial court judgment and maintained the action in revendication of all the timber seized, with costs against the defendant.

Pelletier K.C. for the appellant. The appellant's *auteurs* hold the lands by titles prior to the plaintiff's license which have the effect of withdrawing them, by the mere operation of the statute, from the license to cut timber which can only apply to ungranted lands belonging exclusively to the Crown at the date of the license. Arts. 1269, 1270, 1273, 1309 R. S. Q. The Commissioner of Crown Lands must be assumed

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to have approved of the sales of lots 23 and 24 to Bourque and Arbour at the time the local agent's report of the sales reached the department in January, 1899, and, although the local agent received such notification only upon the 22nd of May, 1899, the approval related back to the dates when the sales were made in December, 1898, and validated them from those dates. Art. 1085 C. C. The plaintiff's license is, therefore, subject to the exception made by the statute and by its own express terms. Arts. 1244 1310, 1343, R. S. Q.

The sales were complete when and as made by the local agent, subject only to the condition that the Commissioner of Crown Lands might have disallowed them for some special reason, and this was never done. See 63 Vict. ch. 14 (Que.)

We rely also upon the following authorities, viz.: 1 Proudhon, Traité du Domaine, nos. 96, 97, 182; 1 Gandry, Traité du Domaine, nos. 53, 54, 58; 2 Gaudry, Traité du Domaine, no. 323; *Rocheleau* v. *Lacharité* (1), at page 538 *per* Bossé J.

Chase-Casgrain K.C. for the respondent. The mere act of the book-keeper claimed to have been an approval of the sales is not a compliance with the statute. The approval contemplated is a judicial act which can only be effectual when performed by the Commissioner of Crown Lands in person. The effect of the statute is *delectus personæ* and the commissioner cannot delegate the powers conferred upon him as such. Arts. 1269, 1283 R. S. Q. The effect of Art. 1273 R. S. Q. is merely to validate sales made by a local agent after this formal approval has been duly given. The Act 63 Vict. ch. 14, amending Art. 1269 R. S. Q., can only affect this case as showing that our contention is based upon the correct construction of that article as

(1) Q. R. 1 Q. B. 536.

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it stood at the time of our license. The statute is in restraint of alienations of the public domain and must be strictly construed as against delegation of powers or tacit approval. We refer to *Rocheleau* v. *Lacharité* (1); *Lanigan* v. *Gareau* (2).

THE CHIEF JUSTICE.—I am of opinion that this appeal ought to be dismissed.

When the license of the 3rd of May, 1899, was granted to the respondent, the sales to Bourque and Arbour had not been approved by the commissioner. *Primâ facie* therefore the licenses were valid.

I cannot agree that article 1085 C. C. (similar to article 1179 Code Napoleon) applies. We cannot, I think, treat the inchoate sales made by the agent Maguire as sales made under a suspensive condition, namely, the condition that the commissioner should approve of the sales, and that consequently when at some date between the 3rd of May, 1899, the date of the license, and the 22nd of the same month, the date at which the approval of the commissioner was communicated to Maguire, there was, by reason of the commissioner's act approving the sales, a retroactive effect to be attributed to the approval destroying the condition and making the sales, by relation, absolute from the dates of the respective location tickets issued by Maguire. Whatever may be the operation of the article referred to in the case of ordinary contracts I cannot regard the statutes as meaning anything other than this: that if there should be no absolute and completed sale at the date of the issue of the license to cut timber, the license should in law be unconditionally good and effectual. The statutes therefore, I think, exclude the operation of the provision of the code. This alone would be sufficient to dispose of the case.

(1) Q. R. 1 Q. B. 536. (2) 14 L. C. R. 21.

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Even if the article 1085 C. C. ought to be held to apply, I could not come to the conclusion that it annulled the license. According to the Roman law (1), and to English law also, retroactive operation is regarded as a fiction which is held not to take effect to the prejudice of the rights of third persons acquired intermediately. This, however, I must admit is, in the opinion of some of the commentators on the Code Napoleon, especially Laurent and Huc, not the effect of the article 1085 C. C. (2). They hold that the condition being put an end to in the case of a sale all intermediate dispositions of the property fall with the condition and that the sale is by relation good *ab initio*. Older and other commentators are of a different opinion But treating the first mentioned view of the law as sound even those who insist upon it admit a distinction in favour of acts of administration which, though subsequent to a sale subject to a suspensive condition afterwards ratified by the performance of the condition, are conserved. Even Laurent is of this opinion. Then the timber license in question was not a sale of the land but a mere act of administration and, as such, a disposition which ought to be upheld.

I cannot concur in upholding the objection that the commissioner's personal approval was essential. The approval of sales made by a local agent is a ministerial not a judicial duty imposed on the commissioner the performance of which may be delegated.

The appeal must be dismissed with costs.

TASCHEREAU J. (différant).—Cet appel devrait, à mon avis, être alloué. Comme le jugement de la cour doit être en sens contraire, il me suffira de dire en peu de mots les motifs sur lesquels je me fonde pour en différer. La cause a perdu de son importance pour le

(1) 1 Mayntz (5 ed.) p. 466. (2) C. N. 1179.

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public et l'administration des terres de la Couronne par le fait que les dispositions statutaires qui ont donné lieu au conflit entre les parties ont depuis été amendées.

Le demandeur, intimé, invoque comme son titre à la propriété du bois en question, une licence ou permis de coupe de bois sur les lots en litige en date du 3 mai, 1899. Ce permis lui a été octroyé par l'agent des Terres de la Couronne à New-Carlisle, sous l'autorité de la section 1309 des Statuts Refondus de Québec, qui donne le droit au Commissaire d'émettre un tel permis, mais exclusivement *sur les terres publiques non concédées.*

Et le permis de l'intimé comporte d'ailleurs la stipulation expresse

> Que tous les lots vendus ou mis sous location par l'autorité du Commissaire des Terres de la Couronne, avant la date des présentes (le 3 mai, 1899) sont retirés de cette licence.

Les lots en question avaient-ils été, avant le 3 mai 1899, concédés ou vendus ou mis sous location par l'autorité du Commissaire des Terres? C'est là, dans l'espèce, toute la question. Le jugement *à quo* décide que non, et que conséquemment la licence de l'intimé lui a été légalement octroyée. Avec déférence, je crois que ce jugement est erroné.

Il appert, et il est d'ailleurs admis, qu'en décembre, 1898, plusieurs mois avant l'octroi à l'intimé de sa licence de coupe de bois, l'appelant (par ses auteurs) avait acheté les lots en question de l'agent des Terres de la Couronne, qui lui avait accordé, non pas un billet de location sous la section 1269 des Statuts Refondus, mais ce que je considérerai en premier lieu comme un permis d'occupation comportant vente sous la section 1270. Or cette section 1270 décrète expressément que le porteur d'un tel permis, acheteur de la terre y décrite, peut en prendre possession et l'occuper.

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Le permis de l'appelant sur ce terrain, il est vrai, réserve au Commissaire le pouvoir d'en révoquer la vente. Mais il n'est question dans la cause d'aucune telle révocation ; il n'est pas prétendu qu'il y en ait jamais eu. Et ce permis n'était pas sujet à l'approbation du Commissaire, comme le prétend l'intimé. Ce n'est que l'octroi fait sous la section 1269 qui soit sujet à cette approbation. La section 1270 paraîtrait à elle seule, n'accorder le droit d'octroyer un tel permis qu'au Commissaire lui-même. Mais la section 1273 décrète expressément que le permis émis par l'agent des Terres de la Couronne confère les mêmes droits que s'il avait été émis par le Commissaire lui-même.

J'en conclus que tant aux termes du statut qu'à ceux de la licence elle-même de l'intimé, les lots en question n'ont pu être inclus dans la dite licence parce qu'ils avaient été vendus à l'appelant plusieurs mois avant son émission.

Maintenant, en supposant que le titre, daté en décembre 1898, de l'appelant soit un billet de location sous la section 1269, je ne puis admettre avec l'intimé que la Couronne ait pu légalement, cinq mois plus tard, pendant que ce billet de location était en vigueur, lui donner une licence de coupe de bois sur un terrain qui était sorti de son domaine, et dont l'appelant était en possession à titre de propriétaire. Car, il avait cette possession, à ce titre, tant en vertu du droit public de la province, d'après lequel toute vente ou cession d'un terrain par la Couronne en transmet *ipso facto et eo instanti* la possession, *the seizin*, que d'après les articles 1025, 1472 et 1493 du Code Civil, et les termes mêmes de son billet de location en vertu duquel il s'est mis de suite en possession active de ce terrain. La Couronne n'aurait pu de plein droit vendre ce terrain à un tiers ; elle ne peut pas plus qu'aucun de ses sujets céder des droits dont elle s'est départie. L'agent qui a

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vendu ce terrain a dûment remis au département, à Québec, en janvier 1899, le montant du prix de vente reçu de l'appelant, avec son rapport mensuel, exigé par le département, constatant qu'il avait vendu ces lots en décembre 1898. Sur ce rapport, l'entrée a de suite été régulièrement faite de cette vente dans les régistres du département comme ayant été dûment faite, *ut ex tunc* en décembre 1898; et il est en preuve que telles ventes ainsi entrées sont, et ont toujours été, considérées comme dès lors approuvées par le Commissaire.

Le Commissaire lui-même a dû, suivant la section 1240, certifier à la municipalité du comté de Bonaventure, qu'il avait vendu ces lots en décembre 1898, *omnia præsumuntur rite esse acta.* Et ces lots, d'après la même section, sont devenus sujets aux taxes municipales à compter de décembre 1898. Et l'intimé soutiendrait que l'appelant n'était pas propriétaire, quoiqu'il fût sujet aux taxes. S'il était sujet aux taxes, c'est, il me semble, que la Couronne n'était plus propriétaire. Et si la Couronne n'était pas propriétaire après décembre 1898, c'est l'appelant qui l'était. Et la Couronne n'avait aucun droit d'octroyer subséquemment une licence pour coupe de bois sur ce terrain. La licence octroyée à l'intimé est donc nulle.

Mais, dit l'intimé, par la section 1269 du statut,

le billet de location de l'appelant était sujet à l'approbation du Commissaire lui-même, et cette approbation n'avait pas été donnée lorsque j'ai obtenu ma licence.

Cette partie de l'argumentation de l'intimé ne me parait reposer que sur un jeu de mots. Quand le billet de location de l'appelant dit "if sale not disallowed by the Commissioner", n'est-il pas conforme au statut qui décrète que tel octroi est sujet à l'approbation du Commissaire? Les mots "if not disallowed by the Commissioner" veulent bien dire, il me semble, "sujet à la dés-

approbation du Commissaire." Or, quand le Commissaire ne désapprouve pas, n'est-ce pas parce qu'il approuve ? Et ces mots du statut "sujets à l'approbation du Commissaire", n'ont pas suspendu la vente. Ils ne comportent qu'une condition protestative résolutoire, le pouvoir de désapprouver et résilier. Et tant que le Commissaaire n'a pas résilié, la vente est parfaite ; l'acheteur est propriétaire. Puis, comme le statut ne fixait aucun délai au Commissaire pour faire option, approuver ou désapprouver, l'approbation pouvait être donnée en aucun temps comme elle l'a été le 23 mai 1899 ; art. 1082 C.C., *ut ex tunc*, avec effet rétroactif jusqu'à la date de la vente par l'agent, art. 1085 C.C. C'est là, il est en preuve et le billet de location donné à l'appelant le constate, l'interprétation que le département a toujours lui-même donnée au statut alors en force et cette interprétation était raisonable. Le seul changement que le statut 63 V. c. 16 a apporté là-dessus, c'est de limiter à quatre mois le temps durant lequel le Commissaire a maintenant le pouvoir de désapprouver une vente faite par son agent.

Il m'est impossible de donner au statut avec le jugement *à quo*, une interprétation qui laisserait à la Couronne la propriété du terrain vendu par l'agent, tant que le Commissaire n'a pas en termes formels lui-même approuvé la vente. Le billet de location en question, en termes non équivoques, considère la vente comme parfaite du jour qu'elle a été faite, car c'est dans six mois de sa date que l'acheteur est tenu de prendre possession.

De plus, il est statué par la section 1273 que toute personne à qui un billet de location a été octroyé a les mêmes droits que si elle avait obtenu du Commissaire lui-même un permis d'occupation sous la section 1270. Or cette section 1270 donne à un acheteur à qui a été octroyé un tel permis le droit de prendre possession et

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d'occuper à titre de propriétaire, avec réserve de tout permis de coupe de bois pourvu qu'il soit antérieur à sa date. Et le permis de coupe de bois de l'intimé est postérieur à l'achât de l'appelant. Le titre de l'appelant doit donc prévaloir. La Couronne n'a pu transmettre à l'intimé en mai, 1899, des droits qu'elle n'avait pas.

Je vois qu'il a été question en cour d'appel de la section 1343. Il doit y avoir eu là un malentendu dont les parties sont probablement responsables. Il n'est pas fait mention au dossier d'une réserve de bois par la Couronne sur le terrain en litige telle qu'autorisé par la section 1339. Et je ne puis y voir la preuve que l'intimé avait une licence de coupe de bois sur ce terrain avant le 3 mai 1899.

L'intimé, dans son factum, me semble exciper largement des droits de la Couronne et se constituer le protecteur du domaine public, qui, dit-il, ne peut être aliéné que suivant toutes les formalités requises par le statut. Et c'est sur ce point-là exclusivement qu'il paraît avoir réussi devant la cour d'appel. Mais vraiment je ne puis voir comment dans l'espèce la Couronne a pu souffrir, ou même ait jamais été en danger de souffrir, des actes de son agent ou du département. La vente n'a été faite à l'appelant que sous la réserve expresse du pouvoir absolu du Commissaire de la résilier à son gré et quand il le voudrait. A mon point de vue, il n'y a qu'une question dans la cause. La licence du 3 mai 1899 qu'invoque l'intimé, lui a-t-elle été octroyée sur un lot de la Couronne alors en vente, ou bien sur un lot qu'elle avait antérieurement concédé? Il n'est guère possible de dire que ce lot n'avait pas été concédé. La licence de l'intimé est donc nulle.

GWYNNE and GIROUARD, JJ.—Concurred in the judgment dismissing the appeal with costs.

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DAVIES, J. (dissenting.)—I concur generally in the reasons of Mr Justice Taschereau for allowing this appeal, but I desire to place my concurrence on the ground that the appellant's title was the location ticket which he obtained from the Crown Lands Agent, under section 1259 R.S.Q.

This location ticket was, no doubt, subject to the approval of the Commissioner of Crown Lands. I agree with my brother Taschereau that such approval was given and that, when given, it confirmed the action of the agent and validated the location ticket from its date when the sale was made by the agent and the ticket issued.

Under section 1273 of the Revised Statutes of Quebec, location ticket holders have conferred upon them the same rights, powers and privileges, in respect of the lands for which such tickets have been issued by the Crown Lands Agent, and in my opinion, from the time when so issued, as are conferred upon persons obtaining licenses of occupation from the Commissioner under section 1270. I cannot accede to the argument that these rights only attach after the approval of the Commissioner is formally given.

Appeal dismissed with costs.

Sollicitors for the appellant: *Drouin, Pelletier & Bélanger.*

Sollicitors for the respondent: *Riopel & Lavery.*

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*Mar. 25,26.

*Nov. 16.

W. D. MORRIS (DEFENDANT).....APPELLANT;

AND

THE UNION BANK OF CANADA (PLAINTIFF)..... } RESPONDENT;

R. G. CODE (DEFENDANT)..... APPELLANT;

AND

THE UNION BANK OF CANADA (PLAINTIFF)..... } RESPONDENT;

UNION BANK OF CANADA (PLAINTIFF)..... } APPELLANT;

AND

MARY A. MORRIS (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Joint stock company—Payment for shares—Equivalent for cash—Written contract.

M. and C. each agreed to take shares in a Joint Stock Company paying a portion of the price in cash and receiving receipts for the full amount the balance to be paid for in future services. The company afterwards failed.

Held, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396) that as there was no agreement in writing for the payment of the difference by money's worth instead of cash under sec. 27 of The Companies Act M. & C. were liable to pay the balance of the price of the shares to the liquidator of the company.

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

(Mr. Justice King was present at the argument but died before judgment was delivered.)

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial against the defendant Code, reversing that in favour of the defendant W. D. Morris and affirming that in favour of the defendant Mary A. Morris.

The plaintiff bank, as a creditor of the Anderson Trading Co. in liquidation under The Winding-up Act, brought action against the defendants to recover from them respectively the amount alleged to be unpaid on shares of the company purchased by the defendants W. D. Morris and Code. Mary A. Morris was sued with her husband as liable in case it should be held that the latter's shares had been validly transferred to her.

The facts respecting the purchase of the shares were stated by Mr. Justice MacMahon at the trial as follows:

W. D. Morris was in Toronto about the last of April or the first of May, 1894, and had a conversation with Mr. Barr, who was then connected with the company as one of its officers. Barr wanted Morris to purchase fifty-two shares of the Anderson Trading Company's stock, which, at its par value, would represent $5,200. Morris, according to his own evidence and that of Barr, made an offer of $3,000 for the stock representing the sum named. The transaction was not then carried out, and Barr visited Ottawa, where Morris was residing and carrying on business, and, according to Morris's statement, he had consulted with his solicitor, Mr. Code, and from the opinion received from him he found that the offer made by Morris to Barr, of the payment of $3,000 for $5,200 of stock might not be regarded as a legal transaction, that is, if carried out Morris might still be liable to pay the difference between the $3,000 and the $5,200. The difficulty which was to be overcome was stated by Morris quite

(1) 27 Ont. App. R. 396.

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openly, for he says he told Barr that he was to have paid-up shares, and it was then agreed that Morris should purchase thirty-four shares, the par value of which was $3,400 and for this he was to pay $3,400 and he was to be repaid by the company the sum of $1,400 for services to be rendered in connection with the Merchants' Supply Company, which was being formed by the directors of the Anderson Company to supply merchants with cash registers at a rental, and designed to assist the Anderson Company, whose business was the manufacture of such registers. Barr said he was to give his services towards securing financial aid in Ottawa for the Merchants' Supply Company, but he was not called upon to perform any services in connection with it, because the Anderson Trading Company had failed to make cash registers that could be guaranteed, or would be accepted by merchants.

The eighteen shares, to make up the whole of the fifty-two shares which Barr had offered to sell Morris, were taken by Mr. Code, who is a barrister and solicitor in Ottawa, and at the interview at which Barr, Morris and himself were present, the matter was discussed, and Morris's services were spoken of, and also the services that Mr. Code could render to the company, by obtaining from the Customs Department some modifications in the customs regulations so as to protect the Canadian company, against a company in Cleveland that had the whole of the market in Canada to itself.

Morris says that it was arranged that he should pay for the thirty-four shares by his cheque for $3,400 and that he was to get back from the company $1,400, for the services to which I have referred. Mr Code says he was to pay the $1,800 for his shares, and that the arrangement that had been made with Barr as to the payment for the services was that he should

receive $800, and that was to be immediately upon payment by Code of the $1,800.

The agreement so made was carried out in its entirety, as evidenced by the cheques which were filed, and which appear to have been on blank cheques supplied at Ottawa during Barr's visit on the agreement as to the purchase of the shares being concluded. Now the way that the return of the $800 to Code and the $1,400 to Morris was arranged was this: the company passed a resolution granting to Mr. Anderson, the president of the company, a sum of $2,300, purporting to be for services rendered by him to the company. That amount was credited in Anderson's account. Mr. Barr, as one of the officers of the company drew cheques on the bank at which the Anderson company kept its account for these two several amounts. Anderson derived no benefit whatever from the moneys voted by the company, except to the extent of about $100, and he was an assenting party to the money being so paid to Code and Morris. In fact, what Code and Morris received back was part of the moneys derived from their cheques which had been deposited to the credit of the company in the Union Bank.

Between May and August, Morris, having possession of his stock certificate, put it in an envelope and handed it to his wife, saying that he was giving it to her because he thought she was entitled to it, she having lent him money at the time of their marriage in 1882. The certificate so handed to her she says she looked at but did not read. She returned it to the envelope and handed it back to her husband, just after looking at it to see what it was; she did not know perhaps its value, and did not certainly know, unless her husband told her, what the nature of the certificate was. After it was handed back by Mrs. Morris to

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her husband, he instructed Mr. Code to deliver up the certificate to be cancelled, and to obtain new certificates in his wife's name, who, he then told Mr. Code, was the owner of the stock. In compliance with these instructions, Mr. Code procured from the company the issue of the seven certificates in the name of the defendant, Mary A. Morris, representing the thirty-four shares that had originally belonged to her husband.

I find as a fact that Mrs. Morris had lent to her husband in 1882 the sum of $700. There were some other items which she claimed formed an indebtedness by her husband to her, but I consider that no valid claim could be found to exist as to those. The legal liability as to the $700 would have been barred by the statute. Mr. Morris regarded it as a moral obligation to return to his wife that which he had received from her some twelve years before, with interest thereon which I understand he said he had not made up.

In the action against Code judgment was given for the plaintiff bank. In the other action both defendants succeeded, the learned judge holding that W. D. Morris had transferred the shares to his wife and that she was a purchaser for value without notice and so not liable. Code appealed from the judgment against him and the bank also appealed in the other case. The Court of Appeal dismissed Code's appeal and allowed that of the bank against W. D. Morris holding that there was no legal transfer to his wife. As against the latter the judgment at the trial was affirmed. Code and W. D. Morris then appealed to the Supreme Court and the bank as a precaution in case the latter should succeed appealed from the judgment in favour of Mrs. Morris.

Watson K.C. for the appellants, Morris and Code and respondent Mrs. Morris. The stock held by Morris was part of the new issue and the first issue was never

fully paid. His stock therefore was illegally issued and he cannot be liable on it. *Page* v. *Austin* (1); *In re Ontario Express and Transportation Co.* (2).

The shares of both appellants were fully paid for in cash and the payment cannot be affected by other transactions. *In re Harmony and Montague Tin and Copper Mining Co.; Spargo's Case* (3); *In re Paraguassu Steam Tram-Road Co.; Ferrao's Case* (4); and the contract for fully paid-up shares can only be rescinded by putting the appellants in their original positions. *North West Electric Co.* v. *Walsh* (5); *In re Johannesburgh Hotel Co.* (6).

As to the effect of sec. 27 of the Companies Act see *In re Almada and Tirito Co.* (7) approved by House of Lords in *Oregum Gold Mining Co.* v. *Roper* (8); *Welton* v. *Saffery* (9).

Hellmuth and *Saunders* for the respondent, the Union Bank. *Page* v. *Austin* (1); was decided under a statute passed in 1864 containing very different provisions from those in the present Companies Act, R. S. C. ch. 119.

The learned counsel referred to *Re Government Security Fire Ins. Co.; White's Case* (10); *In re London Celluloid Co.* (11).

THE CHIEF JUSTICE.—It is impossible in the teeth of the statute which requires that when shares are contracted to be paid for, not in money, but in money's worth, there must be an agreement in writing, to do otherwise than to dismiss these appeals. I may add however, that I have no doubt whatever on the

(1) 10 Can. S. C. R. 132.
(2) 21 Ont. App. R. 646.
(3) 8 Ch. App. 407.
(4) 9 Ch. App. 355.
(5) 29 Can. S. C. R. 33.
(6) [1891] 1 Ch. 119.
(7) 38 Ch. D. 415.
(8) [1892] A. C. 136.
(9) [1897] A. C. 299.
(10) 12 Ch. D. 511.
(11) 39 Ch. D. 190.

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evidence that, as the appellants have claimed, these shares were honestly paid for by the services rendered to the full amount of their value at least.

Since the case of *McCraken* v. *McIntyre* (1) there have been great changes in the statute law affecting shareholders' liability. At the time *McCraken* v. *McIntyre* (1) was decided, companies incorporated, as that company was, were corporations pure and simple. They were not (to use the expression of Lord Justice Lindley) like that statutory hybrid between a partnership and a corporation, a joint stock company. They did not partake in any way of the character of a partnership. There was no winding up process. Therefore creditors of the company had nothing to do *ab initio* with the agreements between the company and its shareholders. The only remedy afforded to creditors as regards unpaid shares was that an execution creditor who got a return of *nulla bona* was subrogated to the rights of the company in respect of unpaid liabilities for shares. Now all is different; the Winding Up Acts entitle the creditors to insist on payment for shares in cash, or (subject to the statute requiring an agreement in writing) for money's worth, and the companies can no longer, as they could when mere corporations, make special agreements with shareholders respecting the payment for their shares. Even if the first statute mentioned above had not been passed the change wrought by the Winding Up Act would by itself have been a difficulty in the appellants' way, but as it is we cannot, however honest and upright the intention of the appellants was, and I believe it to have been, avoid giving effect to the peremptory language of the statute.

The appeals must be dismissed with costs.

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

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Gwynne J.

In the case of *The Union Bank* v. *Morris* the appeal is dismissed with costs for the reasons given by the Court of Appeal.

GWYNNE J.—In all of these cases I am of opinion that the judgments in the courts below should be affirmed and the appeals be dismissed with costs for the reasons given in the judgments in the courts below, which in my opinion are conclusive upon the points in issue.

SEDGEWICK and GIROUARD JJ. concurred in the dismissal of the appeals.

Appeals dismissed with costs.

Solicitors for W. D. Morris and Mary A. Morris: *Code & Burritt.*

Solicitor for R. G. Code: *E. F. Burritt.*

Solicitors for the Union Bank: *Kingsmill, Hellmuth Saunders & Torrance*

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*Oct. 29, 30.

*Nov. 16.

PETER SCHMIDT AND DIEDRICH FROESE (DEFENDANTS)..... } APPELLANTS;

AND

HENRY RITZ AND EUGENE WIDMEYER (PLAINTIFFS)..... } RESPONDENTS.

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

Statute—Amending Act—Retroaction—Sale of lands—Judgments and orders.

Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under rules 803 *et seq.* of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular and in the following session the legislature passed an Act providing that "in the case of a County Court judgment, an application may be made under rule 803 or rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment."

Held, Sedgewick J. dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments and not to orders and judgments of the County Courts.

Held further, reversing the judgment of the King's Bench (13 Man. L. R. 419) Davies J. dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force but not from the date on which they were made.

Held, per Sedgewick J., that the clause had no retroactive operation at all.

APPEAL from a decision of the Court of King's Bench for Manitoba (1) affirming the judgment at the trial in favour of the plaintiffs.

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

(1) 13 Man. L. R. 419.

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The only question to be decided on this appeal was whether or not the Act of the Manitoba Legislature, 60 Vict. ch. 4, set out in the head-note, made valid an order for sale of lands under a judgment of a County Court and proceedings thereunder, made and done before the Act came into force. The facts are fully stated in the opinions published herewith.

Aylesworth K.C. and *Phillips* for the appellants.

J. Stewart Tupper K.C. for the respondent.

The CHIEF JUSTICE:—The appellant Peter Schmidt being seized in fee of the lands for the recovery of which this action was brought, sold and conveyed the same for valuable consideration to the appellant Diedrich Froese. Subsequently one Russell having recovered a judgment in the county court against Schmidt it was registered and afterwards an order was summarily made and entered in the Court of Queen's Bench for the sale of the land in satisfaction of the judgment and it was sold accordingly and purchased by the respondents who, having obtained a vesting order, brought this action.

It having been held by the Court of Queen's Bench in Manitoba that it was not within the jurisdiction of that court to make an order for sale of lands founded on a county court judgment the legislature altered the law by passing the following amendment to the existing law:—

> In the case of a county court judgment an application may be made under rule 803 or 804 as the case may be. This amendment shall apply to orders and judgments heretofore made or entered except in cases where such orders or judgments have been attacked before the passing of the amendment.

This enactment came into force on the 30th of March, 1897, after the completion of the sale to the respondents.

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The question which has been raised by the appeal is whether the amendment has a retrospective operation sufficient to make valid not only the order of the Queen's Bench upon which the sale proceedings were founded but also all the subsequent proceedings upon the order including the sale.

The Court of King's Bench have attributed such a retrospective effect to the statute and have held that it covers all objections on this head to the respondents' title.

I agree with the Court of King's Bench and with my brother Davies in the opinion that the words "orders and judgments" in the amending clause refer not to county court orders and judgments but to orders and judgments of the Court of Queen's Bench made summarily or by plenary proceedings for the sale of lands in satisfaction of county court judgments, the word "orders" referring to summary proceedings and "judgments" to formal judgments for sale obtained as the result of proceedings in the Queen's Bench based on recoveries in the inferior tribunal. I need not repeat the reasoning upon which I reach that conclusion as it is the same as that of the Chief Justice of Manitoba in his judgment in the court below, and of my brother Davies in this court.

The question is however how far does the statute when thus interpreted have a retroactive effect? I am constrained upon this point to differ from the court below. I do not think the amendment has any retrospective effect except in so far that from the date at which the Act came into force, the 30th March, 1897, any orders for sale previously made by the Queen's Bench founded on county court judgments, were from that date to be held valid. If it had been intended to make such orders valid *ab initio*, that is from the dates at which they were made, the language of the

legislature should have been in explicit terms, namely, such orders should have been declared to have been valid from the time at which they were made, which is certainly not the import of the words in which the new law is actually expressed. Further, even if the legislature had shewn an intent to go beyond the limited retrospective operation I have indicated and had declared that the orders should be taken to have been valid from the date at which they were actually made and entered, that would not, in my opinion, have been sufficient to confirm previous sales under orders made without jurisdiction.

The well known rule that retrospective statutes, especially such as divest vested rights, are to receive a restrictive construction is too well established to permit any larger interpretation than that which I attribute to the words according to their strict grammatical construction.

That the legislature had demonstrated an intention to enact retrospectively to a certain extent is not sufficient to warrant a retroactive operation carried beyond the meaning of the terms used strictly construed.

That the presumption against retroactive operation is to be applied so as to confine language to some extent expressly retroactive to the case indicated, appears from the judgment of Bowen L. J. in the case of *Reid* v. *Reid* (1) when he says:

> Now the particular rule of construction which has been referred to but which is valuable only when the words of an Act of Parliament are not plain is enbodied in the well known trite maxim *omnis nova constitutio futuris formam imponere debet non præteritis;* that is that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to be a certain extent retrospective and in construing a section which is to be to a certain extent retrospective we ought nevertheless to bear in mind that maxim as applicable whenever

(1) 31 Ch. D. 402.

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we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant.

It is said that to restrict the latter part of the amending clause to legalising orders for sale previously made and entered only from the date of the Act coming into force is to attribute to it a very insignificant modicum of relief; the answer must be that that is the very intent of this rule of interpretation, designed to prevent injustice resulting from interference with rights of property except in cases where the unmistakable language of the legislature demands an *ex post facto* construction.

The appeal must, in my opinion, be allowed and the action dismissed with costs to appellants here and also in the court below.

TASCHEREAU and GIROUARD JJ. concurred.

SEDGEWICK J.—I am of opinion that this appeal should be allowed. As I go further than some of my brothers as to the construction of the amendment in question, it is proper that I should shortly give expression to the grounds of my judgment.

I am willing to admit that the framers of the enactment intended that it should have a retroactive effect and work out as the Court of King's Bench has found, but there has been an extraordinary failure to give expression to that intention.

While courts are bound to give effect to legislation, no matter how flagitious or confiscatory it may be, when its purpose is apparent and the legislature, whether explicitly or by necessary implication, has given expression to that purpose, it is not their privilege or function to claim the law-making power or

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by conjecture or guess to give effect to even an admitted intention, not actually declared in the enactment itself. That condition has arisen here.

The Queen's Bench Act, 1895, contains six sections or rules creating a summary method of procedure for the realization of Queen's Bench registered judgments and orders for the payment of money. Rules 803 and 804 authorise the making of the application by or on behalf of the judgment creditor or other party entitled and nothing more. The three remaining rules specify the procedure to be followed and expressly give jurisdiction to the court and judges to adjudicate upon the application and, if a case is made out, to make an order for sale of the lands charged by the registered judgment or order.

Now, the amendment in question, so far as this point is concerned, while, of course, relating to the Act as a whole, does not purport to be an amendment to rules 803 and 804. They remain unchanged. But it is made to form a new rule, (807a), "In the case of a County Court Judgment" it says:

> An application may be made under rule 803 or 804 as the case may be

and there it stops. It absolutely fails to indicate what is to be done upon the application or to give the court jurisdiction to deal with the application by making an order for sale. In other words, it has not made the jurisdictional clauses a part of it. Had it amended rules 803 and 804 by inserting, after the word "order" in the second line of both, the words, "of the Court of Queen's Bench or County Court," or if it had proceeded to add words to the effect that "upon such application such proceedings shall be had and orders made as specified in rules 805, 806 and 807," then there would have been such a sufficient expression, a state-

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ment of the legislative intent, as to make the amendment capable of being applied.

How can a court supply or read into the amendment these or similarly effective expressions? That, I think, would be legislation and not interpretation.

And there does not appear to be much excuse for this "ill expressed" and "slovenly" legislation, (the adjectives are those of the court below). For the very Act amended contains numerous instances of how legislation of this character should be drafted. There is the creation of the litigants' rights, the jurisdiction of the judicial tribunal, and the machinery requisite for the enforcement of its judgments; (see rules 5, 86, 317, 318, 643, 754-758 and these six sections themselves).

I do not propose to cite authorities to shew that in this case this amendment cannot have any effect. It is perfectly clear that a distinct and unequivocal enactment is required for the purpose of either adding to or taking away from the jurisdiction of a superior court of law and the amendment, not complying with this elementary principle, is wholly inoperative.

I proceed to my second ground.

Assuming that I am wrong about my first proposition, I think there is error in the judgment below in the meaning it places upon the word "orders". It does not mean orders for sale made in the Superior Court, but orders for the payment of money made in the County Court.

The learned Chief Justice of the court below wholly based his argument in support of the other construction, upon the alleged fact that there was no statutory provision for the registration of an order of the County Court. I say it with all deference, but it seems to me quite clear that there is such provision, which I demonstrate as follows: Section 96 of the County Courts Act (R.S.M. ch. 33), provides that "any party

who has obtained a judgment in any County Court for a sum exceeding $40, may, at any time, obtain a certificate from the clerk of such court * * * which certificate shall, on the request of the party obtaining the same, be registered under the 'Registry Act' in any Registry Office * * * and such registration shall bind all interest or estate of the defendant or defendants in lands and hereditaments situate within the registration district * * * in which such office is situate * * * the same as though the defendant or defendants had in writing under his or their hand or hands and seal or seals charged the said lands and hereditaments with the amount of the said judgment," the proceeding thereafter being a suit in equity for the purpose of realizing the amount of the judgment by the sale of the lands so charged. Then the Judgments Act (Ch. 80, R.S.M.), section 3, enacts that

> decrees and orders in equity and rules and orders at law, whether of a court or a judge for the payment of money, costs, charges or expenses, shall constitute judgments and shall have all the force and effect of judgments at law, * * * and the expression 'judgment,' when used in this or *any other* Act, unless the context shows otherwise, shall include any such decree, judgment or order.
>
> Sec. 4. It shall not be necessary in any case to make a judge's order for the payment of money a rule of court before issuing execution thereon, but upon filing the order it shall constitute a judgment, and executions and certificates of judgments may thereon issue as on a regular judgment obtained in the ordinary way.

This Act is, I think, applicable to County Courts and upon general principles the interpretation clause, as well as the clauses just set out, may be read into the County Courts Act.

I do not overlook sections five and six of the Act which only apply to the Court of Queen's Bench judgments and orders. There is there provision made for the registration of such judgments and orders, but it

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is only doing for such judgments and orders what the County Courts Act as supplemented by the general provisions of the Judgments Act, has done for the County Court judgments and orders.

I take it, therefore, to be reasonably clear that County Court orders for the payment of money may be registered so as to bind lands in the same way as similar Queen's Bench orders may be registered.

Returning to the amendment here, and, having in view the fact that, at the time of its passing, County Court orders were subjected to registration as being statutory judgments, we are able to give it a natural and reasonable meaning. The object was to put County Court judgments (including orders for the payment of money), in the same position as regards their summary enforcement as similar Queen's Bench judgments and orders, the word "orders" being inserted in the retroactive and enlarging clause of the amendment, in the same way as they were inserted (several times), in the clauses which were the subject of the amendment merely *ex abundanti cautela.*

The court below gave a construction to the word "order," thinking, under the statute law, it was capable of that construction only. Had they thought that County Court orders were capable of registration, as I think they were, they would have doubtless adopted what I submit is the proper view.

Finally, if I am wrong on this branch of the case, I adopt the reasoning of the learned Chief Justice as to the limited retroactivity of the amendment, accepting as authority and as applicable here, the judgment of Lindley J., in *Lauri* v. *Renad* (1).

The action in my view should be dismissed with costs in all the courts.

(1) [1892] 3 Ch. 402, 421.

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DAVIES J. (dissenting).—This is an appeal from the judgment of the Supreme Court of Manitoba in favour of the respondents in an action brought by them for the recovery of possession of land. The questions raised upon the appeal involved the proper construction to be placed upon a statute of the Manitoba Legislature, 60 Vict. ch. 4, purporting to extend the rules 803 and 804 of "The Queen's Bench Act, 1895", of that province, so as to cover County Court judgments and applying the amendment to orders previously made.

The amendment in question is one of a number of amendments made to the Act of 1895, and reads as follows:

> Rule 807. By inserting the following rule after rule 807. Rule 807 (*a*). In the case of a County Court judgment an application may be made under rule 803 or rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment.

This enactment came into force on 30th March, 1897, after the completion of all the proceedings upon which the respondents rely for title.

The questions raised and argued before us on the appeal were: First. Whether the amendment applied to orders made previously to its passing on County Court judgments under sections 803 and 804; and, secondly: Assuming that it did, whether it was broad and comprehensive enough to cover the proceedings including the sale which followed the orders.

I am of the opinion that the amendment does apply to orders previously made by the Court of Queen's Bench, on applications to sell lands on judgments obtained in the county court.

The reasoning of the learned Chief Justice and Mr. Justice Bain, who delivered the judgment of the court below, appear to me on this point conclusive. In

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point of fact, every judge of the Court of Queen's Bench for Manitoba, before whom the question has come, including the late Chief Justice Taylor, reached the same conclusion.

The history of the amendment may well be referred to in placing a construction upon it. It appears that the court had for some time assumed that they had jurisdiction to make orders under the rules in question on County Court judgments, for the sales of lands, and these orders were treated as valid until an objection to the jurisdiction of the court to make them was sustained in *Proctor* v. *Parker* (1). It seems clear that the amendment in question was passed in consequence of that decision and was intended to remove all doubts as to the power of the court to have made or to make orders for sales on County Court judgments.

The question is: Has the legislature clearly expressed its intention?

It was argued by Mr. Aylesworth that the word "orders" in the amendment must have reference to orders of the County Court for the payment of money and not to orders under the rules embodied in the Queen's Bench Act, 1895, which were being amended, but, as is pointed out by Chief Justice Killam, this cannot be so because the rules which are amended only give power to proceed upon *registered* judgments and orders and there was no provision for the registration of County Court orders. Besides, the latter part of the section, exempting orders or judgments which had been "attacked," from its operation clearly shewed that what the legislature must have referred to were such orders as had been made by the Court of Queen's Bench in the past on County Court judgments and against the validity or legality of which proceedings had been taken. By no reasonable construction could

(1) 11 Man. L. R. 485.

such language be applied to orders in the County Court for the payment of money. In my opinion the true construction of the amendment, which is admittedly obscurely worded and badly drawn, is to extend the jurisdiction of the Court of Queen's Bench under rules 803 and 804 to County Court judgments and further to confirm past proceedings under such rules on County Court judgments taken when it was supposed jurisdiction existed.

The first part of the section relates to future applications to be made, and extends as well to existing as to future County Court judgments. The latter part relates to previous applications made and was doubtless intended to have a retroactive affect and to confirm them It is argued, however, that while the latter part of the section has a retroactive effect so as to confirm these disputed orders for sale, it does not confirm the proceedings taken upon and subsequent to the orders. But this part of the amendment does not pretend simply to validate any particular order or proceeding. It applies the first part of the amendment which extends the jurisdiction of the court to County Court judgments to orders theretofore made and by doing so declares the court to have had jurisdiction to hear the applications and make the orders in the past which the court had held it did not possess.

It is in my opinion a declaratory enactment so far as its latter part is concerned making its first part, which gave the Court of Queen's Bench jurisdiction to make orders for sale of land on County Court judgments, apply retroactively to orders already made under such rules on such judgments.

A proper provision was made exempting from the operation of this retroactive legislation such orders as had been "attacked" before the passing of the amendment. The effect of this declaratory legislation

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was not only to validate the orders themselves but all proceedings taken under or in pursuance of them. Any other construction would defeat what I hold to be the declared intention of the Legislature.

If in the case now before us the Court of Queen's Bench had power and jurisdiction under the amendment to hear the application and make the order for the sale of the land in question, then the necessary proceedings directed by the order or the rules to be taken to give it effect must also be held to be confirmed.

Once it had full jurisdiction given to it, or had its jurisdiction declared and confirmed, over the subject matter, than all the provisions of the rules became applicable to enable the court to carry out its order.

The appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellants: *Cameron & Phillips.*

Solicitors for the respondents: *Tupper, Phippen & Tupper.*

SIDNEY STOCKTON TAYLOR (DEFENDANT) ..... APPELLANT;

AND

WALTER SCOTT ROBERTSON (PLAINTIFF) ..... RESPONDENT.

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*Oct. 21.

*Nov. 16.

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

Solicitor and client—Negligence or misconduct—Breach of duty—Advising according to established jurisprudence—Territories Real Property Act—Unregistered transfers—Charging lands—Levy under execution—Indemnity to sheriff—Tort—Pleading—Interpleader—Counterclaim—Signed bill of costs.

In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead but may be properly joined in a defence with the execution creditor.

A solicitor advising his client according to the established jurisprudence of the court in which procedings are taken is not guilty of actionable negligence although the decision upon which he relied in giving the advice may be subsequently overruled.

Neither a solicitor nor a sheriff is a tort-feasor, as against a transferree whose transfer is unregistered, by registering, in the discharge of their respective duties, an execution of a judgment against lands of the judgment debtor.

The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution.

In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such

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

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an action, the solicitor may set up by way of counterclaim h costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim.

APPEAL from the judgment of the Supreme Court of the North-west Territories affirming that part of the judgment of Mr. Justice Rouleau at the trial which directed judgment in favour of the plaintiff and reversing that portion of the trial court judgment which directed a reduction of the plaintiff's claim by the amount of a portion of the counter-claim filed by the defendant, Taylor.

The appellant was the advocate of the deputy sheriff of the Northern Alberta Judicial District, and also the advocate of a judgment creditor for whom he had caused execution to issue which was duly filed in the sheriff's office. As advocate of the execution creditor, he delivered to the deputy sheriff a requisition to charge lands then registered in the name of the execution debtors in the Northern Alberta Land Registration District, as their interest might appear, and the lands were accordingly charged by the sheriff under the provisions of the Territories Real Property Act, as amended by 51 Vict. ch. 20, sec. 94, and advertised for sale under the execution. Subsequently, certain transferees of the lands so charged and advertised registered their deeds of conveyance, which were dated prior to the execution, and served notices upon the sheriff forbidding the sale. At the time the jurisprudence of the territorial courts was considered as settled by the decision *In re Rivers* (1), which had not then been reversed, and on being informed by the sheriff of the notices served, the appellant advised him to continue the sale proceedings, notwithstanding the notices, on the ground that the unregistered transfers

(1) 1 N. W. T Rep. pt. IV. 66.

were inoperative as against the execution lodged in the lands registration office. The transferees then brought actions against the execution creditor and the deputy sheriff to restrain the sale proceedings and to have the execution cancelled and removed from the register as a cloud upon their titles. The appellant appeared in these suits as advocate for both the execution creditor and the deputy sheriff and pleaded a joint defence, without interpleading for the sheriff, but alleging that the sheriff of the district, and not the deputy sheriff, had charged the lands and contending that the deputy sheriff had been improperly joined as a defendant in the actions. The appellant also moved in the trial court to have the name of the deputy sheriff struck out as a defendant, but the trial judge (Rouleau J.), dissolved the injunction and entered judgment for the defendants without making any order on the motion to strike out the deputy sheriff's name. On appeal to the full court, the trial court judgment was reversed, and a motion, renewed by the appellant before the court *en banc*, to have the deputy sheriff's name struck out was refused with costs.

The deputy sheriff did not appeal from the judgment *en banc* and brought the present action against his advocate to recover certain fees and charges for matters in which he had taken proceedings for clients in the sheriff's office and also to recover, as damages on the ground of negligence and misconduct, the costs incurred by him in the above mentioned suits, alleging also that the appellant had impliedly and expressly obliged himself to indemnify the plaintiff against any liability for costs or damages in consequence of the proceedings which had been taken.

In his defence, in addition to the general issue and other pleas, the defendant (present appellant), counter-claimed, first, for alleged overcharges made by the

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sheriff in bills previously paid to him for fees and charges in respect of matters in the sheriff's office in which his clients had been interested parties, and, secondly, for his costs in defending the deputy sheriff in the suits brought by the transferees, but of which no signed bill had been rendered before the filing of the defence.

The trial court declared that the plaintiff was entitled to be indemnified for the amount of the costs awarded against him in the actions by the transferees, less $147.42 which sum was allowed the defendant for a portion of his counterclaim for overcharges.

On appeal to the full court by the defendant against the trial court judgment in so far as it favoured the plaintiff, and cross-appeal by the plaintiff from that part of the judgment which allowed a portion of the counterclaim, the Supreme Court of the North-west Territories, *en banc*, dismissed the appeal by the defendant and allowed the cross-appeal of the plaintiff with costs.

J. Travers Lewis and *Smellie* for the appellant. Throughout all the transactions in question in the case the appellant acted solely as the advocate of the execution creditor; he was an agent and his principal was known, consequently he incurred no personal liability. He carefully limited his requisition to the sheriff as to charging the lands only so far as the debtor's interest might appear and incurred no liability on account of the sheriff exceeding his authority and attempting to charge and levy on the fee. No express contract by appellant to indemnify the sheriff has been proved and certainly no such indemnity can be implied from anything appellant may have done in discharging his duty towards his client and by his special authorisation seeking to secure for him the fruits of his judg-

ment. See *Smith* v. *Keal* (1) *per* Lindley L. J. at page 354; *Levi* v. *Abbott* (2); *Hallett* v. *Mears* (3); *Jarmain* v. *Hooper* (4); *Childers* v. *Wooler* (5); *Robbins* v. *Bridge* (6).

There is no evidence of any misconduct on the part of appellant nor of anything which might constitute actionable negligence. The plaintiff, respondent, knew and approved of every step taken by the appellant in the suits against him. When appellant advised as to the unregistered transfers being inoperative as against the registered execution he was justified and bound by the decision *In re Rivers* (7) which was then the established jurisprudence of the North-west Territories on that question. In any event, *crassa negligentia* has not been proved. *Blair* v. *The Assets Company* (8); *Purves* v. *Handell* (9); *Hart* v. *Frame* (10); *Kemp* v. *Burt* (11); *Swinfen* v. *Chelmsford* (12).

There could be no objection to appellant acting for both the sheriff and the execution creditor in the actions brought against them and it was so found by the trial judge. The sheriff could not withdraw the notification by which he had charged the lands in the Lands Registration Office and he was properly joined in all the defences pleaded.

The appellant insists that his counterclaim is well founded and that he should recover on both heads. The rule requiring an advocate to render a signed bill of costs one month before suit does not prevent the amount of his costs being set up by way of counterclaim although this formality may have been omitted.

(1) 9 Q. B. D. 340.
(2) 4 Ex. 588.
(3) 13 East 15.
(4) 6 M. & G. 827.
(5) 29 L. J. Q. B. 129.
(6) 3 M. & W. 114.
(7) 1 N. W. T. Rep. pt. iv, 66.
(8) [1896] A. C. 409.
(9) 12 C. & F. 91.
(10) 6 C. & F. 193.
(11) 4 B. & Ad. 424.
(12) 5 H. & N. 890.

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Brown v. *Tibbits* (1); *Lester* v. *Logarus* (2); *Irving* v. *Wilson* (3); *Umphelby* v. *McLean* (4). The practice followed was in conformity with the best precedents of pleading; see Bullen & Leake, (4 ed.) page 944.

We also refer generally to *Hebb* v. *Pun Pong* (5); *Lee* v. *Everest* (6); *Boyle* v. *Busby* (7); *Smith* v. *Broadbent & Co.* (8); *Ford* v. *Williams* (9); *Rascorlla* v. *Thomas* (10); *Lampleigh* v. *Braithwait* (11); *Snow* v. *Hix* (12).

Chrysler K.C. for the respondent. There is an implied indemnity under the circumstances of this case which makes the appellant liable to the sheriff. *Heugh* v. *Abergavenny* (13); *Bennett* v. *Bayes* (14); *Ontario Industrial Loan & Investment Co.* v. *Lindsey* (15); *Jellett* v. *Wilkie et al.* (16). As the sheriff acted by direction of the appellant and by his act occasioned injury to the rights of a third party, not evidently illegally but honestly and *bonâ fide* in compliance with the direction, the party giving the direction is under an implied agreement to indemnify the party acting upon it. Addison on Contracts (9 ed.) 423; Evans, Principal and Agent, 416 *et seq.*; 12 Campbell's Ruling Cases, "Indemnity," 838. There is no evidence that appellant acted as agent for Jellett in directing the sheriff. As solicitor for Jellett he had no implied authority to give such a direction. *Re McPhillips* (17); *Keal* v. *Smith* (18) affirmed *sub. nom. Smith* v. *Keal* (19); *Burrell* v. *Jones* (20); *Wallbridge*

(1) 11 C. B. N. S. 855.
(2) 2 C. M. & R. 665.
(3) 4 T. R. 485.
(4) 1 B. & Ald. 42.
(5) 18 Can. S. C. R. 290.
(6) 26 L. J. Ex. 334.
(7) 6 Q. B. D. 171.
(8) [1892] 1 Q. B. 551.
(9) 3 Kernan N. Y. 577.
(10) 3 Q. B. 234.
(11) Sm. L. C. (10 ed.) 136.
(12) 54 Vt. 478.
(13) 23 W. R. 40.
(14) 29 L. J. Ex. 224; 5 H. & N. 391.
(15) 3 O R. 66; 4 O. R. 473.
(16) 26 Can. S. C. R. 282.
(17) 6 Man. L. R. 108.
(18) 51 L. J. Q. B. 487.
(19) 9 Q. B. D. 340.
(20) 3 B. & Ald. 47.

v. *Hall* (1); *Muirhead* v. *Shirreff* (2). There is no evidence of express authority. The direction given was personal the words "Advocate for the Plaintiff" being merely descriptive. *Hall* v. *Ashhurst* (3); *Lennard* v. *Robinson* (4); *Scrace* v. *Whittington* (5); *Parker* v. *Winlo* (6); *Watson* v. *Murrell* (7); *Hutcheson* v. *Eaton* (8); Story on Agency, secs. 269, 270, 278; Evans Prin. & Agent, 245; 359. There appears to be a stronger inference in favor of personal liability in the case of an attorney or professional agent than in the case of others. The ratification by Jellett claimed in argument, but not established by the evidence would not relieve appellant from liability; see *Woolen* v. *Wright* (9); *Kenedy* v. *Patterson* (10); The general statement, that ratification transfers both rights and liabilities to the ratifying principal, is subject to the limitation that the agent is released only if he is not liable *ex directo* on the contract, but only on his implied warranty of authority; he is not released if he is liable *ex directo* on the contract by virtue of the terms thereof as, it has already been submitted, is the case here. Am. & Eng Ency. Law (2 ed.) p. 214, note 9. Story on Agency, s. 251. *Collen* v. *Wright* (11); Ruling cases, Vol. II, Agency 484.

But in truth, the law of principal and agent has no application at all to the present action, which is not based on contract but on general principles of equity. See DeColyar on Guarantees, pp. 305 *et seq.*, and 7 Am. & Eng. Ency. of Law (2 ed.) tit. "Contribution and Exoneration," pp. 326, *et seq.* The cases from *Pasley*

(1) 4 Man. L. R. 341.
(2) 14 Can. S. C. R. 735.
(3) 1 Cr. & M. 714.
(4) 5 El. & B. 125.
(5) 2 B. & C. 11.
(6) 27 L. J. Q. B. 49.
(7) 1 C. & P. 307.
(8) 13 Q. B. D. 861.
(9) 1 H. & C. 554.
(10) 22 U. C. Q. B. 556.
(11) 26 L. J. Q. B. 147; 27 L. J. Q. B. 215.

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v. *Freeman* (1); *Derry* v. *Peek* (2); both annotated in 12 Campbell's Ruling Cases, tit. "Fraud" settles the law that wilful falsehood, or reckless disregard of truth is an essential element in an action for deceit, and the rule deducible is that where A. asserts the ownership of property to be in a particular person, and where if such assertion be true, he may lawfully give a direction to B. (either as being his special mandatary or as holding a public office) to do an act regarding such property, B. if he does the act by the direction of A. or at his request, and it turns out that A.'s assertion was in fact false and the real owner recovers damages against B., is entitled in an action in the case alleging the direction or request and the falsity of A.'s assertion to recover damages by way of indemnity against A., whether A. be acting on his own behalf or not. *Adamson* v. *Jarvis* (3); *Palmer* v. *Wick S. S. Co.* (4); *Burrows* v. *Rhodes* (5); *Humphreys* v. *Pratt* (6); *Betts* v. *Gibbins* (7); *Collins* v. *Evans* (8); *Childers* v. *Wooler* (9); *Dugdale* v. *Lovering* (10); *Moodie* v. *Dougall* (11).

The evidence establishes an express agreement to indemnify Robertson. There is undoubtedly a direct conflict of evidence upon this point, but the conclusion should, it is submitted, be in respondent's favour. See Pollock on Contracts (5 ed.) pp. 233, 439, 440; *Smith* v. *Hughes* (12); *Birrell* v. *Dryer* (13); *Knox* v. *Munro* (14). Appellant ought to have declined to act for the sheriff while acting for Jellett, their interests being in conflict, inasmuch as the sheriff was entitled

(1) 3 T. R. 51.
(2) 14 App. Cas. 337.
(3) 4 Bing. 66.
(4) [1894] A. C. 318.
(5) 68 L. J. Q. B. 545.
(6) 5 Bligh N. S. 154.
(7) 2 Ad. & E. 57.
(8) 13 L. J. Q. B. 180.
(9) 29 L. J. Q. B. 129.
(10) 44 L. J. C. P. 197.
(11) 12 U. C. C. P. 555.
(12) L. R. 6 Q. B. 597.
(13) 9 Ap. Cas. 345.
(14) 13 Man. L. R. 16.

to be indemnified by Jellett, if Jellett authorized the direction on which he acted, and, in any case, by the appellant himself. Under the circumstances appellant was guilty of breach of duty and misconduct for the consequences of which he is liable. 3 Am. and Eng. Ency. Law (2 ed.) pp. 295, 299, 300, 379, 380, 387. *Taylor* v. *Blacklow* (1); *Barber* v. *Stone* (2); *Donaldson* v. *Haldane* (3); *Lanphier* v. *Phipos* (4); *Hart* v. *Frame* (5); *Parker* v. *Rolls* (6); *Cox* v. *Leech* (7); *Godefroy* v. *Dalton* at page 468, (8); *Leslie* v. *Ball* (9); *O'Connor* v. *Gemmill* (10); *Armour* v. *Kilmer* (11); *Armour* v. *Dinner* (12).

The court has inherent power to protect its own officers, independently of the Interpleader Acts, which extend to goods only, and on application to that effect proceedings have been stayed till indemnity was given, and a withdrawal of the execution directed, if indemnity were not given. 22 Am. & Eng. Ency. Law, (1 ed.) "Sheriffs," p. 537; Ib. Vol. x, "Indemnity," p. 420; 2 Freeman on Executions (2 ed.) pp. 254, 275; *King* v. *Bridges* (13); *Burr* v. *Freethy* (14); *Bernasconi* v. *Fairbrother* (15); *Probinia* v. *Roberts* (16); *Beaven* v. *Dawson* (17); *Holmes* v. *Mentze* (18).

A sheriff is entitled to file a Bill of Interpleader. Snell's Eq. (5 ed.) 584; Mitford on Pleading, 48-49; Story's Eq. Jur. 820 (b.); *Dutton* v. *Furniss* (19); *Tufton* v. *Harding* (20); *Child* v. *Mann* (21). The deputy sheriff would have been protected had he refrained

(1) 3 Bing. N. C. 235.
(2) 50 L. J. Q. B. 297.
(3) 7 Cl. & F. 762.
(4) 8 C. & P. 475.
(5) 6 Cl. & F. 193.
(6) 14 C. B. 691.
(7) 1 C. B. N. S. 617.
(8) 6 Bing. 460.
(9) 22 U. C. Q. B. 512.
(10) 29 O. R. 47.
(11) 28 O. R. 618.
(12) 4 N. W. T. Rep. 30.
(13) 7 Taunt, 294.
(14) 1 Bing. 71.
(15) 7 B. & C. 379.
(16) 1 Chit. 577.
(17) 6 Bing. 566.
(18) 4 A. & E. 127.
(19) 35 L. J. Ch. 463.
(20) 29 L. J. Ch. 225.
(21) L. R. 3 Eq. 806.

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from contesting and set up his true position in a separate Statement of Defence. The course actually pursued by attempting to have his name struck out was clearly wrong on principle and authority, apart even from the claim of injunction, it being clear on the authorities already cited that, notwithstanding his official capacity, he was liable. Had he either by interpleader action, or by motion or by separate defence made his claim for protection merely, he would undoubtedly have been protected and escaped being charged with costs. *Neuman* v. *Godfrey* (1); *Jones* v. *Wiggins* (2); Bullen & Leake (1 ed.) p. 457; Odger on Pleading, (2 ed.) p. 201; Seton on Decrees pp. 213; *Clark* v. *Wilmott* (3). It is not necessary, in order that these principles should apply, that there should be a formal disclaimer. *Wansley* v. *Smallwood* (4).

So far as the counterclaim relates to the bill of costs in the actions, the grounds on which the plaintiff is entitled to judgment on his claim at the same time disentitle the appellant to his costs. As to the rest of the counterclaim the Judicature Ordinance No. 6 of 1893, sec. 538, (now rule 536, C. O. 1898,) affords an answer in law. There is no pretence that any of its provisions have been complied with. The form of action is immaterial; notice is necessary, though the form of action is for money had and received. *Greenway* v. *Hurd* (5); *Selmes* v. *Judge* (6); *Waterhouse* v. *Keen* (7); *Midland Railway Co.* v. *Withington Local Board* (8). A further answer is that the sums were all paid voluntarily under a mistake of law.

(1) 2 Bro. C. C. 332.
(2) 2 Y. & J. 385.
(3) 11 L. J. Ch. 16.
(4) 11 Ont. App. R. 439.
(5) 4 T. R. 553.
(6) L. R. 6 Q. B. 724.
(7) 4 B. & C. 200.
(8) 11 Q. B. D. 788.

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The judgment of the court was delivered by:

DAVIES J.—This was an action brought by the respondent Robertson, Deputy Sheriff at Edmonton, against his solicitor or advocate, the appellant Taylor, in which it was claimed that Taylor was bound to indemnify Robertson for costs incurred by him in the defence of certain actions brought against him and one Jellatt by Wilkie and others, on the grounds of an alleged express or of an implied indemnity from Taylor, or alternatively, against such parts thereof as were incurred by the breach of duty, misconduct or negligence of Taylor.

The appellant, Taylor, denied, as a matter of fact, having given any express indemnity or that, under the facts, any implied indemnity from him arose. He also denied all charges of breach of duty or negligence and counter-claimed: First, for the amount of his costs in defending Deputy Sheriff Robertson in the actions brought against him, and; Secondly, for certain alleged overcharges made by Robertson as sheriff's fees, in cases which the appellant, Taylor, had placed in his hands and in which Taylor was advocate or solicitor.

The facts out of which the proceedings arose are not disputed. One Jellatt had obtained a judgment against The Edmonton and Saskatchewan Land Company and, on the twenty-ninth May, 1893, Taylor, as his advocate, placed an execution on this judgment in the hands of Robertson, as Deputy Sheriff of the Northern Alberta Judicial District, and at the same time in writing, directed the sheriff to charge the interest of the company in certain lands with the said judgment and execution. The direction or requisition was entitled in the suit, was signed by Taylor, as advocate of Jellatt, the plaintiff, and was as follows:

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REQUISITION TO CHARGE LANDS.

MR. SHERIFF,—Required the following lands to be charged, under the Territories Real Property Act, as to the defendant's interest, as the same may appear. (Here follows the description of the several parcels of land required to be charged.)

There was another requisition delivered by Taylor, as Jellatt's advocate, to Robertson, at the same time affecting other lands, but as these other lands were not the lands of any of the plaintiffs in the consolidated suits against Jellatt and Robertson, out of which the present proceedings arose, it has no bearing upon the case.

Copies of this execution and requisition were, on being received by the deputy sheriff, duly delivered by him to the registrar of the district within which the lands were situate, pursuant to the 94th section of the Territories Real Property Act, as amended by 51 Vict. ch. 20, and the registrar entered a memorandum thereof in the register.

At this date all these lands were registered in the name of The Edmonton and Saskatchewan Land Company.

In April, 1894, the deputy sheriff advertised the lands for sale and, on the 27th of June, 1894, the deeds to Wilkie and others of these lands, which had been delivered before the registration of the execution, were registered and notices served upon the deputy sheriff forbidding him to sell.

There is a dispute as to whether the appellant Taylor, who was the execution creditor's advocate, actually directed the lands to be advertised by the sheriff, or whether the latter did it without express orders in the ordinary discharge of his duties. But, in the view I take of the appellant's position, and duty, it does not matter which contention is correct.

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There is also some difference of opinion as to what was said by Taylor at the time the deputy sheriff came to him with the notices of the deeds having been registered and forbidding further proceedings upon the sale. It may be assumed from the evidence that Taylor made light of them and told Robertson to pay no attention to them. His client Jellatt, the plaintiff in the action, had determined to go on with the sale and not withdraw his execution, relying upon a previous decision of the Supreme Court of the Territories, *In re Rivers* (1). Taylor would be fully justified in telling the deputy sheriff of this determination and it would be his duty to do so.

On the fourth of July following, Messrs. Wilkie and others, the grantees of the Edmonton and Saskatchewan Land Company, whose several deeds had now been registered, commenced their actions against Jellatt, the execution creditor, and Robertson, the deputy sheriff, to restrain them from proceeding with the sale under the execution which had been issued and registered against The Edmonton and Saskatchewan Land Company on the ground that the execution was a cloud on their titles and asked that the entry of the execution should be cancelled and removed from the register and that an injunction should be issued restraining the sale of the lands and for damages.

Taylor, the appellant, appeared as solicitor for both defendants, Jellatt and Robertson, being expressly retained by them and defended the suit on the ground that the deeds of the plaintiffs, being unregistered at the time of the registration of the execution against the grantors, they were inoperative as against the execution.

In pleading, he joined both parties in the same defence and, it is now contended, on the part of Robert-

(1) 1 N. W. T. Rep. pt. iv, p. 66.

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son, the deputy sheriff, that in doing so, he was guilty of such negligence as made him liable in this action for the damages sustained by Robertson.

In pleading as he did, he followed the usual forms prescribed by the best pleaders, and it is difficult to see how he could have put in any other defence, or wherein his negligence lay.

He certainly could not have interpleaded for the sheriff and, if he had severed in his defence, his plea could not be materially different from the one he put in for the execution plaintiff and the sheriff jointly. But he did not stop there. Shortly after the actions were begun he applied to one of the judges of the North-West Territories court to have the name of the deputy sheriff Robertson struck out of the writ and the subsequent proceedings. The learned judge who heard the application, unfortunately died before giving his judgment thereon, and Taylor, at the trial of the action before Judge Rouleau, renewed his application, but, as the action was dismissed by Mr. Justice Rouleau and the injunction dissolved, he does not appear to have thought it necessary to accede to the motion and strike out Robertson's name. At any rate, his name was not struck out and the case went up by appeal to the Supreme Court of the North-west Territories, when Taylor appears again to have renewed his argument to have Robertson's name struck out. The application was not successful and the Supreme Court of the Territories reversed the judgment of the trial judge, declared the execution to be clouds upon the plaintiff's titles, ordered the registrar to remove from the register of the lands in question the entries made by him of the execution and enjoined the deputy sheriff from selling the lands. The Deputy Sheriff Robertson was thus made liable for costs of the trial and of the appeal. He accepted the judgment and declined joining in the

appeal to this court. Such an appeal was, however, taken by Jellatt his co-defendant, the execution creditor, and was dismissed, the judgment of the Supreme Court of the North-west Territories being sustained. It is for the costs incurred by Robertson on the trial before Judge Rouleau and on the appeal to the Supreme Court of the North-west Territories, that he now brings this action against Taylor, his advocate and solicitor.

I have already said that I do not see on what possible ground Taylor can be condemned for negligence. So far as his pleading was concerned, I think, with every respect to the learned judges of the Supreme Court of the Territories, that he was right and he certainly shewed zeal and persistence in endeavouring to get his client's name struck out of the action. At the time the actions against Jellatt and Robertson were brought and up to the delivery of the judgment therein by the Supreme Court of the Territories, the case of *Re Rivers* (1) was supposed to have correctly declared what the law was as to the effect of registered executions upon unregistered deeds. Mr. Justice Rouleau, who was himself a party to the judgment in *re Rivers*, in giving judgment on the trial of the case now before us in appeal says:

> In *re Rivers*, the language of the court as expressed by Wetmore and McGuire JJ., is unequivocal. It was held that an unregistered transfer did not pass or affect land and that an execution registered against the registered owner had priority and that such transfer could not be registered afterwards, except subject to such execution.

Feeling himself bound by that judgment and having been himself a party to it, he dismissed the action.

And yet it is contended Taylor should be liable for actionable negligence because, as was said by Lord Davey, in the case of *Blair* v. *Assets Company* (2) he gave advice to his client

(1) 1 N. W. T. Rep. (pt. iv,) 66. (2) [1896] A. C. 409.

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which involved the assumption that a recent and unanimous decision of the very judges before whom the question would come was correct.

As to the question of indemnity, the learned judges in the court below assume Taylor and Robertson to be joint wrongdoers in registering execution against the lands of The Edmonton and Saskatchewan Land Company and hold that Taylor was liable upon an implied indemnity to Robertson, arising out of the written requisition or instructions he had given him to register that execution.

I am of opinion that neither position is sound. I do not think that either the advocate Taylor or the deputy sheriff Robertson was a tort feasor in causing that execution to be registered against the lands of the company, nor do I think that any implied indemnity from the solicitor to the sheriff arose out of it. Each one was, in my opinion, only discharging his duty. It was the clear duty of the solicitor to do everything in his power to gather for his client Jellatt the fruits of his judgment. No question arises as to his authority to act. What he did was with the full authority and consent of Jellatt. He appears to have acted with great caution, for he carefully required the sheriff to charge the lands specified under the "Territories Real Property Act" *as to the defendant's interest therein as the same may appear.* What was the defendant's interest in the land? At that time as far as Taylor or Robertson knew or had notice and as far as the register shewed their interest was that of owner.

How could Taylor justify himself if, being charged by Jellatt his client to reap for him the fruits of his judgment, he had neglected to notify the sheriff of these lands which, as far as he knew or had means of knowledge, belonged to the defendant land company, and if as a consequence the lands were subsequently conveyed away by the land company? The cases cited in

the judgment below, and at the bar, of solicitors going beyond and outside of their duty and officiously pointing out to the sheriff specific personal property as that of the defendant and requiring him to sell are not in point. Taylor here was acting strictly within and in discharge of his duty to his client and the lands which he directed the deputy sheriff to register his execution against, were lands registered in the name of the defendant company and which, being so registered and without notice to the contrary, he had every reason to assume they were the owners of.

It was not until the end of June in the following year, 1894, that he received any notice to the contrary. He was not therefore an officious solicitor going outside of his duty and taking upon himself personal responsibilities which did not properly belong to his position as solicitor, but one discharging a duty which, under the circumstances, was incumbent on him and directing the sheriff to do that which was apparently his duty.

Section ninety-four of the "Territories Real Property Act," as amended by 51 Vict. ch. 20, directs the sheriff to deliver a copy of every writ or process affecting lands which he may have had delivered to him, together with a memorandum in writing of the lands intended to be charged to the registrar within whose district the lands are situate and declares that no land shall be bound by any such writ unless such copy or memorandum has been so delivered. It became clearly his statutory duty after receiving the requisition designating the lands intended to be bound to see if they were registered in the name of the execution defendant and if they were to deliver a copy of both writ and memorandum to the registrar. In the present case he found the lands designated were registered in the name of the execution debtor and in giving

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the registrar the copy of the writ and memorandum he was only discharging his statutory duty. In the like manner when, in April following, eleven months afterwards, he advertised the land, he was only doing his duty and was in no sense a tort-feasor.

The holders of the unregistered deeds had them in their pockets and only produced and registered them on the twenty-seventh of June, 1894, nearly two months after the lands were advertised. Jellatt, the execution creditor, being then notified of these deeds and their registration refused to withdraw the execution, claiming that it took precedence, whereupon the proceedings were taken which rightly determined that the Territories Real Property Act does not give the execution creditor any superiority of title over prior unregistered transferees, but merely protects lands from intermediate sales and dispositions by the execution debtor. See judgment of Chief Justice Strong in *Jellatt* v. *Wilkie, et al* (1). But in that very case the Chief Justice says, at p. 292:

> No doubt, if the sheriff had sold and the purchaser had registered his transfer, the Act would apply, and would in that case, invalidate prior unregistered transfers made by the execution debtor before the registration of the execution.

And so it seems to me that the execution creditor was perfectly right in registering his execution against the lands standing in the name of the judgment debtor and in advertising such lands and continued in the right until at least the unregistered deeds were registered. His refusal to recognize these deeds after registration as taking precedence of his judgment and insisting upon going on to sale compelled the grantees to take the proceedings they did and made him liable for their costs. It may have also created a relationship between him and the sheriff from

(1) 26 Can. S.C.R. 282.

which an implied indemnity to the latter might be assumed. But how could such an indemnity be assumed against the solicitor? His action throughout was taken as solicitor. His notice or requisition to the sheriff was so signed His principal was known from beginning to end and, unless therefore some express indemnity was given by him, he is not liable. See *Lewis* v *Nicholson* (1); *Collen* v. *Wright* (2); *Cherry* v. *The Colonial Bank of Australasia* (3). See also *Ford* v. *Williams* (4).

As regards the alleged "express indemnity", the court below say that the evidence is conflicting and that in view of the conclusion they have reached upon the implied indemnity

it was unnecessary to inquire whether there was, in fact, any express promise to indemnify.

Neither the trial judge nor the court in banc found that any express indemnity was given.

It is true that Judge McGuire says he

thinks, if it was necessary to connect the defendant with the advertisement, he was aware of it and approved of it.

That may well be so, but such knowledge or approval falls very far short of an express indemnity. There certainly never was any written indemnity, and the existence of any verbal contract was hardly urged upon us at the argument. From a careful perusal of the evidence, I have come to the conclusion that there is not sufficient evidence to justify this court in finding that an express binding promise was made. The deputy sheriff (respondent), does no doubt say that Taylor, more than once, promised him

that he would guarantee him from all damage and harm.

He says that these promises were made at or about the time he was being sued and after the suit was

(1) 21 L. J. Q.B. 311.
(2) 7 E. & B. 301; 8 E. & B. 647.
(3) L.R 3 P.C. 24.
(4) 3 Kernan N.Y. 577, 584.

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begun. The appellant Taylor, on the other hand, emphatically denies that anything was said about indemnity, or that the idea of indemnity was ever brought up, except in the summer of 1895, presumably after the judgment of the Supreme Court of the Territories which was delivered 13th June, 1895, and when an appeal to this court was being considered. He further states that he never indemnified or guaranteed any one for their costs in the whole course of his profession, and that Robertson approved of the application being made to have his name struck out as a defendant, and that it was impossible that anything could have been said about indemnity. Mr. H. C. Taylor, the appellant's law partner, says that he was in constant attendance at the office during the years when these proceedings were going on; that he knew nothing of any indemnity to be given Robertson and never heard Robertson mention it. He further says:

> I can't recall any specific conversation with Robertson but have no doubt I was present when there was any conversation between S. S. Taylor (the appellant), and Robertson.

The evidence is conflicting, but I do not entertain any reasonable doubt that no express indemnity was ever given by Taylor or intended to be given. I think a good deal of the confusion or misunderstanding on the part of the respondent, Robertson, arose out of the conversations with respect to the proceedings having for their object the striking out of his name from the action, and the subsequent negotiations to induce him to join in the appeal to this court which he declined doing.

There remains only to be considered the counterclaim. With respect to the second part, to recover back certain alleged overcharges for work done by respondent as sheriff, that clearly cannot be allowed as the moneys, if recoverable at all, do not belong to

Taylor, but to his clients. With respect to the first part of the counter-claim, viz., the costs of defending Robertson in the suit, it was objected that no signed bill had been delivered by Taylor pursuant to the statute. But it is clear from the authorities that such an objection does not apply to a set-off or counter-claim. The court below dismissed this part of the case with the statement that as they found against Taylor on the implied indemnity, if the counter-claim was allowed it would simply go to increase the amount which they held Taylor was bound to indemnify Robertson against. In my view of the case however, there was no such indemnity express or implied and Taylor is entitled on his counter-claim to judgment for what are reasonable charges.

The appeal should, in my judgment, be allowed with costs in all courts, and judgment entered for the defendant on his first counter-claim for such an amount as the proper officer may tax the costs.

Appeal allowed with costs.

Solicitor for the appellant: *H. C. Taylor.*

Solicitors for the respondent: *Beck & Emery.*

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*Oct. 30, 31.

*Nov. 16.

THE OTTAWA ELECTRIC COMPANY (PLAINTIFF)..... } APPELLANT;

AND

F. X. ST. JACQUES (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Duration—Right to cancel—Repugnant clauses.

A contract for supplying light to a hotel containing the following provisions. "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. * * * Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer.

Held, reversing the judgment of the Court of Appeal (1 Ont. L. R. 73) that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial in favour of the defendant.

The question to be decided on this appeal was whether or not, under the above recited provisions of a contract for lighting the Russell House in Ottawa, the defendant, as lessor of the said hotel premises, had a right to cancel the contract during a renewed term of his lease. The Electric Company appealled from a judgment of the Court of Appeal deciding that the provision for cancellation after 36 months was in force after the renewal.

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

(1) 1 Ont. L. R. 73.

G. F. Henderson for the appellant.

Hogg K. C. and *F. A. Magee* for the respondent.

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

SEDGEWICK J.—The Standard Electric Co. of Ottawa, to whose rights in the premises the appellant Company has succeeded, entered into a contract with the respondent on the 5th November, 1892, to supply the Russell House, of which the latter was lessee, with electric light. The period during which this supply was to, or might, continue, was fixed by two clauses, the interpretation of which is the question involved here. The first clause is as follows:

> This contract is to continue in force for not less than 36 consecutive calendar months from the date of first burning, and thereafter until cancelled in writing by one of the parties thereto.

There is no dispute about this clause. The light was furnished and paid for during the three years therein specified. It so happened that the lease under which Mr. St. Jacques held the Russell House had at the time of the agreement three years to run, and it is conceded thatt he period of supply fixed upon was mainly influenced by that consideration, and that the clause itself had reference only to then present conditions.

The second clause reads:

> Special conditions, if any, * * * This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House, and should he fail to renew his lease, the parties of the first part will not remove their wires from the Russell House, providing the new tenant does not wish to use electric incandescent lights, but if the new tenant does wish to use electric incandescent lights and not take them from the parties of the first part, they will expect to be paid for the wiring the sum of five hundred dollars, and if this contract is renewed for five years, the wiring is to belong to the Russell House.

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About the period of the expiration of the lease under which the property was held in 1892, a renewal lease was entered into at a higher rental and for additional property, the term therein specified being for a period of five years to be computed from the 1st November 1895. On the 1st December, 1897, the defendant, St. Jacques, gave notice of cancellation of the contract, to take effect from the date of notice, and required the company to disconnect the wires connecting the Russell House with the main line. The question is: Was this cancellation effective for the purposes of putting an end to the agreement between the parties? The learned Chancellor before whom the case was tried, in attempting to give effect to both clauses, and having stated that they were not repugnant or contradictory, thus interprets the contract:

> It is to be enforced for 36 months and thereafter for the term that St. Jacques renews his lease, until cancelled in writing by one of the parties;

and this construction was adopted by the Court of Appeal. In my view however, but with great deference, this is not the proper construction. Both of the learned judges who dealt with the case below admit the principle that effect must, if possible, be given to every stipulation of a contract, no one part being rejected unless absolutely repugnant to some other part. And they were apparently of opinion that there no repugnancy between the two clauses or any difficulty in giving them both a clear and definite meaning.

I agree with this, but the effect which they gave to the second clause had the effect of eliminating i altogether from the agreement. If, as the learned Chancellor says, it was to be in force for 36 months and thereafter for the term that St. Jacques renewed his lease until cancelled in writing by one of the parties, then he could have cancelled it immediately upon the expiration of the 36 months, independently of the fact whether

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he renewed or did not renew his lease, so that the insertion of the clause respecting the rights and obligations of the parties upon a renewal of the lease was rendered absolutely futile and unnecessary. The agreement, so far as its duration was concerned, had reference first to the existing term and secondly, in respect to a non-existing but contingent term to be determined by the parties subsequently. The second clause had relation to rights of the parties only upon and in the event of the contingency happening, in which case certain new rights and liabilities would arise. Mr. St. Jacques was under no obligation to renew the lease, but, (and we must assume that the provision was as much in his interest as in the interest of the appellants) he would seem to have been anxious to secure light for his hotel should he remain its tenant after its termination, and it was, I imagine, with that end in view that this special provision was inserted. It had no reference whatever to the condition of affairs during the first three years, but it was a definite and unambiguous arrangement securing his supply of light for a definite period of time thereafter should he in the future elect to renew his lease. In other words, the appellant company undertook to deliver to him and he undertook to pay for during the period of five years from the commencement of the term created by the new lease, all such light as he might require for the purposes of his hotel. I have not been able to appreciate any argument which justified the respondent in attempting behind the company's back and without their consent, to put an end to the agreement at the time and in the manner he did. The moment that Mr. St. Jacques became tenant for a renewed term of the Russell property then for the first time the second clause took effect, and in so far as the duration of that extended lease was concerned, the time was a part of

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the contract between the lighting company and the lessee of the hotel. It rendered certain the duration of the contract which up till then had been uncertain, as depending upon the contingency as to whether a renewed term would ever be created, and its effect was to give to the lessee an absolute right to five years' supply of light at contract prices, and to the company payment therefor for the same period. If the new lease had itself contained any provisions for the shortening of the term from five years to a lesser period, or had given an option to the lessee to terminate it at any time, or had stipulated for a forfeiture, of which there is nothing of the kind here, I am not prepared to say that such provisions would not have to be read into the contract, but I repudiate the idea that in circumstances like the present, any one party to a contract can annihilate or even prejudice the rights of another party by some secret or voluntary agreement which the former may make with a third party. *Lord Dynevor* v *Tennant* (1).

The respondent's counsel endeavoured to make a point under the Statute of Frauds. We disposed of that at the argument, it appearing that there was no change made in the agreement sued on either verbally or in writing, the alleged change in the method of computing the price being for convenience only, and legally subject either to alteration or to a return at any time to the original manner of ascertaining the monthly consumption.

The appeal, in my judgment, should be allowed with costs in all the courts, and judgment entered for the plaintiffs with the usual reference to the Master to ascertain the damages sustained by the plaintiffs between the 1st day of December, 1897 and the 31st day of October, 1900. Upon payment of these damages

(1) 13 App. Cas. 279.

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the Russell House will be entitled to retain possession of the electric fixtures in the pleadings mentioned, and the money paid into court either returned to the defendant or credited upon any judgment which may be recovered against him, as the Master may determine.

GIROUARD J. (dissenting)—I agree with the court below. I believe we should give effect to the two clauses and we do so by holding that during the first 36 months no cancellation of the lease can take place, but that it can be done after by either of the parties.

Appeal allowed with costs.

Solicitors for the appellant: *MacCracken, Henderson & McDougal.*

Solicitors for the respondent: *O'Connor, Hogg & Magee.*

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*Nov. 7.
*Nov. 26.

THE LONDON STREET RAILWAY COMPANY (DEFENDANT)..... } APPELLANT;

AND

EDWARD C. BROWN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence.—Findings of jury.—Contributory negligence.

In an action founded on personal injuries caused by a street car the jury found that defendants' negligence was the cause of the accident and also that plaintiff had been negligent in not looking out for the car.

Held, reversing the judgment of the Court of Appeal (2 Ont. L. R. 53) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court in favour of the defendant and ordering a new trial.

The facts in this case are as follows:

The plaintiff was a mechanic returning from work to his home, about half-past five in the evening. He came to the corner of Colborne and Dundas Streets, in the City of London (Dundas Street being the main thoroughfare of the city, largely travelled, and shaded at this section with shade trees). Before starting across the road, going south, the plaintiff looked to his left (being towards the east) for a car and saw none. He then started to cross the street, diagonally, towards the south-west, being unable to go directly south owing

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

(1) 2 Ont. L. R. 53.

to repairs and obstructions in the highway. He had just reached the track when he was struck by a car of the defendant Company.

On the second trial of the action against the Street Railway Company for damages there was contradictory evidence as to the rate of speed at which the car was going at the time of the accident and also as to whether or not the bell was rung so as to warn the plaintiff of its approach. The jury's findings were as follows:

I. Were the defendants guilty of negligence? Yes.

II. If so, in what the negligence consist? Running at too high a rate of speed and not properly sounding the gong, also not having the car under proper control.

III. If the defendants were negligent was the injury to the plaintiff caused by their negligence? Yes.

IV. Was the plaintiff guilty of contributory negligence? Yes.

V. If so, in what does negligence consist? In not using more caution in crossing the railway tracks.

VI. Might the defendants' servants, after the position of the plaintiff became apparent, by the exercise of reasonable care have prevented the accident? No.

VII. At what sum to you assess the plaintiff's damages? Six hundred dollars.

On these findings the trial judge, Meredith C.J., ordered a verdict to be rendered for the defendants which was afterwards affirmed by the Divisional Court. The Court of Appeal reversed the latter judgment and set the verdict aside ordering a third trial of the action. The defendant company appealed to this court.

Hellmuth for the appellant.

Gibbons K.C. for the respondent.

TASCHEREAU J.—In my opinion this appeal should be allowed.

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THE LONDON STREET RAILWAY COMPANY v. BROWN.

Gwynne J.

GWYNNE J.—This is an appeal from the judgment of the Court of Appeal for Ontario, reversing a judgment rendered in favour of the defendants upon a trial before Meredith C.J. and ordering another trial of the case to be had. The case had been brought down to trial before when the jury having been unable to agree were dismissed and a second trial was ordered, at which trial, judgment having been entered for the defendants in accordance with the finding of the facts by the jury, the defendants insist that they are entitled in law to retain that judgment.

The action is for an injury sustained by the plaintiff occasioned, as he alleges, by the negligence of the defendants' servants in managing a street railway car running on Dundas street in the City of London, when the plaintiff was crossing the street on foot.

The plaintiff, having been examined as a witness on his own behalf, said that on the twentieth of July, 1899, he was going home from his work as a carpenter, and walked down the east side of Colborne street to where that street is crossed at right angles by Dundas street. That when he reached the curb-stone there at the north-east angle of Dundas and Colborne streets he stepped on to the street and looked round and saw no car on the railway and heard no bell, and that although within fourteen feet of the railway track on the ordinary footpath across the street in continuation of the sidewalk on Colborne street which he had come down he immediately started to cross Dundas street diagonally to the south-west corner of Dundas and Colborne streets, and that when he had proceeded but half way, that is to say, about forty-five or fifty feet, he was struck on the left shoulder by a street railway car proceeding from east to west.

Another witness, called by the plaintiff, named Joseph Waugh, was engaged in dumping gravel on the side-

walk at the said north-east corner, when the plaintiff arrived there. This witness saw him enter on the street from the curb-stone and proceed diagonally across Dundas street. Witness immediately, while dumping his gravel, heard some one exclaim "they have killed a man." Whereupon witness turned and saw the plaintiff down on the street. Witness says that until then he heard no gong but that then the gong began to ring vigourously. Witness said that a car had just before passed going from the west to the east and that he heard no gong from it either, although he had passed close to it when hauling the gravel to the said north-east corner. He said also that the car which struck the plaintiff was running very fast, at a rate which he judged to be eighteen or twenty miles an hour. He said that his reason for saying that rate was the distance the car ran after the accident before it was stopped, which distance, he says, was the whole length of a block, where it reached a house called the Gustier House. Being asked how far the place where the car was stopped was from the place where the plaintiff was struck, he said, he would judge it to be one hundred and fifty or may be, two hundred *yards*, (that is to say, from four hundred and fifty to six hundred feet). Now, another witness called for the plaintiff, named John McLean, testified that he was standing at the side-walk on the *north-west corner* of Dundas and Colborne streets when the plaintiff stepped from the curb stone on to the street at the north-west corner; that while the plaintiff was there, a street car passed coming from the west, ringing its gong, and went on east, and at the same time, witness saw the car coming from the east; that the plaintiff, immediately upon his entering on to the street from the curb-stone, proceeded diagonally across the street and just as he reached the centre of Dundas and Colborne streets and was about to put

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his foot upon the railway, he was struck by the right hand corner of the car which the witness had seen coming from the east; had one step been then withheld, the accident could not have happened. The gong, he says, of that car may have been ringing before the plaintiff was struck but witness was very much excited, as he said, and did not notice it, but when the plaintiff was struck it was ringing violently. This witness also judged of the speed at which the car was running, to be from fifteen to eighteen miles an hour, from the distance which it ran before it was stopped, which the witness also put near the Gustier House, which he estimated to be *probably*, three hundred feet from where the accident had occurred.

Another witness called by the plaintiff testified that he also was at the north-east angle of Dundas and Colborne streets when he saw the plaintiff start diagonally across the street. Witness immediately turned to pick up his dinner bucket and, as he did so, saw the car coming and, instantly, he heard the crashing of tools, (in a bag which the plaintiff carried on his shoulder). He says he did not hear the gong until he heard the crash of the tools.

From all this evidence it is clear that the plaintiff was struck almost instantaneously after his starting from the curb-stone on the north-east corner of Dundas and Colborne streets, during which time the car, as testified to by McLean, was plainly visible, coming from the east.

Now, on the part of the defence, the motorman and the conductor both swore that the gong was rung when the car had reached within from seventy-five to one hundred feet of Colborne street, and the motorman added that the car was going at the ordinary rate of about eight miles an hour and that it was stopped

within three cars length; that is, within one hundred feet from his applying the brakes.

A witness named Carrie Grantham, who lived on Dundas street and knew, as she said, the locality well, and was on the car at the time, testified that as the car approached Colborne street the gong was ringing and that, immediately before the accident, it was ringing vigourously and, while it was so ringing, she felt the shock of the accident. Of this she entertained no doubt. S also testified that she observed the place where the car stopped, and that this was a long distance east of the Gustier House and that, as well as she could judge, the car had not gone quite a quarter of a block from where the accident occurred until it was stopped. What the length of the block was, was not asked and did not appear.

Now, upon this evidence the jury, upon a charge to which the plaintiff has no just ground of complaint, have found that the injury suffered by the plaintiff was due to negligence of which the defendants were guilty in running at too high a rate of speed and not properly ringing the gong and not having the car under proper control, and that the plaintiff himself was guilty of contributory negligence in not using more caution in crossing the railway tracks and that the defendants' servants could not, after the position of the plaintiff became apparent, have by the exercise of reasonable care prevented the accident.

The finding of the jury, upon the question of the plaintiff's own negligence having contributed to the accident, is much more in accord with the evidence than was their finding upon the question as to the defendants' negligence, the evidence offered upon which question was, it must be admitted, of a most contradictory and not very satisfactory character.

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Upon the above findings the learned Chief Justice rendered judgment for the defendants dismissing the action.

The Court of Appeal for Ontario has reversed that judgment and ordered another trial, upon the ground, that they thought the finding of the jury upon the question of the contributory negligence of the plaintiff not satisfactory.

Now, that question, and what would constitute contributory negligence, appears in nearly two hundred pages of printed matter in the case before us to have been so very fully and clearly explained by the learned Chief Justice to the jury in a charge to which the plaintiff can have no reasonable ground of complaint, that we can see no reason to doubt that the jury in finding the plaintiff guilty of contributory negligence meant that the plaintiff was guilty of negligence without which, notwithstanding the negligence of which they found the defendants guilty, the accident could not have occurred, and in so finding, they were acting in accordance with the explanation of the term "contributory negligence" as explained to them by the learned Chief Justice, in his charge.

That finding was, we think, most fully justified by the evidence, and with a finding of the jury in perfect accord with the evidence upon that point, we do not think that the defendants should be remitted to the third trial in this case.

The appeal must therefore be allowed with costs and the judgment of the learned Chief Justice at the trial restored.

SEDGEWICK and GIROUARD JJ. concurred in the judgment allowing the appeal.

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DAVIES J.—This is an appeal from the judgment of the Court of Appeal for Ontario directing a new trial of the action and reversing the judgment of Chief Justice Meredith before whom the cause was tried, who had ordered judgment to be entered for the defendant. The action was brought for the recovery of damages for injuries sustained by the plaintiff owing to the alleged negligence of the appellants when attempting to cross the street railway track in the City of London.

The learned Chief Justice submitted to the jury a series of questions all of which were answered, and it was upon these answers that he directed the verdict to be entered for the defendants, the now appellants.

The questions and answers were as follows :

1. Were the defendants guilty of negligence ?

A. Yes.

2. If so, in what did the negligence consist ?

A. Running at too high a rate of speed and not properly sounding the gong, also not having the car under proper control.

3. If the defendants were negligent was the injury to the plaintiff caused by their negligence ?

A. Yes.

4. Was the plaintiff guilty of contributory negligence ?

A. Yes.

5. If so, in what does his negligence consist ?

A. In not using more caution in crossing the railway tracks.

6. Might the defendants' servants, after the position of the plaintiff became apparent, by the exercise of reasonable care, have prevented the accident ?

A. No.

7. At what sum to you assess the plaintiff's damages ?

A.. Six hundred dollars.

The learned judges of the Court of Appeal in Ontario thought that the findings of the jury were inconsistent.

Mr. Justice Osler in his opinion, in which Mr. Justice Moss concurred, says:

The express finding of the jury that the plaintiff's injury was caused by the specific acts of negligence of which the defendants were guilty

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makes it to my mind almost impossible to attribute to their further finding that the plaintiff should have used more caution in crossing the track the legal result of a finding of contributory negligence;

while Mr. Justice Lister found the finding of the jury "confused and unsatisfactory."

But if there is an apparent confusion and uncertainty or even of repugnance in the several findings of the jury, it will be found I think on a closer examination that it is only apparent and not real, and that it is to some extent inseparable from all findings, both of negligence on the defendants' part and contributory negligence on the plaintiff's. It would have perhaps been more satisfactory if the jury had pointed out more specifically the want of caution shewn by the plaintiff in crossing the track, but read as the answer must be in light of the evidence given at the trial and of the charge of the learned judge, there cannot be any doubt as to its meaning.

The findings of the jury on the whole amount to this, that while the accident would not have happened but for the negligence of the appellants, neither would it but for the negligence of the respondent, the plaintiff below. The learned Chief Justice in a comprehensive charge to the jury, in which he minutely reviewed all the facts, pointed out to them the nature of contributory negligence and its effect upon the plaintiff's action if found. The jury found specifically on evidence, which I think warranted the finding, that the plaintiff had been guilty of contributory negligence, and in answer to the next question say it consisted in want of caution in crossing the tracks. Read in the light of the facts as disclosed in the evidence, there can be no doubt as to the meaning of these answers. They find in effect that the plaintiff in crossing the track was careless and negligent, and did not take such ordinary precautions as a reasonable and prudent man under the circumstances should have taken. It is

equally true as found by them that the appellants were guilty of negligence in the running of their cars at the time and that but for such negligence the accident would not have occurred. But the rule of law in all such cases is too firmly established to admit of any doubt. Even if the accident is attributable in the first instance to the defendants' negligence, if it would not have occurred but for the negligence of the plaintiff himself he cannot recover.

The questions were peculiarly those proper for the consideration of a jury. They have found as stated above, after a full and fair trial and after having had the benefit of a carefully considered explanation of the law on the subject from the learned trial judge, a charge, the correctness of which, too, is not now challenged. I can see therefore no justification for sending the case back for further trial.

The case of *Rowan* v *Toronto Railway Co.* (1) referred to in the judgments below, does not seem to me to have any special application to the case now under review for the simple reason that in that case there was no finding of the jury specifically of contributory negligence as there is here.

The respondent's counsel, both in his factum and in his oral argument before this court, pressed very strongly the contention that the sixth question could have been put in an altogether different form and that the evidence shewed the negligence of the defendants' servants to have been so gross that no exercise of care on their part could have prevented the accident after the plaintiff's position on the track was discovered and that they therefore must be held liable. In support of this proposition he relied upon a statement made by Mr. Smith in his book on the law of negligence. But fo th s statement no authority was cited by Mr.

(1) 29 Can. S. C. R. 717.

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Smith, and it does not seem to me at any rate applicable to a case such as this where the jury have really found that the accident would not have occurred but for the plaintiff's negligence. If any such doctrine could be invoked to destroy the legal consequence of a negligent act or want of action which was the proximate cause of the injury complained of, it would go far to destroy the doctrine of contributory negligence altogether.

I think the appeal should be allowed with costs and the judgment of the learned Chief Justice restored.

Appeal allowed with costs.

Solicitors for the appellant: *Hellmuth & Ivey.*

Solicitors for the respondent: *Gibbons & Harper.*

THE SCHOONER "RELIANCE" (DEFENDANT) ..... APPELLANT;

AND

WALTER N. CONWELL AND R. E. CONWELL, OWNERS OF THE SCHOONER "CARRIE E. SAYWARD" AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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*Nov. 20, 21.

*Nov. 26.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Collision—Appreciation of evidence—Findings of fact—Appeal—Proper navigation—Negligent lookout.

In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance" the decision mainly depended on whether or not the lights of the lost schooner were burning as the admiralty rules required at the time of the accident. The local judge gave judgment against the "Reliance."

Held, that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not, therefore, be disturbed on appeal. *Santanderino* v. *Vanvert* (23 Can. S. C. R. 145), and *The Village of Granby* v. *Ménard* (31 Can. S. C. R. 14), followed.

APPEAL for a decision of the local judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada (1), in favour of the plaintiffs, owners of the "Carrie E. Sayward."

The facts are fully stated in the judgment of the court.

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

(1) 7 Ex. C. R. 181.

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Harris K.C. for the appellant. The burden of proving negligence is upon the plaintiff; *Morgan* v. *Sim* (1), per Lord Wensleydale at page 312. See also *Harris* v. *Anderson* (2); *Wakelin* v. *London & South Western Railway Co.* (3); *The Catherine of Dover* (4); *The Ligo* (5). Marsden on Collisions at Sea (4 ed.) p. 2. The plaintiff, in order to recover entire damages, must prove both care on his part, and want of it on the part of defendant; *The Clara* (6); his light was burning and could be seen; *The Florence P. Hall* (7). Where the evidence is conflicting, and there is reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen. *The Agda* (8). See Stockton's Admiralty, p. 565.

There is no obligation upon the master to be on deck if it is in charge of competent men; *The Obey* (9). We refer also to Marsden on Collisions at Sea (4 ed.) p. 49, 64, 71, 72, 331, 332, 333, 423, and Canadian cases there cited; *Emery* v. *Cichero; The Arklow* (10); *Ocean SS. Co.* v. *Apcar & Co.; The Arratoon Apcar* (11); *The Milan* (12); *Eastern SS. Co.* v. *Smith*; *The Duke of Buccleuch* (13); *The Fanny M. Carvill* (14). At the worst both vessels were in fault and it is submitted that if the evidence shews any fault whatever on the part of the defendant, it also shews an equally serious one on the part of the plaintiffs' ship, and in that case the damages will be divided; *The Lapwing* (15); and there should be no costs to either side in such a case. *The Lake St. Clair* (16); Stockton's Admiralty, p. 567; *The Heather*

(1) 11 Moo. P. C. 307.
(2) 14 C. B. N. S. 499.
(3) 12 App. Cas. 41.
(4) 2 Hag. Adm. 145.
(5) 2 Hag. Adm. 356.
(6) 12 Otto. 200.
(7) 14 Fed. Rep. 408.
(8) Cook Vice Ad. Cas. 1.
(9) L. R. 1 A. & E. 102.
(10) 9 App. Cas. 136.
(11) 15 App. Cas. 37.
(12) Lush. 388.
(13) [1891] A. C. 310.
(14) 13 App. Cas. 455n.
(15) 7 App. Cas. 512.
(16) Cook Vice Ad. Cas. 43.

Belle (1); *The Julia* (2); *The Picton* (3) at p 265; *The Sisters* (4); *The Santanderino* v. *Vanvert* (5); *The Maid of Auckland* (6).

Borden K.C. for the respondents. Article 11 was not only reasonably, but abundantly complied with; *The Fire Queen* (7); *The General Birch* (8).

In the Preliminary Act of the "Reliance," although mention is made, in stating the course of the vessel, that the helm of the "Reliance" was starboarded in compliance with a call from the "Sayward," this is not alleged to be a fault on the part of the "Sayward" contributing to the accident, the fault or default alleged being solely in regard to the light. The practice in Admiralty forbids the amendment of a contradiction of the Preliminary Act at the trial. *The Vortigern* (9); *The Frankland* (10).

The findings of the trial court are much better supported in this case than in *The Santanderino* v. *Vanvert* (5). See as to the weight of findings, *The Julia* (2); *The Araxes and The Black Prince* (11); *The Alice and The Princess Alice* (12); *Gray* v. *Turnbull* (13); *The Sisters* (4); *The Picton* (3); *Lefeuntéum* v. *Beaudoin* (14); *The Village of Granby* v. *Ménard* (15).

The judgment of the court was delivered by:

DAVIES J.—This is an appeal from the judgment of the local judge of the Nova Scotia Admiralty District, the Chief Justice of Nova Scotia (16), holding the schooner Reliance responsible for a collision which

(1) 3 Ex. C. R. 40.
(2) 14 Moo. P. C. 210.
(3) 4 Can. S. C. R. 648.
(4) 1 P. D. 117, 281; 2 Asp. Mar. Cas. 589; 3 Asp. Mar. Cas. 122.
(5) 23 Can. S. C. R 145.
(6) 6 Notes of Cases 240.
(7) 12 P. D. 147.
(8) 6 Q. L. R. 300.
(9) Swabey 518.
(10) L. R. 3 A. & E. 511.
(11) 15 Moo. P. C. 122.
(12) L. R. 2 P. C. 245.
(13) L. R. 2 Sc. App. 53.
(14) 28 Can. S. C. R. 89.
(15) 31 Can. S. C. R. 14.
(16) 7 Ex. C. R 181.

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took place between her and the schooner Carrie E. Sayward on the night of September 6th, 1900, on Quero Bank in the North Atlantic. The learned judge held that the Sayward was not in any respect to blame, and that the collision was caused by the negligent and careless navigation of the Reliance. The facts of the case are stated by him as follows:—

The Carrie E. Sayward, a fishing schooner of the Port of Provincetown, United States of America, while in pursuit of her fishing voyage was at anchor on Bank Quero, about one hundred miles east of Sable Island on the morning of the 6th September, 1900. The schooner had a crew of twelve men all told and had nearly completed her cargo of fish, when about three o'clock on the morning of the day mentioned she was run into by a schooner afterwards ascertained to be the Reliance of Nova Scotia, also fishing on the Bank Quero. The result of the collision was that the Carrie E. Sayward sank at her anchors, and the vessel and cargo were totally lost. The wind was blowing about a three or four knot breeze from the W. S. W. or S. W. The Carrie E. Sayward had occupied the berth at which she was anchored when the collision took place for about a fortnight, and three other fishing vessels, the Lottie Burns, A. K. Damon, and the Hattie Western were anchored southerly from her at distances varying from half a mile to a mile and a-half. The Reliance had also been fishing in the neighbourhood for some weeks at a distance of three or four miles from the Carrie E. Sayward, and having resolved to change her berth her master was, when the collision occurred, sailing through and among the vessels anchored in the immediate neighbourhood of the Carrie E. Sayward. Some hours before the collision the Reliance had passed and spoken the Lottie Burns while sailing N. N. W. or N. W. on the port tack, and having tacked was sailing a course near south and on the port tack when the collision occurred. At the time of collision the Reliance had all her sails set and was making between two and one half and three miles an hour speed. It is generally admitted on both sides that during the early part of the night of the 5th September the weather was fine, the sea smooth with a slight ground swell, a bright moonlight and clear starlight. The moon sank about 2 a.m. on the 6th September, and there is much discrepancy as to the state of the atmosphere after the moon had disappeared, one party alleging that the night became dark and cloudy, while the others declare that it continued fine and clear till the collision took place. There is no question that the Reliance struck the Carrie E. Sayward a square blow about midships, and that from the effects of that blow the

latter vessel with her cargo sank about two hours after the collision, after every effort had been made to save her by pumping. The only question for discussion therefore, is that raised by the defendant vessel in her preliminary act, namely:

The fault or default attributed to the Carrie E. Sayward is as follows:

(*a*) She was carrying no light at all.

(*b*) The light, if any, carried by her was very dim and indistinct, and not in accordance with the regulations for preventing collisions at sea.

(*c*) The light was not so constructed as to show a clear or uniform unbroken light, nor was the same visible at a distance of at least one mile, but was a very dim and indistinct light, and was only visible a few feet from the said ship.

The appellant contends, first, that the burden of proving negligence lay upon the plaintiff, the Sayward, and that if in the end the case is left in "even scales" and does not satisfy the court that the loss was occasioned by the neglect or default of the Reliance, the plaintiff cannot succeed. He further contends that the fault was solely that of the Sayward, and that at the worst both vessels were in fault and the damages should be divided.

This court has time and again laid down the rule that the decision of the trial judge on disputed questions of fact will not be reversed unless it is clearly shown that the evidence is against the finding. *Santandarino* v. *Vanvert* (1); *Village of Granby* v. *Ménard* (2).

Such a rule is peculiarly applicable to cases of collision at sea, where there is almost invariably a great conflict of testimony and the judge must necessarily be largely influenced by the demeanor and conduct of the witnesses when examined. The contention of the appellant as to the onus of proof is admitted. The court before condemning the defendant must be first satisfied that the loss was occasioned by his neglect

(1) 23 Can. S. C. R. 145. (2) 31 Can. S. C. R. 14.

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and further that the plaintiff was not guilty of any breach of the regulations which by possibility could have contributed to the collision. As to these legal propositions, there is no dispute.

The sole and only questions in this case are of fact and they turn mainly, if not altogether, upon the single question whether, on the night and at the time in question, the Carrie E. Sayward exhibited such a light as the statute requires of a vessel lying at anchor. If she had and displayed such a light, then it cannot be argued that the navigation of the Reliance was not unskillful or careless, and did not cause the accident. On this crucial question the finding of the trial judge is clear and explicit. He says:

> The evidence of the master and crew of the "Carrie E. Sayward" is very clear and positive as to the sufficiency of the light during the whole voyage up to the time of the collision,

and after giving a few of the more important parts of that evidence he goes on to say:

> This evidence of those on board the vessel, who have best opportunity of learning and knowing the facts as to which they testify, has not in my opinion been seriously, if at all, shaken or impugned by testimony on the part of the defendant vessel, while it is corroborated very strongly indeed by the evidence of those on board the schooners in the immediate neighbourhood of the Carrie E. Sayward, on the night of the collision, and as to the general character of the light on board the Carrie E. Sayward not only on the night and morning of the collision, but during the whole period of her voyage on the banks. These witnesses are Brier, master of the Lottie Burns; Silver, master of the Ada K. Damon; Marshall, master of the Hattie Western; and Gasper, a fisherman on the Ada K. Damon.

The contention of Mr. Harris, for the appellant, that the evidence does not justify this finding, he based upon two distinct grounds, one, that the lantern itself was defective, having been carelessly or badly repaired during the fishing voyage and after the vessel had left her port of departure, and the other, that even if the lantern was a good and efficient one, the light was

insufficient and not up to the regulations on the particular night in question, and especially at and for some time previous to the moment of the collision.

On the first point it seems sufficient to say that the learned Chief Justice had the lantern in court at the trial before him and therefore had the best possible opportunity of deciding whether it was as alleged leaky and otherwise defective. But in addition to that the evidence shows that the crew of the Reliance took possession of the lantern, which belonged to the Sayward, at the time of the collision, produced it in court for a time, and then took it away and have since retained it. If it was leaky or otherwise inherently defective, they surely would have given positive evidence on the point either from experiment or by ocular demonstration. The presumption against them from their not having done so, is to my mind conclusive. Then on the question whether the light was insufficient on the night in question and not up to that prescribed by the regulations, I think the findings of the learned Chief Justice fully justified by the evidence. It is true there is conflicting evidence. There generally is under the like circumstances. But while the three men who were on the deck of the Reliance testified that the light was not seen by them until just before the collision, it must be borne in mind that this is purely negative testimony and that it comes from witnesses who may fairly be classed as interested. On the other hand, not less than seven or eight witnesses testified positively that at the time or immediately before the collision took place they saw the light of the Sayward and that it was burning clearly and distinctly. While several of these witnesses belonged to the crew of the Sayward and might also be classed as interested, at least three of them were wholly disinterested and belonged to the vessels Lottie Burns, Ada K.

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Damon and Hattie Western, which were riding at anchor some distance from each other and at a distance of about a quarter of a mile, a mile and a mile and a half respectively from the Sayward. The overwhelming weight of testimony therefore establishes the fact that on the night in question and at the time of the collision the Sayward had her light burning and that it complied fully with the regulation. That fact being once established, the negligence and carelessness of the Reliance in running into the Sayward follows as of course. The conclusion is then irresistible that the latter vessel was so negligently navigated as to have caused the collision.

It was however contended that just before the Reliance ran into the Sayward, the look-out, or some one of the latter vessel, shouted out "keep her off," and that the look-out man of the Reliance repeated the order, which the steersman of the Reliance immediately acted upon by starboarding the helm, whereas if the order or shout had been to luff the two vessels would or might have cleared or at most met side to side. Whether the predicted result would have followed the suggested order to "luff" is little more than conjecture, it might perhaps be correctly called a pious hope. As a matter of fact the Reliance does not appear to have answered much, if any, to the starboarding of her helm, and there is no good reason to believe she would have answered more readily to it had it been ported. But leaving all such speculations aside, we find that the vessels were at that moment in immediate peril of collision, only in fact a few yards apart. The exclamation, shout, or order, whatever it may be termed, was one given in presence of an immediate and pressing danger, a natural cry coming from the lips of some one unknown at the moment, when it was evident the vessel he was aboard

of was in immediate peril of being run down. To ask this court to hold that such a cry was under the circumstances an order for which the owners of the Sayward should be held responsible as they would be for an improper order given by a person in authority, when navigating his own ship, is to ask something in support of which I venture to say no principle or authority could be cited. As a matter of fact the immediate order in which the helmsman of the Reliance acted when he starboarded his helm came from the look-out man of the Reliance. He says he took it up and repeated it from the cry he heard from the Sayward. But he was surely in as good a position to judge of the proper order to be given as was the unknown man aboard the Sayward, and if the order was a wrong one and contributed to the collision, those navigating the Reliance have themselves to blame.

On all the material disputed facts the learned Chief Justice has found in favour of the Sayward, and in my opinion his findings are fully justified by the evidence.

The appeal therefore should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Harris, Henry & Cahan.*

Solicitors for the respondent: *Borden, Ritchie & Chisholm.*

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ACTION—*Continued.*

consent and the payment had been made under duress and in error and, further, that there had been no ratification of the consent to the deduction of the amount by the subsequent payment, because the denial of access to the books and vouchers caused him to continue in the same error which vitiated his consent in the first place, and, further, that, even if the consent given could be regarded as amounting to transaction, it would be voidable on account of error as to fact. MIGNER *v.* GOULET — — **26**

2——*"Quebec Pharmacy Act" — Retroactive legislation — Suit for joint penalties — Second offences—Unlicensed sale of drugs—*50 *V. c.* 5, *s.* 7—*R. S. Q. Arts.* 11, 4035, 4039*b*, 4040, 4046, 4052.]—The amendment to the "Quebec Pharmacy Act" by 62 Vict. ch. 35, s. 2 (Que.) adding Art. 4039 (*b*), Revised Statutes of Quebec, has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. Penalties for several offences under the said Act may be joined in one action and, when the aggregate amount is sufficiently large, the action may be brought in the Superior Court as a court of competent jurisdiction under the statute. Such action may properly be taken in the name of the Pharmaceutical Association of the Province of Quebec.—It is improper in such an action to describe the subsequently charged offences as second offences under the statute, as a second offence cannot arise until there has been a condemnation for a penalty upon a first offence charged. L'ASSOCIATION PHARMACEUTIQUE DE QUÉBEC *v.* LIVERNOIS — — — **43**

AND *See* "QUEBEC PHARMACY ACT."

3——*Statement of claim — Action on foreign judgment — Original consideration — Ontario Judicature Act.*] Under the Ontario Judicature Act, as before it, the declaration in an action on a foreign judgement may include counts claiming to recover on the original consideration.—A promoter of a joint stock company borrowed money for the purposes of the company giving his own note as security. The lender was informed at the time of the manner in which the loan was to be, and was, applied. *Held*, that as the company did not exist at the time of the loan it could not be

ACTION—*Continued.*

the principal debtor nor the borrower a mere guarantor. The latter was, therefore, primarily liable for repayment of the loan. Judgment of the Court of Appeal (*Bugbee* v. *Clergue*, 27 Ont. App. R. 96) affirmed. CLERGUE *v.* HUMPHREY — — — — 66

4— —*Conveyance to married woman—Authorization of husband—Propre de communauté—Action pétitoire.*] *Quære.*—Is a deed of sale of lands in Quebec to a married woman, without the authorization of her husband, sufficient to support a petitory action? CHALIFOUR *v.* PARENT — — — — — 224

AND *see* PRESCRIPTION, 2.
" " TITLE TO LAND, 1.

5——*Municipal contract—Condition as to subletting—Consent of council—Pleading non-performance of condition—Right of action—Replication—Joinder of issues* — — — 34

See CONTRACT, 1.

6——*Voluntary conveyance of land*—13 *Eliz. ch.* 5—*Solvent vendor—Action by mortgagee*—91

See DEBTOR AND CREDITOR, 2.
" FRAUDULENT CONVEYANCE, 1.
" STATUTE OF ELIZABETH.

7——*Action in damages — Contract—Pleading —Conversion—Defect in plaintiff's title—Statute of frauds* — — — — 110

See PLEADING, 3.
" STATUTE OF FRAUDS.

8——*Cause of action—Contract by correspondence—Acceptance by post letter—Domicile*—186

See CONTRACT, 2.
" PLEADING, 4.

9——*Assessment and taxes—Appeal from assessment—Estoppel—Judgment confirming decision of municipal committee—Payment of taxes under protest—Res judicata*— — — 321

See ASSESSMENT AND TAXES.
" RES JUDICATA, 1.

10——*Municipal corporation — Water commissioners—Statutory body — Powers — Contract*—37 *V. c.* 79 *(Ont.)—Right of action* — 326

See MUNICIPAL CORPORATION, 6.
" WATERWORKS.

11——*Municipal drains—Continuing trespass—Limitation of actions—Actions ex delictu*—58 *V. c.* 4, *s.* 295 *(N.S.)* — — — 380

See LIMITATIONS OF ACTIONS, 2
" MUNICIPAL CORPORATION, 8.

ADMIRALTY LAW—*Collision—Appreciation of evidence—Findings of fact—Appeal—Proper navigation—Negligent lookout—Anchor light.*] In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance" the decision mainly depended on whether or not the lights on the lost schooner were burning as the admiralty rules required at the time of the accident. The local judge gave judgment against the "Reliance." *Held*, that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not, therefore, be disturbed on appeal. *Santanderino v. Vanvert* (23 Can. S. C. R. 145), and *The Village of Granby v. Ménard* (31 Can. S. C. R. 14), followed. SCHR. RELIANCE *v.* CONWELL — — — — — 653

ADULTERY—*Criminal Conversation—Damages—Statute of Limitations* — — 338

See CRIMINAL CONVERSATION.
See LIMITATIONS OF ACTIONS, 1.

ADVOCATE.

See SOLICITOR.

AFFIDAVIT—*Controverted election—Status of petitioner—Certified copy of voters' list—Imprint of Queen's Printer—Evidence—Form of petition—Jurat on affidavit of verification—Preliminary objections* — — — 437

See ELECTION LAW, 2.

AMENDMENT—*Parties on appeal—Practice—Proceeding in name of party deceased—Amendment in Court of Review—Jurisdiction—Interference with discretion on appeal* — 505

See APPEAL, 17.

APPEAL—*Practice on appeal—Supplementary evidence—Objections not taken at trial—Amendment of pleadings.*] On the hearing of the appeal, objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question. *Held*, following *The Exchange Bank of Canada v. Gilman* (17 Can. S. C. R. 108), that the court must refuse to receive the document as fresh evidence can not be admitted upon appeal. *Held*, also, that the defendant could not raise the question as to the sufficiency of the plaintiff's title, for the first time on appeal.—In this case it appeared that the allegations and conclusions of the plaintiff's declaration were deficient and the court, under sec. 63 of the Supreme and Exchequer Courts Act, ordered all necessary amendments to be made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence. *Piché v. City of Quebec* (Cass. Dig. (2 ed.) 497);

APPEAL—*Continued.*

Gorman v. Dixon (26 Can. S. C. R. 87) followed. City of Montreal *v.* Hogan — 1

2——*Jurisdiction—Amount in controversy—60 & 61 V. c. 34 (c) and (f).*] Sec. 1, sub-sec. (*f*) of 60 & 61 Vict. ch. 34, providing that in appeals from the Court of Appeal for Ontario "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different," is inoperative, being repugnant to sub-sec. (*c*).—The fact that sub-sec. (*f*) is placed last in point of order in the section does not require the court to construe it as indicating the latest mind of Parliament as the whole section came into force at the one time. City of Ottawa *v.* Hunter — 7

3——*Jurisdiction—Amount in dispute—R. S. C. c. 135, s. 29 (b).*] In an action by the lessee of lands leased for 4 years and 9 months at a rental of $250 per annum, to have the lease cancelled as being simulated as he was, at the time of the lease, owner of the property leased: *Held*, that no amount of $2,000 or upwards was in dispute, and that as the appeal did not relate to any title to land or tenements, nor to annual rents within the meaning of sec. 29 (*b*) of R. S. C. c. 135, it could not be entertained by the Supreme Court of Canada. Frechette *v.* Simoneau — — — — — 12

4——*Negligence—Trial by judge without a jury—Findings of fact—Evidence—Reversal by appellate court.*] In an action for damages for personal injuries, the trial judge, who heard the case without a jury, and before whom the witnesses were examined, held that the evidence of the witnesses for the defence was best entitled to credit and dismissed the action. The judgment was reversed by the Court of Review and its decision affirmed on further appeal by the Court of Queen's Bench. On appeal to the Supreme Court: *Held*, that as the the judgment at the trial was supported by evidence, it should not have been disturbed on appeal. Judgment appealed from reversed and judgment of the trial judge restored. Village of Granby *v.* Ménard — — — 14

5——*Quashing appeal — Jurisdiction — Withdrawal of defence raising constitutional question —R. S. C. c. 135 s. 29 (a).*] Where a motion to quash an appeal has been refused on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal. L'Association Pharmaceutique de Québec *v.* Livernois— — 43

6——*Appeal per saltum—Divisional Court judgment—62 V. (2), c. 11, s. 27 (Ont.)—Constitutional question — Indian lands — Legislative*

45½

APPEAL—*Continued.*

jurisdiction—Costs.] Under the provisions of section 26, sub-sec. 3 of the Supreme and Exchequer Courts Act, leave to appeal direct from the final judgment of the divisional court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario, and the fact that an important question of constitutional law is involved and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave. The Ontario Mining Company *v.* Seybold — — — — 125

7——*Jurisdiction—Motion to quash appeal—Dismissing appeal for reasons in court below.*] The court dismissed an appeal on the merits with costs, without determining a question as to the jurisdiction raised by the respondent at the hearing by motion to quash the appeal. Bastein *v.* Filiatrault *et ux.* — 129

and *see* Community, 1.
" " Husband and Wife, 1.

8——*Expiration of time limit — Forfeiture of right of appeal—Condition precedent—Ouster of jurisdiction—Objection taken by court—Waiver—Arts. 1020, 1209, 1220 C. P. Q.*] The provisions of articles 1020 and 1209 of the Code of Civil Procedure of the Province of Quebec, limiting the time for inscription and prosecution of appeals in the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may therefore be waived by the respondent. *Cimon* v. *The Queen* (23 Can. S. C. R. 62 referred to). —Art. 1220 C. P. Q. applies to appeals in cases of Petition of Right. Lord *v.* The Queen — — — — — — — 165

9——*Appeals from Court of Review—Legislative jurisdiction—B. N. A. Act, s. 101.*] The Parliament of Canada had power to pass 54 & 55 V. c. 25 authorising appeals from the Court of Review—Association St. Jean-Baptiste *v.* Brault — — — — — 172

And *see* Constitutional Law, 3.

10——*Right of appeal—Débats de compte—Issues on reddition—Amount in controversy—Jurisdiction.*] In an action, *en reddition de compte*, where items in the account filed exceeding in the aggregate two thousand dollars have been contested, the Supreme Court of Canada has jurisdiction to entertain the appeal. Bell *v.* Vipond — — — — — 175

11——*Practice—Appeal to Privy Council—Stay of execution.*] A judge in chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the court to the Judicial Committee of the Privy Council. Adams & Burns *v.* Bank of Montreal— 223

APPEAL—*Continued.*

12——*Appeal per saltum—Jurisdiction—R. S. C. c.* 135 *s.* 26 (3)] Leave to appeal direct to the Supreme Court from a judgment of a Divisional Court of the High Court of Justice under sec. 26, sub-sec. 3 of the Supreme and Exchequer Courts Act, cannot be granted unless it is clear that there is a right of appeal from such judgment to the Court of Appeal for Ontario. Ottawa Electric Co. *v.* Brennan — — — — — — — 311

13——*Ontario appeals—Special leave*—60 *&* 61 *V. c.* 34, *s.* 1 (*e*)]. Special leave to appeal from a judgment of the Court of Appeal for Ontario under 60 & 61 Vict. ch. 34, sec. 1 (e) will not be granted where the questions involved are not of public importance and the judgment of the Court of Appeal appears to be well founded. Royal Templars of Temperance *v.* Hargrove — — — — — — — 385

14—*Title to land—Troubles de droit—Eviction —Legal warranty—Issues on appeal—Parties.*] A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from judgments maintaining both the principal action and the action in warranty although he may have refused to do so in the court of first instance, but, should the appellate court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the pricipal action. Monarque *v.* Banque Jacques-Cartier — — — — 474

And *see* Title to Land, 2
" " Warranty, 1.

15——*Issue on appeal — Church discipline— Domestic tribunal.*] Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference. Ash *v.* The Methodist Church — — 497

16——*Exchequer appeal—Assessment of damages—Interference with findings of Exchequer Court Judge.*] The Exchequer Court Judge heard witnesses and upon his appreciation of contradictory testimony awarded damages to the respondents. The Crown appealed on the ground that the damages were excessive. *Held*, Gwynne and Girouard JJ. dissenting, that as it did not appear from the evidence that there was error in the judgment appealed from, the Supreme Court would not interfere with the decision of the Exchequer Court Judge. The Queen *v.* Armour — — — — 499

17——*Parties on appeal—Practice—Proceeding in name of deceased party—Amendment—Jurisdiction—Interference with discretion on appeal.*] Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertance inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *ès qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted amendment and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side), reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on its merits, and that, consequently, all the orders and judgments given were nullities. *Held*, reversing the judgment appealed from, (Q. R. 10 K. B. 511), The Chief Justice and Taschereau J. dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not have interfered. Price *v.* Fraser — 505

18——*Arbitration — Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate court.*] An objection as to arbitration and award being a condition precedent to an action for damages which had been waived or abandoned in the Court of Queen's Bench, cannot be invoked on an appeal to the Supreme Court.—On a cross appeal the Supreme Court refused to interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence. Hamelin *v* Bannerman — — — — — 534

And *See* Rivers and Streams, 1.

19——*New points—Concurrent findings—Evidence* — — — — — — 244

See Contract, 3.
" Public Policy.

20——*Assessment and taxes—Appeal from assessment—Judgment confirming decision of municipal committee—Failure to appeal to Supreme Court—Payment of taxes under protest—Res judicata* — — — — — 321

See Assessment and Taxes.
" Res Judicata, 1.

21——*Nuisance—Operation of electric railway —Powerhouse machinery—Vibration, smoke and noise—Injury to adjoining property—Evidence —Assessment of damages—Reversal on questions*

APPEAL—*Continued.*

of fact— — — — — — 463

See Nuisance.

22——*Findings of jury—Answers to questions—Verdict reversed on appeal*— — — 642

See Negligence, 10.

23——*Collision—Proper navigation—Negligent outlook—Sufficiency of anchor light—Findings of fact—Appreciation of evidence—Practice* 653

See Admiralty Law.

" Navigation.

ARBITRATION AND AWARD—*Riparian rights—Building dams—Penning back water—Improvement of watercourses—Art.* 5535 *R.S.Q.* — *Arbitration* — *Condition precedent* — *New grounds on appeal—Assessment of damages—Interference by appellate court* — — 534

See Rivers and Streams, 1.

ARBITRATION ON PUBLIC ACCOUNTS OF PROVINCE OF CANADA.

See Common School Fund.

" Dominion Arbitrators.

ASSESSMENT AND TAXES—*Appeal from assessment—Judgment confirming—Payment under protest—Res judicata.*] J., having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council and then applied to the Supreme Court of New Brunswick for a writ of certiorari to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. In 1897 he was again assessed under the same circumstances, appealing to the Supreme Court of Canada from and took the same course with the addition of the judgment refusing a certiorari, and that court held the assesement void and ordered the writ to issue for quashing, J. then brought an action for repayment of the amount paid for the assessment in 1896. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a certiorari to quash the assessment in 1896 was *res judicata* against J., and he could not recover the amount so paid. Jones *v.* City of St. John — 321

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Lease—Forfeiture* — *Company—Shareholder—Personal liability under covenant—Waiver* — — — — 572

See Landlord and Tenant.

ATTORNEY-AT-LAW.

See Solicitor.

BANKS AND BANKING—*Marked cheque* — *Fraudulent alteration* — *Payment by third party—Liability for loss—Negligence.*] A man dealing with others is under no duty to take precautions to prevent loss to the latter by the criminal acts of third persons, and the omission to do so is not, in itself, negligence in law.—B., having an account for a small amount in the Bank of Hamilton, had a cheque for five dollars marked good, and altering it so as to make it a cheque for $500, had it cashed by the Imperial Bank. The same day it went through the clearing house and was paid by the Bank of Hamilton to the Imperial Bank. The error was discovered next day by the former, and repayment demanded from the Imperial Bank and refused. The Bank of Hamilton then brought action to recover from the Imperial Bank $495, the sum overpaid on the cheque. The defendant contended that the cheque as presented to be marked good was so drawn as to make the alteration an easy matter, and the plaintiff's act in marking it in that form was negligence which prevented recovery. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 590), which affirmed that at the trial (31 O. R. 100), that there was nothing in the circumstances to take the case out of the rule that money paid by mistake can be recovered back, and the Bank of Hamilton was therefore entitled to judgment. Imperial Bank of Canada *v.* Bank of Hamilton — — — — — 344

(Leave to appeal to Privy Council has been granted.)

2——*Security for advances—Bank Act sec.* 74 *—Chattel mortgage—Conversion.*] H. held a chattel mortgage on a sawmill belonging to G., with the machinery and lumber therein, and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no priority over subsequent incumbrancers. Two months later G. gave H. a second mortgage on said property to secure a note for $794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes. G. being unable to purchase the logs asked the Merchants Bank for an advance. The bank, knowing G. to be financially embarassed, refused the advances to him but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of $3,500 G. assigned the contractor's order to the bookkeeper and agreed to cut the logs at a price fixed and deliver them to the bookkeeper at the mill site. The latter then assigned to the bank all monies to accrue in respect to the contract, which assignment was agreed to by the contractor, and a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. This purported to be done under sec. 74 of the Bank Act. Two or three days later G. made an assignment for benefit of his creditors, previous to which, however, the logs had arrived at the mill and were mixed with

BANKS AND BANKING—*Continued.*

other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage. *Held*, affirming the judgment of the Supreme Court of British Columbia (7 B. C. Rep. 465), that no property in the logs assigned to the bank had passed to G., and H. having no higher right than his mortgagor, could not claim them under his mortgage. –Shortly before G's assignment for benefit of his creditors his bookkeeper transferred to the bank a chattel mortgage given him by G. to secure payment of $800. The judgment appealed from ordered the assignee in bankruptcy to pay the bank the balance due on said mortgage. *Held*, reversing said judgment, that the assignee had been guilty of no acts of conversion and was not liable to repay this money. The mortgage was not given to secure advances and did not give the bank a first lien on the property. The bank was in the same position as if it had received the mortgage directly from G. when he was notoriously insolvent. HOUSTON *v.* THE MERCHANTS BANK OF HALIFAX — — — — 361

BILLS AND NOTES — *Promissory note—Indorser—Bills of Exchange Act*, 1890, *s.* 56—*Chattel mortgage—Consideration.*] Under sec. 56 of The Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee may be liable as an indorsee to the latter.—The provisions of the Ontario Chattel Mortgage Act requiring the consideration of a mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated, not their legal effect. ROBINSON *v.* MANN — — — — 484

2——*Contract by correspondence—Acceptance—Mailing of letter—Domicile—Indication of place of payment—Delivery of goods sold* — — 186

See CONTRACT, 2.

" PLEADING, 4.

BOUNDARY — *Title to land — Trespass — Overhanging roof—Right of view—Evidence—Boundary line—Servitude.*] In 1844 the defendants constructed a toll-house close to or on the boundary of their land with windows overlooking an adjoining vacant lot, and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or any subsequent owner till after the purchase of the lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable and defendants paid the costs of the necessary alteration. In 1900 the plaintiff instituted the present action against defendants to have the

BOUNDARY—*Continued.*

remaining projection of the roof demolished and the windows closed up. There was no evidence that there had ever been a division line established between the properties and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty. *Held*, affirming the judgment appealed from, Strong C. J. dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute and consequently that his action could not be maintained. PARENT *v.* THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES—556

AND *see* TITLE TO LAND.

CADASTRE — *Title to lands — Metes and bounds—Description—Sale en bloc—Possession beyond boundaries—Prescription—Construction of deed — Cadastral plan and description—Notice.*] C. purchased lands *en bloc* by a deed which described it by metes and bounds, but also making reference to its number on the Cadastral Plan of the Parish which described it as of greater width. *Held*, that the description left the true limits of the emplacement subject to determination according to the title held by C's. *auteur* which granted only the narrower width; that the registered title charged C. with notice, actual or implied, of the width so held, and he could not invoke an acquisitive prescription of title to the disputed strip of the land by ten years possession under the deed, and that no augmentation could take place in consequence of the cadastral description. CHALIFOUR *v.* PARENT — — — 224

AND *see* PRESCRIPTION, 2.

" TITLE TO LAND, 1.

CANADA, PROVINCE OF.

See COMMON SCHOOL FUND.

" DOMINION ARBITRATORS.

CANVASSER—*Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent* — — — — 488

See INSURANCE, FIRE, 4.

CASES—*The Asbestos and Asbestic Co.* v. *Durand* (30 Can. S. C. R. 285) discussed and approved — — — — — 392

2——*Archibald* v. *Town of Truro* (33 N. S. 401) affirmed — — — — 380

3——*Ash* v. *Methodist Church* (27 Ont. App. R. 702) affirmed — — — 497

4——*Association Pharmaceutique de Québec* v. *Livernois* (Q. R. 9 Q. B. 243) reversed — 43

5——*Association St. Jean-Baptiste* v. *Brault* (30 Can. S. C. R. 598) followed — — 172

6———— v. ———— referred to - 244

7——*Bailey* v. *King* (27 Ont. App. R. 703) affirmed — — — — 338

CASES—*Continued.*

8——*Bank of Hamilton* v. *Imperial Bank of Canada* (27 Ont. App. R. 590) affirmed — 344

9——*Bannerman* v. *Hamelin* (Q. R. 10 K. B. 68) affirmed — — — 534

10——*Bastien* v. *Filiatrault* (6 Rev. de Jur. 13) affirmed — — — 129

11——*Beauchemin* v. *Cadieux* (Q. R. 10 K. B. 255) affirmed — — — 370

12——*Bigelow* v. *The Queen* (31 N. S. Rep. 436) affirmed — — — 128

13——*Biggs* v. *Freehold Loan and Savings Co.* (26 Ont. App. R. 232) reversed — — 136

14——*Brown* v. *London Street Railway Co* (2 Ont. L. R. 53) reversed — — 642

15——*Bugbee* v. *Clerque* (27 Ont. App. R. 96) affirmed — — — — 66

16——*Burrard Election Case*; *Duval* v. *Maxwell* (8 B. C. Rep. 65) affirmed — — 459

17——*Conwell* v. *Schooner "Reliance"* (7 Ex. C. R. 181) affirmed — — 653

18——*Cooke* v. *Millar* (3 R. L. 446; 4 R. L. 240) referred to — — — — 471

19——*Delorme* v. *Cusson* (28 Can. S. C. R. 66) followed by Girouard J. — — — 556

20——*Drysdale* v. *Dugas* (26 Can. S. C. R. 20) followed — — — — — 463

21——*Ducondu* v. *Dupuy* (9 App. Cas. 150) followed — — — — — 563

22——*Exchange Bank of Canada* v. *Gilman* (17 Can. S. C. R. 108) followed — — 1

23——*Eckhardt* v. *Lancashire Insurance Co* (27 Ont. App. R. 373) affirmed — — 72

24——*Fraser* v. *Price* (Q. R. 10 K. B. 511) reversed — — — 505

25——*General Engineering Co.* v. *Dominion Cotton Mills Co* (6 Ex. C. R. 357) reversed — — — — — 75

26——*The George Matthews Co.* v. *Bouchard* (28 Can. S. C. R. 580) followed — 392

27——*Gorman* v. *Dixon* (26 Can. S. C. R. 87) followed — — — — — 1

28——*Granby, Village of* v. *Ménard* (31 Can. S. C. R. 14) followed — — — — 653

29——*Grand Trunk Railway Co.* v. *Coupal* (28 Can. S. C. R. 531) followed — — 210

30——*Guthrie* v. *Canadian Pacific Railway Co.* (27 Ont. App. R. 64) reversed — — — 155

31——*Hargrove* v. *Royal Templars of Temperance* (2 Ont. L. R. 79, 126) affirmed — 385

32——*Hogan* v. *City of Montreal* (31 Can. S.C. R. 1) distinguished — — — — 210

33——*Ince* v. *City of Toronto* (27 Ont. App. R. 410) affirmed — — — 323

34——*Keefer* v. *Phœnix Insurance Co.* (26 Ont. App. R. 277) reversed — — — 144

35——*Kent* v. *Ellis* (32 N. S. Rep. 549) affirmed — — — — 110

36——*King, The* v. *Adams* (Q.R. 18 S. C. 520) restored — — — 220

37——*Larose* v. *The King* (6 Ex. C. R. 425) affirmed — — — 206

38——*Littlejohn* v. *Soper* (1 Ont. L. R. 172) reversed — — — 572

39——*Lisgar Election Case* (20 Can. S. C. R. 1) followed — — — — — 459

40——*McDonald* v. *Lake Simcoe Ice and Cold Storage Co.* (26 Ont. App. R. 411) reversed — — — — 130

41——*MacDougall, Sons & Co.* v. *Water Commissioners of Windsor* (27 Ont. App. R. 566) affirmed — — — — 326

42——*Magann* v. *Auger* (Q. R. 16 S. C. 22) reversed — — — — 186

43——*Merchants Bank of Halifax* v. *Houston* (7 B. C. Rep. 465) affirmed in part and reversed in part — — — 361

44——*Messenger* v. *Town of Bridgetown* (33 N. S. Rep. 391) affirmed — — — 379

45——*Metropolitan Railway Co.* v. *Wright* (11 App. Cas. 152) followed — — 392

46——*Millard* v. *Darrow* (32 N. S. Rep. 334) reversed — — — 196

47——*Miller* v. *Green* (32 N. S. Rep. 129) affirmed — — — — 177

48——*Monarque* v. *Banque Jacques-Cartier* (Q. R. 10 Q. B. 245) affirmed — — — 474

49——*Montreal, City of*, v. *Hogan* (Q. R. 8 Q. B. 534) varied — — — — 1

50——*Ottawa Electric Co.* v. *St. Jacques* (1 Ont. L. R. 73) reversed — — — 636

51——*Perera* v. *Perera* ([1901] A. C. 354) followed — — — — — — 387

52——*Piché* v. *City of Quebec* (Cass. Dig. (2 ed 497) followed — — — — 1

53——*Queen, The* v. *Cimon* (23 Can. S.C. R. 62) referred to — — — — — 165

CASES—*Continued.*

54——*Ritz* v. *Schmidt* (13 Man. L. R. 419) reversed — — — — 602

55——*Robinson* v. *Mann* (2 Ont. L. R. 63) affirmed — — — — 484

56——*Rolland* v. *La Caisse d'Economie, etc.*, (24 Can. S. C. R. 403) discussed — — 244

57——*Ryan* v. *Willoughby* (27 Ont. App. R. 135) affirmed — — — — 33

58——*Salomon* v. *Salomon & Co.* ([1897] A. C. 22) followed — — — — — 572

59——*Santanderino* v. *Vanvert* (23 Can. S.C.R. 145) followed — — — — 653

60——*Short* v. *Federation Brand Salmon Canning Co.* (7 B. C. Rep. 197) affirmed — 378

61——*Sinclair* v. *Preston* (13 Man. L. R. 228) affirmed — — — — 408

62——*Snell* v. *Toronto Railway Co.* (27 Ont. App. R. 161) affirmed — — 241

63——*Standard Life Assurance Co.* v. *Trudeau* (Q. R. 9 Q. B. 499) affirmed — — 376

64——*Summers* v. *Commercial Union Assurance Co.* (6 Can. S. C. R. 19) followed — 488

65——*Sun Life Assurance Co.* v. *Elliott* (7 B. C. Rep. 189) reversed — — — 91

66——*Underwood* v. *Maguire* (Q. R. 6 Q. B. 237) overruled — — — — 186

67——*Union Bank* v. *Morris* (27 Ont. App. R. 396) affirmed — — — 594

68——*Union Colliery Co.* v. *The Queen* (7 B. C. Rep. 247) affirmed — — — 81

69——*Wilson* v. *Hotchkiss* (2 Ont. L. R. 261 affirmed — — — 481

70——*Wilson* v. *Windsor Foundry Co.* (33 N. S. Rep. 21) affirmed — — — 381

CERTIORARI—*Nova Scotia Liquor License Act*, 1895—*Conviction by magistrate—Jurisdiction—Application for certiorari — Affidavit—Constitutional law—Powers of provincial legislature—Matter of procedure.*] The Supreme Court of Canada affirmed the decision appealed from, (31 N. S. Rep. 436) by which it had been held that section 117 of the Nova Scotia Liquor License Act, 1895, was intended to operate, not in the sense of abolishing the writ of certiorari but merely prescribed a mode of procedure providing that, in the absence of the affidavit denying the commission of the offence charged, as required by that section, the court had no power to grant a writ of certiorari and, consequently, an application for a writ was dismissed. Mr. Justice Gwynne, dissented and was of opinion that a question raised as to the constitutionality of the Liquor License Act ought to have been decided before entering upon the technical point respecting the production of the affidavit. BIGELOW *v.* The QUEEN. — — — — — — 128

CERTIORARI—*Continued.*

2——*Assessment of taxes —Appeal from assessment—Estoppel—Judgment confirming decision of municipal committee—Payment of taxes under protest—Res judicata* — — — 321

See ASSESSMENT AND TAXES.

" RES JUDICATA, 1.

CHATTEL MORTGAGE — *Security for advances—Banks and banking—Bankrupt Act, sec. 74—Conversion.*] H. held a chattel mortgage on a sawmill belonging to G., with the machinery and lumber therein, and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no priority over subsequent incumbrances. Two months later G. gave H. a second mortgage on said property to secure a note for $794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes. G. being unable to purchase the logs asked the Merchants Bank for an advance. The bank, knowing G. to be financially embarassed, refused the advances to him but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of $3,500 G. assigned the contractor's order to the bookkeeper and agreed to cut the logs at a price fixed and deliver them to the bookkeeper at the mill site. The latter then assigned to the bank all monies to accrue in respect to the contract, which assignment was agreed to by the contractor, and a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. This purported to be done under sec. 74 of the Bank Act. Two or three days later G. made an assignment for benefit of his creditors, previous to which, however, the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage. *Held*, affirming the judgment of the Supreme Court of British Columbia (7 B. C. Rep 465), that no property in the logs assigned to the bank had passed to G., and H. having no higher right than his mortgagor, could not claim them under his mortgage.—Shortly before G.'s assignment for benefit of his creditors his bookkeeper transferred to the bank a chattel mortgage given him by G. to secure payment for $800. The judgment appealed from ordered the assignee in bankruptcy to pay the bank the balance due

CHATTEL MORTGAGE—*Continued.*

on said mortgage. *Held*, reversing said judgment, that the assignee had been guilty of no acts of conversion and was not liable to repay this money. The mortgage was not given to secure advances and did not give the bank a first lien on the property. The bank was in the same position as if it had received the mortgage directly from G. when he was notoriously insolvent. HOUSTON *v.* THE MERCHANTS BANK OF HALIFAX — — — 361

2——*Promissory note — Indorser — Bills of Exchange Act*, 1890, *s.* 56—*Chattel mortgage —Consideration.*] Under sec. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note not indorsed by the payee may be liable as an indorser to the latter.—The provisions of the Ontario Chattel Mortgage Act requiring the consideration of a mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated not their legal effect. ROBINSON *v.* MANN — — 484

CHURCH — *Decision of domestic tribunal— Conference of Methodist Church—Church discipline* — — — — — — 497

See APPEAL, 15.
" PRACTICE, 10.

CIVIL CODE—*Arts.* 1047, 1049, 1140 *C. C.* (*Délit; Payment*) — — — — — 26

See ACTION, 1.

2——*Art.* 1301 (*Married women*) — 129

3——*Arts.* 85, 86 *C. C.* (*Election of domicile*)—186

See DOMICILE.

4——*Arts.* 1503, 2168, 2174, 2185, 2210, 2227, 2242, 2251, 2254 — — — — 224

See PRESCRIPTION, 2.
" TITLE TO LAND, 1.

5——*Arts.* 989, 1000, 1067, 1077, 2188 — 244

See CONTRACT, 3.
" PUBLIC POLICY, 2.

6——*Art.* 610 (*Unworthy heir*) — — 576

See INSURANCE, LIFE.

7——*Arts.* 1506, 1508, 1520 (*Warranty by Vendor*) — — — — — 474

See WARRANTY, 1.

8——*Art.* 1085 *C. C.* (*Conditional obligations*) — — — — — 582

See CROWN LANDS, 2.

CIVIL CODE OF PROCEDURE — *Arts.* 1020, 1209, 1220 *C. P. Q.* (*Appeals*) — 165

See APPEAL, 8.

CIVIL CODE—*Continued.*

2——*Arts.* 85, 94, 129, 1164, 1173, 1175, 1176 *C. P. Q.* (*Oppositions to judgments, etc.*) — 186

See PLEADING, 4.

3——*Arts.* 1 *and* 279 *C. P. Q.* (*Péremption d'instance* — — — — — 471

See PÉREMPTION D'INSTANCE.

4——*Art.* 454 *C. C. P.* (*Péremption d'instance*) — — — — — 471

See PÈREMPTION D'INSTANCE.

5——*Arts.* 186, 187, 188 *C. P. Q.* (*Actions in warranty*) — — — — 474

See WARRANTY, 1.

COMMON SCHOOL FUND — *Accounts of the Province of Canada—Common school fund and lands—Administration by Ontario—Remitting price of land sold—Default in collections— Withholding lands from sale—Uncollected balances—Jurisdiction of Dominion arbitrators.*] By the submission of 10th April, 1890, amongst other matters submitted to the Dominion Arbitrators were the following: "(*h*) The ascertainment and determination of the principal of the Common School Fund, the rate of interest which would be allowed on such fund, and the method of computing such interest. (*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold." The Province of Quebec claimed that Ontario was liable (1) for the purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence had been used, have been collected from the purchasers by Ontario, but which, owing to the neglect and default of the provincial officers, have not been collected but have been lost; (3) for lands which might have been sold but have not been sold; and (4) for all uncollected balance of purchase money. *Held*, Gwynne J. dissenting, that the Dominion arbitrators have jurisdiction, under the submission, to hear and adjudicate upon the claims so made by the Province of Quebec. THE PROVINCE OF QUEBEC *v.* THE PROVINCE OF ONTARIO AND THE DOMINION OF CANADA. *In re* COMMON SCHOOL FUND AND LANDS — — — 516

COMMUNITY—*Husband and wife—Married woman—Judicial separation as to property— Debts of community—Obligation by wife—Art.* 1301 *C. C.—Nullity—Public policy—Dation en paiement.*] The Supreme Court affirmed the judgment appealed from (6 Rev. de Jur. 13) by

COMMUNITY—*Continued.*

which it had been held that *conjoints* could not avoid the prohibition decreed by Art. 1301 C.C. by disguising a contract made with a third party after the community between them had been judicialy dissolved; that, after dissolution of community, the wife cannot be held liable for the debts of the community, even where she may have made payment through error, for any greater part of such debts than that fixed by law and could not oblige herself therefor with her husband nor guarantee his obligations in respect thereto, and that, after the dissolution, the husband remained liable for debts of the community contracted by him, saving his recourse against his wife or her heirs (should they accept the community) for the moiety of such debts. BASTIEN *v.* FILIATRAULT *et ux* — — — — 129

2——*Construction of deed — Sale to married woman—Propre de communauté—Arts.* 1503, 2168, 2174, 2185, 2210, 2227, 2242, 2251, 2254, *C. C.* — — — — 224

See PRESCRIPTION, 2.
" TITLE TO LAND, 1.

COMPANY LAW—*Promotion of joint stock company—Loan to promoter — Personal liability.*] A promoter of a joint stock company borrowed money for the purposes of the company giving his own note as security. The lender was informed at the time of the manner in which the loan was to be, and was, applied. *Held*, that as the company did not exist at the time of the loan it could not be the principal debtor nor the borrower a mere guarantor. The latter was, therefore, primarily liable for repayment of the loan. Judgment of the Court of Appeal (*Bugbee* v. *Clergue*, 27 Ont. App. R. 96) affirmed. CLERGUE *v.* HUMPHREY — 66

2——*Indictable negligence — Criminal law — Manslaughter—Indictment against body corporate—Crim. Code, s.* 213—*Fine.*] Under sec. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control.—The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment.—As sec. 213 provides no punishment for the offence the common law punishment of a fine may be imposed. THE UNION COLLIERY CO. *v.* THE QUEEN— — 81

3——*Principal and agent—Promoters of company—Agent to solicit subscriptions—False representations—Ratification—Benefit.*] Promoters of a company employed an agent to solicit subscriptions for stock and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters: *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 261) that the latter, having benefited by the sum paid by W. were liable to repay it though they did not authorize it and had no knowledge of the false representations of their agent. *Held*, per Strong C. J., that neither express authority to make the representations nor subsequent ratification or participation in benefit were necessary to make the promoters liable; the rule of *respondeat superior* applies as in other cases of agency. MILBURN *v.* WILSON — — — — — 481

4——*Joint stock company—Payment for shares—Equivalent for cash—Written contract.*] M. and C. each agreed to take shares in a Joint Stock Company paying a portion of the price in cash and receiving receipts for the full amount the balance to be paid for in future services. The company afterwards failed. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396) that, as there was no agreement in writing for the payment of the difference by money's worth instead of cash under sec. 27 of the Companies Act, M. & C. were liable to pay the balance of the price of the shares to the liquidator of the company. MORRIS *v.* UNION BANK OF CANADA; UNION BANK OF CANADA *v.* MORRIS; CODE *v.* UNION BANK OF CANADA — — — — — — — 594

5——*Lease to Joint Stock Company—Shareholders—Personal liability—Assignment for benefit of creditors—Forfeiture* — — — 572

See LANDLORD AND TENANT.

COMPENSATION—*Pleading — Declinatory exception—Incompatible pleas—Waiver—Jurisdiction—Opposition to judgment—Arts* 85, 94, 129, , 1164, 1173, 1175, 1176 *C. P. Q.—Arts* 85 *and* 86 *C. C.—Post Office Act* — — 186

See PLEADING, 4.
" SET-OFF, 1.

2——*Overcharges on fees—Counterclaim in suit by sheriff—Signed bill of costs.* — — 615

See SHERIFF.
" SOLICITOR.

CONDITION—*Municipal contract—Condition as to sub-letting—Consent of council—Pleading non-performance of condition—Right of action—Replication—Joinder of issues.* — — 34

See CONTRACT, 1.

2——*Forfeiture of right to appeal—Expiration of time limit—Ouster of jurisdiction—Condition*

CONDITION—*Continued.*

precedent—Waiver—Objection taken by the court —Arts 1020, 1209, 1220 C. P. Q. — 165

See APPEAL, 8.

" WAIVER, 1.

3——*Deed of lands—Riparian rights—Building dams—Penning back water— Warranty— Improvement of watercourses. Arts.* 5535 R. S. Q. *—Arbitration — Condition precedent — Assessment of damages* — — — — 534

See RIVERS AND STREAMS, 1.

4——*Location of Crown Lands—Suspensive condition—Sales by local agents* — 582

See CROWN LANDS, 2.

" TIMBER LICENSES.

CONSPIRACY — *Contract — Unlawful consideration — Répétition de l'indu — Account — Public policy—Monopoly—Trade combination—Conspiracy—Malum prohibitum—Malum in se —Interest on advances—Foreign laws—Matters judicially noticed* — — — — 244

See CONTRACT, 3.

" PUBLIC POLICY, 2.

CONSTITUTIONAL LAW — *Appeal — Jurisdiction — Pleadings raising constitutional questions—Withdrawal of plea—R. S. C. c.* 135, *s.* 29 (*a*).] Where a motion to quash an appeal has been refused on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal. ASSOCIATION PHARMACEUTIQUE DE QUÉBEC *v.* LIVERNOIS — — — — — — 43

2——*Appeal per saltum —Divisional Court judgment—62 V.* (2), *c.* 11, *s.* 27 (*Ont.*)*—Constitutional question—Indian lands, Legislative jurisdiction —Costs.*] Under the provisions of section 26, sub-sec. 3 of the Supreme and Exchequer Courts Act, leave to appeal direct from the final judgment of a divisional court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario, and the fact that an important question of constitutional law is involved and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave. THE ONTARIO MINING COMPANY *v.* SEYBOLD — — — — — 125

3——*Legislative powers—Appeals from the Court of Review.*] The power of Parliament under sec. 101 of the B. N. A. Act, respecting a general court of appeal for Canada, is not restricted to the establishment of a court for the administration of laws of Canada and, it had authority to enact the third section of 54 & 55 V. c. 25, authorising appeals from the Court of Review. On merits, appeal allowed with coast, Girouard J. dissenting, *Association St. Jean-Baptiste* v. *Brault* (30 S. C. R. 598) followed. ASSOCIATION ST. JEAN-BAPTISTE *v.* BRAULT — — 172

CONTRACT—*Municipal work—Condition as to sub-letting—Consent of council—Pleading—Joinder of issue.*] Where a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation it is incumbent on the contractor to obtain such consent before sub-letting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do.—In an action against the sub-contractor the latter pleaded the want of assent by the council, whereupon the plaintiff replied that the assent was withheld at the wrongful request and instigation of the defendant, and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract. Issue was joined on this replication. *Held*, that the only issue raised by the pleadings was whether or not the defendant had wrongfully caused the consent to be withheld and that the plaintiff had failed to prove his case on that issue. RYAN *v.* WILLOUGHBY — — — — — — — 34

2——*Contract by correspondence—Acceptance—Mailing—Domicile—Indication of place of payment—Bills and notes—Delivery of goods sold.*] In the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but it is complete on the mailing of such letter in the general post-office. *Underwood v. Maguire* (Q. R. 6 Q. B. 237) overruled. Article 84 of the Civil Code, as amended by 52 Vict. ch. 48 (Que.), providing that the indication of a place of payment in any note or writing should be equivalent to election of domicile at the place so indicated, requires that such place should be actually designated in the contract. [The judgment appealed from, affirming the decision of the Superior Court (Q. R. 16 S. C. 22), was reversed]. MAGANN *v.* AUGER — 186

AND *see* PLEADING, 4.

3——*Sale of land—Vendor and purchaser — Artifice— Misrepresentation — Consideration of contract—Error—Laches — Possession and administration—Ratification — Waiver —Estoppel —Arts.* 992, 993, 1053, 1054 *C.C.*] B having a hotel scheme under promotion, agreed to purchase an old building from R in order to prevent it from falling into the hands of persons

who might use it for a brewery and thereby cause a nuisance and ruin his enterprise. R. by falsely representing that he had a serious offer for the purchase or lease of the property for the purpose of a brewery, induced B to close on his agreement, and take a deed of the property, the payment of the price being deferred. On discovery of the falsity of these representations B notified R that he repudiated the contract, and invited him to bring an action to test its validity if he was unwilling to give a release and take back the property. The vendor delayed some time in taking action for the recovery of the price and, in the meantime, B remained in possession and collected the rents. *Held*, that, under the provisions of the Civil Code, as the vendor had made false representations which deceived the purchaser as to the principal consideration for which he contracted, he could not recover; that the purchaser had a right to have the contract rescinded on the ground of error; that, under the circumstances, the delay in bringing the action could not be imputed as laches of the defendant, nor waiver of his right to have the contract set aside, and that defendant's administration of the property in the meantime could not be construed as ratification of the contract. BARNARD *v.* RIENDEAU — — — — 234

4—— *Unlawful consideration — Répétition de l'indu—Account— Public policy — Monopoly—Trade combination—Conspiracy—Malum prohibitum—Malum in se—Interest on advances—Foreign Laws—Arts.* 989, 1000, 1067, 1077, 2188 *C. C.—Matters judicially noticed.*] In an action to recover advances with interest under an agreement in respect to the manufacture of binder twine at the Central Prison at Toronto, the defence was the general issue, breach of contract and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract. *Held*, *per* Sedgewick, King and Girouard JJ. that the evidence disclosed a conspiracy and that, although under the provisions of the Civil Code the money so advanced could be recovered back, yet no interest before action could be allowed thereon, as the law merely requires that the parties should be replaced in the position they respectively occupied before the illegal transactions took place. *Rolland* v. *La Caisse d'Economie Notre-Dame de Quebec*, (24 S. C. R. 405) discussed and *l'Association St. Jean-Baptiste de Montréal* v. *Brault*, (30 S. C. R. 598) referred to. *Held* also, that laws of public order must be judicially noticed by the court *ex proprio motû*, and that, in the absence of any proof to the contrary the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractu.*—*Per* Taschereau J. (dissenting.)—1. A new point should never be entertained on appeal, if evidence could have been brought to affect it, had objection been taken at the trial. 2. In the present case, the concurrent findings of both courts below, amply supported by evidence ought not to be disturbed, and as the company itself prevented the performance of the condition of the agreement in question requiring the assent of the Government to the transfer of the binder twine manufacturing contract, its non-performance cannot be admitted as a defence to the action upon the executed contract.—Gwynne J. also dissented on the ground that the judgment appealed from proceeded upon wholly inadmissable evidence, and that, therefore, the action should have been dismissed and further, that the evidence which was received and acted on, though inadmissible for the purposes for which it was intended, showed that the action was based upon a contract between the plaintiffs and defendant for the commission of an indictable offence; that neither party could recover either by action or by counter-claim upon such a contract and, therefore that the incidental demand, as well as the action, should be dismissed. THE CONSUMERS CORDAGE COMPANY *v.* CONNOLLY — — — — 244

5——*Sale of goods—Evidence to vary written instrument — Admission of evidence.*] The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 21) which in effect held, under the special circumstances of the case, involving dealings with two companies connected in business and having almost similar names, that it was not inconsistent with a written agreement with the plaintiff to prove that defendant supposed he was dealing with another party with whom he had made other arrangements in respect to payment for goods purchased. WILSON *et al. v.* WINDSOR FOUNDRY CO. — — — — — 381

6——*Interim receipt—Insurance against fire—Principal and agent—Lex loci—Lex fori—Acts of sub-agent.*] The *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different. CANADIAN FIRE INSURANCE CO. *v.* ROBINSON — — 488

AND *see* INSURANCE, FIRE, 4.

7——*Contract — Duration — Right to cancel—Repugnant clauses.*] A contract for supplying light to a hotel contained the following provisions: "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. * * * Special conditions if any. This contract to remain in force after the expi-

CONTRACT—*Continued.*

ration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer. *Held*, reversing the judgment of the Court of Appeal (1 Ont L R. 73) that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term. Ottawa Electric Co. *v.* St. Jacques — — — 636

8——*Action in damages—Contract—Pleading—Conversion—Defect in plaintiff's title—Statute of frauds* — — — — 110

See Pleading, 3.

" Statute of frauds.

9——*Covenant in mortgage—Rate of interest—Payment by instalments* — — — 136

See Interest, 1.

" Mortgage, 2.

10——*Illegal consideration—Lottery—Co-relative agreements* — — — — 172

See Constitutional Law, 3.

11——*Sale of land—Action for price—Counterclaim—Specific performance—Costs*— — 196

See Costs, 2.

" Sale of land, 1.

12——*Municipal corporation—Water commissioners—Statutory body—Powers—Contract—37 V. c. 79 (Ont.)—Right of action* — 326

See Municipal Corporation, 6.

" Waterworks.

13——*Condition of policy of fire insurance—Breach—Further insurance—Interest of insured—Mortgagor as owner—Pleading—Practice—Waiver—Estoppel* — — — — 373

See Estoppel, 1.

" Insurance Fire, 3.

" Mortgage, 3.

CONVERSION—*Action in damages—Contract—Pleading—Defect in plaintiff's title—Statute of frauds* — — — — 110

See Pleading, 3.

" Statute of Frauds.

2——*Banks and banking—Advances on security—Chattel mortgage—Insolvent debtor—Bank Act, sec. 74* — — — — — 361

See Banks and Banking, 2.

" Chattel Mortgage, 1.

COPYRIGHT—*Publication of dictionary—Source of information—Infringement—Evidence—Textual copy.*] In an action for infringement of copyright in a dictionary the unrebutted evidence shewed that the publication complained of treated of almost all its subjects in the exact words used in the dictionary first published and repeated a greater number of errors that occurred in the plaintiff's work. *Held*, affirming the judgment appealed from, that the evidence made out a *primâ facie* case of piracy against the defendants which justified the conclusion that they had infringed the copyright. Cadieux *v.* Beauchemin — 370

CORPORATIONS.

See Company Law.

" Municipal Corporation.

CORRESPONDENCE—*Libel by statement in letter — Privileged communication — Malice — Charge to jury—Evidence* — — 177

See Libel.

COSTS—*Appeal per saltum—Divisional Court judgment—62 V.* (2) *c.* 11, *s.* 27 (*Ont.*)—*Constitutional question — Indian lands — Legislative jurisdiction.*] On special application by the plaintiff to appeal direct from the judgment of the Queen's Bench Division of the High Court of Justice for Ontario, leave to appeal *per saltum* was granted on the ground that an important question of constitutional law was involved, and that neither party would be satisfied with any judgment that might be obtained in the Court of Appeal for Ontario. Under the circumstances the costs of the application were directed to be costs in the cause to the successful party. The Ontario Mining Co. *v.* Seybold — — — — 125

2——*Contract for sale—Action for price—Counterclaim—Specific performance—Costs.*] In an action for the price of land under an agreement for sale, or in the alternative for possession, defendant filed a counterclaim for specific performance, and paid into court the amount of the purchase money and interest demanding therewith a deed with covenants of warranty of title. Plaintiff proceeded with his action and recovered judgment at the trial for the amount claimed and costs, including costs on the counterclaim, the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the court *en banc*. *Held*, that as the defendant had succeeded on his counterclaim he should not have been ordered to pay the costs before receiving his deed, and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the court below *en banc*, and to the Supreme Court of Canada, against plaintiff. Parties to pay their own costs in court of first instance. *Held*, per Gwynne J.—Defendant should have all costs subsequent to the payment into court. Millard *v.* Darrow — — — 196

COSTS—*Continued.*

3——*Injuries sustained through obstruction on highway—Municipal corporation—Negligence—Telephone poles—Parties to suit—Costs—Proximate cause of accident* — — — 61

See Municipal Corporation, 3.

" Negligence, 1.

" Telephone Company.

4——*Counterclaim by solicitor against sheriff's fees—Signed bill of costs—Set off* — — 615

See Sheriff.

" Solicitor.

COUNTERCLAIM — *Solicitor and client—Action by sheriff for fees—Pleading—Setting off claim for overcharges in bills paid—Signed bill of costs.*] In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested, because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such an action, the solicitor may set up by way of counterclaim his costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. Taylor *v.* Robertson—615

And *see* Sheriff.

" " Solicitor.

2——*Action for price of land—Counterclaim for specific performance of contract—Order for conveyance and payment—Costs* — — 196

See Costs, 2.

" Sale of Land, 1.

COUNTY COURT—*Statute—Amending Act—Retroaction—Sale of lands—Judgments and orders.* Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under rules 803 *et seq.* of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and in the following session the legislature passed an Act providing that "in the case of a County Court judgment, an application may be made under rule 803 or rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment." *Held*, Sedgewick J. dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments and not to orders and judgments of the County Courts. *Held* further, reversing the judgment of the King's Bench (13 Man. L. R. 419) Davies J. dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force but not from the date on which they were made. *Held*, per Sedgewick J., that the clause had no retroactive operation at all. Schmidt *v.* Ritz — — — — 602

COURT OF REVIEW—*Appeal—Jurisdictioon—Legislative powers—Constitutional Law* — — — — — — 172

See Appeal, 9.

2——*Parties on appeal—Practice—Proceeding in name of party deceased—Amendment on review—Jurisdiction—Interference with discretion on appeal* — — — — — 505

See Appeal, 17.

CRIMINAL CONVERSATION—*Statute of limitations—Damages.*] The statute of limitations is not a bar to an action for criminal conversation where the adulterous intercourse between defendant and the plaintiff's wife has continued to a period within six years from the time the action was brought. *Quaere*—Does the statute only begin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within the six years preceding the action? King *v.* Bailey — — — — — — 338

CRIMINAL LAW — *Negligence — Manslaughter—Indictment against body corporate—Crim. Code, s.* 213—*Fine.*] Under sec. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control.—The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment.—As sec. 213 provides no punishment for the offence the common law punishment of a fine may be imposed on a corporation indicted under it. The Union Colliery Company *v.* The Queen — — — — 81

2——*Quashing appeal—Jurisdiction—Raising constitutional question—Withdrawal of plea—"Quebec Pharmacy Act"—Retroactive legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs* — — — 43

See Appeal, 5.

" "Quebec Pharmacy Act."

" Statute, 2.

CROSS-DEMAND — *Pleading — Declinatory exception—Incompatible pleas—Waiver—Cause of action—Jurisdiction—Domicile — Opposition to judgment* — — — — — 186

See CONTRACT, 2.
" PLEADING, 4.

CROWN—*Negligence—Militia class firing — Government rifle range—Public work—Officers and servants of the Crown—Injury to the person—50 & 51 V. c. 16, s. 16, (c.) (D.)—R. S. C. c. 41, ss. 10, 69.*] A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act, 50 & 51 Vict. ch. 16, sec. 16 (c).—The words "any officer or servant of the Crown" in the section referred to, do not include officers and men of the Militia. Girouard J. dissented. LAROSE *v.* THE KING — 206

CROWN LANDS—*Scire facias—Grant made in error—Adverse claim—Cancellation—32 V. c. 11, s. 26 (Que.)—R. S. Q.* 1299.] The provisions of the Quebec statute respecting the sale and management of public lands (32 Vict. ch. 11; R. S. Q. Art. 1299) do not authorize the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist. THE KING *v.* ADAMS — — — — — 220

2——*Timber licenses—Sales by local agent—Location ticket—Suspensive condition — Title to lands—Art.* 1085 *C. C.—Arts.* 1269 *et seq. and* 1309 *et seq. R. S. Q.*] During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown Lands Agent made a sale of a part of the lands covered by the license, and issued location tickets or licenses of occupation therefor under the provisions of Arts. 1269 *et seq.* of the Revised Statutes of Quebec, respecting the sale of Crown Lands. Subsequently the timber license was renewed, but, at the time the renewal license was issued, there had not been any express approval by the Commissioner of Crown Lands of the sales so made by the local agent as provided by Art. 1269 R. S. Q. *Held*, affirming the judgment appealed from, Taschereau and Davies JJ. dissenting, that the approval required by Art. 1269 R. S. Q. was not a suspensive condition, the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown for which the timber license had been validly issued. LEBLANC *v.* ROBITAILLE — — — — — — — 582

DAMAGES—*Expropriation by municipal corporation—Abandonment of proceedings—Illegal detention of lands—Measure of damages.*] Expropriation proceedings for the widening of a street were commenced and after the plaintiff's lands had been occupied by the municipal corporation and incorporated with the street, the proceedings were abandoned in virtue of a statute to that effect, without paying indemnity or returning the lands which had been so occupied. *Held*, that the plaintiff had been illegally dispossessed of his land and was entitled to have it returned to him in the state in which it was at the time he was evicted, and also to recover compensation for the illegal detention. *Held*, further, that, under the circumstances of the case, the measure of damages, as representing the rent, issues and profits of the lands so usurped, should be the interest upon the value of the property during the period of illegal detention. CITY OF MONTREAL *v.* HOGAN — — — — 1

2——*Expropriation — Widening streets — Estimating damages.*] The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. *The Grand Trunk Railway Co.* v. *Coupal* (28 Can. S. C. R. 531) followed. FAIRMAN *v.* CITY OF MONTREAL — — — — — 210

AND *see* EXPROPRIATION, 2.

3——*Operation of electric power house—Vibration, smoke and noise—Assessment of damages—Reversal on appeal.*] In reversing the judgment appealed from, the Supreme Court, in the interest of both parties, assessed damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise, the record was ordered to be transmitted to the trial court to have the amount of damages determined. GAREAU *v.* MONTREAL STREET RAILWAY CO. — — — 463

AND *see* NUISANCE.

4——*Injuries sustained through obstruction on highway—Municipal corporation—Negligence—Telephone poles—Parties to suit—Costs—Proximate cause of accident* — — — 61

See MUNICIPAL CORPORATION, 3.
" NEGLIGENCE, 1.
" TELEPHONE COMPANY.

5——*Criminal conversation—Damages—Statute of limitations* — — — — 238

See CRIMINAL CONVERSATION.
" LIMITATIONS OF ACTIONS, 1.

6——*Exchequer court appeal — Assessment of damages—Interference with findings of Exchequer court judge* — — — — 499

See APPEAL, 16.

DAMAGES—*Continued.*

7——*Riparian rights — Building dams—Penning back waters—Warranty—Improvement of watercourses—Art.* 5535 *R. S Q.—Arbitration —Condition precedent—Assessment of damages* — — — — — — 534

See RIVERS AND STREAMS, 1.

DAMS — *Riparian rights— Building dams— Penning back waters—Improvement of watercourses- - Art.* 5535 *R. S. Q. — Arbitration— Condition precedent — Assessment of damages* — — — — — 534

See RIVERS AND STREAMS, 1.

DÉBATS DE COMPTE

See ACCOUNT.

DEBTOR AND CREDITOR—*Loan to Promoter of Joint Stock Company—Personal liability.*] A promotor of a joint stock company borrowed money for the purposes of the company giving his own note as security. The lender was informed at the time of the manner in which the loan was to be, and was, applied. *Held,* that as the company did not exist at the time of the loan, it could not be the principal debtor nor the borrower a mere guarantor. The latter was, therefore, primarily liable for repayment of the loan. Judgment of the Court of Appeal. *Bugbee* v. *Clergue* (27 Ont. app. R. 96) affirmed. CLERGUE *v.* HUMPHREY — 66

AND *see* ACTION, 3.

2——*Voluntary conveyance of land—*13 *Eliz. c.* 5 *(Imp.)—Solvent vendor—Action by mortgagee.*] A voluntary conveyance of land is void under 13 Eliz. ch. 5 (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made, if it results in denuding him of all his property and so rendering him insolvent thereafter.—A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realizing his security. Judgment of the Supreme Court of British Columbia (7 B. C. Rep. 189) reverse, Gwynne J. dissenting. THE SUN LIFE ASSURANCE CO. *v.* ELLIOTT. — — 91

3——*Interest—Debt certain and time certain—*3 *& 4 Wm. IV, c.* 42 *s.* 28 *(Imp.)* To entitle a creditor to interest under 3 & 4 Wm. IV, ch. 42 sec. 28 (Imp.) the written instrument under which it is claimed must show by its terms that there was a debt certain, payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. SINCLAIR *v.* PRESTON — — — 408

DEED—*Title to lands—Metes and bounds—Prescription—Sale en bloc—Possession beyond boundaries—Prescription—Construction of deed—*

DEED—*Continued.*

Sale to married women—Propre de communauté —Cadastral plan and description.] A deed of lands, occupied by the grantee and accepted by him, which described the emplacement as of less width than his actual occupation operates as an interruption of prescription and limits the grantee's title to the lesser frontage. CHALIFOUR *v.* PARENT — — — 224

AND *see* PRESCRIPTION, 2.

" " TITLE TO LAND, 1.

2——*Construction of Deed of lands—Riparian rights—Building dams—Penning back waters— Warranty—Improvement of watercourses—Art.* 5535 *R. S. Q.*]—A deed conveying a portion of the vendor's lands bordering on a stream granted the privilege of constructing dams, etc., therein, with the proviso that, in case of damages being caused through the construction of any such works, the vendor or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators and that the purchasers should pay the amount awarded. *Held,* that, under the deed, the purchasers were liable, not only for damages caused by the flooding of lands, but also for all other damages occasioned by the building of dams and other works in the stream by them; and, that the provisions of Art. 5535 R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused. HAMLIN *v.* BANNERMAN — 534

AND *see* RIVERS AND STREAMS, 1.

3——*Construction of warranty clause—Sheriff's deed—Sale of rights in land—Claimant under prior title—Eviction* — — — 563

See TITLE TO LAND, 4.

DEMOLITION—*Trespass—Overhanging roof —Waiver—Servitude.*] In an action for demolition of an overhanging roof and to close up windows: *Held,* per Girouard J. following *Delorme* v. *Cusson* (28 S. C. R. 66) that, as the plaintiff and his *auteurs* had waived objection to the manner in which the toll-house had been constructed and permitted the roof and windows to remain there, the demolition could not be required at least so long as the building continued to exist in the condition in which it had been so constructed. PARENT *v.* QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES — 556

AND *see* TITLE TO LAND, 3.

DOMESTIC TRIBUNAL — *Decision of domestic tribunal — Conference of Methodist Church—Church discipline.* — — — 497

See APPEAL, 15.

" PRACTICE, 10.

DOMICILE — *Contract by correspondence—Acceptance—Mailing of letter—Domicile—Indication of place of payment—Bills and notes—Delivery of goods sold.*] Article 85 of the Civil Code, as amended by 52 Vict. ch. 48 (Que.), providing that the indication of a place of payment in any note or writing should be equivalent to election of domicile at the place so indicated, requires that such place should be actually designated in the contract. MAGANN *v.* AUGER — — — — — 186

AND *see* PLEADING, 4.

DOMINION ARBITRATORS—*Accounts of the Province of Canada—Common school funds and lands—Administration by Ontario—Remitting price of lands sold—Default in collections—Withholding lands from sale — Uncollected balances—Jurisdiction of Dominion arbitrators.*] By the submission of 10th April, 1890, amongst other matters submitted to the Dominion Arbitrators were the following: "(*h*) The ascertainment and determination of the principal of the Common School Fund, the rate of interest which would be allowed on such fund, and the method of computing such interest. (*i*) In the ascertainment of the amount of the principal of the said Common School Fund, the arbitrators are to take into consideration not only the sum now held by the Government of the Dominion of Canada, but also the amount for which Ontario is liable, and also the value of the school lands which have not yet been sold." The Province of Quebec claimed that Ontario was liable (1) for the purchase money of lands sold which may have been remitted by the Province of Ontario to the purchasers; (2) for purchase moneys which might, if due diligence had been used, have been collected from the purchasers by Ontario, but which, owing to the neglect and default of the provincial officers, have not been collected but have been lost; (3) for lands which might have been sold but have not been sold, and (4) for all uncollected balances of purchase money. *Held*, Gwynne J. dissenting, that the Dominion Arbitrators have jurisdiction, under the submission, to hear and adjudicate upon the claims so made by the Province of Quebec. THE PROVINCE OF QUEBEC *v.* THE PROVINCE OF ONTARIO AND THE DOMINION OF CANADA. *In re* COMMON SCHOOL FUND AND LANDS — — — — 516

DRAINS—*Municipal drains—Continuing trespass—Limitation of actions—Actions ex delictu* —58 *V.* c. 4, *s.* 295 (*N.S.*) — — 380

See LIMITATIONS OF ACTIONS, 2.

" MUNICIPAL CORPORATION, 8.

DRUGS — *"Quebec Pharmacy Act"—Retroactive legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs.* — 43

See "QUEBEC PHARMACY ACT."

" STATUTE, 2.

DURESS—*Répétition de l'indu—Actio condictio indebiti—Transaction—Payment under threat of criminal prosecution—Error—Ratification—Arts.* 1047, 1049, 1140 *C. C.*] About the time a dissolution of partnership was imminent one of the partners was accused of embezzlement of funds, and, supposing that he was liable for an alleged shortage and under threat of a criminal prosecution, he signed a consent that the amount should be deducted from his share as a member of the firm. He was denied access to the books and vouchers, and, some weeks afterwards, upon settlement of the affairs of the partnership, the amount so charged to him was paid over to the other partners. It was subsequently shewn that this partner had made his returns correctly and had not appropriated any part of the missing funds. *Held*, that he was entitled to recover back the amount so paid in an action *condictio indebiti* as both the consent and the payment had been made under duress and in error and, further, that there had been no ratification of the consent to the deduction of the amount by the subsequent payment, because the denial of access of the books and vouchers caused him to continue in the same error which vitiated his consent in the first place, and, further, that, even if the consent given could be regarded as amounting to transaction, it would be voidable on account of error as to fact. MIGNER *v.* GOULET — — — — — 26

2——*Will—Capacity of testator—Undue influence.*] A codicil to a will executed shortly before the testator's death, increasing the provision made by a former codicil for a niece of his wife who had lived with him for nearly thirty years, for a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, Taschereau and Sedgewick JJ. dissenting, that as the testator was shown to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece even if it had been proved that she urged him to make better provision for her than he had previously done such would not have amounted to undue influence. *Held*, also, following *Perera* v. *Perera* ([1901] A. C. 354) that even if there was ground for saying that the testator was not at the time of execution capable of making a will if he were when he gave the instructions the codicil would still have been valid. KAULBACH *v.* ARCHBOLD; *in re* ARCHBOLD — — — — — — 387

EASEMENT—*Right of way—User—Prescription—Farm Crossing.*] The user of a passage temporarily left under a railway trestle cannot ripen into a title by prescription of the right of way nor give a right to a farm crossing. Canadian Pacific Railway Co. *v.* Guthrie. 155

See Railway, 1.

" User.

And *see* Servitude.

ELECTION LAW—*Election petition—No return of member—Illegal deposit—Parties to petition.*] A petition under the Dominion Controverted Elections Act (R. S. C. ch. 9) alleged that T., a respondent, who had obtained a majority of the votes at the election was not properly nominated, and claimed the seat for his opponent, and that if it should be held that T. was duly elected his election should be set aside for corrupt acts by himself and agents. *Held*, that the petition as framed came within the provisions of sec. 5 of the Act and that T. was properly made a respondent. West Durham Election Case — — — 314

2——*Controverted election—Status of petitioner—Evidence—Certified copy of voters' list—Imprint of Queen's Printer—Form of Petition—Jurat—* 61 *V. c.* 14 *s.* 10 *(D.)*] On the hearing of preliminary objections to a controverted election petition the production of a list appearing on its face to be an imprint emanating from the Queen's Printer, certified by the Clerk of the Crown in Chancery to be a copy of the voters' list used at the election, and upon which the name of the petitioner appeared as a person having a right to vote at such election, is sufficient proof of the status of the petitioner. A copy of the list of electors bearing upon its face a statement that it is issued by the Queen's Printer makes proof of its contents without further verification. The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne." *Per* Gwynne J.—An objection to the regularity of the subscription to the jurat does not constitute proper matter to be inquired into by way of preliminary objection to the petition. Two Mountains Election Case; Ethier *v.* Legault — — — 437

3——*Controverted election—Preliminary objections—Status of petitioner—*61 *V. c.* 14; 63 *& 64 V. c.* 12 *(D.)*—59 *V. c.* 9, *s.* 272 *(Que.)*—*Dominion franchise—Construction of statute.*] The principal contention on preliminary objections to a controverted election petition was that the petitioner had been guilty of corrupt practices before and during the election, and that, by the effect of the statutes 61 Vict. ch 14 and 63 & 64 Vict. ch. 12, the Dominion Franchise Act was repealed, and the provisions of the "Quebec Elections Act" regulating the franchise in the Province of Quebec substituted therefor so as, thereby, to deprive the petitioner of a right to note under 59 Vict. ch. 9, sec. 272, and being so deprived of a vote that he had no status as petitioner. In the Election Court, evidence was taken on issues joined and the judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada: *Held*, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise. *Per* Gwynne J.—The amendment to the Dominion Franchise Act by 61 Vict. ch. 14 (D.) and 63 & 64 Vict. ch. 12 (D.) has not introduced into the Act the provisions of section 272 of "The Quebec Elections Act" so as to deprive a person properly on the list of voters for a Dominion election of his right to vote at such election Beauharnois Election Case; Loy *v.* Poirier— — — — — 447

4——*Election petition—Deposit of Copy—Preliminary objections.*] Where a copy of an election petition was not left with the prothonotary when the petition was filed and, when deposited later, the forty days within which the petition had to be filed had expired: *Held*, Gwynne J. dissenting, that the petition was properly dismissed on preliminary objections (8 B. C. Rep. 65.) *Lisgar Election Case* (20 Can. S. C. R. 1) followed. *Per* Gwynne J.—The Supreme Court is competent to overrule a judgment of the court differently constituted if it clearly appears to be erroneous. Burrard Election Case; Duval *v.* Maxwell — — 459

ELECTRIC LIGHTING — *Contract—Duration—Right to cancel—Repugnant clauses.*] A contract for supplying light to a hotel contained the following provisions. "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled in writing by one of the parties hereto. · · Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer. *Held*, reversing the judgment of the Court of Appeal (1 Ont. L. R. 73) that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term. Ottawa Electric Co. *v.* St. Jacques — — 636

ELECTRIC RAILWAY.

See Tramway.

EMPLOYERS LIABILITY—*Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workmen—Employers' liability—Presumptions—Findings of jury sustained by court below* — — — 392

See EVIDENCE, 5.

" NEGLIGENCE, 7.

ERROR—*Consideration of Contract—Misrepresentation—Artifice—Ratification—Waiver* 234

See CONTRACT, 4.

" VENDOR AND PURCHASER, 2.

AND *see* MISTAKE.

ESTOPPEL—*Condition of policy of insurance—Breach—Further insurance—Pleading—Waiver.*] By a condition of a policy it would be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance but before being notified of the acceptance of his application the premises were destroyed by fire. *Held*, that there was no brrach of said condition. *Commercial Union Assurance Co.* v. *Temple* (29 Can. S. C. R. 206) followed.—In one count of his declaration plaintiff admitted a breach of said condition but alleged that it was waived. On the trial counsel agreed that the facts proved in the case against the Commercial Union should be taken as proved in the present case. These facts showed, as held by the decision in the previous case, that there was no breach. *Held*, that the agreement at the trial prevented the appellant company from claiming that respondent was estopped from denying that there had been a violation of the condition. WESTERN ASSURANCE CO. *v.* TEMPLE — — — — 373

AND *see* INSURANCE, FIRE, 3.

2——*Forfeiture of right to appeal—Expiration of time limit—Ouster of jurisdiction—Condition precedent—Waiver—Objection taken by the court—Arts.* 1020, 1209, 1220 *C. P. Q.* — 165

See APPEAL, 8.

" WAIVER, 1.

3——*Waiver—Ratification—Administration by purchaser in possession—Laches* — — 234

See CONTRACT, 4.

" VENDOR AND PURCHASER, 2.

4——*Title to land—Legal warranty—Description—Plan of subdivision—Accession—Troubles de droit—Eviction—Issues on appeal—Parties* — — — — — 474

See APPEAL, 14.

" TITLE TO LAND, 2.

" WARRANTY, 1.

ESTRAYS—*Cattle straying on highway—Railway fencing—Protection at watercourses—Culvert—Injury by train—Negligence* — 420

See NEGLIGENCE, 8.

" RAILWAY, 3.

EVICTION—*Title to land—Legal warranty—Description—Plan of subdivision—Accession—Troubles de droit—Eviction—Issues on appeal—Parties* — — — — 474

See APPEAL, 14.

" TITLE TO LAND, 2.

" WARRANTY, 1.

2——*Special Warranty—Sheriffs' deed—Claimant under prior title* — — 563

See TITLE TO LAND, 4.

" WARRANTY, 2.

EVIDENCE—*Supplementary evidence refused on appeal—Objections raised for first time on appeal.*] The court refused plaintiff permission to file a supplementary deed in proof of his title to the lands to which objection was first taken on the appeal, on the ground that it had no jurisdiction to admit such fresh evidence upon the appeal. *The Exchange Bank of Canada* v. *Gilman* (17 Can. S. C. R. 108) followed. CITY OF MONTREAL *v.* HOGAN—1

2——*Libel by statement in letter—Privileged communication—Malice—Material issue.*] One portion of the communication containing an alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact. *Held*, that as to prove malice the writer's knowledge of the falsity of the fact was the material point the sense in which he may have used the words was the governing consideration. GREEN *v.* MILLER—177

3——*Copyright—Infringement—Textual copy—Common sources of information.*] In an action for infringement of copyright in a dictionary the unrebutted evidence shewed that the publication complained of treated of almost all its subjects in the exact words used in the dictionary first published and repeated a great number of errors that occurred in the plaintiff's work. *Held*, affirming the judgment appealed from, that the evidence made out a *primâ facie* case of piracy against the defendants which justified the conclusion that they had infringed the copyright. CADIEUX *v.* BEAUCHEMIN — 370

4——*Contract—Sale of goods—Evidence to vary written instrument — Admission of evidence.*] The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 21) which in effect held, under the special circumstances of the case, involving dealings with two companies connected in business and having almost similar names, that it was not incon-

EVIDENCE—*Continued.*

sistent with a written agreement with the plaintiff to prove that defendant supposed he was dealing with another party with whom he had made other arrangements in respect to payment for goods purchased. WILSON *et al.* *v.* WINDSOR FOUNDRY Co. — — 381

5——*Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workman — Employer's liability — Presumptions — Findings of jury sustained by courts below.*] As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability in a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the finding of a jury in favour of the plaintiff, not assented to by the trial judge, have been sustained by two courts below. Taschereau J. dissented, taking a different view of the evidence and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *The George Matthews Co.* v. *Bouchard* (28 S. C. R. 580,) and *The Metropolitan Railway Co.* v. *Wright* (11 App. Cas. 152) those findings ought not to be reversed on appeal. *The Asbestos and Asbestic Co.* v. *Durand* (30 S. C. R. 285) discussed and approved. DOMINION CARTRIDGE Co. *v.* MCARTHUR — — — — 392

6——*Controverted election—Status of petitioner—Evidence—Certified copy of voters' list—Imprint of Queen's Printer*—61 *V. c.* 14, *s.* 10 (*D*).] On the hearing of preliminary objections to a controverted election petition the production of a list appearing on its face to be an imprint emanating from the Queen's Printer, certified by the Clerk of the Crown in Chancery to be a copy of the voters' list used at the election, and upon which the name of the petitioner appeared as a person having a right to vote at such election, is sufficient proof of the status of the petitioner. A copy of a list of electors bearing upon its face a statement that it is issued by the Queen's Printer makes proof of its contents without further verification. TWO MOUNTAINS ELECTION CASE; ETHIER *v.* LEGAULT — 437

AND *see* ELECTION LAW, 2.

7..—*Expert testimony—Appreciation of evidence—Reversal on questions of fact.*] In an action by the owner of adjoining property for damages caused by the operation of an electric power house, the evidence was contradictory, and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality. *Held*, Taschereau J. dissenting, that notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations. GAREAU *v.* MONTREAL STREET RAILWAY Co. — 463

AND *see* NUISANCE.

8——*Public order—Matters judicially noticed—Foreign law—Presumption* — — 244

See CONTRACT, 4.

" PUBLIC POLICY, 2.

9——*Maintenance of streets— Negligence—Accumulation of snow and ice—Gross Negligence—R. S. O.* (1897) *c.* 223 *s.* 606 (2) — — 323

See MUNICIPAL CORPORATION, 5.

" NEGLIGENCE, 4.

10——*Trespass — Overhanging roof —Right of view—Boundary line* — — — 556

See TITLE TO LAND, 3.

11——*Collision—Proper navigation—Negligent lookout—Sufficiency of anchor light—Findings of fact—Appreciation of evidence—Practice* - 653

See ADMIRALTY LAW.

" NAVIGATION.

EXCEPTION.

See PLEADING.

EXCHEQUER COURT — *Exchequer Court appeal—Assessment of damages —Interference with findings of Exchequer Court Judge* — 499

See APPEAL, 16.

EXECUTION — *Practice — Appeal to Privy Council—Stay of execution.*] A judge in chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the court to the Judicial Committee of the Privy Council. ADAMS & BURNS *v.* THE BANK OF MONTREAL — — — — 223

2——*Solicitor and client—Territories Real Property Act — Unregistered transfers—Charging lands— Levy under execution — Indemnity to sheriff—Tort— Pleading — Interpleader.*] In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to inter-

EXECUTION—*Continued.*

plead but may be properly joined in a defence with the execution creditor. The delivery of an execution with a requisition to the sheriff to charge and levy upon the lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution. TAYLOR *v.* ROBERTSON — — — — 615

And see SHERIFF.

" SOLICITOR.

EXPROPRIATION — *Public street — Local improvement—Occupation and detention of lands —Amendment of pleadings—Abandonment of expropriation—Measure of damages — Costs.*] The city commenced expropriation proceedings and forthwith took possession of plaintiff's land, constructed works thereon and incorporated it with a public street. Subsequently, in virtue of a statute granting permission to do so, the city abandoned the expropriation proceedings without paying indemnity or returning the lan is so occupied and used. *Held*, that the plaintiff had been illegally dispossessed of his property and was entitled to have it returned to him in the state in which it was at the time it had been so taken possession of, and also to recover compensation for the illegal detention. *Held*, further, that, in the present case, the measure of damages, as representing the rents, issues and profits of the lands usurped by the city, should be the interest upon the value of the property during the period of its illegal detention. CITY OF MONTREAL *v.* HOGAN — 1

2—— *Municipal corporation — Montreal City charter—Local improvements — Expropriation for widening street— Action for indemnity*—52 *V. c.* 79 (*Que.*) — *V. c.* 78 *Que.*) — 59 *V. c.* 49 (*Que.*)] Where the City of Montreal, under the provisions of 52 Vict. ch. 79, sec. 213, took possession of land for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so effected and, notwithstanding the subsequent amendment of the tatute in December of that year, by 59 Vict. ch. 49, sec. 17, the city was bound, within a reasonable time, to apply to the court for the appointment of commissioners to fix the amount of the indemnity to be paid, to levy assessments therefor and to paid over the same to the owner, and, having failed to do so, the owner had a right of action to recover indemnity for his land so taken. *Hogan* v. *The City of Montreal* (31 Can. S. C. R. 1) distinguished. The assessment of damages by taking the average of estimates of

EXPROPRIATION—*Continued.*

the witnesses examined is wrong in principle. *The Grand Trunk Railway Co.* v. *Coupal* (28 Can. S. C. R. 531) followed. FAIRMAN *v.* CITY OF MONTREAL — — — — 210

FENCES—*Cattle straying on highway—Railway fencing—Protection at watercourses—Culvert—Injury by train—Negligence* — — 420

See NEGLIGENCE, 8.

" RAILWAY, 3.

FINE—*Criminal law — Manslaughter—Negligence — Indictment against body corporate — Criminal Code*, 1892, *s.* 213—*Common law penalty.*] As sec. 213 provides no punishment for indictable negligence by a corporation, the common law punishment of a fine may be imposed on a corporation indicted under it. THE UNION COLLIERY CO. *v.* THE QUEEN — 81

FOREIGN JUDGMENT.

See JUDGMENT.

FOREIGN LAW—*Evidence—Presumption—Matters judicially noticed — Public policy.*] Laws of public order must be judicially noticed by the court *ex proprio motû*, and, in the absence of any proof to the contrary, the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractû*. CONSUMERS CORDAGE CO. *v.* CONNOLLY — — — — — — 244

AND *see* CONTRACT, 4.

" " PUBLIC POLICY, 2.

FOREIGN PATENT—*Patent of invention —Option as to priority—Expiration of foreign patent—Construction of statute—R. S. C. c.* 61, *s.* 8—55 *& 56 V. c.* 24, *s.* 1.] Under the provisions of the eighth section of "The Patent Act" as amended by 55 & 56 Vict. ch. 24, sec. 1 (D.), it is only in the case of the applicant exercising the option of obtaining a foreign patent before the issue of a Canadian patent for his invention that the Canadian patent shall expire by reason of the expiration of a foreign patent in existence at the time the Canadian patent is granted.—Where several applications are made in different countries upon the same day, the applicant cannot be said to have exercised an election to obtain any one patent before obtaining another. THE GENERAL ENGINEERING COMPANY OF ONTARIO *v.* THE DOMINION COTTON MILLS COMPANY AND THE AMERICAN STOKER CO. — — — — — 75

FRANCHISE — *Controverted election — Preliminary objections—Status of petitioner—Dominion franchise—"Quebec Elections Act"— Construction of statute— Right to vote* — 447

See ELECTION LAW, 3.

FRAUD—*Misrepresentation by vendor—Consideration of contract—Error—Estoppel* — 234
See VENDOR AND PURCHASER, 2.
" CONTRACT, 3.

FRAUDULENT CONVEYANCE — *Voluntary conveyance of land* — 13 *Eliz. c.* 5 (*Imp.*)—*Solvent vendor—Action by mortgagee.*] A voluntary conveyance of land void under 13 Eliz, ch. 5 (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made if it results in denuding him of all his property and so rendering him insolvent thereafter.—A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance, and that without first realizing his security. Judgment of the Supreme Court of British Columbia (7 B. C. Rep. 189) reversed, Gwynne J. dissenting. SUN LIFE ASSURANCE CO. *v.* ELLIOTT — 91

2——*Banks and banking—Advances on security—Chattel mortgage — Insolvent debtor — Bank Act, s.* 74—*Conversion* — — — 361
See BANKS AND BANKING, 2.
" CHATTEL MORTGAGE, 1.

HABEAS CORPUS—*Practice—Habeas corpus—Binding effect of judgment in provincial court.*] An application for a writ of *habeas corpus* was referred by the judge to the Supreme Court of the province and, after hearing, the application was refused. On application subsequently made to Mr. Justice Sedgewick, in chambers: *Held*, that, under the circumstances, it would be improper to interfere with the decision of the provincial court. *In re* WHITE — — — — 383

HIGHWAY—*Obstruction on highway—Repair of municipal streets—Negligence.*] The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 291) which held that permitting a mound of earth about eight inches in height to remain at a filling over a trench dug to lay a pipe across a public street was not a serious or unusual obstruction due to negligence on the part of the municipality and holding the plaintiff guilty of want of proper care in approaching during the darkness the dangerous place which he had previously seen by daylight in the same condition. MESSENGER *v.* TOWN OF BRIDGETOWN — — 379

2——*Injuries sustained through obstruction on highway—Municipal corporation—Negligence—Telephone poles—Parties to suit—Costs—Proximate cause of accident* — — — 61
See MUNICIPAL CORPORATION, 3.
" NEGLIGENCE, 1.
" TELEPHONE COMPANY.

HIGHWAY—*Continued.*

3——*Maintenance of streets—Negligence—Accumulation of snow and ice—Gross negligence—R. S. O.* (1897) *c.* 223, *s.* 606 (2) — — 323
See MUNICIPAL CORPORATION, 5.
" NEGLIGENCE, 4.

4——*Cattle straying on highway — Railway fencing—Protection at watercourses—Culvert—Injury by train—Negligence* — — 420
See NEGLIGENCE, 8.
" RAILWAYS, 3.

5——*Title to land—Legal warranty—Prescription—Plan of subdivision—Change in street line—Accession—Troubles de droit—Eviction*—474
See TITLE TO LAND, 2.
" WARRANTY, 1.

6——*Operation of tramway — Care at street crossings—Speed of cars—Negligence* — 642
See TRAMWAY, 3.

HUSBAND AND WIFE—*Married women—Judicial separation as to property—Debts of community—Obligation by wife—Art.* 1301 *C. C.—Nullity—Public policy—Dation en paiement.*] The Supreme Court affirmed the judgment appealed from (6 Rev. de Jur. 13) by which it had been held that *conjoints* could not avoid the prohibition decreed by art. 1301 C. C., by disguising a contract made with a third party after the community between them had been judicially dissolved; that, after dissolution of community the wife cannot be held liable for the debts of the community, even where she may have made payment through error, for an amount greater than that fixed by law and could not oblige herself therefor with her husband to guarantee his obligations, in respect thereto, and, that after the dissolution, the husband remained liable for debts of the community contracted by him, saving his recourse against his wife or her heirs, (should they accept the community) for the moiety of such debts. BASTIEN *v.* FILIATRAULT *et ux* — 129

2——*Criminal conversation—Damages—Statute of limitations* — — — 238
See CRIMINAL CONVERSATION.
" LIMITATIONS OF ACTIONS, 1.

ICE — *Watercourses — Navigable waters — Cutting ice—Trespass on water lots.*] An ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice-houses, and for that purpose may cut a channel through private water lots through which to float the ice. Judgment appealed from (26 Ont. App. R. 411) reversed, and that of MacMahon J. at the trial (29 O. R. 247) restored, Strong C.J. and Taschereau J. dis-

ICE—*Continued.*

senting. The Lake Simcoe Ice and Cold Storage Co. *v.* McDonald — — 130

2——*Maintenance of streets—Accumulation of snow and ice—Gross negligence* — — 323

See Municipal Corporation, 5.

" Negligence, 4.

INDEMNITY — *Territories Real Property Act—Charging lands under execution—Tort—Implied indemnity to sheriff* — — 615

See Sheriff.

" Solicitor.

INDIAN LANDS—*Question of constitutional law — Legislative jurisdiction — Appeal per saltum* — — — — — 125

See Appeal, 6.

" Constitutional Law, 2.

INJUNCTION—*Patent of invention—Combination of known devices—Novelty—New result —Infringement* — — — — 378

See Patent of Invention, 2.

INSOLVENCY — *Voluntary conveyance — Statute of Elizabeth—Solvent vendor—Depletion of estate—Debtor and creditor—Action by mortgagee* — — — — 91

See Debtor and Creditor, 2.

" Fraudulent Conveyance, 1.

" Mortgage, 1.

2——*Banks and banking—Advances on security —Chattel mortgage — Insolvent debtor — Bank Act, sec.* 74*—Conversion*— — — 361

See Banks and Banking, 2.

" Chattel Mortgage, 1.

3——*Covenant in lease — Assignee of leased premises—Forfeiture—Payment of accelerated rent—Payment of rent to mortgagee—Waiver* — — — — — — — 572

See Landlord and Tenant.

INSURANCE FIRE—*Fire insurance—Statutory conditions — Variations — Co-insurance.*] The co-insurance clause printed as a variation from the statutory conditions in a policy of insurance against fire, requiring the insured in consideration of a reduced premium to keep the property covered by other policies to at least 75 per cent of its value, will not be pronounced unjust and unreasonable within the meaning of sec. 115 of the Ontario Insurance Act (R. S. O. [1887] ch. 167.) Eckardt & Co. *v.* Lancashire Insurance Co. — — 72

2——*Vendor and purchaser—Insurance against fire—Insurable interest—Unpaid vendor.*] An

INSURANCE FIRE—*Continued.*

unpaid vendor who, by agreement with his vendee, has insured the property sold, may recover its full value in case of loss though his interest may be limited if, when he effected the insurance, he intended to protect the interest of the vendee as well as his own.—The fact that the vendor is not the sole owner need not be stated in the policy nor disclosed to the insurer. Judgment appealed from (26 Ont. App R. 277) reversed, and that of the trial judge (29 O. R. 394) restored. Keefer *et al. v.* Phœnix Insurance Co. of Hartford —144

3——*Insurance against fire—Condition in policy —Interest of insured — Mortgagor as owner— Further insurance — Estoppel—Pleading.*] By a condition in a policy of insurance against fire the policy was to become void " if the assured is not the sole and unconditional owner of the property * * or if the interest of the assured in the property whether as owner, trustee * * mortgagee, lessee or otherwise is not truly stated." *Held*, that a mortgagor was sole and unconditional owner within the terms of said condition.—By another condition the policy would be avoided if the assured should have or obtain other insurance, whether valid or not, on the property. The assured applied for other insurance, but before being notified of the acceptance of his application, the premises were destroyed by fire. *Held*, that there was no breach of said condition. *Commercial Union Assurance Co.* v. *Temple* (29 Can. S. C. R. 206) followed.—In one count of his declaration plaintiff admitted a breach of said condition, but alleged that it was waived. On the trial counsel agreed that the facts proved in the case against the Commercial Union should be taken as proved in the present case. These facts shewed, as held by the decision in the previous case, that there was no breach. *Held*, that the agreement at the trial prevented the appellant company from claiming that respondent was estopped from denying that there had been a violation of the condition. Western Assurance Co. *v.* Temple — — — 373

4 ——*Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent.*] The *lex fori* must be presumed to be the law governing a contract unless the *lex loci* be proved to be different.—The appointment of a local agent of a fire insurance company is one in the nature of *delectus personæ*, and he cannot delegate his authority or bind his principal through the medium of a sub-agent. *Summers* v. *The Commercial Union Assurance Company* (6 Can. S. C. R. 19) followed.—The local agent of a fire insurance company was authorised to effect interim insurances by issuing receipts countersigned by him

INSRANCE FIRE—*Continued.*

on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt which he countersigned as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium. *Held*, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority. *Held*, further, that even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurance. CANADIAN FIRE INSURANCE CO. *v.* ROBINSON — 488

INSURANCE LIFE—*Cancellation of policy—Agency—Art. 610 C. C.—Unworthy beneficiary—Murder of assured—Exclusion from succession.*] The action to cancel a policy was against the representatives of a deceased policy holder who was murdered by his wife and her lover, who were executed for the murder. Deceased left all his property to his wife, and had no issue surviving. The widow was judicially deprived of all rights as beneficiary under the policy and the will as unworthy of succession. The company charged the remaining beneficiaries with endeavouring to take advantage of fraud and the felony. The judgment appealed from held that as there was no evidence that, at the date of the policies, assured was aware of the evil intentions of his wife, nor that she was acting as agent in effecting the insurances, the fact that she might then have had such intentions and subsequently murdered her husband would not have the effect of discharging the insurer from liability under the policies towards the legal representatives of the assured. The judgment appealed from (Q. R. 9 Q. B. 499) was affirmed by the Supreme Court of Canada. THE STANDARD LIFE ASSURANCE COMPANY *v.* TRUDEAU, *et al.* — — — — — — — 376

INTERPLEADER—*Levy under execution—Charging lands under Territories Real Property Act—Indemnity to sheriff—Pleading joint pleas.*] In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead, but may be joined properly in a defence with the execution creditor. TAYLOR *v.* ROBERTSON — — — 615

AND *see* SHERIFF.
" " SOLICITOR.

INTEREST—*Mortgage — Rate of interest—Payment by instalments.*] A mortgage given to secure payment of $20,000 with interest at

INTEREST—*Continued.*

nine per cent payable half yearly, contained these provisos: "Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable.** Provided that on default of payment of any of the instalments hereby secured, or insurance or any part thereof at the times provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid." *Held*, reversing the judgment appealed from (26 Ont. App. R. 232) that the principal sum of $20,000 becoming due for non-payment under the first of the above provisos was not an instalment in arrear under the second on which the mortgagee was entitled to interest at the rate of nine per cent per annum. BIGGS *v.* FREEHOLD LOAN AND SAVINGS CO. — — 136

2——*Charging interest—Debt certain and time certain—3 & 4 Wm. IV. c. 42, s. 28 (Imp.)*] To entitle a creditor to interest under 3 & 4 Wm. IV. ch. 42, sec. 28 (Imp.) the written instrument under which it is claimed must show by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. SINCLAIR *v.* PRESTON—408

3——*Contract—Unlawful consideration—Repetition de l'indu — Account — Public policy — Monopoly—Trade combination — Conspiracy—Malum prohibitum—Malum in se—Interest on advances — Foreign laws — Matters judicially noticed* — — — 244

See CONTRACT, 4.
" PUBLIC POLICY, 2.

ISSUES—*Municipal contract—Condition as to sub-letting—Consent of council—Pleading non-performance of condition — Right of action—Replication—Joinder of issues* — — 34

See PLEADING, 1.

JOINT STOCK COMPANY

See COMPANY LAW.

JUDGE—*Trial without jury—Findings of fact—Reversal by appellate court* — — 14

See PRACTICE, 2.

JUDGMENT—*Statement of claim—Action on foreign judgment — Original consideration — Ontario Judicature Act.*] Under the Ontario Judicature Act, as before it, the declaration in an action on a foreign judgment may include counts claiming to recover on the original consideration. CLERGUE *v.* HUMPHREY — 66

2——*Habeas corpus — Practice of Supreme Court of Canada—Binding effect of judgment in provincial court* — — — 383

See Habeas Corpus.

" Practice, 6.

JURISDICTION—*Pleading—Declinatory exception—Incompatible pleas—Waiver—Cause of action—Jurisdiction—Domicile—Opposition to judgment.*] In forming an opposition or petition in revocation of judgment the defendant, in order to comply with art. 1164 of the Code of Civil Procedure of the Province of Quebec, is obliged to include therein any cross-demand he may have by way of set-off in compensasation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right. A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the court.—In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. The judgment appealed from, affirming the decision of the Superior Court (Q. R. 16 Q. B. 22) was reversed. Magann *v.* Auger — — — 186

And *see* Contract, 2.

2——*Forfeiture of right to appeal—Expiration of time limit—Ouster of jurisdiction—Condition precedent—Waiver—Objection taken by the court—Arts,* 1020, 1209, 1220, *C. P. Q.* — 165

See Appeal, 8.

" Waiver, 1.

3——*Title to land—Troubles de droit—Eviction—Issues on Appeal—Parties* — — 474

See Appeal, 14.

" Warranty, 1.

4——*Parties on appeal—Practice—Proceeding in name of party deceased—Amendment in Court of Review—Interference with discretion on appeal* — — — — 505

See Appeal, 17.

JURISPRUDENCE—*Binding effect of Supreme Court decisions—Election petition—Preliminary objections* — — — 459

See Election Law, 4.

" Practice, 9.

JURY—*Libel — Privileged communication — Malice— Charge to jury—Evidence.*] On the trial of an action claiming damages for a libel alleged to be contained in a privileged communication the judge charged the jury as to privilege and added "if the defendant made the

JURY—*Continued.*

communication *bonâ fide*, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him." *Held*, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him. The judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only proof of unfriendliness consisted of hard things said of the defendant by the plaintiff. Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 129) affirmed, Gwynne and Sedgewick JJ. dissenting. Green *v.* Miller — — 177

And *see* Libel.

2——*Negligence- Use of dangerous materials—Proximate cause of accident—Injuries to workmen — Employers' liability — Presumptions — Findings of jury sustained by court below* - 392

See Evidence, 5.

" Negligence, 7.

" Practice, 8.

3——*Answers to questions—Judgment entered on findings - Reversal on appeal* — — 642

See Negligence, 10.

JUSTICE OF THE PEACE—*Nova Scotia Liquor License Act, 1895—Conviction by magistrate—Jurisdiction—Application for certiorari—affidavit—Constitutional law—Powers of provincial legislature—Matter of procedure.*] The Supreme Court of Canada affirmed the decision appealed from, (31 N. S. Rep. 436) by which it had been held that section 117 of the Nova Scotia Liquor License Act, 1895 was intended to operate, not in the sense of abolishing the writ of certiorari, but merely prescribing a mode of procedure providing that, in the course of the affidavit denying the commission of the offence charged, as required by that section, the court had no power to grant a writ of certiorari and, consequently, an application for a writ was dismissed. Mr. Justice Gwynne dissented, and was of opinion that a question raised as to the constitutionality of the Liquor Licence Act ough to have been decided before entering upon the technical point respecting the production of the affidavit. Bigelow *v.* The Queen — 128

KING'S PRINTER

See Election Law, 2.

LACHES—*Delay in bringing action—Error in consideration of contract — Waiver — Estoppel* — — — — — 234

See Contract, 3.

LANDLORD AND TENANT — *Lease — Covenant—Forfeiture—Company — Shareholder Personal liability—Waiver.*] A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors six months rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment which was afterwards done, the lessors executing the assignment as creditors assenting thereto. *Held*, reversing the judgment of the Court of Appeal (1 Ont. L. R. 172) that the lessors and the company were distinct legal persons and the individual interests of the former were not affected by the above action. *Salomon* v. *Salomon & Co.* ([1897] A. C. 22) followed.—The assignee of the company held possession of the leased premises for three months and the lessors accepted rent from him for that time and from sub-lessees for the month following. *Held*, also reversing the judgment appealed from, that as the lessors had claimed the six months accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; as the assignee had a statutory right to remain in possession for the three months and collect the rents; as the evidence showed that the receipt by the lessors of the three months rent was in pursuance of a compromise with the assignee in respect to the acceleration; and as the months rent from the sub-tenants was only for compensation by the latter for being permitted to use and occupy the premises and for their accommodation; the lessors could not be said to have waived their right to claim a forfeiture of the lease.—Mortgagees of the premises having notified the sub-tenants to pay rent to them the assignee paid them a sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged. *Held*, that this also was no waiver of the lessors' right to claim a forfeiture.—*Quære.* Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company or would it, on surrender of the original lease, have bound the lessor and a purchaser from him of the fee? SOPER *v.* LITTLEJOHN — — — 572

LEASE—*Simulated lease—Annual rents—Title to land—Appeal — Jurisdiction — Amount in dispute—R. S. C. c.* 135, *s.* 29 (*b*).] In an action by the lessee of lands leased for 4 years and 9 months at a rental of $250 per annum, to have the lease cancelled as being simulated as he was, at the time of the lease, owner of the property leased: *Held*, that no amount of $2,000 or upwards was in dispute, and that as the

LEASE—*Continued.*

appeal did not relate to any title to land or tenements nor to annual rents within the meaning of sec. 29 (*b*) of R. S. C. c. 135, it could not be entertained by the Supreme Court of Canada. FRÉCHETTE *v.* SIMMONEAU — — 12

2——*Assignment by lessee—Covenant in lease—Forfeiture—Company—Shareholder—Personal liability.*] A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors six months rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company and while the lease was in force one of them, at a meeting of the directors moved, and the other seconded, that a by-law be passed authorising the company to make an assignment which was afterwards done, the lessors executing the assignment as creditors assenting thereto. *Held*, reversing the judgment of the Court of Appeal (1 Ont. L. R. 172) that the lessors and the company were distinct legal persons and the individual interests of the former were not affected by the above action. *Salomon* v. *Salomon & Co.* ([1897] A. C. 22) followed. *Quære.* Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company or would it, on surrender of the original lease have bound the lessor and a purchaser from him of the fee? SOPER *v.* LITTLEJOHN — 572

AND *see* LANDLORD AND TENANT.

LEGAL MAXIMS—"*Respondeat Superior*" — — — — — — 481

See COMPANY, 3.

" PRINCIPAL AND AGENT, 2.

LEGISLATION — *Péremption d'instance — Retrospective legislation—Arts.* 1 *&* 279 *C. P. Q.—Art.* 454 *C. C. P.* — — — 471

See LIMITATION OF ACTIONS, 3.

" PÉREMPTION D'INSTANCE.

LETTER—*Libel by statement in letter—Privileged communication—Malice—Charge to jury —Evidence* — — — — — 177

See LIBEL.

LEX FORI—*Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent* — — — — 488

See INSURANCE, FIRE, 4.

LEX LOCI—*Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent* — — — — 488

See INSURANCE, FIRE, 4.

LIBEL—*Statement in letter—Privileged communication — Malice — Charge of jury—Evidence.*] On the trial of an action claiming damages for a libel alleged to be contained in a privileged communication the judge charged the jury as a privilege and added "if the defendant made the communication *bonâ fide*, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him." *Held*, that plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him.—One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact. *Held*, that as to prove malice the writer's knowledge of the falsity of the fact was the material point the sense in which he may have used the words was the governing consideration. The judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff. Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 129) affirmed, Gwynne and Sedgewick JJ. dissenting. GREEN *v.* MILLER — — — — — 177

LICENSES—"*Quebec Pharmacy Act*"—*Retroactive legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs* — 43

See "QUEBEC PHARMACY ACT."

" STATUTE, 2.

2——*Sale of Crown lands—Timber licenses—Suspensive condition—Location tickets—Renewal of licenses* — — — — — 582

See CROWN LANDS, 2.

" TIMBER LICENSES.

AND *See* LIQUOR LAWS.

LIEN—*Banks and banking—Advances on security—Chattel mortgage—Insolvent debtor—Bank Act*, 74—*Conversion* — — — 361

See BANKS AND BANKING, 2.

" CHATTEL MORTGAGE, 1.

LIGHT AND AIR—*Boundary line—Windows overlooking adjoining land—Waiver* — 556

See TITLE TO LAND, 3.

LIMITATION OF ACTIONS—*Statute of limitations—Criminal conversation—Damages.*] The statute of limitations is not a bar to an action for criminal conversation where the adulterous intercourse between the defendant and plaintiff's wife has continued to a period within six years from the time the action is brought. *Quære.* Does the statute only begin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within the six years preceding the action? KING *v.* BAILEY — 338

2——*Municipal drains—Continuing trespass—Limitation of actions ex delictu*—58 *V. c.* 4, *s.* 295 *(N. S.) Verdict.*] Action for trespass by reason of the municipal corporation constructing and maintaining a drain through the plaintiff's land. The jury found that it had been constructed in 1886 "by virtue of the street commissioner's power of office." The plaintiff, though aware of its existence at the time, made no objection till 1896, when the land caved in. The court below held (33 N. S. Rep. 401) that the jury had found that the defendant had constructed the drain by its agent, and that, the trespass being a continuing one, the action was not barred by the limitation provided in the "Town's Incorporation Act of 1895" for actions *ex delictu* against towns. This judgment was affirmed by the Supreme Court of Canada. TOWN OF TRURO *v.* ARCHIBALD — — — 380

3——*Péremption d'instance—Retrospective legislation—Arts.* 1 *and* 279 *C. P. Q.—Art.* 454 *C. C. P.*] When the period of peremption commenced after the promulgation of the new Code of Procedure of the Province of Quebec the exceptions declared by the fourth paragraph of its first article do not prevent the peremption of a suit pending at the time it came into force under the limitation provided by article 279. *Cooke* v. *Millar*, (3 R. L. 446; 4 R. L. 240) referred to. SCHWOB *v.* TOWN OF FARNHAM. 471

AND *See* PRESCRIPTION.

LIQUOR LAWS—*Nova Scotia Liquor License Act*, 1895—*Conviction by magistrate—Jurisdiction—Application for certiorari—Affidavit—Constitutional law—Powers of provincial legislature—Matter of procedure.*] The Supreme Court of Canada affirmed the decision appealed from, (31 N. S. Rep. 436) by which it had been held that section 117 of the Nova Scotia Liquor License Act, 1895, was intended to operate, not in the sense of abolishing the writ of certiorari, but merely prescribing a mode of procedure providing that, in the absence of the affidavit denying the commission of the offence charged, as required by that section, the court had no power to grant a writ of certiorari and, consequently, an application for a writ was dismissed. Mr. Justice Gwynne dissented and was of opinion that a question raised as to the constitutionality of the Liquor License Act ought to have been decided before entering upon the technical point respecting the production of the affidavit. BIGELOW *v.* THE QUEEN. — — — — — 128

LOAN—*Advances loaned to promoter of joint stock company—Personal liability—Debtor and creditor* — — — — — 66

See ACTION, 3.

" COMPANY LAW, 1.

LOCATION TICKET—*Crown lands—Sales by local agent—Suspensive conditions—Timber licenses—Priority of title* — — 582

See CROWN LANDS, 2.

" TIMBER LICENSES.

LOTTERY—*Illegal consideration of contract—Co-relative agreement* — — — 172

See CONSTITUTIONAL LAW 3.

MACHINERY—*Nuisance—Operation of electric railway—Power house machinery—Vibration, smoke and noise—Injury to adjoining property—Evidence—Assessment of damages—Reversal on questions of fact*— — — 463

See NUISANCE.

MALICE—*Statement in letter—Privileged communication—Charge to jury—Evidence.* — 177

See LIBEL.

MARRIAGE LAWS—*Title to lands—Prescription—Construction of deed—Sale to married women—Propre de communauté—Arts.* 1503, 2168, 2174, 2185, 2210, 2242, 2251, 2254, *C.C.*] *Quære.* Is a deed of sale of lands in Quebec to a married woman without the authorization of her husband, sufficient to support a petitory action? Would such a deed be null for defect of form and insufficient, under Art. 2254 C. C., to serve as the ground for a prescription by ten years possession? CHALIFOUR *v.* PARENT — — — — 224

AND *see* PRESCRIPTION, 2.

" " TITLE TO LAND, 1.

METHODIST CHURCH—*Decision of domestic tribunal—Conference of Methodist Church—Church discipline* — — — 497

See APPEAL, 15.

" PRACTICE, 10.

MILITIA—*Public work—Negligence—Militia class firing—Government rifle range—Officers and servants of the Crown—Injury to the person*—50 *& 51 V. c.* 16, *s.* 16 *c.* (*D.*)—*R. S. C. c.* 41 *ss.* 10, 69.] A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act, 50 & 51 Vict. ch. 16, sec. 16 (*c*).—The words "any officer or servant of the Crown" in the section referred to, do not include officers and men of the militia. Girouard J. dissented. LAROSE *v.* THE KING 206

MISTAKE—*Payment under threat of criminal prosecution— Ratification — Répétition de l'indu—Transaction* — — — 26

See DURESS, 1.

MISTAKE—*Continued.*

2——*Marked cheque—Fraudulent alteration—Payment by a third party—Liability for loss—Negligence* — — — — 344

See BANKS AND BANKING, 1.

" NEGLIGENCE, 5.

MONOPOLY—*Contract—Unlawful consideration — Répétition de l'indu—Account — Public policy — Monopoly — Trade combination—Conspiracy—Malum prohibitum—Malum in se—Interest on advances—Foreign laws— Matters judicially noticed*— — — 244.

See CONTRACT, 4.

" PUBLIC POLICY, 2.

MORTGAGE—*Voluntary conveyance*—13 *Eliz. c.* 5 *(Imp.)—Solvent vendor—Action by mortgagee.*] A voluntary conveyance of land is void under 13 Eliz. ch. 5, (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made, if it results in denuding him of all his property and so rendering him insolvent thereafter.—A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realizing his security. Judgment of the Supreme Court of British Columbia (7 B. C. Rep. 189) reversed, Gwynne J. dissenting. THE SUN LIFE ASSURANCE COMPANY *v.* ELLIOTT — — — — 91

2——*Rate of interest—Payment by instalments*—A mortgage given to secure payment of $20,000 with interest at nine per cent payable half yearly, contained these provisos: "Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable.** Provided that on default of payment of any of the instalments hereby secured, or insurance or any part thereof at the times provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid." *Held*, reversing the judgment appealed from (26 Ont. App. R. 232) that the principal sum of $20,000 becoming due for non-payment under the first of the above provisions was not an instalment in arrear under the second on which the mortgagee was entitled to interest at the rate of nine per cent per annum. BIGGS *v.* FREEHOLD LOAN & SAVINGS CO. 136

3——*Insurance against fire—Condition in policy—Interest of insured—Mortgagor as owner.*] By a condition in a policy of insurance against fire the policy was to become void "if the assured is not the sole and unconditional owner of the property * or if the interest of the assured in the property whether as owner or trustee * * mortgagee, lessee or otherwise is not truly

MORTGAGE—*Continued.*

stated." *Held*, that a mortgagor was sole and unconditional owner within the terms of said condition. Western Assurance Co. *v.* Temple — — — — — 373

And *see* Insurance, Fire, 3.

MUNICIPAL CORPORATION—*Local improvements—Widening streets—Expropriation—Illegal detention of lands—Measure of damages.*] The city commenced expropriation proceedings and forthwith took possession of plaintiff's land, constructed works thereon and incorporated it with a public street. Subsequently, in virtue of a statute granting permission to do so, the city abandoned the expropriation proceedings without paying indemnity or returning the lands so occupied or used. *Held*, that the plaintiff had been illegally dispossessed of his property and was entitled to have it returned to him in the state in which it was at the time it had been so taken possession of and also to recover compensation for the illegal detention. *Held* further, that in the present case, the measure of damages, as representing the rents, issues and profits of the lands usurped by the city, should be the interest upon the value of the property during the period of illegal detention. City of Montreal *v.* Hogan — — 1

2——*Contract for municipal work—Condition as to sub-letting—Consent of council.*] Where a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation it is incumbent on the contractor to obtain such consent before sub-letting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do. Ryan *v.* Willoughby — 34

And *see* Contract, 1.

3——*Obstruction on highway — Damages for injuries — Negligence—Proximate cause—Telephone pole—Third party—Costs.*] A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away, and that their violent uncontrollable speed was the proximate cause of the accident.—In an action against the city corporation for damages in such a case the latter was ordered to pay the costs of the Telephone Company brought in as a third party it being shewn that the company placed the pole where it was lawfully, and by authority of the corporation. Bell Telephone Co. *v.* City of Chatham; City of Chatham *v.* Atkinson — — — — — — — 61

MUNICIPAL CORPORATION—*Con.*

4——*Montreal City Charter—Local improvements — Expropriation for widening streets—Action for indemnity*—52 *V. c.* 79 (*Que.*)—54 *V. c.* 78 (*Que.*)—59 *V. c.* 49 (*Que.*)] Where the City of Montreal, under the provisions of 52 Vict. ch. 79, sec. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so affected and, notwithstanding the subsequent amendment of the statute in December of that year, by 59 Vict. ch. 49, sec. 17, the city was bound, within a reasonable time, to apply to the court for the appointment of commissioners to fix the amount of the indemnity to be paid, to levy assessments therefor and to pay over the same to the owner, and, having failed to do so, the owner had a right of action to recover indemnity for his land so taken. *Hogan v. The City of Montreal* (31 Can. S. C. R. 1) distinguished. Fairman *v.* City of Montreal — — — — — 210

And *see* Damages, 2.

5——*Negligence—Maintenance of streets—Accumulation of snow and ice—Gross negligence—R. S. O.* [1897] *c.* 223 *s.* 606 (2).] About 10.30 a.m. on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shown that there had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employees of the city had scattered sand on the crossing but the high wind prevailing at the time had probably blown it away. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R 410) that the facts in evidence were not sufficient to show that the injury to the deceased was caused by "gross negligence" of the corporation within the meaning of R. S. O. [1897] ch. 223, sec. 606 (2). Ince *v.* City of Toronto — — 323

6——*Water commissioners—Statutory body—Powers — Contract—37 V. c. 79 (Ont.)*—By 37 Vict. ch. 79 (Ont.) the waterworks system of Windsor is placed under the management of a Board of Commissioners who are to collect the revenue, paying over to the city any surplus therefrom, and to initiate works for improving the system, the city supplying the funds to pay for the same. The total expenditure is not to exceed $300,000 and

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not more than $20,000 can be expended in any one year without a vote of the ratepayers. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 566) that the Board is merely the statutory agent of the city in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, not authorized by by-law of the council, and incurring an expenditure which would exceed the statutory limit was not a binding contract. *Held* also, that if an action could have been brought on such contract the city corporation would have been a necessary party. *Quære.*—Would not the city corporation have been the only party liable to be sued? MACDOUGALL SONS & CO. *v.* WATER COMMISSIONERS OF THE CITY OF WINDSOR—**326**

7——*Obstruction on highway—Repair of municipal streets—Negligence.*] The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 291) which held that permitting a mound of earth about eight inches in height to remain at a filling over a trench dug to lay a pipe across a public street was not a serious or unusual obstruction due to negligence on the part of the municipality and holding the plaintiff guilty of want of proper care in approaching during the darkness the dangerous place which he had previously seen by daylight in the same condition. MESSENGER *v.* TOWN OF BRIDGETOWN — — — — **379**

8——*Municipal drains—Continuing trespass—Limitation of actions ex delictu*—58 *V. c.* 4, *s.* 295 (*N.S.*)—*Verdict.*] Action for trespass by the municipal corporation constructing and maintaining a drain through plaintiff's land. The jury found that it had been constructed in 1886 "by virtue of the Streets Commissioner's power of office." Plaintiff, though aware of its existence at the time, made no objection till 1896, when the land caved in. The court below held (33 N. S. Rep. 401) that the jury had found that the defendant had constructed the drain by its agent, and that the trespass, being a continuing one, the action was not barred by the limitation provided in the "Towns' Incorporation Act of 1895" for actions *ex delictu* against towns. This judgment was affirmed by the Supreme Court of Canada. TOWN OF TRURO *v.* ARCHIBALD — — — **380**

9——*Assessment and taxes—Appeal from assessment—Estoppel—Judgment confirming decision of municipal committee—Payment of taxes under protest—Res judicata* — — — **321**

See ASSESSMENT AND TAXES.

" RES JUDICATA, 1.

NAVIGABLE WATERS — *Watercourses—Cutting ice—Trespass on water lots.*] An ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice-houses, and for that purpose may cut a channel through private water lots through which to float the ice. Judgment appealed from (26 Ont. App. R. 411) reversed, and that of MacMahon J. at the trial (29 O. R. 247) restored, Strong C.J. and Taschereau J. dissenting. THE LAKE SIMCOE ICE AND COLD STORAGE CO. *v.* MCDONALD — — **130**

NAVIGABLE WATERS—*Continued.*

NAVIGATION—*Collision—Appreciation of evidence—Findings of fact—Appeal—Proper navigation—Negligent lookout—Anchor light.*] In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance" the decision mainly depended on whether or not the lights of the lost schooner were burning as the admiralty rules required at the time of the accident. The local judge gave judgment against the "Reliance." *Held*, that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not, therefore, be disturbed on appeal. *Santanderino* v. *Vanvert* (23 Can. S. C. R. 145), and *The Village of Granby* v. *Ménard* (31 Can. S. C. R. 14) followed. SCHOONER "RELIANCE" *v.* CONWELL — **653**

NEGLIGENCE — *Municipal corporation—Highway—Damages for injuries—Proximate cause—Telephone pole.*] A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent, uncontrollable speed was the proximate cause of the accident. BELL TELEPHONE CO. *v.* CITY OF CHATHAM; CITY OF CHATHAM *v.* ATKINSON. — — **61**

2——*Criminal law—Indictable negligence—Manslaughter—Indictment against a corporation—Criminal Code sec.* 213—*Common law penalty.*] Under section 213 of the Criminal Code a corporation may be indicted for omitting, without lawful cause, to perform the duty of avoiding danger to human life from anything in its charge or under its control.—The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment.—As section 213 provides no punishment for the offence, the common law punishment of a fine may be imposed on a corporation indicted and found guilty of such an offence. THE UNION COLLIERY CO. *v.* THE QUEEN — — **81**

NEGLIGENCE—*Continued.*

3——*Electric railway—Motorman—Workmen's Compensation Act—Injury to conductor.*] The motorman of an electric car may be a "person who has charge or control" within the meaning of sec. 3 of the Workmen's Compensation Act (R. S. O. [1897] ch. 160) and if he negligently allows an open car to come into contact with a passing vehicle whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured the electric company is liable in damages for such injury. Judgment of the Court of Appeal (27 Ont. App. R. 151) affirmed. TORONTO RAILWAY COMPANY v. SNELL — — — — — **241**

4——*Negligence—Maintenance of streets—Accumulation of snow and ice—Gross negligence—R. S. O.* [1897] *c.* 223 *s.* 606 (2)]. About 10.30 a.m. on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shown that there had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employees of the city had scattered sand on the crossing but the high wind prevailing at the time had probably blown it off. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 410) that the facts in evidence were not sufficient to show that the injury to the deceased was caused by "gross negligence" of the Corporation within the meaning of R. S. O. [1897] ch. 223, sec. 606 (2). INCE *v.* CITY OF TORONTO — — — **323**

5——*Marked cheque—Fraudulent alteration—Payment by third party—Liability for loss.*] A person dealing with others is under no duty to take precautions to prevent loss to the latter by the criminal acts of third persons, and the omission to do so is not, in itself, negligence in law.—B. having an account for a small amount in the Bank of Hamilton had a cheque for five dollars marked good, and altering it so as to make it a cheque for $500, had it cashed by the Imperial Bank. The same day it went through the clearing house and was paid by the Bank of Hamilton to the Imperial Bank. The error was discovered next day by the former, and re-payment demanded from the Imperial Bank and refused. The Bank of Hamilton then brought an action to recover from the Imperial Bank $495, the sum overpaid on the cheque. The defendant contended that the cheque as presented to be marked good was so drawn as to make the subsequent alteration an easy matter, and the plaintiff's act in marking it in that form was negligence which prevented recovery. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 590), which affirmed that at the trial (31 O. R. 100), that there was nothing in the circumstances to take the case out of the rule that money paid by mistake can be recovered back, and the Bank of Hamilton was therefore entitled to judgment. IMPERIAL BANK OF CANADA *v.* BANK OF HAMILTON — **344**

6——*Negligence—Railway company—Injury to passengers in sleeping berth.*] S. an elderly lady, was travelling on a train of the Canadian Pacific Railway Company from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding with her back to the engine she tried to turn around in the berth, and the car going around a curve at the time she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages it was not shown that the speed of the train was excessive or that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor. CANADIAN PACIFIC RAILWAY CO. *v.* SMITH—**367**

7——*Use of dangerous materials—Proximate cause of accident—Injuries to workman—Employer's liability—Presumptions—Findings of jury sustained by courts below.*] As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability in a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff, not assented to by the trial judge, have been sustained by two courts below. Taschereau J. dissented, taking a different view of the evidence and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *The George Matthews Co.* v. *Bouchard* (28 S. C. R. 580), and *The Metropolitan Railway Co.* v. *Wright* (11 App. Cas. 152) those findings ought not to be reversed on appeal. *The Asbestos and Asbestic Co.* v. *Durand*

NEGLIGENCE—*Continued.*

(30 S. C. R. 285) discussed and approved Dominion Cartridge Co. *v.* McArthur — **392**

8——*Railway company — Fencing — Culvert—Negligence—Cattle on highway* — 51 *V. c.* 29, *s.* 194—53 *V. c.* 28, *s.* 2.] A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a water-course and where cattle went through the culvert into a field and thence to the highway and straying on to the railway track were killed, the company was not liable to their owner. Taschereau J. dissenting. Grand Trunk Railway Co. *v.* James — — **420**

9——*Solicitor and client — Breach of duty — Misconduct—Advice given to client.*] A solicitor advising his client according to the established jurisprudence of the court in which proceedings are taken is not guilty of actionable negligence although the decision upon which he relied in giving the advice may be subsequently overruled. Taylor *v.* Robertson — — **615**

And *see* Sheriff.

" " Solicitor.

10——*Operation of tramway—Street crossings—Speed and control of car—Findings of jury—Contributory negligence.*] In an action founded on personal injuries caused by a street car the jury found that defendants' negligence was the cause of the accident and also that plaintiff had been negligent in not looking out for the car. *Held*, reversing the judgment of the Court of Appeal (2 Ont. L. R. 53) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover. London Street Railway Co. *v.* Brown — — **642**

11——*Obstruction on highway—Repair of municipal streets — Contributory negligence.*] The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 291) which held that permitting a mound of earth about eight inches in height to remain at a filling over a trench dug to lay a pipe across a public street was not a serious or unusual obstruction due to negligence on the part of the municipality and holding the plaintiff guilty of want of proper care in approaching during the darkness the dangerous place which he had previously seen by daylight in the same condition. Messenger *v.* Town of Bridgetown — **379**

12——*Injury to the person—Militia class firing—Government rifle range—Public work—Officers and servants of the Crown* — — — **206**

See Crown.

" Militia.

NOTICE—*Title to lands—Metes and bounds—Description—Sale en bloc—Possession beyond boundaries—Prescription—Construction of deed—Sale to married woman—Propre de communauté—Cadastral plan and description—Arts.* 1503, 2168, 2174, 2185, 2210, 2242, 2251, 2254 *C. C.*] The registered title to land charges a subsequent grantee with notice, either actual or implied, of the limitations in the description of the land contained in the registered deed under which his vendor acquired title. Chalifour *v.* Parent. — — — **224**

And *ses* Prescription, 2.

" " Title to Land, 1.

NUISANCE—*Operation of electric railway—Power house machinery—Vibrations, smoke and noise—Injury to adjoining property—Evidence—Assessment of damages—Reversal on questions of fact.*] Notwithstanding the privileges conferred by its Act of Incorporation, upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of the city the company is responsible in damages to the owners of property adjoining its power-house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and value thereby occasioned. *Drysdale* v. *Dugas* (26 S. C. R. 20) followed.—In an action by the owner of adjoining property for damages thus caused the evidence was contradictory and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality. *Held*, Taschereau J. dissenting, that notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations.—In reversing the judgment appealed from, the Supreme Court, in the interest of both parties, assessed damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise, the record was ordered to be transmitted to the trial court to have the amount of damages determined. Gareau *v.* Montreal Street Railway Co. — — — — — — — **463**

NULLITY — *Husband and wife — Married woman—Judicial separation as to property—Debts of community—Obligation by wife—Art.* 1301 *C. C.—Public policy—Dation en paiement.*] The Supreme Court affirmed the judgment appealed from (6 Rev. de Jur 13) by which it had been held that *conjoints* could not avoid the prohibition decreed by Art. 1301 C. C., by dis-

NULLITY—*Continued.*

guising a contract made with a third party after the community between them had been judicially dissolved, that, after dissolution of community the wife cannot be held liable for the debts of the community, even where she may have made payment through error, for an amount greater than that fixed by law and could not oblige herself therefor with her husband nor guarantee his obligations in respect thereto. Bastien *v.* Filiatrault *et ux.* — — — — — 129

ONTARIO INSURANCE ACT—*Construction of statute—Fire insurance—Statutory conditions—Variations — Co-insurance.*] The co-insurance clause printed as a variation from the statutory conditions in a policy of insurance against fire, requiring the insured in consideration of a reduced premium to keep the property covered by other policies to at least 75 per cent of its value, will not be pronounced unjust and unreasonable within the meaning of sec. 115 of the Ontario Insurance Act (R. S. O. [1887] ch. 167.) Eckardt & Co. *v.* The Lancashire Insurance Co. — — 72

ONTARIO JUDICATURE ACT—*Action on foreign judgment—Original consideration-Statement of claim* — — — — 66

See Action, 3.

OPPOSITION—*Pleading—Declinatory exception—Incompatible pleas—Waiver—Cause of action — Jurisdiction — Domicile — Opposition to judgment* — — — — — 186

See Revocation.

PARTNERSHIP—*Partnership Accounts — Transaction—Error—Payment under threat of prosecution—Duress-Répétition de l'indu—Actio condictio indebiti* — — — — 26

See Action, 1.

PATENT OF INVENTION—*Option as to priority—Expiration of foreign patent—Construction of statute—R. S. C. c. 61, s. 8—55 & 56 V. c. 24 s. 1.*] Under the provisions of the eighth section of "The Patent Act" as amended by 55 & 56 Vict. ch. 24, sec. 1 (D.) it is only in the case of the applicant exercising the option of obtaining a foreign patent before the issue of a Canadian patent for his invention that the Canadian patent shall expire by reason of the expiration of a foreign patent in existence at the time the Canadian patent is granted.—Where several applications are made in different countries upon the same day, the applicant cannot be said to have exercised an election to obtain any one patent before obtaining another. The General Engineering Co. of Ontario *v.* The Dominion Cotton Mills Company and the American Stoker Company — — — — — 75

PATENT OF INVENTION—*Continued.*

2——*Combination of known devices—Novelty—New result — Infringement of patent.*] The Supreme Court of Canada affirmed the judgment appealed from (7 B. C. Rep. 197) which reversed the trial judgment granting an injunction and for nominal damages in an action for alleged violation of a patent of invention for soldering oval cans by causing them to revolve with regularity and to be evenly dipped in a bed of solder. The defence claimed the use of another patent with the consent and license of the patentee and that the machine so used possessed advantages superior to the plaintiff's patent. Federation Brand Salmon Canning Company *v.* Short — — — 378

PATENT OF LANDS—*Scire facias—Crown lands—Grant made in error—Adverse claim—Cancellation of patent—32 V. c. 26 (Que)—R. S. Q., Art.* 1299 — — — — 220

See Scire Facias.

PAYMENT—*Contract—Lex loci—Lex fori—Fire insurance—Principal and agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent* — — — 488

See Insurance, Fire, 4.

2——*Marked cheque—Fraudulent alteration—Payment by third party—Liability for loss—Negligence* — — — 344

See Banks and Banking, 1.

" Negligence, 5.

3——*Joint stock company—Payment for shares—Equivalent for cash— Written agreement—Winding up* — — — 594

See Company Law, 4.

" Shareholder.

PENALTY—*Quashing appeal—Jurisdiction—Raising constitutional question—Withdrawal of plea — "Quebec Pharmacy Act"—Retroactive legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs*— — 43.

See Appeal, 5.

" "Quebec Pharmacy Act."

" Statute, 2.

And *See* Criminal Law.

" " Fine.

PÉREMPTION D'INSTANCE—*Abatement of action—Retrospective legislation—Arts. 1 and 279 C. P. Q.—Art. 454 C. C. P.*] When the period of peremption commenced after the promulgation of the new Code of Procedure of the Province of Quebec the exceptions declared by the fourth paragraph of its first article do not prevent the peremption of a suit pending at

PÉREMPTION D'INSTANCE—*Continued.*

the time it came into force under the limitation provided by article 279. *Cooke* v. *Millar*, (3 R. L. 446; 4 R. L. 240) referred to. SCHWOB v. TOWN OF FARNHAM — — — 471

PETITION OF RIGHT—*Arts.* 1020, 1209, 1220, *C. P. Q.—Forfeiture of right to appeal—Waiver.*] Art. 1220 C. P. Q. applies to appeals in cases of Petition of Right. LORD *v.* THE QUEEN — — — — 165

AND *see* APPEAL, 8.

"PHARMACY ACT"—"*Quebec Pharmacy Act*"—*Retroactive legislation—Suit for joint penalties—Second offences—Unlicensed sale of drugs* — — — — 43

See "QUEBEC PHARMACY ACT."

" STATUTE, 2.

PLAN OF SUBDIVISION—*Title to land—Legal warranty—Description—Change in street line—Accession—Troubles de droit—Eviction* — — — — 474

See TITLE TO LAND, 2.

" WARRANTY, 1.

PLEADING—*Non-performance of condition n contract—Replication—Joinder of issue.*] In an action against a municipal sub-contractor the latter pleaded the want of assent by the council required under a condition respecting sub-letting the contract for a municipal work, whereupon the plaintiff replied that the assent was withheld at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract. Issue was joined on this replication. *Held*, that the only issue raised by the pleadings was whether or not the defendant had wrongfully caused the consent to be withheld and that the plaintiff had failed to prove his case on that issue. RYAN *v.* WILLOUGHBY - 34

AND *see* CONTRACT, 1.

2——*Statement of claim—Action on foreign judgment—Original consideration—Ontario Judicature Act.*] Under the Ontario Judicature Act, as before it, the declaration in an action on a foreign judgment may include counts claiming to recover on the original consideration. CLERGUE *v.* HUMPHREY — 66

3——*Action in damages—Contract—Conversion—Defect in plaintiff's title—Statute of frauds.*] In an action claiming damages for the conversion of goods the plaintiff must prove an unquestionable title in himself and if it appears that such title is based on a contract the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded.—It is only where the action is between the parties to the contract which one of them seeks to enforce against the other that the defendant must plead the Statute of Frauds if he wishes to avail himself of it. Judgment of the Supreme Court of Nova Scotia (32 N.S. Rep. 549) affirmed. KENT *v.* ELLIS — — — — 110

4——*Declinatory exception—Incompatible pleas—Waiver—Cause of action—Jurisdiction—Domicile—Procedure—Opposition to judgment—Arts.* 85, 94, 129, 1164, 1173, 1175, 1176, *C. P. Q.—Arts.* 85, 86, *C. C.—Post Office Act.*] An offer was made by letter dated and mailed at Quebec, the defendant's acceptance being by letter dated and mailed at Toronto. In a suit upon the contract in the Superior Court at Quebec, the defendant, who was served substitutionally, opposed a judgment entered against him by default by petition in revocation of judgment, first by preliminary objection taking exception to the jurisdiction of the court over the cause of action and then, constituting himself incidental plaintiff, making a cross-demand for damages to be set off against plaintiff's claim. *Held*, that in forming an opposition or petition in revocation of judgment the defendant, in order to comply with art. 1164 C. P. Q. is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right.—A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the court.—In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. The judgment appealed from, affirming the decision of the Superior Court, District of Quebec (Q. R. 16 S. C. 22), was reversed. MAGANN *v.* AUGER — — 186

AND *see* CONTRACT, 2.

5——*Election petition—No return of member—Illegal deposit—Parties to petition.*] A petition under The Dominion Controverted Elections Act (R. S. C. ch. 9) alleged that T., a respondent, who had obtained a majority of the votes at the election was not properly nominated, and claimed the seat for his opponent, and that if it should be held that T. was duly elected his election should be set aside for corrupt acts by himself and agents. *Held*, that the petition as framed came within the provisions of sec. 5 of the Act and that T. was properly made a respondent. WEST DURHAM ELECTION CASE — — — — — 314

PLEADING—*Continued.*

6——*Controverted election—Form of petition—Jurat—Preliminary objections.*] The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne." *Per* Gwynne J.—An objection to the regularity of the subscription to the jurat does not constitute proper matter to be inquired into by way of preliminary objection to the petition. Two Mountains Election Case; Ethier *v.* Legault — — 437

And *see* Election Law, 2.

7——*Levy under execution — Charging lands under Territories Real Property Act—Indemnity to sheriff — Pleading joint pleas — Interpleader — Counterclaim — Signed bill of costs.*] In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead but may be joined properly in a defence with the execution creditor. —In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such an action, the solicitor may set up by way of counterclaim his costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of costs prior to the filing of the counterclaim. Taylor *v.* Robertson — — — — 615

And *see* Sheriff.
" " Solicitor.

8——*Statement of claim—Amendment allowed on appeal* — — — — — 1

See Appeal, 1.

9——*Quashing appeal — Jurisdiction — Raising constitutional question — Withdrawal of pleas — "Quebec Pharmacy Act"—Suit for joint penalties—Second offences—Unlicensed sale of drugs* — — — — — 43

See "Appeal, 5.
" "Quebec Pharmacy Act."
" Statute, 2.

10——*Parties to action—Municipal corporation — Water commissioners — Statutory body — Powers — Contract — 37 V. c. 79 (Ont.)—Right of action* — — — — — 326

See Municipal Corporation, 6.
" Waterworks.

PLEADING—*Continued.*

11——*Condition of policy of fire insurance—Breach—Further insurance—Interest of insured—Mortgagor as owner — Practice — Waiver—Estoppel* — — — 373

See Estoppel, 1.
" Insurance Fire, 3.
" Mortgage, 3.

12—*Title to land — Legal warranty—Troubles de droit—Eviction — Issues on appeal—Parties* — — — — — 474

See Appeal, 14.
" Warranty, 1.

POSSESSION—*Title to land — Metes and bounds—Description—Sale en bloc—Possession beyond boundaries—Prescription—Construction of deed—Sale to married woman—Propre de communauté—Cadastral plan and description—Arts.* 1503, 2168, 2174, 2185, 2210, 2242, 2251, 2254 *C. C.* — — — — — 224

See Prescription, 2.
" Title to Land, 1.

2——*Vendor's misrepresentation—Error in consideration — Laches — Administration by purchaser in possession—Estoppel—Waiver—Ratification* — — — — — 234

See Contract, 3.
" Vendor and Purchaser, 2.

POST OFFICE—*Contract by correspondence—Acceptance—Mailing of letter—Domicile—Indication of place of payment—Bills and notes—Delivery of goods sold* — — — 186

See Contract, 2.
" Pleading, 4.

PRACTICE—*New evidence tendered on appeal—New points raised at hearing—Amendment of pleadings.*] On the hearing of the appeal, objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question. *Held*, following *The Exchange Bank of Canada* v. *Gilman* (17 Can. S. C. R. 108), that the court must refuse to receive the document as fresh evidence can not be admitted upon appeal. *Held*, also, that the defendant could not raise the question as to the sufficiency of the plaintiff's title, for the first time, on appeal.—In this case it appeared that the allegations and conclusions of the plaintiff's declaration were deficient, and the court, under sec. 63 of the Supreme and Exchequer Courts Act, ordered all necessary amendments to be made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence. *Piché* v. *City of Quebec* (Cass. Dig (2 ed.) 497); *Gor-*

PRACTICE—*Continued.*

man v. *Dixon* (26 Can. S. C. R. 87) followed. CITY OF MONTREAL *v.* HOGAN — — 1

2——*Negligence—Trial by judge without a jury—Findings of fact—Evidence—Reversal by appellate court.*] In an action for damages for personal injuries, the trial judge, who heard the case without a jury, and before whom the witnesses were examined, held that the evidence of the witnesses for the defence was best entitled to credit and dismissed the action. The judgment was reversed in the Court of Review and its decision affirmed on further appeal by the Court of Queen's Bench. On appeal to the Supreme Court:—*Held*, that as the judgment at the trial was supported by evidence, it should not have been disturbed. Judgment appealed from reversed and judgment of the trial judge restored. VILLAGE OF GRANBY *v.* MÉNARD — — — 14

3——*Jurisdiction—Motion to quash appeal—Dismissing appeal for reasons in court below.*] The court dismissed an appeal on the merits with costs, without determining a question as to the jurisdiction raised by the respondent at the hearing by motion to quash the appeal. BASTIEN *v.* FILIATRAULT *et ux.* — — 129

AND *see* COMMUNITY, 1.
" " HUSBAND AND WIFE, 1.

4——*Appeal to Privy Council—Stay of execution.*] A judge in chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the court to the Judicial Committee of the Privy Council. ADAMS & BURNS *v.* THE BANK OF MONTREAL — 223

5——*Appeal per saltum—Jurisdiction—R. S. C. c.* 135, *s.* 26, (3).] Leave to appeal direct to the Supreme Court from a judgment of a Divisional Court of the High Court of Justice under sec. 26, sub-sec. 3, of the Supreme and Exchequer Courts Act, cannot be granted unless it is clear that there is a right of appeal from such judgment to the Court of Appeal for Ontario. OTTAWA ELECTRIC CO. *v.* BRENNAN — — — — — — — 311

6——*Practice—Habeas corpus—Binding effect of judgment in provincial court.*] An application for a writ of *habeas corpus* was referred by the judge to the Supreme Court of the province and, after hearing, the application was refused. On application subsequently made to Mr. Justice Sedgewick, in chambers. *Held*, that, under the circumstances, it would be improper to interfere with the decision of the provincial court. *In re* WHITE — — 383

7——*Ontario appeals—Special leave—60 & 61 V. c.* 34, *s.* 1, (*e*).] Special leave to appeal from a judgment of the Court of Appeal for Ontario under 60 & 61 Vict. ch. 34, sec. 1 (*e*) will not be granted where the questions involved are not of public importance and the judgment of the Court of Appeal appears to be well founded. ROYAL TEMPLARS OF TEMPERANCE *v.* HARGROVE — — — — — 385

8——*Negligence—Proximate cause of accident—Injuries to workman—Employer's liability—Presumptions—Findings of jury sustained by courts below.*] As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability, in a case where there is no evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff, not assented to by the trial judge, have been sustained by two courts below. Taschereau J. dissented, taking a different view of the evidence, and being of opinion that the findings of the jury, concurred in by both courts below, were based upon reasonable presumptions drawn from the evidence, and that, following *The George Matthews Co.* v. *Bouchard* (28 S. C. R. 580, and *The Metropolitan Railway Co.* v. *Wright* (11 App. Cas. 152) those findings ought not to be reversed on appeal. *The Asbestos and Asbestic Co.* v. *Durand* (30 S. C. R. 285) discussed and approved. DOMINION CARTRIDGE CO. *v.* MCARTHUR — — 392

9——*Jurisprudence of Supreme Court of Canada—Binding effect of decisions—Election petition—Deposit of copy—Preliminary objections.*] Where a copy of an election petition was not left with the prothonotary when the petition was filed and, when deposited later, the forty days within which the petition had to be filed had expired. *Held*, Gwynne J. dissenting, that the petition was properly dismissed on preliminary objections (8 B. C. Rep. 65). *Lisgar Election Case* (20 Can. S. C. R. 1) followed. *Per* Gwynne J.—The Supreme Court is competent to overrule a judgment of the court differently constituted, if it clearly appears to be erroneous. BURRARD ELECTION CASE; DUVAL *v.* MAXWELL — — — — 459

10——*Decision of domestic tribunal—Interference on appeal—Church discipline.*] Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme

PRACTICE—*Continued.*

Court refused to interfere, the matter complained of being within the jurisdiction of the Conference. Ash *v.* The Methodist Church — — — — — 497

11——*Exchequer appeal—Assessment of damages — Interference with findings of Exchequer Court Judge.*] The Exchequer Court Judge heard witnesses and upon his appreciation of contradictory testimony awarded damages to the respondents. The Crown appealed on the ground that the damages were excessive. *Held*, Gwynne and Girouard JJ. dissenting, that as it did not appear from the evidence, that there was error in the judgment appealed from, the Supreme Court would not interfere with the decision of the Exchequer Court Judge. The Queen *v.* Armour — — — 499

12——*Parties on appeal—Proceeding in name of deceased party—Amendment—Jurisdiction—Interference with discretion on appeal.*] Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *ès qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted the amendment, and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side), reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that, consequently, all the orders and judgments given were nullities. *Held*, reversing the judgment appealed from, (Q. R. 10 K. B. 511) the Chief Justice and Taschereau J. dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not have interfered. Price *v.* Fraser — — — 505

13——*Injuries sustained through obstruction on highway—Municipal corporation—Negligence—Telephone poles—Parties to suit—Costs—Proximate cause of accident* — — — 61

See Municipal Corporation, 3.
" Negligence, 1.
" Telephone Company.

14——*Forfeiture of right of appeal—Expiration of time limit—Ouster of jurisdiction—Condition precedent—Waiver—Objection taken by the court —Arts.* 1020, 1209, 1220, *C. P. Q.* — 165

See Appeal, 8.
" Waiver, 1.

15——*Pleading—Declinatory exception—Incompatible pleas—Waiver—Cause of action—Jurisdiction — Domicile — Opposition to judgment* — — — — — — 186

See Contract, 2.
" Pleading, 4.

16——*Condition of policy of fire insurance—Breach—Further insurance—Interest of insured —Mortgagor as owner—Pleading—Waiver—Estoppel* — — — — — 373

See Estoppel, 1.
" Insurance, Fire, 3.
" Mortgage, 3.

17——*Controverted election—Status of petitioner —Certified copy of voters' list—Imprint of Queen's Printer—Evidence—Form of petition—Jurat on affidavit of verification—Preliminary objections* — — — — — 437

See Election Law, 2.
" Pleading, 6.

18——*Nuisance—Operation of electric railway —Power house machinery—Vibration, smoke and noise—Injury to adjoining property—Evidence—Assessment of damages—Reversal on questions of fact* — — — — 463

See Nuisance.

19——*Péremption d'instance — Limitation of action — Abatement — Retrospective legislation* — — — — — — — 471

See Péremption d'instance.

20——*Legal warranty — Issues on appeal — Parties* — — — — — 474

See Appeal, 14.
" Warranty, 1.

21——*Improvement of watercourses—Art.* 5535 *R. S. Q.—Arbitration—Condition precedent—New grounds on appeal—Assessment of damages —Interference by appellate court* — — 534

See Appeal, 18.

22——*Findings of fact—Appreciation of evidence—Appeal* — — — — 653

See Admiralty Law.
" Navigation.

PRESCRIPTION—*Railway crossing—User—Right of way—Easement.*] The user of a passage left open temporarily under a railway trestle cannot ripen into a title by prescription of the

PRESCRIPTION—*Continued.*

right of way nor entitle the person using it to a farm crossing. Canadian Pacific Railway Co. *v.* Guthrie — — — — **155**

And *see* Railway, 1.

" " User.

2——*Title to land—Metes and bounds—Description—Sale en bloc—Possession beyond boundaries—Construction of deed—Sale to married woman—Propre de communauté—Cadastral plan and description—Arts.* 1503, 2168, 2174, 2185, 2210, 2227, 2242, 2251, 2254 *C. C.*] In June, 1868, by deed of gift, P granted to his son, F, an emplacement, described by metes and bounds and stated to have thirty feet frontage, "tel que le tout est actuellement * * * et que l'acquereur dit bien connaître" declaring, in the deed, that the donation had actually been made in 1860, although no deed had been executed, and that since then F had been in possession as owner and erected the buildings thereon. Under this donation the donee and his vendees claimed title to thirty-six feet frontage as having been actually occupied by him and them since F took possession as owner in 1860, and also that plaintiff had acquired a prescriptive title by ten years possession, at the time of the action in 1897 to recover possession of the six feet then in occupation of the defendant, whom plaintiff alleged to be a trespasser. *Held*, that the deed in 1868 operated as an interruption of prescription and limited the title to the thirty feet of frontage as therein described.—The plaintiff's wife purchased from F in 1885 by deed describing the emplacement in a manner similar to the description in the donation, but also making a reference to its number on the Cadastral Plan of the Parish which described it as of greater width. *Held*, that the description in the deed of 1885 left the true limits of emplacement subject to determination according to the title held by the plaintiff's *auteur* which granted only thirty feet of frontage; that by the registered title, the plaintiff was charged with either actual or implied notice of this fact and that, consequently, he had not, in good faith, possessed more than the thirty feet of frontage under this deed and could not invoke an acquisitive prescription of title to the disputed six feet by ten years possession thereunder; and further, that no augmentation of the lands originally granted could take place in consequence of the cadastral description of the emplacement in question.—The words "Tel que le tout est actuellement et que l'acquéreur dit bien connaître" used in the deed of gift, cannot be interpreted in contradiction of the special description that precedes them and can only be construed as extending "dans les limites ci-dessus décrites"; A prescriptive title to lands beyond the boundaries limited by the description in the deed of conveyance can only be acquired by thirty years possession.—*Quære.* Is a deed of sale of lands in Quebec to a married woman without the authorization of her husband, sufficient to support a petitory action? Would such a deed be null for defect of form and insufficient, under article 2254 C. C., to serve as the ground for a prescription by ten years possession? Chalifour *v.* Parent — — — — **224**

3——*Statute of limitations—Criminal conversation* — — — — **338**

See Criminal Conversation.

" Limitation of Actions, 1.

PRINCIPAL AND AGENT—*Life insurance—Agency—Art.* 610 *C. C.—Unworthy beneficiary—Murder of assured—Exclusion from succession.*] The action to cancel policies was against the representatives of a deceased policy holder who was murdered by his wife and her lover who were executed for the murder. Deceased left all his property to his wife, and had no issue surviving. The widow was judicially deprived of all rights as beneficiary under the policy and the will, as unworthy of succession. The company charged the remaining beneficiaries with endeavouring to take advantage of fraud and the felony. The judgment appealed from held that as there was no evidence that, at the date of the policies, assured was aware of the evil intentions of his wife, nor that she was acting as agent in effecting the assurances, the fact that she might then have had such intentions and subsequently murdered her husband would not have the effect of discharging the insurer from liability under the policies towards the legal representatives of the assured. The judgment appealed from (Q. R. 9 Q. B. 499) was affirmed by the Supreme Court of Canada. The Standard Life Assurance Company *v.* Trudeau, *et al.* — — — — — — — **376**

2——*Promoters of company—Agent to solicit subscriptions—False representations—Ratification—Benefit.*] Promoters of a company employed an agent to solicit subscriptions for stock and W. was induced to subscribe on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters; *Held*, affirming the judgment of the Court of Appeal (2 Ont. L. R. 261) that the latter, having benefited by the sum paid by W. were liable to repay it, though they did not authorize and had no knowledge of the false representations of their agent. *Held*, per Strong C.J., that neither express authority to make the representations

PRINCIPAL AND AGENT—*Continued.*

nor subsequent ratification or participation in benefit were necessary to make the promoters liable; the rule of *respondeat superior* applies as in other cases of agency. MILBURN *v.* WILSON — — — — — 481

3——*Contract—Lex loci—Lex fori—Insurance agent—Payment of premium—Interim receipt—Repudiation of acts of sub-agent.*] The appointment of a local agent of a fire insurance company is one in the nature of *delectus personæ*, and he cannot delegate his authority nor bind his principal through the medium of a sub-agent. *Summers* v. *The Commercial Union Assurance Company* (6 Can. S. C. R. 19), followed.—The local agent of a fire insurance company was authorized to effect interim insurances by issuing receipts countersigned by him on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt which he countersigned as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium. *Held*, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority. *Held*, further, that even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurance, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurance. CANADIAN FIRE INSURANCE CO. *v.* ROBINSON — — 488

AND *see* INSURANCE, FIRE, 4.

4——*Municipal corporation—Water commissioners—Statutory body—Powers—Contract*—37 *V. c.* 79 (*Ont.*)—*Right of action* — 326

See MUNICIPAL CORPORATION, 6.

" WATERWORKS.

PRIVY COUNCIL — *Practice — Appeal to Privy Council—Stay of execution.*] A judge in chambers of the Supreme Court of Canada will not entertain an application to stay proceedings, pending an appeal from the judgment of the court to the Judicial Committee of the Privy Council. ADAMS & BURNS *v.* THE BANK OF MONTREAL — — — — 223

PROTHONOTARY—*Controverted election—Status of petitioner—Evidence—form of petition—Jurat on affidavit of verification—Preliminary objections* — — — 437

See ELECTION LAW, 2.

" PLEADING, 6.

PUBLIC LANDS.

See CROWN LANDS.

PUBLIC POLICY—*Contract—Unlawful consideration — Répétition de l'indu — Account—Monopoly—Trade combination—Conspiracy — Malum prohibitum—Malum in se—Interest on advances—Foreign laws—Arts.* 989, 1000, 1067, 1077, 2188 *C. C.—Matters judicially noticed.*] In an action to recover advances with interest under an agreement in respect to the manufacture of binder twine at the Central Prison at Toronto, the defence was the general issue, breach of contract and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract. *Held, per* Sedgewick, King and Girouard JJ. that the evidence disclosed a conspiracy, and that, although under the provisions of the Civil Code the moneys so advanced could be recovered back, yet no interest before action could be allowed thereon, as the law merely requires that the parties should be replaced in the position they respectively occupied before the illegal transactions took place. *Rolland* v. *La Caisse d'Economie Notre-Dame de Québec* (24 S. C. R. 405) discussed and *l'Association St. Jean-Baptiste de Montréal* v. *Brault*, 30 S. C. R. 598) referred to. *Held* also, that laws of public order must be judicially noticed by the court *ex proprio motû*, and that, in the absence of any proof to the contrary the foreign law must be presumed to be similar to that of the forum having jurisdiction in an action *ex contractu*. *Per* Taschereau J. (dissenting.)—1. A new point should never be entertained on appeal, if evidence could have been brought to affect it had objection been taken at the trial. 2. In the present case, the concurrent findings of both courts below, amply supported by evidence, ought not to be disturbed, and as the company itself prevented the performance of the condition of the agreement in question requiring the assent of the Government to the transfer of the binder twine manufacturing contract, its non-performance cannot be admitted as a defence to the action upon the executed contract. Gwynne J. also dissented on the ground that the judgment appealed from proceeded upon wholly inadmissible evidence and that, therefore, the action should have been dismissed, and further, that the evidence which was received and acted on, though inadmissible for the purpose for which it was intended, showed that the action was based upon a contract between the plaintiffs and defendant for the commission of an indictable offence; that neither party could recover either by action or counter-claim upon such a contract and, therefore, that the incidental demand as well as the

PUBLIC POLICY—*Continued.*

action should be dismissed. THE CONSUMERS CORDAGE COMPANY *v.* CONNOLLY — 244

PUBLIC PRINTING—*Controverted election petition—Imprint of Queen's Printer—Certified copy of voters' list—Evidence—Status of petitioner* — — — — 437

See ELECTION LAW, 2.

PUBLIC WORK — *Government rifle range—Militia class firing—Officers and servants of the Crown—Negligence* — — — 206

See CROWN.

" MILITIA.

"QUEBEC ELECTIONS ACT" — *Controverted election—Preliminary objections—Status of petitioner—Dominion franchise—Construction of statute—Right to vote* — — 447

See ELECTION LAW, 3.

"QUEBEC PHARMACY ACT" — *Retroactive legislation—Suit for joint penalties—Second offence—Unlicensed sale of drugs—50 V. c. 5, s. 7—R. S. Q. Arts.* 11, 4035, 4039*b*, 4040, 4046, 4052.] The amendment to the "Quebec Pharmacy Act" by 62 Vict. c. 35, s. 2 (Que.) adding Art. 4039 (*b*), R. S. Q., has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. 50 V. c. 5, s. 7 (Que.); Art. 11 R. S. Q.—Penalties for several offences under the said Act may be joined in one action and, when the aggregate amount is sufficiently large, the action may be brought in the Superior Court as a court of competent jurisdiction under the statute. Such action may properly be taken in the name of the Pharmaceutical Association of the Province of Quebec.—It is improper in such an action to describe the subsequently charged offences as second offences under the statute, as a second offence cannot arise until there has been a condemnation for a penalty upon a first offence charged.—The sale in the Province of Quebec, by an unlicensed person, of drugs by retail, whether or not such drugs be poisonous, or partially composed of poison, or absolutely free from poison, is a violation of the prohibition contained in Art. 4035, R. S. Q., whether or not the articles sold be enumerated in the "Quebec Pharmacy Act" as poisonous or as containing an enumerated poison. Judgment of the Court of Queen's Bench (Q. R. 9 Q. B. 243) reversed. Taschereau and Gwynne JJ. dissenting. L'ASSOCIATION PHARMACEUTIQUE DE QUEBEC *v.* LIVERNOIS — — — — 43

QUEEN'S PRINTER

See ELECTION LAW, 2.

RAILWAY—*Easement—Right of way—User—Prescription—Farm crossing.*] A railway line passed over the northern half of lots 32, 33 and 34 respectively, of the eighth concession of North Dumfries, having a trestle bridge over a ravine on 34, near the boundary of 33. G., the owner of lot 33 (except the part owned by the railway company) for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34 over which he could pass to a village on the west side, his predecessor in title, who owned all these lots, having used the same route for the purpose. The company having filled up the ravine, G. applied for an injunction to have it re-opened. *Held*, reversing the judgment appealed from (27 Ont. App. R. 64) that such user could never ripen into a title by prescription of the right of way nor entitle G. to a farm crossing on lot 34. THE CANADIAN PACIFIC RAILWAY CO. *v.* GUTHRIE — — — — 155

RAILWAY—*Continued.*

2—*Negligence—Railway company—Injury to passengers in sleeping berth.*] S. an elderly lady, was travelling on a train of the Canadian Pacific Railway Company from Montreal to Toronto. While in a sleeping berth at night, believing that she was riding with her back to the engine she tried to turn around in the berth, and the car going around a curve at the time she was thrown out on to the floor and injured her back. On the trial of an action against the company for damages, it was not shown that the speed of the train was excessive nor that there was any defect in the roadbed at the place where the accident occurred to which it could be attributed. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, that the accident could not be attributed to any negligence of the servants of the company which would make it liable in damages to S. therefor. CANADIAN PACIFIC RAILWAY CO. *v.* SMITH—367

3—*Railway culverts—Fencing—Negligence—Cattle on highway—51 V. c. 29, s. 194—53 V. c. 28 s. 2.*] A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a water course and where cattle went through the culvert into a field and thence to the highway and straying on to the railway track were killed, the company was not liable to their owner. Taschereau J. dissenting. GRAND TRUNK RAILWAY CO. *v.* JAMES—420

4—*Negligence—Electric railway—Motorman—Workmen's Compensation Act—Injury to conductor* — — — — — — — 241

See NEGLIGENCE, 3.

AND *see* TRAMWAY.

RATIFICATION—*Payment under duress—Transaction—Mistake—Répétition de l'indu* — 26

See ACTION, 1.

RATIFICATION—*Continued.*

2——*Principal and agent—Promoters of company—Agent to solicit subscriptions—False representations—Benefit* — — — — 481

See Company Law, 3.

" Principal and Agent, 2.

REAL PROPERTY ACTS.

See Registry Laws.

" Title to Lands.

REGISTRY LAWS—*Misconduct—Breach of duty—Established jurisprudence—Territories Real Property Act—Unregistered transfers—Charging lands—Levy under execution—Indemnity to sheriff—Tort.*] Neither a solicitor nor a sheriff is a tort-feasor, as against a transferee whose transfer is unregistered, by registering, in the discharge of their respective duties, an execution against the lands of the judgment debtor.—The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution. Taylor *v.* Robertson. — — — — 615

And *see* Sheriff, 1.

" " Solicitor.

RÉPÉTITION DE L'INDU—*Actio condictio indebiti—Duress—Error—Payment under threat of criminal prosecution.* — — — 26

See Action, 1.

2——*Contract—Unlawful consideration—Account—Public policy—Monopoly—Trade combination—Conspiracy—Malum prohibitum—Malum in se—Interest on advances—Foreign laws—Matters judicially noticed* — — — 244

See Contract, 4.

" Public Policy, 2.

3——*Marked cheque—Fraudulent alteration—Payment by third party—Liability for loss—Negligence* — — — — — — — 344

See Banks and Banking, 1.

" Negligence, 5.

4——*Overcharge of sheriff's fees—Counterclaim—Set-off* — — — — — 615

See Counterclaim, 1.

" Sheriff, 1.

RES JUDICATA—*Assessment and taxes—Appeal from assessment—Judgment confirming—Payment under protest—Res judicata.*] J., having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council and then applied to the Supreme Court of New Brunswick for a writ of certiorari to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. In 1897 he was again assessed under the same circumstances, and took the same course with the addition of appealing to the Supreme Court of Canada from the judgment refusing a certiorari, and that court held the assessment void and ordered the writ to issue for quashing. J. then brought an action for repayment of the amount paid for the assessment in 1896. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a certiorari to quash the assessment in 1896 was *res judicata* against J., and he could not recover the amount so paid. Jones *v.* City of St. John — 321

RES JUDICATA—*Continued.*

2——*Title to land—Legal warranty—Description—Plan of subdivision—Change in street line—Accession—Troubles de droit—Eviction—Issues on appeal—Parties* — — — — 474

See Appeal, 14.

" Title to Land, 2.

" Warranty, 1.

RESPONSIBILITY.

See Employer's Liability.

" Negligence.

REVIEW, COURT OF.

See Court of Review.

REVOCATION—*Pleading—Declinatory exception—Incompatible pleas—Waiver—Cause of action—Jurisdiction—Domicile—Opposition to judgment.*] In forming an opposition or petition in revocation of judgment the defendant, in order to comply with Art. 1164 C. P. Q. is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right.—A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an exceptance of the jurisdiction of the court.—In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. The judgment appealed from, affirming the decision of the Superior Court, District of Quebec (Q. R. 16 S. C. 22) was reversed. Magann *v.* Auger—186

And *see* Contract, 2.

RIFLE RANGE—*Militia class firing—Negligence—Government rifle range—Officers and servants of the Crown—Public work* — — 206

See Crown.

" Militia.

RIPARIAN RIGHTS — *Building dams — Penning back waters—Improvement of watercourses —Art. 5535 R. S. Q. —Arbitration—Condition precedent—Assessment of damages* — — 534

See RIVERS AND STREAMS, 1.

RIVERS AND STREAMS—*Deed of lands —Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses —Art. 5535 R. S. Q.—Arbitration—Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate court.*] A deed conveying a portion of the vendor's lands bordering on a stream granted the privilege of constructing dams, etc., therein, with the proviso that, in case of damages being caused through the construction of any such works, the vendor or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators and that the purchasers should pay the amount awarded. *Held*, that, under the deed, the purchasers were liable, not only for the damages caused by the flooding of lands, but also for all other damages occasioned by the building of dams and other works in the stream by them; and, that the provisions of Art. 5535 R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused. *Held*, also, that an objection as to arbitration and award being a condition precedent to an action for such damages which had been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Supreme Court. On cross-appeal the Supreme Court refused to interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence. HAMELIN *v.* BANNERMAN — — 534

2——*Navigable waters—Cutting ice—Trespass on water lots* — — — — 130

See ICE.

" NAVIGABLE WATERS.

SALE OF GOODS—*Contract — Evidence to vary written instrument—Admission of evidence.*] The Supreme Court of Canada affirmed the judgment appealed from (33 N. S. Rep. 21) which in effect held, under the special circumstances of the case, involving dealings with two companies connected in business and having almost similar names, that it was not inconsistent in a written agreement with the plaintiff to prove that defendant supposed he was dealing with another party with whom he had made other arrangements in respect to payment for goods purchased. WILSON *et al. v.* WINDSOR FOUNDRY CO. — — — 381

2——*Contract by correspondence — Acceptance — Mailing of letter—Domicile—Indication of place of payment—Bills of notes—Delivery of goods sold.* 186

See CONTRACT, 2.

" PLEADING, 4.

SALE OF LAND—*Contract for sale—Action for price—Counterclaim — Specific performance — Costs.*] In an action for the price of land under an agreement for sale, or in the alternative for possession, defendant filed a counterclaim for specific performance and paid into court the amount of the purchase money and interest demanding therewith a deed with covenants of warranty of title. Plaintiff proceeded with his action and recovered judgment at the trial for the amount claimed and costs, including costs on the counterclaim, the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the court *en banc*. *Held*, that as the defendant had succeeded on his counterclaim he should not have been ordered to pay the costs before receiving his deed and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the court below *en banc*, and to the Supreme Court of Canada against plaintiff. Parties to pay their own costs in court of first instance. *Held*, per Gwynne J.—Defendant should have all costs subsequent to the payment into court. MILLARD *v.* DARROW — — — 196

2——*Title to lands—Metes and bounds—Description—Sale en bloc—Possession beyond boundaries—Prescription—Construction of deed—Sale to married woman—Propre de communauté—Cadastral plan and description—Arts.* 1503, 2168, 2174, 2185, 2210, 2242, 2251, 2254, *C. C.* — — 224

See PRESCRIPTION, 2.

" TITLE TO LAND, 1.

3——*Levy under execution—Charging lands—Territories Real Property Act—Tort—Indemnity to sheriff* — — — — 615

See SHERIFF.

" SOLICITOR.

SCIRE FACIAS—*Crown lands—Grant made in error—Adverse claim—Cancellation—32 V. c.* 11, *s.* 26 *(Que.)—R. S. Q.* 1299.] The provisions of the Quebec Statute respecting the sale and management of public lands (32 Vict. ch. 11 ; R. S. Q. Art. 1299) do not authorize the cancellation of letters patent by the Commissioner of Crown Lands where adverse claims to the lands exist. THE KING *v.* ADAMS — — 220

SERVITUDE — *Overhanging roof—Right of air, light and view—Evidence—Boundary line—Waiver* — — — — 556

See TITLE TO LAND, 3.

AND *see* EASEMENT.

SET-OFF—*Pleading — Declinatory exception — Incompatible pleas—Waiver—Jurisdiction—Opposition to judgment—Arts.* 85, 94, 129, 1164, 1173, 1175, 1176 *C. P. Q.—Arts.* 85 *and* 86 *C. C.—Post Office Act.*] In forming an opposition or petition in revocation of judgment, the defendant, in

SET-OFF—*Continued.*

order to comply with Art. 1164 of the Code of Civil Procedure of the Province of Quebec, is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right.—A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the court. —In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. The judgment appealed from, affirming the decision of the Superior Court (Q. R. 16 S. C. 22) was reversed. Magann *v.* Auger — — — 186

And *see* Contract, 2.

2——*Suit for sheriff's fees—Counterclaim for overcharges—Signed bill of costs.*— — — 615

See Sheriff, 1.

" Solicitor.

SHAREHOLDER — *Joint stock Company — Payment for shares—Equivalent for cash—Written contract.*] M. and C. each agreed to take shares in a Joint Stock Company paying a portion of the price in cash and receiving receipts for the full amount the balance to be paid for in future services. The company afterwards failed. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 396) that as there was no agreement in writing for the payment of the difference by money's worth instead of cash under sec. 27 of The Companies Act, M. & C. were liable to pay the balance of the price of the shares to the liquidator of the company. Morris *v.* Union Bank; Union Bank *v.* Morris; Code *v.* Union Bank — — 594

2——*Principal and agent—Promoters of company —Agent to solicit subscriptions—False representations—Ratification—Benefit* — — — 481

See Company Law, 3.

" Principal and Agent, 2.

SHERIFF—*Solicitor and client—Negligence or misconduct—Breach of duty—Advising according to established jurisprudence — Territories Real Property Act—Unregistered transfers—Charging lands—Levy under execution—Indemnity to sheriff —Tort—Pleading—Interpleader — Counterclaim— Signed bill of costs.*] In a suit against the sheriff and an execution creditor in respect of alleged irregular levy under writ of execution, the sheriff is not obliged to interplead but may be properly joined in a defence with the execution creditor.—A solicitor advising his client according to the established jurisprudence of the court in which proceedings are taken is not guilty of actionable negligence although the decision upon which he relied in giving the advice may be subsequently overruled.—Neither a solicitor or a sheriff is a tort-feasor, as against a transferee whose transfer is unregistered, by registering, in the discharge of their respective duties, an execution of a judgment against lands of the judgment debtor.—The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution.—In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such an action, the solicitor may set up by way of counterclaim his costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. Taylor *v.* Robertson — — 615

2——*Sale of rights in land—Sheriff's deed—Warranty — Construction of deed — Claimant under prior title—Eviction* — — — 563

See Title to Land, 4.

" Warranty, 2.

SNOW AND ICE—*Maintenance of streets— Accumulation of snow and ice—Gross negligence R. S. O.* (1897) *c.* 223, *s.* 606 (2) — — 323

See Municipal Corporation, 5.

" Negligence, 4.

And *see* Ice.

SOLICITOR—*Solicitor and client—Negligence or misconduct—Breach of duty—Advising according to established jurisprudence—Territories Real Property Act—Unregistered transfers — Charging lands—Levy under execution—Indemnity to sheriff — Tort—Pleading—Interpleader — Counterclaim— Signed bill of costs.*] In a suit against the sheriff and an execution creditor, in respect of alleged irregular levy under a writ of execution, the sheriff is not obliged to interplead, but may be properly joined in a defence with the execution creditor.—A solicitor advising his client according to the established jurisprudence of the court in which proceedings are taken is not guilty of actionable negligence although the decision upon which he relied in giving the advice may be subsequently overruled.—Neither

SOLICITOR—*Continued.*

a solicitor nor a sheriff is a tort-feasor, as against a transferee, whose transfer is unregistered, by registering in the discharge of their respective duties an execution of a judgment against lands of the judgment debtor.—The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor, does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy, under the execution.—In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested because any such overcharges, if recoverable from the sheriff, do not belong to the solicitor but to the clients for whom he acted, but, in such an action, the solicitor may set up by way of counterclaim his costs in a suit in which he had appeared for the sheriff notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. TAYLOR *v.* ROBERTSON — — — — — 615

SPECIFIC PERFORMANCE—*Contract for sale of land—Action for fence — Counterclaim—Specific performance—Costs* — — 196

See COSTS, 2.

" SALE OF LAND, 1.

STATUTE—*Construction of statute — Appeals from Ontario — Jurisdiction — Amount in controversy—60 & 61 V. c. 34 s. 1 s.s. (c) and (f).*] Sec. 1 subsec. (*f*) of 60 & 61 Vict. ch. 34, providing that in appeals from the Court of Appeal for Ontario "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different," is inoperative, being repugnant to sub-sec. (*c*).—The fact that sub-sec. (*f*) is placed last in point of order in the section, does not require the court to construe it as indicating the latest mind of parliament as the whole section came into force at the one time. CITY OF OTTAWA *v.* HUNTER—7

2 — '*Quebec Pharmacy Act*'—*Unlicensed sale of drugs — Retroactive legislation — Suit for joint penalties—Second offences.*] The amendment to the 'Quebec Pharmacy Act' by 62 Vict. c. 35, s. 2 (Que.) adding Art. 4039 (*b*), R. S. Q., has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. 50 V. c. 5, s. 7 (Que.); Art. 11 R. S. Q.—The sale in the Province of Quebec, by an unlicensed person, of drugs by retail, whether or not such drugs be poisonous, or partially composed of poison, or

STATUTE—*Continued.*

absolutely free from poison, is a violation of the prohibition contained in Art. 4035, R. S. Q., whether not the articles sold be enumerated in the 'Quebec Pharmacy Act' as poisonous or as containing an enumerated poison. Judgment of the Court of Queen's Bench (Q. R. 9 Q. B. 243) reversed. Taschereau and Gwynne JJ. dissenting. L'ASSOCIATION PHARMACEUTIQUE DE QUÉBEC *v.* LIVERNOIS — — 43

AND *see* " QUEBEC PHARMACY ACT."

3 —*Patent of invention—Option as to priority—Expiration of foreign patent — Construction of statute—R. S. C. c. 61, s. 8—55 & 56 V. c. 24, s. 1.*] Under the provisions of the eighth section of "The Patent Act" as amended by 55 & 56 Vict. ch. 24, sec. 1 (D), it is only in the case of the applicant exercising the option of obtaining a foreign patent before the issue of a Canadian patent for his invention that the Canadian patent shall expire by reason of the expiration of a foreign patent in existence at the time the Canadian patent is granted —Where several applications are made in different countries upon the same day, the applicant cannot be said to have exercised an election to obtain any one patent before obtaining another. THE GENERAL ENGINEERING COMPANY OF ONTARIO *v.* THE DOMINION COTTON MILLS COMPANY AND THE AMERICAN STOKER COMPANY — 75

4 —*Nova Scotia Liquor License Act*, 1895—*Conviction by magistrate—Jurisdiction—Application for certiorari—Affidavit—Construction of statute—Constitutional law—Powers of provincial legislature — Matter of procedure.*] The Supreme Court of Canada affirmed the decision appealed from (31 N. S. Rep. 436) by which it had been held that section 117 of the Nova Scotia Liquour License Act, 1895, was intended to operate, not in the sense of abolishing the writ of certiorari, but merely prescribing a mode of procedure providing that, in the absence of the affidavit denying the concession of the offence charged, as required by that section, the court had no power to grant a writ of certiorari, and consequently, an application for a writ was dismissed. Mr. Justice Gwynne dissented, and was of opinion that a question raised as to the constitutionality of the Liquor License Act ought to have been decided before entering upon the technical point respecting the production of the affidavit. BIGELOW *v.* THE QUEEN — — — — — — — 128

5 —*Controverted election—Preliminary objections —Status of petitioner—61 V. c. 14; 63 & 64 V. c. 12 (D.)—59 V. c. 9, s. 272 (Que.)—Dominion franchises*]—The principal contention on preliminary objections to a controverted election petition was, that the petitioner had been guilty of corrupt practices before and during the election, and that, by the effect of the

STATUTE—*Continued*

statutes, 61 Vict. ch. 14 and 63 & 64 Vict. ch. 12, the Dominion Franchise Act was repealed, and the provisions of the "Quebec Elections Act" regulating the franchise in the Province of Quebec substituted therefor so as, thereby, to deprive the petitioner of a right to vote under 59 Vict. ch. 9, sec. 272, and being so deprived of a vote that he had no status as petitioner. In the Election Court, evidence was taken on issues joined and the judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada: *Held*, that as corrupt practices had not been proved, the question as to the effect of the statutes did not arise. *Per* Gwynne J.—The amendment to the Dominion Franchise Act by 61 Vict. ch. 14 (D.) and 63 & 64 Vict. ch. 12 (D.) has not introduced into that Act the provisions of section 272 of 'The Quebec Elections Act' so as to deprive a person properly on the list of voters for a Dominion election of his right to vote at such election. Beauharnois Election Case; Loy *v.* Poirier — — — — — — — 447

6——*Construction of statute—Amending Act——Retroaction—Sale of lands—Judgments and orders.*] Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under rules 803 *et seq.* of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and in the following session the legislature passed an Act providing that "in the case of a County Court judgment, an application may be made under rule 803 or rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders and judgments have been attacked before the passing of this amendment." *Held*, Sedgewick J. dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench, for sale of lands on County Court judgments and not to orders and judgments of the County Courts. *Held* further, reversing the judgment of the King's Bench (13 Man. L. R. 419) Davies J. dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force but not from the date on which they were made. *Held*, per Sedgewick J., that the clause had no retroactive operation at all. Schmidt *v.* Ritz — — — — — — 602

7——*Ontario Judicature Act—Statement of claim—Action on foreign judgment* — — 66
See Action, 3.

STATUTE—*Continued.*

8——*Construction of statute—R. S. O.* (1887) *c.* 167—"*Ontario Insurance Act*"—*Statutory conditions* — — — — — — 72
See Insurance Fire, 1.

STATUTE OF ELIZABETH—*Voluntary conveyance—13 Eliz. c. 5 (Imp.)—Solvent vendor—Action by mortgagee.*] A voluntary conveyance of land is void under 13 Eliz. ch. 5 (Imp.) as tending to hinder and delay creditors though the vendor was solvent when it was made if it results in denuding him of all his property, and so rendering him insolvent thereafter. A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance and that without first realising his security. Judgment of the Supreme Court of British Columbia (7 B. C. Rep. 189) reversed, Gwynne J. dissenting. The Sun Life Assurance Co. *v.* Elliott — — — 91

STATUTE OF FRAUDS—*Action in damages—Contract—Conversion—Pleading—Defect in plaintiff's title.*] In an action claiming damages for the conversion of goods, the plaintiff must prove an unquestionable title in himself, and if it appears that such title is based on a contract the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded.—It is only where the action is between the parties to the contract which one of them seeks to enforce against the other, that the defendant must plead the Statute of Frauds if he wishes to avail himself of it. Judgment of the Supreme Court of Nova Scotia (32 N. S. Rep. 549) affirmed. Kent *v.* Ellis — — — — 110

STATUTES—13 *Eliz. c.* 15 (*Imp.*) (*Fraudulent conveyances.*) — — — 91
See Debtor and Creditor, 2.
" Fraudulent Conveyance, 1.
" Statute of Elizabeth.

2——29 *Car. II. c.* 3 *(Statute of frauds)* — 110
See Pleading, 3.
" Statute of Frauds.

3——3 & 4 *Wm. IV., c.* 42, *s.* 28 (*Imp.*) [*Charges for interest*] — — — — 408
See Debtor and Creditor, 3.
" Interest, 2.

4——*B. N. A. Act. s.* 101 — — 172
See Constitutional Law, 3.

5——*R. S. C. c.* 35 *(Post Office Act)* — 186
See Contract, 2.

6——*R. S. C. c.* 9 (*Controverted elections.*) 314
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" Pleading, 5.

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7——*R. S. C. c.* 41, *ss.* 10, 69 (*Militia Act*) 206
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" Militia.

8——*R. S. C. c.* 61, *s.* 8, (*Patents of Invention*) — — — — — 75
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9——*R. S. C. c.* 119, *s.* 27 (*Companies Act*) 594
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" Shareholder, 1.

10——*R. S. C. c.* 129 (*Winding-up Act*)— 594
See Company Law, 4.
" Shareholder, 1.

11——*R. S. C. c*, 135, *s.* 26 (3) [*Supreme Court Act.*] — — — — 311
See Appeal, 12.
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12——*R. S. C. c.* 135, *s.* 29 (*a*) (*Supreme Court Act*] — — — — — 43
See Appeal, 5.

13——*R. S. C. c.* 135, *s.* 29 (*b*) [*Supreme Court Act.*] — — — — 12
See Appeal, 3.

14——50 & 51 *V. c.* 16, *s.* 16 (*c*) [*D.*] (*Exchequer Court Act*) — — — — 206
See Crown.
" Militia.

15——51 *V. c.* 20, *s.* 94 (*D.*) [*Territories Real Property Act*] — — — 615
See Sheriff, 1.
" Solicitor.

16——51 *V. c.* 29, *s.* 194 (*Railway Act*) — 420
See Railways, 3.

17——53 *V. c.* 28, *s.* 2 (*Railways*) — 420
See Railways. 3.

18——53 *V. c.* 31, *s.* 74 (*D.*) [*Bank Act*] — 361
See Banks and Banking, 2.
" Chattel Mortgage, 1.

19——53 *V. c.* 33 (*D.*) [*Bills of Exchange Act*]—484
See Bills and Notes, 1.
" Chattel Mortgage, 2.

20——54 & 55 *V. c.* 25, *s.* 3 (*Supreme Court Act.*) — — — — — 172
See Constitutional Law, 3.

21——55 & 56 *V. c.* 24, *s.* 1 (*Patents of Invention*) — — — — — 75
See Patent of Invention, 2.

STATUTES—*Continued.*

22——60 & 61 *V. c.* 34 *sec. 1* (*c*) *and* (*f*) (*D.*)—(*Appeals to Supreme Court from Court of Appeal for Ontario*) — — — — 7
See Appeal, 2.

23——61 *V. c.* 14, *s.* 10 (*D.*) [*Controverted Elections*[— — — — — 437
See Election Law, 2.

24——61 *V. c.* 14 (*D.*) (*Controverted Elections*—447
See Election Law, 3.

25——60 & 61 *V. c.* 34 *s.* 1 (*e*) [*Supreme Court Act*] — — — — 385

26——63 & 64 *V. c.* 12 (*D.*) [*Controverted Elections*] — — — — — — 447
See Election Law, 3.

27——37 *V. c.* 79 (*Ont.*) [*Windsor Waterworks*] — — — — — — 326
See Municipal Corporation, 6.
" Waterworks.

28——*R. S. O.* (1887) *c.* 167 ('*Ontario Insurance Act*' — — — — — 72
See Insurance Fire, 1.

29——*R. S. O.* (1897) *c.* 51 ("*Ontario Judicature Act*") — — — — — 66
See Action, 3.

30——*R. S. O.* [1897] *c.* 160, *s.* 3, (*Workmen's Compensation Act.*) — — — 241
See Negligence, 3.
" Tramway, 1.

31——*R. S.O.* [1897] *c.* 223, *s.* 606 (2) [*Maintenance of streets.*] — — — 323
See Municipal Corporation, 5.
" Negligence, 4.

32——62 *V.* (2) *c.* 11, *s.* 27, (*Ont.*) [*Special leave to appeal.*] — — — — 125
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" Constitutional Law, 2.

33——32 *V. c.* 26 (*Que.*) [*Sale of Crown Lands*] — — — — — 220
See Scire Facias.

34——*R. S. Q. Art.* 1299 (*Sale of Crown lands*) — — — — — 220
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35——*R. S. Q., Arts.* 1269 *et seq.; Arts.* 1309 *et seq.* (*Sales and Licenses of Crown Lands and Timber Berths.*) — — — 582
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" Timber Licenses.

STATUTES—*Continued*

36——*Rev. Stats. Que., Arts.* 11, 4035, 4039 *b*, 4040, 4046, 4052, (*Pharmaceutical profession.*) — — — — — — 43

See "Quebec Pharmacy Act."

37—*R. S. Q. Art.* 5535 (*Improvement of Watercourses.*) — — — 534

See Rivers and Streams, 1.

38——50 *V. c.* 5, 57 (*Que.*) (*Pharmacy Act*) 43

See "Quebec Pharmacy Act."

39——52 *V. c.* 79 (*Que.*) [*Montreal City Charter.*] — — — — — 210

See Expropriation, 2.

40——54 *V. c.* 78 (*Que.*) [*Montreal City Charter.*] — — — — 210

See Expropriation, 2.

41——59 *V. c.* 9, *s.* 272 (*Que.*) [*Electoral franchise.*] — — — — 447

See Election Law, 3.

42——59 *V. c.* 49, *s.* 17 (*Que.*) [*Montreal City Charter.*] — — — — 1

See Expropriation, 1.

43——*V. c.* 79 (*Que.*) [*Montreal City Charter.*] — — — — 210

See Expropriation, 2.

44——62 *V. c.* 35, *s.* 2. (*Que.*) ["*Quebec Pharmacy Act.*"] — — — — 43

See "Quebec Pharmacy Act."

45——58 *V. c.* 2 (*N. S.*) *s.* 117 (*Certiorari on Convictions under Liquor License Act,* 1895.) — 128

See Certiorari, 1.

" Justice of the Peace.

" Liquor Laws.

46——58 *V. c.* 4. *s.* 295 (*N. S.*) [*Short limitation for actions ex delictu against towns.*]— 380

See Limitation of Actions, 2.

" Municipal Corporation, 8.

47——60 *V. c.* 4, (*Man.*) [*Orders for sale of lands.*] — — — — 602

See County Court.

" Statute, 6.

48——*N. W. Ter. Ord. No.* 6, *of* 1893 *sec.* 538, (*Bill of Costs.*) — — — 615

See Sheriff, 1.

" Solicitor.

TELEPHONE COMPANY — *Obstructing highway — Damages for injuries — Negligence — Proximate cause—Telephone pole—Third party—Costs.*] A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away, and that their violent, uncontrollable speed was the proximate cause of the accident.—In an action against the city corporation for damages in such a case, the latter was ordered to pay the costs of the Telephone Company brought in as third party, it being shown that the company placed the pole where it was lawfully, and by authority of the corporation. Bell Telephone Co. *v.* City of Chatham; City of Chatham *v.* Atkinson — — — 61

TIMBER LICENSE—*Crown lands—Timber licenses—Sales by local agent — Location ticket—Suspensive condition — Title to lands—Art.* 1085 *C. C.—Arts.* 1269 *et seq. and* 1309 *et seq. R. S. Q.*] During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown Lands Agent made a sale of a part of the lands covered by the license, and issued location tickets or licenses of occupation therefor under the provisions of Arts. 1269 *et seq.* of the Revised Statutes of Quebec, respecting the sale of Crown Lands. Subsequently the timber license was renewed, but, at the time the renewal license was issued, there had not been any express approval by the Commissioner of Crown Lands of the sales so made by the local agent as provided by Art. 1269 R. S. Q. *Held,* affirming the judgment appealed from, Taschereau and Davies JJ. dissenting, that the approval required by Art. 1269 R. S. Q. was not a suspensive condition, the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown for which the timber license had been validly issued. Leblanc *v.* Robitaille — — 582

TITLE TO LAND — *Metes and bounds — Description — Sale en bloc — Possession beyond boundaries — Prescription — Construction of deed —Sale to married woman—Propre de communauté —Cadastral plan and description — Arts.* 1503, 2168, 2174, 2185, 2210, 2227, 2242, 2251, 2254 *C. C.*] In June, 1868, by deed of gift, P granted to his son, F, an emplacement, described by metes and bounds and stated to have thirty feet frontage, "tel que le tout est actuellement * * * et que l'acquereur dit bien connaître" declaring, in the deed, that the donation had actually been made in 1860, although no deed had been executed, and that since then F had been in possession as owner

TITLE TO LAND—*Continued.*

and erected the buildings thereon. Under this donation the donee and his vendees claimed title to thirty-six feet frontage as having been actually occupied by him and them since F took possession as owner in 1860, and also that plaintiff had acquired a prescriptive title by ten years possession, at the time of the action in 1897 to recover possession of the six feet then in occupation of the defendant, whom plaintiff alleged to be a trespasser. *Held*, that the deed in 1868 operated as an interruption of prescription and limited the title to the thirty feet of frontage as therein described.—The plaintiff's wife purchased from F in 1885 by deed describing the emplacement in a manner similar to the description in the donation, but also making reference to its number on the Cadastral Plan of the Parish which described it as of greater width. *Held*, that the description in the deed of 1885 left the true limits of emplacement subject to determination, according to the title held by the plaintiff's *auteur*, which granted only thirty feet of frontage; that by the registered title, the plaintiff was charged with either actual or implied notice of this fact, and that, consequently, he had not, in good faith, possessed more than the thirty feet of frontage under this deed, and could not invoke an acquisitive prescription of title to the disputed six feet by ten years possession thereunder; and further, that no augmentation of the lands originally granted could take place in consequence of the cadastral description of the emplacement in question.—The words "Tel que le tout est actuellement et que l'acquéreur dit bien connaître" used in the deed of gift, cannot be interpreted in contradiction of the special description that precedes them, and can only be construed as extending "dans les limites ci-dessus décrites."—A prescriptive title to lands beyond the boundaries limited by the description in the deed of conveyance can only be a acquired by thirty years possession. *Quære.*—Is a deed of sale of lands in Quebec to a married woman without the authorization of her husband, sufficient to support a petitory action? Would such a deed be null for defect of form and insufficient, under article 2254 C. C., to serve as the ground for a prescription by ten years possession. CHALIFOUR *v.* PARENT — — — 224

2——*Legal warranty—Description—Plan of subdivision — Change in street line — Accession — Arts.* 1506, 1508, 1520 *C. C.—Arts.* 1 86, 187, 188 *C. P. Q.—Troubles de droit—Eviction—Issues on appeal—Parties.*] A vendor of land, described according to an existing plan of subdivision, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently, by municipal authorities, of powers in respect to the alteration of the street line.—A party called into a petitory action, to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from judgments maintaining both the principal action, and the action in warranty, although he may have refused to do so in the court of first instance, but, should the appellate court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action. MONARQUE *v.* BANQUE JACQUES-CARTIER — — 474

3——*Trespass—Overhanging roof—Right of view—Evidence—Boundary line — Waiver — Servitude.*] In 1844 the defendants constructed a toll-house close to or on the boundary of their land with windows overlooking an adjoining vacant lot, and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or by any subsequent owner till after the purchase of the lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable and defendants paid the costs of the necessary alteration. In 1900 the plaintiff instituted the present action against defendants to have the remaining projection of the roof demolished and the windows closed up. There was no evidence that there ever had been a division line established between the properties and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty. *Held*, affirming the judgment appealed from, Strong C. J. dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute, and consequently that his action could not be maintained. *Held* further, *per* Girouard J. following *Delorme* v. *Cusson* (28 S. C. R. 66) that, as the plaintiff and his *auteurs* had waived objection to the manner in which the toll-house had been constructed and permitted the roof and windows to remain there, the demolition could not be required at least so long as the building continued to exist in the condition in which it had been so constructed. PARENT *v.* THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES — — 556

4——*Sale of land—Warranty — Construction of deed—Sheriff's deed—Sale of rights in lands—Eviction by claimant under prior title.*] By deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff in the lands

TITLE TO LAND—*Continued.*

therein mentioned and of which he was actually in possession, and that the immovable belonged to him as having been acquired at the sheriff's sale. *Held*, reversing the judgment appealed from, the Chief Justice and Taschereau J. dissenting, that the warranty covenanted by the vendor had reference merely to the rights he may have acquired in the lands under the sheriff's deed and did not oblige him to protect the purchaser against eviction by a person claiming under prior title to a portion of the lands. *Ducondu* v. *Dupuy* (9 App. Cas. 150) followed. DROUIN *v.* MORISSETTE — 563

5——*Simulated lease—Appeal—Matter in controversy—R. S. C. c.* 135 *s.* 29 (*b*). — 12

See APPEAL, 3.

6——*Watercourses—Navigable waters—Cutting ice—Trespass on water lots* — — — 130

See ICE.

" NAVIGABLE WATERS.

7——*Crown lands—Timber licenses—Sales by local agents—Location tickets—Suspensive conditions*— — — — — — 582

See CROWN LANDS.

" TIMBER LICENSES.

8——*Solicitor and client—Negligence or misconduct—Breach of duty—Advising according to established jurisprudence—Territories Real Property Act—Unregistered transfers — Charging lands — Levy under execution—Indemnity to sheriff— Tort* — — — — — — 615

See SHERIFF, 1.

" SOLICITOR.

TORT—*Charging lands under execution—Levy on requisition by solicitor—Territories real Property Act.*] Neither a solicitor nor a sheriff is a tort-feasor as against a transferee whose transfer is unregistered, by registering in the discharge of their respective duties, an execution of a judgment against lands of a judgment debtor. TAYLOR *v.* ROBERTSON — 615

AND *see* SHERIFF, 1.

" " SOLICITOR.

TRADE COMBINATION — *Contract—Unlawful consideration—Répétition de l'indu—Account—Public policy—Monopoly—Trade combination—Conspiracy—Malum prohibitum—Malum in se—Interest on advances—Foreign laws—Matters judicially noticed* — — — 244

See CONTRACT, 4.

" PUBLIC POLICY, 2.

TRAMWAY—*Negligence—Electric railway—Motorman—Workmen's Compensation Act—Injury to conductor.*] The motorman of an electric car may be a " person who has charge or control " within the meaning of sec. 3 of the Workmen's Compensation Act (R. S. O. [1897] ch. 160) and if he negligently allows an open car to come in contact with a passing vehicle whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured the electric company is liable in damages for such injury. Judgment of the Court of Appeal (27 Ont. App. R. 151) affirmed. TORONTO RAILWAY CO. *v.* SNELL — — — — 241

2——*Nuisance—Operation of electric railway—Power house machinery—Vibrations, smoke and noise—Injury to adjoining property.*] Notwithstanding the privileges conferred by its Act of Incorporation, upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city the company is responsible in damages to the owners of property adjoining its power-house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rental and value thereby occasioned. *Drysdale* v. *Dugas* (26 S. C. R. 20) followed. GAREAU *v.* MONTREAL STREET RAILWAY CO. — — — 463

AND *see* NUISANCE.

3——*Operation of street railway—Speed of tramcar—Street crossings—Injuries to person—Negligence—Findings of jury — Contributory negligence.*] In an action founded on persoual injuries caused by a street car the jury found the defendants' negligence was the cause of the accident and also that plaintiff had been negligent in not looking out for the car. *Held*, reversing the judgment of the Court of Appeal (2 Ont. L R. 53) that as the charge to the jury had properly explained the law as to contributory negligence the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence and he could not recover. LONDON STREET RAILWAY CO. *v.* BROWN — — — — — 642

TRANSACTION — *Ratification — Payment under duress—Répétition de l'indu—Actio conditio indebiti—Error* — — — — — 26

See DURESS, 1.

TRESPASS —*Watercourses — Navigable waters—Cutting ice—Trespass on water lots* — 130

See ICE.

" NAVIGABLE WATERS.

2——*Municipal drains — Continuing trespass—Limitation of actions—Actions ex delictu—58 V. c.* 4, *s.* 295 (*N.S.*) — — — — 380

See LIMITATIONS OF ACTIONS, 2.

" MUNICIPAL CORPORATION, 8.

TRESPASS—*Continued.*

3——*Overhanging roof—Right of view—Boundary line—Evidence—Demolition of works constructed—Waiver* — — — — — 556

See TITLE TO LAND, 3.

USER — *Easement—Right of way—Prescription—Farm crossing.*] A railway line passing over the northern half of lots 32, 33 and 34 respectively, of the eighth concession of North Dumfries, having a trestle bridge over a ravine on 34, near the boundary of 33. G., the owner of lot 33 (except the part owned by the railway company) for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34 over which he could pass to a village on the west side, his predecessor in title, who owned all these lots, having used the same route for the purpose. The company having filled up the ravine, G. applied for an injunction to have it re-opened. *Held*, reversing the judgment of the Court of Appeal (27 Ont. App. R. 64) that such user could never ripen into a title by prescription of the right of way nor entitle G. to a farm crossing on lot 34. CANADIAN PACIFIC RAILWAY CO. *v.* GUTHRIE — — — — — — — — 155

VENDOR AND PURCHASER—*Insurance against fire—Insurable interest—Unpaid vendor.*] An unpaid vendor, who by an agreement with his vendee has insured the property sold, may recover its full value in case of loss though his interest may be limited, if when he effected the insurance he intended to protect the interest of the vendee as well as his own. The fact that the vendor is not the sole owner need not be stated in the policy, nor disclosed to the insurer. Judgment appealed from (26 Ont. App. R. 277) reversed, and that of the trial judge (29 O. R. 394) restored. KEEFER *et al. v.* PHŒNIX INSURANCE CO. OF HARTFORD — — — 144

2——*Sale of land—Artifice—Misrepresentation—Consideration of contract—Error—Laches—Possession and administration—Ratification—Waiver—Estoppel—Arts.* 992, 993, 1053, 1054 *C. C.*] B having a hotel scheme under promotion, agreed to purchase an old building from R in order to prevent it from falling into the hands of persons who might use it for a brewery and thereby cause a nuisance and ruin his enterprise. R by falsely representing that he had a serious offer for the purchase or lease of the property for the purpose of a brewery, induced B to close on his agreement and take a deed of the property, the payment of the price being deferred. On discovery of the falsity of these representations B notified R that he repudiated the contract and invited him to bring an action to test its validity if he was unwilling to give a release and take back the property. The vendor delayed some time in taking action for the recovery of the price and, in the meantime,

VENDOR AND PURCHASER—*Con.*

B remained in possession and collected the rents. *Held*, that, under the provisions of the Civil Code, as the vendor had made false representations which deceived the purchaser as to the principal consideration for which he contracted, he could not recover; that the purchaser had a right to have the contract rescinded on the ground of error; that, under the circumstances, the delay in bringing the action could not be imputed as laches of the defendant, nor waiver of his right to have the contract set aside, and the defendant's administration of the property in the meantime could not be construed as ratification of the contract. BARNARD *v.* RIENDEAU — — 234

3——*Voluntary conveyance—Statute of Elizabeth—Solvent vendor—Depletion of estate—Debtor and creditor—Action by mortgagee* — 91

See DEBTOR AND CREDITOR, 2.
" FRAUDULENT CONVEYANCE, 1.
" MORTGAGE, 1.

4——*Title to land—Legal warranty—Description—Plan of subdivision—Accession—Troubles de droit—Eviction—Issues on appeal—Parties* — 474

See APPEAL, 14.
" TITLE TO LAND, 2.
" WARRANTY, 1.

5——*Deed of lands—Riparian rights—Building dams—Penning back water—Warranty—Improvement of watercourses—Art.* 5535 *R. S. Q.—Arbitration—Condition precedent* — — 534

See RIVERS AND STREAMS, 1.

VIEW—*Trespass—Windows overlooking adjoining land—Boundary line—Evidence—Waiver* — — — — — 556

See TITLE TO LAND, 3.

VOTER—*Controverted election—Preliminary objections—Status of petitioner—Dominion franchise—"Quebec Elections Act"—Construction of statute—Right to vote* — — — 447

See ELECTION LAW, 3.

VOTERS' LIST — *Controverted election—Imprint of Queen's Printer—Certified copy of voters' list—Evidence—Status of petitioner* — 437

See ELECTION LAW, 2.

WAIVER—*Appeal—Expiration of time limit—Forfeiture of right—Condition precedent—Ouster of jurisdiction—Objection taken by court—Waiver—Arts.* 1020, 1209, 1220 *C. P. Q.*] The provisions of articles 1020 and 1209 of the Code of Civil Procedure of the Province of Quebec, limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may there-

WAIVER—*Continued.*

fore be waived by the respondent. *Cimon* v. *The Queen* (23 Can. S. C. R. 62) referred to.—*Art.* 1220 *C. P. Q.* applies to appeals in cases of Petition of Right. LORD *v.* THE QUEEN—165

2——*Pleading — Declinatory exception — Incompatible pleas—Waiver — Cause of action — Jurisdiction — Domicile — Opposition to judgment.*] In forming an opposition or petition in revocation of judgment the defendant, in order to comply with art. 1164 of the Code of Civil Procedure of the Province of Quebec, is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim and, unless he does so, he cannot afterwards file it as of right.—A cross-demand so filed with a petition for revision of judgment is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the court.—In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. The judgment appealed from, affirming the decision of the Superior Court (Q. R. 16 S.C. 22) was reversed. MAGANN *v.* AUGER — 186

AND *see* CONTRACT, 2.

3——*Mortgage premises—Assignment by lessee—Payment of rent to mortgagee—Forfeiture—Payment of accelerated rent.*] The assignee of a lessee held possession of the leased premises for three months and the lessors accepted rent from him for that time and from sub-lessees for the month following. *Held*, reversing the judgment appealed from, (1 Ont. L. R. 172) that as the lessors had claimed six months accelerated rent under the forfeiture clause in the lease and testified at the trial that they had elected to forfeit; as the assignee had a statutory right to remain in possession for the three months and collect the rents; as the evidence showed that the receipt by the lessors of the three months rent was in pursuance of a compromise with the assignee in respect to the acceleration; and as the month's rent from the sub-tenants was only for compensation by the latter for being permitted to use and occupy the premises and for their accommodation; the lessors could not be said to have waived their right to claim a forfeiture of the lease.—Mortgagees of the leased premises having notified the sub-tenants to pay rent to them the assignee paid them a sum in satisfaction of their claim with the assent of the lessors against whose demand it was charged. *Held*, that this also was no waiver of the lessors' right to claim a forfeiture. SOPER *v.* LITTLEJOHN — — 572

AND *see* LANDLORD AND TENANT.

WAIVER—*Continued.*

4——*Estoppel — Laches — Ratification — Error in consideration of contract—Administration by purchaser in possession* — — — 234

See CONTRACT, 3.

" VENDOR AND PURCHASER, 2.

5——*Condition of policy of fire insurance—Breach—Further insurance—Interest of insured—Mortgagor as owner—Pleading—Practice—Estoppel* — — — — — 373

See ESTOPPEL, 1.

" INSURANCE FIRE, 3.

" MORTGAGE, 3.

6——*Arbitration — Condition precedent — New grounds on appeal—Assessment of damages—Interference by appellate court* — — — 534

See RIVERS AND STREAMS, 1.

WARRANTY—*Title to lands—Legal warranty—Description—Plan of sub-division—Change in street line—Accession—Arts.* 1506, 1508, 1520 *C. C.—Arts.* 186, 187, 188 *C. P. Q.—Troubles de droit—Eviction—Issues on appeal—Parties.*] A vendor of land, described according to an existing plan of sub-division, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently by municipal authorities of powers in respect to the alteration of the street line.—A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from judgments maintaining both the principal action and the action in warranty although he may have refused to do so in the court of first instance, but, should the appellate court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action. MONARQUE *v.* BANQUE JACQUES-CARTIER — 474

2——*Title to land — Warranty — Construction of deed—Sheriff's deed—Sale of rights in lands—Eviction by claimant under prior title.*] By the deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff in the lands therein mentioned and of which he was actually in possession, and that the immovable belonged to him as having been acquired at the sheriff's sale. *Held*, reversing the judgment appealed from, the Chief Justice and Taschereau J. dissenting, that the warranty covenanted by the vendor had reference merely to the rights he may have acquired in the lands under the sheriff's deed and did not oblige him to protect the purchaser against eviction by a person claiming under prior title to a portion of the lands. *Ducondu* v. *Dupuy* (9 App. Cas. 150) followed. DROUIN *v.* MORISETTE — 563

WARRANTY—*Continued.*

3——*Deed of land—Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Art.* 5535 *R. S. Q.—Arbitration—Condition precedent—Assessment of damages* — — — — — — 534

See RIVERS AND STREAMS, 1.

WATERCOURSES—*Navigable waters—Cutting ice—Trespass on water lots* — — 130

See ICE.

" NAVIGABLE WATERS.

2——*Cattle straying on highway—Railway fencing—Protection at watercourses—Culvert—Injury by train—Negligence* — — — — 420

See NEGLIGENCE, 8.

" RAILWAYS, 3.

AND *see* RIVERS AND STREAMS.

WATER LOTS—*Navigable waters—Cutting ice—Trespass on water lots* — — — 130

See ICE.

" NAVIGABLE WATERS.

WATERWORKS—*Municipal corporation—Water commissioners—Statutory body—Powers—Contract—37 V. c. 79 (Ont.)*] By 37 Vic. ch. 79 (Ont.) the waterworks system of Windsor is placed under the management of a Board of Commissioners who are to collect the revenue, paying over to the city any surplus therefrom, and to initiate works for improving the system, the city supplying the funds to pay for the same. The total expenditure is not to exceed $300,000, and not more than $20,000 can be expended in any one year without a vote of the ratepayers. *Held*, affirming the judgment of the Court of Appeal (27 Ont. App. R. 566) that the Board is merely the statutory agent of the city in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, not authorized by by-law of the council, and incurring an expenditure which would exceed the statutory limit was not a binding contract. *Held* also, that if an action could have been brought on such contract the city corporation would have been a necessary party. *Quære.*—Would not the city corporation have been the only party liable to be sued? MACDOUGALL SONS & CO. *v.* WATER COMMISSIONERS OF THE CITY OF WINDSOR. — — — — 326

WILL — *Capacity of testator — Undue influence.*] A codicil to a will executed shortly before the testator's death, increasing the provision made by a former codicil for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, Taschereau and Sedgewick JJ. dissenting, that as the testator was shown to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece even if it had been proved that she urged him to make better provision for her than he had previously done, such would not have amounted to undue influence. *Held*, also, following *Perera* v. *Perera* ([1901] A. C. 354) that even if there was ground for saying that the testator was not at the time of execution capable of making a will if he were when he gave the instructions the codicil would still have been valid. KAULBACH *v.* ARCHBOLD; *In re* ARCHBOLD — — — 387

WINDING-UP—*Joint Stock Company—Payment for shares—Equivalent for cash — Written agreement—Contributories* — — 594

See COMPANY LAW, 4.

" SHAREHOLDER, 1.

WINDOWS—*Right of air, light and view—Boundary line—Evidence—Trespass—Waiver* 556

See TITLE TO LAND, 3.

WORKMEN'S COMPENSATION ACT—*Electric railway—Negligence—Moterman—Injury to conductor—"Person in charge"—"Control"*— — — — — — 241

See NEGLIGENCE 3.

" TRAMWAY, 1.

WORKMEN—*Negligence—Use of dangerous materials—Proximate cause of accident—Injuries to workmen—Employer's liability—Presumptions—Findings of jury sustained by court below* — 392

See EVIDENCE, 5.

" NEGLIGENCE, 7.